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ARTICLE

INDIGENOUS CONSTITUTIONALISM

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INDIGENOUS CONSTITUTIONALISM

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By standard accounts, there are fifty-four constitutions across the federal, state, and territorial governments of the United States. But in fact, there are 230 other governmental constitutions that currently govern peoples and territories within the United States. These constitutions not only flow from a sovereignty that existed prior to the United States but also came out of a legal movement that asserted its independence from both the U.S. Constitution and state constitutions.

This Article tells the story of these constitutions — the constitutions of Native nations. Having existed for over two centuries with an archive of thousands of constitutional documents and amendments, tribal constitutions have been left out of the narratives of American constitutional history while being obscured within the fields of American constitutional law and federal Indian law. This Article corrects these oversights and calls for the recognition of a tradition of “Indigenous constitutionalism” in the United States.

This Article’s aims are both theoretical and historical. On one hand, it conceptualizes Indigenous constitutionalism as a distinct and shared constitutional practice through which Native nations claim and exercise self-governance while embedded in the wider constitutional — and colonial — landscape of the United States. On the other hand, this Article draws Indigenous constitutionalism’s features from the two-hundred-year history of tribal constitutions. It explores, for the first time, three major eras of tribal constitutional development: the first constitutions during the early nineteenth-century period of Indian Removal, the explosion of constitutions under the Indian Reorganization Act in the early twentieth century, and the movement for tribal constitutional reform that has stretched from the late twentieth century to today.

But this Article also brings theory and history together to rethink the prevalent narratives surrounding tribal law, federal Indian law, and American constitutionalism. Indigenous constitutionalism reveals the fundamental and persistent questions around which a tribal constitutional law framework can be constructed. It also revises the origin stories of federal Indian law, demonstrating that the field did not coalesce in isolation from tribal law but was actually cocreated with tribal constitutions. Finally, by placing tribal constitutions into conversation with other American charters, Indigenous constitutionalism disrupts and expands the category of constitutionalism itself. This Article demonstrates that tribal constitutions — unique among American constitutions — showcase how these documents can appear in many forms, function as external-facing declarations of sovereignty, and exist alongside other forms of fundamental law.

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In the past we have always had laws; however the Choctaw people shall possess this series of strong laws. . . . Now, in coming days we should take well to heart these laws we have passed as we continue our lives. It is imperative that we not forget.

— Choctaw Constitution of 1826¹

“How long will Indian constitutions last?” . . . An Indian constitution will exist as long as there remains in human hearts a community of interdependence, of common interests, aspirations, hopes, and fears, in realms of art and politics, work and play.

— Felix S. Cohen (1939)²

INTRODUCTION

The United States is known for its constitutions. At the nation’s birth, the American Revolution sparked a bold political experiment: The newly declared states replaced their colonial charters with the world’s first written constitutions and organized into a loose confederation.³ A decade later, delegates from twelve of the thirteen states, a group of fifty-five white men, met in Philadelphia and wrote a constitution that transformed that confederation into a national republic.⁴ Over 230 years later, that document, the U.S. Constitution, still governs us. And the list of our constitutional contributions has only expanded, with the addition of twenty-seven amendments to the U.S. Constitution,⁵ the admission of thirty-seven more states with their own constitutions,⁶ the successive adoption of thousands of amendments and rewritten

¹ *Entries from August 5, 1826* [hereinafter CONST. OF THE CHOCTAW NATION of 1826], in PETER PERKINS PITCHLYNN, *A GATHERING OF STATESMEN: RECORDS OF THE CHOCTAW COUNCIL MEETINGS, 1826–1828*, at 45, 61–62 (Marcia Haag & Henry J. Willis eds. & trans., 2013).

² FELIX S. COHEN, *How Long Will Indian Constitutions Last?*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 222, 228–29 (Lucy Kramer Cohen ed., 1960).

³ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 133, 356–57 (1969).

⁴ See *Meet the Framers of the Constitution*, NAT’L ARCHIVES (Feb. 18, 2026), <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/NSG3-GWJJ>].

⁵ See U.S. CONST. amends. I–XXVII.

⁶ BEN LEUBSDORF ET AL., *CONG. RSCH. SERV.*, R47747, *ADMISSION OF STATES TO THE UNION: A HISTORICAL REFERENCE GUIDE* 1 (2024).

constitutions by the fifty states,⁷ and continually raging debates over constitutional meaning.⁸

But this familiar picture of American constitutionalism is incomplete.⁹ Beyond the fifty-four federal, state, and territorial constitutions,¹⁰ approximately 230 other constitutions¹¹ currently govern millions of people and tens of thousands of square miles of territory within the boundaries of the United States.¹² And these contemporary constitutions are part of a much larger legal tradition, one that stretches back 200 years and includes an archive of over 1,000 constitutions and associated documents.¹³ These missing documents within the American

⁷ For a compilation of original and rewritten state constitutions through the twentieth century, see John Joseph Wallis, THE NBER/MARYLAND STATE CONSTITUTIONS PROJECT, <http://www.stateconstitutions.umd.edu/index.aspx> [https://perma.cc/6C4W-RJ3E]. For a compilation of current state constitutions, see *50 Constitutions*, STATE DEMOCRACY RSCH. INITIATIVE, UNIV. WIS. L. SCH., <https://50constitutions.org> [https://perma.cc/J6LA-Y8PK].

⁸ The various topics of current constitutional debate, ranging from the scope of the individual right to bear arms to the Executive's power to remove officers, are too numerous to list here. However, debates over originalism and the role of history permeate modern discussions on constitutional meaning and interpretation. See, e.g., JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 2–3 (2024); JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 8–9 (2024).

⁹ This Article builds on Native legal scholar Professor Elizabeth Hidalgo Reese's work foregrounding the importance of including tribal law in our study of American law. Although this Article situates tribal constitutions as both in conversation with and separate from American constitutions, it picks up her call by seeking to end the obscurity and marginalization of tribal constitutions within American constitutional history and constitutional law scholarship. See Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 559–64 (2021).

¹⁰ See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW, at ix, 10–11 (2018); Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 214–15 (2022).

¹¹ See Robert Miller, *Tribal Constitutions and Native Sovereignty*, in OXFORD HANDBOOK TOPICS IN POLITICS (online ed. 2015), <https://academic.oup.com/edited-volume/41327/chapter/496999456> [https://perma.cc/D2Z8-GTMS].

¹² See Reese, *supra* note 9, at 558 & n.5, 569. While recognizing that there are thousands of other legal documents in the United States that could be considered “foundational,” such as municipal charters, I am limiting my analysis here to documents that are held out as constitutions and therefore expressions of popular sovereignty within a polity — features not shared by municipal or corporate charters as creatures of state and federal law or by private associations' articles of incorporation.

¹³ The number of tribal constitutions and associated documents comes from an ongoing project led by Professors Beth Redbird and Erin Delaney at Northwestern University to compile and catalog all such documents from Native nations. See *Examining Tribes' Sovereignty Through Their Constitutions*, NW. UNIV.: INST. FOR POL'Y RSCH. (Jan. 16, 2024), <https://www.ipr.northwestern.edu/news/2024/examining-tribes-sovereignty-through-their-constitutions.html> [https://perma.cc/6JCD-HJAC].

constitutional picture¹⁴ — documents that comprise a substantial portion of this picture — are the constitutions of Native nations.¹⁵

Despite their number and long history, the written constitutions of Native nations have been overlooked by legal and historical scholarship thus far. While the U.S. Constitution, and increasingly state constitutions,¹⁶ command the field of constitutional law scholarship as the documents establishing the quintessential American governments, tribal constitutions are constrained to the supposedly “tiny backwater”¹⁷ of federal Indian and tribal law.¹⁸ Additionally, only one tribal constitution — that of the Cherokee Nation in 1827 — shows up in mainstream narratives of American constitutional history and solely in the context

¹⁴ While tribal constitutions have been largely excluded from the study of U.S. constitutional law thus far, Native legal scholar Professor Maggie Blackhawk’s groundbreaking work has shown that federal Indian law and Native nations have been central to the development of American constitutionalism. As she has convincingly illustrated, the “plenary power” doctrine has provided space for Native nations to “reclaim and reshape” American colonialism to their benefit. Maggie Blackhawk, *The Supreme Court, 2022 Term — Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 8, 12 (2023) [hereinafter Blackhawk, *Constitution of American Colonialism*]. This Article both posits that tribal constitutions offer one example of this phenomenon and answers Blackhawk’s call for the recognition of a “borderlands constitutionalism” that would uphold tribal self-determination. *See id.* at 19–21, 89–90, 100–03; *see also* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1795–96 (2019) [hereinafter Blackhawk, *Federal Indian Law*] (arguing that modern constitutional doctrines governing presidential and congressional power draw on earlier analogues in federal Indian law); Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2211 (2023) [hereinafter Blackhawk, *Legislative Constitutionalism*] (“Federal Indian law has . . . reshaped the face of U.S. government . . . and [its] constitutional framework.”).

¹⁵ This Article uses the terms “Native nation” and “Indian tribe” to describe the Indigenous polities of the United States, as well as the terms “Native” and “Indian” to describe the Indigenous peoples of the United States. The term “Indian” is used in its historical and legal context and as part of key terms of art. For discussion of these various terms as they are used — and should be used — in historical writing, see Brooke Bauer & Elizabeth Ellis, *Indigenous, Native American, or American Indian?: The Limitations of Broad Terms*, 43 J. EARLY REPUBLIC 61, 62–64, 70–71 (2023).

¹⁶ *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1857–59 (2023).

¹⁷ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993) (“Federal Indian law does not deserve its image as a tiny backwater of law inhabited by impenetrably complex and dull issues.”).

¹⁸ For examples of the scattered legal scholarship on tribal constitutions, see Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe*, 26 AM. INDIAN L. REV. 147, 149–50 (2002); Kristen A. Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 159, 168–72 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012); Sarah Deer & Cecilia Knapp, *Muscoogee Constitutional Jurisprudence: Vhaku Em Pvtaku (The Carpet Under the Law)*, 49 TULSA L. REV. 125, 149 (2013); Jason P. Hipp, *Rethinking Rewriting: Tribal Constitutional Amendment and Reform*, 4 COLUM. J. RACE & L. 73, 80–81 (2013); Robert J. Miller, *American Indian Constitutions and Their Influence on the United States Constitution*, 159 PROCS. AM. PHIL. SOC’Y 32, 33 (2015); and Kekek Jason Stark, *Exercising the Right of Self-Rule: Tribal Constitutional Law and Customary Law*, 51 MITCHELL HAMLIN L. REV. 94, 97 (2024).

of debates on the U.S. Constitution.¹⁹ Otherwise, Native nations' constitutions have been pushed to the margins, confined to the histories of specific Indigenous polities.²⁰ As a result, Indigenous political activity has been separated from both American constitutionalism and mainstream U.S. history, leading to a stunted narrative on American constitutional development.

This Article seeks to correct these oversights. First and foremost, this Article counters tribal constitutions' obscurity by calling for the recognition of a category of *Indigenous constitutionalism*.²¹ It contends that a coherent and shared constitutional tradition among Native nations exists and that uncovering this tradition is necessary to grasp fully the scope and history of American constitutionalism. And this Article sets out to understand and describe a particular historical and legal phenomenon that is part of this shared constitutional practice: Native nations adopting and transforming a Euro-American legal

¹⁹ See, e.g., ALISON L. LACROIX, *THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS* 248–50 (2024); Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 *YALE L.J.* 1792, 1856–61 (2019); see also GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S*, at 201–03 (2019) (providing a detailed account of how the Cherokee Nation's claim to sovereignty shaped American constitutional law).

²⁰ See, e.g., KEITH RICHOTTE JR., *CLAIMING TURTLE MOUNTAIN'S CONSTITUTION: THE HISTORY, LEGACY, AND FUTURE OF A TRIBAL NATION'S FOUNDING DOCUMENTS* 6 (2017); JEAN DENNISON, *COLONIAL ENTANGLEMENT: CONSTITUTING A TWENTY-FIRST-CENTURY OSAGE NATION* 4–5 (2012); DUANE CHAMPAGNE, *SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK* 12 (1992); RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 188* (1975). Lumbee political scientist Professor David Wilkins's recent book approaches tribal constitutions in a more comprehensive way, but that discussion is couched within a larger study on Native nations' various forms of government. See DAVID E. WILKINS, *INDIGENOUS GOVERNANCE: CLANS, CONSTITUTIONS, AND CONSENT* 159–60 (2024).

²¹ This Article is not the first to use the term “Indigenous constitutionalism.” Legal scholars have previously used the term to refer to constitutional thought in nations that are distinct from colonial or Western conceptions. See, e.g., Margaret A. Burnham, *Indigenous Constitutionalism and the Death Penalty: The Case of the Commonwealth Caribbean*, 3 *INT'L J. CONST. L.* 582, 583 (2005); Steven Wang, *Indigenous Constitutionalism and Global Legitimacy: Excavating the Roots of Chinese Constitutionalism*, 46 *YALE J. INT'L L. ONLINE* 99, 124 (2021). And in Canada, the term has been employed extensively to describe First Nations' traditional legal orders, conceptions of rights, and written constitutions. See, e.g., JOHN BORROWS, *FREEDOM AND INDIGENOUS CONSTITUTIONALISM* 12 (2016); Aaron Mills, *The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today*, 61 *MCGILL L.J.* 847, 872 (2016); John Borrows, *Indigenous Constitutionalism: Pre-Existing Legal Genealogies in Canada*, in *THE OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION* 13, 13–17 (Peter Oliver, Patrick Macklem & Nathalie Des Rosiers eds., 2017); Alex Geddes, *Indigenous Constitutionalism Beyond Section 35 and Section 91(24): The Significance of First Nations Constitutions in Canadian Law*, 3 *LAKEHEAD L.J.* 1, 2 & n.3 (2019); Karen Drake, *Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation*, 48 *FED. L. REV.* 570, 571 (2020). But this Article is the first to apply this term to the written constitutions of Native nations within the United States, and it does so in order to stress that such constitutions — with uniquely Indigenous features — comprise part of the same overarching tradition in the United States. See *infra* section I.B, pp. 1274–83.

instrument — the written constitution²² — to commit their legal traditions and unwritten fundamental law²³ to textual form. This syncretic process of adaptation and transformation *is* Indigenous constitutionalism. And its study illuminates not only the history of tribal sovereignty and governance, but also offers insights into Indigenous self-determination around the globe and the diversity and exceptionalism within American constitutionalism.²⁴

On one level, this work is conceptual. This Article frames Indigenous constitutionalism as a distinct constitutional practice through which Native nations claim and exercise self-governance while embedded in the wider constitutional — and colonial — landscape of the United States.²⁵ And it identifies four defining features of Indigenous constitutionalism: (1) the appropriation of the Euro-American concept of constitutionalism, including the written constitutional form; (2) the subversion of constitutions' tendency to assimilate and erase non-Western polities and customary law; (3) the adaptation of unwritten customary law and written law to construct a hybrid legal order; and (4) the resistance to incorporation into the United States while demanding recognition of tribal sovereignty.²⁶

But this work is also historical, drawing Indigenous constitutionalism's features from the two-hundred-year history of written tribal constitutions. Using archival research alongside the work of Indian Country

²² For scholarship on the various iterations of constitutionalism in the American colonies and, later, the United States, including the role of written constitutionalism, see, for example, MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 195–96 (2004); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 7–8 (2005); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 *STAN. L. REV.* 1397, 1400 (2019); and Jonathan Genapp, *Written Constitutionalism, Past and Present*, 39 *LAW & HIST. REV.* 321, 322 (2021).

²³ For discussions of fundamental and customary law among Native nations, see, for example, Daniel K. Richter, *Ordeals of the Longhouse: The Five Nations in Early American History*, in *BEYOND THE COVENANT CHAIN: THE IROQUOIS AND THEIR NEIGHBORS IN INDIAN NORTH AMERICA, 1600–1800*, at 11, 16–18 (Daniel K. Richter & James H. Merrell eds., 2003), and JOHN PHILLIP REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION* 35–48 (1970).

²⁴ See *infra* section I.B, pp. 1274–83.

²⁵ This Article's sole focus is the Native nations — American Indian tribes and Alaska Native villages — within the continental United States, even though its insights may also apply to other Indigenous polities that have been subsumed within the United States, such as the Kingdom of Hawai'i, or exist around the world. For studies of constitutionalism in Hawai'i, see generally NOELANI ARISTA, *THE KINGDOM AND THE REPUBLIC: SOVEREIGN HAWAI'I AND THE EARLY UNITED STATES* (2019), and SALLY ENGLE MERRY, *COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW* (2000).

²⁶ See *infra* section I.A, pp. 1270–74. By focusing on Indigenous peoples' use of law as a means of resistance and decolonization, this Article comports with other recent scholarship in global constitutional history and theory emphasizing the role of law rather than violence for subordinated groups to achieve autonomy. See, e.g., LINDA COLLEY, *THE GUN, THE SHIP, AND THE PEN: WARFARE, CONSTITUTIONS, AND THE MAKING OF THE MODERN WORLD* 10–11 (2021); Richard Albert, *Decolonial Constitutionalism*, 25 *CHI. J. INT'L L.* 341, 345 (2025).

scholars, this Article identifies and explores three major eras of tribal constitutional development. The first era centers on the origins of written tribal constitutions in the nineteenth century, events that led to the recognition of tribal sovereignty in American law. Unfolding in the time of Indian Removal, the narrative of this era focuses on a moment never before studied in full: the simultaneous creation of the first written tribal constitutions — those of the Choctaw and Cherokee Nations — in the 1820s South, showcasing how these nations turned to constitutionalism to exercise and reify tribal power when faced with attempts to strip them of their homelands and their sovereignty.²⁷ The second era covers the explosion of constitutions in the early twentieth century under the federal Indian Reorganization Act of 1934²⁸ (IRA). Despite a heavy-handed federal approach and a standard constitutional format,²⁹ this era demonstrates that Native constitutional thought persisted even in a period of imposition. Felix Cohen — the legendary author of the *Handbook of Federal Indian Law*³⁰ — relied on the nineteenth-century Native constitutions to both spell out and recognize the substantial breadth of tribal sovereignty that persisted after a century of Native dispossession, genocide, and subjugation.³¹ Finally, the third era is comprised of the movement for tribal constitutional reform that has stretched from the final decades of the twentieth century to today. Coinciding with the Self-Determination Era³² in federal Indian law that began in the 1960s and 1970s, tribes that had been stripped of their earlier constitutions, had recently regained federal recognition, or had

²⁷ See *infra* section II.A, pp. 1285–91. Although plenty of scholars have studied the Cherokee Constitution of 1827, the Choctaw Constitution of 1826 has escaped sustained analysis and has never been placed into conversation with the Cherokee document. For scholarship that mentions the Choctaw Constitution while dismissing its significance as a legal document, see JAMES TAYLOR CARSON, *SEARCHING FOR THE BRIGHT PATH: THE MISSISSIPPI CHOCTAWS FROM PREHISTORY TO REMOVAL* 97 (1999); CHAMPAGNE, *supra* note 20, at 151; CLARA SUE KIDWELL, *CHOCTAWS AND MISSIONARIES IN MISSISSIPPI, 1818–1918*, at 111–12 (1995); and ANGIE DEBO, *THE RISE AND FALL OF THE CHOCTAW REPUBLIC* 48–49 (3d prtg. 1972).

²⁸ Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479).

²⁹ These features of the IRA constitutions have given rise to the oft-repeated critique that the constitutions are “boilerplate” documents that were imposed on Native nations. See, e.g., David Wilkins, *Seasons of Change: Of Reforms, Melees, and Revolutions in Indian Country* [hereinafter Wilkins, *Seasons of Change*], in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* 35, 40 n.12 (Eric D. Lemont ed., 2006) [hereinafter *AMERICAN INDIAN CONSTITUTIONAL REFORM*]; GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934–45*, at 96–98 (1980). However, the political scientists Professors Elmer Rusco and David Wilkins refute this claim. See Elmer Rusco, *The Indian Reorganization Act and Indian Self-Government*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM*, *supra*, at 49, 62–66; David E. Wilkins, *Introduction* [hereinafter Wilkins, *Introduction*] to FELIX S. COHEN, *ON THE DRAFTING OF TRIBAL CONSTITUTIONS*, at xi, xxii–xxiii (David E. Wilkins ed., 2006); see also *infra* section III.B, pp. 1308–11.

³⁰ FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (3d prtg. 1942).

³¹ See *id.* at 122–26; see also *infra* section III.A.2, pp. 1305–08.

³² See COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* § 1.07, at 93 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S *HANDBOOK*].

struggled to govern under their IRA constitutions undertook constitution-writing projects — all pursuing innovative ways to bolster their status as modern nations with sophisticated tribal state apparatuses.³³

Through this history, Indigenous constitutionalism has much to teach us. First, it promotes the continued flourishing of tribal law scholarship. Tribal law studies are currently undergoing a renaissance as scholars demand external recognition of tribal law as part of American law,³⁴ call for attention to tribal law innovations in various regulatory areas,³⁵ and propose methods for expanding tribal court systems to incorporate customary law and restorative justice methods.³⁶ The study of Indigenous constitutionalism supplements this growing field by exploring in depth the ways in which Native peoples have approached their written constitutions, which — along with customary law — serve as the primary foundation for all other tribal law. It shows that just because tribal constitutions were written in the context of colonialism does not mean that these documents are inauthentic. In fact, their colonial nature helps to unearth Indigenous constitutionalism's extensive history and diversity, which can inform further research into tribal law as a hybrid and congruent field combining Native customary and Euro-American positive law.

Perhaps Indigenous constitutionalism's greatest contribution to the field of tribal law, though, is providing scaffolding for a tribal constitutional law framework. By viewing tribal constitutional practices as an ongoing, two-centuries-long dialogue among Native nations, Indigenous constitutionalism reveals the fundamental and persistent questions that Native peoples have encountered through writing and interpreting their constitutions. While tribal constitutions could easily slot into a federal or state constitutional law framework — with their similar concerns around issues such as separation of powers and individual rights — they also confront challenges that no other American polity faces due to their tribal character, persisting cultures, and colonial positionality. This Article points to three such issues that could structure the distinctive

³³ See *infra* section IV.A, pp. 1313–19.

³⁴ See Reese, *supra* note 9, at 557 (“Tribal law is American law, and as such . . . ought to occupy an equally prominent place alongside federal, state, and local law.”).

³⁵ See Angela R. Riley, *Tribal Law Innovations in Native Governance*, 71 UCLA L. REV. 1742, 1745 (2025); Alejandro E. Camacho et al., *Adapting Conservation Governance Under Climate Change: Lessons from Indian Country*, 110 VA. L. REV. 1549, 1557–58 (2024); Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 718–19 (2017); Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. ST. L.J. 857, 858–59 (2015); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1729 (2012).

³⁶ See Matthew L.M. Fletcher, *The Three Lives of Mamengwaa: Toward an Indigenous Canon of Construction*, 134 YALE L.J. 696, 763–66 (2025); Stark, *supra* note 18, at 97; Kekok Jason Stark, Gwayak Ateg Onaakonigewi Dibenjigewin: *Decolonizing Jurisdiction in Anishinaabe Tribal Courts*, 103 NEB. L. REV. 199, 235–37 (2024); Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CALIF. L. REV. 103, 142–43 (2024).

aspects of an academic and legal framework for tribal constitutional law: the construction of Native polities around membership and territory,³⁷ the legal hybridity of constitutions that combine elements from Indigenous and Euro-American legal orders,³⁸ and the effects of Native nations' status within a protectorate system.³⁹ And by showing how Native nations have taken various approaches to overcoming these same challenges across time and space, Indigenous constitutionalism emphasizes the sheer amount of constitutional creativity that Native peoples have exhibited.

Further, this Article positions Indigenous constitutionalism as a bridge between tribal law and federal Indian law. Uncovering the histories of tribal constitutions revises the standard origin stories of the field of federal Indian law, shifting its foundations from the isolation from — and even subjugation of — tribal law to being inextricably intertwined with respect for tribal authority. The common understanding is that federal Indian law derives from two moments — the “Marshall Trilogy”⁴⁰ of U.S. Supreme Court cases in the early nineteenth century and the publication of Cohen’s *Handbook of Federal Indian Law*⁴¹ in the mid-twentieth century — and is the work of non-Native people wrestling with how to justify and ameliorate conquest. But inserting the foundational eras of tribal constitutional development — namely, the first constitutions in the Removal Era and the IRA constitutions of the twentieth century — into these stories reveals that Native peoples and their claims to and exercises of tribal sovereignty heavily influenced the field of federal Indian law.⁴² Thus, Indigenous constitutionalism demonstrates that tribal constitutions and federal Indian law were cocreated, ultimately providing more space for the further recognition and incorporation of tribal law into federal Indian law. And doctrinally, tribal constitutional provisions could concretize the often-amorphous concept of tribal sovereignty in federal law.⁴³

This Article also opens pathways for examining how Indigenous constitutionalism may inform the practice of U.S. constitutional law. For instance, originalism is ascendant as a method of constitutional interpretation at the U.S. Supreme Court, and some have argued the same is true of state courts.⁴⁴ But the same is not true for tribal courts that have

³⁷ See *infra* section V.A.1, pp. 1322–24.

³⁸ See *infra* section V.A.2, pp. 1324–25.

³⁹ See *infra* section V.A.3, pp. 1325–26.

⁴⁰ See Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627 (2006).

⁴¹ See COHEN, *supra* note 30.

⁴² See *infra* section V.B, pp. 1326–29.

⁴³ See *infra* notes 556–560 and accompanying text.

⁴⁴ See Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL’Y 341, 344 (2017) (arguing that state courts are primarily

engaged in their own acts of constitutional interpretation — acts that both reveal alternative interpretive approaches and challenge originalism’s inevitability.⁴⁵ Likewise, tribes have implemented diverse approaches to allocating power across legislative, executive, and judicial branches⁴⁶ — approaches that can inform ongoing separation of powers debates, such as arguments over legislative constitutionalism,⁴⁷ the unitary executive,⁴⁸ and judicial review.⁴⁹ Awareness of antebellum tribal constitutions can even shed light on important interpretive debates, providing Native-authored documents that serve as evidence for what Native people thought of the U.S. Constitution and how they shaped its meaning.⁵⁰ And such potential further indicates why we should view tribal constitutions as part of the wider debates over American constitutionalism.⁵¹ Although space constraints preclude a full investigation

originalist). *But see* Chihiro Iozaki & Maryjane Johnson, *State Justices Continue to Challenge Originalism*, STATE CT. REP. (Aug. 12, 2025), <https://statecourtreport.org/our-work/analysis-opinion/state-justices-continue-challenge-originalism> [<https://perma.cc/KKS7-SU9H>].

⁴⁵ *See, e.g.*, *Standing Bear v. Whitehorn*, No. SCO-2015-01, slip op. at 3–6 (Osage Nation Sup. Ct. Mar. 8, 2016), <https://turtletalk.files.wordpress.com/2016/03/sco-2015-01-slip-opinion-3-8-16.pdf> [<https://perma.cc/SN8Y-8T6T>] (using Osage history and custom to interpret the Osage Constitution’s separation of powers principles). For more examples of the various approaches tribal courts have used in constitutional and statutory interpretation, see Fletcher, *supra* note 36, at 747–61, and Stark, *supra* note 18, at 134–62.

⁴⁶ *See, e.g.*, *infra* sections II.A.1, pp. 1286–89 (describing mixing of powers in the Choctaw Constitution of 1826), and III.B, pp. 1308–11 (describing legislative supremacy in IRA constitutions).

⁴⁷ *See, e.g.*, Blackhawk, *Legislative Constitutionalism*, *supra* note 14, at 2214.

⁴⁸ For a discussion of the unitary executive concept, see generally Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131 (2024).

⁴⁹ *See, e.g.*, Elizabeth Hidalgo Reese, *Native Marburys: Judicial Review in Tribal Courts*, 93 U. CHI. L. REV. (forthcoming 2026) (manuscript at 3) (on file with the Harvard Law School Library).

⁵⁰ For the argument that we should take Native peoples’ views on the meaning of the U.S. Constitution seriously, see Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 252 (2023). One potential constitutional debate in which we should consider Native views is the current one over the meaning of the phrase, “subject to the jurisdiction thereof,” in the Fourteenth Amendment’s Citizenship Clause. U.S. CONST. amend. XIV, § 1, cl. 1. As Professors Gregory Ablavsky and Bethany Berger have shown, Native peoples were not subject to U.S. jurisdiction — and therefore were not birthright citizens — because of their membership in Native nations, which “lay within the territorial borders of the United States” but were “self-governing, independent sovereign[s].” Gregory Ablavsky & Bethany Berger, *“Subject to the Jurisdiction Thereof”: The Indian Law Context*, 100 N.Y.U. L. REV. ONLINE 201, 205 (2025). Native peoples’ understandings of tribal jurisdiction in their own constitutions align with this federal law interpretation as they claimed exclusive jurisdiction over their territories and peoples and had to explicitly opt in to U.S. jurisdiction when they wished to subject themselves to it. *See, e.g.*, DECLARATION OF THE SENECA NATION OF INDIANS, CHANGING THEIR FORM OF GOVERNMENT, AND ADOPTING A CONSTITUTIONAL CHARTER §§ 4–5, reprinted in DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT: 1500S TO 1933, at 77, 78 (David E. Wilkins ed., 2009) [hereinafter DOCUMENTS] (relinquishing partial jurisdiction over its members to New York state courts).

⁵¹ As Professor Ablavsky and I have shown, prevailing approaches to U.S. constitutional history have overlooked Native-authored sources debating the Constitution, thereby omitting Native peoples’ views. *See* Ablavsky & Allread, *supra* note 50, at 248–50. However, once they are included within the American constitutional tradition, tribal constitutions provide a source base for such research.

of these evergreen constitutional law debates in this Article, this study's aim is to offer initial thoughts on how this category of Indigenous foundational documents might reorient our current approaches to U.S. history, federal Indian law, and American constitutional law.

But, most importantly, Indigenous constitutionalism complicates the nature and scope of American constitutionalism. By focusing on the federal and state constitutions, we have accepted the view that constitutions share the same structure, are the sole sources of supreme law, are pure expressions of popular sovereignty, and focus on two matters: internal governance through a three-branch framework and rights protection.⁵² But, recently, scholarship on state constitutional law has begun to alter the ways we think about American constitutionalism, highlighting state constitutions' unique pro-democracy structures and alignment with features of other constitutions around the world.⁵³

This Article contends that like state constitutions, tribal constitutions offer their own distinct perspective on American constitutionalism. Indigenous constitutionalism shows that Native nations have departed from the prevalent definitions of a Euro-American constitution. They have followed different formats in expressing their constitutional thought. They have also refused to recognize their written constitutions as the only and ultimate source of legal authority, placing them alongside other sources of fundamental law, such as treaties and customary law.⁵⁴ Further, Native nations wrote constitutions for internal and external audiences, asserting their sovereignty and defining their relationship to other American governments.⁵⁵ And tribal constitutions have employed alternative and creative institutional structures to reflect political circumstances and tribal culture. Thus, Indigenous constitutionalism expands the concept of American constitutionalism by pointing to the complex ways in which these charters have navigated Indigenous and colonial power.⁵⁶ But exploring Indigenous constitutionalism also forces us to reexamine the dominant narrative on how we think about and interpret the U.S. Constitution, recovering features that were once seen as part of the Constitution but that have been obscured over time.⁵⁷ In

⁵² See *infra* section V.D, pp. 1332–40.

⁵³ See, e.g., Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 864–65 (2021); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1643–46 (2014).

⁵⁴ See *infra* section V.D.1, pp. 1334–36; see also, e.g., Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1, 12–13 (2000) (noting that both the Laguna and Hopi Constitutions provide for the application of traditional law, or orally transmitted “custom”).

⁵⁵ See *infra* section V.D.2, pp. 1336–38; see also, e.g., *Developments in the Law — Chapter One: Tribal Executive Branches: A Path to Tribal Constitutional Reform*, 129 HARV. L. REV. 1662, 1662 & n.9 (2016) (noting that tribal constitutions have been motivated, in part, by an interest in both serving their polities and inspiring confidence in outsiders with whom they interact).

⁵⁶ See *infra* section V.D, pp. 1332–40.

⁵⁷ See *id.*

other words, what makes Indigenous constitutionalism distinctive for modern Americans would have been familiar to our forebears from the eighteenth and nineteenth centuries. Thus, this Article shows that instead of being merely a “mirror[]”⁵⁸ of their American neighbors’ documents, tribal constitutions are actually a *prism* that refracts what we think we know about constitutionalism in the United States.

Ultimately, Indigenous constitutionalism speaks to the past, present, and future of Native nations and of the United States. This Article, however, is only the beginning of a much larger project. It focuses on three constitutional moments and a sampling of tribal constitutions to paint the broad outlines of the concept and illuminate the role of tribal constitutions in protecting Native self-government vis-à-vis the United States. Nevertheless, much remains to be explored in future work, including the constitutions’ impact on inter- and intratribal politics, changes in constitutional ideas across both adopted and proposed tribal constitutions from the nineteenth century to today, and the relationship between tribal constitution-making efforts and the drafting of both state and territorial constitutions. What follows is the theoretical and historical foundation required for such future research.

This Article proceeds in five Parts. Part I proposes Indigenous constitutionalism as the necessary paradigm for understanding Native nations’ fundamental law, particularly their written constitutions. Parts II through IV then discuss the three eras of tribal constitutional development from the nineteenth century to the present, drawing out how Native nations have used written constitutions and built a lasting constitutional tradition. Finally, Part V provides preliminary thoughts on the lessons that can be learned from the study of Indigenous constitutionalism, including rethinking the tribal constitutional law framework, revising the origin stories of federal Indian law, reframing the dominant narratives on U.S. constitutional law and history, and questioning the category of American constitutionalism.

I. THE CASE FOR INDIGENOUS CONSTITUTIONALISM

This Article proceeds from a simple premise: Tribal constitutions deserve recognition in American legal scholarship. For two centuries, hundreds of tribal constitutions have been part of the American constitutional landscape, governing peoples and territories within the United States alongside the federal and state constitutions.⁵⁹ But tribal constitutions have been overlooked, more likely due to ignorance of how this “third sovereign” governs rather than deliberate marginalization.⁶⁰ Still, American constitutionalism has been presented as a concept

⁵⁸ See Mary Young, *The Cherokee Nation: Mirror of the Republic*, 33 AM. Q. 502, 524 (1981).

⁵⁹ See *supra* notes 9–15 and accompanying text.

⁶⁰ Sandra Day O’Connor, Remarks, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997); WILKINS, *supra* note 20, at 5.

involving only the U.S. Constitution and, more recently, state constitutions.⁶¹ And federal Indian and tribal law scholarship have dedicated little space to thinking about how tribal constitutions fit in the frameworks concerning tribal sovereignty and Native nations' government-to-government relationship with the United States.⁶²

Yet, recognition alone does not tell us what written tribal constitutions are and why they matter. Thus, this Article posits a new paradigm to understand why and how Native nations have used written constitutions — *Indigenous constitutionalism*. Drawing from numerous tribal constitutions over the past 200 years, it contends that Indigenous constitutionalism is a distinct constitutional practice through which Native nations have appropriated the form of the written constitution to claim and exercise self-governance within a colonial context.

This Part maps out the contours of this theory. First, it defines Indigenous constitutionalism while describing its significant characteristics. It then demonstrates how Indigenous constitutionalism provides several missing threads in studies of Native law and constitutionalism: connecting the concept of tribal sovereignty in U.S. law to Native governance, a matter of tribal law; showing how Native nations have participated in a shared constitutional tradition; and revealing how this form of Indigenous self-governance is a distinctively Indigenous and American phenomenon.

A. *The Contours of the Concept*

Drawing from history, legal doctrine, and constitutional function, this Article defines Indigenous constitutionalism as a distinct constitutional practice through which Native nations claim and exercise self-governance while embedded in the wider constitutional landscape of a colonial power — in this case, that of the United States. It is a novel category constructed to help us understand the fundamental law of Native nations as they have encountered, and been forcibly incorporated into, the United States. However, this Article approaches the broader category through a particular historical phenomenon that began in the early nineteenth century and continues to the present day: Native nations writing constitutions. And it seeks to explain why Native peoples wrote constitutions and what they accomplished inside and outside their nations in doing so. In other words, this Article explores a specific practice within the larger category, uncovering why Native nations have explicitly turned to written constitutionalism — a concept of colonial powers — while facing the effects and ambitions of American colonialism.

⁶¹ See Versteeg & Zackin, *supra* note 53, at 1647–52.

⁶² See *supra* notes 18–20 and accompanying text.

It is important to clarify the role of *written* constitutions in Indigenous constitutionalism. Certainly, unwritten forms of Native fundamental law — law that many Native nations still possess — can be labeled as “tribal constitutions,”⁶³ and even many nations that have written charters embed them in a web of customary law, broadening constitutionalism beyond a specific text.⁶⁴ Yet, for people who equate “Indigenous law” with “oral, customary law,” the breadth and depth of written constitutional practice among Native peoples may be surprising. However, this widespread adoption of written constitutions is a significant aspect of tribal constitutional development. First and foremost, the written documents provide an evidentiary and epistemic basis for studying Native fundamental law. The written constitutions provide an entrée into exploring the nature of Indigenous constitutionalism, from which we can then begin to investigate the unwritten forms. Also, historically, Native peoples explicitly adopted the technology of writing to align themselves with the Euro-American constitutional form, demonstrating their sovereignty through what had become the dominant legal paradigm in the United States.⁶⁵ Additionally, this characteristic made Native law easily legible to Euro-Americans, and Euro-Americans, in turn, took these documents seriously. The historical events discussed herein were made possible only because of the written nature of these instruments.⁶⁶

It is also necessary to explain what the descriptor of *Indigenous* means for this constitutional category. At base, “Indigenous” refers to the fact that these documents are associated with Native peoples and their self-governance — they were authored by Native peoples, adopted by Native peoples, and/or accepted or held out as the governing charters of Native nations. But the term is not meant to suggest that written tribal constitutions are a truly authentic manifestation of timeless

⁶³ While much of the existing scholarship on tribal constitutions has studied their written iterations, there is a growing movement to label Native nations’ unwritten fundamental law as “constitutions.” See, e.g., Miller, *supra* note 11; Stark, *supra* note 18, at 116–17, 135–36. This movement has especially taken off in Canada where Native legal scholars and Professors John Borrows and Aaron Mills have driven much of the recent scholarship on unwritten constitutions among Canada’s First Nations. See Borrows, *supra* note 21, at 13–44; Mills, *supra* note 21, at 854–84. But this Article’s focus on written constitutions is not intended as a commentary on unwritten constitutions or the relative superiority of either form. The majority of Native nations — including one of the largest, the Navajo Nation — continue to govern themselves under unwritten constitutions or alternative legal forms and have done so effectively. See, e.g., DAVID E. WILKINS, *THE NAVAJO POLITICAL EXPERIENCE* 114–15 (4th ed. 2013).

⁶⁴ See *infra* section V.D.1, pp. 1334–36.

⁶⁵ See AZIZ RANA, *THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM* 28 (2024) (“By the mid-nineteenth century, [constitution writing] had spread as a defining political experience in American life.”).

⁶⁶ See, e.g., *infra* sections II.B, pp. 1292–1300; III.A, pp. 1302–08.

Native law.⁶⁷ Rather, just as the concept of Indigeneity derives from, and is intertwined with, colonialism, so, too, are written tribal constitutions. All these charters bear the imprint of American colonialism: Some arose in response to colonial pressures, others were colonial impositions, and all appear in a form pioneered by Euro-American colonizers.⁶⁸ Nevertheless, Native peoples incorporated customary notions of power and political structures into these documents and utilized these constitutions for their own purposes.⁶⁹ Thus, Indigenous constitutionalism is inevitably a Native *and* colonial category, composed of constitutions both used by Native nations and wrought in the crucible of colonialism.

But these outlines of what is included in the category of written tribal constitutions are not the heart of Indigenous constitutionalism. As demonstrated in the remainder of this Article, the history and content of these constitutions reveal that the concept exhibits four defining features: (1) appropriation, (2) subversion, (3) adaptation, and (4) resistance/recognition.

First, Indigenous constitutionalism is built on Native peoples' appropriation of the Euro-American concept of constitutionalism, including the written constitutional form. For Euro-Americans, written charters possessed legal legitimacy as they were easily legible and granted the status of positive law⁷⁰ — a sharp contrast to the Native customs that Euro-Americans often refused to recognize as law.⁷¹ And not only did Native peoples rely on this feature to gain recognition from external audiences, but they also viewed the written form as necessary to both alter preexisting fundamental law and announce their nations as modern sovereigns.⁷²

Second, Indigenous constitutionalism subverts constitutions' assumed tendency to assimilate and erase non-Western polities and customary law.⁷³ Even though many tribal constitutions resemble Euro-American ones at first glance, Native peoples refused to use these documents as instruments for assimilating into the United States or shifting the basis of their polity to a Western political understanding that rejected culture

⁶⁷ Cf. VAL NAPOLEON, THINKING ABOUT INDIGENOUS LEGAL ORDERS 4, 17 (2007) ("Law is never static, but rather, lives in each new context. . . . [S]orting out Indigenous legal traditions does not mean trying to return to the past.").

⁶⁸ See *infra* sections II.A, pp. 1285–91; III.B, pp. 1308–11.

⁶⁹ See *infra* sections II.A, pp. 1285–91; III.B, pp. 1308–11.

⁷⁰ See, e.g., Gienapp, *supra* note 22, at 342–43 (explaining the significance of written constitutionalism in the Founding Era).

⁷¹ See SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 10–11 (1994) (stating how U.S. courts often treated tribal law "contemptuously," *id.* at 10, and Euro-Americans often viewed tribal law not as law but as "individual actions," *id.* at 11).

⁷² See, e.g., *infra* section II.A, pp. 1285–91.

⁷³ For the argument that Native nations have been denied representation in the United States due to their refusal to assimilate, see Elizabeth Hidalgo Reese, *Tribal Representation and Assimilative Colonialism*, 76 STAN. L. REV. 771, 776–77 (2024).

and kinship.⁷⁴ Rather, Native peoples made space for traditional institutions and customary law within the written framework.⁷⁵ They also often placed the constitution alongside other forms of fundamental law, constructing a supreme law comprised of numerous sources of authority.⁷⁶

Third, Indigenous constitutionalism involves internal adaptation. Native nations used constitutions to construct hybrid legal orders that would ameliorate colonialism's effects on their populations across social, cultural, and economic dimensions.⁷⁷ As a result, these constitutions served as amalgamations of Native and Euro-American political concepts, customary law, and written law. Moreover, this proclivity for adaptation has meant that some tribal constitutions employ alternative designs to the Euro-American system, experimenting with traditional institutions, novel constitutional bodies, and innovative representation systems to balance cultural prerogatives and modern needs.⁷⁸

Finally, Indigenous constitutionalism facilitates external resistance to colonialism's goals of eliminating Native nations and incorporating Native peoples into the colonial polity. Native nations utilized constitutions to claim and exercise the right of self-governance, and they wrote specific constitutional provisions that situated themselves in relation to the other American sovereigns.⁷⁹ Ultimately, they sought autonomy and separation. And this resistance proved successful as Native nations' persistent advocacy and constitutional movements led to the recognition of tribal sovereignty by Euro-Americans, a principle that continues into the present.⁸⁰

Yet, like every legal tool, Indigenous constitutionalism entails costs and limitations. In some instances, constitution making itself caused disruptions within Native nations: Adopting certain Euro-American legal concepts within their constitutions pushed out customary law, disempowered traditional leaders, excluded women from politics, and led to racial formations that subordinated people based on blood quantum and Blackness.⁸¹ While detailing these conflicts is beyond the scope of this Article, this Article recognizes that tribal power, as expressed through constitutionalism, could, and sometimes did, extend the harms caused by colonialism. But neither would it be accurate to say that constitution making by Native nations was always and necessarily a

⁷⁴ See *id.*

⁷⁵ See, e.g., *infra* section II.A, pp. 1285–91.

⁷⁶ See *infra* section V.D.1, pp. 1334–36.

⁷⁷ See, e.g., *infra* section II.A, pp. 1285–91.

⁷⁸ See *infra* section V.D.3, pp. 1338–40.

⁷⁹ See *infra* section V.D.2, pp. 1336–38.

⁸⁰ See W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1609 (2023).

⁸¹ See, e.g., *infra* notes 173–175 and accompanying text. For discussions of blood quantum, see generally THE GREAT VANISHING ACT: BLOOD QUANTUM AND THE FUTURE OF NATIVE NATIONS (Kathleen Ratteree & Norbert Hill eds., 2017).

destructive process through which colonizers imposed their will upon a subjugated people — or so this Article hopes to show.

Additionally, this Article acknowledges that its specific study of written tribal constitutions applies only to a subset of the 574 federally recognized tribes,⁸² with over half of them governing themselves through traditional institutions, corporate charters, or statutes alone.⁸³ Although Native nations' reasons for choosing to govern through a written constitution or some other means remain unclear, this Article shows how even this partial story of Indian Country governance is central to our understanding of tribal sovereignty in American law, the sovereignty that all tribes exercise.

B. *From Tribal Constitutions to Constitutionalism*

At first glance, distilling a singular theory of constitutionalism from tribal constitutions may seem misguided. With two centuries of history, thousands of tribal constitutions and amendments, and hundreds of Native nations with their own politics and cultures, what can be accomplished by lumping them all together and eliding historical and cultural differences? This Article contends that, actually, much can be accomplished. As detailed below, moving from the study of tribal constitutions to constitutionalism — in other words, understanding them as part of a unified constitutional category — allows us to see Native political development, Native agency, and American constitutionalism in a new light, things we might otherwise miss while mired in the details of an individual Native nation's constitutional tradition.

i. Beyond Tribal Sovereignty, Governance, and Treaties. — To begin, Indigenous constitutionalism must be distinguished from two other legal concepts associated with Native nations: tribal sovereignty and tribal governance. Certainly, tribal constitutions cannot be understood apart from these concepts and the overarching legal frameworks in which they are situated. On the one hand, federal Indian law doctrine establishes that tribes exercise a form of preconstitutional sovereignty — and thus are not bound by the U.S. Constitution⁸⁴ — but are still subject to Congress's plenary power.⁸⁵ Therefore, tribes retain all sovereign powers that have not been lost by treaty, federal statute, or their status as domestic dependent nations.⁸⁶ And among these retained powers is the right of self-government, the basis for enacting a tribal constitution.⁸⁷ On the other hand, tribal governance is a matter of tribal

⁸² See Miller, *supra* note 11; Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 91 Fed. Reg. 4102 (Jan. 30, 2026).

⁸³ See WILKINS, *supra* note 20, at 164–71.

⁸⁴ See *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

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

⁸⁶ *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

⁸⁷ See *id.* at 322–24.

law.⁸⁸ An expansive concept, governance includes both the various forms a tribal government can take — such as a theocracy, business committee, or a constitutional system⁸⁹ — and how that government functions through making laws, administering programs, and providing services.⁹⁰

To date, tribal sovereignty and governance have dominated legal scholarship regarding Native nations. But these accounts often fail to bridge the gap between these two concepts and their fields.⁹¹ Viewing tribal constitutions as a whole, however, provides the missing link. From a doctrinal standpoint, tribal constitutions must be viewed from the perspective of both federal Indian law and tribal law: Tribal sovereignty underlies a Native nation's constitution, while a constitution is a specific form of tribal governance.⁹² And, as this Article describes in depth below, historically, Native nations' written constitutionalism has tied sovereignty and governance into a cyclical relationship. It was Native nations' decisions to structure their governance through written constitutions in the early nineteenth century that led to the recognition of tribal sovereignty in U.S. law.⁹³ This recognition then encouraged Native nations to continue experimenting with the constitutional form.⁹⁴ Additionally, by the early twentieth century, federal law renewed its affirmation of tribal sovereignty through constructing a statutory framework to encourage Native nations to exercise such sovereignty through written constitutions.⁹⁵

Further, the constitutional tradition of Native nations moves us beyond studying tribal sovereignty and governance in the abstract, instead grounding these concepts and their deep connections doctrinally and historically. As Native legal scholar Professor Elizabeth Hidalgo Reese has explained, federal Indian law scholars, as well as the Supreme Court, “too often engage with tribal sovereignty on a solely theoretical level, focusing exclusively on a uniform pantribal concept defined exclusively by federal law.”⁹⁶ But just as the U.S. Constitution enumerates the particular bounds of national sovereignty, tribal constitutions serve as the documents that define what tribal sovereignty means.⁹⁷ In contrast to an abstract federal legal concept, tribal constitutions concretize sovereignty through specific governmental powers and jurisdictional

⁸⁸ See Reese, *supra* note 9, at 565.

⁸⁹ See WILKINS, *supra* note 20, at 163, 166, 178.

⁹⁰ See Reese, *supra* note 9, at 571–72 (describing tribal laws and programs across numerous areas, including consumer protection, child welfare, criminal justice, estates, and environmental law).

⁹¹ A notable exception is Reese, *supra* note 9, at 565–69.

⁹² See Miller, *supra* note 11.

⁹³ See *infra* section II.A, pp. 1285–91.

⁹⁴ See *infra* section II.B, pp. 1291–1300.

⁹⁵ See *infra* Part III, pp. 1300–11.

⁹⁶ Reese, *supra* note 9, at 630–31.

⁹⁷ *Examining Tribes' Sovereignty Through Their Constitutions*, *supra* note 13.

definitions.⁹⁸ Yet, these documents have not only allowed Native nations to enact their understandings of sovereignty for themselves; they have also supplied the exact principles on which the federal concept is based. As Part III describes in detail, twentieth-century federal officials explicitly relied on the provisions of nineteenth-century tribal constitutions to expound the scope of tribal powers recognized under federal law.⁹⁹

Considering tribal constitutions also expands the federal Indian law repertoire beyond the documents that have been most often used to define Native nations' government-to-government relationship with the United States: treaties.¹⁰⁰ Constitutions serve as fitting complements to treaties. While treaties may distort Native understandings through negotiated language and federal coercion,¹⁰¹ constitutions can help distill Native perspectives on Native nationhood and tribal legal principles. In other words, tribal constitutions work alongside treaties to illustrate fully how Native peoples conceived of their rights, including the territories they retained and who they authorized to speak on behalf of the nation.¹⁰² At the same time, these charters — through provisions situating nations' sovereignty and jurisdiction in relation to the United States¹⁰³ and claiming ownership of resources¹⁰⁴ — articulate the “tribal” side of the trust relationship with the federal government.¹⁰⁵ In sum, tribal constitutions not only expand the universe of sources that jurists and scholars can rely on to elucidate tribal authority but also help

⁹⁸ For such jurisdictional provisions in tribal constitutions, see, for example, *infra* section V.A.1, pp. 1322–24.

⁹⁹ See *infra* section III.A.2, pp. 1305–08.

¹⁰⁰ See FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 22, 46 (2009) (pointing to the central role that treaties between the United States and Indian tribes, as well as the U.S. Supreme Court's neglect of such treaties, has had in the recognition of tribal sovereignty under the Constitution).

¹⁰¹ For the sordid history of treaty negotiations and impositions, see generally COLIN G. CALLOWAY, *PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY* (2014).

¹⁰² See, e.g., CONST. OF THE CHEROKEE NATION of 1827, art. I, § 1 [hereinafter CONST. OF THE CHEROKEE NATION of 1827], in CHEROKEE NAT'L COUNCIL, *LAWS OF THE CHEROKEE NATION* 118, 118–19 (1852) [hereinafter *LAWS OF THE CHEROKEE NATION*] (describing the specific boundaries of Cherokee territory); *id.* art. VI, § 4 (authorizing the General Council to appoint delegates to transact business with the federal government).

¹⁰³ See, e.g., CONST. OF THE MUSCOGEE (CREEK) NATION of 1979, art. I, § 2 (stating that the Nation's jurisdiction extends to land held in trust by the United States and is exempt from federal and state taxes).

¹⁰⁴ See, e.g., CONST. OF THE OSAGE NATION of 2006, art. XV, § 1 (“The legislature of the Osage Nation shall provide for the utilization, development and conservation of all natural resources within the territory of the Nation for the maximum benefit of the Osage People.”).

¹⁰⁵ For an in-depth look at the trust responsibility, see generally Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, “We Need Protection from Our Protectors”: *The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397 (2017).

rectify the power imbalance in a relationship whose bounds are often dictated — or at least recognized as so — by the federal government.¹⁰⁶

2. *Native Nations' Shared Constitutional Tradition.* — Among scholars studying Native nations, tribal “fungibility” — treating hundreds of Native nations with their own histories and cultures similarly — has been a persistent concern.¹⁰⁷ In the context of constitutionalism, lumping the stunning variety of tribal constitutions together threatens to flatten the rich historical contexts in which Native nations wrote their constitutions, obscure the range of purposes for which they were adopted, and undermine the unique language and institutions incorporated into each document. So, does it make sense to speak of a “shared constitutional tradition” among Native nations? This Article answers in the affirmative, contending that it is not only instructive but also necessary to do so in order to grasp the history and common goals of tribal constitutional development in the United States.¹⁰⁸

First, Native nations explicitly shared constitutional ideas and provisions. In the nineteenth century, written constitutions spread among Native nations through communication networks and neighboring examples. For example, the Seneca Nation in New York began writing constitutions in the 1840s after corresponding with the Cherokee, who had adopted their constitution in 1827, during the previous decade.¹⁰⁹ And several nations in Indian Territory — the Chickasaw, Osage, Muscogee, and Sac and Fox — modeled their constitutions after those of their neighbors, the Choctaw and Cherokee.¹¹⁰ Such borrowing also continued into the twentieth century, with similar provisions regarding membership, individual rights, and tribal council organization and powers being employed widely in IRA and non-IRA constitutions.¹¹¹

Second, as Parts II through IV describe, numerous Native nations drafted, replaced, and amended their constitutions in response to the same federal policies. In the nineteenth century, Indian Removal, containment on reservations, and pushes for territorialization prompted

¹⁰⁶ See *id.* at 425–49.

¹⁰⁷ Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORN. L. REV. 1069, 1070–71 (2004).

¹⁰⁸ The following case for a shared constitutional tradition among Native nations parallels that made by Professors Jessica Bulman-Pozen and Miriam Seifter in the context of state constitutions. See Bulman-Pozen & Seifter, *supra* note 53, at 865–67.

¹⁰⁹ See Letter from the Cherokee Delegation to the Seneca Delegation (Apr. 14, 1834), in 1 THE PAPERS OF CHIEF JOHN ROSS 284, 284–88 (Gary E. Moulton ed., 1985); DOCUMENTS, *supra* note 50, at 75.

¹¹⁰ See, e.g., DOCUMENTS, *supra* note 50, at 169 (pointing out that the Osage modeled their 1881 constitution after those of the Cherokee). The other tribal constitutions in Indian Territory followed the example of the Cherokee and Choctaw Constitutions by including similar preambles and establishing three-branch governments. Compare CONST. OF THE CHICKASAW NATION of 1856, pmbl., art. 3, reprinted in DOCUMENTS, *supra* note 50, at 105, 105, 107, CONST. OF THE MUSCOGEE NATION of 1867, pmbl., arts. I–III, and CONST. OF THE SAC AND FOX NATION of 1885, pmbl., art. II, reprinted in DOCUMENTS, *supra* note 50, at 212, 212–13, with CONST. OF THE CHEROKEE NATION of 1839, pmbl., art. II, and CONST. OF THE CHOCTAW NATION of 1850, pmbl., art. III.

¹¹¹ See *infra* section III.B, pp. 1308–11.

bouts of constitution writing.¹¹² Then, in the 1930s and 1940s, the IRA led to the widespread adoption of tribal constitutions.¹¹³ And the federal government's self-determination stance in the late twentieth century provided space for Native nations to replace or drastically amend their earlier documents.¹¹⁴

Finally, despite variance across the documents, tribal constitutions have long been treated as part of the same tradition both historically and legally. In preparing his guidance for IRA constitution drafting, Cohen grouped the pre-IRA tribal constitutions together by labeling them as “the past experience of various Indian tribes with traditional and modern forms of legal government.”¹¹⁵ The collector Lester Hargrett also referred to nineteenth-century tribal constitutions from nations in Indian Territory and on the Great Plains as “an increasingly unified effort . . . to adjust themselves to changing conditions by means of self-government under constitutional forms.”¹¹⁶ Further, federal Indian law treats the duly adopted constitutions of all federally recognized tribes as equal and valid exercises of tribal sovereignty.¹¹⁷

By pointing out these characteristics, this Article's case for a shared constitutional tradition of Native nations has much in common with the work of state constitutional law scholars who have similarly argued for a shared “state constitutional tradition”¹¹⁸ and a “trans-state constitutional theory.”¹¹⁹ Like state constitutions, tribal constitutions not only developed in the same historical contexts, but they also contain similar provisions, address the same recurring issues, and therefore deserve the same cohesive approach.¹²⁰ But, unlike state constitutions, the most unifying feature of tribal constitutions is that they were, and are, written in a colonial context, a matter taken up in the next section.

3. *A Distinctively Indigenous (and American) Form of Self-Governance.* — Native nations' constitutionalism is unique in that it is, at once, Indigenous and American — the outgrowth of tribal constitutions being forged under colonial circumstances. But disaggregating the complicated interplay between what is “Indigenous” and what is

¹¹² See, e.g., *infra* notes 172–232, 294–305 and accompanying text.

¹¹³ See, e.g., *infra* notes 382–410 and accompanying text.

¹¹⁴ See *infra* section IV.A, pp. 1313–19.

¹¹⁵ FELIX S. COHEN, *Basic Memorandum on Drafting of Tribal Constitutions*, in ON THE DRAFTING OF TRIBAL CONSTITUTIONS, *supra* note 29, at 1, 3.

¹¹⁶ LESTER HARGRETT, A BIBLIOGRAPHY OF THE CONSTITUTIONS AND LAWS OF THE AMERICAN INDIANS, at v (1947).

¹¹⁷ See COHEN'S HANDBOOK, *supra* note 32, § 4.04[3][b], at 260 (recognizing that the adoption of a constitution under the IRA or another process does not impact “the self-governing powers of Indian nations under federal law”).

¹¹⁸ See JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 5–6 (2006).

¹¹⁹ See Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 301 (1998).

¹²⁰ For explanations of the state constitutional features underlying the case for a shared state constitutional tradition, see Bulman-Pozen & Seifter, *supra* note 53, at 865–67, and G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 6 (1998).

“American” in tribal constitution making is a difficult, if not impossible, task. Many tribal constitutions were written in culturally complex and often coercive environments. For instance, the Choctaw and Cherokee Nations wrote the first constitutions under immense pressures, doing so in the wake of federal civilization policies, amid settlers’ vehement demands for Native lands, and under the leadership of biracial and bicultural men who sought to build civilized Native republics.¹²¹ Yet, even while adopting the Euro-American invention of the written constitutional form, the Choctaws and Cherokees — and those nations that followed them — made the documents their own, incorporating traditional principles and institutions.¹²² And ultimately, many Native nations have used written constitutions for their own ends, employing a Euro-American legal tool to reject their legal assimilation into the United States.¹²³

It is this perspective — that Native peoples utilized constitutions to manage and combat American colonialism despite the charters’ colonial character — that reveals what we can call the distinctively Indigenous aspects of this form of constitutionalism. For one, Native nations have maintained their own political traditions and existence against the hegemonic and assimilative nature of U.S. law by disrupting the Euro-American constitutional model. As section V.D describes, Native nations place constitutions alongside other sources of fundamental law, construct external-facing constitutional provisions that assert sovereignty, and develop alternative and creative institutional structures.¹²⁴ Although these characteristics may have utility from a comparative law aspect, this Article argues that more importantly, they make us reconsider the nature of American constitutionalism. As Professors Mila Versteeg and Emily Zackin have compellingly shown, the inclusion of state constitutions within studies of American constitutionalism undermines the notion of its exceptionality due to state constitutions’ similarities to other constitutions around the world.¹²⁵ Similarly, once we incorporate the unique features of tribal constitutions into American constitutionalism, its landscape looks much more like the postcolonial constitutions of the Global South than previously recognized — showcasing hybridity between Western and non-Western forms of law, an emphasis on fundamental rights and avenues for self-determination, and the use of constitutions as tools for social transformation.¹²⁶ In other words, Indigenous

¹²¹ See *infra* section II.A, pp. 1285–91.

¹²² See *infra* notes 192–203, 226–32 and accompanying text.

¹²³ See *infra* notes 189–194, 226–232 and accompanying text.

¹²⁴ See *infra* section V.D, pp. 1332–40.

¹²⁵ See Versteeg & Zackin, *supra* note 53, at 1643–46.

¹²⁶ For a review of similar features across postcolonial constitutions, see Julian Go, *A Globalizing Constitutionalism?: Views from the Postcolony, 1945–2000*, 18 INT’L SOCIO. 71, 73–89 (2003). For

constitutionalism complicates what characteristics are attached to American constitutionalism.

One such complication lies in the frameworks explaining how American constitutions are made. The common conception is that the federal and state constitutions are all variations of the same Euro-American ideal, a grouping of standard constitutional structures that were unprecedented in the late eighteenth century and simply deployed again and again as new states wrote their constitutions.¹²⁷ Further, all these constitutions serve as expressions of popular sovereignty.¹²⁸ But such frameworks are not applied to Native constitution making. Rather, tribal constitutions have been excluded on the grounds that Native peoples simply mimicked their Euro-American neighbors or that the federal government imposed “boilerplate” constitutions on Native nations.¹²⁹

Focusing on the ways in which Native peoples incorporate their own governance concepts into constitutions, however, provides a more layered approach than these dominant understandings. On one hand, U.S. colonial policies toward Native nations were certainly coercive, even to the point where federal officials wrote the documents for the nations¹³⁰ and claimed the power to approve and disapprove amendments.¹³¹ And, while we often forget that the federal government also imposed a plethora of requirements on state constitutions,¹³² such aspects of the Indigenous constitutional tradition particularly undermine the primacy of the popular sovereignty narrative. In the case of tribal constitutions, Native peoples who had been formally excluded from,¹³³ and then

discussions of the intersection between constitutionalism and social transformation in postcolonial constitutions, see SANDIPTO DASGUPTA, *LEGALIZING THE REVOLUTION: INDIA AND THE CONSTITUTION OF THE POSTCOLONY* 10–13 (2024); Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 150 (1998); and Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMPAR. L. 527, 528–30 (2017).

¹²⁷ See DASGUPTA, *supra* note 126, at 7–8 (arguing that by the 1960s, “[c]onstitutionalism” had “become[] synonymous with a particular institutional matrix consisting of separation of powers, guaranteed individual rights against the state, and judicial review,” *id.* at 7, due to American influence).

¹²⁸ For discussions of popular sovereignty in the early republic, see generally CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

¹²⁹ See Wilkins, *Seasons of Change*, *supra* note 29, at 47 n.12; TAYLOR, *supra* note 29, at 96–98.

¹³⁰ See TAYLOR, *supra* note 29, at 75 (describing how a Bureau of Indian Affairs official wrote the Hopi Constitution).

¹³¹ See Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81, 84 (1993–1994) (reviewing and critiquing the Secretary of the Interior’s statutory authority to disapprove validly ratified tribal constitutional amendments).

¹³² See Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 129 (2004) (describing the congressional practice of imposing conditions that had to be implemented in state constitutions in exchange for admission to the Union).

¹³³ Ablavsky & Allread, *supra* note 50, at 246–47.

forcibly included in,¹³⁴ the U.S. polity also faced force and constraint from the federal government when adopting the documents that were intended to ensure self-government.¹³⁵ Thus, even constitutions within the American tradition — supposedly built on guaranteeing freedom and self-determination — were means of empire.¹³⁶

On the other hand, Indigenous adaptations within constitutions indicate that the “[c]harges of mimicry” and of imposed constitutions paint with too broad a brush.¹³⁷ Rather, tribal constitutions’ constructions mostly align with those of postcolonial constitutions across the globe. Similar to how the drafters of the Indian Constitution drew conventions from the “established genre” of the modern constitution while making variations to fit the country’s needs,¹³⁸ Native peoples have adopted Euro-American structures, rights, and language — features of the Euro-American constitutional genre — while modifying them to address the tribal context.¹³⁹ As a result, they have created documents marked by hybridity, or in the words of Professor Julian Go, documents featuring “novel syntheses” of the “old blended with the new, the local articulated with the global.”¹⁴⁰ Additionally, the concept of imposition obscures Native agency when instituting such hybridity.¹⁴¹ It also cannot account for how Native nations approached their imposed constitutions, either using the documents as licenses to resist incorporation into the United States or disregarding the constitutions altogether.¹⁴²

The other complication for American constitutionalism — and thus distinctively Indigenous aspect of tribal constitutionalism — is the space that Native nations have carved out for themselves to exist as separate sovereigns. Although relying on a constitution “to assert equal sovereign statehood”¹⁴³ is not unique, including for the United States, American colonialism has forced Native nations to articulate a different kind of sovereignty through their charters. Instead of national sovereignty, tribal constitutions claim what sovereignty looks like in a protectorate.

¹³⁴ *Id.* at 314.

¹³⁵ See *infra* notes 283–98, 376–405 and accompanying text.

¹³⁶ For more on this American constitutional paradox, see generally AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010).

¹³⁷ Cf. DASGUPTA, *supra* note 126, at 15–16 (discussing how “[c]harges of mimicry were levelled,” *id.* at 16, at the Indian Constitution but that the document differed from previous constitutions due to its postcolonial character). For a discussion, and defense, of the concept of imposed constitutionalism, see generally Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005).

¹³⁸ DASGUPTA, *supra* note 126, at 16.

¹³⁹ See *infra* sections II.A, pp. 1285–91; IV.A, pp. 1313–19.

¹⁴⁰ Go, *supra* note 126, at 90.

¹⁴¹ For a thoughtful discussion of how agency and coercion can interact in an environment of “coercive constitutionalism,” see generally Erin F. Delaney, *Mapping Power: Constitutionalism and Its Colonial Legacy*, in REDEFINING COMPARATIVE CONSTITUTIONAL LAW: ESSAYS FOR MARK TUSHNET 385, 387 (Vicki C. Jackson & Madhav Khosla eds., 2025).

¹⁴² See, e.g., Theodore H. Haas & John E. Jay, *Toward Effective Indian Government*, 6 AM. INDIAN 17, 21–22 (1951) (describing the Hopi Tribe’s refusal to adhere to its IRA constitution).

¹⁴³ RANA, *supra* note 65, at 29.

Put another way, Native nations have positioned constitutions as the instruments through which to translate their ancient sovereignty into autonomy within a colonial constitutional system. The actions of Choctaws and Cherokees in writing constitutions in the 1820s — an unprecedented move for Indigenous peoples — and then advocating for their right to do so directly resulted in the U.S. Supreme Court recognizing tribal sovereignty.¹⁴⁴ And, since that time, Native nations have maintained their right of self-governance by elucidating the scope of their authority in constitutional preambles¹⁴⁵ and jurisdictional provisions.¹⁴⁶ Tribal constitutions have also become the marker for Native nations to exercise tribal sovereignty under federal law, with nations readily adopting them when seeking to assert their autonomy.¹⁴⁷

Paradoxically, this second distinctively Indigenous aspect of tribal constitutionalism is also a uniquely American phenomenon. Among nations with Indigenous peoples or discrete minority groups, the United States is the only one to recognize the inherent sovereignty of such groups.¹⁴⁸ Other nations have implemented various tools to give power and representation to Indigenous and minority groups, including quotas for seats in legislatures,¹⁴⁹ plurinational structures,¹⁵⁰ and advisory bodies.¹⁵¹ But all these systems incorporate the groups into the national state, subjecting them to the nation's sovereignty. Even the closest example to the United States follows this dominant model: Although some First Nations in Canada have begun writing constitutions in the past two decades, the Canadian legal system has viewed them “as subservient to Canada's laws.”¹⁵² In contrast, Native nations in the United States write constitutions on the basis of inherent, extraconstitutional

¹⁴⁴ See *infra* notes 533–540 and accompanying text.

¹⁴⁵ See, e.g., CONST. OF THE CHOCTAW NATION OF 1838, pmbl.

¹⁴⁶ See, e.g., CONST. & BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN OF 1977, art. I.

¹⁴⁷ See 25 U.S.C. § 5123(e); see also, e.g., CONST. AND BY-LAWS OF THE HOPI TRIBE, ARIZONA OF 1936, pmbl.

¹⁴⁸ See Blackhawk, *Federal Indian Law*, *supra* note 14, at 1862.

¹⁴⁹ For example, the New Zealand Parliament currently contains seven reserved seats for representatives of the Māori electorates. See JOHN WILSON, N.Z. PARLIAMENTARY LIBRARY, THE ORIGINS OF THE MĀORI SEATS 17 (2009), <https://www3.parliament.nz/resource/en-NZ/ooPLLawRPo3141/e27e432e971eb1f60ea75booc987a39e4b2e62ce> [<https://perma.cc/P8X9-NE87>].

¹⁵⁰ Developed in Latin America, the concept of plurinationalism has been implemented constitutionally only in Bolivia. See Winston Ardoín, *Institutionalizing the Revolution or Maintaining the Status Quo: The Question of Plurinationalism in Bolivia*, COLUMBIA UNIV.: RIGHTS VIEWS (June 5, 2022), https://blogs.cuit.columbia.edu/rightsvIEWS/2022/06/05/institutionalizing_the_revolution [<https://perma.cc/B95H-MZUN>].

¹⁵¹ In Norway, Sweden, and Finland, the Indigenous people, the Sámi, have parliaments that exercise authority over some laws and programs directly related to Indigenous issues, but the parliaments otherwise serve as administrative and advisory bodies for the national governments. See EVA JOSEFSEN, INTER-PARLIAMENTARY UNION & UNDP, THE SAAMI AND THE NATIONAL PARLIAMENTS: CHANNELS FOR POLITICAL INFLUENCE 7–9 (2010), <http://archive.ipu.org/splz-e/chiapas10/saami.pdf> [<https://perma.cc/45VP-SR2F>].

¹⁵² Geddes, *supra* note 21, at 2–3.

sovereignty, and U.S. law explicitly acknowledges that tribal constitutions — while subservient to U.S. law under plenary power — are nevertheless not subject to the U.S. Constitution.¹⁵³ Thus, the American constitutional landscape is exceptional in that it contains a distinct Indigenous constitutional tradition — crafted and claimed by Indigenous peoples themselves in opposition to colonialism — that legally exists as separate from the U.S. constitutional order.

* * *

The study of Indigenous constitutionalism cannot be divorced from the history that produced it. Therefore, the following three Parts explore the prominent eras of tribal constitutional development that bear out these features of Indigenous constitutionalism. At the same time, Indigenous constitutionalism cannot be separated from the legal fields from which it derives or the American constitutional landscape it inhabits, and the final Part considers how this category forces us to rethink these areas.

II. SHIELDS AGAINST COLONIALISM: TRIBAL CONSTITUTIONS IN THE NINETEENTH CENTURY

Since time immemorial, Native peoples have possessed fundamental law. Expressed orally through creation stories, ceremonies, or teachings passed down from generation to generation, fundamental law structured Native political, social, and religious systems, which were often intertwined.¹⁵⁴ And, while many forms of fundamental law — such as that of the Navajo, or Diné — are composed of principles that structure Native life, relationships, and worldviews,¹⁵⁵ other forms — like the Haudenosaunee's Great Law of Peace — explicitly set out the institutions and procedures that would allow for political cohesion and communal decisionmaking.¹⁵⁶

But colonization disrupted the power of fundamental customary law. As European powers attempted to claim authority over North America and settlers poured into the continent, Native peoples found themselves in a drastically changed political, cultural, and social world. Disease and war led to new tribal formations,¹⁵⁷ diplomacy consolidated power in individual leaders and gave rise to nations,¹⁵⁸ and new technologies

¹⁵³ See *Talton v. Mayes*, 163 U.S. 376, 382–83 (1896).

¹⁵⁴ See, e.g., WILKINS, *supra* note 20, at 35–36.

¹⁵⁵ See RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE*, at xvii (2009). See *generally id.* (describing the foundational legal principles that underlay the Navajo courts' construction of Diné common law).

¹⁵⁶ See Arthur C. Parker, *The Constitution of the Five Nations or The Iroquois Book of the Great Law*, N.Y. ST. MUSEUM BULL., Apr. 1916, at 1, 10. See *generally id.* (relaying the Haudenosaunee Confederacy's Great Law of Peace).

¹⁵⁷ See, e.g., PATRICIA GALLOWAY, *CHOCTAW GENESIS 1500–1700*, at 349–51 (1995).

¹⁵⁸ See, e.g., STEVEN C. HAHN, *THE INVENTION OF THE CREEK NATION, 1670–1763*, at 8 (2004) (explaining how European contact contributed to formation of the Creek “nation”).

reshaped everyday life.¹⁵⁹ Such transformations only accelerated with the establishment of the United States and its rapid territorial expansion in the late eighteenth and early nineteenth centuries.¹⁶⁰ Forced to cede large amounts of land, Native nations found themselves surrounded by American states and territories.¹⁶¹

Although customary law often proved resilient in adapting to these changes, this new environment eventually pushed Native peoples to establish novel forms of lawmaking and institutions. This Part argues that some Native nations began turning to written constitutionalism in the nineteenth century as a way to combat these disruptions generated by colonialism. While the written constitutional form itself was a creation of colonial powers — and could be used to subjugate Native peoples¹⁶² — some Native peoples — particularly those who bore the brunt of U.S. expansion in the South, Northeast, Great Lakes, and Indian Territory — viewed written constitutions as effective tools to address internal and external challenges. Internally, the constitutions could be used to generate unity among populations that were politically, socially, and culturally fracturing under the weight of colonial influences. Externally, such charters projected sovereignty against the American powers — the federal and state governments — that sought to subsume, and even exterminate, Native nations. And, even though the documents would not prevent dispossession and eventual incorporation into the United States, this Part contends that the Native nations' constitutional strategy ultimately proved successful: Written tribal constitutions influenced Euro-American jurists to recognize tribal sovereignty, perpetuated tribes as legally and culturally distinct entities, and demonstrated the creative as well as subversive aspects of Native political forms.

To show how tribal constitutions served as shields against colonialism, this Part focuses on the first tribal constitutions from the nineteenth century. Situated in the Removal Era of the 1820s and 1830s, it recounts how the Choctaw and Cherokee Nations wrote constitutions as they faced pressure to cede their homelands and move west. And it emphasizes the large role that these constitutions played in the sovereignty debates that led to the famed Cherokee Cases,¹⁶³ in which the U.S. Supreme Court upheld the right of tribal self-government in American

¹⁵⁹ See, e.g., DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND THE VIOLENT TRANSFORMATION OF NATIVE AMERICA 8 (2016) (explaining how firearms “revolutionize[d]” the lives of Native peoples).

¹⁶⁰ See JEFFREY OSTLER, SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS 4–5 (2019).

¹⁶¹ See, e.g., STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 198–99 (2005). See generally *id.* (describing the history of land cessions by Native nations in the United States).

¹⁶² See Blackhawk, *Constitution of American Colonialism*, *supra* note 14, at 28–30 (quoting U.S. CONST. art. I, § 8, cl. 3).

¹⁶³ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

law. In other words, this Part demonstrates how these nineteenth-century constitutions embodied both Native resistance to subjugation and expulsion as well as Native aspirations to recreate themselves as distinct and modern sovereigns.

A. Contesting Removal

Indigenous constitutionalism was born in the Native struggle against expulsion in the U.S. South. But its birth had as much to do with the changing world that Native nations faced as it did with the specific policy of Removal. For centuries, the Choctaw and Cherokee Nations had almost exclusively relied on local governance and custom to maintain themselves. Until the late eighteenth century, the Choctaw Nation existed as a loosely organized polity¹⁶⁴ that stretched across present-day Mississippi and western Alabama.¹⁶⁵ The Nation was composed of three independent districts¹⁶⁶ — referred to as the Northeastern, Southeastern, and Western Districts — each governed by a *mingo*, or chief,¹⁶⁷ who held the position for life.¹⁶⁸ Similarly, the Cherokee Nation was a decentralized collection of towns¹⁶⁹ spread throughout present-day North Carolina, Georgia, Alabama, and Tennessee.¹⁷⁰ And law, as Choctaws and Cherokees understood it, was expressed through clan custom, the oral pronouncements of priestly lawgivers, and the consensual decisions of town councils or local chiefs.¹⁷¹

But both Nations experienced drastic changes in the late eighteenth and early nineteenth centuries that tested the limits of local governance and custom. Repeated treaty negotiations with colonial and U.S. governments not only reduced the nations' landholdings, but also shifted power away from local communities and toward national councils and the chiefs who led them.¹⁷² This shift also excluded women from their traditional political and diplomatic roles, resulting in councils filled exclusively with men.¹⁷³ Federal "civilization" programs galvanized the

¹⁶⁴ See CHAMPAGNE, *supra* note 20, at 32–33.

¹⁶⁵ *Id.* at 13–14.

¹⁶⁶ See *id.* at 61.

¹⁶⁷ See *Choctaws: The Present Condition of the Mission, As Affected by the Proposed Removal of the Indians*, 26 MISSIONARY HERALD 233, 251–52 (1830) [hereinafter *Choctaws*].

¹⁶⁸ See DEBO, *supra* note 27, at 49.

¹⁶⁹ See STRICKLAND, *supra* note 20, at 51.

¹⁷⁰ See WILLIAM G. M'CLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* 7 (1986).

¹⁷¹ See CHAMPAGNE, *supra* note 20, at 28–30; STRICKLAND, *supra* note 20, at 11.

¹⁷² See STRICKLAND, *supra* note 20, at 52; see also *id.* at 56 (quoting Treaty Concluded November 28, 1785, Cherokee Nation-U.S., in J.W. POWELL, *FIFTH ANNUAL REPORT OF THE BUREAU OF ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION 1883–'84*, at 133, 133 (1887)).

¹⁷³ For descriptions of women's roles in the Cherokee and Choctaw Nations, see, for example, THEDA PERDUE, *CHEROKEE WOMEN: GENDER AND CULTURE CHANGE, 1700–1835*, at 52–

expansion of animal and plantation agriculture, incorporation into the market economy, and the establishment of missionary-run schools.¹⁷⁴ And some Choctaws and Cherokees adopted Black chattel slavery and gave birth to a generation of bicultural and biracial tribal members, following the example of, and intermarrying with, the white traders and farmers who poured into the nations.¹⁷⁵

Alongside these internal changes, the Nations faced mounting external pressures. After several decades of pursuing the assimilation of Native peoples into the United States through “civilization” programs, federal officials began to pursue a new policy in the late 1820s.¹⁷⁶ Spurred by settlers’ demands for Native land and the rise of a racial ideology that considered the lifestyles of whites and Native peoples incompatible, some Americans pleaded for tribes’ removal across the Mississippi River.¹⁷⁷ Believing removal necessary for states’ territorial integrity and economic development as well as for tribes’ survival, federal and state politicians increasingly pushed for all the southern Native nations, including the Choctaw and Cherokee, to sign treaties ceding their homelands.¹⁷⁸

In response to these internal and external pressures, first the Choctaw, and then the Cherokee, initiated constitutional revolutions. And these revolutions reverberated far beyond Choctaw and Cherokee borders, leading to constitutional collisions with the federal and state governments that eventually affirmed tribal sovereignty.

I. The Choctaw Constitution of 1826. — Facing the threat of losing its homelands, the Choctaw government underwent a quick and radical transformation. Angry at the district chiefs for signing another land cession treaty in 1825 and embezzling treaty annuity funds, a group of bicultural elites and warriors deposed two of them around April 1826.¹⁷⁹

56, 144–45 (1998), and Greg O’Brien, *The Conqueror Meets the Unconquered: Negotiating Cultural Boundaries on the Post-Revolutionary Southern Frontier*, in *PRE-REMOVAL CHOCTAW HISTORY: EXPLORING NEW PATHS* 148, 162–63 (Greg O’Brien ed., 2008).

¹⁷⁴ See CARSON, *supra* note 27, at 71–72; KIDWELL, *supra* note 27, at 35.

¹⁷⁵ See BARBARA KRAUTHAMER, *BLACK SLAVES, INDIAN MASTERS: SLAVERY, EMANCIPATION, AND CITIZENSHIP IN THE NATIVE AMERICAN SOUTH* 2 (2013); THEDA PERDUE, *SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY, 1540–1866*, at 50, 60 (1979). For studies of slavery in the Choctaw and Cherokee Nations, see generally KRAUTHAMER, *supra*; TIYA MILES, *TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM* (2005); PERDUE, *supra*. For discussion of the rising biracial generation, see generally THEDA PERDUE, “MIXED BLOOD” INDIANS: RACIAL CONSTRUCTION IN THE EARLY SOUTH (2003).

¹⁷⁶ See CLAUDIO SAUNT, *UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY* 22–23, 26 (2020).

¹⁷⁷ See *id.* at 28–29.

¹⁷⁸ See OSTLER, *supra* note 160, at 192–96.

¹⁷⁹ See Letter from David Folsom, Northeastern District Chief, Choctaw Nation, to Thomas McKenney, Superintendent of Indian Affs. (June 27, 1826) (on file with the Bureau of Indian Affs., Letters Received by the Office of Indian Affairs, 1824–81, Record Group 75, Microfilm Reel 169, Choctaw Agency, M234 [hereinafter BIA Records]); *Choctaws*, *supra* note 167, at 251–52.

And, in their place, these men elected David Folsom and Greenwood LeFlore, two educated and politically well-connected leaders who possessed “good knowledge of the Laws of nations,”¹⁸⁰ to four-year terms, ending the traditional life tenure.¹⁸¹ A few months later, these newly elected chiefs convened a national council.¹⁸² Stating that the Choctaw people “continue to not be of one mind”¹⁸³ regarding land cessions, the Council acknowledged that it met because it saw “the necessity of entering into some definite compact,”¹⁸⁴ or, in other words, the necessity of writing a constitution.

The Choctaw Constitution written by the Council was an attempt to restructure their government in a way that would prevent Removal. Recognizing the risks inherent in a system in which the federal government could approach any one of the districts for land, the Constitution created a national government for the Choctaw Nation for the first time. This government included a national legislature, or General Council, composed of the district chiefs and the town or clan captains,¹⁸⁵ and the Constitution explicitly stated that the General Council’s laws superseded any conflicting district customs or laws.¹⁸⁶ The government was also headed by a tripartite executive comprised of the three district chiefs¹⁸⁷ and possessed a National Committee that controlled the distribution of treaty annuities and the nation’s funds.¹⁸⁸ By establishing these national institutions, the Constitution reconstructed the balance of power in the Choctaw Nation to limit the chiefs’ unilateral authority and generate a united front against further land cessions.

The Constitution supplemented these protective institutions with fundamental legal principles to constrain government action. It declared that land in the Choctaw Nation was communally owned, stating, “The land where we reside belongs to all who are called Choctaw people.”¹⁸⁹ The Constitution also made it explicit that all districts had to agree on any future land cession.¹⁹⁰ And, as if to ensure that no Americans who already resided in or would move into the nation would influence these decisions, the third article emphasized that “the white

¹⁸⁰ Letter from William Ward, Indian Agent, to Peter B. Porter, Sec’y of War (Oct. 11, 1828), BIA Records, *supra* note 179.

¹⁸¹ See *Choctaws*, *supra* note 167, at 252.

¹⁸² CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 45.

¹⁸³ *Id.* at 46.

¹⁸⁴ AM. BD. OF COMM’RS FOR FOREIGN MISSIONS, EIGHTEENTH ANNUAL REPORT OF THE AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS, OCTOBER, 1827, app. at xxvi (1827) [hereinafter EIGHTEENTH ANNUAL REPORT].

¹⁸⁵ CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 47.

¹⁸⁶ EIGHTEENTH ANNUAL REPORT, *supra* note 184, app. at xxvi.

¹⁸⁷ See CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 47–48.

¹⁸⁸ *Id.* at 54–55.

¹⁸⁹ *Id.* at 50.

¹⁹⁰ *Id.* at 51.

American citizens are not counted with us who are named Choctaws,” excluding them from citizenship.¹⁹¹

But the Choctaw Constitution was more than its anti-Removal characteristics. Although the National Council adopted the Euro-American concept of a constitution, it did not simply implement a Euro-American political system. Rather, the Council constructed a national government based on Indigenous forms. Captains from the districts served as national legislators,¹⁹² and the district chiefs retained their customary prerogatives through their veto power over legislation¹⁹³ and their authority to appoint the General Council’s members.¹⁹⁴ Further, the new government was structured around Choctaw notions of federalism, allowing the districts to maintain some independence. The Constitution empowered the chiefs to appoint district standing committees, which would both “see that the [national] laws are duly carried into effect”¹⁹⁵ and pass laws within each district to address “cases of a local nature.”¹⁹⁶ The National Committee itself was a body composed of all three district standing committees.¹⁹⁷

This balance between written law and Choctaw custom extended to Choctaws’ understanding of what a constitution was. On one hand, the Council’s language indicated that they viewed their document in a manner similar to Euro-Americans: as a fixed set of fundamental laws that served as the basis of government. They referred to their articles as a “series of strong laws”¹⁹⁸ and a “definite compact.”¹⁹⁹ Additionally, the Council distinguished between the articles and an appropriations law for a council house passed immediately afterwards. Using the lawmaking procedure in the Constitution, the Council stated that the appropriations legislation had “been made with reference to our previous decisions.”²⁰⁰

On the other hand, the Council intentionally positioned the Constitution within the Choctaw legal tradition. For them, the Constitution was not a complete break or a fundamental law that established an entirely new political order. Rather, the Constitution was a continuation of past practice because “each district ha[d] always possessed laws.”²⁰¹ But the Constitution importantly laid out the procedure under which any new legislation that conflicted with the old laws had to be “permitted

¹⁹¹ *Id.* at 55.

¹⁹² *See id.* at 47.

¹⁹³ *See id.* at 49.

¹⁹⁴ *See id.* at 57.

¹⁹⁵ EIGHTEENTH ANNUAL REPORT, *supra* note 184, app. at xxvi.

¹⁹⁶ *Id.* at xxvii.

¹⁹⁷ CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 53.

¹⁹⁸ *Id.* at 61.

¹⁹⁹ EIGHTEENTH ANNUAL REPORT, *supra* note 184, app. at xxvi.

²⁰⁰ CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 66.

²⁰¹ *Id.* at 49.

and approved by the Nation,” so that the old laws could be “completely laid aside and forgotten.”²⁰² And even though it was written — departing from the traditional emphasis on speaking as authoritative — the Constitution commanded that the legislators “should take well to heart these laws,” as if the provisions had been spoken.²⁰³ Thus, the Council put forth a legal framework in which the Constitution and the legislation emanating from it existed alongside Choctaw custom.

The Choctaw Constitution not only targeted the Removal threat but also sought to manage the social, economic, and cultural changes disrupting the nation. It empowered the district standing committees to legislate locally, and, throughout 1827 and 1828, the committees passed laws on a wide range of subjects,²⁰⁴ including appropriations for smithies and cotton factories,²⁰⁵ inheritance codes,²⁰⁶ and bans on marriage and sex between enslaved Black people and Choctaws or white people who lived among the Choctaws.²⁰⁷ Also, the Constitution and the district laws created a tribal state embodied in numerous officials who would execute the laws. While the Constitution provided for arbiters and a paymaster,²⁰⁸ the district committees appointed judges and light-horse men to administer the criminal justice system and keepers of stray livestock.²⁰⁹ Armed with legal codes and state officers, the Choctaw constitutional government reconfigured the Choctaw people’s relationships to their nation and the law.

2. *The Cherokee Constitution of 1827.* — Two months after the adoption of the Choctaw Constitution, the Cherokee Nation called for its own constitutional convention to take place the following year.²¹⁰ Only a few hundred miles to the east of the Choctaw, the Cherokee did not face a similar political crisis that spurred the call for a convention. In fact, the Cherokee Nation had already pursued a piecemeal state-building project for almost two decades.²¹¹ By 1826, it possessed a national government with a principal chief, a national council, and an extensive legal code.²¹² A thirteen-member National Committee managed

²⁰² *Id.* at 50.

²⁰³ *Id.* at 62.

²⁰⁴ PITCHLYNN, *supra* note 1, at 68, 68–154 (entries from June 12, 1827, June 12, 1828, and August 26, 1828).

²⁰⁵ *Id.* at 68–71.

²⁰⁶ *Id.* at 92–99.

²⁰⁷ *Id.* at 139–43.

²⁰⁸ CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 57.

²⁰⁹ PITCHLYNN, *supra* note 1, at 109–10, 122, 131.

²¹⁰ See Act of Oct. 13, 1826, in LAWS OF THE CHEROKEE NATION, *supra* note 102, at 73, 76.

²¹¹ See STRICKLAND, *supra* note 20, at 57–59.

²¹² See *id.* at 57–64.

the day-to-day affairs of the nation.²¹³ And the government included a judicial system comprised of district courts and a supreme court.²¹⁴

But the Cherokee likely pursued a constitution as a way to shore up their institutions while facing increasing scrutiny from outsiders. The State of Georgia had long called for the removal of Native peoples from within its boundaries,²¹⁵ and, by late 1826, the State had not only attempted to confiscate Cherokee lands through an incorrect survey line but also tried to pressure the Cherokee into letting it build a canal through the nation.²¹⁶ That same year, the nation also witnessed its neighbor, the Muscogee Nation — who possessed a national legal code but no constitution — cede most of its lands in Georgia.²¹⁷ The federal government added to these anxieties by challenging various exercises of Cherokee authority over non-Natives. Throughout the 1820s, federal officials had contested the nation's ability to impose taxes on licensed American traders selling goods in Cherokee territory and to confiscate both illegally imported liquor and property to settle debts.²¹⁸

Eager to demonstrate their sovereignty and capability to govern like their Euro-American neighbors through “the principles of republicanism,”²¹⁹ Cherokee delegates met in convention in July 1827 and adopted their first constitution.²²⁰ The Cherokee Constitution clearly emulated the Euro-American constitutional formula and political system. It began with a familiar preamble, stating that the document's purpose was “to establish justice, ensure tranquility, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty.”²²¹ The constitution also reified the national government that was already in place while slotting it into a separation-of-powers framework: The National Committee and National Council comprised a bicameral legislature,²²² the principal chief served as the executive,²²³ and the

²¹³ See *id.* at 62–64; Act of May 6, 1817, in LAWS OF THE CHEROKEE NATION, *supra* note 102, at 4, 5.

²¹⁴ See J. MATTHEW MARTIN, THE CHEROKEE SUPREME COURT: 1823–1835, at 7 (2021). For an in-depth study of the Cherokee court system, see generally *id.*

²¹⁵ Allread, *supra* note 80, at 1551–52.

²¹⁶ See Letter from Charles R. Hicks, Assistant Principal Chief, & John Ross, President, Cherokee Nat'l Comm., to Col. Hugh Montgomery (Dec. 11, 1826), in 7 JOHN HOWARD PAYNE PAPERS 27, 27, 31 (Rowena McClinton ed., 2022).

²¹⁷ See MICHAEL D. GREEN, THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY IN CRISIS 70–71, 122–23 (1985).

²¹⁸ See Letter from Charles R. Hicks, Assistant Principal Chief, & John Ross, President, Cherokee Nat'l Comm., to Col. Hugh Montgomery, *supra* note 216, at 28.

²¹⁹ William Hicks, Interim Principal Chief, & John Ross, Interim Assistant Principal Chief, Cherokee Nation, Annual Message to the General Council (Oct. 13, 1828), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 109, at 140, 142.

²²⁰ CONST. OF THE CHEROKEE NATION of 1827, *supra* note 102, at 118.

²²¹ *Id.* pmbl.

²²² *Id.* art. III, § 1.

²²³ *Id.* art. IV, § 1.

supreme court headed the judicial branch.²²⁴ Additionally, the final article included individual rights provisions, guaranteeing freedom of religion, protection against double jeopardy, and the right to a jury trial.²²⁵

However, the Cherokee Constitution's similarity to Euro-American ones did not prevent the convention from expressing its overarching aim: to hold on to Cherokee homelands. The very first article described the Nation's territorial boundaries in detail and declared that the "boundaries of this Nation . . . shall forever hereafter remain unalterably the same."²²⁶ The Constitution then announced the Nation's power over this territory, stating that it was subject to the "sovereignty and Jurisdiction of this Government" and that "the lands therein are, and shall remain, the common property of the Nation."²²⁷ As if these provisions were not a clear enough signal that no land cessions would occur, the article also prohibited Cherokee citizens from selling or transferring their improvements to the United States, individual states, or U.S. citizens.²²⁸ The convention further emphasized this bond between Cherokee citizenship and Cherokee homelands by stripping anyone who "shall remove with their effects out of the limits of this Nation" of all the rights and privileges of citizenship.²²⁹ Ultimately, the heart of the Cherokee Constitution was the Cherokee territory's inviolability and the Cherokee government's absolute jurisdiction over that territory.

Like the Choctaw, the Cherokee did not view their Constitution as a complete reordering of their legal system. The call for a convention had explicitly stated that the Constitution "shall not in any degree go to destroy the rights and liberties of the free citizens of this Nation, nor to effect or impair the fundamental principles and laws, by which the Nation is now governed."²³⁰ And the convention appeared to follow this constraint by reproducing the political institutions already in place and including the principle of communal land ownership, as well as rights protections. Further, all laws that were in force at the Constitution's adoption were to continue.²³¹ But Cherokee leaders also recognized that their charter was not the sole, fundamental law directing the Nation. The article on the legislature declared that "[a]ll acknowledged Treaties shall be the Supreme law of the land."²³² Thus, from the Cherokee perspective, the Constitution not only lay in a web of existing law but also lived alongside the treaties that had shaped the Nation's boundaries and rights.

²²⁴ *Id.* art. V, § 1.

²²⁵ *Id.* art. VI, §§ 3, 8–9.

²²⁶ *Id.* art. I, § 1.

²²⁷ *Id.* art. I, § 2.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Act of Oct. 13, 1826, in *LAWS OF THE CHEROKEE NATION*, *supra* note 102, at 73, 76.

²³¹ *CONST. OF THE CHEROKEE NATION* of 1827, *supra* note 102, art. VI, § 12.

²³² *Id.* art. III, § 22.

B. Constitutional Collisions and the Recognition of Tribal Sovereignty

The Choctaw and Cherokee Constitutions did more than remake the law and governments within their nations; they also redefined the debate over Indian Removal. The familiar narrative of the Removal debates is that they revolved around the U.S. Constitution, considering questions of federalism, judicial review, and separation of powers.²³³ But as Professor Gregory Ablavsky and I have explained elsewhere, for Native peoples, these debates centered on “a much larger, existential issue: whether, as Native leaders repeatedly insisted, the Constitution enshrined the diplomatic constitution by protecting Native peoples’ right to remain as sovereigns within their ancestral homelands.”²³⁴ And it was the Choctaw and Cherokee Constitutions that brought this issue to the fore, leading to a collision of tribal and state sovereignty.

The problems began immediately after the Choctaw’s adoption of their Constitution. In November 1826, federal commissioners arrived in the Choctaw Nation, seeking more land cessions.²³⁵ But the new national government rejected their demands. Exercising its constitutional powers, the General Council had appointed a thirteen-person committee to meet with the commissioners.²³⁶ When the commissioners complained that so few warriors had attended the treaty negotiations, the committee replied, “Our council speaks the voice of the nation.”²³⁷ In addition to claiming this sovereign authority, the committee emphasized that their refusal to cede more Choctaw lands reflected “the sentiments of nine-tenths of the nation.”²³⁸ Having failed to produce a treaty, the federal commissioners then attempted to undermine the legitimacy of the constitutional government. As they reported to the Secretary of

²³³ See, e.g., AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840*, at 636–40 (2021) (studying Removal with a focus on the interaction between the executive and judicial branches of the federal government); LEONARD & CORNELL, *supra* note 19, at 200–07 (exploring Removal as a conflict in which the Marshall Court and Andrew Jackson’s Democratic Party fought over constitutional meaning); JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 215–16 (2018) (arguing that Removal was a Jacksonian policy made possible by Jackson ignoring Supreme Court decisions); Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 25 J. SUP. CT. HIST. 215, 227 (2000) (arguing that the Cherokee cases ultimately strengthened the power of the Supreme Court); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 501, 530–31 (1969) (using the Cherokee cases as a study of the motivations of the Marshall Court).

²³⁴ Ablavsky & Allread, *supra* note 50, at 287.

²³⁵ Letter from William Clark, Superintendent of Indian Affs. at St. Louis, Off. of Indian Affs., Rep. Thomas Hinds, Miss. Legislature, & Gen. John Coffee, to James Barbour, Sec’y of War (Nov. 19, 1826), in 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 709, 709 (Walter Lowrie & Walter S. Franklin eds., 1834) [hereinafter AMERICAN STATE PAPERS].

²³⁶ Letter from Choctaw Comm’rs to William Clark, Superintendent of Indian Affs. at St. Louis, Off. of Indian Affs., Rep. Thomas Hinds, Miss. Legislature, & Gen. John Coffee (Nov. 16, 1826), in AMERICAN STATE PAPERS, *supra* note 235, at 715, 715–16.

²³⁷ *Id.* at 715.

²³⁸ Letter from Choctaw Comm’rs to William Clark, Superintendent of Indian Affs. at St. Louis, Off. of Indian Affs., Rep. Thomas Hinds, Miss. Legislature, & Gen. John Coffee (Nov. 14, 1826), in AMERICAN STATE PAPERS, *supra* note 235, at 713, 713.

War, “Indeed, it appears they have no fixed government; it has lately passed out of the hands of the old acknowledged chiefs, and is now placed in the hands of young men, without years and experience to justify the measure.”²³⁹ Despite the commissioners’ characterization, the Choctaw Constitution was clearly working as intended.

The Cherokee Constitution made even bigger waves. According to the interim Cherokee Chiefs William Hicks and John Ross, the Constitution “produced a clamour in the adjoining states.”²⁴⁰ Federal and state officials feared that the Cherokee’s action was either a declaration of independence — in which the nation had separated itself from its relationship of protection with the United States — or a brazen attempt to form itself into a new state within the boundaries of existing states — a clear violation of the U.S. Constitution.²⁴¹ President John Quincy Adams even wrote to Hicks and Ross in early 1828 to inform them that the act of constitution making “cannot be considered in any other light, than as Regulations of purely municipal Character.”²⁴² In other words, the Cherokee Constitution was akin to an act of incorporation passed by a state legislature to establish a town, providing that town with the right to legislate so long as its regulations did not “impe[] the Regular administration of the Laws of the State.”²⁴³

But Cherokee leaders objected to these reactions, deploying legal principles that would come to define Indigenous constitutionalism’s relationship to American law. First, Hicks and Ross contended that nothing had changed in the Cherokee’s connection to the United States, especially when the Cherokee Constitution recognized treaties between them as supreme law.²⁴⁴ Second, the chiefs refuted the town incorporation analogy. For Hicks and Ross, the Cherokee Nation was superior to a town because it had “claim[ed] for itself and always maintained sovereign jurisdiction over its territorial limits.”²⁴⁵ Additionally, the nation existed outside the jurisdiction of the United States and therefore had no need to rely on another government to enact a constitution. The Cherokee “had no relation or connection to a *State* to ask of it, its

²³⁹ Letter from William Clark, Superintendent of Indian Affs. at St. Louis, Off. of Indian Affs., Rep. Thomas Hinds, Miss. Legislature, & Gen. John Coffee, to James Barbour, Sec’y of War, *supra* note 235, at 709.

²⁴⁰ Letter from William Hicks, Interim Principal Chief, & John Ross, Interim Assistant Principal Chief, Cherokee Nation, to Col. Hugh Montgomery (Apr. 16, 1828), in *CHEROKEE PHOENIX* (New Echota, Cherokee Nation), Apr. 24, 1828, at 2.

²⁴¹ See, e.g., President John Quincy Adams, Fourth Annual Message (Dec. 2, 1828), in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897*, at 407, 415–16 (James D. Richardson ed., 1898).

²⁴² Communication to the Chiefs of the Cherokee Nation (Apr. 16, 1828), in *CHEROKEE PHOENIX* (240 at 2).

²⁴³ *Id.*

²⁴⁴ Letter from William Hicks, Interim Principal Chief, & John Ross, Interim Assistant Principal Chief, Cherokee Nation, to Col. Hugh Montgomery, *supra* note 240.

²⁴⁵ *Id.*

consent, being connected and related to the United States *alone*, by treaty.”²⁴⁶ And even with this treaty relationship, the nation had “never surrendered her right to self Government or the exercise of its internal and domestic regulation.”²⁴⁷ According to *Cherokee Phoenix* editor Elias Boudinot, if it “has always been the case” that the Cherokee government “exists and acts independently of the laws of the United States,” why was a constitution producing a “cry . . . at this late hour?”²⁴⁸

The Americans’ cries, however, only continued and were amplified in the halls of Congress, the offices of the Executive, and the chambers of state legislatures. To an extent previous scholarship has not appreciated,²⁴⁹ the tribal acts of constitution making fueled the more forceful push for Removal in the late 1820s. In his final message to Congress in December 1828, President Adams relayed that “we have unexpectedly found forming in the midst of ourselves communities claiming to be independent of ours and rivals of sovereignty.”²⁵⁰ According to Adams, “[t]his state of things require[d] . . . a remedy” that “may secure to the members of our confederation their rights of sovereignty and of soil.”²⁵¹ In other words, the tribes needed to be expelled from within state boundaries to allow states to claim and exercise jurisdiction over Native lands. A year later, the new President, Andrew Jackson, reiterated this disapproval while proposing that Congress pass a Removal bill.²⁵² He informed Congress that the attempt of Native nations in Georgia and Alabama “to establish an independent government would not be countenanced” because of their violation of the Constitution’s New State Clause.²⁵³ Thus, the nations either had to “emigrate beyond the Mississippi, or submit to the laws of those States.”²⁵⁴

Afraid that the constitutions would secure the tribes’ permanent presence within their borders, southern states quickly responded with their own laws, aligning with Jackson’s ultimatum. Georgia,²⁵⁵

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Elias Boudinot, *Indian Emigration*, CHEROKEE PHOENIX (New Echota, Cherokee Nation), Feb. 21, 1828, at 2.

²⁴⁹ See, e.g., SAUNT, *supra* note 176, at 47–49 (attributing the push for a federal Removal scheme to the election of Andrew Jackson and the work of southern politicians in Congress).

²⁵⁰ Adams, *supra* note 241, at 416.

²⁵¹ *Id.*

²⁵² See ANDREW JACKSON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TO THE TWO HOUSES OF CONGRESS, AT THE COMMENCEMENT OF THE FIRST SESSION OF THE TWENTY-FIRST CONGRESS, S. DOC. NO. 21-2, at 16 (1st Sess. 1829).

²⁵³ *Id.* at 15–16.

²⁵⁴ *Id.* at 16.

²⁵⁵ Act of Dec. 22, 1830, 1830 Ga. Laws 114; Act of Dec. 19, 1829, 1829 Ga. Laws 98; Act of Dec. 20, 1828, 1828 Ga. Laws 88.

Alabama,²⁵⁶ Mississippi,²⁵⁷ and Tennessee²⁵⁸ — the states in which the Choctaw and Cherokee nations resided²⁵⁹ — enacted laws extending state jurisdiction over Native lands and peoples. And some of these state law extension acts explicitly targeted the tribes' constitutional governments, banning — and in some cases attaching criminal penalties to — the convening of tribal governments, the application of tribal law, and the exercise of any authority by tribal officials.²⁶⁰ Also — as I have discussed in previous work — Southern politicians constructed a “theory of state supremacy” to justify these laws.²⁶¹ This theory not only claimed state authority over Indian affairs, rejecting federal supervision, but also refuted Native nations' sovereignty within states.²⁶² According to the Alabama legislature, the Cherokee constitutional government raised the prospect of *imperium in imperio*, and because this was “a state of things that never has or can exist,” the Cherokee (or Alabama, a prospect that was not seriously considered) “must give up their pretensions to govern.”²⁶³ This absolute territorial jurisdiction supposedly possessed by the states provided no space for tribal constitutions.

Congress also repeatedly debated the impact of tribal constitutions. In January 1828, the House of Representatives passed a resolution requiring the Committee on Indian Affairs “to inquire if any of the Indian tribes, within the territorial jurisdiction of any of the States, have organized an independent government, with a view to a permanent location in said States.”²⁶⁴ In light of common knowledge that the Cherokee had established a written constitution, Representative Wilson Lumpkin of Georgia stated that the federal government “ought to interfere promptly and efficiently to prevent” the consequences that he predicted would occur if the Cherokee Constitution were to go into effect.²⁶⁵ A month later, the House took up another resolution to investigate whether the Cherokee Constitution violated the U.S. Constitution, although it was ultimately tabled.²⁶⁶ But the most intense arguments occurred during consideration of the Indian Removal Act in early 1830. Congressmen and senators faced the entangled issues of federal authority over Indian affairs, the state law extension acts, and the tribal constitutions when

²⁵⁶ Act of Jan. 16, 1832, 1832 Ala. Laws 7.

²⁵⁷ Act of Jan. 19, 1830, ch. 1, 1830 Miss. Laws 5; Act of Feb. 4, 1829, ch. 77, 1829 Miss. Laws 81.

²⁵⁸ Act of Nov. 8, ch. XVI, 1833, 1833 Tenn. Pub. Acts 10.

²⁵⁹ See *History*, CHEROKEE NATION, <https://www.cherokee.org/about-the-nation/history/> [<https://perma.cc/Z8H5-PQW4>].

²⁶⁰ See §§ 7–13, 1829 Ga. Laws at 99–101; § 8, 1828 Ga. Laws at 89; §§ 1, 5, 1830 Miss. Laws at 5–6; § 7, 1832 Ala. Laws at 7–8.

²⁶¹ Allread, *supra* note 80, at 1556 (emphasis omitted).

²⁶² *Id.*

²⁶³ H.R. JOURNAL, Gen. Assemb., 12th Sess., at 93 (Ala. 1831).

²⁶⁴ 4 REG. DEB. 914 (1828).

²⁶⁵ *Id.* at 926.

²⁶⁶ *Id.* at 1592–93.

discussing whether the federal government would authorize a process and appropriations for large-scale Native deportation.²⁶⁷ In powerful language, Senator Theodore Frelinghuysen railed against the bill and defended tribal sovereignty against the federal and state attacks. In his words, Native nations, and especially the Cherokee Nation, “have nothing to do with State sovereignty, or United States, sovereignty. They are above and beyond both.”²⁶⁸

Yet Senator Frelinghuysen’s words failed to stop the passage of the Indian Removal Act²⁶⁹ and arrest further collisions, eventually putting the Removal controversy before the U.S. Supreme Court. After several failed attempts, the Cherokee were able to get a challenge to Georgia’s state law extension acts to the Court in the case of *Worcester v. Georgia*.²⁷⁰ Although the primary question in *Worcester* was whether the federal or state governments had authority over Indian affairs — and was answered definitely in favor of the federal government — Chief Justice Marshall also recognized the principles of tribal sovereignty put forth by the Cherokees in defense of their government.²⁷¹ Chief Justice Marshall explained that the treaties between the Cherokee Nation and the United States had repeatedly affirmed the Cherokees’ right of self-government.²⁷² Further, Congress’s Indian Trade and Intercourse Acts²⁷³ had considered Native “nations as distinct political communities, having territorial boundaries, within which their authority is exclusive.”²⁷⁴ Chief Justice Marshall also rejected any contention that Native nations coming under the protection of the United States had stripped them of their independence or resulted in their “ceasing to be a state.”²⁷⁵ Thus, Georgia’s state law extension acts were void for trying to assert jurisdiction over a self-governing nation protected by the U.S. Constitution and federal policies.²⁷⁶ According to Chief Justice Marshall, “The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.”²⁷⁷

²⁶⁷ See SAUNT, *supra* note 176, at 70–74; 6 REG. DEB. 332–33 (1830).

²⁶⁸ 6 REG. DEB. 312.

²⁶⁹ 4 Stat. 411 (1830).

²⁷⁰ 31 U.S. (6 Pet.) 515 (1832). For detailed studies of the Cherokee’s litigation campaign, see generally TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 169–97 (paperback ed. 2009); LACROIX, *supra* note 19, at 285–309; JILL NORNGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* 87–141 (1996).

²⁷¹ 31 U.S. (6 Pet.) at 561–62.

²⁷² *Id.* at 553–56, 559–60.

²⁷³ An Act to Regulate Trade and Intercourse with Indian Tribes, And to Preserve Peace on the Frontiers, Pub. L. No. 7-13, 2 Stat. 139 (1802) (codified as amended at 25 U.S.C. § 177).

²⁷⁴ *Worcester*, 31 U.S. (6 Pet.) at 557.

²⁷⁵ *Id.* at 561.

²⁷⁶ *Id.* at 560–61.

²⁷⁷ *Id.* at 561.

Unfortunately, *Worcester's* affirmation of Native sovereignty was not enough to prevent Removal. Both the Choctaw and Cherokee governments cracked under the pressures exerted by the state laws and threats of the Jackson Administration, leading to the imposition of treaties ceding all their homelands in the South.²⁷⁸ In the case of the Choctaw, worries about being subjected to Mississippi law resulted in a government restructuring in which two district chiefs resigned in favor of appointing the third, Greenwood LeFlore, as sole chief in order to negotiate a Removal treaty.²⁷⁹ But this move — a clear violation of the Choctaw Constitution²⁸⁰ and political traditions — only caused divisions within the nation. Rival district councils elected different chiefs, and it became unclear who wielded legitimate political authority in the nation.²⁸¹ Taking advantage of perceived “weakness,” federal commissioners arrived in September 1830 and convinced a small group of Choctaw leaders to sign the Treaty of Dancing Rabbit Creek under the threat of military force.²⁸²

For the Cherokee, President Jackson’s repeated refusal to enforce *Worcester* undermined the Cherokee government’s forceful opposition to Removal.²⁸³ By the early 1830s, the Cherokee constitutional government existed in a state of emergency. Evading “the reach of the Georgia Guard,” Cherokee leaders convened a series of special councils in Red Clay in Tennessee instead of at the seat of government in New Echota, which was within the Georgia portion of the Cherokee Nation.²⁸⁴ They also suspended elections.²⁸⁵ Then, “a small group of Cherokee leaders broke from Chief Ross,” supporting Removal as the only way to ensure the nation’s survival.²⁸⁶ And, in 1835, this group signed a treaty in secret ceding all Cherokee “lands east of the Mississippi” and agreeing to move west.²⁸⁷ The Senate subsequently ratified the treaty by one vote, disregarding Cherokee petitions decrying the treaty as illegitimate because it was signed without the authorization of the Cherokee National Council.²⁸⁸

²⁷⁸ See ARTHUR H. DEROSIER, JR., *THE REMOVAL OF THE CHOCTAW INDIANS* 124 (1970); see also *id.* at 117–26 (discussing federal commissioners’ threats of force to compel Choctaw leaders to sign the Treaty of Dancing Rabbit Creek).

²⁷⁹ See Letter from Greenwood LeFlore to Mushulatubbee (Apr. 1830), BIA Records, *supra* note 179; KIDWELL, *supra* note 27, at 134.

²⁸⁰ See CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 47 (requiring “three chiefs” as “main representatives”).

²⁸¹ See *Choctaws: State of the Churches, With the Additions to Them During the Year Ending July 1, 1830*, 26 MISSIONARY HERALD 349 (1830).

²⁸² See DEROSIER, *supra* note 278, at 117–26.

²⁸³ See Ablavsky & Allread, *supra* note 50, at 296–97.

²⁸⁴ LACROIX, *supra* note 19, at 322.

²⁸⁵ John Ross, Annual Message (Oct. 10, 1832), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 109, at 251, 251.

²⁸⁶ Ablavsky & Allread, *supra* note 50, at 297.

²⁸⁷ *Id.* at 298, 297–98.

²⁸⁸ *Id.* at 298–99.

Removal disrupted any force that the Choctaw and Cherokee Constitutions still retained after the signing of the treaties, as the tribes were divided into groups and forced west to Indian Territory, with thousands dying on the journey.²⁸⁹ However, the Constitutions played a lasting role in the continuing development of Native self-government that would unfold in Indian Territory and beyond. The Cherokee Constitution, and Cherokee leaders' arguments in defense of it, had set up the conflict that gave birth to *Worcester* and influenced Chief Justice Marshall's reasoning.²⁹⁰ Thus, the Cherokee exercise in constitution making enshrined Native sovereignty in one of the cases that established the field of federal Indian law.²⁹¹ Additionally, the Choctaw and Cherokee Nations' emphases on their rights to self-government resulted in Removal treaties that explicitly protected those rights. Both treaties contained language that obliged the federal government to secure to the nations "the jurisdiction and government of all the persons and property that may be within their limits west."²⁹² Therefore, the federal government committed to not interfering with the Nations' laws so long as they were consistent with the U.S. Constitution and Congress's Indian affairs authority.²⁹³ So the Constitutions had a complicated legacy: Although their drafting led to heightened Removal debates that ultimately stripped the nations of their homelands, the Constitutions' embodiment of Native independence and self-government — and Native nations' insistence on upholding the constitutions — meant that sovereignty in the West was assured.

* * *

Despite the tragedies of Removal, Indigenous constitutionalism lived on. In fact, tribal constitutional development continued, and even thrived, during the remainder of the nineteenth century. Even as they were rendered null in the 1830s, the Choctaw and Cherokee Constitutions served as models when those tribes arrived in Indian Territory and for other Native nations. And these new foundational documents continued to challenge colonialism, albeit in different ways. Some

²⁸⁹ See generally SAUNT, *supra* note 176 (detailing the history of forced migration of Native Americans in the 1830s); OSTLER, *supra* note 160 (providing a narrative of Native dispossession and the attendant violence perpetrated against Native peoples).

²⁹⁰ See Ablavsky & Allread, *supra* note 50, at 289–91, 296.

²⁹¹ For an analysis of Native peoples' constitutional arguments that were ultimately incorporated into *Worcester*, see *id.* at 289–96.

²⁹² Treaty of Dancing Rabbit Creek, Choctaw Nation-U.S., art. IV, Sep. 27, 1830, 7 Stat. 333, 333–34; see also Treaty of New Echota, Cherokee Nation-U.S., art. V, Dec. 29, 1835, 7 Stat. 478 (requiring the federal government to "secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them").

²⁹³ See Treaty of Dancing Rabbit Creek, *supra* note 292, at art. IV; Treaty of New Echota, *supra* note 292, at art. V.

constitutions, such as those of the Choctaw and Cherokee, facilitated the conjoining of peoples that found themselves forced to reside in the same territory.²⁹⁴ For other nations, written constitutions were increasingly relied on to bolster the nations' continued existence and jurisdictional claims when confined to reservations either carved out of their once-extensive homelands or set aside from public lands.²⁹⁵ For example, on the Plains, the Osage and Sisseton-Wahpeton Nations wrote constitutions in the 1860s and 1880s, respectively, after they were sequestered to reservations.²⁹⁶ And, from the 1840s to the 1880s, numerous nations that were resettled in Indian Territory — the Chickasaw, the Muscogee, the Seminole, and the Sac and Fox — enacted such foundational documents.²⁹⁷ While each document was distinctive, the spread of tribal constitutions across Indian Country demonstrated that a constitution-writing movement marked by communication and borrowing had arisen among those Native nations seeking to exist within the expanded United States.

But Native nations' constitutional achievements over the course of eight decades preceded an overwhelming assault on Native sovereignty at the turn of the century. Supported by the U.S. Supreme Court, Congress exercised its plenary power to subject Native peoples to federal criminal jurisdiction,²⁹⁸ to allot and sell reservation lands,²⁹⁹ and to unilaterally abrogate treaties.³⁰⁰ On some reservations, the Bureau of Indian Affairs (BIA) targeted tribal governments and customary law, with the reservation superintendents assuming all powers of administration and setting up so-called "Courts of Indian Offenses" without statutory authorization.³⁰¹ And in Indian Territory, an explosion in the non-Indian population and the resulting push for statehood led to Congress passing the Curtis Act³⁰² in 1898, which abolished the Five Tribes' courts and set a 1906 expiration date for their constitutional

²⁹⁴ CONST. OF THE CHOCTAW NATION of 1838, in *THE CONSTITUTION AND LAWS OF THE CHOCTAW NATION* 3, 3–4 (David Folsom ed., 1840) (incorporating the Chickasaw Nation as the fourth district of the Choctaw Nation); CONST. OF THE CHEROKEE NATION of 1839, in *THE CONSTITUTION AND LAWS OF THE CHEROKEE NATION: PASSED AT TAH-LE-QUAH, CHEROKEE NATION*, 1839, at 5, 5 (1840) (joining Eastern and Western Cherokee Nations under one government); see also Act of Union Between the Eastern and Western Cherokees, in *THE CONSTITUTION AND LAWS OF THE CHEROKEE NATION: PASSED AT TAH-LE-QUAH, CHEROKEE NATION*, 1839, *supra*, at 3, 3–4 (same).

²⁹⁵ See FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 155–57, 183, 187 (abr. ed. 1986).

²⁹⁶ *Constitutions of the Osage Nation (Osage People, 1861 and 1881)*, in *DOCUMENTS, supra* note 50, at 168, 169; *Sisseton-Wahpeton Constitution (Sisseton and Wahpeton Peoples, 1884)*, in *DOCUMENTS, supra* note 50, at 195, 196.

²⁹⁷ See HARGRETT, *supra* note 116, at 41–43, 78–81, 102–05.

²⁹⁸ *United States v. Kagama*, 118 U.S. 375, 379–80, 383, 385 (1886).

²⁹⁹ General Allotment Act of 1887, ch. 119, 24 Stat. 388.

³⁰⁰ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

³⁰¹ See HARRING, *supra* note 71, at 185–92.

³⁰² Pub. L. No. 55-517, 30 Stat. 495 (1898).

governments.³⁰³ Although the nations of Indian Territory made one last-ditch attempt to manage their incorporation through the proposed State of Sequoyah and its constitution, federal officials rejected the proposal, and, in 1907, the nations were subsumed into the State of Oklahoma.³⁰⁴ Thus, the space for these constitutional resistance strategies had shrunk considerably by the beginning of the twentieth century, marking the end of an era.

Still, the nineteenth-century constitutions demonstrated the power that Native nations could wield through them. They extended and modified customary law, showing that a hybrid legal order could reconcile traditional understandings with the many changes happening within the nations. They also substantiated that Native nations could effectively exercise rights of self-government and jurisdiction without the interference of Euro-Americans, resulting in the recognition of tribal sovereignty in American law. Finally, these documents expressed how Native nations conceived of the ways in which they could interact with the federal and state governments, carving out a distinct status. In other words, the written constitutions proved effective as shields against the ultimate goal of colonialism — the elimination of Native nations' separate sovereignty — ensuring the nations' continued existence.³⁰⁵

III. INDIGENIZING IMPOSITION: THE IRA CONSTITUTIONS IN THE EARLY TWENTIETH CENTURY

The New Deal is known for remaking American government in the early twentieth century.³⁰⁶ Yet it also remade governments in Indian Country, designating tribal constitutions as a central pillar of federal Indian affairs policy for the first time. Through the Indian Reorganization Act of 1934³⁰⁷ — also known as the “Indian New Deal”³⁰⁸ — federal policymakers attempted to reform Indian affairs,

³⁰³ See Robert J. Miller & Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma*, 101 B.U. L. REV. 2049, 2064–65 (2021).

³⁰⁴ See Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 5–6 (2007).

³⁰⁵ See PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPHIC EVENT 2* (1999) (arguing that the development of settler colonies and states, such as the United States, was “premised on the elimination of native societies”).

³⁰⁶ See generally DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945* (1999) (“Debate about the New Deal’s historical significance, its ideological identity, and its political, social, and economic consequences has ground on for more than half a century. Roosevelt’s reforms have become an unavoidable touchstone of American political argument, a talisman invoked by all parties to legitimate or condemn as the occasion requires, an emblem and barometer of American attitudes toward government itself.” *Id.* at 363–64.); KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1932–1972* (2016) (“New Deal welfare programs helped the federal government develop the robust and extensive administrative machinery that is with us today.” *Id.* at 8.).

³⁰⁷ Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479).

³⁰⁸ TAYLOR, *supra* note 29, at x.

emphasizing tribal self-government in the wake of the federal government's disastrous allotment and assimilation policies and the failures of BIA rule. And, to accomplish this goal of self-government, section 16 of the IRA established a process through which a Native nation could "organize for its common welfare" by "adopt[ing] an appropriate constitution and bylaws."³⁰⁹ Under this process, a tribe would draft a constitution, and the Secretary of the Interior would call a special election for the constitution's ratification.³¹⁰ If "ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation," the constitution would become effective, and the federal government would acknowledge the tribe's right to exercise "all powers vested in any Indian tribe or tribal council by existing law."³¹¹

This federal facilitation of tribal constitution writing marked a major reversal in the history of Indigenous constitutionalism. While Native nations had written constitutions in the nineteenth century to oppose colonial domination³¹² — and over the objections of federal officials — now the federal government appropriated the very same form to achieve its ends. Federal support for tribal constitutions, and a closely managed process, resulted in a drastic increase in the number of Native nations with constitutions in the 1930s and 1940s.³¹³

But the IRA has a complicated legacy. According to the standard narrative, the federal government "imposed" a model constitution on tribes, forcing them to accept a form of government that was foreign to them and eliminating Native political traditions.³¹⁴ And the sources certainly confirm that a model constitution did exist, while many believe that nations felt pressured to adopt a standardized constitutional arrangement.³¹⁵

Yet a closer look at the IRA records reveals three insights that show how the standard narrative underplays Native influence and self-government in this period. First, Felix Cohen's guidance for BIA staff and tribes involved in drafting constitutions relied heavily on the pre-IRA constitutions that Native nations had written, providing an explicit link to the Native legal strategies pursued in the nineteenth century.³¹⁶ Second, the IRA's focus on drafting constitutions that would allow tribes

³⁰⁹ Ch. 576, § 16, 48 Stat. at 987.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² See *supra* section II.A, pp. 1285–92.

³¹³ See THEODORE H. HAAS, *TEN YEARS OF TRIBAL GOVERNMENT UNDER I.R.A.* 21–30 (1947).

³¹⁴ Wilcomb E. Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 *AM. ANTHROPOLOGIST* 279, 280 (1984).

³¹⁵ See FELIX S. COHEN, *Model Constitution*, in *ON THE DRAFTING OF TRIBAL CONSTITUTIONS*, *supra* note 29, app. A at 173–77; see also Wilkins, *Introduction*, *supra* note 29, at xxii–xxiii (describing Felix Cohen's circulation of a model constitution that BIA personnel could use when working with tribes that met certain conditions).

³¹⁶ See *infra* section III.A.1, pp. 1303–06.

to exercise their recognized powers provided an opening for the reassertion of tribal sovereignty.³¹⁷ Third, the BIA process made space — albeit limited — for Native voice and customary law, allowing Native nations to begin exercising their authority once again.³¹⁸ Thus, even though the IRA constitutions were certainly adopted under a more coercive federal regime than those that came before, the earlier constitutions as well as contemporary exercises of Native agency *indigenized* this imposition.

This Part contends that the IRA changed the direction of Indigenous constitutionalism with the federal government imposing constitutions on Native nations even as the IRA explicitly built on the Indigenous innovations of the nineteenth century. It first analyzes the documents that informed this entire era of constitution making, namely Cohen's *Basic Memorandum on Drafting of Tribal Constitutions*³¹⁹ and the Interior Solicitor's *Powers of Indian Tribes*³²⁰ opinion, both of which relied on the achievements of Native resistance from the earlier era. This Part then studies the IRA constitution-making process, detailing its steps that allowed for a collaborative yet colonial workflow, its methods that occasionally incorporated Native custom and governance goals, and its results in spreading constitutions throughout Indian Country.

A. The IRA Guidance Documents

During the year following the IRA's enactment, Commissioner of Indian Affairs John Collier and the BIA focused mostly on administrative planning. Congress had passed the IRA at the end of its session in June 1934 without any appropriations.³²¹ Thus, Collier turned to his existing staff to prepare for IRA implementation. While reservation superintendents conducted the initial elections necessary for tribes to come under the provisions of the IRA, Collier relied on Interior officials in Washington to begin laying the groundwork for "organizing" the tribes once they had accepted the IRA.³²²

This organization work produced two documents in 1934 that structured the constitution-writing process, incorporating Native nations' constitutional achievements from the nineteenth century while recognizing the opportunities for tribal sovereignty in the modern age. One of these documents, a *Basic Memorandum on Drafting of Tribal Constitutions*, was written by Assistant Interior Solicitor Cohen on behalf of the

³¹⁷ See *infra* section III.A.2, pp. 1305–08.

³¹⁸ See *infra* section III.B, pp. 1308–11.

³¹⁹ See COHEN, *supra* note 115, at 1–171.

³²⁰ 55 Interior Dec. 14 (1934).

³²¹ See TAYLOR, *supra* note 29, at 33.

³²² See *id.* at 27, 32, 37 (describing how Collier relied on reservation superintendents to conduct the IRA elections while he gathered lawyers and anthropologists in the Interior Department to advise on the tribal constitutions); see also Wilkins, *Introduction*, *supra* note 29, at xxiii (naming the members of the Tribal Organization Committee).

Tribal Organization Committee (TOC) and intended to specifically guide constitution drafting.³²³ The other was the Interior Solicitor's opinion on the *Powers of Indian Tribes*, which explained what powers Native nations retained under existing federal law and what they could exercise through their constitutions.³²⁴

I. *Felix Cohen and the Pre-IRA Constitutions.* — The IRA was novel in providing a federally sanctioned role for tribal constitutions, but the BIA's approach to constitution writing did not start from scratch. Collier had established the TOC immediately after the IRA's passage³²⁵ — appointing Cohen as chair — and explicitly tasked the body with preparing a guidance memorandum.³²⁶ But rather than drawing from Euro-American constitutions or their own political predispositions, Collier asked the TOC to review the nearly forty tribal constitutions drafted prior to the IRA that had been approved or were awaiting approval by the BIA.³²⁷ The TOC was to undertake a thorough review, identifying, among other things, the processes under which the constitutions were adopted, any tribal political traditions reflected in the constitutions, whether the constitutions provided for the exercise of any “real powers” or for a “merely advisory” role, and any perceived strengths or weaknesses of the documents.³²⁸ The TOC would then incorporate its findings into a memorandum “contain[ing] an outline of the various topics to be dealt with in a constitution.”³²⁹

By November 1934, Cohen had completed a draft of the *Basic Memorandum on Drafting of Tribal Constitutions*.³³⁰ An attempt “to outline legal possibilities in the drafting of constitutions under the Wheeler-Howard Act,”³³¹ the *Basic Memorandum* was a detailed document offering “useful suggestions” for constitutional provisions to Indians and members of the Indian Service.³³² Composed of fourteen sections, Cohen's memo was thorough, providing guidance on topics ranging from the name of the tribal organization to the conduct of elections.³³³ And, while most of the sections discussed provisions that the TOC viewed as mandatory, such as the form of the tribal governing body and membership requirements,³³⁴ others presented topics that tribes were to consider only if they aligned with the traditions or wishes of the community, such

³²³ See Wilkins, *Introduction*, *supra* note 29, at xxiv–xxx.

³²⁴ See 55 Interior Dec. at 17–18.

³²⁵ See WILKINS, *supra* note 20, at 141.

³²⁶ See Wilkins, *Introduction*, *supra* note 29, at xxiii–xxv.

³²⁷ See *id.* at xxiv.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ See *id.* at xxvi.

³³¹ *Id.* (quoting Papers of Felix S. Cohen (n.d.) (on file with Yale Univ., Beinecke Rare Book and Manuscript Library, Box 7, Folder 100)).

³³² COHEN, *supra* note 115, at 3.

³³³ See *id.* at 3–78.

³³⁴ See *id.* at 13–18, 28–32.

as district governments, the role of chiefs in tribal government, and declarations of individual rights.³³⁵

However, all sections of the *Basic Memorandum* demonstrated that the TOC had brought “to bear upon the work of constitution-making the past experience of various Indian tribes with traditional and modern forms of legal government” by referencing provisions from pre-IRA constitutions.³³⁶ For example, the section on a “Statement of Purposes” included the preamble to the Seneca Constitution of 1848, which had explained the abolition of the old government under a system of chiefs due to its failure to meet new conditions.³³⁷ Similarly, various titles from nineteenth-century constitutions — such as the Seneca’s “Peacemakers Court,” the Muscogee’s “House of Kings” and “House of Warriors,” and the Five Tribes’ “Light Horsemen” — were offered as examples for how tribes could refer to their institutions and officers.³³⁸ And the most comprehensive section, “Powers of Tribal Self-Government,” listed a plethora of constitutional provisions from the San Carlos Apache, the Fort Belknap Reservation, the Fort Yuma Reservation, and the Osage to describe tribal powers over property, taxation, guardianships, exclusion, and law and order.³³⁹ In essence, the *Basic Memorandum* suggested that the IRA constitutions follow the example of numerous Native nations who had already, and successfully, channeled their authority through written constitutions.

But the memo also revealed that just because Native nations had chosen a certain form of government in the past did not mean that Cohen would encourage others to do so now. When discussing the propriety of adopting a district organization for representation and administrative purposes, the memo explicitly disapproved of granting the districts legislative authority.³⁴⁰ Although nations like the Choctaw had clung to their district autonomy,³⁴¹ Cohen stated that “many disputes and difficulties are likely to arise, as they have arisen, for instance, in the United States.”³⁴² He also rejected proposals for a bicameral legislature and governments divided into separate executive, legislative, and judicial departments.³⁴³ While recognizing that many Native nations — including the Cherokee, Chickasaw, Choctaw, and Muscogee — were organized this way in the nineteenth century, Cohen wrote that adopting these systems was “highly inadvisable” due to the

³³⁵ See *id.* at 22–27, 37–39, 76–78.

³³⁶ *Id.* at 3.

³³⁷ *Id.* at 6, 8–9.

³³⁸ *Id.* at 20–21.

³³⁹ *Id.* at 55–75.

³⁴⁰ *Id.* at 24.

³⁴¹ See, e.g., *supra* p. 1288.

³⁴² COHEN, *supra* note 115, at 24.

³⁴³ *Id.* at 32.

“delay, friction, and inefficiency” involved and his belief that “[s]uch a system of government makes change very difficult.”³⁴⁴

The memo’s simultaneous use of past constitutional provisions to uphold Native self-government and enact paternalist guidance contributed to a complicated vision for the IRA constitutions. On the one hand, Cohen acknowledged that one of the main purposes of the IRA constitutions was “to reassert and reestablish the ancient powers of the tribe.”³⁴⁵ And he disposed of the idea that the BIA furnish model constitutions to tribes, expressing his desire that the tribal constitutions be “the natural offspring of Indian hearts and minds.”³⁴⁶ Like the earlier charters of Native nations, Cohen suggested that the IRA constitutions could be the vehicle through which the nations could reclaim their status as self-governing sovereigns separate from the federal and state governments.³⁴⁷

But, on the other hand, the memo adopted the paternalist view that many tribes were ill-prepared to establish and exercise the powers of modern governments. Not only did Cohen refer to tribal authority as “powers of local home rule,”³⁴⁸ akin to the powers of a municipality, but he also recommended that many Native nations insert provisions for secretarial review and approval of tribal ordinances into their constitutions.³⁴⁹ According to the memo, some nations would not be able to exercise the “greatest degree of self-government”³⁵⁰ — operating instead under the “most elementary”³⁵¹ or “[i]ntermediate”³⁵² form — and therefore, some or all resolutions and ordinances would need to be submitted to Interior officials for approval.³⁵³ Ultimately, even as Cohen praised the plethora of constitutional provisions and laws crafted by Native peoples, his belief that federal Indian policy had robbed them of their ability to govern themselves ensured that some constraints would continue.

2. *Revitalizing Tribal Powers.* — The second document that guided the IRA constitution-making process was an October 1934 advisory opinion entitled *Powers of Indian Tribes* by Interior Solicitor Nathan Margold.³⁵⁴ Secretary of the Interior Harold Ickes had requested that

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 55.

³⁴⁶ *Id.* at 3.

³⁴⁷ *See id.*

³⁴⁸ *Id.* at 74.

³⁴⁹ *Id.* at 33–36.

³⁵⁰ *Id.* at 33.

³⁵¹ *Id.*

³⁵² *Id.* at 36.

³⁵³ *See id.* at 33–36.

³⁵⁴ 55 Interior Dec. 14, 16, 66 (1934); WILKINS, *supra* note 20, at 144–48, 225. Before joining the federal government under the Roosevelt Administration, Margold had written the “Margold Report” for the NAACP — a 218-page document that set out the organization’s strategy to challenge the constitutionality of segregated schools. *See* MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION*, 1925–1950, at 15–16, 26 (1987).

Margold explain what section 16 of the IRA meant when it stated that “all powers vested in any Indian tribe or tribal council by existing law” could be exercised by a tribe through its adopted constitution.³⁵⁵ As BIA officials prepared to assist tribes in writing their foundational documents,³⁵⁶ Margold’s opinion was intended to supply the range and scope of tribal powers that could be enumerated therein.³⁵⁷

The *Powers* opinion looked to multiple sources of law, including congressional statutes, treaties, and judicial decisions, to elucidate the bounds of Native sovereignty,³⁵⁸ but tribal constitutions and their legacy featured prominently.³⁵⁹ The opinion’s discussion began with announcing “the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*”³⁶⁰ And it identified *Worcester* as the “earliest complete expression of these principles,” emphasizing Chief Justice Marshall’s recognition of Native nations as separate sovereigns.³⁶¹ Citing Chief Justice Marshall’s discussion of tribal sovereignty³⁶² — which stemmed from the Cherokee’s defense of their constitution³⁶³ — Margold noted that the acknowledgment of tribes’ inherent sovereignty continued to the present.³⁶⁴ For this proposition, he extensively cited a 1927 New York Court of Appeals case, *Patterson v. Council of Seneca Nation*,³⁶⁵ which considered the status of the Seneca Constitution of 1848.³⁶⁶ In *Patterson*, the court held that the power to determine tribal membership was derived from the sovereignty of the Seneca Nation,³⁶⁷ with the source of the Nation’s jurisdiction over tribal members being “the Indian constitution,” not state law.³⁶⁸ Even though the Seneca Constitution uniquely gave its consent for the New York legislature to pass laws “for the protection and improvement” of the Nation,³⁶⁹ the court rejected the argument that this provision and the New York legislature’s approval of the constitution equated to “assum[ing] governmental

³⁵⁵ *Powers*, 55 Interior Dec. at 17 (emphasis omitted) (quoting Wheeler-Howard Act, ch. 576, 48 Stat. 984, 987 (1934)).

³⁵⁶ See WILKINS, *supra* note 20, at 144.

³⁵⁷ See *Powers*, 55 Interior Dec. at 17–18.

³⁵⁸ *Id.* at 18–19.

³⁵⁹ See, e.g., *id.* at 20–22.

³⁶⁰ *Id.* at 19.

³⁶¹ *Id.* at 20.

³⁶² See *id.* (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–61 (1832)).

³⁶³ See *supra* pp. 1296–97.

³⁶⁴ *Powers*, 55 Interior Dec. at 20–22.

³⁶⁵ 157 N.E. 734 (N.Y. 1927).

³⁶⁶ *Powers*, 55 Interior Dec. at 21–22.

³⁶⁷ 157 N.E. at 736, 738.

³⁶⁸ *Id.* at 738.

³⁶⁹ *Id.* at 737 (emphasis omitted) (quoting CONST. OF THE SENECA NATION OF INDIANS OF 1848, § 19).

control.”³⁷⁰ Rather, “by its approval of the Indian Constitution in its original and amended form, the state of New York acknowledged the Seneca Indians to be a separate nation, a self-governing people, having a central government with appropriate departments to make laws, to administer and to interpret them.”³⁷¹ In other words, Native nations’ constitutions were expressions of inherent sovereignty and acknowledged as such by American governments.

The solicitor’s opinion also remarked that federal courts had consistently deferred to Native nations’ constitutions.³⁷² Rather than being “a matter of lip service to a venerable but outmoded theory,” courts had often undertaken a “painstaking analysis” of tribal constitutional provisions, “exhibit[ing] a degree of respect proper to the laws of a sovereign state.”³⁷³ As a prime example of such behavior, the opinion quoted Federal Court of Claims Judge Nott, who praised the Cherokee Constitution of 1839:

[I]t is not the least of the successes of the constitution of the Cherokees that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it for the protection of Cherokee citizens and the maintenance of their personal and political rights.³⁷⁴

Further, Margold cited federal court cases analyzing the Muscogee (Creek) and Choctaw constitutions for the interpretive principle that tribal laws should be construed “in the light of the traditions and circumstances of the Indian people” instead of in line with “the technical rules of the common law.”³⁷⁵

While the advisory opinion certainly tied tribal constitutions to foundational Indian law principles, it also looked to these documents to justify specific tribal powers. For example, Margold discussed the case of *Buster v. Wright*³⁷⁶ and its analysis of the Muscogee Constitution to support the proposition that Native nations had the power to tax tribal members and nonmembers who had accepted certain privileges from the tribe.³⁷⁷ Additionally, the Choctaw and Cherokee Constitutions helped define the scope of tribal regulation of individual property interests.³⁷⁸ But, ultimately, the opinion identified nine areas in which Native sovereignty had “never been terminated by law or waived by

³⁷⁰ *Id.* at 736–37 (quoting United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13, 16 (1925)).

³⁷¹ *Id.* at 738.

³⁷² See Powers of Indian Tribes, 55 Interior Dec. 14, 26–27 (1934).

³⁷³ *Id.* at 26.

³⁷⁴ *Id.* at 26–27 (quoting *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 318 (1893)); *Journeycake*, 28 Ct. Cl. at 303.

³⁷⁵ Powers, 55 Interior Dec. at 27 (citing *Ex parte Tiger*, 47 S.W. 304, 305 (Indian Terr. 1898); *McCurtain v. Grady*, 38 S.W. 65, 71 (Indian Terr. 1896)).

³⁷⁶ 135 F. 947 (8th Cir. 1905).

³⁷⁷ Powers, 55 Interior Dec. at 46–47 (citing *Buster*, 135 F. at 949–52).

³⁷⁸ See *id.* at 51–53.

treaty³⁷⁹: adopting a form of government, defining membership, regulating domestic relations, prescribing rules of inheritance, levying taxes, excluding nonmembers, regulating property, administering justice, and regulating federal employees' conduct.³⁸⁰ Therefore, tribes could reasonably enumerate these powers in their IRA constitutions, and Cohen specifically incorporated this guidance in his *Basic Memorandum* and his model constitution.³⁸¹

B. Constitution Writing Under the IRA

The IRA process differed significantly from the Native-led constitution-writing methods of the earlier era. With the guidance documents in place by the end of 1934, the BIA sent members of the TOC, and later field agents under the newly created Indian Organization Division, to Indian Country to assist tribes with constitution writing.³⁸² The standard process looked like this: When a tribe that had accepted the IRA was ready to draft a constitution, a committee of representative tribal members was chosen to write the document.³⁸³ Often, the committee worked alongside an organization field agent to produce a draft.³⁸⁴ Once completed, the draft was then submitted to the Washington office for review.³⁸⁵ The central office would likely send back a letter of suggested revisions that the tribal committee would consider.³⁸⁶ If the committee and BIA agents agreed to a revised version, either the committee or a petition signed by one-third of the tribal members would request that the Secretary of the Interior call an election.³⁸⁷ This request was mandatory upon the Secretary, who would issue an order calling an election.³⁸⁸ A tribal election board, the tribal governing body, and the agency superintendent then supervised the vote on the reservation,³⁸⁹ which required that a majority of at least thirty percent of the adult members on the reservation vote in favor of the constitution to ratify

³⁷⁹ *Id.* at 16.

³⁸⁰ *Id.* at 16–17.

³⁸¹ COHEN, *supra* note 115, at 55–75; COHEN, *supra* note 315, app. A at 174–75.

³⁸² See Wilkins, *Introduction*, *supra* note 29, at xxiii–xxiv; John Painter et al., *Implementing the IRA*, in *INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN* 79, 81–82 (Kenneth R. Philp ed., 1995); see also, e.g., TAYLOR, *supra* note 29, at 98–99, 114 (discussing the visit by the BIA, including Cohen, to the San Carlos Apache Reservation to assist in the drafting of their constitution).

³⁸³ See HAAS, *supra* note 313, at 2; TAYLOR, *supra* note 29, at 100–01, 114.

³⁸⁴ See HAAS, *supra* note 313, at 2.

³⁸⁵ See, e.g., Joe Jennings, *Program for Indian Organization Unit to July 1, 1936* (1936), *mircoformed on Native Americans and the New Deal: The Office Files of John Collier, 1933–1945*, Reel 15 (Univ. Publ'ns of Am., Inc.).

³⁸⁶ See, e.g., *id.*

³⁸⁷ HAAS, *supra* note 313, at 2.

³⁸⁸ *Id.*

³⁸⁹ See CONST. AND BYLAWS OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA of 1936.

it.³⁹⁰ Once the constitution was ratified, the tribe submitted it again to Washington.³⁹¹ And there, the Commissioner of Indian Affairs would review and decide whether to provide a recommendation of approval to the Secretary.³⁹² The final step was the Secretary's certification approving the constitution and declaring that all Interior and BIA regulations in conflict with the constitution would be inapplicable to that tribe.³⁹³ The certification also ordered that all Interior employees abide by the tribal constitution.³⁹⁴

This procedure demonstrated the complications inherent in realizing tribal self-determination through federally managed means. On one hand, BIA officials' heavy-handed involvement meant that Native nations felt pressured to follow the standardized material produced by Cohen, including a model constitution that was only intended to be an "educational document."³⁹⁵ In December 1935, even Cohen complained that except for four provisions, the Wisconsin Oneida's draft constitution was "identical" to his model constitution.³⁹⁶ Although this was a rare case, most IRA constitutions did at least follow the structure set out in Cohen's documents,³⁹⁷ containing similar sections on membership, tribal organization, powers of the governing body, elections, removal from office, and land.³⁹⁸

On the other hand, the BIA's coercive approach could not overcome all exercises of Native agency. First, Native peoples played a large role in drafting the constitutions and considering revisions.³⁹⁹ And the ratification votes mattered: By early 1936, at least five Native nations had rejected their proposed constitutions through the ratification elections.⁴⁰⁰

³⁹⁰ HAAS, *supra* note 313, at 43 (quoting Oklahoma Indian Welfare Act, Pub. L. No. 74-816, § 3, 49 Stat. 1967, 1967 (1936)). For an example of the tribal election certification, see CONST. AND BYLAWS OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA of 1936.

³⁹¹ TAYLOR, *supra* note 29, at 103.

³⁹² For an example of this review, see CONST. AND BYLAWS OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA of 1936.

³⁹³ See, e.g., *id.*

³⁹⁴ See, e.g., *id.*

³⁹⁵ Wilkins, *Introduction*, *supra* note 29, at xxvii.

³⁹⁶ *Id.* at xxviii.

³⁹⁷ See FELIX S. COHEN, *Outline of Tribal Constitution and Bylaws*, in ON THE DRAFTING OF TRIBAL CONSTITUTIONS, *supra* note 29, app. B at 178-82.

³⁹⁸ See, e.g., CONST. AND BYLAWS OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA of 1936; CONST. AND BY-LAWS OF THE SAN CARLOS APACHE TRIBE, ARIZONA of 1936.

³⁹⁹ See Jennings, *supra* note 385 (listing examples of revisions to proposed constitutions written by Native nations).

⁴⁰⁰ *Id.* While rejecting a constitution did not affect the scope of a tribe's inherent authority, it would technically prevent them from exercising powers extended to them — or at least explicitly recognized as part of the tribe's authority — under the IRA: the right

[t]o employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or

Second, even those Native nations that followed the standardized structure in their constitutions exercised their agency in constructing the content of the provisions. Membership eligibility ranged in terms of blood quantum, residency requirements, and opportunities for adoption.⁴⁰¹ Some tribes decided to govern through general councils composed of all tribal members while others adopted councils of elected representatives.⁴⁰² And several constitutions retained traditional political positions and titles, such as Santa Clara Pueblo's governor and the Havasupai Tribe's hereditary chiefs.⁴⁰³

In fact, the IRA formula did not prevent Native nations from constructing hybrid governments that retained and incorporated many of their traditional political structures into the written constitutions. For example, the Hopi Tribe, which had always existed as a collection of autonomous villages bound by culture,⁴⁰⁴ adopted an IRA constitution in 1936 that created a centralized government⁴⁰⁵ and contained sections similar to those of other IRA documents.⁴⁰⁶ Yet the Hopi Constitution, even as it established a unified tribal council, maintained the nation's identity as "a union of self-governing villages."⁴⁰⁷ Powers in certain areas, such as guardianships, domestic relations, and farmland assignments, were explicitly reserved to the villages.⁴⁰⁸ Additionally, the villages had the right to organize their own governments and determine the method for selecting representatives to the tribal council, and the constitution recognized the continuing authority of each village's *Kikmongwi*, or traditional leader.⁴⁰⁹ Thus, even though the IRA process

encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments as well as to be notified of federal appropriation estimates that would benefit the tribe. Indian Reorganization Act of 1934, Pub. L. No. 73-383, § 16, 48 Stat. 984, 987.

⁴⁰¹ Compare CONST. AND BYLAWS OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA of 1936, art. III, § 2 (conditioning child's membership on, inter alia, "one-fourth or more Indian blood"), with CONST. AND BY-LAWS OF THE SAN CARLOS APACHE TRIBE, ARIZONA of 1936, art. III (permitting nonresident member child's membership after "resid[ing] on the San Carlos Reservation [for] at least six months").

⁴⁰² Compare CONST. AND BY-LAWS OF THE ABSENTEE-SHAWNEE TRIBE OF INDIANS OF OKLAHOMA of 1938, art. III (designating general council of all members twenty-one or older as governing body), with CONST. AND BYLAWS OF THE GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA of 1936, art. III, § 1 (designating representative tribal council as the government).

⁴⁰³ CONST. AND BYLAWS OF THE PUEBLO OF SANTA CLARA, NEW MEXICO of 1935, art. III, § 1; CONST. AND BY-LAWS OF THE HAVASUPAI TRIBE OF THE HAVASUPAI RESERVATION, ARIZONA of 1939, art. III, § 1.

⁴⁰⁴ See TAYLOR, *supra* note 29, at 74-75.

⁴⁰⁵ CONST. AND BY-LAWS OF THE HOPI TRIBE, ARIZONA of 1936, art. III, § 1 (addressing tribal organization).

⁴⁰⁶ Compare *id.* art. V, §§ 1-2 (addressing removal from office), with CONST. AND BYLAWS OF THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA of 1936, art. VIII, §§ 1-2 (same).

⁴⁰⁷ CONST. AND BY-LAWS OF THE HOPI TRIBE, ARIZONA of 1936, art. III, § 1.

⁴⁰⁸ *Id.* art. III, § 2.

⁴⁰⁹ *Id.* art. III, §§ 3-4; *id.* art. IV, § 4.

constrained Native constitution making in a manner unheard of in the nineteenth century, Native nations still found ways to assert distinctive understandings of their own nationhood.

Despite the fraught nature of IRA constitution writing, the BIA's "organization" work dramatically altered the constitutional landscape in Indian Country. While BIA records indicated that at least sixty-five Native nations had written constitutions prior to the IRA's passage,⁴¹⁰ that number had more than doubled in the decade following its enactment. By 1946, 159 Native nations had adopted constitutions under the IRA's terms.⁴¹¹ Through the support of the federal government, written constitutions had become the default instrument through which Native nations could claim and exercise their sovereignty.

* * *

This flurry of constitution writing, however, only lasted a decade. The onset of World War II, declining congressional appropriations, and the forced resignation of John Collier as Commissioner of Indian Affairs in 1945 halted IRA implementation.⁴¹² Instead, federal Indian affairs policy shifted once again, focusing on terminating, rather than bolstering, the government-to-government relationship between the United States and Native nations.⁴¹³

Nevertheless, the IRA's constitutional legacy is secure. An estimated thirty-five to forty percent of the more than 500 federally recognized tribes currently operate under IRA constitutions.⁴¹⁴ Further, the *Powers* opinion has been described as "revolutionary" for securing the conception of tribal powers as "inherent" rather than "delegated."⁴¹⁵ Not only has the U.S. Supreme Court cited the opinion in cases upholding tribal sovereignty,⁴¹⁶ but according to Native scholars and activists Vine Deloria, Jr., and Clifford M. Lytle, "[m]odern tribal sovereignty thus beg[an] with this opinion."⁴¹⁷ Thus, the IRA extended the impact of the nineteenth-century tribal constitutions by appropriating the constitutional form and incorporating it — as well as the earlier constitutions' achievements — as the foundation for Native self-government in American law.

⁴¹⁰ See WILKINS, *supra* note 20, at 132.

⁴¹¹ See HAAS, *supra* note 313, at 21–30.

⁴¹² See TAYLOR, *supra* note 29, at 139–42.

⁴¹³ For an overview of the termination policy and its impact on tribes, see CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 57–86 (2005).

⁴¹⁴ Miller, *supra* note 11.

⁴¹⁵ See VINE DELORIA, JR., & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 160 (1984).

⁴¹⁶ See, e.g., *United States v. Wheeler*, 435 U.S. 313, 328 & n.27 (1978) (quoting *Powers of Indian Tribes*, 55 Interior Dec. 14, 14 (1934)).

⁴¹⁷ DELORIA & LYTLE, *supra* note 415, at 159–60.

IV. NATIVE NATION (RE)BUILDING: TRIBAL CONSTITUTIONS IN THE SELF-DETERMINATION ERA

It would take another two decades for Native self-government to become the settled policy of the federal government. Starting in the 1960s and 1970s, Native activism pushed Congress and the Executive to recognize tribal sovereignty by allowing tribes to contract with federal agencies to administer a range of programs in education, healthcare, housing, economic development, and the environment.⁴¹⁸ The federal government also began working to restore the government-to-government relationship with Native nations that had been severed through termination or inaction.⁴¹⁹

In this new Self-Determination Era,⁴²⁰ Indigenous constitutionalism has experienced — and is still experiencing — a revival. Native nations have turned their attention to governmental reform as federal policy and resources have provided the space for them to do so. And although Native nations have approached constitution writing from different vantage points — reviving dormant governments, starting anew after federal recognition, and revising IRA documents — this moment has two unifying features. First, this era is not simply a continuation of the IRA in which nations adopted constitutions at the federal government's behest. Rather, Native peoples themselves have led this movement, directing the constitution-drafting processes as they see fit and undertaking such processes inside and outside the IRA framework. Second, these new, or amended, constitutions have served as instruments for Native nation (re)building. Native peoples are reclaiming power by writing and amending constitutions to reflect the ideas and needs of their nations while trying to make sense of their status as modern sovereigns existing in a web of dependent relationships with other American governments. It is these constitutions that complete the picture of what motivates Native peoples to write such foundational documents.

This Part explores this era of tribal constitutional development that extends from the late twentieth century to the present. It first discusses the various impetuses for tribal constitutional reform — including federal policy reversals, restoration of federal recognition, and discontent under IRA constitutions — while providing a handful of examples of Native nations that have undertaken reforms for these reasons. This Part then identifies and analyzes major tensions in the modern-day

⁴¹⁸ See WILKINSON, *supra* note 413, at 191, 197, 261. See generally *id.*, at 177–268 (discussing the key role that Indian Country leaders played in drafting federal policy proposals and working with Congress to assert their rights through the twenty-first century).

⁴¹⁹ See MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS 2–12 (2004) (documenting the history of federal acknowledgment of tribes in the post–World War II era).

⁴²⁰ See COHEN'S HANDBOOK, *supra* note 32, § 1.07, at 93.

constitutional reform movement and the differing approaches that Native nations have taken.

A. *Initiating Constitutional Reform*

The diversity of Native nations — due to their histories, traditions, population sizes, and resources — and their existing governments have translated into a myriad of motivations for constitutional reform. Professor David Wilkins, a citizen of the Lumbee Nation, has grouped these motivations under four major factors: “structural and philosophical inadequacies . . . of the Western-style constitutional systems established in the 1930s and beyond”; “state and societal developments” like pro-tribal federal policies and more educated Native peoples; “a resurgence of traditionalism”; and “internal political, economic, and moral crises.”⁴²¹ But this taxonomy has failed to explain what Native nations are specifically focused on achieving in their constitutions. By combining the features of late twentieth-century tribal constitutions with those from earlier eras, it becomes clear that Native nations have used these documents to achieve a variety of purposes, from elevating the interests of the tribal populace to building or rebuilding a tribal state apparatus.

To explore these various motivations, this Part approaches tribal constitutional development over the last six decades from a structural standpoint. As discussed below, such development can be divided into three categories: the revival of constitutions after federal policies restricting tribal self-government had been reversed, the writing of new constitutions after federal recognition had been restored, and the reform of IRA constitutions.

i. Revival. — The first set of “self-determination constitutions” are those that were written and adopted after the reversal of federal policies limiting tribal self-government. Although some federal policies, like the IRA, have supported tribal constitutions, these have been exceptions to the norm whereby federal statutes have specifically destroyed tribal constitutional governments.⁴²² Notably, in the case of the Five Tribes in Indian Territory — the Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole Nations — the Curtis Act of 1898⁴²³ dissolved their courts and set a 1906 expiration date for their governments in anticipation of Oklahoma statehood.⁴²⁴ Even though Congress passed an act in 1906 authorizing the Tribes’ existence to be “continued in full force and effect,”⁴²⁵ the legislation disempowered their governments, making their chiefs subject to presidential appointment and removal, limiting the

⁴²¹ Wilkins, *Seasons of Change*, *supra* note 29, at 39.

⁴²² See, e.g., H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (establishing Congress’s intent to terminate tribal self-governance).

⁴²³ Pub. L. No. 55-517, 30 Stat. 495.

⁴²⁴ See Miller & Dolan, *supra* note 303, at 2064–65.

⁴²⁵ Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148 (repealed in part 1952).

councils to meet for no more than thirty days a year, and subjecting all legislation to presidential approval.⁴²⁶

These “zombie” governments continued for over seven decades, until Native activism spurred legislative and judicial reversals. In 1970, tribal members capitalized on the federal government’s self-determination stance and successfully lobbied Congress to allow for the popular election of the Five Tribes’ chiefs.⁴²⁷ The Five Tribes then directed their desire for autonomy and democratic government into a constitutional revival across the former Indian Territory, although each Tribe acted based on different motivations. For example, the Cherokee adopted their first constitution in over 130 years in 1976 chiefly to secure federal funding and administer their own social services.⁴²⁸ In contrast, the Muscogee’s pursuit of constitutional reform arose from a dispute between traditional *etvkwv* (town) governments and the Principal Chief, John Davis, over whether the Chief was constitutionally required to consult the Creek National Council.⁴²⁹ In 1974, Muscogee representatives sued the Secretary of the Interior and secured judicial recognition that the Nation’s 1867 Constitution was still valid.⁴³⁰ Concerned about the lack of input from the Muscogee people in the ongoing constitutional reform process, the federal court also mandated a tribal constitutional convention, and in 1979, the Muscogee Nation ratified a new constitution.⁴³¹ The Choctaw combined the services-oriented approach of the Cherokee with the grassroots movement of the Muscogee. After years of youth activism in opposition to a termination proposal and an expansion of tribal services, the Choctaw turned to a judicial remedy to recognize the power of the Choctaw Council.⁴³² And in 1981, a federal court declared that the Choctaw Nation’s 1860 Constitution remained in effect,⁴³³ prompting a new constitution in 1983.⁴³⁴

The Five Tribes’ new constitutions continued the three-branch governments that had existed in the nineteenth century.⁴³⁵ Yet now, the legislative branches existed as much smaller, unicameral tribal

⁴²⁶ *Id.* § 6, 34 Stat. at 139.

⁴²⁷ See Act of Oct. 22, 1970, Pub. L. No. 91-495, 84 Stat. 1091, 1091; Sean Rowley, *Cherokees Ratified First “Modern” Constitution in 1976*, TAHLEQUAH DAILY PRESS (Oct. 21, 2017), https://www.tahlequahdaily.com/news/cherokees-ratified-first-modern-constitution-in-1976/article_19fc963d-1df6-5f9c-a700-c8320012fc1e.html [<https://perma.cc/37AT-UZ43>].

⁴²⁸ See Rowley, *supra* note 427.

⁴²⁹ See Deer & Knapp, *supra* note 18, at 165–66.

⁴³⁰ See *id.* at 167–68; see also Harjo v. Kleppe, 420 F. Supp. 1110, 1143 (D.D.C. 1976), *aff’d sub nom.*, Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978) (adjudicating Muscogee citizens’ claims regarding the validity of the 1867 constitution).

⁴³¹ See Deer & Knapp, *supra* note 18, at 168–69; Harjo, 420 F. Supp. at 1144–46.

⁴³² See VALERIE LAMBERT, CHOCTAW NATION: A STORY OF AMERICAN INDIAN RESURGENCE 61–63, 90 (2007).

⁴³³ Morris v. Watt, 640 F.2d 404, 415 (D.C. Cir. 1981).

⁴³⁴ See LAMBERT, *supra* note 432, at 90–91, 93.

⁴³⁵ See, e.g., CONST. OF THE CHICKASAW NATION of 1983, art. V, § 1.

councils,⁴³⁶ likely reflecting the influence of the IRA documents. Additionally, the Tribes' membership provisions — whose nineteenth-century definitions had included intermarried whites, adopted Indians, and the descendants of enslaved people⁴³⁷ — now limited the polity to the descendants of those who had appeared on the turn-of-the-century allotment rolls.⁴³⁸ And although these governments have undergone some reforms since,⁴³⁹ the baseline constitutional structures have continued largely unchanged, even as the underlying nations have grown to encompass exceptionally large populations, extensive territories, a plethora of governmental services, and multibillion-dollar business and gaming enterprises.⁴⁴⁰

2. *Recognition.* — Another group of “self-determination” constitutions includes those of tribes that have gained “federal recognition” through the Federal Acknowledgment Process overseen by the Department of the Interior or congressional statute.⁴⁴¹ Because federal recognition entails that tribes have a government-to-government relationship with the United States — and are therefore eligible for federal services extended to Indians⁴⁴² — Native nations pursuing such recognition have often prepared governing documents, including constitutions, to exercise readily powers of tribal self-government.

One illustrative example of this constitution-making process is that of the Grand Traverse Band of Ottawa and Chippewa Indians. Residing in the lands that would eventually become Michigan, the Grand Traverse Band participated in several treaties with the United States during the nineteenth century.⁴⁴³ But confusion among U.S. negotiators regarding how the various Ottawa and Chippewa bands politically conceived of themselves infected the treaties. An 1836 treaty named the bands as a single “nation.”⁴⁴⁴ The bands, however, protested this characterization because of their relative independence from one another.⁴⁴⁵ Thus, the 1855 Treaty of Detroit formally eliminated this fictional nation in favor

⁴³⁶ See *id.* art. VI, § 1.

⁴³⁷ See, e.g., CELIA E. NAYLOR, *AFRICAN CHEROKEES IN INDIAN TERRITORY: FROM CHATTEL TO CITIZENS* 161 (2008).

⁴³⁸ See, e.g., CONST. OF THE CHICKASAW NATION of 1983, art. II, § 1.

⁴³⁹ See, e.g., Eric Lemont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM*, *supra* note 29, at 287, 294–310 (describing the Cherokee Nation's process for revising its 1976 constitution through an independent convention commission, broad citizen participation, and a four-year effort culminating in the ratification of the 2003 Constitution).

⁴⁴⁰ See, e.g., CHEROKEE NATION, <https://www.cherokee.org> [<https://perma.cc/5LMC-5VL5>].

⁴⁴¹ See MAINON A. SCHWARTZ, CONG. RSCH. SERV., R47414, *THE 574 FEDERALLY RECOGNIZED INDIAN TRIBES IN THE UNITED STATES* 1 (2024).

⁴⁴² See *id.*

⁴⁴³ See MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* 2–3, 34 (2012).

⁴⁴⁴ *Id.* at 156.

⁴⁴⁵ *Id.*

of recognizing the bands' distinctiveness.⁴⁴⁶ However, federal officials misinterpreted this provision in the 1870s, assuming that all the Lower Peninsula bands "had voluntarily agreed to disband and abandon their tribal relations."⁴⁴⁷ Thus, in the words of Native legal scholar and Grand Traverse Band member Matthew Fletcher, the Band was subject to "administrative termination."⁴⁴⁸ But a century later, the Band — still existing as a distinct community — began pushing for federal recognition in order to regain its governing power as well as to exercise its treaty fishing rights.⁴⁴⁹ And in 1978, the Band formally petitioned the Interior Department for federal recognition.⁴⁵⁰

Included with the petition was a draft tribal constitution that was subsequently subjected to protracted negotiations with federal officials.⁴⁵¹ Although the Band was the first tribe to receive federal recognition under the administrative Federal Acknowledgment Process in 1980,⁴⁵² Interior officials objected to the Band's proposed membership criteria that would have allowed members of other Michigan Ottawa bands, which were unrecognized at the time, to enroll.⁴⁵³ This dispute led to a standoff in which the Band sued in federal court and Interior officials responded with a threat to reconsider the recognition decision.⁴⁵⁴ Nevertheless, the Band and the federal government eventually reached a compromise that relied on specific blood-quantum requirements.⁴⁵⁵ And in 1987, after federal negotiators had imposed the membership criteria and another provision mandating secretarial approval of attorney contracts, the Secretary of the Interior finally authorized a ratification election, which passed overwhelmingly.⁴⁵⁶

Despite the federal government's use of its recognition authority to dictate the content of certain provisions, the Band was able to structure the Constitution's remainder in a manner that reflected its sovereignty. Although the Band's governmental structure largely resembled those established under the IRA, with its emphasis on a tribal council,⁴⁵⁷ the Constitution created an independent judiciary as a separate branch.⁴⁵⁸ Additionally, the Band deliberately excluded any requirement for secretarial approval of tribal legislation, rejecting this paternalist practice as

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *See id.* at 104–05.

⁴⁵⁰ *Id.* at 105.

⁴⁵¹ *See id.* at 157.

⁴⁵² *Id.* at 105.

⁴⁵³ *See id.* at 158.

⁴⁵⁴ *See id.* at 159.

⁴⁵⁵ *See id.* at 159–60.

⁴⁵⁶ *See id.* at 161.

⁴⁵⁷ *See* CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS OF 1988, art. III, § 1.

⁴⁵⁸ *Id.* art. V, §§ 1, 6.

anathema to self-government.⁴⁵⁹ As the example of the Grand Traverse Band indicates, those tribes seeking federal recognition have had to find alternate ways to claim sovereign powers through constitutions that are often subject to greater federal scrutiny and even interference.

3. *Reorganization.* — The final set of constitutions that have dominated tribal constitutional development during the Self-Determination Era are those that have amended or replaced the IRA constitutions enacted in the 1930s and 1940s. From the beginning, the IRA constitutions have been subject to extensive criticism. Because of their supposedly “boilerplate” form, reliance on Euro-American institutions, and English writing, these documents often contained concepts and language unfamiliar to many Native peoples.⁴⁶⁰ Also, the federally managed and rushed nature of IRA constitution writing meant that there was little time to incorporate Native custom.⁴⁶¹ Ultimately, Native skepticism, tribal factionalism, and institutional deficiencies undermined many of the constitutions’ effectiveness, with some nations disregarding them altogether.⁴⁶²

But Native nations have undertaken efforts to address these issues. In some cases, these nations have merely amended their IRA constitutions, targeting specific aspects of their governmental institutions. For example, the Northern Cheyenne Tribe in Montana was one of the first nations to ratify an IRA constitution in late 1935.⁴⁶³ This Constitution followed the standard IRA structure, vesting all enumerated powers in a tribal council and its officers.⁴⁶⁴ By the 1990s, the council was composed of twenty-one members who were elected to two-year terms and worked as legislators on a part-time basis.⁴⁶⁵ Additionally, the Tribe had established a judiciary but not as an independent branch of government.⁴⁶⁶

However, a constitutional reform committee restructured this ad hoc nature of the government in the 1990s.⁴⁶⁷ The committee recommended reducing the size of the council to ten full-time members who would serve staggered terms of four years.⁴⁶⁸ It also introduced a separation of powers amendment that designated the judiciary as a constitutional branch of government; the council as the legislative department; and the

⁴⁵⁹ See FLETCHER, *supra* note 443, at 160–61.

⁴⁶⁰ Stark, *supra* note 18, at 129–30; Haas & Jay, *supra* note 142, at 20–23.

⁴⁶¹ Haas & Jay, *supra* note 142, at 20.

⁴⁶² See Lemont, *supra* note 18, at 148; *see also, e.g.*, Haas & Jay, *supra* note 142, at 21–22 (describing the Hopi Tribe’s refusal to adhere to its IRA constitution).

⁴⁶³ See CONST. AND BYLAWS OF THE NORTHERN CHEYENNE TRIBE of 1935.

⁴⁶⁴ *Id.* art. III, § 1; *id.* art. IV.

⁴⁶⁵ See Lemont, *supra* note 18, at 161–62.

⁴⁶⁶ *See id.* at 161.

⁴⁶⁷ *See id.*

⁴⁶⁸ *See id.* at 161–62.

president, vice president, secretary, and treasurer as part of the executive branch.⁴⁶⁹ In 1996, the Tribe's members approved these amendments.⁴⁷⁰

In other cases, Native nations have written entirely new constitutions to supersede the earlier IRA documents. The Hualapai Tribe in Arizona took this approach when it adopted a new constitution in 1991.⁴⁷¹ Once again, its IRA constitution had concentrated all governing authority in a nine-member tribal council.⁴⁷² The document also had liberal recall procedures that allowed either two-thirds of the council or a petition signed by seventy-five voters to initiate a recall election.⁴⁷³

Concerned about the council's interference in tribal court decisions and the frequency of recall elections, several reform efforts were launched in the 1980s. In the 1990s, at the prompting of a New York nonprofit, a volunteer constitutional reform committee formed and subsequently wrote a new constitution.⁴⁷⁴ This new charter divided the government into two branches — legislative and judicial — and gave the judiciary the power to declare laws unconstitutional.⁴⁷⁵ It also provided for an election board and heightened the recall initiative threshold to twenty percent of eligible voters while limiting the number of council members who could be simultaneously recalled to three.⁴⁷⁶ Content with these efforts to stabilize the government, Hualapai members overwhelmingly ratified the new Constitution.⁴⁷⁷

As the IRA examples demonstrate, constitutional reform efforts have revolved around modernizing and stabilizing tribal governments.⁴⁷⁸ Felix Cohen's concerns around inefficiency and delay in recommending a single governing body⁴⁷⁹ failed to predict the problems that would accompany both the incongruity of the IRA structure to tribal politics and the accretion of power and resources to tribal governments over the following decades.⁴⁸⁰ Thus, Native nations have once again turned to

⁴⁶⁹ See *id.* at 162; CONST. AND BYLAWS OF THE NORTHERN CHEYENNE TRIBE of 1935, art. XI (amended 1996).

⁴⁷⁰ See Lemont, *supra* note 18, at 162.

⁴⁷¹ See *id.* at 158; CONST. OF THE HUALAPAI TRIBE OF THE HUALAPAI INDIAN RESERVATION, ARIZONA of 1991, pml.

⁴⁷² CONST. AND BY-LAWS OF THE HUALAPAI TRIBE OF THE HUALAPAI RESERVATION, ARIZONA of 1938, art. III, § 1.

⁴⁷³ *Id.* art. V, §§ 2–3.

⁴⁷⁴ Lemont, *supra* note 18, at 158.

⁴⁷⁵ CONST. OF THE HUALAPAI INDIAN TRIBE OF THE HUALAPAI INDIAN RESERVATION, ARIZONA of 1991, art. III; *id.* art. VI, § 3.

⁴⁷⁶ *Id.* art. IV, § 12.

⁴⁷⁷ See *id.* at 1, <https://webgen1files.revize.com/hualapaitribeaz/Documents/Community/Election/constitution-of-the-hualapai-indian-tribe.pdf> [<https://perma.cc/E8KG-7JSX>] (election results).

⁴⁷⁸ As referenced above, a central piece of these reforms has been instituting an independent judiciary, even though there have also been calls for strengthening tribal governments' executive branches. See *Developments in the Law — Chapter One: Tribal Executive Branches: A Path to Tribal Constitutional Reform*, *supra* note 55, at 1664.

⁴⁷⁹ See *supra* notes 340–344 and accompanying text.

⁴⁸⁰ See Lemont, *supra* note 18, at 153, 155–56.

constitutionalism to correct the oversights of federal officials and find their own paths to self-government.

B. Contemporary Tensions in Indigenous Constitutionalism

Despite Native nations' successful constitutional reforms in recent decades, the challenges of Indigenous constitutionalism persist into the present. As the history recounted above helps us understand, tribal constitutions are where the practicalities of everyday governance and the higher principles of Native sovereignty and nationhood converge. And although the consensus of the current constitutional reform movement has been to modernize institutions — often aligning them more with Euro-American structures⁴⁸¹ — Native nations continue to struggle with balancing tribal sovereignty and federal plenary power, Euro-American and customary law, and political traditions and contemporary circumstances. In other words, tensions arise when Native nations seek to “match”⁴⁸² their constitutions with their enduring yet ever-changing political culture while facing the historical and legal weight of colonialism.

Although an in-depth treatment of these issues is reserved for future work, it is worth highlighting a few instances in which Native nations' modern constitutions have confronted these tensions while exhibiting the features of Indigenous constitutionalism. For example, some nations have continued subverting the assimilative aspect of Euro-American constitutionalism, making space for customary law and traditional institutions.⁴⁸³ One such nation, the White Earth Nation in Minnesota, would establish a “Council of Elders” through its proposed constitution to “provide ideas and thoughts on totemic associations, traditional knowledge, cultural and spiritual practices, native survivance, and considerations of resource management, and advise the Legislative Council.”⁴⁸⁴ Others have adapted constitutional bodies to serve the modern circumstances of their polity. Facing the division of their population

⁴⁸¹ See sources cited *supra* note 460.

⁴⁸² Stephen Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't* 12 (Joint Occasional Papers on Native Affs., (No. 2005-02, 2005)), https://nnigovernance.arizona.edu/sites/default/files/2022-09/2005_CORNELL_kalt_JOPNA_twoapproaches.pdf [<https://perma.cc/RG4A-RC4U>]. Tribal political and economic development scholars Joseph Kalt and Stephen Cornell have argued that a “[c]ultural match,” *id.* at 12, must exist between a tribe’s government and its “[I]ndigenous political culture,” *id.* at 11, in order for the government to be effective and gain legitimacy from the tribal population.

⁴⁸³ See, e.g., CONST. OF THE OSAGE NATION of 2006, art. XIV, § 1 (recognizing traditional villages and their distinctive customs and histories); CONST. OF THE YUOK TRIBE of 1993, art. VII (mandating that the tribal judiciary, “whenever possible, shall give full recognition and weight to Tribal customs”).

⁴⁸⁴ CONST. OF THE WHITE EARTH NATION of 2009, ch. 8, in GERALD VIZENOR & JILL DOERFLER, *THE WHITE EARTH NATION: RATIFICATION OF A NATIVE DEMOCRATIC CONSTITUTION* 63, 69–70 (2012). Although over eighty percent of White Earth Nation voters chose to adopt the proposed constitution in a 2013 referendum, resistance on the Nation’s Business Council has thus far prevented the constitution from going into effect. See WILKINS, *supra* note 20, at 186–87.

between those on the reservation, or tribal lands, and those outside these lands, both the Citizen Potawatomi and Cherokee Nations in Oklahoma provided seats on their councils for those members who live outside the Nations and the state.⁴⁸⁵ And finally, some nations have sought to shore up their constitutions' role in resisting incorporation into the United States and claiming their sovereign status recognized under U.S. law.⁴⁸⁶ In contrast to several IRA constitutions stating that the tribe's relationship to the U.S. government is "similar to that which a town or a county has to State and Federal Governments,"⁴⁸⁷ other constitutions reinforce inherent tribal sovereignty. For instance, the Choctaw Nation's current Constitution affirms that the people "ordain and establish" the document "pursuant to the inherent tribal sovereignty of the Choctaw Nation of Oklahoma."⁴⁸⁸ In sum, even the twenty-first-century constitutional debates in Indian Country center on the same features that have defined Indigenous constitutionalism since its origins 200 years prior.

* * *

In placing the tribal constitutions of the Self-Determination Era in conversation with the nineteenth-century and IRA documents, we can begin to grasp the range of motivations for Native nations using written constitutions. As this Article has demonstrated through numerous examples, Native nations have deployed, and continue to deploy, constitutions to express their sovereignty internally and externally, determine the role of customary law and tribal culture in modern governance, and build or rebuild a tribal state apparatus while distributing governmental power through separation of powers and checks and balances. And by unveiling the range of modern uses to which Native nations put constitutions, Indigenous constitutionalism paves the way for future scholarship to drill down on the specific methods incorporated into tribal constitutions, thereby providing examples for other Native nations to follow in their own reform efforts.

V. A CONSTITUTIONAL PRISM: LESSONS FROM INDIGENOUS CONSTITUTIONALISM

The study of Indigenous constitutionalism has lessons beyond just the history of tribal constitutions. While, at first glance, the story of written tribal constitutions would simply seem to be a mirror, reflecting the history of federal Indian affairs and the design of Euro-American

⁴⁸⁵ See Reese, *supra* note 9, at 614; CONST. OF THE CHEROKEE NATION of 1999, art. VI, § 3.

⁴⁸⁶ See, e.g., CONST. OF THE YUOK TRIBE of 1993, pmbl. (stating that the Constitution was adopted, in part, to "[u]phold and protect our tribal sovereignty which has existed from time immemorial and which remains undiminished").

⁴⁸⁷ CONST. AND BY-LAWS OF THE SAN CARLOS APACHE TRIBE, ARIZONA of 1936, art. I.

⁴⁸⁸ CONST. OF THE CHOCTAW NATION OF OKLAHOMA of 1983, pmbl.

constitutions, this Part contends that Indigenous constitutionalism actually serves as a prism, disrupting what we think we know about tribal law, federal Indian law, and U.S. constitutional law and its history. First, Indigenous constitutionalism makes us reconsider how to approach tribal constitutional law, providing key tenets of an academic framework. Second, the history of tribal constitutions reconstructs our conception of the origins of the field of federal Indian law, revealing that tribal constitutions and federal Indian law were cocreated. Third, bringing attention to the long, connected, and immense history of tribal constitution making should recast our narratives on American constitutional history. This history and the vast number of tribal constitutions should also make us rethink how we talk about and teach U.S. constitutional law. Finally, various features of tribal constitutions unsettle and expand the meaning of American constitutionalism. Considering tribal constitutions forces us to alter our understanding of what an American constitution is, what it does, and how it can design a government.

This Part offers some preliminary thoughts on these reconstructions. It first paints the broad outlines of a tribal constitutional law framework informed by Indigenous constitutionalism. It subsequently discusses the role that tribal constitutions have played in the creation of the field of federal Indian law and its foundation on the principle of tribal sovereignty. The Part then advocates for a revamped approach to U.S. constitutional law and history that incorporates tribal constitutions. It concludes by contemplating ways that Indigenous constitutionalism reshapes how we think about constitutions in the United States.

A. Rethinking the Tribal Constitutional Law Framework

While other scholars have already shown how tribal constitutions can contribute to a “New Era of American Tribal Law,”⁴⁸⁹ Indigenous constitutionalism opens up new and promising lines of inquiry for studying tribal constitutional law on its own terms. In particular, if we view Indigenous constitutionalism as an ongoing dialogue among Native nations on how to organize their governments in the face of U.S. colonialism — a dialogue that stretches across two centuries — we can identify the persistent issues that should structure the academic and legal framework in which to situate tribal constitutions. Of course, tribal constitutional law begs many of the same foundational questions as federal and state constitutional law, including separation of powers, enumeration,

⁴⁸⁹ Reese, *supra* note 9, at 621; *see also* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 123 (3d ed. 2024) (situating modern tribal constitutions and tribal court cases interpreting such constitutions within the larger study of tribal law).

and individual-rights recognition.⁴⁹⁰ But tribal constitutions also confront challenges that are unique to Native nations, and any tribal constitutional law framework must be structured, in part, around these distinctive issues. Therefore, the following section draws from tribal constitutional practices to briefly illustrate three examples that should frame scholarly and legal analysis in the field: the careful construction of Native polities along the lines of membership and territory, the integration of Native customary-law understandings and Euro-American legal concepts into hybrid constitutional orders, and the impacts of Native nations' sovereign status within a protectorate system on constitutional design. And although these examples may initially seem like limitations on Indigenous governance, Native people's constitutional practices demonstrate that they are actually sources of immense constitutional creativity.

I. Membership and Territory. — Like all nations, Native nations exhibit a dual nature based around membership and territory. But unlike other nations, Native nationhood depends on Indigeneity. In other words, their claim to a separate existence and sovereignty depends on maintaining their character as a group bound by shared language, culture, and lineage whose ancestors resided on the North American continent prior to contact.⁴⁹¹ Yet now, Native nations also exist as demarcated territories.⁴⁹² But balancing this duality in constitutional form — through definitions of membership, territorial boundaries, and the jurisdiction that tribal governments exercise over each — has long vexed Native nations.⁴⁹³ Federal policy has especially exacerbated this issue as federal officials diminished tribal land bases,⁴⁹⁴ federal laws defined “Indian” status based on blood,⁴⁹⁵ and federal courts narrowed tribal jurisdiction over non-Indians and fee land within reservations.⁴⁹⁶

Thus, Native nations have pursued various constitutional approaches to maintain their identity as Indigenous people while exerting control over their territories. Whereas the first Choctaw and Cherokee

⁴⁹⁰ For a discussion of some of the foundational questions in U.S. constitutional law, see, for example, RICHARD PRIMUS, *THE OLDEST CONSTITUTIONAL QUESTION: ENUMERATION AND FEDERAL POWER* 1–2, 17–18 (2025). For consideration of similar issues in tribal constitutional law, see, for example, Reese, *supra* note 49 (manuscript at 3), and Kekek Jason Stark, *The Utmost Rights and Interests of the Indians: Tribal Law Interpretations of the Indian Civil Rights Act*, 30 TEX. J. ON C.L. & C.R. 270, 324–25 (2025).

⁴⁹¹ See Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 8–9 & n.37 (2012). This view has been described as “membership-based sovereignty.” Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 3–4 & n.9 (1993).

⁴⁹² This view has been described as “geographically-based sovereignty.” Dussias, *supra* note 491, at 4 & n.10.

⁴⁹³ See *infra* pp. 1323–24.

⁴⁹⁴ See Katherine Florey, *Tribal Land, Tribal Territory*, 56 GA. L. REV. 967, 990–94 (2022).

⁴⁹⁵ See Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 48–50 (2006).

⁴⁹⁶ See Florey, *supra* note 494, at 999–1014.

constitutions largely continued the kinship-based membership systems that had long served as the basis of their polities,⁴⁹⁷ several of the nineteenth-century tribal constitutions reflected Native nations' conception of themselves as territorial sovereigns, connecting citizenship to residency within tribal territories, even when the person had a different or no tribal background.⁴⁹⁸ The IRA constitutions similarly tied membership to residency within tribal reservations, yet they often incorporated descendancy or blood-quantum requirements that limited belonging along lines of ancestry and race.⁴⁹⁹ However, Native nations have increasingly rejected such ties to place, instead disentangling citizenship from territory completely. They now define citizenship on the basis of descendancy or blood quantum, with no residency requirement,⁵⁰⁰ and separately claim jurisdiction over their territorial boundaries.⁵⁰¹

Yet separating these components has led to new governance dilemmas: For example, when the tribal government is structured around territorial representation, how should the citizens that live outside that territory be represented? Relatedly, should a tribal government exercise extraterritorial jurisdiction over its citizens, and what should the scope of that jurisdiction be?

Native nations have answered such dilemmas by increasingly tying their governance to their citizens, moving beyond their traditional territorial boundaries. One approach lies in Native nations restructuring representation in their governments to include the voices of the substantial portions of their populations living outside tribal boundaries. For example, approximately two-thirds of the Citizen Potawatomi Nation's citizens lived outside its lands in Oklahoma in 2010.⁵⁰² To accommodate this fact, the Nation possesses a representative legislature in which eight of the legislature's sixteen representatives "are chosen from legislative districts drawn to represent citizens who live outside the state of Oklahoma."⁵⁰³ A second approach lies in assertions of extraterritorial

⁴⁹⁷ CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 55; CONST. OF THE CHEROKEE NATION of 1827, *supra* note 102, art. III, § 4, at 120.

⁴⁹⁸ See, e.g., CONST. OF THE CHICKASAW NATION of 1856, General Provisions, § 11, in CONSTITUTION, LAWS, AND TREATIES OF THE CHICKASAWS 3, 19 (1860) ("The Legislature shall have the power, by law, to admit, or adopt any person to citizenship in this Nation, except a negro, or descendant of a negro . . ."); CONST. OF THE CHEROKEE NATION of 1839, art. III, § 5 (amended 1866), in CONSTITUTION AND LAWS OF THE CHEROKEE NATION 23, 25 (1875) (granting citizenship to "[a]ll native born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen . . . as well as free colored persons . . . and their descendants, who reside within the limits of the Cherokee Nation").

⁴⁹⁹ See, e.g., CONST. AND BY-LAWS OF THE STOCKBRIDGE MUNSEE COMMUNITY OF WISCONSIN of 1937, art. III (describing membership requirements, including one-fourth blood quantum and residency "within the original confines of the Stockbridge Reservation").

⁵⁰⁰ See, e.g., CONST. OF THE MOHEGAN TRIBE OF INDIANS OF CONNECTICUT of 2007, art. V, § 1 (lineal descendancy requirement for membership).

⁵⁰¹ See, e.g., *id.* art. III, § 1 (describing territorial extent of Mohegan Tribe's jurisdiction).

⁵⁰² See Reese, *supra* note 9, at 613.

⁵⁰³ *Id.* at 614; see also CONST. OF THE CITIZEN POTAWATOMI NATION of 2007, art. 12, § 3.

jurisdiction. For instance, the Yurok Tribe's Constitution claims extensive jurisdiction not only over its "Ancestral Lands," which extend beyond the current bounds of the Yurok Reservation,⁵⁰⁴ but also over "all of its members wherever located."⁵⁰⁵ Therefore, Indigenous constitutionalism illustrates how Native nations have widely experimented through their constitutions to maintain themselves not just as a *government* but as a *people* whose ties to a particular homeland persist wherever tribal citizens may reside.

2. *Legal Hybridity*. — Another area in which tribal constitutions balance the competing demands of maintaining Indigeneity while engaging with modernity is the provenance of the concepts within their provisions. As discussed above, a key feature of tribal constitutions is their hybridity, combining a Native nation's traditional political institutions and customary law with Euro-American governmental structures.⁵⁰⁶ Therefore, mapping out the various approaches that Native nations have pursued in integrating elements of both Indigenous and Euro-American legal orders into their constitutions is integral to understanding a swath of issues — the particular origins of concepts and language in a tribal constitution, the history and purpose of certain provisions, and those provisions' ultimate meaning — in a realm of constitutional interpretation that is so culturally fraught.⁵⁰⁷

But disentangling these elements is not always straightforward, especially when Native peoples often translated their own ideas about law and governance into the dominant terminology of Euro-American law.⁵⁰⁸ Take the concept of citizenship in the Cherokee Nation for example. Despite being a foreign concept to the kinship-based society,⁵⁰⁹ citizenship was readily adopted in the Cherokee's 1827 Constitution as the marker for belonging in the constitutional republic.⁵¹⁰ And, even as the Constitution's citizenship provision expanded the category of membership in the Cherokee Nation to the children of Cherokee men and "free women," it explicitly acknowledged the traditional matrilineal system by recognizing "the posterity of Cherokee women by all free men" as citizens.⁵¹¹ Certainly, such conceptual translations could also leave behind, and even undermine, traditional governance: The expansion of Cherokee citizenship and exclusive grant of suffrage to Cherokee men further disempowered Cherokee women and the clan system the women

⁵⁰⁴ CONST. OF THE YUROK TRIBE of 1993, art. I, § 1.

⁵⁰⁵ *Id.* § 3.

⁵⁰⁶ See *supra* section I.A, pp. 1270–74.

⁵⁰⁷ For examples of how tribal courts have approached hybridity in tribal constitutional interpretation cases, see Fletcher, *supra* note 36, at 726–31, 744–46, 748–51.

⁵⁰⁸ See *supra* pp. 1288–89, 1291–92.

⁵⁰⁹ See Theda Perdue, *Clan and Court: Another Look at the Early Cherokee Republic*, 24 AM. INDIAN Q. 562, 564 (2000).

⁵¹⁰ See CONST. OF THE CHEROKEE NATION of 1827, *supra* note 102, art. I, § 2 (referring to "the citizens of the Nation").

⁵¹¹ *Id.* art. III, § 4.

controlled.⁵¹² Nevertheless, this example reveals the numerous possibilities inherent in the hybridity of Indigenous constitutionalism — ranging from Native peoples' fixation of customary law, to translation of customary understandings into Euro-American terms, to the wholesale adoption of Euro-American legal concepts — and the need for those engaged in making, interpreting, and studying tribal constitutional law to pinpoint them.

3. *Sovereign Arrangements.* — Finally, any tribal constitutional law framework should consider how tribal constitutions reflect the unique space that Native nations occupy in the American constitutional system. Not formally part of the U.S. constitutional order that limits its constituent polities to the federal and state governments, Native nations exist within a protectorate relationship with the United States.⁵¹³ Thus, despite being subject to federal plenary power, Native nations retain “*inherent powers of a limited sovereignty which has never been extinguished.*”⁵¹⁴ And tribal constitutions — through their language as well as the governing institutions they establish — have responded creatively to such an arrangement. For instance, the Choctaw Nation's current constitution requires all elected and appointed officials to take an oath upholding the Oklahoma and U.S. Constitutions,⁵¹⁵ even as it clearly states that the charter itself is “establish[ed] pursuant to the inherent tribal sovereignty” of the Nation.⁵¹⁶

Perhaps the best illustration of the protectorate relationship's impact derives from comparing Indigenous constitutionalism to both national constitutionalism and “subconstitutionalism.”⁵¹⁷ On the one hand, Native nations are not on the same plane as states on the international level. In contrast to the constitutional freedom enjoyed by ordinary states,⁵¹⁸ tribal constitutions are subject to external constraints imposed through federal plenary power, such as the federal Indian Civil Rights Act,⁵¹⁹ which requires tribal governments to recognize certain individual rights.⁵²⁰ On the other hand, because Native nations are not included within the “two-tiered constitutional structure that establishes a superior state and a group of subordinate states,”⁵²¹ tribal constitutions have a different relationship to the U.S. Constitution than the state constitutions that are subject to its supremacy. And although Native nations are arguably more constrained than states under plenary power,

⁵¹² See Perdue, *supra* note 509, at 564–66.

⁵¹³ See *supra* section I.B.3, pp. 1278–83.

⁵¹⁴ COHEN, *supra* note 30, at 122.

⁵¹⁵ CONST. OF THE CHOCTAW NATION OF OKLAHOMA of 1983, art. XVII.

⁵¹⁶ *Id.* pmb1.

⁵¹⁷ Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1584–85 (2010).

⁵¹⁸ See *id.* at 1595–96.

⁵¹⁹ 25 U.S.C. §§ 1301–1304.

⁵²⁰ See *id.* § 1302.

⁵²¹ Ginsburg & Posner, *supra* note 517, at 1584.

the “superconstitution,”⁵²² that is, the U.S. Constitution, does not act as a convergence point⁵²³ for tribal constitutions. Thus, these charters have set up a wide array of governing structures — from three-branch governments⁵²⁴ to singular tribal councils⁵²⁵ to federalist systems⁵²⁶ — despite all being constructed within the United States. Ultimately, considerations of tribal constitutional design must account for this seemingly contradictory mix of limits and autonomy that flow from Native nations’ sovereign status within a protectorate.

B. *Revising the Origin Stories of Federal Indian Law*

The field of federal Indian law has two origin stories. The first story focuses on the principles underlying the field — recognition of Native title,⁵²⁷ Native nations as “domestic dependent nations,”⁵²⁸ federal supremacy over Indian affairs, and tribal sovereignty⁵²⁹ — and traces their beginnings to the U.S. Supreme Court cases in the 1820s and 1830s known as the “Marshall Trilogy.”⁵³⁰ The second story recounts when federal Indian law coalesced as a “field,” identifying the 1941 publication of Felix Cohen’s *Handbook of Federal Indian Law* and its elucidation of general Indian law concepts as the moment it was birthed.⁵³¹ But thus far, these standard narratives have emphasized the roles played by non-Native people, namely Chief Justice Marshall and Cohen, in constructing the principles and bounds of a field attempting to situate Native nations within the American federal system. And these stories have insulated federal Indian law from the laws of Native peoples themselves, suggesting that the two fields have developed in isolation from one another. In the words of Deloria, “what is missing in federal Indian law are the Indians.”⁵³²

Indigenous constitutionalism, however, revises both these stories, highlighting how tribal constitutions — as visible and significant embodiments of tribal law — and federal Indian law were actually cocreated. According to the history recounted above, Indigenous constitutionalism demonstrates that the major moments of tribal constitutional development and the creation of federal Indian law occurred simultaneously. Also, instead of developing in isolation, these bodies of

⁵²² *Id.*

⁵²³ *See id.* at 1626–27.

⁵²⁴ *See, e.g.*, CONST. OF THE PASCUA YAQUI TRIBE of 1988, art. IV.

⁵²⁵ *See, e.g.*, CONST. AND BYLAWS OF THE TULE RIVER INDIAN TRIBE OF CALIFORNIA of 1936, art. III, § 1 (as amended).

⁵²⁶ *See, e.g.*, CONST. AND BY-LAWS OF THE HOPI TRIBE, ARIZONA of 1936, art. III; *id.* art. IV.

⁵²⁷ *See Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 603 (1823).

⁵²⁸ *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

⁵²⁹ *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561–62 (1832).

⁵³⁰ *See Fletcher*, *supra* note 40, at 628.

⁵³¹ *See* Vine Deloria, Jr., Essay, *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 206 (1989).

⁵³² *Id.* at 205.

law influenced one another, leading to the designation of tribal sovereignty as a foundational principle in federal Indian law.

Indigenous constitutionalism's history reveals that it was no coincidence that *Worcester's* recognition of tribal sovereignty⁵³³ shortly followed the writing of the first tribal constitutions. As statements of territorial sovereignty, permanence, and national unity, the Choctaw and Cherokee acts of constitution making were the opening salvo in a legal conflict that eventually pitted federal, state, and tribal power against one another.⁵³⁴ The constitutions directly led to the southern states extending their jurisdiction over Native peoples and outlawing tribal governments.⁵³⁵ And the Cherokee Nation's challenges to Georgia's laws through litigation resulted in two of the three cases of the Marshall Trilogy, *Cherokee Nation v. Georgia*⁵³⁶ and *Worcester v. Georgia*.⁵³⁷ Although the Cherokee were unsuccessful in *Cherokee Nation*, Chief Justice Marshall declared that the Nation was a "state" after confronting the Cherokee's Constitution and its assertions of self-government and territorial jurisdiction.⁵³⁸ A year later in *Worcester*, Marshall took this statement even further, declaring that Native nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive"⁵³⁹ and that the Cherokee Nation specifically was "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."⁵⁴⁰ Ultimately, Marshall's recognition of the tribal right of self-government, the lack of state authority in Indian Country, and federal supremacy in Indian affairs — the principles that laid the foundation for federal Indian law — directly followed the acts of writing and the claims made within the Choctaw and Cherokee Constitutions.

The tether between tribal constitutions and federal Indian law created during the Removal Era revealed itself again in the Indian New Deal of the early twentieth century. As discussed in detail above, tribal constitutions and the federal recognition of tribal authority's scope were deeply intertwined in the Interior Solicitor's *Powers of Indian Tribes* opinion.⁵⁴¹ And this opinion, along with Cohen's *Basic Memorandum*, created an explicit link between the earlier constitutions that informed the guidance documents and the IRA constitutions that incorporated the enumerated tribal powers.⁵⁴²

⁵³³ See *Worcester*, 31 U.S. (6 Pet.) at 561–62.

⁵³⁴ See *supra* section II.B, pp. 1292–98.

⁵³⁵ See *id.*

⁵³⁶ 30 U.S. (5 Pet.) 1 (1831).

⁵³⁷ 31 U.S. (6 Pet.) 515 (1832).

⁵³⁸ 30 U.S. (5 Pet.) at 6, 16.

⁵³⁹ 31 U.S. (6 Pet.) at 557.

⁵⁴⁰ *Id.* at 561.

⁵⁴¹ See discussion *supra* section III.A.2, pp. 1305–08.

⁵⁴² See discussion *supra* section III.A, pp. 1302–08.

But Cohen's *Handbook of Federal Indian Law* was also a creation of this moment. Along with implementing the IRA, in the late 1930s and early 1940s, Interior officials set out to "reduc[e] th[e] unmanageable mass of [Indian law] materials" — quantified at the time as "more than 4,000 treaties and statutes and upon thousands of judicial decisions and administrative rulings" — to "a simple manual."⁵⁴³ Under the leadership of Felix Cohen, a team of lawyers completed this "manual," titled the *Handbook of Federal Indian Law*, in 1942.⁵⁴⁴ But the *Handbook* became more than a "resource . . . where one can find leads for research."⁵⁴⁵ Rather, it has become "canon" for federal Indian law doctrine,⁵⁴⁶ with Deloria derisively accusing courts of citing "the *Handbook* with approval as if they were using Gospels and, one might add, with considerably more frequency."⁵⁴⁷

In designating federal law regarding Indians as a "field,"⁵⁴⁸ the *Handbook* identified several key principles underlying the doctrine, including that of "tribal self-government."⁵⁴⁹ In fact, Cohen's chapter on "The Scope of Tribal Self-Government"⁵⁵⁰ largely reproduced the discussion on tribal authority featured in the *Powers of Indian Tribes* opinion.⁵⁵¹ The chapter began by similarly characterizing tribal powers as "inherent powers" of tribal sovereignty rather than "delegated" federal powers.⁵⁵² It also cited the opinion directly for some propositions while featuring many of the same federal court cases analyzing tribal constitutions on which the opinion had relied.⁵⁵³

However, the cocreation of tribal constitutions and federal Indian law is made even clearer in the larger context of this moment. The *Handbook* was being produced at the same time that Native nations across Indian Country were engaged in constitution writing under the IRA.⁵⁵⁴ These constitutions instantiated tribal self-government as federal officials were grounding this new category of federal Indian law in the principle of tribal sovereignty.⁵⁵⁵ Once again, tribal exercises of sovereignty went hand-in-hand with federal recognition of this right.

⁵⁴³ Harold L. Ickes, *Foreword* to COHEN, *supra* note 30, at v.

⁵⁴⁴ Deloria, *supra* note 531, at 206.

⁵⁴⁵ *Id.* at 208.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* at 207.

⁵⁴⁸ Nathan R. Margold, *Introduction* to COHEN, *supra* note 30, at viii.

⁵⁴⁹ *Id.* at x.

⁵⁵⁰ COHEN, *supra* note 30, at 122.

⁵⁵¹ Compare *id.* at 122–26 (identifying the source and range of tribal powers), with discussion *supra* section III.A.2, pp. 1305–08 (highlighting the same analysis within the *Powers of Indian Tribes* opinion).

⁵⁵² COHEN, *supra* note 30, at 122 (emphases omitted).

⁵⁵³ See, e.g., *id.* at 125, 143.

⁵⁵⁴ See *supra* Part III, pp. 1300–11.

⁵⁵⁵ See *id.*

But what does it mean to revise these origin stories in ways that show the simultaneous rise of Indigenous constitutionalism and federal Indian law? Conceptually, I contend that this reconstruction of the field's history allows us to recognize that Indians have had a large part to play in the foundational moments of federal Indian law. Through their actions and arguments for Native nations' authority — as embodied in the tribal constitutions — Native peoples have forced non-Native jurists to contend with tribal sovereignty and convinced them to include it as a central tenet of federal law. And, by emphasizing federal Indian law's tribal law origins, Native peoples may continue to push for further recognition and incorporation of tribal law into federal Indian law as well as challenge American law's colonial tendencies.

Doctrinally, tribal constitutions can concretize what the federal-law concept of tribal sovereignty means. These revised origin stories reveal that the tribal constitutions of the nineteenth and early twentieth centuries supplied the exact principles on which the federal concept is based. Thus, rather than “engag[ing] with . . . sovereignty on a solely theoretical level”⁵⁵⁶ or as a signal that broadly “recognizes a government's importance and acknowledges its interests,”⁵⁵⁷ federal jurists could look to the governmental powers and jurisdictional definitions explicitly set out in the tribal constitutions — specifically the provisions that federal officials recognized and deferred to — to elucidate the scope of tribal authority. This turn to tribal constitutions would especially provide federal courts with a historical and legal basis for decisions regarding contemporary and controversial topics, such as Native nations' powers of exclusion,⁵⁵⁸ property regulation,⁵⁵⁹ and civil jurisdiction over, and taxation of, nonmembers.⁵⁶⁰

C. Reframing the Narratives of American Constitutional Law and History

The dominant narratives of U.S. constitutional law and history are woefully incomplete. For one, these narratives almost exclusively focus on the U.S. Constitution, reinforcing the notion that it is an exceptional document that demands veneration.⁵⁶¹ In constitutional law courses, students learn the content and interpretations of the U.S. Constitution. Histories have also prioritized the federal charter while often looking to

⁵⁵⁶ Reese, *supra* note 9, at 630.

⁵⁵⁷ Gregory Ablavsky, *Structural Federal Indian Law After Brackeen*, 67 ARIZ. L. REV. 291, 341 (2025).

⁵⁵⁸ See, e.g., Florey, *supra* note 494, at 1017–37.

⁵⁵⁹ See, e.g., Michelle Bryan, *A Most Essential Power: The Case for Restoring Comprehensive Land Use Authority in Indian Country*, 48 PUB. LAND & RES. L. REV. 46, 96–97 (2025).

⁵⁶⁰ See, e.g., *Lexington Ins. Co. v. Smith*, 117 F.4th 1106, 1107–08 (9th Cir. 2024) (denial of rehearing en banc).

⁵⁶¹ See RANA, *supra* note 65, at 3–4 (describing and critiquing the concept of “creedal constitutionalism,” *id.* at 3 (emphasis omitted)).

the thoughts and actions of the white, male elite that dominated the national government.⁵⁶² Recently, legal scholars have called for the inclusion of state constitutions⁵⁶³ — and even territorial ones⁵⁶⁴ — in these narratives, yet this shift is still one in the making.

But Indigenous constitutionalism, particularly its two-hundred-year history and hundreds of constitutions, shows just how much the prevailing approaches omit. Certainly, Native nations differ from U.S. states and territories, existing outside the American constitutional framework. However, as Nambé legal scholar Elizabeth Reese has pointed out, “[t]ribal governments are American governments.”⁵⁶⁵ They govern territories and peoples within the boundaries of the United States and have been incorporated into the dependent web of American sovereigns. Further, Native nations have adopted the Euro-American constitutional form in writing their constitutions, inserting themselves into the Euro-American constitutional tradition.⁵⁶⁶ Thus, we cannot claim to accurately and comprehensively study and teach American constitutionalism without considering Indigenous constitutionalism.

Tribal constitutions impart new lessons on American constitutional history, as Native peoples’ constitutional contributions have been obscured for far too long. In fact, the history of tribal constitution writing suggests that a much richer constitutional conversation has been going on in the United States than previously imagined. Not only were Native nations’ constitutions influenced by the U.S. Constitution, but also Native nations’ and state constitutions were likely in dialogue with one another, with some appearing almost simultaneously, while other tribal constitutions preceded state constitutions in the same territories by years and even decades.⁵⁶⁷ Further, just as so much of the history of Native

⁵⁶² For a critique of constitutional histories focused on the Founding Fathers, see Gregory Ablavsky, *Akhil Amar’s Unusable Past*, 121 MICH. L. REV. 1119, 1120–22 (2023) (reviewing AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840* (2021)).

⁵⁶³ See, e.g., Marcus Gadson, *Why Study State Constitutional Law?*, 99 N.Y.U. L. REV. 1924, 1927 (2024); SUTTON, *supra* note 10, at 10.

⁵⁶⁴ See Ciolli, *supra* note 10, at 208–10.

⁵⁶⁵ See Reese, *supra* note 9, at 634.

⁵⁶⁶ See *supra* section I.B.3, pp. 1279–83.

⁵⁶⁷ For example, various versions of the Choctaw and Mississippi constitutions were written in quick succession in the early nineteenth century: Mississippi enacted its first constitution in 1817, the Choctaw Nation followed with its first in 1826, and then both polities wrote their second constitutions shortly after one another, with Mississippi adopting its charter in 1832 and the Choctaw Nation adopting its document in 1834. See MISS. CONST. of 1817; CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1; MISS. CONST. of 1832; CONST. OF THE CHOCTAW NATION of 1834 (on file with Gilcrease Museum, Peter Perkins Pitchlynn Collection, box 1, folder 145). Additionally, multiple constitutions from multiple Native nations governed the territory that would become Oklahoma decades before its admission to the Union and the enactment of its constitution in 1907. See HARGRETT, *supra* note 116, at xvii–xviii; Leeds, *supra* note 304, at 11. Native peoples even sought to have Indian Territory admitted to the Union as its own state, the State of Sequoyah,

peoples' interpretation of the U.S. Constitution remains to be uncovered, the connections between these interpretations and Native peoples' understanding of their own constitutions should be studied. For if we are to take Native peoples' interpretations of the meaning of the U.S. Constitution seriously — as Ablavsky and I have argued⁵⁶⁸ — we must rely on tribal constitutions as a valuable source for understanding Native perspectives on constitutional doctrine. For example, how did Native peoples' ideas on the separation of powers within the federal and state governments interact with how they conceived of such divisions within their nations? And how did Native peoples reconcile Indigenous and Euro-American concepts of citizenship, popular sovereignty, and individual rights? Much work remains to be done to answer such questions while bridging the divide between tribal constitutions and Euro-American ones in constitutional histories.

Additionally, Indigenous constitutionalism is necessary for grasping the expansive cast of actors involved in American constitutional history. Recent scholarship has compellingly shown how subaltern history has a role to play in American constitutionalism, highlighting the impact of the political thought and activism of women, Black Americans, and LGBTQ people on constitutional principles.⁵⁶⁹ And, even though Native peoples utilized constitutions to *reject* their incorporation into the American legal system, rather than seeking inclusion as others did, these charters demonstrate the widespread nature of constitutional debates and self-determination projects among historically excluded communities. They also add an enormous number of documents, albeit more successful ones, to Professor Robert Tsai's archive of aspirational

and drafted a constitution. See Leeds, *supra* note 304, at 5–6. While not a tribal constitution, the Sequoyah Constitution may provide interesting links between the tribal constitutions in Indian Territory that preceded it and the Oklahoma Constitution that incorporated aspects of the Sequoyah document. See ROBERT L. TSAI, *AMERICA'S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY* 178–82 (2014). And these links may even prove impactful for U.S. constitutional litigation and interpretation. For example, the Oklahoma Constitution's prohibition on state aid for religion echoes language in the Sequoyah Constitution, and this provision recently came before the U.S. Supreme Court as it considered the constitutionality of states prohibiting religious charter schools. See Brief of Historians and Legal Scholars as Amici Curiae in Support of Respondent at 25–26, *Okla. Statewide Charter Sch. Bd. v. Drummond*, 145 S. Ct. 1381 (2025) (Nos. 24-394 & 24-396).

⁵⁶⁸ Ablavsky and I have begun this work of uncovering Native peoples' interpretations of the U.S. Constitution in the Founding Era, but the study of other constitutional arguments made by Native peoples in the two centuries since should be undertaken. See *generally* Ablavsky & Allread, *supra* note 50.

⁵⁶⁹ See *generally, e.g.*, MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018) (highlighting Black American legal activism); KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* (2021) (same); DYLAN C. PENNINGROTH, *BEFORE THE MOVEMENT: THE HIDDEN HISTORY OF BLACK CIVIL RIGHTS* (2023) (same); MARIE-AMÉLIE GEORGE, *FAMILY MATTERS: QUEER HOUSEHOLDS AND THE HALF-CENTURY STRUGGLE FOR LEGAL RECOGNITION* (2024) (focusing on women's and LGBTQ people's legal activism).

constitution-writing efforts within the United States.⁵⁷⁰ Thus, the Native councils and conventions in which the tribal constitutions were drafted should join the Seneca Falls Convention and the Colored Conventions as key sites of American constitutional development.⁵⁷¹

Yet, Native nations' constitutions are not just historical documents, and what we think of as "American constitutional law" should include contemporary tribal constitutions. Tribal governments govern alongside the federal and state governments, and U.S. citizens, specifically those who are also tribal citizens, wrote and live under tribal constitutions. Without consideration of tribal constitutions, legal scholarship and education miss a key component of the constitutional law to which some U.S. citizens are subject. And similar to the turn to state constitutions for alternative protection of individual rights in light of federal rights retrenchment,⁵⁷² tribal constitutions offer their own sets of rights and differing interpretations on those rights' meanings.⁵⁷³ Therefore, the current state of constitutional governance and thinking in the United States can only be captured by adding tribal constitutions to studies and curricula on the federal and state constitutions.

D. *Refracting the Concept of American Constitutionalism*

More important than recognition or comprehensiveness within American constitutional narratives, however, is how Indigenous constitutionalism disrupts our understanding of American constitutionalism. Within the United States, we have a dominant narrative regarding what a constitution entails, a narrative constructed around the paradigmatic nature of the U.S. Constitution. Under this narrative, a constitution is understood to be the singular, supreme law — a law that is tied to the

⁵⁷⁰ See generally TSAI, *supra* note 567 (analyzing efforts by various groups to create constitutions in America).

⁵⁷¹ For documents relating to the Colored Conventions, see COLORED CONVENTIONS PROJECT, <https://coloredconventions.org> [<https://perma.cc/69XN-5FKB>]. On the Seneca Falls Convention, see Judith Wellman, *The Seneca Falls Convention: Setting the National Stage for Women's Suffrage*, HIST. NOW, Spring 2016, <https://www.gilderlehrman.org/history-resources/essays/seneca-falls-convention-setting-national-stage-womens-suffrage> [<https://perma.cc/WG8S-MD2Q>].

⁵⁷² See, e.g., SUTTON, *supra* note 10, at 82–83; Helen Hershkoff, Symposium, *Introductory Remarks: The Promise and Limits of State Constitutions*, 99 N.Y.U. L. REV. 1895, 1912–13 (2024); Gadson, *supra* note 563, at 1926–27.

⁵⁷³ For consideration of how tribal constitutional rights can depart from federal rights interpretations, see, for example, Stark, *supra* note 490, at 301–24; Lauren van Schilfgaarde et al., *Tribal Nations and Abortion Access: A Path Forward*, 46 HARV. J.L. & GENDER 1, 65–71 (2023); *Developments in the Law — Chapter Three: ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1718–19 (2016). *But cf.* Crispin T. South, Note, *Transplanted Rights in the Choctaw Nation: Threats to Sovereignty and Potential Solutions*, 30 TEX. J. ON C.L. & C.R. 326, 327–28 (2025) (noting that tribal constitutional provisions that incorporate state and federal rules risk diminishing tribal sovereignty).

constitution's text.⁵⁷⁴ Constitutional supremacy and content derive purely from the democratic and collective will of the sovereign people within the polity.⁵⁷⁵ Additionally, a constitution performs two functions. The first function is structural: A constitution creates government institutions and allocates power between those institutions for purposes of internal governance.⁵⁷⁶ And within this structural aspect, a constitution accepts that there are three types of governmental power — legislative, executive, and judicial — and that each of these powers is exclusively assigned to a distinct branch.⁵⁷⁷ The second function is rights-related: A constitution either recognizes individual rights and constrains government action that would interfere with those rights⁵⁷⁸ or bestows individual rights and mandates that the government must provide them.⁵⁷⁹

But Indigenous constitutionalism reveals that tribal constitutions do not follow the model set out in the dominant American narrative. Rather, tribal constitutions exhibit features that we do not associate with other American constitutions, including (1) alternative definitions of a constitution — its form and its relationship to fundamental law; (2) external-facing constitutional provisions; and (3) matters of constitutional design that institutionalize branches of government or traditional bodies beyond the three-branch system. Through these “un-American” characteristics, tribal constitutions display parallels to the postcolonial constitutions and constitutional interpretive methods of parts of the Global South, which often situate themselves externally and incorporate law beyond the constitutional text,⁵⁸⁰ while remaining distinct creations of Indigenous peoples exercising sovereignty within a protectorate.

At the same time, thinking about Indigenous constitutionalism might force us to reexamine how different the U.S. Constitution really is from tribal constitutions. Indigenous constitutionalism lacks the centuries of precedents, debates, and myths that have accreted around the U.S. Constitution. Thus, the seams and dynamism within Indigenous constitutionalism are more obvious. Yet, many of the ways in which tribal constitutions are supposedly distinct from the U.S. Constitution are in fact characteristics that constitutional historians have said *were* true of the Constitution but have subsequently been erased or diminished.⁵⁸¹ Taking Indigenous constitutionalism seriously might then compel us to

⁵⁷⁴ See Gienapp, *supra* note 22, at 322–23, 331 (cataloging “elements that define the orthodox originalist conception of the Constitution,” *id.* at 322).

⁵⁷⁵ See FRITZ, *supra* note 128, at 1–5.

⁵⁷⁶ See, e.g., U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1.

⁵⁷⁷ See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.”).

⁵⁷⁸ See, e.g., U.S. CONST. amends. I–X.

⁵⁷⁹ See Gadson, *supra* note 563, at 1934–35.

⁵⁸⁰ See, e.g., Albert, *supra* note 26, at 346, 373–74, 379–81, 393–96.

⁵⁸¹ See *infra* notes 604–605, 622–626 and accompanying text.

rethink the dominant narrative about the U.S. Constitution and its essential features.

I. The Definitions of a Constitution. — Indigenous constitutionalism questions what it means for something to be considered “constitutional” in character. In one sense, this complication is about form. Euro-American constitutions follow a standard format: a preamble, separate articles defining governmental powers and distributing them among three branches, and a bill of rights (as well as amendments) contained within a single text.⁵⁸² However, some Native nations departed from this structure in drafting their charters. The very first written tribal constitution — that of the Choctaw Nation in 1826⁵⁸³ — was simply a collection of articles written in Choctaw and did not even include the word “constitution.”⁵⁸⁴ It also declined to adopt three separate branches of government, instead mixing executive and legislative powers among the district chiefs, General Council, and a national committee.⁵⁸⁵ Similarly, the Seneca Nation’s “Constitutional Ordinance” of 1845 served as a written amendment to an otherwise unwritten constitution rather than as a singular document.⁵⁸⁶ Although later constitutions aligned more closely with the Euro-American format,⁵⁸⁷ the existence of these alternatives demonstrates that the constitutional form within the United States has been — and can be — more malleable than assumed.

Another unique feature is the role of the written constitution as only one of several sources of fundamental law within Native nations.⁵⁸⁸ As discussed above, Native nations wrote constitutions within already existing legal orders, whether based on customary or positive law, and explicitly recognized their charters as continuations of such orders rather than new foundations.⁵⁸⁹ And to this day, Native nations acknowledge various sources of law as equal — and possibly even superior — to their

⁵⁸² See, e.g., U.S. CONST.; CAL. CONST.

⁵⁸³ See *supra* note 27 and accompanying text.

⁵⁸⁴ The Choctaw word for “constitution” is the same as “law” — *anumpa vllhpisa* — obscuring whether it was actually used in the Choctaw records. CYRUS BYINGTON, A DICTIONARY OF THE CHOCTAW LANGUAGE 48 (John R. Swanton & Henry H. Halbert eds., 1915). Still, both the U.S. Indian Agent William Ward and several missionary sources labeled the Choctaw document a “constitution,” indicating that Euro-Americans recognized the document as part of the Western constitutional tradition. Letter from William Ward, Indian Agent, to James Barbour, Sec’y of War (Aug. 9, 1826) (on file with BIA Records, *supra* note 179); EIGHTEENTH ANNUAL REPORT, *supra* note 184, at 122.

⁵⁸⁵ CONST. OF THE CHOCTAW NATION of 1826, *supra* note 1, at 46–49, 51–55, 57.

⁵⁸⁶ SENECA PEOPLE, CONSTITUTIONAL ORDINANCE OF THE SENECA NATION (1845), reprinted in DOCUMENTS, *supra* note 50, at 72, 73–74.

⁵⁸⁷ See, e.g., CONST. OF THE CHOCTAW NATION of 1860, pmbl.; *id.* art. I (“Declaration of Rights”); *id.* art. II, § 1 (separation of powers into three branches).

⁵⁸⁸ For discussion of the importance of “foundational governing principles” to “good Native governance,” see Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1054, 1080–83 (2007).

⁵⁸⁹ See *supra* section II.A, pp. 1285–91.

constitutions, relying on them to both constrain and supplement constitutional provisions.

For instance, treaties between tribes and the United States may either set boundaries for constitutional powers or impose requirements upon tribal constitutions. A recent example is that of the Cherokee Nation, whose 2007 amendment to the 1999 Constitution limited citizenship and certain privileges to Cherokees “by blood” and excluded Freedmen — the descendants of Black people enslaved by the Cherokee.⁵⁹⁰ Because these constitutional provisions violated the Treaty of 1866, which required the Nation to extend equal rights to Freedmen, the Cherokee Supreme Court declared all “by blood” language “*void ab initio*” and struck it from the Constitution and all tribal laws.⁵⁹¹ According to the court, “Freedmen rights are inherent” as “recorded and memorialized in Article 9 of the 1866 Treaty.”⁵⁹² Therefore, the Cherokee Constitution could not extinguish Freedmen citizenship rights because “[t]he 1866 Treaty rights were enacted to place limits on [the Cherokee] government.”⁵⁹³ In other words, the treaty served as a form of supreme law that the written constitution could not override.

Along with treaties, customary law may provide alternative principles of fundamental law that structure tribal constitutional government. The courts of the Nottawaseppi Huron Band of the Potawatomi have recognized that the Anishinaabe principle of *Mno Bmadzewen* — “the act of living life in a good way”⁵⁹⁴ — is “supreme Anishinaabe law”⁵⁹⁵ and therefore “an unwritten constitutional principle” that supplements its written tribal constitution.⁵⁹⁶ The recognition of this principle arose in a case in which a tribal member alleged several due process violations in a suit against the tribal government over a constitutional amendment referendum.⁵⁹⁷ However, the Nottawaseppi Constitution did not provide an express due process guarantee.⁵⁹⁸ Nevertheless, the Nottawaseppi Supreme Court drew from *Mno Bmadzewen* to “infer[] a duty of fundamental fairness owed by the government to all individuals under its jurisdiction.”⁵⁹⁹ Thus, some forms of Indigenous custom serve as substantive overarching principles under which written constitutions — and the tribal governments created by them — exercise power.

⁵⁹⁰ See JODI A. BYRD, *THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM* 126–27 (2011).

⁵⁹¹ *In re Effect of Cherokee Nation v. Nash*, 16 AM. TRIB. LAW 268, 274 (Cherokee Nation Sup. Ct. 2021).

⁵⁹² *Id.* at 271.

⁵⁹³ *Id.* at 274.

⁵⁹⁴ Fletcher, *supra* note 36, at 728.

⁵⁹⁵ *Id.* at 744.

⁵⁹⁶ *Id.* at 745.

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.* at 744.

⁵⁹⁹ *Id.* at 745.

Other American constitutions are considered singular in nature. While it is said that the federal and state constitutions are informed by “a wide array of prior law” — including “English common law, British constitutionalism, natural law,” “the early modern law of nations, [and] corporate law”⁶⁰⁰ — these sources only aid in interpretation of constitutions’ textual provisions.⁶⁰¹ Unlike treaties or customary law in the Native nations context, these sources have no legal force of their own, nor are they part of the fundamental law of the United States. Additionally, the recognized “extra-canonical norms, practices, relationships, and institutions” that have arisen outside the constitutional text and have constitutional authority are still viewed as part of the Federal Constitution.⁶⁰² This “constitution outside the constitution” is not a separate body of law equal, or superior, to the written Constitution but a penumbra surrounding it.⁶⁰³ The federal and state constitutions are viewed as the sole founts of supreme legal authority for their respective governments.

But this singularity aspect was not always so. In the eighteenth and nineteenth centuries, natural law supplemented American constitutions to construct a fundamental legal order.⁶⁰⁴ And the constitution — understood as “a substantive form of government founded on the people’s authority” — was not synonymous with the written instrument.⁶⁰⁵ Thus, Indigenous constitutionalism’s paradox — emphasizing the role of Native nations’ written constitutions while acknowledging that such documents do not embody the whole of Indigenous fundamental law — continues a particular constitutional perspective that has been obscured over time.

2. *The External Nature of a Constitution.* — Unlike our understanding of Euro-American constitutions as solely concerned with internal governance,⁶⁰⁶ Native nations write constitutions not only to allocate power internally but also to project power externally. Historically and in the present day, Native peoples have framed their charters for multiple audiences, seeking adherence from the tribal polity while asserting

⁶⁰⁰ Ablavsky & Allread, *supra* note 50, at 255 (citations omitted).

⁶⁰¹ See, e.g., *Boyd v. United States*, 116 U.S. 616, 626–27 (1886) (noting that the “propositions” of the English case *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (KB) “were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures”).

⁶⁰² Richard Albert, *Multi-Textual Constitutions*, 109 VA. L. REV. 1629, 1632 (2023).

⁶⁰³ Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 410–14 (2007).

⁶⁰⁴ See, e.g., STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 11 (2021); Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921, 930 (2025).

⁶⁰⁵ Mary Sarah Bilder, *The Character of the Constitution: Instrument and Constitution*, 37 YALE J.L. & HUMS. (forthcoming 2025–2026) (manuscript at 7), <https://ssrn.com/abstract=5239341> [<https://perma.cc/R7T3-9AN3>].

⁶⁰⁶ See, e.g., Ablavsky, *supra* note 19, at 1796.

sovereignty and legitimacy in the face of colonial powers.⁶⁰⁷ In the very first tribal constitutions, the Choctaw and Cherokee Nations claimed national unity, territorial sovereignty, and the mantle of civilization in an attempt to fend off Removal and demand the respect befitting their political status.⁶⁰⁸ And utilizing constitutions in this way has only continued as Native nations today explicitly invoke their “inherent tribal sovereignty”⁶⁰⁹ and preconstitutional status,⁶¹⁰ declaring that such sovereignty “has existed from time immemorial and . . . remains undiminished.”⁶¹¹

In particular, Native nations have used their constitutions to situate themselves in relation to other American governments. In many instances, tribal constitutions have spelled out the relationship between Native nations and the federal government, affirming Native nations’ status as sovereigns while recognizing their treaty obligations and federal plenary power. For example, during the nineteenth century, the Choctaw Nation proclaimed that it was “a free and independ[e]nt nation” but also stated that it was exercising its self-government powers only to an extent “not inconsistent with the [C]onstitution, treaties and laws of the United States,”⁶¹² echoing the language of the 1830 Treaty of Dancing Rabbit Creek.⁶¹³ But some constitutions also included state governments. The Seneca Constitution of 1848 explicitly prohibited the tribal government from passing laws that were “inconsistent with the Constitution of the United States or of the State of New York,” placing the Nation within a web of three interconnected sovereigns.⁶¹⁴ And the Seneca relinquished a portion of its tribal court jurisdiction to New York, consensually giving rise to concurrent jurisdiction.⁶¹⁵ These examples thus show how Native nations allocated, or at least recognized, power externally through constitutionalism.

For the most part, this outward-facing aspect has not been linked to the federal and state constitutions. On the one hand, the federal and most state governments are situated differently than tribal governments, which exist within a protectorate system that constrains their sovereignty.⁶¹⁶ On the other hand, the federal and state documents contain no provisions that describe how their powers relate to those of external

⁶⁰⁷ See *supra* section II.A, pp. 1285–91; Part IV, pp. 1312–20.

⁶⁰⁸ See *supra* section II.A, pp. 1285–91.

⁶⁰⁹ CONST. OF THE CHOCTAW NATION OF OKLAHOMA of 1983, pmbl.

⁶¹⁰ CONST. OF THE YUOK TRIBE of 1993, pmbl.

⁶¹¹ *Id.*

⁶¹² CONST. OF THE CHOCTAW NATION of 1860, pmbl.

⁶¹³ Compare *id.*, with A Treaty of Perpetual Friendship, Cession and Limits, Choctaw Nation-U.S., art. IV, Sep. 27, 1830, 7 Stat. 333.

⁶¹⁴ CONST. OF THE SENECA NATION OF INDIANS of 1848, § 14, in DOCUMENTS, *supra* note 50, at 79.

⁶¹⁵ *Id.* §§ 4–5, at 78.

⁶¹⁶ See Blackhawk, *Constitution of American Colonialism*, *supra* note 14, at 29.

sovereigns.⁶¹⁷ In particular, state constitutions are not seen as deep commentaries on federalism.⁶¹⁸ While the parallels and interactions between federal constitutional rights and state constitutional rights have been extensively studied,⁶¹⁹ state constitutions do not function as documents that stake out ground on the structural relationship between the state governments and the federal government or other sovereigns.⁶²⁰

However, tribal constitutions suggest that the conception of American constitutions as imagined acts of unconstrained popular sovereignty and will is a myth.⁶²¹ Rather, constitution making, even in the United States, has always been subject to external influence. For example, some historians have highlighted the ways in which the U.S. Constitution was written and debated with external audiences in mind — as the United States sought to be admitted to the international “community of civilized states.”⁶²² And although the U.S. Constitution took on an “anti-imperial” framing in the twentieth century,⁶²³ the external focus on constitutional structure fell away after the Founding Era. We no longer consider how the U.S. Constitution has been, or could be, presented and interpreted as a charter that impacts the United States’s status as a member of the international community.⁶²⁴ Tribal constitutions therefore are the principal enduring example within the United States of how such documents are used to claim space within a larger system of sovereigns.

3. *Alternative Constitutional Designs.* — Finally, Indigenous constitutionalism offers alternatives to the predominant institutional framework set out in Euro-American constitutions. Similar to the standard format discussed above, the federal and state constitutions share a common governmental design in which power is distributed across three branches: the legislative, executive, and judicial departments.⁶²⁵ But the contemporary notion that governmental powers must, and can only,

⁶¹⁷ See, e.g., U.S. CONST.; HAW. CONST.; ME. CONST. But see Sean Beienburg, *Teaching Federalism: State Sovereignty Declarations in State Constitutions*, 11 AM. POL. THOUGHT 232, 243–51 (2022) (collecting historical and contemporary state constitutional provisions that reference either the right of the state to regulate its internal affairs or the supremacy of the U.S. Constitution).

⁶¹⁸ See Jim Rossi, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145, 1146 (2011) (reviewing ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009)).

⁶¹⁹ See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977); SUTTON, *supra* note 10, at 8.

⁶²⁰ See Rossi, *supra* note 618, at 1146.

⁶²¹ For the origins of this notion of popular sovereignty as the basis of American constitutionalism, see generally EDMUND S. MORGAN, *INVENTING THE PEOPLE* (1988).

⁶²² See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1066 (2010); Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 WM. & MARY L. REV. 1239, 1242 (2018).

⁶²³ See RANA, *supra* note 65, at 29.

⁶²⁴ See Golove & Hulsebosch, *supra* note 622, at 1066.

⁶²⁵ See Rodriguez, *supra* note 119, at 275.

be divided between these three branches was not accepted at the Founding.⁶²⁶ And while many Native nations now share this structure,⁶²⁷ some have also experimented with constitutionalizing institutions that reflect their culture or political circumstances and are deemed important enough to exist outside the three branches.

In some instances, Native nations have incorporated “fourth branches” of government into their foundational documents.⁶²⁸ The Constitution of the Ho-Chunk Nation in Wisconsin explicitly establishes four branches of government, adding the General Council as a separate entity from the legislature, executive, and judiciary.⁶²⁹ The General Council — composed of all eligible Ho-Chunk voters — is the democratic heart of the Nation’s government, exercising “all inherent sovereign powers” of “[t]he People of the Ho-Chunk Nation.”⁶³⁰ This body also serves as the supreme branch, retaining the power “to set policy for the Nation,” to reverse most legislative actions and judicial decisions, and to propose constitutional amendments.⁶³¹ Similarly, the Osage Nation in Oklahoma created the Osage Minerals Council through its Constitution to administer and develop the Nation’s vast minerals estate.⁶³² Even though it is not labeled as a fourth branch, the Council is described as an independent agency that is separately elected by mineral royalty interest holders and possesses the authority to “promulgate its own rules and regulations” and “to consider and approve leases and to propose other forms of development.”⁶³³ Through these independent bodies, Native nations have indicated that some powers, such as popular sovereignty and resource management, are best channeled outside the usual departments.

Other nations have found creative ways to inject cultural authority into their constitutional governments. As discussed above, the White Earth Nation Constitution established a “Council of Elders” that does not directly exercise governmental power.⁶³⁴ Yet, the Constitution recognizes the body’s ability to determine “totemic associations, traditional knowledge, cultural and spiritual practices, native survivance, and considerations of resource management” and empowers it to advise the

⁶²⁶ See, e.g., William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 263 (1989).

⁶²⁷ See, e.g., CONST. OF THE CHOCTAW NATION OF OKLAHOMA of 1983, art. V, § 1.

⁶²⁸ For various definitions of “fourth branches,” see, for example, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984), and MARK TUSHNET, *THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY* 10 (2021).

⁶²⁹ CONST. OF THE HO-CHUNK NATION of 1994, art. III, § 2.

⁶³⁰ *Id.* art. IV, § 1.

⁶³¹ *Id.* art. IV, § 3.

⁶³² CONST. OF THE OSAGE NATION of 2006, art. XV, § 4.

⁶³³ *Id.*

⁶³⁴ See *supra* note 484 and accompanying text.

legislature.⁶³⁵ Thus, such entities allow Native governments to reflect and be directed by cultural imperatives, a function foreign to other Euro-American governments.

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To be sure, Native nations have borrowed plenty of features from American constitutions: their written nature, separation of powers, preamble language, declarations of rights, and more. But Indigenous constitutionalism is no mirror for American constitutionalism.⁶³⁶ Its very existence — predicated on the ability to maintain Native sovereignty in the face of a colonial system — disrupts the assimilative and hegemonic nature of American law. Further, tribal constitutions' distinctiveness disrupts and expands our concept of constitutionalism within the United States, making space for alternative understandings of how political authority is represented and exercised through written constitutions. Ultimately, Indigenous constitutionalism is a prism that refracts constitutionalism, transforming one common view into a range of perspectives and possibilities.

CONCLUSION

Five years after the IRA's passage, Felix Cohen posed a question regarding the constitutions he had so heavily influenced: "How long are these Indian constitutions likely to last?"⁶³⁷ Cohen wrote that "no single answer . . . can be given to the question" because "different constitutions will perish at different ages."⁶³⁸ However, he concluded that "[a]n Indian constitution will exist as long as there remains in human hearts a community of interdependence, of common interests, aspirations, hopes, and fears."⁶³⁹

Over eight decades later, Cohen's reflections still ring true. While many Native nations have significantly amended or thrown out altogether their IRA constitutions,⁶⁴⁰ others still retain them, using the governments created under these documents to confront a modern world vastly different from the one in which Cohen lived.⁶⁴¹ But more importantly, Indigenous constitutionalism lives on. After almost two centuries, this distinct constitutional tradition continues to grow, with Native nations constantly experimenting with written constitutions

⁶³⁵ CONST. OF THE WHITE EARTH NATION of 2009, ch. 8, in VIZENOR & DOERFLER, *supra* note 484, at 63, 69–70.

⁶³⁶ See generally Young, *supra* note 58 (arguing that "the Cherokee Nation mirrored not only the ideal images their mentors sought to foster, but the competitive, contentious, and exploitive human relationships their masters so cunningly, if half-consciously, modeled for them as well," *id.* at 524).

⁶³⁷ COHEN, *supra* note 2, at 222.

⁶³⁸ *Id.* at 228.

⁶³⁹ *Id.* at 229.

⁶⁴⁰ See *supra* section IV.A.3, pp. 1317460–19.

⁶⁴¹ See Miller, *supra* note 11.

to maintain their polities, assert their sovereignty, and keep colonialism at bay.⁶⁴²

This Article is only an initial step toward capturing this breadth and diversity of tribal constitutions. It shows that tribal constitutions, their histories, and their content are deserving of study and should be incorporated into American constitutional history and constitutional law scholarship to truly reflect how constitutionalism has developed, and is developing, within the United States. Also, much work remains to be done to assist Native nations in fully utilizing written constitutions. Nevertheless, there is no end in sight for Indigenous constitutionalism, and thanks to the achievements and persistence of tribal constitutions, there is no end in sight for Native nations either.

⁶⁴² *See id.*