

# AMERICAN INDIAN INFLUENCE ON THE UNITED STATES CONSTITUTION AND ITS FRAMERS

Robert J. Miller\*

## I. Introduction

History is usually written by the strong or the victorious, and the role of minor or vanquished participants is usually downplayed or forgotten.<sup>1</sup> Similarly, many writers of the history of the United States portray Indians as having had little impact or playing no role at all in the development of this country.<sup>2</sup> However, a closer examination shows a major Indian influence on many aspects of American life affecting us to this day.<sup>3</sup>

Native Americans played a significant role in shaping the United States Constitution and had a profound impact on several of the Founding Fathers. Indian tribes had both a positive and a negative influence on many of the actual provisions and on the important basic themes of the Constitution. The Framers were positively influenced by

\* Adjunct Professor of Law, Northwestern School of Law of Lewis and Clark College; Attorney, Stoel Rives Boley Jones & Grey, Portland, Oregon. Law clerk to the Honorable Diarmuid O'Scannlain, United States Circuit Judge for the Ninth Circuit Court of Appeals, 1991-92. J.D., 1991, Northwestern School of Law of Lewis and Clark College; B.S., 1988, Eastern Oregon State College. The author thanks Professor Jim Huffman and Donna Goldsmith for their comments on an earlier draft of this article.

1. "History never embraces more than a small part of reality." La Rochefoucauld (1613-1680), *quoted in* JOHN V. BARTLETT, *FAMILIAR QUOTATIONS* 587 n.2 (Emily M. Beck ed., 1980); A. Irving Hallowell, *The Backwash of the Frontier: The Impact of the Indian on American Culture*, in *THE FRONTIER IN PERSPECTIVE* 230 (Walker D. Wyman & Clifton B. Kroeber eds. 1957).

2. BRUCE E. JOHANSEN, *FORGOTTEN FOUNDERS: HOW THE AMERICAN INDIAN HELPED SHAPE DEMOCRACY* 6 (1982) (quoting A. Irving Hallowell, *The Backwash of the Frontier: The Impact of the Indian on American Culture*, in *THE FRONTIER IN PERSPECTIVE* 230 (Walker D. Wyman & Clifton B. Kroeber eds., 1957) (quoting in turn Bernard De Voto)) ("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.").

3. See Felix S. Cohen, *Americanizing the White Man*, 21 *AM. SCHOLAR* 177, 181 (1952) [hereinafter Cohen, *Americanizing*] and JOHANSEN, *supra* note 2, at 4-5, for an extensive listing of Indian inventions and developments in food, commercial products, clothing, medicines, and so forth. See generally JACK MCIVER WEATHERFORD, *INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD* (1988). Clinton Rossiter states: "The white man's agriculture, road system, and language owed varying debts to the Indian tribes, but the chief influence of these native Americans was as a bar to easy westward expansion." CLINTON L. ROSSITER, *SEEDTIME OF THE REPUBLIC* 155 (1953). Indians in the Lake Superior area were among the world's first users of metal. BRUCE CATTON & WILLIAM B. CATTON, *THE BOLD AND MAGNIFICENT DREAM: AMERICA'S FOUNDING YEARS, 1492-1815*, at 375 (1978).

Indian ideas regarding government and human freedom. On the other hand, the Framers were negatively influenced by the threat posed by the Indian tribes toward the new United States government. This Indian contribution to the development of the United States has been largely ignored and forgotten, because to some people it seems impossible that educated white Americans could have learned anything from "these inhuman butchers."<sup>4</sup>

Regrettably, Indian cultures and ideas are still ignored today and thought to lack relevance to modern-day American lifestyles or problems. Perhaps today's "Framers" could look to Indian culture for solutions on how to solve environmental problems, how to promote coexistence among diverse lifestyles, how to preserve wildlife, and so on. Yet this probably will not happen because Indians are still perceived and stereotyped as warring savages, or romanticized noble Indians, or alcoholic street persons, or as childlike people who the government must protect. These perceptions reinforce a common belief that white culture cannot learn anything from Indians. This belief is directly contrary, however, to the actions of several of the Framers of the Constitution, who learned much from Indian tribes and incorporated what they learned into the United States Constitution and government.

This article will explore the contribution of Indian ideas and influence on the formation of the United States Constitution and government. Section II examines the Framers' understanding of Indian tribes and culture and the necessity for the fledgling United States government to deal with the sovereign Indian nations on its borders. Section III addresses the positive effects of Indian tribes' governmental ideas on the Framers and the formation of the Constitution. Next, Section IV discusses the negative impact, for want of a better word, that the presence of often hostile tribes exerted on the Framers and on different provisions of the Constitution. Finally, in Section V, this article suggests that as the Founding Fathers studied Indian ideas and incorporated many of them into their society, so should today's society study and utilize Indian ideas in developing solutions to modern-day problems.

## *II. The Framers' View of Indian Tribes*

### *A. The Historical/Governmental View*

The primary emotions the Framers and colonists felt towards Indians were fear and hatred.<sup>5</sup> The danger from the presence of thousands of

4. "It is our misfortune that we are never at peace with these inhuman butchers . . . ." *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, reprinted in 3 HERBER J. STORING, *THE COMPLETE ANTI-FEDERALIST* 62-63 (1981).

5. "As a rule Americans hated red Indians, wished to see them exterminated, and for the most part treated them accordingly." CATHERINE D. BOWEN, *MIRACLE AT PHILADELPHIA* 143-44 (1966); see also NATHAN SCHACHNER, *THE FOUNDING FATHERS* 64-65 (1954).

warriors from dozens of potentially hostile tribes, on and within the United States' borders, must have affected even the most enlightened of the Framers and colonists. The danger the Indian tribes posed provided an impetus for unifying the colonies.<sup>6</sup> Any colonist who had been in the militia or England's colonial army, as were Benjamin Franklin or George Washington, had fought Indians many times.<sup>7</sup> Small skirmishes were a constant problem in one colony or another. Also, four major Indian wars, concluding with the French and Indian War, were fought between 1689 and 1763.<sup>8</sup>

Many Framers were familiar with Indian culture through serving as Indian commissioners for their states or the Continental Congress, and as Indian treaty negotiators.<sup>9</sup> James Wilson of Pennsylvania, a signer of the Constitution and a Supreme Court Justice, served as a commissioner and as a negotiator. He described his job as "securing and preserving the friendship of the Indian Nations"<sup>10</sup> to "prevent them taking any part in the present commotions."<sup>11</sup>

State and national governments in colonial times placed the maintenance of good relations with Indian tribes as a high priority.<sup>12</sup> The French actively recruited tribes to fight against the English and the colonists.<sup>13</sup> Indian opposition to the French, or at least neutrality, was

6. JULIAN A. CHANDLER, *GENESIS AND BIRTH OF THE FEDERAL CONSTITUTION* 237 (1924).

7. The colonists fought as allies with and as enemies of Indian tribes. The Cherokee fought alongside General George Washington in the French and Indian War from 1755-63. DAVID H. CORKRAN, *THE CREEK FRONTIER 1540-1783*, at 142-62 (1967). Different septs or clans within the Shawnee tribe even fought for and against the British at the same time. ALLAN W. ECKERT, *A SORROW IN OUR HEART: THE LIFE OF TECUMSEH* 22 (1992).

8. CHANDLER, *supra* note 6, at 238-40; CATTON & CATTON, *supra* note 3, at 226-27.

9. See *infra* note 61 (discussing Thomas Paine) and notes 105-14 and accompanying text (discussing Benjamin Franklin).

10. PAGE SMITH, *JAMES WILSON: FOUNDING FATHER, 1742-1798*, at 67 (1956). The Supreme Court quoted this passage in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

11. SMITH, *supra* note 10, at 68. The Supreme Court quoted this passage in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

12. *THE AMERICAN HERITAGE BOOK OF INDIANS* 192-93 (Alvin M. Josephy, Jr. ed., 1961) [hereinafter *AMERICAN HERITAGE*]. The colonies established Indian agencies and appointed Indian superintendents from 1650 onwards. 4 *SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS* 245-49 (William C. Sturtevant gen. ed., Wilcomb E. Washburn vol. ed., 1988) [hereinafter *SMITHSONIAN HANDBOOK VOL. 4*].

13. 15 *SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS: NORTHEAST* 430-35 (William C. Sturtevant gen. ed., Bruce G. Trigger vol. ed., 1978) [hereinafter *SMITHSONIAN HANDBOOK VOL. 15*]. See generally WILBUR R. JACOBS, *DIPLOMACY AND INDIAN GIFTS: ANGLO-FRENCH RIVALRY ALONG THE OHIO AND NORTHWEST FRONTIERS, 1748-1763* (1950).

crucial to the existence of the English colonies.<sup>14</sup> The English countered French actions by cultivating the friendship of the Indians as part of their New World strategy.<sup>15</sup> They did such a good job that they won the support or neutrality of many northern tribes, including the Iroquois.<sup>16</sup> The strategy was effective for many years, in that Indian tribes predominantly supported the English against the colonies during the Revolution<sup>17</sup> and in the War of 1812.<sup>18</sup> This was no doubt due in part to the generous gifts the English gave the tribes, and to the great distance between England and tribal settlements. Trappers and explorers did not create the same problems for Indians as did settlers, who arrived in large numbers and stayed permanently.<sup>19</sup> It was the colonists who caused day-to-day problems for the tribes, not the King of England.<sup>20</sup>

14. George Washington wrote numerous times of the urgent need to placate Indian tribes and enlist their assistance if at all possible. See IV COLONIAL SERIES: THE PAPERS OF GEORGE WASHINGTON 192-94 (W.W. Abbot ed., 1988) (discussing Indian affairs, he feared that "the different colonies struggling with each other for their assistance, will be productive of very great Evils . . ."); see also BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 88-89 (1972) (stating that England and then the United States expended lots of time and money keeping Indian tribes happy for trade and reasons of stability); RICHARD AQUILA, THE IROQUOIS RESTORATION: IROQUOIS DIPLOMACY ON THE COLONIAL FRONTIER, 1701-1754, at 106 (1983); J.E. CHAMBERLIN, THE HARROWING OF EDEN 135 (1975); CAROLYN T. FOREMAN, INDIANS ABROAD 34-35 (1943) (stating that in 1710 Queen Anne of England met with Iroquois and Mohawk chiefs to encourage them to fight with England against the French).

15. DONALD A. GRINDE, JR., THE IROQUOIS AND THE FOUNDING OF THE AMERICAN NATION 31-33 (1977).

16. CHAMBERLIN, *supra* note 14, at 126; SMITHSONIAN HANDBOOK VOL. 4, *supra* note 12, at 9-12.

17. CHAMBERLIN, *supra* note 14, at 126; SMITHSONIAN HANDBOOK VOL. 4, *supra* note 12, at 12, 29. The Cherokee tribe fought for the British in the Revolution. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 550-51 (1832). The British also tried to recruit the Ohio tribes to fight the United States. RONALD W. CLARK, BENJAMIN FRANKLIN: A BIOGRAPHY 285 (1983). The revolutionists excoriated the King of England for "endeavor[ing] to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions." THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

Some Indians, however, did fight for the United States in the Revolution. Robert Morris, a member of the constitutional convention and signer of the Constitution, referred in a letter to a request to the Secretary of War to pay the salary of Louis Atayatahgronghta, a chief of the Oneida tribe who was a lieutenant colonel in the Continental Army. 5 THE PAPERS OF ROBERT MORRIS 520-21 (Elmer J. Ferguson ed., 1980). Also, some Stockbridge Indians served as Minutemen in 1775. SMITHSONIAN HANDBOOK VOL. 4, *supra* note 12, at 144.

18. See generally DAVID R. EDMUNDS, TECUMSEH & THE QUEST FOR INDIAN LEADERSHIP (1984). Tecumseh was a British brigadier general commanding up to 3000 Indians fighting for the British.

19. CATTON & CATTON, *supra* note 3, at 324.

20. *Id.*

The Framers and colonial leaders were equally cognizant of the importance of peaceful relations with the tribes both during and after the Revolution.<sup>21</sup> Benjamin Franklin wrote that "securing the Friendship of the Indians is of the greatest consequence for these Colonies."<sup>22</sup> At that time, the colonies and the new United States had to placate Indians because, as James Wilson wrote, "there were neither men nor supplies for the defence of the frontier."<sup>23</sup>

The tense relationship between colonists and Indians did not breed respect or admiration. James Madison provides an excellent example of the development of colonial attitudes towards Indians. Madison was an intelligent, enlightened person, but throughout his childhood and early adult life, Indian wars and retaliations by both sides deeply affected him. His biographer describes Madison's childhood as being spent "within expectant earshot of the cries of Indian attack."<sup>24</sup> His "deepest impressions of [] childhood, however, resulted from the wave of fear that swept over the Virginia frontier" in 1755 after General Braddock's defeat by Indians left Virginia undefended.<sup>25</sup> The "dread of Indians"<sup>26</sup> and "the terror that gripped" Madison and the colonists<sup>27</sup> did not encourage understanding and harmony between these different races and countries.<sup>28</sup>

The dread of Indians did not end with the Revolutionary War, nor did the danger from the tribes lessen once the United States won its freedom and sought westward expansion. Alexander Hamilton consid-

21. "It is sincerely to be desired that all need of coercion in future may cease and that an intimate intercourse may succeed, calculated to advance the happiness of the Indians and to attach them firmly to the United States." President George Washington, Third Annual Address (Oct. 25, 1791), in 2 PHILLIP B. KURLAND & RALPH LERNER, *THE FOUNDER'S CONSTITUTION* 531 (1987). The Continental Congress established an Indian department to manage Indian affairs. SMITHSONIAN HANDBOOK VOL. 4, *supra* note 12, at 29. See generally GRINDE, *supra* note 15, at 62-80 (describing American efforts and desires to keep Indian tribes neutral or on the United States' side in the Revolution).

The United States government had good intentions towards the tribes. In article III of the Northwest Ordinance, the government promised "utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent . . . ." Northwest Ordinance art. III (July 13, 1787), in Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 n.

22. JOHANSEN, *supra* note 2, at 65; see also FRANCIS JENNINGS, *EMPIRE OF FORTUNE* 88 (1988).

23. SMITH, *supra* note 10, at 70-71.

24. IRVING BRANT, *JAMES MADISON: THE VIRGINIA REVOLUTIONIST* 48 (1941).

25. *Id.* at 45.

26. *Id.* at 48.

27. *Id.* at 45.

28. Yet even Madison saw a good side in Indian life and the "disinclination" of whites and Indians "to exchange the savage for the Civilized State." *THE COMPLETE MADISON: HIS BASIC WRITING* 278-79 (Saul K. Padover ed., 1973).

ered one of the important jobs of an American national government to be the protection of the borders from the "savages."<sup>29</sup> Moreover, the tribes remained a source of foreign intrigue to the United States for many years after the Revolution.<sup>30</sup>

In fact, the tribes were a power to be reckoned with on the North American continent.<sup>31</sup> The fledgling United States was a weak country that needed peace and security after the Revolutionary War, not Indian troubles.<sup>32</sup> Treaty negotiations with the Indians during these years were affected by the United States' desire for peace and its need to keep the tribes from allying with England.<sup>33</sup> The tribes lost this important option after the War of 1812; thereafter negotiations with the United States became one-sided and contentious.<sup>34</sup> The governmental and day-to-day relations between colonists and tribes demonstrates the attitudes and interactions that arose between these different peoples. This tribal and colonial contact undoubtedly affected the development of the colonies and the United States.

#### *B. The Judicial View of Indian Tribes*

The colonial and early United States' view of Indians was reflected and even expanded upon in several early court decisions. Chief Justice John Marshall described Congress as exhibiting "the most anxious desire" to avoid Indian troubles in those early years by making "strenuous exertions" to bestow gifts and avoid any problems that would

29. In a "review of the variety of important objects, which must necessarily engage the attention of a national government," Hamilton listed "protect[ing] . . . your western frontier against the savages." 4 THE PAPERS OF ALEXANDER HAMILTON 198 (Harold C. Syrett ed., 1962). Hamilton also dealt with Indian tribes during his tenure as governor of Pennsylvania. ECKERT, *supra* note 7, at 16.

30. Discussing foreign use of Indian tribes against the United States, Hamilton wrote, "The savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies [Britain and Spain], because they have most to fear from us, and most to hope from them." THE FEDERALIST No. 24, at 161 (Alexander Hamilton) (Clinton L. Rossiter ed., 1961).

President Jefferson stated that the Louisiana Purchase could possibly end "the intrigues of foreign nations . . . produc[ing] disturbance between the Indians and us." ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 244 (1970).

31. WILLIAM T. HAGAN, AMERICAN INDIANS 63-65 (1961); WALTER H. MOHR, FEDERAL INDIAN RELATIONS 1774-1788, at 100 (1933).

32. BERNARD A. DEVOTO, THE COURSE OF EMPIRE 335-36 (1952). The Confederation was so weak and desirous of avoiding Indian troubles that it told the Cherokee to "send a deputy of their own choice, whenever they think fit, to Congress." One author suggests this action was tantamount to an offer of statehood for the Cherokee under the Articles of Confederation. JAMES M. BURNS, THE VINEYARD OF LIBERTY 6 (1981).

33. SAMUEL E. MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 362-65 (6th ed. 1969).

34. *Id.* at 386; ALVIN M. JOSEPHY, THE INDIAN HERITAGE OF AMERICA 98, 319 (1968).

lead to hostilities.<sup>35</sup> Marshall's three great Indian opinions — *Johnson v. M'Intosh*,<sup>36</sup> *Cherokee Nation v. Georgia*,<sup>37</sup> and *Worcester v. Georgia*<sup>38</sup> — shed light on the Framers' view of Indians.

While Marshall was not a delegate to the Constitutional Convention, he was one of the Framers of the early American political scene and was crucial in defining the meaning of the Constitution.<sup>39</sup> His opinions have had a great impact on the legal position tribes occupy. The Marshall cases were "rendered at a time when Indian affairs occupied a central position in federal policy. Most Indian tribes had not yet been included within state boundaries. In terms of both military power and population, Indian tribes were a significant factor."<sup>40</sup>

In *Johnson v. M'Intosh*,<sup>41</sup> Marshall relied upon the European "doctrine of discovery" as granting the discovering nation both title to Indian lands and the sole right to acquire those lands from the natives.<sup>42</sup> Under Marshall's decision, the tribes retained occupancy and use rights to their aboriginal lands but were precluded from selling or ceding the lands to anyone other than the country that "discovered" them.<sup>43</sup> Indian "rights to complete sovereignty, as independent nations, were necessarily diminished . . . ."<sup>44</sup>

In the subsequent case of *Cherokee Nation v. Georgia*,<sup>45</sup> Marshall refused to find original jurisdiction in the Supreme Court because an Indian tribe was not a "foreign state"<sup>46</sup> for constitutional jurisdiction.<sup>47</sup> Hence, Marshall weakened the foreign nation status of tribes which

35. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

36. 21 U.S. (8 Wheat.) 543 (1823).

37. 30 U.S. (5 Pet.) 1 (1831).

38. 31 U.S. (6 Pet.) 515 (1832).

39. Marshall fought with Washington and the Continental Army and spent the famous winter at Valley Forge. BARON THOMAS S. CRAIGMYLE, JOHN MARSHALL: IN DIPLOMACY AND IN LAW 5 (1933). Marshall served as a delegate in the Virginia legislature, a delegate in the Virginia convention to ratify the Constitution, as well as United States minister to France, secretary of war, secretary of state, and, for 34 years, chief justice of the Supreme Court. 1 THE PAPERS OF JOHN MARSHALL xlv (Herbert A. Johnson ed., 1974).

40. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 25 (1987).

41. 21 U.S. (8 Wheat.) 543 (1823).

42. *Id.* at 573.

43. *Id.* at 574.

44. *Id.* The Crown could grant title to others while the Indians still lived on the land. These grants were only subject to the Indians right of occupancy. The United States inherited the position of being able to grant Indian title from the English Crown when England relinquished all claim to property and territorial rights in the United States after the Revolution. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832).

45. 30 U.S. (5 Pet.) 1 (1831).

46. *Id.* at 16-20. The vote was 3-2 with two Justices saying the Cherokee Nation was a foreign state. *Id.* at 80.

47. U.S. CONST. art. 3, sec. 2.

entered into treaties with the United States. Tribes lost some of the attributes of being a sovereign nation separate from the United States. Today, tribes cannot trade or negotiate with any nation other than the United States.<sup>48</sup> Marshall called tribes under treaty protection with the United States "domestic dependent nations."<sup>49</sup> Their relationship with the United States is like a ward to its guardian.<sup>50</sup>

Finally, in *Worcester v. Georgia*,<sup>51</sup> Marshall held as repugnant to the Constitution and treaties of the United States an attempt by Georgia to enforce its laws on Cherokee lands.<sup>52</sup> This "distinct, independent, political communit[y]"<sup>53</sup> had entered into treaties with the United States and had availed itself of that protection. Marshall recognized that the tribe still possessed the right of self-government and existence as a state.<sup>54</sup> In other words, even in 1832, the Cherokee were perceived as a separate state and government from the United States and under the protection of the federal government.

The legal position of Indian nations described in Marshall's opinions buttresses the view of the Framers and colonists of the late 1700s that the tribes were a major force that first England and then the United States had to manage and placate.<sup>55</sup> The Framers and colonists in general had a wary respect for their Indian neighbors. Fear, danger,

48. WILKINSON, *supra* note 40, at 55-58; FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122-23 (Univ. of N.M. Press photo. reprint 1971) (1942) [hereinafter COHEN 1942 ED.].

49. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

50. *Id.*

51. 31 U.S. (6 Pet.) 515 (1832).

52. *Id.* at 549. However, the Court's decision that the Georgia indictments were invalid was ignored by Georgia. The white missionary sentenced in the Georgia court to four years hard labor was not released after the Supreme Court's decision. COHEN 1942 ED., *supra* note 48, at 123. The missionary finally was pardoned by Georgia's Governor under federal pressure when President Adams threatened to use the army. ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION* 211 (1983). Georgia had earlier ignored a Supreme Court writ of error and executed an Indian notwithstanding the writ. *Id.*

President Andrew Jackson is reported as saying of *Worcester*, "John Marshall has made his decision; now let him enforce it." HORACE GREELEY, *AMERICAN CONFLICT* 106 (1864). *Contra* MARQUIS JAMES, *THE LIFE OF ANDREW JACKSON* 603-04 (1938). A leading historian on the Court called *Cherokee Nation* and *Worcester* "the most serious crisis in the history of the Court." 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 729 (1926).

53. *Worcester*, 31 U.S. (6 Pet.) at 559.

54. *Id.* at 559-61; see also JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 1094 (1833), reprinted in 2 KURLAND & LERNER, *supra* note 21, at 550 (stating Justice Story's agreement with Marshall's view of Indian nations) ("Indians . . . were always treated, as distinct, though in some sort, as dependent nations. Their territorial rights and sovereignty were respected. . . . But their right of self-government was admitted; and they were allowed a national existence . . .").

55. See *supra* notes 12-16, 21-24, 32-34.

and competition on both sides for living space and security marked the relationship between these two peoples. It colored and affected their actions toward and perceptions of each other. Living closely together for a century and a half influenced and altered both races.<sup>56</sup> Indians obviously influenced colonial and frontier life, and that influence is reflected in the Constitution and government of the new republic born on the North American continent.

### III. Positive Effects on the Framers and the Constitution from Indian Governments and Ideas

To Europeans and the colonists, it was the Indians who were considered to be Americans, not the English newcomers.<sup>57</sup> It is no surprise, then, that Indians influenced the new country and government that formed on this continent.<sup>58</sup> In fact, many commentators have detected an Indian influence extending far beyond this continent's borders. Some authors see the influence of the Indian way of life in the writings of many philosophers, including Marx.<sup>59</sup>

56. From the beginning Indian and English contact "began to shape the nature of the English experiment [colonizing America] . . . ." CATTON & CATTON, *supra* note 3, at 137.

57. MICHAEL KRAUS, *THE ATLANTIC CIVILIZATION: EIGHTEENTH CENTURY ORIGINS* 217 (1949).

58. See AMERICAN HERITAGE, *supra* note 12, at 195. An anti-Federalist writer said that "[w]ith them [Indians] the whole authority of government is vested in the whole tribe. . . . Their government is genuinely democratic." 4 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 107 (1981).

59. Felix S. Cohen, author of *Handbook of Federal Indian Law*, the preeminent work in Indian law, claims Indian influence on Thomas More's *Utopia*, as well as on the works of Locke, Montaigne, Montesquieu, Voltaire, and Rousseau. Cohen, *Americanizing*, *supra* note 3, at 181-83; CHARLES L. SANFORD, *THE QUEST FOR PARADISE: EUROPE AND THE AMERICAN MORAL IMAGINATION* 11, 63 (1961) (citing Indian life as an example of More's *Utopia*); KRAUS, *supra* note 57, at 8-17. Kraus discusses the "noble savage's" influence on literature, language, Hobbes, and Locke. Hobbes and Locke show[ed] a familiarity with the social structure of American Indians which they used to good purpose. Each of the English political scientists wrote in a period of crisis, and in the search for a more valid ordering of society the American Indian was believed to have found many of the answers.

*Id.* at 16. John Locke and Jean Jacques Rosseau studied aboriginal societies. GRINDE, *supra* note 15, at 19-23.

Freidrich Engels was impressed with the Iroquois government after reading LEWIS H. MORGAN, *ANCIENT SOCIETY* (1877), and Engels described the Iroquois at some length and concluded they were a living society that "knows no state." KARL MARX & FREIDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE: SELECTED WORKS* 527 (1968). Several authors have pointed out the influence of the Iroquois and Indian lifestyle on Marxism. *E.g.*, CHAMBERLIN, *supra* note 14, at 227 n.15; ELEMIRE ZOLLA, *THE WRITER AND THE SHAMAN: A MORPHOLOGY OF THE AMERICAN INDIAN* 162-63 (R. Rosenthal trans. 1973); WEATHERFORD, *supra* note 3, at 161-62; GRINDE, *supra* note 15, at 131-32. When Marx read *Ancient Society* he took 98 pages of notes by

The founders of the United States were not immune from this influence. Several of the Framers, for example, were familiar with and impressed by the Iroquois Confederacy in particular.<sup>60</sup> The Iroquois especially influenced the New England states.<sup>61</sup> The power and strategic location of the Iroquois made them an important influence on European expansion in the New World.<sup>62</sup>

The Iroquois Confederacy was comprised of five, and later six,<sup>63</sup> different Indian nations united for protection and strength.<sup>64</sup> Each nation, however, pursued its own goals and strategies, functioning as "an absolute Republic [sic] by itself."<sup>65</sup> The union formed during

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hand, and when Engels first published *The Origin of the Family* it was subtitled "In Light of the Researches of Lewis H. Morgan" (the author of *Ancient Society*). Marx and Engels were impressed with the Iroquois' classless society, one that achieved economic equality without coercion. JOHANSEN, *supra* note 2, at 122.

60. RUTH M. UNDERHILL, *RED MAN'S AMERICA* 83 (1953) (naming Lee, Franklin, Jefferson, and Washington); *see also* CLARK WISSLER, *INDIANS OF THE UNITED STATES: FOUR CENTURIES OF THEIR HISTORY AND CULTURE* 128 (1940) ("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.").

61. "For over 100 years, The Iroquois played a major role in the development of the colonial frontier . . ." AQUILA, *supra* note 14, at 15. Benjamin Franklin admired the "proud, simple life of America's native inhabitants." PAUL CONNER, *POOR RICHARD'S POLITICKS* 76 (1965). Franklin defended the state of nature by describing the Indians as living "in that *Natural State*." *Id.* at 118.

While not classically definable as a Framer, Thomas Paine was an influence on the American Revolution. He had extensive contact with the Iroquois and learned to speak their language to facilitate treaty councils. JOHANSEN, *supra* note 2, at 116. According to Paine's biographer, Paine was "fascinated by" the Iroquois. *Id.* Paine found among the North American Indians "the natural and primitive state of man" in which society ought to exist. *Id.*; *see also* WEATHERFORD, *supra* note 3, at 124-25 (stating Paine's belief that Indians were "living in the natural state" and his use of Indians as a model for how society should be organized).

62. GRINDE, *supra* note 15, at 26-30. The Iroquois "most profoundly influenced history in the seventeenth and eighteenth centuries." SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 418. France and England knew "their contest for control of the North American continent ultimately would be decided by the choice the Iroquois made between them." *Id.* at 434. The Iroquois were prominently placed to control the fur trade with which the French were primarily interested. *Id.*

63. The five nations were the Mohawk, Oneida, Onondaga, Cayuga, and the Seneca. The Tuscaroras joined the Confederacy about 1720. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 420, 433.

64. The Iroquois "achieved for themselves the most remarkable civil organization in the New World excepting only Mexico and Peru." *Id.* at 418 (quoting LEWIS H. MORGAN, *LEAGUE OF THE HO-DE-NA-SAU-NEE OR IROQUOIS* (1851)); *see also id.* at 418-41.

65. 2 CADWALLADER COLDEN, *THE HISTORY OF THE FIVE INDIAN NATIONS OF CANADA* xvi (Allerton Book Co., 1902) (1747). The tribes pursued individual tribal interests while remaining part of the Confederacy. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 430.

the fifteenth and sixteenth centuries<sup>66</sup> and was fully developed when the French first encountered it in 1630.<sup>67</sup> The Iroquois had created a civil system of government that provided for checks and balances to prevent the concentration of individual power and also maintained a wide range of personal freedoms.<sup>68</sup>

The Iroquois' unwritten constitution, the Great Law of Peace, separated military and civilian affairs and provided for freedom of religion, women's suffrage, referendum, veto, and recall.<sup>69</sup> One author stated that the "Iroquois Constitution is [possibly] the longest-going international constitution in the world."<sup>70</sup> Their constitution provided for a yearly council of all-tribal chiefs, during which Confederacy policies were determined by unanimous vote.<sup>71</sup> The constitution provided women with a strong voice in Iroquois government. The Iroquois were a matriarchal society<sup>72</sup> and the clan mothers selected new chiefs.<sup>73</sup> The tribes, through their clan mothers, also had the power to recall or replace an unsatisfactory chief.<sup>74</sup> The Iroquois women had the power to stop war parties.<sup>75</sup> In addition to the recall power, the selection of leaders by ability, and the independent influence of women, the Iroquois constitution further checked the amount of power a chief could possess by not allowing peace chiefs to also be war chiefs.<sup>76</sup>

This brief highlighting of some of the major points of the Iroquois constitution illustrates the democratic traits the Confederacy practiced. The Iroquois were "a decidedly democratic people"<sup>77</sup> who provided an influential model for the Framers. Many Framers were conversant

66. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 418.

67. *Id.*

68. JOHANSEN, *supra* note 2, at 8-10. See generally SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 418-41.

69. JOHANSEN, *supra* note 2, at xiv, 10-11, 25, 26, 29. "[T]he democratic constitution of the Iroquois Confederacy, . . . [contained] provisions for initiative, referendum and recall, and its suffrage for women as well as men." Cohen, *Americanizing*, *supra* note 3, at 182; see also SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 314-17.

70. JOHANSEN, *supra* note 2, at 10 (quoting ARTHUR POUND, JOHNSON OF THE MOHAWKS (1930)).

71. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 422.

72. *Id.* at 424.

73. *Id.* at 425-26.

74. *Id.* at 426. This was called "dehorning" because the official symbol of power, deer antlers, were taken away. *Id.*

75. GRAYMONT, *supra* note 14, at 10.

76. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 429. Allowing a chief peace and military duties "would have concentrated in his hands too much authority." *Id.* (quoting MORGAN, *supra* note 64).

77. JOHANSEN, *supra* note 2, at 11-12 (quoting Frank G. Speck, *The Iroquois, A Study in Cultural Evolution*, BULLETIN (Cranbrook Inst. Sci., Bloomfield Hills, Mich.), Oct. 1945, at 23. See also *supra* note 58.

with the Iroquois and their governmental practices and principles.<sup>78</sup> Several of the Founding Fathers studied this example closely and incorporated what they learned into their own ideas about government.<sup>79</sup>

The colonists and the Framers had extensive contact and familiarity with many tribes other than the Iroquois Confederacy. The British concluded numerous treaties<sup>80</sup> and had many dealings with tribes during the 160-year colonial period.<sup>81</sup> The newly independent United States assumed management of Indian affairs after the departure of the British,<sup>82</sup> and United States' treaty negotiators and Indian commissioners were well acquainted with Indian life and practices.<sup>83</sup> The United States Continental and Confederation Congresses concluded nine separate treaties with different tribes from 1778-1789.<sup>84</sup> Consequently, the Continental Congress, the Confederation Congress, and the Framers of the Constitution of 1787 were accustomed to dealing with tribes and were familiar with Indian practices and government.

The Framers were familiar with and incorporated many democratic governmental ideals similar to the Iroquois Confederacy. However, they diverged from one tribal governing practice, in that women were not allowed to vote under the United States Constitution until 1920.<sup>85</sup> The Iroquois,<sup>86</sup> Shawnee of Ohio and Pennsylvania,<sup>87</sup> Virginian Algonquians,<sup>88</sup> Delawares,<sup>89</sup> Ottawa of Ohio,<sup>90</sup> and Miami of Ohio<sup>91</sup> tribes

78. Americans were more familiar with the Iroquois government than with European governmental models. GRINDE, *supra* note 15, at 52-53.

79. See *supra* notes 10-11, 14, 21-26, 30-31, 60-61, and *infra* notes 103-36.

80. SMITHSONIAN HANDBOOK VOL. 4, *supra* note 12, at 185-94.

81. *Id.* at 128-43, 211-29.

82. *Id.* at 144-62.

83. *Id.* at 195-201.

84. *Id.* at 195; see Treaty with the Delaware, Sept. 17, 1778, U.S.-Delaware, 7 Stat. 13; Treaty with the Six Nations [Iroquois] at Fort Stanwix, Oct. 22, 1784, U.S.-Iroquois, 7 Stat. 15 (negotiated by Oliver Wolcott, a signer of the Declaration of Independence); Treaty with the Wyandot, Jan. 21, 1785, U.S.-Wyandot, 7 Stat. 16; Treaty with the Cherokee, Nov. 28, 1785, U.S.-Cherokee, 7 Stat. 18; Treaty with the Choctaw, Jan. 3, 1786, U.S.-Choctaw, 7 Stat. 21; Treaty with the Chickasaw, Jan. 10, 1786, U.S.-Chickasaw, 7 Stat. 24; Treaty with the Shawnee at Fort Finney, Jan. 31, 1786, U.S.-Shawnee, 7 Stat. 26; Treaty with the Delaware, Wyandot, Chippewa, Ottawa, Jan. 9, 1789, 7 Stat. 28; Treaty with the Six Nations, Jan. 9, 1789, U.S.-Iroquois, 7 Stat. 33.

85. U.S. CONST. amend. XIX.

86. See *supra* note 69.

87. ECKERT, *supra* note 7, at 38; SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 627.

88. *Id.* at 261.

89. *Id.* at 216.

90. *Id.* at 782.

91. *Id.* at 684.

all allowed females to vote and participate in tribal decisions. Several tribes allowed women to hold chief positions.<sup>92</sup>

Like the Iroquois,<sup>93</sup> many tribes instituted checks and balances by separating military and civil duties to avoid placing too much power in the hands of one chief.<sup>94</sup> Decisions in almost all tribes were never made by the chief alone but by a council or "senate" that voted on such decisions. Moreover, most tribes allowed any tribal member to be heard on an issue.<sup>95</sup> The Creek Nation even elected their chiefs.<sup>96</sup>

The Cherokee of Georgia and North Carolina highly valued personal freedom for men and women.<sup>97</sup> They had enacted laws that were

92. ECKERT, *supra* note 7, at 692 n.84. The Shawnee and Miami tribes had committees of women chiefs holding recognized political offices. These women had control of planting and the feasts and could pardon captives and stop war parties. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 617-18, 627. Potawatomi women signed several of that tribes' treaties with the United States. *Id.*

93. *See supra* notes 68, 69, and 76.

94. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 156 (Abenaki); *id.* at 216 (Delaware); *id.* at 627 (Shawnee); *id.* at 640 (Fox); *id.* at 684 (Miami); *id.* at 782 (Ottawa); *see also* ECKERT, *supra* note 7, at 683 n.30 (Shawnee). The Illinois, Sauk, Kickapoo, Menominee, and Potawatomi also divided military and civil duties. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 610. The Cherokee had distinct governmental structures for war and peace functions. RENNARD STRICKLAND, FIRE AND THE SPIRITS 24 (1975). The Creek also divided war and peace chief duties. ANGIE DEBO, THE ROAD TO DISAPPEARANCE 6 (1941).

95. SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 156 (Abenaki); *id.* at 216 (Delaware); *id.* at 627 (Shawnee); *id.* at 732 (Potawatomi). The Shawnee town organizations had extensive political and ritual functions. *Id.* at 622. Women held official positions in Shawnee town governments. *Id.* at 624-25. The Shawnee placed criers at the doors of the council house to relay to waiting tribal members the proceedings of the chiefs council. ECKERT, *supra* note 7, at 37. All Potawatomi individuals voted, making the tribe "perfectly republican." SMITHSONIAN HANDBOOK VOL. 15, *supra* note 13, at 732 (quoting Letter from John Kinzie to Lewis Cass, Governor of Michigan Territory (May 14, 1818)). The Delaware established councils of up to 200 voters. *Id.* at 216. The Cherokee also used large councils as advisors to their chiefs. STRICKLAND, *supra* note 94, at 25. Every tribal member voted in these councils and had a voice. JOHN P. REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT 4 (1976). At Cherokee town councils the entire population could speak and decisions needed unanimous votes. V. RICHARD PERISCO, JR., *Early Nineteenth-Century Cherokee Political Organization*, in THE CHEROKEE INDIAN NATION: A TROUBLED HISTORY 93-94 (Duane H. King ed., 1979). The Creek were a confederacy of tribes governed by tribal councils and laws. DEBO, *supra* note 95, at 7. Their chief was described by a white observer in 1789 as the "president of the national council." DAVID H. CORKAN, THE CREEK FRONTIER 1540-1783, at 4, 12-13 (1967). The Chickasaw were also governed by town councils. ARRELL M. GIBSON, THE CHICKASAWS 21 (1971).

96. I. FREDERICK W. HODGE, HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO 364 (1975).

97. *See* REID, *supra* note 95, at 5.

recited to the Nation every year by their priests.<sup>98</sup> Cherokee laws were even written in English as early as 1808.<sup>99</sup>

The historical evidence demonstrates that tribal governments practiced many principles of democracy and exercised personal rights and freedoms which were later adopted into the United States Constitution. The Iroquois, Shawnee, Cherokee, and many other tribal governments were models with which the Framers were conversant. It, therefore, seems indisputable that the Framers were influenced and affected by the contact they had with these tribes and by their knowledge of tribal governments.<sup>100</sup>

#### A. Framers

Indian influence on several of the Framers has already been addressed.<sup>101</sup> However, Benjamin Franklin and Thomas Jefferson were especially influential Framers<sup>102</sup> who had extraordinary contacts with Indians and appear to have been impressed and affected by these interchanges.

##### 1. Benjamin Franklin

Franklin had extensive contact with Indians and was interested in them for many years.<sup>103</sup> He printed Indian treaties<sup>104</sup> and had a long-standing interest in the welfare and affairs of Indians.<sup>105</sup> He strenuously protested the treatment and massacre of innocent Indians.<sup>106</sup> Franklin's contacts influenced him in many ways. In fact, due to his combining indigenous American thinking with European philosophy, he was sometimes called "the philosopher as savage."<sup>107</sup>

98. STRICKLAND, *supra* note 95, at 10-23.

99. LESTER HARGETT, *THE CONSTITUTIONS AND LAWS OF THE AMERICAN INDIANS* 4 (1976).

100. *See supra* note 78.

101. *See supra* notes 10-11, 14, 21-26, 30-31, 60-61.

102. Franklin and Jefferson have been called the two principal founders of the United States government and Constitution. HENRY S. COMMAGER, *THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT* 19 (1977).

103. Franklin "showed a real interest in Indian affairs." CATHERINE D. BOWEN, *THE MOST DANGEROUS MAN IN AMERICA: SCENES FROM THE LIFE OF BENJAMIN FRANKLIN* 92 (1974); *see also* WEATHERFORD, *supra* note 3, at 136.

104. BOWEN, *supra* note 103, at 98; *see also* RONALD W. CLARK, *BENJAMIN FRANKLIN* 100 (1983) (stating that Franklin also attended several Indian conferences); WEATHERFORD, *supra* note 3, at 136.

105. JOHANSEN, *supra* note 2, at 54; BOWEN, *supra* note 103, at 98 (stating that Franklin was "called friend to the Indians.").

106. Franklin blamed white injustice as the cause for almost every Indian war. BOWEN, *supra* note 103, at 98; *see also* CLARK, *supra* note 104, at 175-76.

107. Peter Gay, *Enlightenment Thought and the American Revolution, in THE ROLE OF IDEOLOGY IN THE AMERICAN REVOLUTION* 48 (J. Howe, Jr. ed., 1970).

If George Washington is the father of this country, Benjamin Franklin must surely be its grandfather.<sup>108</sup> One of the earliest plans expounding for an official union of the colonies was Franklin's Albany Plan,<sup>109</sup> which he presented at an Indian conference at Albany, New York in 1754. Ironically, he was ordered there by the King of England to try to ally the Iroquois with the colonies<sup>110</sup> because the Iroquois were important in England's New World strategy against the French.<sup>111</sup> At this conference, Franklin spent the majority of his time negotiating a union of the states.<sup>112</sup>

Franklin had been impressed by the union of Indian nations which comprised the Iroquois Confederacy.<sup>113</sup> "He admired the Iroquois confederation, and plainly had it in mind in his earliest discussion of the need of union among the colonies."<sup>114</sup> The adoption by the colonies of such a union had been recommended to Franklin by an Indian chief in 1744.<sup>115</sup> Franklin found it a "very strange thing, if six Nations of ignorant Savages should be capable of forming a Scheme for such an Union, . . . and yet that a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary, and must be more advantageous."<sup>116</sup>

Due to Franklin's experiences with Indians, it is generally well accepted that the Iroquois Confederacy was a model and a significant

108. Franklin introduced the Albany Plan (one of the first plans for a union), helped Jefferson with the Declaration of Independence, was on the committee that drafted the Articles of Confederation, and was an important figure at the Constitutional Convention. COMMANGER, *supra* note 102, at 19.

109. ROSSITER, *supra* note 3, at 306-08 (quoting Franklin's Autobiography while describing the forming and adopting of the plan). "Franklin rested his hopes for intercolonial unity upon the Albany Congress of 1754." CONNER, *supra* note 62, at 124; see also CLARK, *supra* note 104, at 102-06 (describing the conference and the creation of Franklin's Albany Plan).

110. "The choice of Franklin as delegate was natural enough . . . he showed a very real interest in Indian affairs . . ." BOWEN, *supra* note 103, at 92.

111. *Id.* at 94.

112. *Id.* at 112-28. Seven colonies were represented by Indian commissioners who unanimously passed a motion "to prepare and receive Plans of Schemes for the Union of the Colonies . . ." *Id.* at 119.

113. *Id.* at 98. It is no surprise that Franklin was impressed with "the democratic constitution of the Iroquois Confederacy, with its provisions for initiative, referendum and recall, and its suffrage for women as well as men." COHEN, *Americanizing*, *supra* note 3, at 182; see also WEATHERFORD, *supra* note 3, at 136.

114. CARL VAN DOREN, BENJAMIN FRANKLIN 209 (1938); see also COHEN 1942 ED., *supra* note 48, at 28.

115. BOWEN, *supra* note 104, at 98; accord FRANCIS JENNINGS, EMPIRE OF FORTUNE: CROWNS, COLONIES, AND TRIBES IN THE SEVEN YEARS WAR IN AMERICA 89 (1988). Another Iroquois chief recommended at the Albany conference in 1754 that the colonies adopt a union. GRINDE, *supra* note 15, at 130.

116. BOWEN, *supra* note 103, at 98; JENNINGS, *supra* note 115, at 89; WEATHERFORD, *supra* note 3, at 135-36.

influence on his Albany Plan and the Articles of Confederation.<sup>117</sup> As a result, Franklin, and subsequently the United States, were influenced and affected by his contact and familiarity with Indian tribes.

## 2. Thomas Jefferson

Thomas Jefferson wrote the immortal words "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ."<sup>118</sup> Jefferson may have come the closest of all the Framers and colonists to believing that these words also applied to Indians.<sup>119</sup> Jefferson was fascinated by Indians and studied them extensively.<sup>120</sup> He felt Indians were part of the "climate" of the New World and that they exerted a great impact on changing the Europeans that came to America.<sup>121</sup> In his studies, Jefferson "raised the thoughtful question whether no law as among the savage American, or too much law, as among civilized Europeans submits man to the greater evil. . . . He was convinced that no law is preferable . . . ."<sup>122</sup> Jefferson found

117. See CHAMBERLIN, *supra* note 14, at 136; Matthew W. Stirling, *America's First Settlers: The Indians*, 72 NAT'L GEOGRAPHIC 535 (1937); GRINDE, *supra* note 15, at 34-35, 132, 168; LEWIS MORGAN, *HOUSES AND HOUSE-LIFE OF THE AMERICAN ABORIGINES* 32 (1965); JOHANSEN, *supra* note 2, at xv; WEATHERFORD, *supra* note 3, at 136.

118. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

119. Jefferson wrote, "I believe the Indian then to be in body and mind equal to the white man." MERLE E. CURTI, *HUMAN NATURE IN AMERICAN THOUGHT: A HISTORY* 83 (1980) (quoting Letter from Thomas Jefferson to Marquis Chastellux (June 7, 1785), in 8 PAPERS OF THOMAS JEFFERSON 186 (Julian P. Boyd ed., 1953)). In his second inaugural address in 1805, Jefferson extended to Indians some of the principles from his Declaration of Independence. He said Indians were "[e]ndowed with the faculties and rights of men." President Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 380 (James D. Richardson ed. 1899), *quoted in* CHAMBERLIN, *supra* note 14, at 139.

120. "No one was more fascinated by the Indians than Jefferson, and no one contributed more to Indian studies . . . ." COMMAGER, *supra* note 102, at 92. Jefferson "studied and wrote numerous articles and essays on the Indians . . . ." WEATHERFORD, *supra* note 3, at 142. Jefferson recommended the new University of Virginia undertake a systematic ethnological study of Indian "traditions, laws, customs, languages and other circumstances." *Id.* (quoting THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 151 (William H. Peden ed., Univ. of N.C. Press 1955) (1787) [hereinafter JEFFERSON, *NOTES*]). Jefferson himself studied Indian languages for many years but a trunk with all his studies was water damaged and while he meant to resume his studies in his old age, he never returned to them. CHARLES A. MILLER, *JEFFERSON AND NATURE: AN INTERPRETATION* 110-11 (1988).

121. "Indians belonged to . . . the 'Climate' of the New World, and it is difficult to exaggerate their contribution in war and in peace to the growth of the sense of American community." COMMAGER, *supra* note 103, at 165; *see also* ROY H. PEARCE, *THE SAVAGES OF AMERICA: A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION* (1953).

122. CARL A.L. BINGER, *THOMAS JEFFERSON: A WELL TEMPERED MIND* 26 (1970).

among the Indians a modified state of nature — a pre-civil society.<sup>123</sup> He praised Indians for having “no law but that of Nature.”<sup>124</sup> They lived, according to Jefferson, without government but enjoyed peace, justice, liberty, and equality.<sup>125</sup> Furthermore, when Indians adopted government, they adopted a republican form, a fact which reinforced Jefferson’s belief that republican government was natural to mankind.<sup>126</sup> Jefferson, as a student of nature and its experiences, learned much from Indians and “freely acknowledged his debt to Indian teachers.”<sup>127</sup>

The Framers, and Jefferson individually, relied heavily on Locke’s theories that a “state of nature” and “public virtue” are necessary elements in creating an enduring republic.<sup>128</sup> To prove that citizens could act in a spirit of public virtue in a democracy, Jefferson pointed to tribal governments, whose “only controls are their manners, and the moral sense of right and wrong.”<sup>129</sup> Jefferson believed that the United States could incorporate the same principles that Indians utilized.<sup>130</sup> In fact, Jefferson came close to rejecting European governmental structures and advocating tribal practices.<sup>131</sup> However, Jefferson believed that the principles would have to be modified somewhat, because although “Indian society may be best,” he thought that “it is not possible for large numbers of people.”<sup>132</sup>

Jefferson also advocated enlightened treatment of Indians.<sup>133</sup> He studied their way of life and attempted to defend their natural rights to exist.<sup>134</sup> However, in direct contradiction to his interest and pleasure

123. MILLER, *supra* note 120, at 158.

124. *Id.* “Every man with them, is perfectly free to follow his own inclinations.”

15 THE WRITINGS OF THOMAS JEFFERSON 25 (Andrew A. Lipscomb & Albert E. Bergh ed. 1904).

125. WRITINGS OF THOMAS JEFFERSON, *supra* note 124, at 125.

126. MILLER, *supra* note 120, at 158.

127. COHEN, *Americanizing*, *supra* note 3, at 184.

128. JOHANSEN, *supra* note 2, at 108-14.

129. *Id.* at 112.

130. “Jefferson identified the human nature of America with its natural history, thus establishing a bond with the Indians . . . .” MILLER, *supra* note 120, at 75.

131. “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.” 2 THE ADAMS-JEFFERSON LETTERS 291 (Lester Cappon ed. 1959).

132. JOHANSEN, *supra* note 2, at 108.

133. “In defending the Indian, Jefferson relied on both universal and environmental conceptions of nature, showing temperaments of both an Enlightenment scientist and an American nationalist.” MILLER, *supra* note 120, at 63-64.

134. “With respect to the Indian, Jefferson saw fine mixtures of red and white and he took literally, or thought white America should make literal, the idea of red brothers — under a great white father.” MILLER, *supra* note 120, at 75 (quoting JEFFERSON, NOTES, *supra* note 120, at 138).

at studying a people living in "Nature," he engaged in converting Indians to "civilization" throughout his life.<sup>135</sup>

Thus, many Framers of the Constitution, especially Thomas Jefferson and Benjamin Franklin, were familiar and impressed with Indian life and governmental ideas. The Framers naturally called on the models they were familiar with when they began designing a new government for the colonies. The Iroquois Confederacy, the Shawnee, and the Cherokee are just a few of the tribes the Framers were knowledgeable of, and who practiced democratic principles which were later incorporated into the United States Constitution.<sup>136</sup>

The dilution of power by checks and balances on the President and Congress, the popular vote, a presidential veto, recall, freedom of religion, and, ultimately, women's suffrage were all ideas borne of Indian governments and later replicated and codified by the Framers in the United States Constitution and government.<sup>137</sup> The Framers surely built upon their ideas of and experiences with European governments, but they undoubtedly borrowed ideas from tribal models in formulating the United States government.<sup>138</sup>

#### B. Constitution

Indians are only mentioned twice in the Constitution. However, Indian influence on the Constitution extends far beyond these two clauses.<sup>139</sup> First, Congress was given the exclusive power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."<sup>140</sup> Second, Indians were not counted as part of the population for deciding the number of representatives a state could have in Congress. Indians only counted if they paid taxes.<sup>141</sup>

The Fourteenth Amendment continued this constitutional exclusion of Indians by denying them citizenship rights even as African-Americans were emancipated and granted United States citizenship.<sup>142</sup> This exclusion demonstrates that the Framers and the United States government, over a century after adopting the Constitution, still viewed Indians as belonging to a separate sovereign nation and therefore ineligible for citizenship to the United States. Most Indians were not made United States citizens until 1924.<sup>143</sup>

135. BERNARD W. SHEEHAN, *SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN* 95 (1973).

136. *See supra* notes 68-69, 71-76, 85-98.

137. *See supra* notes 69, 73-76, 85-97.

138. *See supra* note 78.

139. *See supra* notes 102-38.

140. U.S. CONST. art. I, § 8, cl. 3.

141. *Id.* art. I, § 2, cl. 3.

142. *Id.* amend. XIV, § 2.

143. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1988)). Some Indians became citizens before 1924 by statute when they accepted allotment lands. *See, e.g.,* Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390.

Despite the paucity of references to Indians, numerous provisions of the Constitution were directly influenced by Indians.<sup>144</sup> In fact, problems the states experienced in dealing with tribes pointed out the weakness of the Articles of Confederation<sup>145</sup> and the need for a much stronger central federal government empowered by a new constitution. Indian nations, then, had an indirect role in formulating certain sections of the Constitution, and in creating a need for replacing the Articles of Confederation.<sup>146</sup>

The Confederation Congress did not have the power to restrain states from dealing with tribes, nor effective enforcement power restricting tribes to trade solely with the new United States. After the Revolution, seven states claimed the land west of the colonies to the Mississippi River.<sup>147</sup> These claims led to wars between states and tribes,<sup>148</sup> unauthorized state treaties with tribes,<sup>149</sup> unauthorized state purchases of Indian lands,<sup>150</sup> and state claims that federal treaties with tribes

144. See *supra* notes 102-38.

145. See Letter from James Monroe to James Madison (Nov. 15, 1784), in 2 PHILLIP B. KURLAND & RALPH LERNER, *THE FOUNDER'S CONSTITUTION* 529 (1987); Letter from James Madison to James Monroe (Nov. 27, 1784), in KURLAND & LERNER, *supra*. Madison wrote that the provision in the Articles controlling Indian policy if "taken in its full latitude, [] must destroy the authority of Congress altogether . . . ." Letter from Madison to Monroe, *supra*, in KURLAND & LERNER, *supra*.

The Confederation Congress replaced the Continental Congress, a loose structure that governed nationally during the Revolutionary War. The Confederation Congress was created by the ratification of the Articles of Confederation in 1781, after the Continental Congress approved the Articles in 1777. The Confederation Congress governed until 1789, when the present-day structure of federal government, created by the new Constitution, started governing. See 2 OSCAR HANDLIN & LILLIAN HANDLIN, *LIBERTY IN EXPANSION 1760-1850*, at 146-48 (1989).

146. "In certain cases the authority of the Confederation was disregarded [by the states] . . . the federal authority was violated by treaties and wars with Indians . . . ." U.S. CONSTITUTIONAL CONVENTION, *JOURNAL OF THE FEDERAL CONVENTION* 47 (E.H. Scott ed., Scott, Foresman 1893) (1787) [hereinafter *CONVENTION JOURNAL*]. "Agreements between the states were in direct contradiction of that instrument [the Articles]. So also were the dealings with the Indians which several of the states indulged in to the detriment of any uniform policy, so important in treaties with uncivilized peoples." MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* 47-48 (1913).

147. CATHERINE BOWEN, *MIRACLE AT PHILADELPHIA* 168-70 (1966); see also NATHAN SCHACHNER, *THE FOUNDING FATHERS* 65 (1954).

148. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 316 (Max Farrand, ed., 1937) [hereinafter *CONVENTION RECORDS*] (statement of James Madison).

149. *Id.* at 326 (statement of Robert Yates); see also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 231 (1985) (addressing tribal claims arising from New York State's illegal treaty purchase of Indian lands even after the Constitution was ratified).

150. See *supra* note 141. Madison and Monroe, in letters to each other, disclosed the differences caused by New York Indian commissioners and federal Indian commissioners dealing with the same tribe and pursuing different agendas. Letter from James Monroe to James Madison (Nov. 15, 1784), in 2 PHILLIP B. KURLAND & RALPH LERNER, *THE FOUNDER'S CONSTITUTION* 529 (1987); Letter from James Madison to James Monroe (Nov. 27, 1784), in KURLAND & LERNER, *supra*.

were illegal.<sup>151</sup> Georgia in particular engaged in war and treaties with the Cherokees in violation of the Confederation Congress's authority.<sup>152</sup> Acting independently, the individual states were not effective at pacifying and removing Indians.<sup>153</sup>

Due to state conflicts with Indian tribes, the Articles of Confederation proved inadequate in maintaining uniformity among the states and creating a federal Indian policy.<sup>154</sup> The Articles did not give the Confederation exclusive authority to deal with Indians, and, hence, each state pursued its own agenda and goals. The Framers perceived that a unified policy toward Indian affairs required one federal policy<sup>155</sup> and not a hodgepodge of state control.<sup>156</sup> These

151. New York was furious at the Continental Congress for dealing directly with the Iroquois tribe, which New York considered to be "its" Indians. A speaker comparing the recommended new Constitution with New York's constitution said the new Indian commerce clause would be a further invasion of New York's sovereignty. 6 STORING, *supra* note 4, at 111-12.

New York's Governor forced Indian land sales in 1785-1788 in direct violation of a federal treaty the Confederation commissioners had negotiated with the Oneida tribe, which was part of the Iroquois Confederacy. RICHARD B. MORRIS, *THE FORGING OF THE UNION 187-88* (1987).

152. "In other cases, the Federal authority was violated by treaties and war with Indians, as by Georgia . . ." CONVENTION JOURNAL, *supra* note 146, at 47.

153. "It soon became apparent that empire building required a more central, co-ordinated effort than the states were prepared to give." BOWEN, *supra* note 147, at 168-70.

154. Article IX stated:

The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated . . . .

ARTICLES OF CONFEDERATION art. IX (U.S. 1781); see KURLAND & LERNER, *supra* note 145 (citing letter from James Madison to James Monroe (Nov. 27, 1784) (stating that it was impossible for Congress to act without infringing a state's power under the Articles)). Chief Judge Marshall said the Article's "ambiguous phrases . . . were so construed . . . as to annul the power itself." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-59 (1832). Marshall saw the Articles "from the first [as] a symbol of futility." CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 386 (1927).

155. Franklin realized even in 1754 that one central government needed to control Indian affairs with a unified policy. His Albany Plan recommended exclusive control of Indian affairs by the President-General. He tried to see that the Articles provided this power to the Confederation Congress, but the Articles were ambiguously drafted. RICHARD B. MORRIS, *THE FORGING OF THE UNION 186-87* (1987).

156. John Jay stated:

[I]t appears equally clear to me that one good national government affords vastly more security against dangers of that sort [causes of war] than can be derived from any other quarter. Because such violences are more frequently caused by the passions and interests of a part than of the whole; of one or two States than of the Union. Not a single Indian war has yet been occasioned by aggressions of the present federal government, . . .

defects in the Articles<sup>157</sup> led to an acknowledged need for a stronger constitution to hold the union together and to give real powers over Indian affairs to a central government.<sup>158</sup> James Madison recommended enacting an Indian Commerce Clause to remedy this inherent problem.<sup>159</sup>

At the Constitutional Convention, the need for a unified Indian policy, and the power in the central government to enforce it, was accepted with little recorded debate.<sup>160</sup> The Convention only made changes in language before it adopted the Indian Commerce Clause into the new Constitution.<sup>161</sup> While the Indian Commerce Clause may

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but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States . . . .

THE FEDERALIST No. 3, at 44 (John Jay) (Charles A. Beard ed. 1964), *quoted in* 13 STATE HISTORICAL SOC'Y OF WIS., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 557 (1981).

157. The Confederation Congress "could only pass resolutions, ask the states for money, and govern by supplication." CATTON & CATTON, *supra* note 3, at 313.

158. James Madison stated:

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States

THE FEDERALIST No. 42, at 268-69 (James Madison) (Clinton L. Rossiter ed. 1961).

159. "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 . . . ." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 n.4 (1985).

160. The Constitutional Convention was called to "remedy the proved defects of the Article of Confederation." 1 SAMUEL E. MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 246 (7th ed. 1980).

161. The language in the Articles (see *supra* note 154) was altered to improve the weaknesses in the Confederation. The first recommendation, referred to a committee of the Convention on Aug. 18, 1787, allowed the government "[t]o regulate affairs with the Indians, as well within as without the limits of the United States." 2 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION IN PHILADELPHIA IN 1787 439 (1836) [hereinafter CONVENTION DEBATES]; CONVENTION JOURNAL, *supra* note 146, at 549; 2 CONVENTION RECORDS, *supra* note 148, at 321.

The committee recommended a slightly changed clause, on Aug. 22, 1787, to be added to the general commerce clause: "and with Indians, within the limits of any state, not

or may not have served tribal needs, it has certainly served the Convention's purpose and "provide[d] Congress with plenary power to legislate in the field of Indian affairs . . . ." <sup>162</sup> The new Constitution and this clause made it clear that the federal government would regulate Indian affairs. <sup>163</sup>

The Indian Commerce Clause has been as important to the development of a relatively coherent and unified federal Indian policy as the Interstate Commerce Clause has been to the modern-day expansion of congressional power. <sup>164</sup> This plenary power over Indian affairs has been exercised by Congress mostly to the benefit of tribes over the past thirty years, in stark contrast to illegal congressional actions prior to that time <sup>165</sup> and nearly three centuries of official oppression and genocide. <sup>166</sup>

The long history of interaction and contact between Indians and the United States has affected and shaped both entities. Indians have affected the Constitution and the United States in many positive ways

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subject to the laws thereof." CONVENTION DEBATES, *supra*, at 462; CONVENTION JOURNAL, *supra* note 146, at 585; CONVENTION RECORDS, *supra* note 148, at 367.

The recommended clause went back to committee and was reported out on Sept. 4, 1787 in the final form that was adopted in the Constitution: "and with the Indian tribes." CONVENTION DEBATES, *supra*, at 506-07; CONVENTION JOURNAL, *supra* note 146, at 654.

162. *Cotton Petroleum Corp. v. N. M.*, 490 U.S. 163, 192 (1989) (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) and *FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 207-08 nn. 2, 3, 9-11 (Rennard Strickland et al. eds. 1982) [hereinafter *COHEN* 1982 ED.]).

163. The first Congress under the new Constitution took authority over Indian affairs, Indian Trade and Intercourse Act, July 22, 1790, ch. 23, 1 Stat. 137, and has since rarely allowed the states much voice in the matter.

164. *Cf. COHEN* 1942 ED., *supra* note 48, at 91-93.

165. *See generally* EDWARD LAZARUS, *BLACK HILLS WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES 1775 TO THE PRESENT* (1991). The Black Hills were illegally confiscated by an 1877 statute after gold was discovered. An 1868 treaty, ratified by Congress, stated that land cessions needed the approval of 3/4 of the adult male Indians. Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635, 639. Congress ratified the 1877 "agreement" although only ten percent of adult male Sioux had agreed. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254. In *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980), the Supreme Court awarded the Sioux nation over \$100 million due to this bad faith act.

166. Only in the 1930s did the Bureau of Indian Affairs rescind regulations prohibiting reservation Indians, who were supposedly living on their own land, from wearing long hair and performing their religious dances. *COHEN* 1942 ED., *supra* note 48, at 175-76. It is undisputed that the colonies and the United States in general desired to push back and take Indian lands, and to destroy the race to further the white race and its "Manifest Destiny." *See supra* note 5 and *infra* note 185. This attitude is well exemplified by General Philip Sheridan's comment that "the only good Indians I ever saw were dead." BARTLETT, *supra* note 1, at 610.

as demonstrated by the Framers' incorporation of the Iroquois, Shawnee, Cherokee, and other tribal ideas on government and personal freedoms into the United States Constitution.<sup>167</sup> The Framers were acquainted with tribal theories on separation of powers, tribal voting rights, veto power, and freedom of religion.<sup>168</sup> The Framers likely borrowed these principles from tribal governments.<sup>169</sup> Thus, Indian governmental principles helped shape many of the powers that the United States' government and its citizens possess. Additionally, the challenges the colonies had in dealing with tribes served as a catalyst for the creation of a strong central government which could formulate and enforce one federal Indian policy.<sup>170</sup> Consequently, this government and country have been shaped by many different forms of Indian ideas and influences.

#### *IV. Negative Indian Effects on the Framers and the Constitution*

The term "negative Indian effects" refers here to the Framers' reaction to the threat of Indian nations on the United States' borders. What this article has defined as "positive effects," such as the establishment of a strong Congress with plenary power over the tribes, would probably not have been viewed as positive by anti-Federalists or states' rights advocates who opposed a strong federal government. In comparison, the "negative effects" discussed in this section might have been viewed as positive by staunch Federalists, because these effects enhanced federal powers. However, these steps were deemed necessary solely because of the unwarranted danger the government and the Framers felt from the tribes.

The neophyte United States took steps to protect itself from hostile tribes by establishing a standing army. The tribes provided the main justification for the federal government's need for armed forces.<sup>171</sup> Many Framers feared a standing army because of the power it gave the government and the President, and the danger of tyrannical misuse of that power.<sup>172</sup> However, most of the Framers agreed a standing army was necessary, albeit dangerous in peacetime.<sup>173</sup> State militias

167. See *supra* notes 68-69, 71-76, 85-98.

168. See *supra* notes 69, 73-76, 92-95.

169. See *supra* note 78.

170. See *supra* notes 153, 155, 158, 162-63.

171. This danger required the United States to keep "small garrisons on our Western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians." *THE FEDERALIST* No. 24, at 161 (Alexander Hamilton) (Clinton L. Rossiter ed. 1961).

172. Most Framers probably did not like a standing army but the anti-Federalists despised the thought. STORING, *supra* note 4, at 414. The anti-Federalists said that tyrants use a standing army to "deprive their citizens of freedom, and reduce them to slavery . . . ." *Id.* at 59.

173. DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 41 (1984). Even some anti-Federalists agreed the army was a necessary evil in light of the danger from Indians. STORING, *supra* note 4, at 416.

were seen as insufficient to protect borders from Indian attacks, thus creating a need for the United States to have frontier garrisons.<sup>174</sup> The United States had to guard against potential problems arising due to state actions, Indians, and foreign intrigues.<sup>175</sup> Even the desire to control the often-lucrative Indian trade required the maintenance of border outposts.<sup>176</sup>

The Framers and the states disliked a standing army not only because of the threat of tyranny, but also due to the taxes that would be siphoned from state treasuries to support the army. The problem posed by the federal government's inability to collect sufficient taxes was a major downfall of the Confederation;<sup>177</sup> this problem was addressed by the new Constitution, through the Interstate Commerce Clause and the tariff power granted to the new government.<sup>178</sup> States that loathed seeing the federal government maintain a permanent standing army or giving tax money to support it were nevertheless cognizant of the need of an army due to the hostile tribes on their frontiers.<sup>179</sup>

Another negative Indian effect on the Constitution, in the view of ardent states' rights advocates, was the establishment of plenary congressional control over Indian affairs and a unified federal Indian policy. The loss of state authority over Indian matters within state borders was a bone of contention among federal, state and tribal governments in the late eighteenth century,<sup>180</sup> and remains so today.<sup>181</sup>

174. EPSTEIN, *supra* note 173, at 41.

175. "Indian hostilities, instigated by Spain or Britain, would always be at hand." THE FEDERALIST No. 25, at 165 (Alexander Hamilton) (Clinton L. Rossiter ed. 1961). "The savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies [Britain and Spain]; because they have most to fear from us, and most to hope from them." THE FEDERALIST No. 24, at 161 (Alexander Hamilton) (Clinton L. Rossiter ed. 1961).

176. The desire to trade with tribes led to the general approval of garrisoned forts along the frontier. STORING, *supra* note 4, at 415-16.

177. The Confederation was unable to raise money except through postal rates. The states grudgingly parted with money. HANDLIN & HANDLIN, *supra* note 145, at 146-48. Congressmen were not even paid their salaries. MORISON ET AL., *supra* note 160, at 227-29.

178. HANDLIN & HANDLIN, *supra* note 145, at 149.

179. "It is our misfortune that we are never at peace with these inhuman butchers of their species, and while they remain in our neighborhood, we are always, with respect to them, in a state of war . . ." *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, reprinted in 3 STORING, *supra* note 4, at 62-63.

180. See *supra* notes 148-52. The dispute between Georgia and the federal government over the Cherokee Nation nearly led to federal troops being sent to Georgia. See *supra* note 52.

181. The struggle between Washington state and the federal courts to destroy or protect treaty fishing rights was described as "[e]xcept for some desegregation cases . . . the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." *United States v. Washington*, 573 F.2d 1123, 1126 (9th Cir. 1978), *aff'd sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

In fact, the application of executive control of Indian treaty making, requiring only Senate ratification, led to states' demands that the House of Representatives have a voice in federal Indian policy so that the states could exercise an influence.<sup>182</sup> As a result, Congress ended treaty making with Indians in 1871.<sup>183</sup>

Several Framers foresaw the friction that would result as frontier states aggressively pushed their own borders into tribal territories and claimed Indian lands for themselves. They recognized that the states' treatment of Indians would create problems for the federal government.<sup>184</sup> Frontiersmen often resisted peaceful solutions, inciting and then exploiting Indian resistance to repeated treaty violations.<sup>185</sup> It has been noted that "local ill feeling" often makes a state's inhabitants the "deadliest enemies" of a tribe.<sup>186</sup> The federal government, tribes, and states have clashed over the years regarding federal power and state and tribal sovereignty in resolving Indian issues and problems.<sup>187</sup>

Consequently, Indians have had an impact, which could be described as "negative," on the United States Constitution and government. The standing army which was deemed necessary due to the "Indian threat," the resultant large increase in taxes, and the diminishment of state sovereignty in Indian affairs have been major issues of federal and state authority since colonial times. The federal government has been strengthened, at the expense of state and tribal sovereignty, by the powers conferred upon it by the necessity of dealing with semi-auton-

182. COHEN 1982 ED., *supra* note 162, at 105-07; HOUSE-SENATE TASK FORCE ON TRUST RESPONSIBILITY, FEDERAL-INDIAN RELATIONS, AND TREATY REVIEW, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 173 (Comm. Print 1976).

183. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1988)).

184. George Washington stated:

[T]he provisions heretofore made with a view to the protection of the Indians from the violences of the lawless part of our frontier inhabitants are insufficient. . . . [U]nless the murdering of Indians can be restrained . . . all the exertions of the Government to prevent destructive retaliations by the Indians will prove fruitless and all our present agreeable prospects illusory.

President George Washington, Seventh Annual Address (Dec. 8, 1795), *reprinted in* KURLAND & LERNER, *supra* note 145, at 532.

185. CATTON & CATTON, *supra* note 3, at 184-86 (stating that English racism played a large role in the hatred of the Indian). The goal of frontiersmen was to destroy Indians and take their lands. ROBERT E. SHALHOPE, *THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760-1800*, at 128-31 (1990) (stating that philanthropists had the same goals but used different methods). See generally DONALD E. WORCESTER, *FORKED TONGUES AND BROKEN TREATIES* (1975) (describing treaty violations by state and federal governments and state citizens); VINE DELORIA, *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* (1974) (same); RUPERT COSTA & JEANNETTE HENRY, *INDIANS TREATIES: TWO CENTURIES OF DISHONOR* (1977) (same).

186. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

187. See *supra* notes 53, 146-52, 159, 180-83.

omous Indian nations. Many states resent this power and have long fought it. These states, and states' rights advocates, would definitely view these Indian effects on the Constitution as negative.

However, in the long run, a standing army and a single federal Indian policy might not have been "negative effects" on the United States. In general, federal powers over Indian affairs and a unified federal Indian policy have contributed to a strong, peaceful United States government. Depending upon one's view of states' rights, these "negative" impacts upon the United States government and its Constitution might really be called positive contributions to American life, contributions brought about by Native Americans.

#### V. Conclusion

Native Americans have played a major role in the shaping of the United States government. Indians were Americans with functioning governments and societies long before Europeans ever "discovered" this continent.<sup>188</sup> It is only natural that Indian lifestyles and beliefs influenced the views of colonists, as well as the nation those European settlers developed. Though the majority of scholars have ignored contributions made by Native Americans to modern-day American life and government, a closer inspection reveals that Indians had a major impact on the development of the United States.

The Framers were familiar with Indian life and governmental ideas. Several Framers, including Franklin and Jefferson, were impressed and greatly influenced by Indian ideas and governmental models. The ideal government many Framers hoped to form was an amalgamation of European and Indian ideas. The Iroquois constitution and confederacy served as Franklin's model for his Albany Plan and the Articles of Confederation. Thereafter, the Constitution of the United States came to reflect many principles the Framers learned from the Iroquois, Shawnee, and other tribal governments.<sup>189</sup> The Constitution also reflects Indian influences in that it gave the federal government power to address Indian affairs and problems.<sup>190</sup> Additionally, state conflicts with Indian nations showed that the Articles of Confederation were inadequate to manage federal, state and tribal relations. As a result, a new constitution and a strong central government were brought into being.<sup>191</sup>

188. An Indian, Squanto, visited England before the Pilgrims ever landed in America. In fact, the Pilgrims were surprised to be greeted by him in English when they arrived at Plymouth Rock. JOHANSEN, *supra* note 2, at 4.

189. See *supra* notes 64-65, 67-72, 81-94.

190. See *supra* notes 171-76, 180-87.

191. See *supra* notes 145-60, 163-64.

Indians, then, played a role in the beginning of this new American society as well as in the formulation of the United States Constitution and government.<sup>192</sup> They further influenced the development of the nation after 1787, as United States-tribal relations were the major foreign policy concern of the United States for many decades after the Revolution.<sup>193</sup> The presence of hostile tribes controlled how this country developed and expanded its borders. Hence, in war and in peace, Indian tribes have had significant positive and negative influences on our national development for over three centuries.

The past contributions of Native Americans to American life should alert modern-day American society to stop ignoring the significant contributions that Indian people have made and still can make to contemporary life. The United States is faced with a myriad of problems which tribal governments have already overcome. Tribes have designed and implemented plans for managing waterways, forests, wildlife, and for solving the urgent salmon survival problem in the Pacific Northwest.<sup>194</sup> American society can learn many important

192. Osker Spicer, *Indian Contributions Need Our Recognition, Respect*, OREGONIAN (Portland, Or.), Mar. 14, 1991, at B7, col. 5.

193. WILKINSON, *supra* note 40, at 25.

194. See, e.g., Richard Cockle, *Tribal Leaders Seek to Draw Up "Indian Agenda,"* OREGONIAN (Portland, Or.), Mar. 24, 1991, at D4, col. 1 (stating that Indian leaders will attend a national conference to develop an Indian agenda on Indian and national issues); Columbia River Inter-Tribal Fish Comm'n, *Integrated Tribal Production Plan: Production Proposal for Recovery of Snake River Stocks* (Dec. 10, 1990) (unpublished report) (available from Columbia River Inter-Tribal Fish Commission, Portland, Or.) (presented at the recent "Salmon Summit" called by Sen. Mark Hatfield (R.-Or.) to attempt to solve the destruction of salmon runs in the Columbia River); Testimony of the Yakima, Nez Perce, Umatilla, and Warm Springs Tribes Before Senator Hatfield on Endangered Species Act Listing for Salmon Runs, Portland, Or. (May 2, 1991) (unpublished testimony) (available from Columbia River Inter-Tribal Fish Commission, Portland, Or.); Paul Koberstein, *The Tribes Become a Major Salmon Manager*, HIGH COUNTRY NEWS (Paonia, Colo.), Apr. 22, 1991, at 21.

The Supreme Court has recognized tribal ability and expertise in managing reservation wildlife. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

The Wild and Scenic Rivers Act, 16 U.S.C. § 1277(a), allows tribal plans to supplement federal river management. Cf. U.S. DEPT. OF INTERIOR, BUREAU OF LAND MANAGEMENT, *ISSUES AND ALTERNATIVES FOR MANAGEMENT OF THE LOWER DESCHUTES RIVER* (1990) (recommendations from a committee comprised of representatives from the Bureau of Indian Affairs, Confederated Tribes of the Warm Springs Nation, State of Oregon, U.S. Bureau of Land Management, City of Maupin, Oregon, and three Oregon counties). Tribal plans on river and fish management were incorporated into the Columbia River Fish Management Plan approved by the federal courts. *United States v. Oregon*, 913 F.2d 576, 579 (9th Cir. 1990). Involvement by 24 tribes and a lawsuit, *Confederated Tribes & Bands v. Baldrige*, 605 F. Supp. 833 (W.D. Wa. 1985), prompted Alaska to comply with procedures developed to divide the salmon fisheries harvest.

Tribes have been involved in land use planning on federal and private lands. Four tribes, through the Columbia River Inter-Tribal Fish Commission, have appealed 15

lessons from Indians.<sup>195</sup>

The United States has learned much from Indians throughout history; maybe far more than society can imagine, and maybe far more than it will ever be able to discover for certain, since history has ignored and discounted such contributions. In land use planning, fish and wildlife conservation, government, and human relations, "we still have much to learn from the Indian."<sup>196</sup> Regarding such problems, this country would be wise to consider and acknowledge Indian solutions and Indian philosophy when addressing this nation's modern-day issues and problems.

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administrative Forest Service land use plans for national forest land. Interview with James W. Weber, Policy Assistant, Columbia River Inter-Tribal Fish Commission, in Portland, Or. (May 28, 1991). These same tribes make yearly recommendations for amendments to the Northwest Power Planning Council's operating plans for the Columbia Basin Fish Program. *Id.*; see also Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657 (1991) (pointing out the value of tribal involvement with federal fishery agencies in planning fish management). The Tualip tribe in Washington state is involved with devising plans to improve forestry practices on state and private land to improve fisheries. WASHINGTON STATE DEP'T OF NATURAL RESOURCES, SUSTAINABLE FORESTRY ROUNDTABLE (1990).

195. "American Indians . . . are still teaching America to solve perplexing problems of land-use, education, government and human relations . . . ." COHEN, *Americanizing*, *supra* note 3, at 180.

196. *Id.* at 190.