

# American Indian Constitutions and Their Influence on the United States Constitution<sup>1</sup>

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## I. INTRODUCTION

American Indian political theories and tribal governance helped shape the political thinking of some of the United States' Founding Fathers and the development of several provisions in the U.S. Constitution."<sup>2</sup> This statement is not universally accepted,<sup>3</sup> but it is without question that Benjamin Franklin, Thomas Jefferson, James Madison, James Wilson, John Adams, Thomas Paine, and other Founding Fathers were acquainted with Indian peoples, tribal governments, and indigenous theories of governance.<sup>4</sup> Many of the Founders worked with Indian nations as treaty negotiators and commissioners for colonial, state, and national governments for many decades before the United States and

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2 See, e.g., R. J. Miller, "American Indian Influence on the United States Constitution and its Framers," *Am. Indian L. Rev.* 18 (1993), 133; D. A. Grinde, Jr., and B. E. Johansen, *Exemplars of Liberty: Native America and the Evolution of Democracy* (1991); see also R. M. Underhill, *Red Man's America* (1953), 83; C. Wissler, *Indians of the United States: Four Centuries of Their History and Culture* (rev. ed. 1966, org. ed. 1940), 128.

3 See, e.g., P. A. Levy, "Exemplars of Taking Liberties: The Iroquois Influence Thesis and the Problem of Evidence," *Wm. & Mary Q.* 53 (1996), 588; E. M. Jensen, "The Imaginary Connection between the Great Law of Peace and the United States Constitution," *Am. Indian L. Rev.* 15 (1991), 25; E. Tooker, "The United States Constitution and the Iroquois League," *Ethnohistory* 35 (1988), 305.

4 See, e.g., R. J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark and Manifest Destiny* (2006), 77–8, 84–97; Miller, "American Indian Influence," 141–4, 146–50; Grinde and Johansen, *Exemplars of Liberty*, 15, 155.

the Constitution were created. Interestingly, the government that was created by the U.S. Constitution more closely reflects the principles of indigenous governments than those of the European monarchies and political regimes of the late-1700s. Furthermore, there is no question that Indian affairs were among the primary justifications for the U.S. Constitution.

In section II, this paper briefly sets out the evidence that American Indian political theories and governments influenced the Founding Fathers and the Constitution. Section III then broadly describes modern-day Indian constitutionalism. The paper concludes with the thought that American history and government has been impacted by tribal nations in the past, perhaps more than has been recognized, and will continue to be influenced by indigenous peoples and governments into the future.

## II. TRIBAL AND INDIAN INFLUENCE ON THE FOUNDERS AND THE U.S. CONSTITUTION

Most American history has been written as if history were a function solely of white culture—in spite of the fact that well into the nineteenth century the Indians were one of the principal determinants of historical events.

– Bernard DeVoto<sup>5</sup>

In this short paper, we cannot delve deeply into the history of American Indian governments and their organizational and operational principles. It is sufficient to note, however, that historic tribal governments, across what is now the United States, represented a broad array of governance styles, from relatively complex to simple governments, and from nearly autocratic to extremely democratic governments.<sup>6</sup> We can also state that there is no question that some of America's Founding Fathers were quite familiar with tribal governmental structures. Many Founders, for example, served their colonial, state, and national governments as treaty negotiators and commissioners to tribal governments and actively studied indigenous theories of government.<sup>7</sup> In addition,

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5 A. I. Hallowell, "The Backwash of the Frontier: The Impact of the Indian on American Culture," in *The Frontier in Perspective* (W. D. Wyman, and C. B. Kroeber eds., 1957), 230.

6 See, e.g., R. J. Miller, *Reservation "Capitalism": Economic Development in Indian Country* (2012), 13, 18–21.

7 See, e.g., Smithsonian Institution Scholarly Press, *Handbook of North American Indians: History of Indian-White Relations*, Book 4, (William C. Sturtevant gen. ed., Wilcomb E. Washburn vol. ed., 1988), 128–62, 185–201, 211–29; C. Bowen, *The Most Dangerous Man in America: Scenes From the Life of Benjamin Franklin* (1974), 91–4, 97–8; C. P. Smith, *James Wilson: Founding Father, 1742–1798* (1956), 67–72.

many Euro-American colonists observed democratic principles and governance at work in Indian governments. Ultimately, the Founders developed democratic political theories and principles that were barely practiced in Europe. Instead, many of the principles that were incorporated into the U.S. Constitution were practiced by North American indigenous cultures and governments long before European contact.<sup>8</sup>

In addition, there is no question that Native Americans and tribal governments played a significant role in shaping the history of the English colonies and the early history of the American states and the United States.<sup>9</sup> Indian affairs were some of the most important “foreign affairs” issues that the U.S. faced in the first decades of its existence and were cited as primary justifications for developing the Constitution.<sup>10</sup> It is no surprise, then, that scholars allege that tribal governments and political theories played a part in developing the Founders’ political ideas and impacted the development of many provisions in the U.S. Constitution. Tribal cultures and governments had, what I call, both “positive” and “negative” influences on some of the constitutional provisions, as the Founders were positively influenced by Indian ideas regarding government and human freedom and negatively influenced by the threats posed by Indian tribes.<sup>11</sup>

### *Tribes and Indians in the U.S. Constitution*

Tribes are expressly mentioned once in the U.S. Constitution, and individual Indians are mentioned twice. In Article I, in the Interstate (Indian) Commerce Clause, the Founders decided that Congress would have the sole power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”<sup>12</sup> This

8 Miller, “American Indian Influence,” 133–4, 143–5; M. L. J. Fletcher, “The Original Understanding of the Political Status of Indian Tribes,” *St. John’s L. Rev.* 82 (2008), 153, 165–72, 181; D. E. Wilkins, *American Indian Politics and the American Political System* (2nd ed., 2007), 127–38.

9 G. S. Wood, “Federalism from the Bottom Up,” *U. Chicago L. Rev.* 78 (2011), 705, 706; Smithsonian Institution, *Handbook of North American Indians: History of Indian-White Relations*, 128–62, 185–201, 211–29. Indian and English interactions “began to shape the nature of the English experiment [of colonizing America] . . . .” B. Catton, and W. B. Catton, *The Bold and Magnificent Dream: America’s Founding Years, 1492–1815* (1978), 137. The Iroquois “most profoundly influenced history in the seventeenth and eighteenth centuries.” Smithsonian Institution Scholarly Press, *Handbook of North American Indians: Northeast*, Book 15 (William C. Sturtevant gen. ed., Bruce G. Trigger vol. ed., 1978), 418.

10 Miller, “American Indian Influence,” 138, 155–7; G. Ablavsky, “The Savage Constitution,” 63 *Duke Law Journal* 999 (2013), 1003–8, 1052–66. Accessed at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2229957](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229957)

11 Miller, “American Indian Influence,” 133, 141–6, 155–8.

12 U.S. Const. art. I, § 8, cl. 3.

provision was expressly designed to correct one of the greatest weaknesses of the Articles of Confederation—that state governments were allowed to meddle in Indian affairs. James Madison and other Founders agreed that fixing this problem was crucial to the success of a national government and any new constitution because states had caused Indian wars for the Continental and Articles of Confederation governments.<sup>13</sup>

Furthermore, federal/tribal treaties were included in the Treaty Clause of the Constitution and became “the supreme Law of the Land” to prevent states from interfering with federal/tribal treaties and entering state treaties with tribes.<sup>14</sup> Consequently, the Constitution places the sole authority for conducting business with tribes in the hands of Congress.

Indian individuals are mentioned in the Constitution in the provisions that require a census of state populations to determine how many House representatives each state receives. Indians were not to be counted as state citizens (i.e., as part of a state’s population) unless they paid taxes.<sup>15</sup> In 1868, when the freed slaves were granted full citizenship rights through the Fourteenth Amendment, Indians were again expressly excluded from state populations unless they paid taxes.<sup>16</sup> These exclusions demonstrate that the Founders and the Constitution recognized that Indians were citizens of their own separate nations. (Most Indians were not made United States citizens until 1924.<sup>17</sup>)

### *Positive Indian Effects on the Founders and the Constitution*

It would be a very strange Thing, if six Nations of ignorant Savages should be capable of forming a Scheme for such an Union, and be able to execute it in such a Manner as that it has subsisted Ages, and

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13 James Madison, *The Federalist Papers No. 42* (Clinton L. Rossiter ed., 1961) 268–9; id. at No. 3, 44–5 (J. Jay); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 n.4 (1985) (“Madison cited the National Government’s inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation and urged adoption of the Indian Commerce Clause.”); Letter from James Madison to James Monroe (Nov. 27, 1784), in 2 *The Founder’s Constitution* 529 (P. B. Kurland, and R. Lerner eds., 1987) (Madison wrote that the provision controlling Indian policy in the Articles if “taken in its full latitude, it must destroy the authority of Congress altogether.”). Accord R. B. Morris, *The Forging of the Union* (1987), 186–8; C. Drinker Bowen, *Miracle at Philadelphia* (1966), 168–70; N. Schachner, *The Founding Fathers* (1954), 65.

14 U.S. Const. art. VI, cl. 2. By 1789, the Continental and Articles of Confederation Congresses signed nine treaties with tribal nations and 23 treaties with foreign nations.

15 U.S. Const. art. I, § 2, cl. 3.

16 U.S. Const. amend. XIV, § 2.

17 Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401[b]).

appears indissoluble; and yet a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary, and must be more advantageous; and who cannot be supposed to want an equal Understanding of their Interests.

– Benjamin Franklin<sup>18</sup>

This statement by Benjamin Franklin (perhaps properly considered the grandfather of the United States) is significant evidence that tribal governments had at least some effect on the ultimate creation of the United States.<sup>19</sup> Franklin studied and had extensive contacts with the Iroquois Confederacy and other tribes in negotiating and printing Indian treaties, as well as in numerous other diplomatic encounters.<sup>20</sup> Furthermore, Franklin and colonial representatives were expressly advised in 1744 by an Iroquois Confederacy leader, Canasatego, that the English colonies needed to form a union such as the Iroquois had created.<sup>21</sup>

At a 1744 Lancaster treaty council, Canasatego advised colonial representatives, stating:

. . . we, the Six Nations, heartily recommend union and a good agreement between you . . . . Our wise Forefathers established Union and Amity between the Five Nations; this has made us formidable; this has given us great Weight and Authority with our neighboring Nations. We are a powerful Confederacy; and, by your observing the same Methods our wise Forefathers have taken, you will acquire fresh Strength and Power; therefore whatever befalls you, never fall out one with another.<sup>22</sup>

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18 Benjamin Franklin to James Parker (March 20, 1751), in *The Papers of Benjamin Franklin* 4, (Leonard Labaree et al. eds., 1961), 118–9. See also G. S. Wood, *The Americanization of Benjamin Franklin* (2004), 73 (“If the Iroquois could unite, why couldn’t the colonists?”); F. Jennings, *Empire of Fortune: Crowns, Colonies, and Tribes in the Seven Years War in America* (1988), 89.

19 One author calls it “absurd” to attribute this statement “to the making of the Constitution” because, he argues, Franklin was “advocating colonial union *against* those ‘ignorant savages.’” Jennings, *Empire of Fortune*, 259, n.15 (italics in original). But even if Jennings is correct that Franklin was only advocating colonial union to oppose tribal nations, it is still probable that he learned something about the efficacy of confederacies from Indian nations, and it is indisputable, then, that tribes influenced the colonial decision to unite. See also Wood, *The Americanization of Benjamin Franklin*, 73 (Franklin had other reasons for proposing colonial union than just opposing Indians).

20 Bowen, *The Most Dangerous Man in America*, 91–4, 97–8; R. W. Clark, *Benjamin Franklin: A Biography* (1983), 100; Jennings, *Empire of Fortune*, 87–9 (Franklin studied Cadwallader Colden, *The History of the Five Indian Nations of Canada* [1747]).

21 Bowen, *The Most Dangerous Man in America*, 98–9; Jennings, *Empire of Fortune*, 89.

22 *Indian Treaties Printed by Benjamin Franklin, 1736–1762* (Carl Van Doren, and Julian P. Boyd eds., 1938), 78.

Franklin printed the speech in 1744, and Cadwallader Colden reprinted it in his 1747 book on the Iroquois.<sup>23</sup> Governor George Thomas thanked Canasatego for the advice.<sup>24</sup>

Very significantly, 31 years later, on August 25, 1775, the Commissioners of Indian Affairs for the Continental Congress quoted Canasatego's 1744 speech back to Iroquois leaders at a diplomatic meeting. The commissioners stated: "Our forefathers" said Canasatego's "advice was good" and his "words [had] sunk deep into their hearts," and they would "take their counsel, and teach our children to follow it."<sup>25</sup> Several of the commissioners who spoke these words, including Major General Philip Schuyler and Colonel Oliver Wolcott, were Founding Fathers, as were three of the Continental Congress delegates, Thomas Lynch of South Carolina, and James Duane and Robert Livingston of New York, who also participated in these treaty sessions.

Arguably, Franklin heeded Canasatego's advice because in 1754, he began promoting his Albany plan, one of the first to advocate a union of the thirteen colonies.<sup>26</sup> Scholars agree that Franklin "admired the Iroquois confederation and plainly had it in mind in his earliest discussion of the need of union among the colonies."<sup>27</sup> Professor Julian Boyd, editor of the Jefferson Papers and Franklin's Indian treaties, stated that Franklin "found his materials [for the Albany plan] in the great confederacy of the Iroquois."<sup>28</sup> Furthermore, several historians suggest that the Albany plan was a forerunner of the U.S. Constitution,<sup>29</sup> and Franklin was, of course, heavily involved in the efforts to create the United States; he helped Thomas Jefferson with the Declaration of Independence, was on the committee that drafted the Articles of

23 Id.; Tooker, "The United States Constitution," 309, 330 n.3 (citing Colden, *The History of the Five Indian Nations*, 20).

24 Tooker, "The United States Constitution," 309.

25 "Journal of the Treaty held at Albany, in August, 1775, with the Six Nations by the Commissioners of the Twelve United Colonies," in *Collections of the Massachusetts Historical Society* 5 (3rd series, 1836), 83–4.

26 H. S. Commager, *The Empire of Reason: How Europe Imagined and America Realized the Enlightenment* (1977), 19; C. L. Rossiter, *Seedtime of the Republic* (1953), 306–8.

27 C. V. Doren, *Benjamin Franklin* (1938), 209; accord Bowen, *The Most Dangerous Man in America*, 98.

28 J. P. Boyd, "Dr. Franklin: Friend of the Indians," in *Meet Dr. Franklin* (R. N. Lokken ed., 1981), 239. See also *Meet Dr. Franklin*, 240 ("In the realm of political thought the Indian probably had a greater influence over civilized society than any other savage race."); Commager, *The Empire of Reason*, 165–6 (Colonials learned about cooperation and union from the Iroquois Confederacy, Chief Pontiac's alliance, and from necessity; Indians "set the stage for [American] nationalism.").

29 Rossiter stated that the "Albany Plan is a landmark on the rough road of union that leads through the first Continental Congresses and the Articles of Confederation to the Constitution of 1787." Rossiter, *Seedtime of the Republic*, 308. See also Commager, *The Empire of Reason*, 19.

Confederation, and was an important figure at the Constitutional Convention.<sup>30</sup> Thus, the Indian influence on Franklin's political ideas and the Albany plan carried over to the U.S. Constitution.

In addition to Franklin, other Founders were also acquainted with tribal governments and indigenous political theories after decades of interactions with tribes as colonial, state, and national treaty negotiators and commissioners.<sup>31</sup> The long history of interactions and contacts between Indian tribes and the colonies and states affected and shaped both sides. For example, Thomas Jefferson studied tribal governments and Indian languages over many decades.<sup>32</sup> He "freely acknowledged his debt to Indian teachers."<sup>33</sup> Jefferson also thought that Indian legal systems, which he incorrectly thought had "no law," were "preferable" to "too much law, as among civilized Europeans . . . ."<sup>34</sup> He also concluded: "France and England . . . [are a] den of robbers . . . [and] pirates . . . I would rather wish our country to be ignorant, honest and estimable as our neighboring savages are."<sup>35</sup> In 1787, Jefferson wrote the following to John Rutledge, a member of the Convention committee that compiled the first draft of the Constitution, regarding the virtues of American Indian governments: ". . . the only condition on earth to be compared with ours is that of the Indians, where they still have less law than we. The Europeans are governments of kites over pigeons."<sup>36</sup>

Another influential Founder, James Wilson of Pennsylvania, was an active member of the Continental Congress's permanent committee on Indian affairs and an Indian commissioner and treaty negotiator who had numerous interactions with tribal peoples and the Iroquois Confederacy.<sup>37</sup> At the Constitutional Convention on June 7, 1787,

30 Commager, *The Empire of Reason*, 19; Rossiter, *Seedtime of the Republic*, 308.

31 Smithsonian Institution, *Handbook of North American Indians: History of Indian-White Relations*, 245-9; Grinde and Johansen, *Exemplars of Liberty*, 15, 152; B. E. Johansen, *Forgotten Founders: How the American Indian Helped Shape Democracy* (1982), 116. See also *The Complete Anti-Federalist* (Herbert J. Storing ed., 1981), 107 (Quoting one anti-Federalist: "with [Indians] the whole authority of government is vested in the whole tribe . . . Their government is genuinely democratic.")

32 Miller, "American Indian Influence," 77-8, 84-6; C. A. Miller, *Jefferson and Nature: An Interpretation* (1988), 110-1; *Thomas Jefferson, Notes on the State of Virginia* (William H. Peden ed., 1955, org. ed. 1784), 151.

33 F. S. Cohen, "Americanizing the White Man," *Am. Scholar* 21 (1952), 177, 184.

34 C. A. L. Binger, *Thomas Jefferson: A Well Tempered Mind* (1970), 26; *The Writings of Thomas Jefferson*, vol. 15 (A. A. Lipscomb, and A. E. Bergh eds., 1904), 25 ("Every man with them, is perfectly free to follow his own inclinations.")

35 *The Adams-Jefferson Letters*, vol. 2 (Lester Cappon ed., 1959), 291.

36 Jefferson to Rutledge (Aug. 6, 1787), in *Papers of Jefferson*, vol. 11, (Julian P. Boyd ed., 1955) 701.

37 Smith, *James Wilson*, 67-72; Grinde and Johansen, *Exemplars of Liberty*, 292, n.23 (quoting Wilson that he argued during the debate over the Articles of Confederation that "Indians know the benefits of Confederation [they] have an example of it in the union of the six Nations").

Wilson stated that “the British government cannot be our model.”<sup>38</sup> Charles Pinckney, a South Carolina Convention delegate, agreed. He stated in 1788 that the delegates were skeptical of European governments, as “from the European world no precedents are to be drawn for people who think they are capable of governing themselves.”<sup>39</sup>

John Adams also discussed tribal governments in his 1787 treatise on constitutions, which he no doubt wrote to influence the Constitutional Convention.<sup>40</sup> He demonstrated some knowledge of tribal governments and seemed to be talking about the principle of separation of powers when he stated that it would be worthwhile “[t]o collect together the legislation of the Indians” because while “[t]he sovereignty is in the nation . . . the three powers are strong in every tribe . . . .”<sup>41</sup> He again seems to have been discussing separation of powers when he stated that “an accurate investigation of the form of government of the ancient Germans and modern Indians” would be worthy because “in both, the existence of the three divisions of power is marked with a precision that excludes all controversy.”<sup>42</sup> Adams also noted that in Indian (and ancient German) governments, “[t]he democratical branch, especially, is so determined, that the real sovereignty resided in the body of the people and was exercised in the assembly of king, nobles, and commons together.”<sup>43</sup> He also stated that the Mohawks in particular enjoyed “complete individual independence,” and tribal leaders, or “sachems,” deliberated “national affairs” in councils and put major decisions, such as declarations of war, to “a national assembly.”<sup>44</sup>

Most of the Founders would have also been familiar with tribal governance because the eastern part of North America was governed by multiple confederacies of tribal nations.<sup>45</sup> The Iroquois Confederacy in upstate New York, for example, was a union of five (and later six) tribes that operated under a constitutional system of government starting as early as the 11th century. The Iroquois inscribed their democratic style government in “the symbolized writing of wampum belts,” and the Iroquois Constitution is known as the Great Law of Peace.

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38 *Notes on Debates in the Federal Convention of 1787 Reported by James Madison* (Adrienne Koch ed., 1966), 85.

39 Grinde and Johansen, *Exemplars of Liberty*, 243 (quoting the Charleston *Columbia Herald*, 1788 June 9).

40 John Adams, “Defence of the Constitutions of the Government of the United States of America,” vol. 1 (1787), in *The Works of John Adams*, vol. 4 (Charles Francis Adams ed., 1851, reprint 1971), 271–588.

41 *The Works of John Adams*, 298. See id. 292 (“The rudest tribes of savages in North America have certain families from which their leaders are always chosen.”).

42 *Id.*, 296.

43 *Id.*

44 *Id.*, 511, 566–7.

45 Grinde and Johansen, *Exemplars of Liberty*, 6, 33, 35, 80, 86.



Scholars state that the Iroquois were “a decidedly democratic people” and that “American Indian confederacies figured importantly in the evolution of democratic thought.”<sup>46</sup> Several of the Founders were impressed by the Iroquois Confederacy.<sup>47</sup>

The Iroquois, Shawnee, Cherokee, and other tribal governments operated under democratic principles with “national” or “federal” governing councils, as well as with checks and balances on civil and military affairs to avoid the concentration of power in individuals.<sup>48</sup> Almost all tribes separated military and civil duties between different chiefs or leaders. These tribal governments and communities also protected a wide range of personal freedoms and democratic principles, such as freedom of religion, women’s suffrage, initiative, referendum, veto, and recall.<sup>49</sup> (Iroquois women played very important roles in their government, and women were heavily involved in the governance of most, if not all, tribes.<sup>50</sup>)

Because many of the Founders were conversant with tribal governments and political theories, it seems incorrect to argue that they could not possibly have learned anything from tribes and Indians, and that they were not influenced at all by the extensive contacts they had with tribes and their knowledge of tribal governments. In contrast, the evidence shows that the Founders observed tribal governments and cultures that practiced democratic principles and incorporated similar principles into the U.S. Constitution, including separation of powers,

46 Id., xvii, xx–xxii, xxiv–xxv, 19–32; accord Smithsonian Institution, *Handbook of North American Indians: Northeast*, 418–41; B. Graymont, *The Iroquois in the American Revolution* (1972), 16–7; V. Deloria, Jr., and C. M. Lytle, *American Indians, American Justice* (1983), 82 (“... the first written constitution drafted in North America . . . written on the sacred wampum belts made of sea shells”); Wilkins, *American Indian Politics*, 129; F. Gouldsmith Speck, “The Iroquois: A Study in Cultural Evolution,” *Bulletin* 26 (*Cranbrook Inst. Sci.*, vol. 23, 2nd ed. 1955, org. ed. 1945) (The “self-government of the Iroquois has impressed [many historians] as embodying surprisingly modern conceptions of democratic rule . . . the Iroquois were, and still are, a decidedly democratic people.”).

47 *Supra* notes 4 and 7; R. Aquila, *The Iroquois Restoration: Iroquois Diplomacy on the Colonial Frontier, 1701-1754* (1983), 15; Wissler, *Indians of the United States*, 128 (“There is some historical evidence that knowledge of the league influenced the colonies in their first efforts to form a confederacy and later to write a constitution.”); Underhill, *Red Man’s America*, 83 (naming Lee, Franklin, Jefferson, and Washington).

48 Smithsonian Institution, *Handbook of North American Indians: Northeast*, 156, 216, 422, 429, 610, 627, 640, 684, 782; R. Strickland, *Fire and the Spirits* (1975), 24–5; F. W. Hodge, *Handbook of American Indians North of Mexico* (1975), 364; A. M. Gibson, *The Chickasaws* (1971), 21; A. Debo, *The Road to Disappearance* (1941), 6–7.

49 Cohen, *Americanizing the White Man*, 182; Smithsonian Institution, *Handbook of North American Indians: Northeast*, 156, 314–7, 610, 627.

50 Grinde and Johansen, *Exemplars of Liberty*, 19–32, 218–30; R. Jacobs, “Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers,” *Am. Indian L. Rev.* 16 (1991), 497; Graymont, *The Iroquois in the American Revolution*, 12–3, 18, 21, 159; Smithsonian Institution, *Handbook of North American Indians: Northeast*, 156, 216, 261, 418–41, 610, 617–8, 624–5, 627, 640, 684, 732, 782.

popular vote, presidential veto, recall, freedom of religion, and, later, women's suffrage and the right of all citizens to participate in their government. These ideas were practiced by indigenous governments long before the U.S. Constitution.

Finally, there is no question that tribal governments and Indian affairs were very important to the initial decision to create a new constitution and national government. The interactions between national, state, and tribal governments led the Founders to realize that (1) the Articles of Confederation were inadequate and (2) a new constitution was needed to create a stronger national government that held the exclusive authority to conduct Indian affairs.<sup>51</sup> James Madison, known as the father of the Constitution, and other Founders made this point perfectly clear.<sup>52</sup>

### *Negative Tribal Effects on the Founders*

American Indians and tribes also had “negative effects” on the Constitution due to the Founders’ fears of Indian nations.<sup>53</sup> The United States was incredibly weak and bankrupt after the Revolutionary War, and in the early decades of its existence, it could not afford to fight tribes. Thousands of warriors, from dozens of tribal nations, were located on and within U.S. borders. This fact of life obviously affected the Founders and early Americans. This danger, and the inability of the Congress of the Confederation to address it, created an enormous incentive for the Founders and states to unify under a stronger federal government.<sup>54</sup> Thereafter, the threats posed by Indians impacted the decision to create a new national government and specific provisions that were included in the Constitution.

The challenges presented by tribes served as a catalyst for creating a strong central government with the power to formulate and enforce a unified federal Indian policy, possess a standing army, garrison forts on the frontier, raise needed taxes, and control the Western lands.<sup>55</sup> Staunch Federalists probably did not think these results were

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51 Supra note 13; see also O. Handlin, and L. Handlin, *Liberty in Expansion 1760–1850* (1989), 146–8; R. B. Morris, *The Forging of the Union* (1987), 187–8; M. Farrand, *The Framing of the Constitution* (1913), 47–8.

52 Supra note 13.

53 Miller, “American Indian Influence,” 155–6. Accord Graymont, *The Iroquois in the American Revolution*, 88–9; W. H. Mohr, *Federal Indian Relations 1774–1788* (1933), 100; see generally P. Silver, *Our Savage Neighbors: How Indian War Transformed Early America* (2008).

54 Miller, “American Indian Influence,” 155–6; Ablavsky, “The Savage Constitution,” 1052–53.

55 Miller, “American Indian Influence,” 155–7; accord Ablavsky, “The Savage Constitution,” 1049–55, 1063.

“negative” because they enhanced federal powers, but these steps were controversial, although they were justified and deemed necessary primarily due to the dangers the United States felt from tribes. In fact, Alexander Hamilton wrote that one of the “important objects . . . of a national government” was to “protect . . . your Western frontier against the savages.”<sup>56</sup> He also wrote that “[t]he savage tribes on our Western frontier ought to be regarded as our natural enemies . . . .”<sup>57</sup> According to Hamilton, the United States needed a “standing army” to keep “garrisons on our Western frontier . . . [to guard] against the ravages and depredations of the Indians.”<sup>58</sup> James Madison joined this argument and wrote that only a stronger national government could end European intrigues designed to arouse the Indians against the United States.<sup>59</sup> Furthermore, James Wilson, defending the new Constitution in an important speech that was reprinted across the 13 states, cited ongoing frontier violence as justification for a standing army.<sup>60</sup> Finally, Secretary of War Henry Knox argued at the end of the convention that the Constitution would be ratified if people reflected on the fact that the Articles of Confederation government could not “chastise the despicable bands of murdering savages on the frontiers.”<sup>61</sup>

Many Founders, and especially the Anti-Federalists, feared a standing army because of the power it gave the federal government and the danger of misuse.<sup>62</sup> But most of the Founders, and even some Anti-Federalists, agreed that an army, frontier garrisons, and the required taxes were necessary evils in light of the dangers from tribes.<sup>63</sup> Consequently, Indians and tribal governments played crucial roles in the adoption of these provisions into the U.S. Constitution and government.

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<sup>56</sup> *The Papers of Alexander Hamilton*, vol. 4 (Harold C. Syrett ed., 1962), 198.

<sup>57</sup> Alexander Hamilton, *The Federalist Papers No. 24*, (Clinton L. Rossiter ed., 1961), 161.

<sup>58</sup> *Id.* He also argued that frontier garrisons would be “keys to the trade with the Indian nations.” *Id.*, 162.

<sup>59</sup> Letter from James Madison to George Nicholas (May 17, 1788), in *The Documentary History of the Ratification of the Constitution*, vol. 18 (John P. Kaminiski et al. eds., 1995), 28–9.

<sup>60</sup> J. Wilson, Speech at a Public Meeting in Philadelphia (October 6, 1781), in *Documentary History*, vol. 13 337–8, 341.

<sup>61</sup> Letter from Henry Knox to Unknown (September 1, 1787), in *Documentary History*, vol. 4, 27. See also Ablavsky, “The Savage Constitution,” 1049–51 (noting others who argued for constitutional ratification due to the risk from Indians).

<sup>62</sup> Complete *Anti-Federalist*, supra note 31, 414; Ablavsky, “The Savage Constitution,” 1051–3.

<sup>63</sup> D. F. Epstein, *The Political Theory of the Federalist* (1984), 41; complete *Anti-Federalist*, supra note 31, 415–6.

In conclusion, it seems clear that Indian nations and peoples impacted the formation of the current U.S. government, the Constitution that created it, and several specific provisions in that document.<sup>64</sup> Scholars who disagree with that statement seem a bit too incredulous that Indians and tribal governments could have contributed in any way to the development of American political thought or that the Founding Fathers could have learned anything from Indians. I believe this viewpoint is too parochial and ignores the evidence presented here and elsewhere. The hundreds of years of interactions between native nations and English and American colonies, states, leaders, and the United States Founding Fathers shaped the political thinking of both sides and even influenced the development, drafting, and ratification of the U.S. Constitution.

### III. MODERN TRIBAL CONSTITUTIONS

More than 565 federally recognized tribal governments exercise political and sovereign powers within the United States today. However, only about 230 of these governments have written constitutions. Many observers would no doubt ask how a government can function without a constitution, and how the rights of citizens can be defined and protected if they are not set out in a written constitution. We must note, however, that England has never had a written constitution, and two other recognized democracies, New Zealand and Israel, also do not have written constitutions.<sup>65</sup>

#### *Early Tribal Constitutionalism*

American Indian societies and peoples organized themselves under various forms of governance structures for centuries before European contact.<sup>66</sup> As already cited, the Iroquois Confederacy was governed by a constitution recorded in “the symbolized writing of wampum belts,”<sup>67</sup> but as Indian political leaders became familiar with the American federal government, they began to consider adopting written constitutions. The Cherokee Nation adopted its first written

64 One commentator argues that the context of Indian affairs is crucial to understanding several constitutional provisions and themes. Ablavsky, “The Savage Constitution,” 1062–6.

65 V. Bogdanor, *The New British Constitution* (2009), xii–xiii, 8–9; P. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed., 2007).

66 Miller, “American Indian Influence,” 133–4, 143–5; Smithsonian Institution, *Handbook of North American Indians: Northeast*, 418–41; Deloria and Lytle, *American Indians*, 82; Speck, “The Iroquois,” 26.

67 *Supra* note 46 and accompanying text.

constitution in 1827. That decision seems to have been a deliberate attempt to adopt the U.S. form of government in an effort to fend off the designs Georgia had on Cherokee lands. The Cherokee adopted a government of three branches: executive, legislative, and judicial. When the Nation was forcibly removed to Oklahoma in 1838 and reorganized itself in 1839, it adopted another written constitution. Other tribal nations from the American southeast also adopted written constitutions seemingly based on the U.S. Constitution for the same reasons as the Cherokee Nation.<sup>68</sup>

The Stockbridge-Munsee Band also tried to protect its sovereignty by adopting a constitution written in English in 1837. This document required elected leaders to be Christians, prevented women from voting, and established a three-branch government similar to the United States. Moreover, numerous tribes adopted constitutions in the 19th century, including the Creek, Choctaw, Chickasaw, Seneca, Osage, Sisseton-Wahpeton, Sac and Fox, and Menominee. And even more adopted written constitutions in the early-20th century, including the Pima Indians (1901); the Pueblo of Laguna (1908); the Rosebud Sioux Tribe (1916, 1920, and 1924); and the Indians of the Flathead Reservation (1930), to mention a few.<sup>69</sup> More than 60 tribal nations had written constitutions on file with the U.S. Department of Interior by 1934.<sup>70</sup>

### *Indian Reorganization Act Constitutions*

In 1934, the U.S. Congress enacted the Indian Reorganization Act (IRA) and instituted a new era of United States–Indian policy. The

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68 *Documents of Native American Political Development* (David E. Wilkins ed., 2009), 56–66; R. B. Porter, “Strengthening Tribal Sovereignty through Government Reform: What are the Issues?” *Kan. J.L. & Pub. Pol’y*, 7 (1997), 72, 82–3; D. Champagne, *Social Order and Political Change: Constitutional Governments among the Cherokee, the Choctaw, the Chickasaw, and the Creek* (1992); Strickland, *Fire and the Spirits*, 51–65.

69 *Documents of Native American Political Development*, 56–66 (Cherokee 1827), 75–81 (Seneca 1848), 101–20 (Seneca 1854, Chickasaw 1856, Stockbridge and Munsee 1857), 168–78 (Osage 1861 and 1881), 195–210 (Sisseton-Wahpeton 1884), 211–20 (Sac and Fox 1885), 259–64 and 293–98 (Menominee 1892 and 1904), 269–76 (Creek 1894), 281–7 (Pima), 365–73 (Laguna), 390–401 (Rosebud Sioux), 457–60 (Flathead); J. W. Oberly, *A Nation of Statesmen: The Political Culture of the Stockbridge-Munsee Mohicans, 1815–1972* (2005), 58–62, 207; D. E. Wilkins, and S. Lightfoot, “Oaths of Office in Tribal Constitutions,” *Am. Indian Q.* 32 (2008), 390, 396, 398–9; Champagne, *Social Order and Political Change*.

70 F. S. Cohen, *Handbook of Federal Indian Law* (University of New Mexico Press reprint 1971, orig. ed. 1941), 128–9 and n.59; E. R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* (2000), 38–9; D. E. Wilkins, “Introduction,” in F. S. Cohen, *On the Drafting of Tribal Constitutions* (David E. Wilkins ed., 2006), xxi.

United States (a) intended to help tribal governments reorganize, reform their governments, and exercise self-governing and sovereign powers; and (b) encouraged and assisted tribal communities to draft written constitutions and bylaws, organize their governing bodies, and create federally chartered corporations to engage in economic activities.

The IRA is important to a discussion of modern-day tribal constitutionalism because the majority of written tribal constitutions in use today originate from that law. However, we must not overemphasize the IRA constitutions because they are not the entire story of American Indian constitutions, and because only about 35% to 40% of the more than 565 federally recognized tribes operate under IRA constitutions, it is obvious that there is much more to the study of tribal constitutions than just the IRA.<sup>71</sup>

Under the IRA, Congress created a process in which tribal communities were encouraged to consider organizing their governments. Indian communities that were then federally recognized tribes (except those in Alaska and Oklahoma) had only 2 years, however, to hold elections to decide whether to organize under the Act. In the elections that were held, 181 tribal communities (representing more than 129,000 Indians) voted to organize under the Act, and 77 tribes (representing more than 86,000 Indians) voted not to do so. However, the tribes that voted to organize under the IRA did not automatically acquire a written constitution. A community that voted to organize under the IRA then had to take the additional steps of drafting a

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71 The 2005 edition of Cohen's *Handbook of Federal Indian Law* states that approximately 160 Indian nations adopted constitutions under the IRA and that about 75 other tribes have created constitutions outside the parameters of that Act. In a 1990 article, Professor Elmer Rusco examined 220 tribal constitutions, 154 of which he says were written under the authority of the IRA and the 1936 IRA Oklahoma amendment. For some reason, however, it appears that he did not include any of the 60–70 Alaskan tribal constitutions that were adopted pursuant to the 1936 IRA Alaska amendment. Counting the Alaska constitutions, Rusco's numbers demonstrate that there are perhaps more than 220 tribal IRA constitutions. In contrast, Vine Deloria, Jr. stated in 1984 that of the 181 tribes that voted to organize under the IRA, only "about 96" drafted constitutions that were then approved by the Secretary of the Interior and later adopted by the tribal electorate. Deloria also states that the BIA encouraged other tribes to organize and draft constitutions and that 13 other tribes drafted constitutions that were approved by the Secretary. See E. R. Rusco, "Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions," *Am. Indian L. Rev.* 14 (1989), 269, 270; Rusco, *A Fateful Time*, at 301; V. Deloria, Jr., and C. M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (1984), 172–7; T. H. Haas, *Ten Years of Tribal Government Under I.R.A. 2–3*, (1947), 11–2 (In 1947, four tribes that had voted to organize under the IRA were using constitutions, but they had not been approved under the IRA); Cohen, *Handbook of Federal Indian Law* 277 (N. Jessup Newton ed.-in-chief, 2005 ed.); Wilkins and Lightfoot, "Oaths of Office," 392; M. Hirschfield, "The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form," *Yale L. J.* 101 (1992), 1331, 1335 n.29.

constitution, having it approved by the Secretary of the Interior, and holding another tribal election to decide whether to adopt the constitution as drafted.

In 1936, Congress extended the IRA to Alaska Natives and Oklahoma tribes. In these two states, tribal governments can still vote today whether to organize under the IRA. In other states, tribes that were federally recognized in 1934 cannot vote now to accept the IRA. Tribal communities that accepted the IRA in their 1934–6 elections and adopted a constitution at that time, however, can amend or revoke those constitutions at any time in elections organized and operated by the Secretary of the Interior.<sup>72</sup>

*Boiler plate constitutions?* A widely accepted idea is that the Bureau of Indian Affairs (BIA) presented the tribal communities that voted to organize under the IRA with “boilerplate” and “cookie cutter” constitutions and bylaws that the communities and tribal governments were nearly forced to accept as written.<sup>73</sup> Most scholars and commentators repeat the adage that the BIA imposed constitutions and foreign political theories and governments on American Indian tribes.<sup>74</sup> Vine Deloria, for example, reported that the BIA sent teams of anthropologists and lawyers to reservations with a model constitution and imposed very similar American-style constitutions on communities that had little legal expertise. Thus, the argument is that these constitutions reflect non-Indian values and concepts of governance and intrude on traditional tribal self-government and sovereignty.<sup>75</sup>

Research has shown that Felix Cohen, considered the father of Federal Indian Law, drafted a model IRA constitution, bylaws, and an outline of points that tribes could consider including in their constitutions.<sup>76</sup> Commentators allege that the BIA employees and attorneys who were sent to reservations to help tribes draft their constitutions

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72 25 U.S.C. § 503; Haas, *Ten Years of Tribal Government*, 2, 30; 25 U.S.C. § 476(b).

73 Deloria and Lytle, *American Indians*, 15, 101–2.

74 J. Resnik, “Dependent Sovereigns: Indian Tribes, States, and the Federal Courts,” *U. Chi. L. Rev.* 56 (1989), 672, 712; Haas, *Ten Years of Tribal Government*, 3; see also G. D. Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934–1945* (1980), 33, 97, n.11. Professor Frank Pommersheim says the top-down handiwork of the BIA and the Secretary’s overarching authority under the IRA raises questions about “the quality and authenticity of the tribal constitutions adopted pursuant to the IRA . . . .” F. Pommersheim, “A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Court,” *Gonz. L. Rev.* 27 (1991), 393, 396.

75 Cohen, *Handbook*, 86–7, 253; R. N. Clinton, C. E. Goldberg, and R. Tsoisie, *American Indian Law: Native Nations and the Federal System* (4th ed., 2003), 38–9; Deloria and Lytle, *The Nations Within*, 173; Deloria and Lytle, *American Indians*, 15, 101; Taylor, *The New Deal*, xiii, 33, 96, 97, n.11; E. R. Gross, *Contemporary Federal Policy toward American Indians* (1989), 20.

76 Cohen, *Drafting of Tribal Constitutions*.

“exerted considerable pressure and employed legally manipulative tactics to secure ratification.”<sup>77</sup> Furthermore, it is clear that most of the IRA constitutions have identical and/or nearly identical provisions. In addition, the BIA created an entirely new role for itself by including in most, if not all, tribal IRA constitutions the requirement that the Secretary of the Interior approve all laws enacted by tribal governments that organized under the IRA.

In an ironic twist, the constitutions that the BIA allegedly drafted and which the Secretary approved did not contain separation of powers provisions and the checks and balances on governmental power that are in the U.S. Constitution. The IRA constitutions also did not provide for tribal judicial systems. It is frankly surprising that these elements of American constitutionalism were left out of the IRA constitutions.

However, on the other hand, some dispute the widely accepted viewpoint set out above. Several scholars disagree with the characterization that boilerplate IRA constitutions were forced on tribal communities. Professor Elmer Rusco has argued that because more than one-half of American Indian tribes never adopted a written constitution, and because many variations exist in the IRA constitutions that tribes adopted, it is clear that tribes did not work from a boilerplate model and did not have IRA constitutions forced on them.<sup>78</sup> More recently, Professor David Wilkins states that the “perception that the IRA, including a ‘boilerplate tribal constitution,’ was virtually imposed on nearly all Native nations” is a stereotype.<sup>79</sup> In contrast, however, Cohen himself noted that some tribes were adopting constitutions nearly “identical with the ‘Short Form Model Constitution,’ which has been presented to and adopted by various other tribes.”<sup>80</sup>

Notwithstanding the uncertainty on that question, we can still state some relevant facts. One-third of the 258 tribal communities that held elections whether to organize under the IRA voted “no,” which is firm evidence that tribal communities exercised their sovereignty and decision making in accepting or rejecting the IRA. In addition, almost one-half of the 181 tribes that initially voted “yes” to organize under the IRA ended up not adopting an IRA constitution. These situations

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<sup>77</sup> Clinton, Goldberg, and Tsosie, *American Indian Law*, 38–9. Some BIA officials expressed concerns that boilerplate constitutions were being forced on tribes. *S. Rep. No. 78–1031* (1944), 5–6.

<sup>78</sup> Rusco, *A Fateful Time*, 297, 301–2, 307 n.7; Rusco, *Civil Liberties*, 270; E. R. Rusco, “The Indian Reorganization Act and Indian Self-Government,” in *American Indian Constitutional Reform and the Rebuilding of Native Nations* (E. D. Lemont ed., 2006), 49, 184, 188.

<sup>79</sup> Wilkins and Lightfoot, “Oaths of Office,” 391; Wilkins, “Introduction,” xxiii, xxv.

<sup>80</sup> Wilkins, “Introduction,” xxvi–xxviii.



are evidence of tribal-specific decision making and the exercise of self-government.<sup>81</sup>

*Provide tribal communities with necessary governmental powers?* A very relevant question concerning modern-day tribal constitutionalism is whether the extant constitutions adequately help tribal governments and communities develop the tools and powers they need to exercise governance and sovereign powers.

The answer may be “yes” because tribal communities that voted for or against the IRA, as well as those who then engaged in constitution drafting and voted on those draft constitutions, were exercising self-governance and sovereignty. Even if the BIA provided model constitutions to tribes, those tribal communities were involved in thinking about their governments and whether to write and adopt constitutions to organize and operate such governments. One commentator noted this point: “[T]he mere act of organizing to write an organic instrument in the form of a constitution may have been a stimulus for more effective government . . . .”<sup>82</sup>

In addition, Congress clearly intended the IRA to increase tribal governmental powers by lessening the paternalistic powers and stranglehold that the BIA exerted over tribal governments. The legislative history demonstrates that the IRA was an express congressional attempt to limit the boundless discretion of the BIA and Department of Interior and give Indians a chance at real self-government.<sup>83</sup> In addition, Congress affirmed tribal powers of inherent sovereignty, recognized some new tribal powers, and ratified, in essence, all of the tribal powers that had been recognized by court cases up to 1934.<sup>84</sup> One scholar notes that Congress “makes it clear that the legal theory behind the IRA is that Native American governments established under its authority exercise aboriginal authority not withheld from them.”<sup>85</sup>

In contrast, however, it can also be argued that the IRA did not provide the tools and powers that tribes need to govern effectively. First, there is the glaring omission of a separation-of-powers provision between the governmental branches. The U.S. Constitution, pre-1934 tribal constitutions, and traditional Indigenous governments in North America carefully separated governing powers between different branches and created checks and balances on too much power

81 Taylor, *The New Deal*, 33, 97, n.11; Deloria and Lytle, *The Nations Within*, 172–7.

82 “Tribal Self-Government and the Indian Reorganization Act of 1934,” *Mich. L. Rev.* 70 (1971), 955, 972–3.

83 *Id.*, 966–8.

84 25 U.S.C. § 476(e); accord Rusco, *A Fateful Time*, 262–4, 271, 281; Deloria and Lytle, *The Nations Within*, 142, 158–9.

85 *Tribal Constitutions: Their Past—Their Future* (James J. Lopach, et al. eds., 1978), 12.

accumulating in just one leader or branch. However in the BIA model, as well as the IRA constitutions that most tribes started adopting in 1934, tribal councils were the executive and legislative branches and were even sometimes part of the judicial branch. Furthermore, inexplicably, the IRA constitutions failed completely to provide for tribal court systems.

Second, the IRA did not accomplish Congress' goal of lessening the power of the BIA and the Department of the Interior over tribal nations. That failure must be blamed on the BIA and the Interior. American Indian tribes are still fighting today to free themselves of the paternalistic BIA. As noted by the U.S. Supreme Court, the BIA slipped into all or almost all of the IRA constitutions a provision that the Secretary of the Interior had to approve all tribally enacted laws. Moreover, commentators and studies show that the one-branch governments created under IRA constitutions were often easily controlled by the BIA and that the BIA approved almost every tribal governmental decision. Deloria wrote that the IRA provisions for secretarial approvals of constitutions, bylaws, hiring of attorneys, and tribal laws became, in effect, a veto power over tribal activities.<sup>86</sup>

Finally, to the extent that IRA constitutions limited or infringed on traditional tribal governance systems, the IRA failed to help Indian communities develop and exercise the tools and powers needed to exercise their sovereignty.

### *Amending Tribal Constitutions*

Today, tribal communities use several methods to organize and operate their governments. Dozens of tribes have adopted constitutions pursuant to the IRA, and many other tribes have adopted non-IRA constitutions. Other hundreds of tribal governments have chosen to operate without constitutions and instead rely on their traditional legal customs and modern-day codified laws to operate their governments.<sup>87</sup>

In one sense, all tribes operate pursuant to "modern-day" constitutions no matter how old their constitution may be because the written and unwritten constitutions, as well as the IRA and non-IRA

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<sup>86</sup> 25 U.S.C. § 476(b)-(d); Cohen, *Handbook*, 253 (citing Duane Champagne, Stephen Cornell, and Joseph Kalt); "Tribal Self-Government," 972, 976-7; Deloria and Lytle, *American Indians*, 102; R. J. Miller, "Economic Development in Indian Country: Will Capitalism or Socialism Succeed?" *Ore. L. Rev.* 80 (2001), 757, 821-3.

<sup>87</sup> A. R. Riley, "Good (Native) Governance," *Colum. L. Rev.* 107 (2007), 1049, 1082; J. Kalt, "Constitutional Rule and the Effective Governance of Native Nations," in *American Indian Constitutional Reform and the Rebuilding of Native Nations* (Eric D. Lemont ed., 2006), 184, 188.

constitutions that tribes use today, are the methods that these tribal communities are using in the modern-day to govern themselves. If tribal communities choose not to amend their current governing documents, they have then acquiesced to whatever form of government and constitution they have in place.

Tribal communities and governments have shown that they are capable of amending their constitutions and making them more responsive to traditional tribal structures and their needs and issues. Several tribal communities have held constitutional conventions to address perceived problems in their constitutions. The only apparent limitation on the sovereign right of tribal communities to engage in amending or even revoking IRA constitutions is that the Secretary of the Interior has to organize, operate, and verify any election held to amend or revoke an IRA constitution. Many dozens of IRA tribes have already successfully amended their IRA constitutions, and at least three tribes have completely revoked them.<sup>88</sup>

The elimination of the provision that the Secretary has to approve all tribally enacted laws has become a favorite amendment to make to the IRA constitutions. As Professor Robert Porter stated, after these amendments, tribes clearly have more “autonomous constitutional governments.”<sup>89</sup>

Many tribes have also corrected the absence of separation of powers and tribal court provisions. Some tribal communities and governments did this by statutory fixes and court decisions, but many others have chosen to amend their constitutions to provide these important governing principles with constitutional authority.<sup>90</sup>

Other tribal communities have undertaken major amendment efforts, including organizing conventions and other intensive efforts to amend their constitutions. The Cherokee Nation of Oklahoma, for example, held its third constitutional convention in February 1999, when 79 citizens/delegates met for a 9-day convention.<sup>91</sup> Several other tribes have also used effective processes for amending their constitutions, including the Rosebud Sioux Tribe, Hualapai Nation, and Northern Cheyenne Tribe. In 1991, the Hualapais used a non-profit organization and 25 tribal volunteers to hold monthly meetings, lead discussions, and draft proposed amendments to their 1935 IRA

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88 25 U.S.C. § 476(a)-(c); 25 C.F.R. § 81.4, 81.7, 81.24; Clinton, Goldberg, and Tsosie, *American Indian Law*, 310.

89 Cohen, *Handbook*, 254, 256; Porter, “Strengthening Tribal Sovereignty,” 76.

90 Cohen, *Handbook*, 254, 259–60, 277–8; S. Cornell, and J. Kalt, “Sovereignty and Nation-Building: The Development Challenge in Indian Country Today,” *Am. Indian Culture & Research J.* 22 (1999), 187.

91 E. Lemont, “Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention,” *Am. Indian L. Rev.* 28 (2003), 1, 2.

constitution. The tribal electorate then approved an amended constitution in 1991. Similarly, the Northern Cheyenne Tribe secured a federal grant in 1991 to organize a reform effort, and appointees and volunteers began working with the tribal attorney to review the Tribe's 1935 IRA constitution. This committee met for more than 15 months, and conducted surveys and public meetings to engage tribal citizens. In 1996, the electorate approved three major constitutional amendments, reorganizing the tribal council, creating governmental separation of powers, and establishing an ethics code. In addition, in 1966, the Rosebud Sioux Tribe amended its IRA constitution to add a Bill of Rights, and in 1985, amended it again to remove the Secretary's approval power over tribal ordinances.<sup>92</sup>

Furthermore, even tribes without written constitutions can engage in "constitutional" amendments and change the principles that govern their reservations and people. In 2009–10, the citizens of the Navajo Nation made major amendments to their unwritten constitution. Because they do not have a written constitution, the people changed their government by a referendum vote. On 2009 December 15, the Navajo voted 25,206 to 16,166 to reduce the size of their legislative tribal council from 88 members to 24. They also voted 24,489 to 16,893 to grant the Navajo president a line-item veto power over the Nation's annual budget.<sup>93</sup>

### *Comparative Analysis of Tribal Constitutions*

As already mentioned, the tribal constitutions currently in place define the parameters of modern-day tribal constitutionalism. A close examination of these constitutions demonstrates the different powers that tribal governments exercise under their constitutions and the different ways in which tribal communities have chosen to create, organize, and control their governments. In the Figure, I analyze 28 tribal constitutions from large and small tribes. Several important and interesting points are made abundantly clear by this analysis.

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92 E. 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," *Am. Indian L. Rev.* 26 (2001), 147, 158–62; Pommersheim, "A Path near the Clearing," 74, 393.

93 "Direct Democracy: The Tyranny of the Majority," *The Economist*, (2009 December 19), 47–4, accessed at <http://www.economist.com/node/15127600>; "Navajos Vote to Reduce Council, Line Item Veto, for Dec. 2015," *Navajo.org* (last accessed by author on 14 May 2010); "Navajos Vote on Reducing Council," *The Durango Herald* (last accessed by author on 14 May 2010). Accord *Nelson v. Initiative Committee to Reduce Navajo Nation Council*, No. SC-CV-03-10, at 4 (Navajo Nation Supreme Court, 28 May 2010). Reprinted at <https://turtletalk.files.wordpress.com/2010/05/npsc-initiative-committee-to-reduce-council.pdf> (last accessed by author 22 May 2015).

Tribe	Date	Amended	IRA	Separation of Powers	Tribal Court	Citizenship Rules		Banishment Revoke citizens	Recall Referendum Initiative	Incorp. Culture	Removed Federal Approval	Land Sale Provision	prop representa- tion	Bill of Rights	General Council Powers
						Blood Quantum	other methods								
<b>Blackfeet</b>	1936	31/84, '84, '78) w/ draft in '99	yes		no	added 1/4 <sup>th</sup> rec'd in '62	gov't to def'n citizenship rec'ts in future reserved to tribal cnd'l	no	ref	no	no	yes	4 dist's	yes	vote; amend constitution
<b>Citizen Band Pottawatomie</b>	1938	6 amendments, with latest proposed amendment in '07	yes	3 branches, each with sole jscr in certain areas; trib cmm can veto legislative acts (legis can override); general council must approve legis acts.	yes	no	child of citizen	no	rec, ref, ini	no	yes	yes	no	yes	auth to approve actions of biz comm relating to trust fund spending, sale/purchase of land, treaty settlements
<b>Cherokee of OK</b>	1839	1976, 2006	no	3 branches w/sole jscr; judicial review; principal chief veto approval/veto power over legis tv enactments; legis tv approval of executive appointments	yes	no	descendant of 'original enrollee'	no	rec, ref, ini	no	yes	no	district representati- on; two seats of off- rez citizens	yes	vote; amend constitution
<b>Cheyenne River Sioux</b>	36	1992	yes	added provision to prevent tribal council review of tribal court decisions	yes	no	child of resident- citizen; trib council can admit by 2/3rds vote a person	can exclude non- citizens in event of danger	rec, ref	no	no	yes	13 dist's	no	vote; amend constitution
<b>Chickasaw of OK</b>	1867	1983, 1990, 2002	no	legis sits as ct in all cases of impeachment; govnr has veto power over legis; govnr proposes annual budget to legis; judicial review	yes	for govnr/trib govnr needs to be 1/4	legis fixes citizenship rules	prospective legis right	ini, rec	no	yes	yes	4 dist's	yes	vote; amend constitution
<b>Colville</b>	38	47, '56, '84, '88, '90,	no	2 branches of gov; biz council and tribal court	yes	1/4 <sup>th</sup>	n/a	exclusion powers in biz council	expulsion, rec	no	n/a	yes	4 dist's	no	vote; amend constitution
<b>Eastern Shawnee of OK</b>	39	1999	no	3 branches, each with definite powers	yes	no	child born to citizen	no	rec, ini, ref	no	yes	yes	no	yes	vote; amend constitution; advisory recommendations
<b>Flandreau Santee Sioux</b>	35	67, '94, '90, '97	yes	general council has removal powers; executive cannot review tribal court decisions; mentions a definite separation in judicial article.	yes	1/4 added in 1997	ancestral relations who has 1/4 or more total NDN blood	exec council has power to revise future citizenship laws	rec, ref, ini	no	no	yes	no	no	call meetings; vote; amend constitution
<b>Grand Ronde</b>	36	Post- termination 1984, '99	yes	tribl ct has power of review (for constitutionality) over legis/exec actions; govnr cnd over tribl cnd in matters of land	yes	1/16 <sup>th</sup>	citizen as of either 1983 or 1999	yes	rec, ref, ini	no	yes	yes	no	no	veto power on changes to land base or citizen jscr; advisory recomm'ts
<b>Hopi</b>	36		yes	Exec veto power over legis; judicial review; specific SOP provision	yes	1/4 <sup>th</sup>	delayed adoption provision in ____	within village's powers	ref	rec's tribal leaders to speak Hopi	yes	yes	13 villages	yes	each village determines its organization scheme; determines tribal council representative; determines method of inter-village dispute resolution
<b>Hoopla Valley</b>	1950	latest in '08	no	one govng, quasi-legis branch who establishes court, nothing about court in const; voters have referendum powers	yes	1/8 <sup>th</sup>	legis can make adoption laws	no	rec, ref	no	n/a	yes	7 dist's	yes	elects election board; reserves rights not vested in tribal council;
<b>Ho-Chunk</b>	1962 (as Wisconsin 1994, 2000, 2003 Winn base)		yes	general council has powers to review/seek back legislation, to review/reverse tribal court decisions that interp legis actions, and right to propose const amendments; specific provision for SOP's; general council delegates power to legis	yes	1/4	no admittance to those previously enrolled in another tribe	no	ini, ref	legis has respond to protect traditional practices	yes	yes	5 dist's	yes	source of "all inherent powers"; amend const; call special elections; review/seek back legislation; review/reverse court decisions that interp legis actions

Kickapoo in Kansas	37	none	yes	specific tribal council powers	no	1/4	tribl cnd can adopt intermarried persons	no	rec, ini, ref	no	no	yes	no	no	vote: amend constitution
Micosaukee	62	no	no	specific pws delegated to tribl & grnt cnd	no	1/4	tribl cnd approv intermarried persons	ban, exc	rec	no	no	yes	3 dist's	yes	vote: amend const.
Mississippi Band of Choctaw	45	1975	yes	specific powers delegated to exec and legis branches; budgets; contracts	no	1/4	1/4 is baseline on which council can include	no	rec, ref, ini	no	no	yes	communitie s	yes	vote: amend constitution
Muscogee	1867	1991, 1995, 1997	non	3 definite branches of gov; (typical SOP relationships)	yes	1/4 = "full citizens"	give s membership to those < 1/4, except right to hold office	no	no	no	n/a	yes	8 districts	recognize s US BOF's	vote: amend constitution
Native Tribe of Kuyukuk, Alaska	92	1994	no	voters can recall; nothing about SOP's generally	no	1/4 <sup>th</sup>	council can adopt other Native Alaskans	disenroll if no contact	ini, ref	council has resp to protect traditional practices	n/a	yes	no	yes	vote: amend constitution
Northern Cheyenne	35	1900, 1996	yes	specific article that sets out SOP's;	no	1/4	anyone born to enrolled resident citizens	can exclude non-citizens; future citizenship powers	ref	no	no	yes	5 dist's	yes	vote: amend constitution
Porch Band of Creek Indians	85	no	yes	specific pws delegated to tribl & grnt cnd	no	1/4 <sup>th</sup>	no	tribl cnd pwr	rec, ref, ini	no	no	yes	no	yes	vote: amend const; advisory recommendations
Sac & Fox of OK	37	67, 04	yes	general council has veto power over business comtee over trust funds, land sales and settlement claims and appointment of sub-comtees	yes	changed to 1/8 in '04 revisions	no	no	rec	no	no	yes	no	yes	auth to approve actions of biz comtee relating to trust fund spending, sale/purchase of land, treaty settlements
Siletz	79	amendments, with last one in 5/2008	no	ct review of exco/legis as to constitutionality/comportment with ICRA	yes	Changed from 1/8 to 1/16th in '94 amendment	no	no	rec, ref, ini	no	n/a	yes	no	yes	amend const; advisory recommendations
Standing Rock Sioux	59	8 lines, from 94-08	no	tribal court has jasn over all issues arising under constitution;	yes	1/4 <sup>th</sup>	no	no	rec, ref, ini	no	yes	yes	8 dist's	yes	vote: amend constitution
San Manuel Band		no constitution	yes	governed on the basis of "customs and traditions" by 7-member tribal council	yes	-	-	-	-	-	-	-	-	-	yes
Tlingit and Haida Indian		2007	no	specific pws for legis, exec, and judic	yes	no	apply to grnt cnd	no	rec, ref, ini	no	n/a	yes	2	yes	vote: amend const; develop subordinate bodies for specific tribal biz;
Turtle Mountain Chippewa	32	8 lines, from 62 to 05	no	has specific const provision about SOP- council chairperson can veto any legislative enactments; council must provide 30 comment period b4 amending code; explicit judicial review	yes	1/4 <sup>th</sup>	no	can exclude non-citizens from lands who are not legally there	rec, ref, ini	no	n/a	yes	4 dist's	no, but refers to ICRA	vote: amend constitution
Umatilla	49	13 amendments	no	general council can demand reports from BOT and remove BOT members and general council officers	no	1/4 <sup>th</sup>	3 methods, w/ 1 discontinued	no	rec,	no	n/a	no	no	no	elects general council officers & board of busines; demands reports from board of busines; advisory recomin'ns
White Mountain Apache	38	1993	yes	tribl council has power over economic affairs; tribal court has power of review; chairman has power to vote	yes	1/4 of ANY NDN blood (must be 1/4 WMA)	no	no	ref	ref's council members to speak Apache	no	yes	12 dist's	yes	vote: amend constitution
Snoqualmie	2002	2006	no	Independent court; TC legislature; chair votes only for TC removal	yes	1/8 Sno	adoptions w/ lesser rights	yes	rec, ref, ini	yes, twice	n/a	yes	no	yes	6 specific reserved powers, land sales & amend constitution

First, the majority of tribal constitutions were drafted and ratified under the IRA. Only a bare majority of these tribal communities, however, have so far amended their IRA constitutions to delete the Secretary's authority over tribal laws. Second, these tribes have various methods for determining tribal citizenship, which is to be expected because citizenship requirements are community-specific decisions based on disparate tribal histories and cultures. Third, a wide disparity exists in the presence and definition of separation of powers. Fourth, some tribes have amended their constitutions multiple times, whereas several tribes have never done so. Fifth, I was surprised to see that tribal courts are not provided for in the constitutions of eight of the 28 tribes. Sixth, and most surprising to me, is how few communities have placed provisions in their constitutions to protect cultural issues. Seventh, I was surprised at the variety in the power of tribal citizens to recall elected leaders and vote on initiative or referendum measures. On the other hand, eighth, I was not surprised at all by the nearly unanimous limitations on tribal councils selling tribal lands without a vote of all tribal voters. Ninth, I was surprised to see the frequent use of voting districts on reservations in which the tribal electorate votes for a representative to the tribal council based on the district of the reservation where they live and do not vote for all tribal council members at large. Tenth, I was not surprised by the recognition of a Bill of Rights in the majority of the constitutions. And, eleventh, I was a little surprised that these constitutions do not provide or define more exactly the powers of the general council (i.e., all the voters of the tribes). (Perhaps like the 9th and 10th Amendments of the U.S. Constitution, it is assumed that powers not specifically granted to the tribal council are to remain with the people?)

Finally, it is not surprising that these tribal constitutions are quite similar. Some of these similarities may result from the IRA and the alleged efforts of the BIA to create standardized constitutions, and part of it is probably due to tribal communities borrowing sample constitutions from other tribes. However, in addition, there is probably a finite world of provisions that constitutions can address. It is also axiomatic that constitutions are designed primarily to set forth general statements of the powers that a specific group of people, the body politic, grants to the government being created or reorganized. One reason for that is to allow some latitude and flexibility for governments to develop over time the exact parameters of those powers. The United States and decisions of the U.S. Supreme Court are examples of the application of that kind of constitution. On the other hand, many modern constitutions adopted in Central and South America are very specific and run to

hundreds of clauses. Some argue that these constitutions are written with too much specificity.

Tribal communities are faced with the same question of how narrowly or broadly to define their government's powers. How much does a tribal community want to trust and empower their present and future leadership? How closely were leaders monitored and controlled in their traditional and historic governance systems? What sorts of decisions should be reserved for the entire adult population (the general council), as opposed to being made by the legislature, the tribal council, or the executive branch? These are questions for tribal communities to consider when creating or amending their constitutions and exercising and protecting their sovereignty.

The hundreds of American Indian nations that do not have written constitutions face these same questions. Do tribal communities without a constitution want or need to create one? Without a constitution, tribal leaders operate perhaps with more freedom and power than tribal governments that are restricted by specific constitutional limitations. Without these limitations, and independent court systems, there is a risk that tribal leadership may be tempted to exceed the authority that tribal history and culture would ordinarily allow. Perhaps such communities would be better off protecting their sovereignty by defining more exactly what they expect of tribal leaders and limiting some of the powers of their leaders and governmental bodies.

## CONCLUSION

Some of the most basic rights that citizens can possibly possess are (a) deciding how to govern themselves and (b) choosing how to organize and control their political institutions. For many centuries, American Indians organized their societies and cultures under democratic governing principles that helped protect their important values and sovereignty. Tribal communities continue to be interested in preserving their cultural and political values and directing and deciding their own futures. As the Navajo Nation Supreme Court stated, the Nation must develop its own legal system because the "concept of justice has its source in the fabric of each individual society."<sup>94</sup>

At the same time, however, different societies and political systems can learn from each other. In fact, the evidence demonstrates that America's Founding Fathers studied and were influenced by indigenous political theories and tribal governments, and that the U.S. Constitution reflects such influence. Historians, political scientists, and American

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<sup>94</sup> In re: "Validation of Marriage of Francisco," 6 Navajo Rptr 134, 16 *Ind. L. Rep.* 6113 (1989).



society should not ignore the political and governmental principles that were learned from Indian societies in the past, nor should they ignore that America can continue to learn from the modern-day political efforts and practices of tribal communities.

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