Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795

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In 1794 Joseph Brant, a leader of the Mohawks of the Haudenosaunee Confederacy, met with representatives bearing a message from Henry Knox, the U.S. secretary of war. Knox insisted that "principles of moderation and humanity" would govern the conduct of the United States toward the Indians within its borders, but Brant had little patience for Knox's condescension. "We are of the same opinion with the people of the United States," he informed Knox. "You consider yourselves as independent people; we, as the original inhabitants of this country, and sovereigns of the soil, look upon ourselves as equally independent, and free as any other nation or nations."[1]

Brant's statement exists at the intersection between two significant trends traced in recent historiography. One is the ubiquity of sovereignty talk throughout the late eighteenth-century Americas. As imperial crises spawned new nation-states, participants turned to law to legitimate their actions—particularly the law of nations, the body of rules governing "sovereign states" elaborated in the canonical treatises of European jurists such as Emer de Vattel's *Law of Nations* (originally published in French in 1758). As recent scholarship has demonstrated, the leaders of the fledgling United States grappled with concepts in what scholars now call international law—sovereignty, nationhood, independence—drawn from such works as they asserted their country's claim to equal status in the community of nations.[2]

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[1] Henry Knox, "Message from the Secretary of War to the Sachems Chiefs, and Warriors of the Six Nations," Dec. 24, 1793, in *American State Papers: Indian Affairs,* ed. Walter Lowrie and Matthew St. Clair Clarke (2 vols., Washington, 1832), I, 478; "Reply of the Six Nations . . . to a Speech from General Knox, Secretary of War to the United States," April 21, 1794, *ibid.*, 481.

[2] For works emphasizing the role of international law in the early United States, see David Armitage, *The Declaration of Independence: A Global History* (Cambridge, Mass., 2007); David M. Golove and Daniel J. Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," *New York University Law Review,* 85 (Oct. 2010), 932–1066; Eliga H. Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (Cambridge, Mass., 2012); David C. Hendrickson,

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But the law of nations could further subordination as well as autonomy. Though international law purported universalism, a generation of scholars has traced how its principles often vindicated colonialism. Robert Williams, Eliga Gould, Lisa Ford, Deborah Rosen, and Leonard Sadosky have explored this process in the United States, recounting how the nation's leaders deployed law-of-nations principles to subordinate Brant's Mohawks and other Native communities.[3]

This scholarship focuses on the imposition of law—what was done *to* Native peoples. But another body of scholarship rooted in borderlands and ethnohistorical research has long emphasized that indigenous peoples did not simply acquiesce to U.S. arrogance; they resisted, including through law. Especially in the borderlands, where U.S. assertions of authority rarely matched reality, Native peoples forced Anglo-Americans to embrace indigenous legal concepts of kinship, reciprocity, and grave covering. Hybrid legal orders shaped or even dominated by Native norms consequently governed much of the continent. Interpreted in light of this work, Brant's invocation of nonindigenous ideas of sovereignty can be read against the grain to suggest continuity with Native practices of ethnogenesis and unity building.[4]

Read in conjunction, these two lines of scholarship present the legal contest in the early American borderlands as the battle for primacy between distinct Native and Anglo-American conceptions of law: "indigenous law against empire," as one recent volume labeled

Peace Pact: The Lost World of the American Founding (Lawrence, 2003); Mark Weston Janis, *America and the Law of Nations, 1776–1939* (New York, 2010); and Peter Onuf and Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776–1814* (Madison, 1993). For a survey of internationalist work on the Constitution, see Tom Cutterham, "The International Dimension of the Federal Constitution," *Journal of American Studies,* 48 (May 2014), 501–15. On sovereignty in late eighteenth-century Latin America, see Jeremy Adelman, *Sovereignty and Revolution in the Iberian Atlantic* (Princeton, 2006). For a modern edition of *The Law of Nations,* see Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis, 2008). On the development of the early modern law of nations, see Wilhelm G. Grewe, *The Epochs of International Law,* trans. Michael Byers (Berlin, 2000); and Stephen C. Neff, *Justice among Nations: A History of International Law* (Cambridge, Mass., 2014).

[3] Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York, 1990); Gould, *Among the Powers of the Earth,* 178–207; Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, Mass., 2010); Deborah A. Rosen, *Border Law: The First Seminole War and American Nationhood* (Cambridge, Mass., 2015); Leonard J. Sadosky, *Revolutionary Negotiations: Indians, Empires, and Diplomats in the Founding of America* (Charlottesville, 2009). For an overview of the huge literature on international law and colonialism, see Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, Eng., 2005); Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca, eds., *International Law and Empire: Historical Explorations* (New York, 2017); and Matthew Craven, "Colonialism and Domination," in *Oxford Handbook of the History of International Law,* ed. Bardo Fassbender and Anne Peters (Oxford, Eng., 2012), 874–88.

[4] For indigenous legal arguments against colonizers, see Saliha Belmessous, ed., *Native Claims: Indigenous Law against Empire, 1500–1920* (Oxford, Eng., 2012); Cynthia Cumfer, *Separate Peoples, One Land: The Minds of Cherokees, Blacks, and Whites on the Tennessee Frontier* (Chapel Hill, 2007), 24–97; Katherine A. Hermes, "Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance," *American Journal of Legal History,* 43 (Jan. 1999), 52–73; Katherine Hermes, "'Justice Will Be Done Us': Algonquian Demands for Reciprocity in the Courts of European Settlers," in *The Many Legalities of Early America,* ed. Christopher L. Tomlins and Bruce H. Mann (Chapel Hill, 2001), 123–49; Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York, 1997); and Craig Bryan Yirush, "Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1743," *Law and History Review,* 29 (May 2011), 333–73. Some borderlands historians have stressed indigenous "customs" and "practices." See Brian DeLay, "Blood Talk: Violence and Belonging in the Navajo–New Mexican Borderland," in *Contested Spaces of Early America,* ed. Juliana Barr and Edward Countryman (Philadelphia, 2014), 229–56; and Kathleen DuVal, "Cross-Cultural Crime and Osage Justice in the Western Mississippi Valley, 1700–1826," *Ethnohistory,* 54 (Fall 2007), 697–722. On hybrid legal orders, see Pekka Hämäläinen, "The Shapes of Power: Indians, Europeans, and North American Worlds from the Seventeenth to the Nineteenth Century," in *Contested Spaces of Early America,* ed. Barr and Countryman, 50–60.

it. But this illuminating frame risks obscuring the reality that Natives and Anglo-Americans were often relying on the *same* body of law to advance their claims—the European-derived law of nations. Though statements such as Brant's undoubtedly reflected hidden indigenous transcripts, they also explicitly cited concepts—of "free and independent" nationhood and national equality—that Brant's Anglo-American interlocutors would have readily understood as invocations of international law. Taking such statements seriously means we must also read them *with* the grain, recovering how some Native leaders not only indigenized European ideas such as sovereignty but also confronted these concepts *within* European legal discourse, deploying sophisticated international-law arguments that pushed back against the United States' self-serving claims. Such a perspective heeds recent calls to consider Native intellectual history within the global history of ideas, in this case as part of a transnational story of anticolonial reimaginings of international law.[5]

In this article, I explore the legal contests between Native leaders and U.S. representatives in the early American borderlands as interpretive struggles over the late eighteenth-century law of nations; I seek to reconstruct the arguments that both sides crafted from a common set of European-derived international-law sources. I focus particularly on Iroquoia and the Native Southeast in the years immediately following the American Revolution. In this postwar moment, nationhood and sovereignty were uncertain and deeply contested, even as the triumph of the United States and its "newly virulent anti-Indian" racial ideology presented an existential threat to Native autonomy in eastern North America. International law had special salience, too, for the Native peoples—the Haudenosaunee to the north, the Creeks to the south—who found themselves along the borders between the United States, British Canada, and Spanish Florida hastily and sketchily drawn in the 1783 Treaty of Paris. These powerful confederacies' continued hold over these contested regions thrust them into the center of interimperial diplomacy, an arena where European-educated leaders such as Brant and his Creek counterpart Alexander McGillivray deployed European legal concepts to subvert Anglo-American aims.[6]

The reliance by some Haudenosaunees and Creeks on the law of nations as expounded by Europeans may seem an ironic form of resistance: by implicitly accepting Anglo-American norms, it arguably entrenched cultural imperialism. It also forced McGillivray, Brant, and others into an abstract discourse that transformed arguments rooted in Haudenosaunee and Creek experiences into claims for an invented legal category of

[5] Saliha Belmessous, "Introduction: The Problem of Indigenous Claim Making in Colonial History," in *Native Claims,* ed. Belmessous, 3–18. On globalizing Native intellectual history, see Christina Snyder, "The Rise and Fall and Rise of Civilizations: Indian Intellectual Culture during the Removal Era," *Journal of American History,* 104 (Sept. 2017), 386–409. On later struggles over international law, see Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge, Eng., 2014). Some scholars have placed Native arguments within the frame of European diplomacy. See Melissa A. Stock, "Sovereign or Suzerain: Alexander McGillivray's Argument for Creek Independence after the Treaty of Paris of 1783," *Georgia Historical Quarterly,* 92 (Summer 2008), 149–76; and James L. Hill, "Muskogee Internationalism in an Age of Revolution, 1763–1818" (Ph.D. diss., College of William and Mary, 2016).

[6] Peter Silver, *Our Savage Neighbors: How Indian War Transformed Early America* (New York, 2008), 263–64. On postwar Iroquia, see Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* (New York, 2006). On the postwar Native Southeast, see Kathleen DuVal, *Independence Lost: Lives on the Edge of the American Revolution* (New York, 2015). On Joseph Brant and Alexander McGillivray as part of a new generation of Native leaders, see Isabel Thompson Kelsay, *Joseph Brant, 1743–1807, Man of Two Worlds* (Syracuse, 1984); John Walton Caughey, ed., *McGillivray of the Creeks* (Columbia, 2007); Frederick E. Hoxie, *This Indian Country: American Indian Activists and the Place They Made* (New York, 2012), 13–44; James H. Merrell, "Declarations of Independence: Indian-White Relations in the New Nation," in *The American Revolution: Its Character and Limits,* ed. Jack P. Greene (New York, 1987), 202–3; and Duval, *Independence Lost,* 223–340.

generic "Indian nations." In this way, the articulation of indigenous claims based on other peoples' rules reflected the era's growing inequities of power and the erosion of legal hybridity.

But to read such arguments solely as a reflection of Anglo-American dominance misunderstands the era's law of nations. Although its origins lay in Europe's early modern encounters with non-Europeans, the eighteenth-century law of nations was "an almost exclusively European discourse" centrally preoccupied with the European state system. In this sense, as Brant's comparison hints, *both* Native nations and the United States experienced the law of nations as a body of foreign principles and invented abstractions imposed on them by other nations. Similarly, although Native use of international law was an elite discourse limited to a handful of leaders—Brant and McGillivray were, in certain respects, decidedly unrepresentative of their communities—this was equally true in the United States. Vattel was little more familiar to Anglo-American litigants in county courts than to most residents of Indian country.[7]

Both Native nations and the United States, then, were engaged in a similar intellectual project of extrapolating Eurocentric legal rules to North America's borderlands. Anglo-Americans had a clear advantage in this effort, given international law's friendliness to their imperial pretensions. As I explore, U.S. leaders found particular purchase in leveraging the malleable principles of protection and civilization to blunt Native claims. But the eighteenth-century law of nations encompassed competing strands, and so, like all savvy litigants, Native leaders sought to extract from this jumble of principles a coherent doctrine that would vindicate their interests. And they arguably succeeded—their claims helped write a conception of Native sovereignty into U.S. law, however grudging and partial that acknowledgment often was.

Comparison, particularly to colonial Latin America, helps contextualize these invocations of law. Indigenous peoples there constantly litigated Spanish law in Spanish courts. The distinguished historiography recounting this claims making has resisted concluding that Spanish justice "represented an illusion in service to colonial hegemony," arguing instead that Spanish law was "a chief means by which [indigenous] individuals and communities defended and contested liberty, land, and local autonomy." Other scholars have uncovered similarly robust histories of court-centered advocacy by free and enslaved Africans in both Latin America and the United States. This scholarship suggests that reconstructing the claims that subordinated peoples articulated *within* the dominant society's legal institutions is central to grasping the dynamics of colonialism and power.[8]

[7] Jennifer Pitts, *Boundaries of the International: Law and Empire* (Cambridge, Mass., 2018), 2, 10–13. On local law in the early United States, see Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-revolutionary South* (Chapel Hill, 2009).

[8] Brian P. Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford, 2008), 296–99. For other works on *indios* and law in colonial Latin America, see Woodrow Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real* (Berkeley, 1983); Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia, 1949); Susan Kellogg, *Law and the Transformation of Aztec Culture, 1500–1700* (Norman, 1995); and Rachel Sarah O'Toole, *Bound Lives: Africans, Indians, and the Making of Race in Colonial Peru* (Pittsburgh, 2012). On Africans' legal arguments in colonial Latin America, see Alejandro de la Fuente, "Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited," *Law and History Review,* 22 (Summer 2004), 339–69; and Michelle A. McKinley, *Fractional Freedoms: Slavery, Intimacy, and Legal Mobilization in Colonial Lima, 1600–1700* (New York, 2016). For these claims in the United States, see Kelly M. Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens, Ga., 2017); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857* (New York, 2016); and Lea VanderVelde, *Redemption Songs: Suing for Freedom before Dred Scott* (New York, 2014). For

Native law-of-nations arguments nonetheless differed in ways that have sometimes served to obscure those arguments. In the early United States, unlike in Spanish America, Native legal claims often occurred on the treaty ground, not in the courtroom. Such negotiations have been the mainstay of borderlands scholarship, which has displayed a healthy skepticism about whether principles expounded in imperial centers mattered much where power was plural, fractured, and local. But if "borderlands history is everything that state-centered histories are not," as one recent summary observed, then the law of nations—"the science which teaches the rights subsisting between nations or states," per Vattel—risks omission of these Native arguments altogether.[9]

In this article, I take an approach that focuses less on complex local dynamics than on the borderlands' role as construction zones in the intellectual history of a purportedly transnational legal discourse. I argue that ideas about the rights of states mattered even when states exercised dubious control: given the scholarship showing international law's influence on the discombobulated polity known as the United States, why should we expect any different for the Creeks and Haudenosaunee? While this discourse mapped onto local realities in complex ways that no single article could capture, I also argue that Native embrace of law-of-nations arguments mattered in some broad-gauge ways—it left traces both in the law that the United States used to define the rights of Native peoples and in how some Native peoples shaped their legal claims to make them persuasive.

Borderlands history sometimes risks portraying sovereign states as an invasive species that slowly overspread North America, displacing older, more fluid models in their path. But sovereignty was not an Anglo-American monopoly grafted onto the borderlands: growing from international law, this vision of authority pervaded late eighteenth-century thought, inspiring many who sought to create "free and independent" nations. Like the fashioners of the United States, Native leaders sought to seize this law for their own ends.

Free and Independent Nations

The ubiquity of the term *sovereignty* to describe Native peoples' rights to autonomy sometimes renders it a synonym for all strivings for self-governance. Yet in the late eighteenth century, the comparatively new language of sovereignty had a more specific meaning rooted in its intellectual pedigree. Thinkers such as Jean Bodin and Thomas Hobbes had begun to craft the modern theory of sovereignty—the concept that within each polity there was a single, ultimate source of authority—only two centuries earlier. In North America, ferment around this concept helped prompt the American Revolution, which, as a contest of ideas, manifested as a prolonged debate over sovereignty's meaning, ultimately creating new ideologies of popular sovereignty and federalism in the nascent United States.[10]

Twinned to the idea of internal sovereignty was the question of external sovereignty—the rights of each sovereign among other sovereigns. Seventeenth-century thinkers such as

comparative legal histories, see Brian P. Owensby and Richard J. Ross, eds., *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York, 2018).

[9] Pekka Hämäläinen and Samuel Truett, "On Borderlands," *Journal of American History,* 98 (Sept. 2011), 338, esp. 349; Vattel, *Law of Nations,* 67.

[10] On sovereignty's intellectual history, see F. H. Hinsley, *Sovereignty* (Cambridge, Eng., 1986); Robert Jackson, *Sovereignty: Evolution of an Idea* (Cambridge, Eng., 2007); and James J. Sheehan, "The Problem of Sovereignty in European History," *American Historical Review,* 111 (Feb. 2006), 1–15. On federalism and popular sovereignty in the early United States, see Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass., 2010), 70–103; and Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, 1969),

Hugo Grotius and Samuel von Pufendorf created the modern law of nations by grafting sovereignty onto an amalgam of older ideas rooted in the Roman *ius gentium* (the natural law that bound all peoples) and Christian natural law. This process culminated, scholars have argued, with the mid-eighteenth-century Swiss jurist Vattel, whose canonical 1758 three-volume treatise *Les Droit des Gens* (widely available in English translation as the *The Law of Nations*) was the era's "mostly widely read and disseminated book on international law," especially in the early United States; the work "defined the paradigm of international law" for two centuries after its publication.[11]

Vattel's work represented the apotheosis of a robust vision of national sovereignty. "Of all the rights that can belong to a nation," Vattel reasoned, "sovereignty is, doubtless, the most precious, and that which other nations ought the most scrupulously to respect." This emphasis led Vattel to embrace strong norms of equality among states—"whatever privileges any [nation] derives from freedom and sovereignty," he concluded, "the others equally derive the same from the same source"—and of self-determination and autonomy: no state, he argued, had the "smallest right" to interfere in another nation's internal affairs. Taken together, Vattel's work helped codify the conception of sovereignty that international-relations scholars have labeled as Westphalian—a vision of a world divided into so many "territorially bounded, fictively equal, sovereign nation-states."[12]

Most scholars have interpreted the Westphalian system, and Vattel's thought in particular, as an apologia for colonizing indigenous peoples, for two reasons. First, in two brief sections, Vattel endorsed the commonplace argument that North American colonization might be "extremely lawful" because Native peoples had engrossed more land than they could productively cultivate. This paragraph became a favorite, and ubiquitous, citation with would-be colonizers in the United States and beyond. Second, and more fundamental to his broader project, Vattel's embrace of state autonomy stripped away any overarching principle of justice to which Native peoples could appeal, leaving indigenous communities to the mercies of the nation-states that purportedly held sovereignty over them.[13]

345–89. On Native peoples and sovereignty, see "Sovereignty," in *Native Studies Keywords,* ed. Stephanie Nohelani Teves, Andrea Smith, and Michelle H. Raheja (Tucson, 2015), 3–17; Leanne Betasamosake Simpson, "The Place Where We All Live and Work Together: A Gendered Analysis of 'Sovereignty,'" *ibid.*, 18–24; Michelle H. Raheja, "Visual Sovereignty," *ibid.*, 25–34; and Nandita Shama, "Postcolonial Sovereignty," *ibid.*, 35–56.

[11] Grewe, *Epochs of International Law,* trans. Beyers, 287; Emmanuelle Jouannet, "Emer de Vattel (1714–1767)," in *Oxford Handbook of the History of International Law,* ed. Fassbender and Peters, 1119. On Emer de Vattel's influence in the United States, see Onuf and Onuf, *Federal Union, Modern World,* 5–15; Eileen P. Scully, "The United States and International Affairs, 1789–1919," in *The Cambridge History of Law in America: The Long Nineteenth Century, 1789–1920,* ed. Michael Grossberg and Christopher Tomlins (New York, 2008), 622–23; and Anthony J. Bellia Jr. and Bradford R. Clark, "The Law of Nations as Constitutional Law," *Virginia Law Review,* 98 (June 2012), 747–49. For a skeptical take on Vattel's influence, see Brian Richardson, "The Use of Vattel in the American Law of Nations," *American Journal of International Law,* 106 (July 2012), 547–71.

[12] Vattel, *Law of Nations,* 74, 281, 289; Scully, "United States and International Affairs," 605. For an exploration of sovereignty's meaning in Vattel, see Stéphane Beaulac, *The Power of Language in the Making of International Law: The Word* Sovereignty *in Bodin and Vattel and the Myth of* Westphalia (Boston, 2004), 134–81.

[13] Vattel, *Law of Nations,* 130, 216–17. On Vattel's agriculturalist argument and settler colonialism, see L. C. Green, *The Law of Nations and the New World* (Edmonton, 1989), 75; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York, 1999), 195; and Georg Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?," *Journal of the History of International Law,* 10 (Jan. 2008), 181, 204–5. On Vattel's consequences for indigenous peoples as subnational sovereigns, see S. James Anaya, *Indigenous Peoples in International Law* (Oxford, Eng., 2004), 13–16; Ken Coates, "North American Indigenous Peoples' Encounters," in *Oxford Handbook of the History of International Law,* ed. Fassbender and Peters, 794; Ian Hunter, "Vattel in Revolutionary America: From the Rules of War to the Rule of Law," in *Between Indigenous and Settler Governance,* ed. Lisa Ford and Tim Rowse (London, 2013), 12–22; and Scully, "United States and International Affairs," 606–8, 622–26.

Yet the implications of Vattel's writings for Native peoples were more complicated than these readings suggest. Jennifer Pitts has recently emphasized that Vattel's ambiguous universalism offered the resources to challenge as well as further imperial projects. In particular, Vattel's work defined nationhood stripped of cultural, religious, or racial distinctions. "Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *sovereign state,*" Vattel stated. "To give a nation a right to make an immediate figure in this grand society [of nations], it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws."[14]

Vattel's definition strongly pointed toward a conclusion—that the self-governing Native polities of North America could equally claim the rights of sovereign statehood as the United States—that posed a significant threat to Anglo-American colonization. Sovereign Native nations would be able to invoke Vattelian principles of equality and noninterference to reject would-be colonizers' claims to primacy. At points, Vattel himself hinted at the anticolonial implications of indigenous sovereignty. In the same paragraph in which he endorsed North American colonization, Vattel critiqued the Spanish conquest of Peru and Mexico as a "notorious usurpation." Elsewhere, he described the Spanish trial and execution of the Incan emperor Atahualpa as an "extravagant injustice" that violated the principle that one sovereign had no right to judge another for internal conduct.[15]

Native leaders in North America seemingly picked up on the anti-imperial possibility that the era's international law thought could vindicate their claims to nationhood. They did not necessarily do so by pouring over *The Law of Nations:* the rich paper trail documenting Vattel's outsized influence among Anglo-Americans lacks an analogue among Native peoples, even those who, like Brant and McGillivray, received European educations. The path into Indian country of such concepts as sovereignty was more circuitous: as international-law ideas floated freely through the era's diplomatic discourse, Native leaders discovered a legal tool they could readily repurpose.

The easiest way to trace this influence is through language. Though the congruence between Vattel's principle and Brant's assertion of Haudenausonee equality with "any other nation or nations" may be coincidence, Brant's choice of English words—"free and independent"—was almost certainly deliberate. This dyad captured the essence of Vattelian nationhood: Vattel used it nine times in his first two chapters defining states. For this reason, the United States employed identical terms to assert its own nationhood in the Declaration of Independence—its "use of phrase, 'Free and Independent States,' was a clear reference to the law of nations," legal observers note. The 1783 Treaty of Paris similarly acknowledged that the United States was now "free, sovereign, and independent."[16]

[14] Pitts, *Boundaries of the International,* 68–91; Vattel, *Law of Nations,* 83. Emphasis in original. Andrew Fitzmaurice similarly notes that Vattel's statements on indigenous peoples were "not entirely consistent." Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500–2000* (Cambridge, Eng., 2014), 141–43. The mid-twentieth-century scholar C. H. Alexandrowicz emphasized the potential universality of state recognition in early modern international law, although he focused almost exclusively on Asia and Africa. C. H. Alexandrowicz, *The Law of Nations in Global History,* ed. David Armitage and Jennifer Pitts (New York, 2017).

[15] Vattel, *Law of Nations,* 83, 130, 290.

[16] *Ibid.*, 68, 71, 74, 77, 84, 85, 214, 265; Treaty of Paris, U.S.–Great Britain, Sept. 3, 1783, 8 Stat. 80, 81; Bellia and Clark, "Law of Nations as Constitutional Law," 754. On "free and independent" in the Declaration of Independence, see David Armitage, "The Declaration of Independence and International Law," *William and Mary Quarterly,* 59 (Jan. 2002), 39, 46–50.

The phrase also enjoyed considerable currency with the Haudenosaunee. Brant's fellow Mohawk Aaron Hill insisted three times at the 1784 Treaty of Fort Stanwix negotiations that his nation were "free, and independent people." Brant relied on these English terms whenever he sought to rebuff outside interference, reminding U.S. negotiator Timothy Pickering that the Haudenosaunee were a "Free and Independent People" and rejecting British efforts to restrict his nation's land rights by asserting Haudenosaunee status as a "free & independant Nation."[17]

Free and independent nationhood was not solely a preoccupation of the Haudenosaunee. In the Native Southeast, Creek leaders also invoked the phrase to resist encroachments. "You well know that no sovereignty was ceded to you," the English-speaking Creek leader John Galphin informed encroaching Georgians in 1793. "We are now, as we always have been, an independent and free people; knowing this . . . we view with astonishment the steps taken by the United States to rob us of our rights." Galphin's argument, like Brant's statement, utilized international-law sovereignty to assert legal rights that conflicted with American aims. Similarly, Creek leader Alexander McGillivray repeatedly and consistently referred to the Creeks as a "free nation" in his Spanish- and English-language correspondence.[18]

Where did Brant, Galphin, and others learn to equate the phrase "free and independent" with assertions of national sovereignty? Likely from Europeans and Anglo-Americans preoccupied with their own debates over Native status under international law. In some ways, these discussions merely perpetuated long-standing arguments over Native status that had sharpened after the Seven Years' War. But this issue gained new salience as the postwar United States, flush with the arrogance of victory, sought to end this debate by denying Native nationhood altogether. The 1783 Treaty of Paris, the new nation's leaders insisted, rendered Native peoples legally conquered. You are no longer a "free and independent nation," federal negotiators responded when Haudenosaunees asserted autonomy at Fort Stanwix, but a "subdued people." One New Yorker insisted that the new nation should reject "the disgraceful system of pensioning, courting and flattering [the Haudenosaunee] as great and might nations." He urged a change in language: "I would never suffer [to use] the words nations, or Six Nations . . . or any other Form which would revive or seem to confirm their former Ideas of Independence."[19]

Yet this theory of conquest proved remarkably short-lived, as Native peoples, who "assume[d] a perfect Equality," adeptly demonstrated the holes in Anglo-American arguments. "You talk of the law of nature and the law of nations, and they are both against you," the Cherokee leader Corn Tassel reportedly told federal commissioners as he point-

[17] "Proceedings of the United States and the Six Nations at Fort Stanwix," in *Early American Indian Documents: Treaties and Laws, 1607–1789,* vol. XXVIII: *Revolution and Confederation,* ed. Colin Calloway (Bethesda, 1994), 313, 323–24; Taylor, *Divided Ground,* 292; Peter Russell to Duke of Portland, July 21, 1797, in *The Correspondence of the Honourable Peter Russell,* ed. E. A. Cruikshank and Andrew F. Hunter (3 vols., Toronto, 1932), I, 218–22. Brant's biographer notes, "How often would Six Nations orators describe themselves as 'free and independent.'" Kelsay, *Joseph Brant,* 16.

[18] John Galphin to Gen. Jared Irwin, Aug. 21, 1793, in *American State Papers: Indian Affairs,* ed. Lowrie and Clarke, I, 371; Alexander McGillivray to Arturo O'Neill, Jan. 1, 1784, in *McGillivray of the Creeks,* ed. Caughey, 64–66; McGillivray to William Clark, April 24, 1785, Papers of Panton, Leslie and Company (microfilm: reel 2), 1986 (John C. Pace Library, University of West Florida, Pensacola).

[19] "Proceedings of the United States and the Six Nations at Fort Stanwix," 313, 323–24; "James Duane's Views on Indian Negotiations," July/Aug. 1784, in *Early American Indian Documents,* ed. Calloway, XVIII, 299–300. On prerevolutionary debates over Native status, see Gregory Evans Dowd, *War under Heaven: Pontiac, the Indian Nations, and the British Empire* (Baltimore, 2002), 174–211.

ed out that his nation could just as easily claim to have conquered Anglo-American settlements. Anglo-Americans were often at a loss to defend their nation's untenable claims against such counterarguments. "On the whole I own there appears to me so much Reason in their Observations that I scarcely know a Sufficient Answer," confessed one federal negotiator barraged with Native critiques of conquest.[20]

Natives knew that Anglo-American pretensions flouted the law of nations partly because British and Spanish officials told them so. "At the Peace your Father [the King] considered the Indian Nation[s] as free and independent," Lt. Gov. John Simcoe of British Canada, accompanied by Joseph Brant, informed Native peoples gathered in the Ohio Country in 1794. "He in no manner interfered in your rights admitted by European Compacts as the Laws of Nations." On another occasion, Simcoe piled before assembled Natives legal documents that he informed them "all establish the Freedom & Independency of Your Nations." The Spanish also advocated for Native autonomy. During negotiations over the Treaty of Paris, their representatives pressed the United States over how they could claim "territories which manifestly belong to free and independent nations of Indians."[21]

British and Spanish support for Native nationhood was self-interested and hypocritical; these empires, which challenged indigenous autonomy within their own borders, weaponized Native sovereignty to resist U.S. expansion. But they nonetheless acted on their legal theories. Spanish representatives in Florida received Creek, Cherokee, and Chickasaw ambassadors, supplied them arms and ammunition, and concluded a formal 1784 treaty with the Creek Nation. The British similarly aided Native nations within the United States and even floated the idea of creating a separate autonomous Native buffer state in the Ohio Country.[22]

Even the United States was finally forced to concede the legal principle of Native nationhood. Keenly aware of international critiques of U.S. treatment of Native peoples, the Washington administration repudiated conquest and sought to substitute legal principles "of so just a nature as to admit of an exposure to all the World." The new order it proposed was strikingly Vattelian. Relationships with Native peoples would be governed, federal officials stated, by the "law of nations." Instead of employing the "language of superiority and command," Congress urged "treat[ing] with the Indians . . . on a footing of equality." The United States would seemingly recognize Native polities' status as sovereign

[20] "James Duane's Views on Indian Negotiations," 299; Sam'l C. Williams, ed., "Tatham's Characters among the North American Indians," *Tennessee Historical Magazine,* 7 (Oct. 1921), 176–77; Samuel Holden Parson to Dr. William Johnson, Oct. 27, 1785, folder 5, Samuel Holden Parsons Papers (Connecticut Historical Society, Hartford).

[21] *The Correspondence of Lieut. Governor John Graves Simcoe, with Allied Documents Relating to His Administration of the Government of Upper Canada,* vol. I: *1789–1793* (Toronto, 1923), 123, 364; John Jay to Robert Livingston, Nov. 17, 1782, in *The Revolutionary Diplomatic Correspondence of the United States,* ed. Francis Wharton (6 vols., Washington, 1889), VI, 12–24. On British support for legal recognition of Native nationhood, see Eliga H. Gould, "The Empire That Britain Kept," in *The Oxford Handbook of the American Revolution,* ed. Edward G. Gray and Jane Kamensky (New York, 2012), 473.

[22] On Spanish and British support for Native nations, see Colin G. Calloway, *Crown and Calumet: British-Indian Relations, 1783–1815* (Norman, 1987); Taylor, *Divided Ground,* 285–88; Arthur Preston Whitaker, *The Spanish-American Frontier, 1783–1795: The Westward Movement and the Spanish Retreat in the Mississippi Valley* (Boston, 1927); and J. Leitch Wright Jr., *Britain and the American Frontier, 1783–1815* (Athens, Ga., 1975). On the British vision of a buffer state, see George Hammond to Lord Grenville, June 8, 1792, in *Correspondence of Liet. Governor John Graves Simcoe,* V, 14. On British denial of indigenous sovereignty within their own empire, see P. G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (New York, 2004), 108–16.

states in the international order. "Independent nations and tribes of Indians," Secretary of War Henry Knox informed a newly inaugurated President Washington, "ought to be considered as foreign nations." Secretary of State Thomas Jefferson went further still. "The Indians had . . . full, undivided and independant sovereignty as long as they chose to keep it," he observed, "and that this might be for ever."[23]

In a sense, then, Native legal arguments stressing their status as nations under international law prevailed. Native leaders had seized on a concept implicit in the era's law of nations, secured the self-interested endorsement of European allies, and forced the leaders of a nation eager to deny these claims to grudgingly acknowledge Native sovereignty. But a countervailing reading of international law restricted the scope of their success.

Noninterfering Nations

Anglo-American willingness to recognize Native sovereignty stemmed partly from U.S. leaders' success in locating the tools in the law of nations to blunt the legal implications of that recognition. Here, the law's key provisions were not jurists' offhand remarks about indigenous peoples but their embrace of another concept in the ascendancy in the late eighteenth century: territorial sovereignty.

Though nationhood had long been linked with control over space, the rise of nation-states in early modern Europe replaced older conceptions in which authority radiated outward with newer ideas of uniform sovereignty over a nation's entire domain. Once again, Vattel helped codify this transformation. "The whole space over which a nation extends its government, becomes the seat of its jurisdiction, and is called its *territory,*" he observed. Within its territory, each nation possessed the sole right to sovereignty.[24]

Reality within the United States did not match this vision of homogenous national territorial sovereignty, a gap that troubled the nation's leaders. As Lauren Benton has demonstrated, sovereignty as actually constituted in imperial domains was contested and geographically hazy. Anglo-Americans might demand, in the words of one treaty, that Native peoples "acknowledge the United States to be the sole and absolute sovereigns of all the territory ceded" in the Treaty of Paris, yet actual control over this enormous tract of eastern North America eluded the new nation. As François Furstenberg has observed, notwithstanding the formal transfer of sovereignty, the prospect that the United States would ultimately consolidate authority over the lands beyond the Appalachians—the majority of the new nation's territory—was the "most unlikely scenario" of what he dubs

[23] Henry Knox to William Hull, Feb. 28, 1793, Henry and Lucy Knox Collection (William L. Clements Library, University of Michigan, Ann Arbor); "Report of committee on Indian Affairs," [1787], in *Journals of the Continental Congress,* vol. XXXIII: *July 21–December 19, 1787,* ed. Roscoe E. Hill (Washington, 1936), 477–80, esp. 479; Knox to George Washington, July 7, 1789, in *The Papers of George Washington: Presidential Series,* vol. III: *June–September 1789,* ed. Dorothy Twohig (Charlottesville, 1989), 134–40; Thomas Jefferson, "Notes on Cabinet Opinions," Feb. 26, 1793, in *The Papers of Thomas Jefferson,* vol. XXV: *1 January to 10 May 1793,* ed. John Catanzariti (Princeton, 1993), 271–74. For federal officials applying the "law of nations" to Native nations, see Gov. [Arthur] St. Clair to the Judges of the Northwestern Territory, Aug. 2, 1788, in *The Territorial Papers of the United States,* vol. III: *The Territory Northwest of the River Ohio, 1787–1803, Continued,* ed. Clarence Edwin Carter (Washington, 1934), 275. On federal Indian policy during this era, see David Andrew Nichols, *Red Gentlemen and White Savages: Indians, Federalists, and the Search for Order on the American Frontier* (Charlottesville, 2008).

[24] Vattel, *Law of Nations,* 214, 308. Emphasis in original. On the rise of territorial sovereignty in the period's legal thought, see Grewe, *Epochs of International Law,* trans. Byers, 321–27; Daniel-Erasmus Khan, "Territory and Boundaries," in *Oxford Handbook of the History of International Law,* ed. Fassbender and Peters, 787–809; and Stuart Elden, *The Birth of Territory* (Chicago, 2013).

"the Long War for the West." To the south, Spain disputed the border; to the north, Britain refused to cede its military posts; to the west, ostensible citizens of the United States flirted with secession.[25]

But it was Native nations—Creeks, Haudenosaunees, and others—that maintained the strongest hold over the trans-Appalachian West. Their dominance presented a legal as well as a practical challenge to U.S. sovereignty. Federal officials might be willing to concede that Native nations should be considered *as* foreign nations, but they did not believe them foreign in one key respect: they repeatedly insisted that, by dint of the Treaty of Paris, Native nations were "within the limits of the United States."[26]

This territorial overlap presented a conceptual difficulty, since neither the United States nor Native nations could be fully sovereign if they were not the sole states within the territory they both claimed. Anglo-Americans purported to have solved the conundrum of overlapping sovereigns through federalism, an ideology derived partly from international law, and, as Greg Dowd and others have noted, this embrace of multiplicity seemingly opened space for Native sovereignty. Yet the several states of the United States were not the sovereign states of international law—the U.S. Constitution foreclosed them from declaring war, making treaties, or forming alliances. A polity barred from these quintessential acts of sovereignty, Vattel pointed out, was "no longer a state, and can no longer avail itself directly of the law of nations." If Native peoples were akin to U.S. states, then they were not nations in the international legal sense.[27]

Which kind of states—foreign or domestic—were Native polities most like? This question was at the core of an intense, polyvocal diplomatic confrontation in the early 1790s, precipitated by British and Spanish support for the Haudenosaunees, Creeks, and other nations purportedly within U.S. territory. The ensuing negotiations, which at times grew so heated that there was talk of war between the United States and the European empires, reflected the inescapable centrality of Native peoples in the struggle for the continent. In Madrid and London as well as on the borderlands, Natives, British, Spanish, and Anglo-Americans all debated the fundamental underlying legal question: Could Native nations *within* the United States' ostensible borders engage with other foreign powers—in other words, were they nations in the international-law sense?

Anglo-American officials advanced a legal theory that reconciled U.S. and Native sovereignty while also invalidating British and Spanish actions. They turned to a term of art to describe the relationship between the United States and the Native nations: *protection*. The word had deep roots. *Protection* was a term ubiquitous in imperial contexts, where it

[25] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (New York, 2010); Treaty of Fort Finney, U.S.–Shawnee Nation, art. II, Jan. 31, 1786, 7 Stat. 26, 26; François Furstenberg, "The Significance of the Trans-Appalachian Frontier in Atlantic History," *American Historical Review,* 113 (June 2008), 647–77, esp. 650. On territorial sovereignty in U.S. legal thought, see Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (New York, 2009), 3–43.

[26] For instances of the phrase "within the limits of the United States," see Washington to Commissioners to the Southern Indians, Aug. 29, 1789, in *Papers of George Washington,* ed. Twohig, III, 556; Knox to Washington, June 15, 1789, in *The Papers of George Washington: Presidential Series,* vol. II: *April–June 1789,* ed. W. W. Abbot (Charlottesville, 1987), 493.

[27] Vattel, *Law of Nations,* 85. On overlapping sovereignty in the early United States, see Daniel J. Hulsebosch, "*Imperia in Imperio:* The Multiple Constitutions of Empire in New York, 1750–1777," *Law and History Review,* 16 (Summer 1998), 340; and LaCroix, *Ideological Origins of American Federalism,* 107–31. On divisible sovereignty and Native peoples, see Gregory Evans Dowd, "Indigenous Peoples without the Republic," *Journal of American History,* 104 (June 2017), 19, 36–37; Sadosky, *Revolutionary Negotiations,* 214. Recounting the complicated relationship between Native sovereignty and federalism lies outside this article; I address it more fully elsewhere. Gregory Ablavsky, "Empire States: The Coming of Dual Federalism," *Yale Law Journal,* 128 (May 2019), 1792–1868.

often served colonial aims. Vattel himself spoke of the possibility that a weak state might put itself "under the protection of a more powerful one" and yet retain its status as a full sovereign. Yet federal officials placed a different gloss on protection than did Vattel. For them, protection's key implication was that Native nations within the United States could no longer negotiate or ally with other foreign powers. Indians lacked "that sort of independent sovereignty which would entitle them to a claim on the intervention of a third power," Secretary of State Jefferson informed a British emissary. Or, as Jefferson put it in preparing for yet another diplomatic conversation, it was "an established principle of public law among the white nations of America that while the Indians included within their limits retain all other nat[ura]l rights no other white nation can become their patrons, protectors or Mediators, nor in any shape intermeddle between them and those within whose limits they are."[28]

At its core, protection was an assertion of the preeminence of U.S. territorial sovereignty over that of Native nations. Some acknowledged this reality: Timothy Pickering, Knox's successor as secretary of war, described protection as the "Species of Sovereignty which the United States claim over the Indians within their boundaries in exclusion of every other Sovereign." But Jefferson disingenuously insisted that protection was compatible with full Native sovereignty because its limitations fell not on Natives but on "white nation[s]."[29]

Native peoples disagreed with Jefferson's assessment. They pointed toward another central concept in the law of nations—consent, supposedly required for all legal principles in the positive law of nations. Alexander McGillivray, for instance, refused to accept that the Treaty of Paris could alter Creek sovereignty. "We [Creeks] know our own limits," McGillivray wrote a federal Indian commissioner, in English. "As a free nation . . . we shall pay no regard to any limits that may prejudice our claims, that were drawn by an American, and confirmed by a British negotiator." A 1793 gathering of delegates from sixteen Native nations in the Ohio Country attended by Joseph Brant similarly spurned federal commissioners' recapitulation of Jefferson's position that agreements between European sovereigns could define Native rights. Treaties between the king and the United States, they emphasized in a written English-language communiqué, were "an affair which concerns you and him, and not us: we have never parted with such a power."[30]

U.S. officials implicitly conceded the force of these arguments. Although Jefferson's legal theory notionally obviated Native consent, federal negotiators wrote into each new Indian treaty a nearly identical provision in which the signatory nation explicitly

[28] Vattel, *Law of Nations,* 83; Thomas Jefferson, "Notes of a Conversation with George Hammond," June 4, 1792, in *The Papers of Thomas Jefferson,* vol. XXIV: *1 June to 31 December 1792,* ed. John Catanzariti (Princeton, 1990), 29–30; Thomas Jefferson, "Notes for a Conversation with George Hammond," [ca. Dec. 10, 1792], *ibid.*, 717–21. On "protection" in international law, see Lauren Benton, "Shadows of Sovereignty: Legal Encounters and the Politics of Protection in the Atlantic World," in *Encounters Old and New in World History: Essays Inspired by Jerry H. Bentley,* ed. Alan Karras and Laura J. Mitchell (Honolulu, 2017), 136–50; and Lauren Benton and Lisa Ford, *Rage for Order: The British Empire, and the Origins of International Law, 1800–1850* (Cambridge, Mass., 2016), 85–116.

[29] Timothy Pickering to Gov. William Blount, March 23, 1795, in *The Territorial Papers of the United States,* vol. IV: *The Territory South of the River Ohio, 1790–1796,* ed. Clarence Edwin Carter (Washington, 1936), 387; Jefferson, "Notes on Cabinet Opinions," 271–74.

[30] McGillivray to Andrew Pickens, Sept. 5, 1785, in *Early American Indian Documents,* ed. Calloway, XVIII, 388; General Council of Indian Nations to the Commissioners of the United States, Aug. 13, 1793, in *American State Papers: Indian Affairs,* ed. Lowrie and Clarke, I, 356. On consent and the positive law of nations, see Vattel, *Law of Nations,* 78.

"acknowledge[d] themselves . . . to be under the protection of the United States of America, and of no other sovereign whosoever." As negotiations focused principally on land disputes, federal officials managed to slip this language into nearly all the Indian treaties of the 1780s and 1790s.[31]

But federal negotiators encountered difficulty when they sought to incorporate this provision into treaties with the Creeks, as Alexander McGillivray readily grasped its legal significance. When first shown a draft treaty with this language in 1789, he stormed off in anger. "I had the most rooted objection to the 2d Article [concerning protection] which require[s] an acknowledgement on our Part of the Sovereignty of the United States," McGillivray explained to his Spanish allies. This "Proposition," he complained, was "equally destructive of our independent Situation and of the Treatys of Alliance & Friendship which we [had] formed with Spain." This rejection of supposedly well-established legal principles drove federal officials to distraction. McGillivray "most positive[ly] refus[ed] to acknowledge the Creek Nation to be within the limits, or under the protection of the United States," federal commissioners bitterly complained to George Washington.[32]

Anxious to end conflicts with Georgia, McGillivray met federal officials again the following year in New York. Yet the negotiations remained intractable. "I had a Great Dispute about the Sovereignty of our Country," McGillivray reported, as the federal representatives "wanted me to acknowledge the Americans." There was little resolution, and so, "after several days," the matter was "left undecided, till the limits is drawn between the [Spanish] kings Territory & theirs." Ultimately, the Treaty of New York only confirmed U.S. protection over those "parts of the Creek Nation within the limits of the United States"—a state of affairs "which I hope will never be the Case," McGillivray opined.[33]

Such refusals by McGillivray and other Native leaders to accept U.S. sovereignty threatened to give Spain and Britain a pretext to intervene within supposed U.S. territory and produced twinned diplomatic crises in 1793 and 1794. In a flurry of increasingly tense correspondence with both nations, the United States sought to rebut Native claims by citing the Vattelian principle of noninterference. "One sovereign can have no right to treat with persons inhabiting within the territory of another, and take those persons under his sovereignty and protection," U.S. emissaries in Madrid informed the Spanish minister; the opposing principle would be "contrary to the established laws of nations." Jefferson's successor as secretary of state, Edmund Randolph, expounded the same position to Britain's envoy during a fraught exchange over British patronage of Ohio Indians: "You cannot, Sir, be insensible that it has grown into a maxim, that the affairs of the Indians within the boundaries of any nation exclusively belong to that nation."[34]

[31] For examples, see Treaty of Fort McIntosh, U.S.–Wiandot, Delaware, Chippawa and Ottawa Nations, Jan. 21, 1785, 7 Stat. 16; Treaty of Hopewell, U.S.–Cherokee Nation, Nov. 28, 1785, 7 Stat. 18; Treaty of Hopewell, U.S.–Choctaw Nation, Jan. 3, 1786, 7 Stat. 21; Treaty of Hopewell, U.S.–Chickasaw Nation, Jan. 10, 1786, 7 Stat. 24; Treaty of Fort Harmar, U.S.–Six Nations, Jan. 9, 1789, 7 Stat. 33; Treaty of Holston, U.S.–Cherokee Nation, art. X, July 2, 1791, 7 Stat. 39; and Treaty of Greenville, U.S.–Wyandot Nation et al., Aug. 3, 1795, 7 Stat. 49.

[32] McGillivray to Esteban Miro, Dec. 10, 1789, typescript translation, Papers of Panton, Leslie and Company (reel 5); "Report of the Commissioners for Southern Indians," Sept. 17, 1789, in *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791,* vol. II: *Senate Executive Journal and Related Documents,* ed. Linda Grant De Pauw (Baltimore, 1974), 235.

[33] McGillivray to O'Neill, Nov. 2, 1790, typescript translation, Papers of Panton, Leslie and Company (reel 6); Treaty of New York, U.S.–Creek Nation, art. II, Aug. 7, 1790, 7 Stat. 35, 35.

[34] William Carmichael and William Short to Duke de la Alcudia, Dec. 7, 1793, in *American State Papers: Foreign Relations,* ed. Walter Lowrie and Matthew St. Clair Clarke (6 vols., Washington, 1833), I, 436–37; Edmund Randolph to Hammond, Sept. 1, 1794, in *Diplomatic Correspondence of the United States: Canadian Relations, 1784–1860,* vol. I: *1784–1820,* ed. William R. Manning (Washington, 1940), 82.

The United States was confident that this doctrine of noninterference was law. Jefferson, for one, took it "for granted" that Spain and Britain would "be ready to agree to th[is] principle." Some officials defied this expectation: Lieutenant Governor Simcoe of Canada rejected "Mr. Randolph's assertion" wholesale, refusing to "admit so general and so novel a principle" that would be so "injurious to the acknowledged Independency of the Indian Americans." Yet Spain's foreign minister accepted the U.S. position, clarifying that Spain's sole object was "maintaining of the legal right in the territories which belong to her." Spain, he soothed, intended only to support Natives "who reside within the territory of Spain," not "those Indians who live within the boundaries of the United States."[35]

With the parties largely in agreement on the law, all the heated rhetoric over Native status ultimately boiled down to a dispute over boundaries: the Spanish as well as the Anglo-Americans believed "that the uncertainty that has prevailed heretofore in those Indian affairs originated from the want of fixing positively the limits between the United States and Spain." The 1795 Treaty of San Lorenzo between the two empires not only resolved this uncertainty by clarifying the border, but it also codified the principle of noninterference: in Article V the parties agreed that neither would enter treaties "with the Indians living within the boundary of the other," and each nation further pledged not to allow "her Indians" to attack the other nation. The powerful Native nations of the Southeast now found themselves firmly placed within the borders of the United States and under its "protection." To the north, the near-simultaneous Jay Treaty (1794) with Britain similarly resolved lingering border controversies. It split the Haudenosaunee Confederacy but declared most of Iroquoia to be U.S. territory.[36]

Native leaders loudly objected to such declarations that their territory was now part of the United States. For Brant, the Jay Treaty recalled the betrayal of the Treaty of Paris: "This is the second time the poor Indians have been left in the lurch," he complained. "I was formerly in full courage to use my utmost endeavours to promote the Welfare of the Indians in general . . . but it is now entirely at an end." Brant's compatriots were less resigned. "You . . . tell us that our Country is within the lines of the [United] States," the Haudenosaunee leader Sagoyewatha told federal emissaries in 1796, after the Jay Treaty. "We had always thought that we . . . were outside your lines." Similar complaints appeared to the south. Although Alexander McGillivray did not live to see the outcome he had feared come to pass—he died in 1793—the Treaty of San Lorenzo provoked a heated response from another leader who purported to speak for the Creeks: William Augustus Bowles.[37]

Bowles was a complicated figure. Originally a Maryland Loyalist, he styled himself in the 1790s as the director of affairs for the Creek Nation based on a purported election, a claim long debated by historians. Many contemporaries regarded Bowles as little more than an opportunist and agent for British interests. Yet Bowles's picaresque history re-

[35] Thomas Jefferson to Carmichael and Short, Nov. 3, 1792, in *Papers of Thomas Jefferson,* ed. Catanzariti, XXIV, 565–67; John Graves Simcoe to Hammond, Oct. 20, 1794, in *The Correspondence of Liet. Governor John Graves Simcoe, with Allied Documents Relating to His Administration of the Government of Upper Canada,* vol. III: *1794–1795* (Toronto, 1925), 134; Duke de la Alcudia to Short and Carmichael, Dec. 18, 1793, in *American State Papers: Foreign Relations,* ed. Lowrie and Clarke, I, 439–40.

[36] Alcudia to Short and Carmichael, Dec. 18, 1783, in *American State Papers: Foreign Relations,* ed. Lowrie and Clarke, I, 440; Treaty of Friendship, Limits, and Navigation, U.S.-Spain, Oct. 27, 1795, art. V, 8 Stat. 138, 140–42; Treaty of Amity, Commerce, and Navigation, U.S.–Great Britain, Nov. 19, 1794, Stat. 116.a.

[37] Capt. Joseph Brant to Joseph Chew, Jan. 19, 1796, in *Michigan Historical Collections* (40 vols., Lansing, 1915–1929), XX, 434; Sagoyewatha to James Bruff, Sept. 23, 1796, in *The Collected Speeches of Sagoyewatha, or Red Jacket,* ed. Granville Ganter (Syracuse, 2006), 78.

vealed the possibilities for diplomatic self-fashioning opened by international law. Always undertaken with a keen sense of a European audience, Bowles's actions sought to exploit the legal form of Creek nationhood as an entrée into the rarified world of late eighteenth-century high diplomacy.[38]

As a diplomatic creature, Bowles was well versed in the law of nations, which he employed to protest the Treaty of San Lorenzo. Traveling to Madrid to voice his objections, Bowles remonstrated that the treaty "*interfer[ed] with the dignity of his people* and *nation*, the *Creeks who were as free, and independent, as any other nation in the Universe*." Bowles especially objected to Article V's efforts to restrain Indians, which he argued "*was an attrocious violation of the law of Nations, and should never be submitted to, whilst his people had a drop of blood to spill.*"[39]

In 1799 Bowles wrote a remarkable letter to President John Adams that cataloged two decades of Anglo-American mistreatment of the Creeks. The United States' most perfidious action, Bowles believed, was the Treaty of San Lorenzo. In ratifying the treaty, the U.S. had "disregard[ed] all treaties" with the Indians and "arbitrarily attempted to usurp every right which the Indians have possessed since the beginning of time." The United States and Spain, he pointed out, had "attempted to divide all this country between you, without attending in any manner to the local situation of the Muskugee." If the treaty were carried out, Bowles asked, "where was the indian territory?" Bowles concluded by insisting on the territorial sovereignty of the Creek Nation, threatening to deal with U.S. intruders who sought "to subvert or change the Sovereignty" according to "the law of nations in such cases provided." Bowles closed with a rhetorical flourish: "God save the State of Muskugee."[40]

However dubious Bowles's claims to represent the Creeks, his critique laid bare the legal challenge that confronted Native peoples in the wake of the American Revolution. Native nationhood meant little if Native peoples did not possess their own territory separate from other sovereigns. But the inclusion of Native nations within the boundaries of the United States as recognized through European treaties seemingly foreclosed this possibility, especially as the United States successfully invoked territorial sovereignty to claim sole authority over the Native peoples within its limits. Some dissented from Anglo-American efforts to enfold Native peoples within their "protection"—McGillivray and Bowles, of course, but also Europeans such as Simcoe. Yet Jefferson and others correctly predicted that the principle of noninterference they espoused would receive considerable support from European powers.

This principle's triumph meant that Native status as sovereigns capable of openly allying or negotiating with other sovereigns lasted only as long as the uncertainty of U.S. borders. As McGillivray had feared and Bowles understood, the clarity of the Treaty of San Lorenzo and the Jay Treaty closed much of the space for asserting Native nationhood under international law. Native peoples, of course, continued to insist on their status as full

[38] On William Augustus Bowles, see Gilbert C. Din, *War on the Gulf Coast: The Spanish Fight against William Augustus Bowles* (Gainesville, 2012); Gould, "Empire Britain Kept," 466; Maya Jasanoff, *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York, 2011), xiv–xv, 234–43; J. Leitch Wright Jr., *William Augustus Bowles: Director General of the Creek Nation* (Athens, Ga., 1967); and Hill, "Muskogee Internationalism in an Age of Revolution," 123–64.

[39] The contents of Bowles's letter are recounted in James McHenry to Benjamin Hawkins, Nov. 23, 1799, box 4, James McHenry Papers (Clements Library). Emphasis in original.

[40] William Augustus Bowles to President John Adams, Oct. 31, 1799, Ayer Ms. 100 (Newberry Library, Chicago, Ill.).

sovereigns: "We consider ourselves free to make any bargain . . . whenever and to whomsoever we please," the 1793 communiqué of the united Native nations informed federal commissioners who insisted that Natives could negotiate only with the United States. And British patronage of Native peoples within the United States did not cease until after the War of 1812, when the United States rebuffed British efforts to write Native nationhood into the Treaty of Ghent (1814). But the United States had arguably already won its legal victory as it gained increasing international recognition of its claim that Native peoples were under sole U.S. "protection." In this sense, a tendentious interpretation of international law provided the United States the intellectual tools to justify the subordination of Native sovereignty.[41]

Civilised Nations

One way that the eighteenth-century law of nations lacked the imperial gloss of later international law was the absence of any explicit "standard of civilization." This nineteenth-century principle required that non-Western peoples demonstrate "sociopolitical and legal organization" acceptable to Europeans before they could join the community of "civilized" nations. By contrast, recall that Vattel made independence, not civilization, the requisite measure of statehood. His strong version of state sovereignty made questions of political organization internal issues: each state's constitution, he insisted, was "solely a national concern." Sovereignty, in other words, created space for difference.[42]

This agnosticism about internal politics was significant for Native nations. Authority within the Haudenausonee and Creek Nations functioned differently than among their Anglo-American neighbors. In the early United States, foundational texts granted powers of legitimate coercion to men authorized to act on behalf of the state. The Haudenosaunee and Creeks did not share this political, legal, or gender ideology. Power within their communities rested in villages and in the kinship of matriarchal clans, with authority reliant more on suasion and stature than command. Even the concept of a unitary Native nation was a legal fiction that concealed the diffuse structure of authority in Indian country. Anglo-Americans routinely cited such divergences from their own practices as evidence that Native peoples were, in Jefferson's words, societies "without government."[43]

[41] General Council of Indians to the Commissioners of the United States, Aug. 13, 1793, in *American State Papers: Indian Affairs,* ed. Lowrie and Clarke, I, 356. On the diplomatic history of the Jay Treaty, see Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (New Haven, 1962). On negotiations over Natives' position in the Treaty of Ghent, see Sadosky, *Revolutionary Negotiations,* 180–204.

[42] Brett Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (Chicago, 2009), 32; Vattel, *Law of Nations,* 96. Much of the recent work on international law and empire stresses the standard of civilization. See Liliana Obregón, "The Civilized and the Uncivilized," in *Oxford Handbook of the History of International Law,* ed. Fassbender and Peters, 917–39; Grewe, *Epochs of International Law,* trans. Byers, 446–50; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge, Eng., 2002); and Anghie, *Imperialism, Sovereignty, and the Making of International Law*. For a skeptical view, see Benton and Ford, *Rage for Order,* 21–22, 187–88.

[43] Jefferson to James Madison, Jan. 16, 1787, in *The Papers of Thomas Jefferson,* vol. XI: *1 January to 6 August 1787,* ed. Julian B. Boyd (Princeton, 1955), 92–97. On authority within Haudenosaunee and Creek societies, see Daniel K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill, 1992), 31–49; William N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman, 1998); and Robbie Ethridge, *Creek Country: The Creek Indians and Their World* (Chapel Hill, 2003), 93–117. On Native nationhood as legal fiction, see Steven C. Hahn, *The Invention of the Creek Nation, 1670–1763* (Lincoln, 2004); and Michael Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia, 2012), 75.

None of these differences, though, ostensibly mattered in international law, which was built on the fictitious embodiment of sovereign states as unitary "moral persons." The definitive measure of sovereignty was external, turning on recognition by other sovereigns. Nationhood, in short, was a performative act directed toward an audience of other nations. This aspect of international law empowered men such as McGillivray, Brant, and Bowles. Even though they were but a few of many actors vying for authority within the fractious polities they purported to represent, their mastery of the elements of high diplomatic performance fueled their notoriety among their intended audience and made their claims to indigenous nationhood plausible.[44]

Yet even in the late eighteenth century, the law of nations contained the seeds of what would become a full-blown hierarchy of sovereigns. Though Vattel did not explicitly condition sovereignty on civilization, he nonetheless often appended "civilised" to nations: he labeled, for instance, the Incans and Aztecs as "civilised empires" in implicit contradistinction to North American indigenous peoples. Anglo-Americans readily adopted this habit of excluding their Native neighbors from the ranks of the "civilized nations," with Jefferson going further and distinguishing Indians from "white nations."[45]

To Anglo-Americans, Natives' supposed lack of civilization represented a substantial bar to acknowledging their sovereignty. In particular, Anglo-Americans expressed doubts about whether such uncivilized nations could fulfill their international legal obligations. "Why do we attempt to Treat with a Savage Tribe that will niether adhere to Treaties, nor the law of Nations?" queried a young Andrew Jackson. Two perceived deficiencies in particular supposedly explained Natives' failure to follow treaties. First, Anglo-Americans pointed to the lack of coercive authority in Native communities. "The want of Government both in the Creeks and Cherokees," one federal official reported, "is such that all the Chiefs in either nation can neither restrain nor punish the most worthless fellow in it from nor for a violation of the existing treaties." Second, the unclear divisions of authority within Native nations led to uncertainty about whether those nations would accept treaties as binding. When Alexander McGillivray complained that Creek signatories to earlier treaties had lacked the requisite authority, his Anglo-American counterpart "asked him, how it was to be proved their Nation was fully represented at this time?" The federal negotiator continued: "I lamented that the uncivilised state of the nation would not perhaps admit of the same Evidence to legalize Proceedings which civilised Nations required."[46]

These criticisms of Natives' failure to satisfy international obligations were rich coming from Anglo-Americans: their complaints against Natives closely paralleled the contemporaneous European critiques of the United States traced by Eliga Gould, Dan Hulsebosch, and David Golove. Hobbled by its own decentralized structures of governance, the new nation struggled to prove itself, in Gould's phrase, a "treaty-worthy nation." But it was

[44] Vattel, *Law of Nations,* 85. On performance and diplomacy, see Ellen R. Welch, *A Theater of Diplomacy: International Relations and the Performing Arts in Early Modern France* (Philadelphia, 2017). On the significance of external recognition in the era's law of nations, see Grewe, *Epochs of International Law,* 343–48.

[45] Vattel, *Law of Nations,* 78, 130, 273, 284, 311, 315. For contrasts between Natives and "civilized" or "white" nations, see Short and Carmichael to Duke de la Alcudia, Dec. 7, 1793, in *American State Papers: Foreign Relations,* ed. Lowrie and Clarke, I, 436–37; Report of Mr. [Charles] Carroll, Sept. 18, 1789, in *American State Papers: Indian Affairs,* ed. Lowrie and Clarke, I, 59; Jefferson, "Notes for a Conversation with George Hammond," 717.

[46] Andrew Jackson to John McKee, Jan. 30, 1793, in *The Papers of Andrew Jackson,* ed. Sam B. Smith and Harriet Fason Chappell Owsley (10 vols., Knoxville, 1980–2016), I, 40–41; Blount to Secretary of War [Knox], Nov. 8, 1792, in *Territorial Papers of the United States,* ed. Carter, IV, 208–16, esp. 210; David Humphreys to Washington, Sept. 27, 1789, in *The Papers of George Washington: Presidential Series,* vol. IV: *September 1789–Jan. 1790,* ed. Dorothy Twohig (Charlottesville, 1993), 91–95.

not just Europeans who doubted U.S. civilization, since Native peoples, and even some Anglo-Americans, recognized the worthlessness of U.S. treaty promises. "Let us no longer boast of our civilization," wrote one federal Indian agent disillusioned by persistent treaty violations, "if we cannot adduce one fact to authenticate the theory."[47]

To try to redress such critiques, Anglo-Americans remade their basic law. "The fundamental purpose of the Federal Constitution," Hulsebosch and Golove argue, "was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a 'civilized state.'" Such a state would "comply with its obligations under treaties and the law of nations," a goal the new document sought to accomplish by centralizing authority and expanding the national government's powers of enforcement. Anglo-Americans trumpeted this promise to Natives as well as Europeans. Now that "our Union, which was a child, is grown up to manhood," congressional commissioners told McGillivray just after ratification, "justice shall be done to the nations of Indians situated within the limits of the United States."[48]

This process had its own analogue among the Haudenosaunee and Creeks, with Brant and McGillivray once again in the forefront. Like the United States, they sought to centralize authority, especially in foreign affairs. Both men aspired to forge stronger pan-Indian ties as a counterweight to U.S. power. "[A] *formidable* Indian Confederacy," wrote McGillivray, "must always be [a] great check to the States, in preventing their ambitious designs of possessing themselves of all of the Western Countrys." Brant became active in the construction of the Northwest Indian Confederacy, a union of many Ohio Country tribes that also involved the Haudenosaunee. Although Brant was hardly the impetus for this drive for unity, he sought to mold its reception, helping craft one of the Confederacy's most significant statements, a letter to Congress on behalf of the "United Indian Nations." This formal declaration focused on the treaty process: it demanded that the United States conclude all treaties with the "whole confederacy," insisting that "all partial treaties" would be deemed "void and of no effect." McGillivray similarly pronounced that cessions could be made "only in general Convention [as] an act of the whole [Creek] Nation who are Joint Proprietors in Common." In short, McGillivray and Brant both strove to formalize treaty making, although in ways Anglo-Americans likely did not welcome.[49]

Both men also sought to remake practices of internal governance. Brant, who had long advocated "to have Some Laws and regulations Established amongst us [Indians]," constructed what became known as "Brant's Town" in British Canada, leading officials there to complain that he had "assumed an Air of Sovereignty." McGillivray adopted still more trappings of Anglo-American law. He introduced, for instance, a licensure system for traders within the Creek Nation that paralleled and supplanted Anglo-American systems. In 1791, when Caleb Swan, an emissary from Henry Knox, traveled into Creek Country, he reported that McGillivray had "undertake[n] a reform of the police of the nation." McGillivray, Swan relayed, had surrounded himself with warriors who acted "in the capacity of constables, to pursue, take up, and punish such characters as he may direct." McGil-

[47] Gould, *Among the Powers of the Earth,* 1–12, 112–40; Golove and Hulsebosch, "Civilized Nation"; Silas Dinsmore to John Sevier, March 8, 1797, folder 2, box 2, John Sevier Papers, 1796–1801, First Administration, Governor's Papers (Tennessee State Library and Archive, Nashville).

[48] Golove and Hulsebosch, "Civilized Nation," 935–36; "Abortive Negotiations at Rock Landing," Sept. 1789, in *Early American Indian Documents,* ed. Calloway, XVIII, 550.

[49] McGillivray to O'Neill, Nov. 8, 1785, in *McGillivray of the Creeks,* ed. Caughey, 99–100. Emphasis added. Speech of the United Indian Nations to Congress, Dec. 18, 1786, in *Early American Indian Documents,* ed. Calloway, XVIII, 357; McGillivray to Miro, May 1, 1786, in *McGillivray of the Creeks,* ed. Caughey, 106–7.

livray had particularly targeted horse theft, a constant source of cross-cultural violence, reportedly introducing a "law" under which Creek horse thieves were made to either repay in kind, pay a fine, or face thirty lashes from the injured party. Swan described this practice as the "one institution in the nation, that resembles civilization."[50]

In their embrace of aspects of Anglo-American governance, McGillivray and Brant were harbingers of later transformations throughout Indian country. In a shift most pronounced in the Cherokee Nation but also evident among the Creeks and Haudenosaunee, the institutional structures of authority within Native communities came to resemble those of Anglo-Americans, employing formal councils, written laws (often in English), individual property ownership, and a legal system in which the power to administer justice had passed "from private hands to a public jurisdiction," as an Indian agent noted in the Creek Nation in 1797.[51]

International law provides an important frame for these efforts at Native state building. Scholars have sometimes portrayed these transformations as both a reflection of the federal government's program of "civilizing" Indians as well as an opportunity for some Native leaders to promote themselves at the expense of their conationalists. Yet such dynamics were not confined to Indian country, as comparison to the United States suggests. In elevating individuals to represent nations, international law made it all too easy for U.S. leaders, no less than McGillivray and Brant, to conflate national and self-interest. Similarly, whether crafted in Creek Country or Independence Hall, outward-facing reforms intended to satisfy international legal norms often also served to empower elites *within* the nation.[52]

Nonetheless, the version of civilization that McGillivray and Brant endorsed was not a simple capitulation to the United States in pursuit of self-aggrandizement. Rather, their reforms targeted those aspects of their political structure required to satisfy the implicit standard of civilization that international law imposed on Native nations and the United States alike. They aspired for their nations to be civilized in the same way that the United States sought to be civilized—to achieve recognition as coequal nations in the international community. Brant, for one, clearly saw the parallel: the United States, Brant urged, "could not blame" Natives for their efforts at union, "neither ought they to be jealous of them; for what had Congress done, but to unite thirteen states as one[?]" As this quota-

[50] Brant quoted in Taylor, *Divided Ground,* 124; William Dummer Powell to Russell, Jan. 3, 1797, in *Correspondence of the Honourable Peter Russell,* ed. Cruikshank and Hunter, I, 123; Daniel McMurphy to O'Neill, July 11, 1786, in *McGillivray of the Creeks,* ed. Caughey, 118–21; Caleb Swan, "Report from Caleb Swan to Henry Knox," May 2, 1791, pp. 33–43, Caleb Swan Journal Extracts, 1790–91 (American Philosophical Society, Philadelphia, Pa.). On "Brant's Town," see Kelsay, *Joseph Brant,* 521–52.

[51] Hawkins to McHenry, March 1, 1797, in *Letters, Journals, and Writings of Benjamin Hawkins,* ed. C. L. Grant (2 vols., Savannah, 1980), I, 85–87. For works focusing on Cherokee adoption of Anglo-American practices, see William G. McLoughlin, *Cherokee Renascence in the New Republic* (Princeton, 1986); and Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman, 1975). For this practice among the Creeks, see Claudio Saunt, *A New Order of Things: Property, Power, and the Transformation of the Creek Indians, 1733–1816* (Cambridge, Eng., 1999); and Michael D. Green, *The Politics of Indian Removal: Creek Government and Society in Crisis* (Lincoln, 1982). For this practice among the Haudenosaunee, see Taylor, *Divided Ground,* 217–24; and Anthony F. C. Wallace, *The Death and Rebirth of the Seneca* (New York, 1969).

[52] For interpretations of Native state building, particularly in the Southeast, see Saunt, *New Order of Things;* Theda Perdue, "Clan and Court: Another Look at the Early Cherokee Republic," *American Indian Quarterly,* 24 (Fall 2000), 562–69; and Mark Rifkin, *Manifesting America: The Imperial Construction of U.S. National Space* (New York, 2009), 37–74. On the arguably antidemocratic consequences of the Constitution's reforms, see Terry Bouton, *Taming Democracy: "The People," the Founders, and the Troubled Ending of the American Revolution* (New York, 2007); and Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York, 2007).

tion suggests, his and similar efforts were part of a performative display of nationhood, aimed at making Native polities more legible and credible to an outside audience.[53]

As performances aimed at conveying a message to their would-be colonizers, Brant and McGillivray's actions were arguably successful. Disregarding the involvement of dozens of complex communities, Anglo-Americans readily interpreted the Northwest Indian Confederacy as Brant's effort to "gain a kind of sovereignty over" the disparate tribes, with Brant as the union's "prime mover." To the south, a Virginian commentator read McGillivray's actions as an attempt to force the United States "to acknowledge the independence and sovereignty of the Creek nation." But these Anglo-Americans did not regard these Native reforms of external and internal governance as a triumph of the U.S. colonial project. They viewed these efforts at Native nation building less as the sincerest form of flattery than as a threat—an effort to establish that Native peoples had equal right to be nations on the international stage. This aspect of Native transformation challenged the expansionist Anglo-American project: if Native peoples were coequal civilized nations, it compromised all the carefully laid legal rationalizations of the United States' right to ultimate sovereignty.[54]

McGillivray's Virginian observer implicitly acknowledged this challenge when, to understand Indians, he turned to India. "McGillivray," he recounted, "seems to be possessed of abilities . . . and may not be much inferior to Hyder Ally had he the same opportunity." Hyder Ali—the leader of Mysore who led a revolt against British rule in southern India—was a household name in the United States at the time. Many Anglo-Americans read in Ali's actions a kinship with their own struggles against British colonial rule. McGillivray cast as a new Ali offered hints that another claim to nationhood rooted in anticolonialism had emerged, this time in the Native Southeast. The difference from Anglo-Americans' identification with Ali was that this aspiring nation would be Native and the rejected colonial power was the United States.[55]

Domestic Dependent Nations

There were no international law tribunals in the late eighteenth century. As Anglo-Americans and Native leaders crafted dueling doctrines from the indeterminate materials of the law of nations, no forum existed to determine the validity of Anglo-Americans' assertions of territorial sovereignty or of Native claims to coequal "free and independent" nationhood. Instead, into the nineteenth century, there was only more of the same—fraught diplomacy in which principle, expediency, and power freely intermingled. In that struggle, the legal arguments of Brant and McGillivray largely lost, with Britain's

[53] Brant quoted in Taylor, *Divided Ground,* 116. For other instances when Natives repurposed ideas of civilization, see Snyder, "Rise and Fall and Rise of Civilizations"; and Kathleen DuVal, "Debating Identity, Sovereignty, and Civilization: The Arkansas Valley after the Louisiana Purchase," *Journal of the Early Republic,* 26 (Spring 2006), 25–58.

[54] St. Clair to Knox, Nov. 12, 1788, folder 6, box 2, Arthur St. Clair Papers, 1746–1882 (Ohio History Center, Columbus); Jeremy Belknap to Winthrop Sargent, Jan. 29, 1789, in *Winthrop Sargent Papers,* ed. Frederic Ellis et al. (microfilm, 7 reels, Massachusetts Historical Society, 1965), reel 3; Arthur Campbell to Gov. Randolph, Aug. 16, 1787, in *Calendar of Virginia State Papers and Other Manuscripts,* vol. IV: *January 1, 1785, to July 2, 1789,* ed. William P. Palmer (Richmond, 1884), 333–34.

[55] Campbell to Randolph, Aug. 16, 1787, in *Calendar of Virginia State Papers and Other Manuscripts,* ed. Palmer, IV, 333–34. On Hyder Ali's reception in the United States, see Blake Smith, "Revolutionary Heroes," *Aeon,* Dec. 2016, https://aeon.co/essays/why-american-revolutionaries-admired-the-rebels-of-mysore.

last-ditch effort to defend Native nationhood at the close of the War of 1812 succumbing to the demands of *realpolitik*. These setbacks spoke more to the raw inequalities of power than to the merits of the respective legal claims.[56]

Yet Native international-law arguments *did* belatedly come before a court when, in 1831, the U.S. Supreme Court heard *Cherokee Nation v. Georgia*. The Court was hardly an impartial arbiter: as Leonard Sadosky stresses, merely filing suit in federal court suggested Native reliance on Anglo-American institutions. But the core of the Cherokees' argument was that they were in *not* under U.S. authority—that their nation, with all its signifiers of civilization, was a "foreign State[]" within the meaning of the U.S. Constitution.[57]

Much had changed, both intellectually and in the balance of power, during the half century of unsettled debates over Native nations' status that preceded *Cherokee Nation*. As Lisa Ford has traced, in the early nineteenth century jurisdictional boundaries hardened and insistence on territorial sovereignty deepened. Yet in their reasoning, the justices' conflicting responses to the Cherokees' claim could just as easily have been written in the 1790s, as they invoked divergent strands of international law widely mooted in that earlier era. Justice Smith Thompson, for instance, relied on Vattel's definition of statehood, which he quoted for an entire paragraph. This approach led Thompson to endorse Native nationhood: "Testing the character and condition of the Cherokee Indians by these rules," he determined, "it is not perceived how it is possible to escape the conclusion, that they form a sovereign state." Justice William Johnson, by contrast, leaned heavily on the standard of civilization, doubting whether the "epithet *state*" could apply "to a people so low in the grade of organized society as our Indian tribes most generally are." Indian tribes, he insisted, were "an anomaly unknown to the books that treat of States, and which the law of nations would regard as nothing more than wandering hordes . . . having neither laws or government, beyond what is required in a savage state."[58]

Chief Justice John Marshall's majority opinion readily concluded that the Cherokees were both sovereign and civilized. "So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful." But the Cherokees' success proved fleeting, as Marshall balked at the descriptor *foreign*. Instead, Marshall coined the neologism "domestic dependent nations" to classify Native peoples' "peculiar" international law status.[59]

Marshall's choice of terms was significant. "Domestic" wholeheartedly embraced U.S. arguments from territorial sovereignty: "The Indian Territory is admitted to compose a part of the United States," Marshall wrote, before invoking the principle of noninterference: Native peoples "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt

[56] On the international-law debates over Native status surrounding the War of 1812 and its aftermath, see Sadosky, *Revolutionary Negotiations,* 200–205; Gould, *Among the Powers of the Earth,* 197–206; and Rosen, *Border Law,* 123–57.

[57] *Cherokee Nation v. Georgia,* 30 U. S. (5 Pet.) 1, 1–6 (1831); Sadosky, *Revolutionary Negotiations,* 212–13. For additional background, see Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York, 1996); and Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (Athens, Ga., 2002).

[58] Ford, *Settler Sovereignty,* 129–56, 183–98; *Cherokee Nation v. Georgia,* 30 U.S. at 52–54 (Thompson, J., dissenting); *ibid.*, 11–22 (opinion of Johnson, J.).

[59] *Cherokee Nation v. Georgia,* 30 U.S. at 16–17.

to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory." As for "dependent"—at odds with Native claims to *independence*—Marshall observed that the tribes had "acknowledge[d] themselves in their treaties to be under the protection of the United States."[60]

Cherokee Nation illustrated the perils of Native invocation of the law of nations. The Cherokees' defeat, though arguably overdetermined, reflected more than the forum; it highlighted that the law of nations, even during the more fluid 1790s, was never as open to Native claims as its universal rhetoric posited. In the late-eighteenth-century struggle over international law interpretations, the United States had always possessed a significant advantage, which is why Anglo-Americans could so readily manipulate that law's norms to denigrate Native sovereignty and why Britain and Spain ultimately accepted the United States but not the "State of Muskogee" as a "civilized nation."

Yet it would be an error to dismiss the law-of-nations principles that Native leaders invoked as nothing more than a malleable, post-hoc justification for imperialism—a shell game that colonizers played on the colonized. Vattel had not written for indigenous peoples, but he and his predecessors had inadvertently provided them raw materials for a powerful legal argument. Haudenosaunee and Creek people in late eighteenth-century North America faced a difficult world of constrained choices. Increasingly outnumbered, they faced an insecure United States eager to claim Native territories and deny Native nations' traditional source of power—their ability to enter alliances. Native peoples confronted, too, the triumph of racial hierarchies that defined them as innately incapable of equality with their "white" neighbors.[61]

The law of nations seemingly offered one way to transcend these difficulties. The rights of free and independent nationhood would allow Native peoples to continue their international diplomacy, while internally, within sovereignty's "black box," indigenous nations could govern themselves free from interference. And international law's supposed universalism offered a counterracial vision in which any self-governing people, regardless of skin color, might claim status coequal with other nations, including the United States.

Moreover, Native appeals to international law arguably worked, even if they failed to achieve the full sovereignty that Brant and McGillivray sought. As Greg Dowd has recently observed, U.S. law contains a more robust vision of Native sovereignty than the doctrines of similar settler colonial nations. Dowd hedges on the roots of this divergence, but one potential explanation comes from the final word of Marshall's triad: "nation," which codified the conclusion "by a majority of the Court that the Cherokee Indians form a sovereign state according to the doctrine of the law of nations." This remarkable and important concession did not arise from the exceptional beneficence of Anglo-Americans. It reflected, rather, the hard-won success of Native claims making in forcing a reluctant United States to acknowledge the sovereign rights of Native nations, rights that many Anglo-Americans would just as soon have discarded.[62]

[60] *Ibid.*, 17–18.

[61] For an overview of the expansive work on Natives and race in the early republic, see Joshua Piker, "Indians and Race in Early America: A Review Essay," *History Compass,* 3 (Dec. 2005), 1–17. For representative works, see David J. Silverman, *Red Brethren: The Brothertown and Stockbridge Indians and the Problem of Race in Early America* (Ithaca, 2010); Silver, *Our Savage Neighbors;* Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (New York, 2004); and Daniel K. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, Mass., 2001), 190–236.

[62] Dowd, "Indigenous Peoples without the Republic," 35–38; *Cherokee Nation v. Georgia,* 30 U.S. at 54 (Thompson, J., dissenting).

Once entrenched in federal law, these fundamental principles proved difficult to efface entirely. "It is forever too late to talk of conquest," opined one congressman during the removal debates of the 1830s. "Great Britain has not more fully acknowledged our independence than have we that of the Indians." Of course, prior acknowledgment of Native nationhood did not stop dispossession and violence, nor did it prevent many Anglo-Americans from trying to eliminate what one justice of the Alabama Supreme Court labeled "this high pretension to savage sovereignty." Comparison underscores how fragile and contingent recognition of indigenous sovereignty was: it not only lacked an analogue in other common-law settler societies but it also fell away in places such as Hawaii, Alaska, and California, where distance and neglect broke down earlier legal structures, with pernicious consequences. Natives in those places also resisted through law. But, by the mid-nineteenth century, the already-limited space for Native claims making had significantly narrowed, as international law, thanks in part to the global dissemination of Anglo-American interpretations, grew ever more hostile to indigenous rights. In this sense, it mattered a good deal that the core of what became "Indian law" formed before this hardening, at a time when sovereignty's fluidity made it possible for Natives to claim, and win, international-law rights.[63]

Indigenous peoples, of course, have never stopped invoking international law to assert nationhood, no matter how unfriendly it has been to their claims. Haudenosaunees sought the Six Nations' admission as a state to the League of Nations soon after its creation, and they have recently traveled internationally under their Iroquois, not U.S., passports. Such activism helped secure the 2007 passage (over U.S. opposition) of the United Nations Declaration on the Rights of Indigenous Peoples, which affirmed rights of self-determination, autonomy, and cultural integrity. This broader transformation has led scholars to label the current era a "jurisgenerative moment" for indigenous rights under international law. Yet the declaration is not binding law, and indigenous peoples are still routinely forced into the institutions of the nation-states that claim sovereignty over them to vindicate their rights. This paradox—Native peoples' legal status as quasi-sovereigns encompassed within the territory of sovereign states—is not new. In this sense, Native nations' ongoing fight to extract greater acknowledgment of their sovereignty from an often-unwilling United States reflects the reality that the late eighteenth-century struggles over how to interpret international law never really ended.[64]

[63] *Annals of Congress,* 21 Cong., 1 sess., May 17, 1830, p. 1028; *Caldwell v. State,* 1 Stew. & P. 327, 335 (1832). On the failures of federal law in California, see Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873* (New Haven, 2016), 163–72. On these failures in Alaska, see Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge, Eng., 1994), 207–50. For these failures in Hawaii, see Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, 2000). On international law's retreat from universalism over the nineteenth century, see Anghie, *Imperialism, Sovereignty, and the Making of International Law*. On dissemination of U.S. interpretations, see Rosen, *Border Law,* 150–57.

[64] Kristen A. Carpenter and Angela R. Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," *California Law Review,* 102 (Feb. 2014), 173–234; Declaration on the Rights of Indigenous Peoples, G. A. Res. 61/295, paragraph 12, U.N. Doc. A/RES/61/295 (Sept. 12, 2007). On Haudenosaunees and the League of Nations, see "Appeal of the 'Six Nations' to the League," *League of Nations Official Journal,* 5 (June 1924), 829–42. On continued Haudenosaunee arguments for nationhood and their "refusals" of U.S. and Canadian claims of sovereignty, including the passport controversies, see Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham, N.C., 2014).