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Separate, Sovereign, and Subjugated: Native Citizenship and the 1790 Trade and Intercourse Act

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COMMENTS

SEPARATE, SOVEREIGN, AND SUBJUGATED: NATIVE CITIZENSHIP AND THE 1790 TRADE AND INTERCOURSE ACT

BETHANY BERGER*

ABSTRACT

In 1790, the same year Congress limited naturalization to “free white persons,” it also enacted the first Indian Trade and Intercourse Act. The Trade and Intercourse Act may have even stronger claims to “super statute” status than the Naturalization Act. Key provisions of the Trade and Intercourse Act remain in effect today, and the Act enshrined a tribal, federal, and state relationship that profoundly shapes modern law. Unlike the Naturalization Act, the Trade and Intercourse Act reflected the input of people of color: it responded to the demands of tribal nations and—to a degree—reflected tribal sovereignty. While Indigenous people could not naturalize in 1790, early laws and policies encouraged them to become citizens of the United States. Indigenous citizenship, however, was a tool of subjugation, designed to undermine tribal sovereignty and thereby increase White authority. This history is inconsistent with Chin and Finkelman’s claim of a persistent vision of White citizenship, but it is consistent with allocation of citizenship as a tool of White power.

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INTRODUCTION

On November 9, 2022, Samantha Maltais, like many Indigenous people from across the United States, went to D.C. in hopes of hearing Supreme Court arguments in *Haaland v. Brackeen*.¹ The first citizen of the Aquinnah (Gay Head) Wampanoag Tribe to attend Harvard Law School, Maltais wore her buckskin regalia to the Court.² The guards initially tried to remove her from line, claiming that the traditional garb was a forbidden political statement, but relented when she resisted.³

Like the *Brackeen* case itself, which challenged the Indian Child Welfare Act on federal power and equal protection grounds,⁴ the incident reflected the contested status of Indigenous peoples in the United States. Indigenous people are at once U.S. citizens and possessed of separate political identity, at once celebrated and marginalized for their distinctness, and at once subjects of federal protection and federal domination. This Comment uses Gabriel Chin and Paul Finkelman's wonderful article on the 1790 Naturalization Act as a springboard to examine how this paradoxical status manifested in another possible "super-statute," the 1790 Indian Trade and Intercourse Act,⁵ and what it means for the imagined racial status of the United States.

* * *

As at the *Brackeen* argument, Indigenous people in traditional garb were present as the first Congress conducted its work. Traveling to New York and Philadelphia to negotiate treaties, complain about their violation, receive presents, or simply act as tourists,

1. 143 S. Ct. 1609 (2023).

2. Rebecca Nagle (@rebeccanagle), TWITTER (Nov. 9, 2022), <https://twitter.com/rebeccanagle/status/1590350167013986306> [<https://perma.cc/C7MP-G93K>], *republished in full at* <https://threadreaderapp.com/thread/1590350167013986306.html> [<https://perma.cc/P6R6-CRQC>]; Liz Mineo, *Student of History Makes History*, HARV. L. TODAY (Nov. 23, 2021), <https://hls.harvard.edu/today/student-of-history-makes-history/> [<https://perma.cc/M6HN-K3EL>].

3. See Nagle, *supra* note 2.

4. *Brackeen*, 143 S. Ct. at 1626 (reciting plaintiffs' arguments).

5. Indian Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790).

tribal citizens were frequent and noteworthy visitors to the seats of government.⁶ Indigenous peoples were also frequent subjects of congressional and presidential concern. On July 22, 1790, four months after approving the first Naturalization Act, Congress also approved the first Indian Trade and Intercourse Act.⁷ That act—parts of which are almost unchanged today—created the framework for trade, land purchases, territory, and criminal jurisdiction that still shapes federal Indian law.⁸

Unlike Samantha Maltais, the 1790 tribal visitors were not U.S. citizens, and were almost certainly not among the “free white persons” who could become so under the 1790 Naturalization Act.⁹ Unlike children of Chinese immigrants, Indigenous people born in U.S. territory were not even birthright citizens under the Fourteenth Amendment.¹⁰ Birthright citizenship would not be extended to Indigenous people until 1924 and then only by statute.¹¹ And yet contrary to Chin and Finkelman’s account, incorporating people of Indigenous descent as citizens was part of the U.S. imagination, and even law, from the beginning.¹² What does this mean for Chin and Finkelman’s claim that the framers “unambiguously conceived of the United States as a White country,”¹³ and what does this mean for Native citizenship?

This Comment argues that the history of Native citizenship in 1790 and beyond does not refute Chin and Finkelman’s account but does complicate its meaning. What was at stake was not so much the Whiteness of the citizen population but the Whiteness of power. As Chin and Finkelman document, there was a substantial

6. COLIN CALLOWAY, *THE CHIEFS NOW IN THIS CITY: INDIANS AND THE URBAN FRONTIER IN EARLY AMERICA* 1, 3-13 (2021).

7. 1 Stat. at 137.

8. Indian Trade and Intercourse Act of 1790 §§ 1-5 (codified as amended at 25 U.S.C. §§ 177, 261-263 & 18 U.S.C. § 1152); see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[2] (Nell Jessup Newton et al. eds., 2012) (noting that the statute and those that built on it “contain the fundamental elements of federal Indian policy”).

9. Naturalization Act of 1790, ch. 3, 1 Stat. 103; see *infra* Part II.

10. *Elk v. Wilkins*, 112 U.S. 194 (1884). For extended discussion of the contrast, see Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185 (2016).

11. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924).

12. See *infra* Part II.

13. Gabriel Chin & Paul Finkelman, *The “Free White Persons” Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. 1048 (2024).

non-White population in the United States from its inception.¹⁴ For the first century of U.S. history, moreover, citizenship—or eligibility for it—did not affect one’s right to presence in the country.¹⁵ Instead, its primary function was to allocate power, to some extent through voting,¹⁶ and even more importantly, through ownership of land.¹⁷ Indigenous citizenship, in this light, was consistent with the Whiteness of power, because it was understood to deprive individuals and their nations of autonomy from federal and state law and federal protection from dispossession, facilitating access to land and authority by White citizens and their governments.¹⁸ Indigenous citizenship also affirmed the superiority of White American identity by symbolizing the choice of Indigenous people to abandon their cultures in favor of the Anglo-American culture of the United States.¹⁹

At the same time, the Trade and Intercourse Act and its framework of federal protection of tribal sovereignty and separateness reflected, in part, a more honorable commitment to respect for non-White peoples and the promises made to them. Of course, the Act reflected national self-interest as well, primarily desires to avoid costly conflicts at a time when U.S. coffers were depleted²⁰ and foreign and tribal military might was significant.²¹ Yet it is necessary to acknowledge its more laudable impulses, like the paradoxical citizenship Professor Frost’s Comment describes, to understand the often heartbreaking but sometimes inspiring complexity of the American experiment.²²

Part I of this Comment describes the presence of Indian people and Indian affairs as Congress enacted the first Naturalization Act, and the lasting impact of the Trade and Intercourse Act on

14. *See id.* at 26 (“In 1790 Virginia was 43.4 percent Black, and at least since the 1770s many leaders had feared that there might soon be a Black majority.”).

15. *See id.* at 60.

16. *Id.* at 37-38.

17. *Id.* at 35-39.

18. *See infra* Part II.

19. *See infra* Part II.

20. *U.S. Debt and Foreign Loans, 1775-1795*, U.S. DEP’T OF STATE: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1784-1800/loans> [<https://perma.cc/KN2A-2C> DQ].

21. *See infra* notes 30-32 and accompanying text.

22. *See* Amanda Frost, Comment, *Paradoxical Citizenship*, 65 WM. & MARY L. REV. 1177 (2024).

relationships between Indigenous, federal, and state governments. The Part argues that this relationship enshrined the separate and sovereign status of tribal nations, but also reflected their subjugation to federal authority and national interests. Over time, moreover, federal subjugation increased even as protection for separateness and sovereignty decreased. Part II discusses the lack of birthright citizenship or access to naturalization to Native people, the extension of citizenship to (certain) Native people and how this was consistent with both the Whiteness of U.S. power and identity and the more egalitarian strand of U.S. identity. The Conclusion discusses what this means for our understanding of citizenship, U.S. identity, and Native rights today.

I. 1790: INDIGENOUS PRESENCE AND POWER

Native people were ever-present in the capitals and consciousness of the fledgling United States. This presence manifested many times in the first Congress.²³ President Washington repeatedly provided information, sought advice, and urged action on Indian affairs.²⁴ The Senate and House of Representatives discussed responses to conflicts with tribal governments and allocation of constitutional authority with respect to Indian tribes.²⁵ Before the end of the term, the Senate had ratified a treaty with the Muscogee (Creek) Nation—the first entered into under the new Constitution—and Congress had enacted the first Trade and Intercourse Act.²⁶ Together, these documents sketched a federal Indian policy that has transformed many times, but important parts of whose basic structure remains today.

Indian affairs were a central concern in the first Congress. Burdened with debt from the Revolutionary War,²⁷ fearing territorial ambitions of England and Spain,²⁸ and encouraging its citizens to settle its Western Territory,²⁹ the United States could ill afford

23. See, e.g., *infra* notes 33-49 and accompanying text.

24. See, e.g., *infra* notes 33-49 and accompanying text.

25. See, e.g., *infra* notes 33, 45-49 and accompanying text.

26. See *infra* note 76 and accompanying text.

27. COLIN G. CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON* 293 (2018).

28. See *infra* note 72 and accompanying text.

29. See 27 J. CONTINENTAL CONG. 446, 446-472 (1784) (debating and passing “An

violent conflict with tribal nations. Yet state and settler actions seemed to make it inevitable. The tribes of the Wabash Confederacy were resisting settlement north of the Ohio River,³⁰ the Haudenosaunee Confederacy in New York and the Cherokee Nation in North Carolina protested encroachment on their treaty lands,³¹ and the Muscogee (Creek) Nation was threatening war in Georgia.³²

Conflicts between Georgia and the Muscogee Nation and between North Carolina and the Cherokee Nation were most pressing. On August 22, 1789, the President came to the Senate chamber to discuss the situation.³³ Both Georgia and North Carolina had claimed the federal treaties signed with these tribes under the Articles of Confederation “infring[ed] their legislative rights.”³⁴ The Cherokee treaty had been “entirely violated by the disorderly White people on the [North Carolina] frontiers,” and the state sought a new treaty to resolve the conflict.³⁵ As North Carolina had still not joined the Union, the President doubted whether “efficient measures” by the United States were possible.³⁶ Georgia, meanwhile, claimed to have signed three treaties with the Muscogee Nation, but the Muscogee, led by Alexander McGillivray, denied their validity.³⁷ Washington urged diplomacy to resolve the conflict, noting that the “fate of the Southern States” might depend on it.³⁸

The President returned to the problem in his first annual address to Congress on January 8, 1790.³⁹ After celebrating North Carolina’s

Ordinance for Ascertaining the Mode of Locating and Disposing of Land in the Western Territory”).

30. See 1 ANNALS OF CONG. 80 (1789) (Joseph Gales ed., 1834) (reporting the President’s address on “reciprocal hostilities” between Wabash and settlers).

31. See Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the Constitution*, 123 COLUM. L. REV. 243, 272-73 (2023) (describing Haudenosaunee Confederacy and Cherokee Nation responses when the United States failed to adhere to previous agreements).

32. See *id.* at 267, 267 n.130 (describing violence in Georgia).

33. 1 ANNALS OF CONG. 66 (1789) (Joseph Gales ed., 1834).

34. *Id.*

35. *Id.*

36. *Id.* at 66-67.

37. *Id.* at 67; Ablavsky & Allread, *supra* note 31, at 267 (noting McGillivray as the leader of the Muscogee).

38. 1 ANNALS OF CONG. 66 (1789) (Joseph Gales ed., 1834).

39. *Id.* at 932-34.

recent accession to the Union and emphasizing the need for a regular army (and before mentioning the need for a uniform system of naturalization), Washington highlighted the failure of “pacific measures” to resolve conflicts in the South and West.⁴⁰ He had previously sought advice and consent regarding appointing three commissioners to treat with the Muscogee,⁴¹ and when the commissioners failed, appointed Secretary of War Henry Knox himself to negotiate with the Nation.⁴² Although some—notably Representative James Jackson of Georgia—insisted that the United States propose only war and not diplomacy to the “half-breed savage” McGillivray,⁴³ others chided Jackson for addressing “the passions more than the judgment.”⁴⁴

Indian affairs also raised constitutional questions. President Washington consulted the Senate on whether treaties with tribal nations were self-executing or required Senate ratification and congressional implementation.⁴⁵ He opined that all treaties “formed by the United States with other nations, whether civilized or not, should be made with caution, and executed with fidelity.”⁴⁶ Although a congressional committee advised against requiring Senate ratification in 1789,⁴⁷ by the summer of 1790, the Senate was ratifying treaties without objection,⁴⁸ and the House questioned whether it had any role even with respect to the number of treaty commissioners.⁴⁹

Throughout this period, the new government was sending delegations to secure support from tribal people, and the tribes were sending delegations to meet with them.⁵⁰ As recent scholarship by Gregory Ablavsky and Tanner Allread reveals, constitutional

40. *Id.*

41. *E.g., id.* at 64 (seeking Senate advice and consent to appointment of one of three commissioners).

42. *Id.* at 1027 (seeking the appointment of Knox to negotiate with the Muscogee, the previous commissioners having failed).

43. *Id.* at 699.

44. *Id.* at 700 (quoting Thomas Sumter).

45. *Id.* at 80-81 (displaying the 1789 message from President Washington to the Senate).

46. *Id.* at 80.

47. *Id.* at 82 (report of the committee advising against ratification).

48. *See, e.g., id.* at 1034 (unanimously authorizing the treaty negotiated at Hopewell).

49. *Id.* at 690-94 (House debate).

50. Ablavsky & Allread, *supra* note 31, at 270-71.

principles were debated in these delegations as well.⁵¹ The President's emissaries sought to assure tribal leaders that under the new Constitution, the federal government would have exclusive power enabling it to restrain settlers and the states.⁵² In the summer of 1789, the tribes responded with pointed congratulations. The Cherokee Nation complimented the United States on having "got new powers, and [having] become strong," but expressed its hope that "whatever is done hereafter by the great council will no more be destroyed and made small by any State."⁵³ The Haudenosaunee Confederacy assembled to send a message to the new President to "Congratulate You upon Your New System of Government, by which You have one Head to Rule Who we can look to for redress," but noted that it had always been the custom of *their* confederacy to "have one Great Council fire kept Burning ... and there to do all the public Business which respected the five Nations in General."⁵⁴

Perhaps the most immediate audience for this constitutional message was Muscogee leader Alexander McGillivray, who was engaged in an elaborate diplomatic dance with the United States. The commissioners that the United States sent to negotiate a treaty were unsuccessful, but in June of 1790, McGillivray acceded to the pleas of Washington's emissary to come to New York.⁵⁵ Leading a delegation of twenty-six chiefs and warriors, McGillivray and his party were greeted with welcoming crowds and elaborate ceremony at each stop.⁵⁶ In Richmond, Virginia, they were treated to an evening of theater with the "gentlemen of the bar and heads of the Executive Departments," and the following night were guests of honor at a public dinner with the governor, council, judges and other Virginia leaders.⁵⁷ Reaching Philadelphia on July 1, they were

51. See *id.* at 250 (discussing efforts to persuade tribes of the Constitution's merits); CALLOWAY, *supra* note 6, at 13 (discussing tribal delegations in 1790).

52. Ablavsky & Allread, *supra* note 31, at 270-71.

53. *Id.* at 273 (quoting Letter from Representatives of the Cherokee Nation to George Washington (May 19, 1789), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS 56, 57 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832)).

54. *Id.* at 272-73 (quoting Letter from the Five Nations at Buffalo Creek to George Washington (June 2, 1789), in 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789, 517-18 (Colin G. Calloway ed., 1994)).

55. See CALLOWAY, *supra* note 6, at 63.

56. *Id.*

57. *Id.* (citing 6 THE DIARIES OF GEORGE WASHINGTON 85 (Donald Jackson & Dorothy

greeted by church bells, an artillery salute, and a company of light infantry to escort them to their hotel, followed by days of entertainments and official visits.⁵⁸

The last leg of their journey was by ship, and when they arrived in the port of New York on July 21, they were greeted by cheering crowds, church bells, a cannon salvo, and a ceremonial parade leading them to Federal Hall, where members of Congress gathered on the balcony to greet them.⁵⁹ The Muscogee were then escorted to the President's house, then to their lodgings at the City Tavern, where Secretary of War Knox and Governor DeWitt Clinton hosted them for dinner.⁶⁰ It was the largest official celebration since the President's inauguration.⁶¹

When at last the treaty was concluded in August—the first signed with any government under the new Constitution—it was commemorated with both Indigenous and Anglo-American ceremony at Federal Hall.⁶² Washington, clothed in purple robes and accompanied by an extensive entourage, offered the Muscogee a chain of wampum and tobacco to smoke “as a token of perpetual peace.”⁶³ McGillivray then made his own speech and entwined his arms with Washington, and the Muscogee delegation concluded the ceremony by performing a song of peace.⁶⁴

Although Congress enacted the 1790 Trade and Intercourse Act with little debate,⁶⁵ it must be understood in light of these events. Read for the first time on March 30, 1790,⁶⁶ passed on June 23,⁶⁷

Twohig eds., 1976-1979)).

58. *Id.*

59. *Id.* at 63-64.

60. *Id.* at 64.

61. *Id.*

62. Treaty of Peace and Friendship, Creek Nation-U.S., Aug. 7, 1790, 7 Stat. 35; Ablavsky & Allread, *supra* note 31, at 280.

63. Ablavsky & Allread, *supra* note 31, at 280 (quoting New-York, August 14, Gazette of the United States (N.Y.), Aug. 14, 1790, at 559.).

64. *Id.*

65. The only general legislative debate seems to have been on April 10, 1790 and only concerned the qualifications for superintendents. 2 ANNALS OF CONG. 1522-23 (1790) (Joseph Gales ed., 1834). There was, it seemed, broad agreement on “the importance of competent regulations to secure the peace of the frontiers, and to impress the minds of the Indians with friendly sentiments towards the people of the United States.” *Id.* at 1522 (remarks of Representative Scott).

66. *Id.* at 1480.

67. *Id.* at 1647.

and enacted on July 22,⁶⁸ the statute sought to address and assert federal supremacy with respect to all causes of conflict with tribal nations. It forbade acquiring any Indian land except at a public federal treaty,⁶⁹ a direct rebuke to the actions of Georgia, North Carolina, and New York that had brought the United States to the brink of war.⁷⁰ The statute required trade with the Indians to be conducted only by those with a license and seal from the President,⁷¹ undermining the ability of Britain and Spain to build diplomatic alliances with tribes.⁷² Further, it asserted jurisdiction to punish “any citizen or inhabitant of the United States,” who should go into “any town, settlement, or territory belonging to any nation or tribe of Indians,” and “commit any crime upon, or trespass against, the person or property of any peaceable” Indian “as if the offence had been committed within” the state or district to which the offender belonged.⁷³

In December 1790, the President wrote Seneca leaders that the statute was proof of the “fatherly care the United States intend to take of the Indians.... Here then is the security for the remainder of your lands ... The general Government will never consent to your being defrauded—But it will protect you in all your just rights.”⁷⁴ Over the next years, the United States would distribute copies of the statute “under seal in tin cases with ‘marks of solemnity,’” as tangible symbols of the protection of the United States.⁷⁵

68. Indian Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790).

69. *Id.* § 4 (codified as amended at 25 U.S.C. § 177).

70. *See supra* Part I.

71. Indian Trade and Intercourse Act of 1790 §§ 1-3 (codified as amended at 25 U.S.C. §§ 261-263).

72. *See, e.g.,* Ablavsky & Allread, *supra* note 31, at 281 (discussing tribal hopes that British and Spanish alliances might provide a counterpoint to U.S. domination); 1 ANNALS OF CONG. 1024-25 (reprinting message from the President noting that “the trade of the Indians is a main means of their political management” but trade with the Creeks was almost entirely by British merchants through Spanish ports, and seeking a “secret article” to create new channels for trade).

73. Indian Trade and Intercourse Act of 1790 § 5 (codified as amended at 18 U.S.C. § 1152).

74. Ablavsky & Allread, *supra* note 31, at 271 (quoting Letter from President George Washington to the Seneca Chiefs (Dec. 29, 1790), in 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 146, 146-48 (Edward G. Lengel, Mark A. Mastromarino, Elizabeth B. Mercer, Beverly H. Runge, Dorothy Twohig & Jack D. Warren, Jr. eds., 2008)).

75. *Id.* (quoting Letter from Thomas Jefferson to George Washington (Mar. 13, 1793), in 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 314, 314-15 (Christine

Of course, the statute did not accomplish its goals. Even as the President presented the Senate with the Muscogee treaty, which he called “the main foundation of the future peace and prosperity of the Southwestern frontier,” he warned that “white people settled on the frontiers had openly violated” the Cherokee boundaries, despite a 1785 Treaty and a 1788 congressional proclamation seeking to enforce those boundaries.⁷⁶ The Senate unanimously ratified a new treaty with the Cherokee Nation,⁷⁷ but over the next years, Washington would return again and again to Congress for stronger measures. His 1791 Annual Address emphasized the need for “adequate penalties upon all those who, by violating [Indian] rights, shall infringe the treaties, and endanger the peace of the Union.”⁷⁸ Washington’s 1792 Address similarly urged “more adequate provision for ... restraining the commission of outrages upon the Indians; without which all pacific plans must prove nugatory.”⁷⁹ The following month, having learned that “certain lawless and wicked” Georgians had invaded a Cherokee town and killed several Cherokees, Washington issued a proclamation that “it highly becomes the honor and good faith of the United States to pursue all legal means for the punishment of those atrocious offenders.”⁸⁰

Over the next decades, Congress repeatedly reenacted and strengthened the Trade and Intercourse Act and the measures for enforcing it.⁸¹ But settlers and states continued to claim tribal lands, leading first to treaties—some negotiated, some fraudulent—that shrank tribal homelands⁸² and finally to unilateral measures wresting Indians from their lands without even the semblance of tribal consent.⁸³

Sternberg, Patrick Pinheiro & John Pinheiro eds., 2005)).

76. 1 ANNALS OF CONG. 1033.

77. *Id.* at 1034 (unanimously authorizing treaty negotiated at Hopewell to be carried into execution).

78. 3 ANNALS OF CONG. 13 (1791) (Joseph Gales and William Seaton eds., 1849).

79. *Id.* at 608.

80. George Washington, *Proclamation by the President of the United States*, NAT’L GAZETTE, Dec. 15, 1792, *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 137, 137 (James D. Richardson ed., 1896).

81. 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 102-08 (1984) (describing enactment and modifications).

82. *See* COHEN’S HANDBOOK, *supra* note 8, § 1.03[4][a] (discussing policies and treaties of removal).

83. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding the United States

And indeed that was always the end game. The Washington Administration knew that the United States could not afford all out war with tribal nations and was eager to prove through its observance of tribal treaties that “the United States was ... the equal of European nations in humanitarianism and waging civilized war.”⁸⁴ But the President was “[c]onvinced that both his personal fortune and the nation should be built on Indian lands,”⁸⁵ as were other federal leaders. Orderly, lawful dispossession, that minimized costs and appearance of injustice, was central to national policy. The Trade and Intercourse Act helped to accomplish this policy, by facilitating treaty negotiations, restraining state and settler violence, and isolating tribal governments from foreign nations seeking to ally with them. Over the course of the nineteenth century, federal statutes built on this early foundation to assume more and more power,⁸⁶ finally invading even the internal self-government of tribal nations.⁸⁷

But even as this structure subjugated tribes, it also helped preserve a measure of tribal sovereignty and independence from state authority. The Trade and Intercourse Act, along with the treaties it implemented and the policies it represented, were core to the Supreme Court’s decision in *Worcester v. Georgia* that Georgia’s efforts to extend its jurisdiction over Cherokee lands were “repugnant to the constitution, laws, and treaties of the United States.”⁸⁸ The Act’s assumption of federal control over trade was key to the Court’s 1965 decision excluding state taxes over a federal Indian trader in *Warren Trading Post v. Arizona Tax Commission*,⁸⁹ which in turn allowed the twentieth century resurgence of tribal economic

could unilaterally abrogate treaties to allot land).

84. CALLOWAY, *supra* note 27, at 328.

85. *Id.*

86. For example, although the first Trade and Intercourse Act asserted federal jurisdiction only over non-Indians, in 1817, Congress extended federal jurisdiction over all crimes in Indian country, excluding only crimes between Indians. Act of March 3, 1817, ch. 92, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152).

87. See, e.g., Major Crimes Act, ch. 342, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153) (extending federal jurisdiction over most felonies committed by Indians against Indians as well as non-Indians).

88. 31 U.S. (6 Pet.) 515, 561 (1832).

89. 380 U.S. 685, 691-92 (1965).

power.⁹⁰ And beginning in the 1960s, the Act's prohibition of land purchases without tribal consent has allowed many northeastern tribes to rebuild their sovereign territories.⁹¹

Thus, consistent with Chin and Finkelman's account, the Trade and Intercourse Act, and the separate status it protected, helped to facilitate White access to land and ultimately power. But its immediate effect was to restrict White violation of tribal rights. And even as the separation that the Act mandated eroded over the century, it also helped build a framework that preserved a measure of sovereignty long after tribal military might had gone.

II. INDIGENOUS CITIZENSHIP AND SUBJECTION

As the feting of McGillivray shows, the treatment of Indigenous people in 1790—at least those that had military or economic power—bears little resemblance to our imagined treatment of people of color. But were such Indians citizens? Almost certainly not. This lack of citizenship, however, reflects Native people's sovereignty far more than their subjugation.

The separation of Indigenous people from the federal polity was embraced by both the Constitution and Indians themselves. To apportion Representatives, Article One of the Constitution excluded "Indians not taxed" to reflect their separation from ordinary politics and law.⁹² This exclusion from citizenship likely satisfied racist ideas about which people should be citizens, but it primarily reflected the actual autonomy of tribal nations. As Chancellor Kent

90. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987) (holding the state could not impose its gambling restrictions on non-Indians at a tribal bingo parlor); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343-44 (1983) (declaring the state could not regulate hunting and fishing by non-Indians at tribal resort).

91. See, e.g., Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 17-18 (1978) (discussing the 1790 Trade and Intercourse Act as the source of modern land claims).

92. U.S. CONST. art. I, § 2, cl. 3; see also U.S. DEP'T INTERIOR, M-31039, METHOD OF DETERMINING "INDIANS NOT TAXED," (1940), in 1 U.S. DEP'T OF INTERIOR, OPS. OF THE SOLIC. OF THE DEP'T OF THE INTERIOR RELATING TO INDIAN AFFS. 1917-1974, at 990, 990-91 (1970) (finding that the phrase "Indians not taxed" was designed to exclude Indians because they were "members of sovereign and separate communities or tribes ... outside of the community of people of the United States even though they might be located within the geographical boundaries of a State").

wrote in *Goodell v. Jackson* in 1823, Indians were not citizens because they “are not our subjects ... born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities.”⁹³ Citizenship would “annihilate the political existence of the *Indians* as nations and tribes” and could not justly be extended without the “full knowledge and assent of the *Indians* themselves.”⁹⁴ Tribal nations agreed.⁹⁵ In 1831, for example, when the Cherokee Nation sued Georgia in the U.S. Supreme Court, the Nation’s attorneys “insisted that individually they are aliens, not owing allegiance to the United States.”⁹⁶

The Fourteenth Amendment did not preserve the “Indians not taxed” language but only because a majority of Congress did not believe tribes were fully “subject to the jurisdiction” of the United States as the amendment provided.⁹⁷ An 1870 Senate Committee agreed, opining that tribes retained their “character as a nation or political community” and to treat them as “subject to the municipal jurisdiction of the United States would be unconstitutional and void.”⁹⁸

Later, in *Elk v. Wilkins*, the Supreme Court affirmed that those born as members of Indian tribes were not birthright citizens under the Amendment.⁹⁹ The distinction was not racial but political.¹⁰⁰ The Court agreed that Indians from tribes that lacked federal recognition were born U.S. citizens¹⁰¹ and that they could naturalize with federal consent.¹⁰² But “although in a geographical sense born in the United States,” those born within a tribe were in the same position as children born in foreign countries, or those born in the United

93. See 20 Johns. 693, 712 (N.Y. 1823).

94. *Id.* at 717.

95. See Berger, *supra* note 10, at 1209 (discussing tribal resistance to measures extending citizenship without tribal consent).

96. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

97. Berger, *supra* note 10, at 1198-99; see also Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 505-08 (2008).

98. S. REP. NO. 41-268 at 3, 9 (1870).

99. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884).

100. See *id.* (describing citizenship as a political privilege).

101. *Id.* at 107 (citing *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877); *Danzell v. Webquish*, 108 Mass. 133 (1871); *Pells v. Webquish*, 129 Mass. 469 (1880)).

102. *Id.* at 103.

States to “ambassadors or other public ministers of foreign nations.”¹⁰³

In a move that *was* explicitly racial, Indians were also barred from naturalization by the free white persons clause.¹⁰⁴ Infamously, Justice Taney’s opinion in *Dred Scott v. Sanford* bolstered his conclusions that African Americans could never be citizens by declaring that Indians “may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become ... entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.”¹⁰⁵ The opinion clarified, however, that as to the 1790 Naturalization Act “in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community ... and the word white was not used with any particular reference to them.”¹⁰⁶ As Leti Volpp has highlighted, moreover, a series of cases between 1888 and 1938 held that people of Native descent born outside the United States were ineligible to naturalize under the Act.¹⁰⁷

Yet in contrast with actions toward African Americans and later Asian immigrants, federal policy from the beginning sought to incorporate Native people as citizens. In 1808, President Thomas Jefferson encouraged the Delaware, Mohiccons, and Munsies to “unite yourselves with us, join in our great Councils & form one people with us and we shall all be Americans, you will mix with us by marriage, your blood will run in our veins, & will spread over this great Island.”¹⁰⁸ Such mixing was also celebrated in John Chapman’s depiction of the *Baptism of Pocahontas at Jamestown, Virginia*, which was hung in the Capitol rotunda in 1840,¹⁰⁹ and featured on American currency in the 1860s.¹¹⁰

103. *Id.* at 102.

104. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 419-20 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

105. *Id.* at 404.

106. *Id.* at 419-20.

107. Leti Volpp, *The Indigenous As Alien*, 5 U.C. IRVINE L. REV. 289, 304-05 (2015).

108. See *Letter from Thomas Jefferson to Hendrick Aupaumut*, 21 December 1808, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/99-01-02-9358> [<https://perma.cc/ED52-Z73Z>].

109. SUSAN SCHECKEL, *THE INSISTENCE OF THE INDIAN: RACE AND NATIONALISM IN NINETEENTH-CENTURY AMERICAN CULTURE* 139-40 (1998).

110. Harcourt Fuller, *Who Was the First Woman Depicted on American Currency?*, *THE*

This policy was reflected in federal law. As early as 1817, treaties with tribal nations offered citizenship to those wishing to separate from their tribes.¹¹¹ In the wake of *Elk v. Wilkins*, federal statutes offered citizenship more globally, to all Indians who had accepted an allotment or had “voluntarily taken up ... his residence separate and apart from any tribe of Indians ... and ... adopted the habits of civilized life,”¹¹² as well as to Indian women marrying White men.¹¹³ By 1924, when Congress extended birthright citizenship to all Native people born in the United States, two-thirds had already become citizens under one of these laws,¹¹⁴ and one would soon serve as vice President of the United States.¹¹⁵

Native citizenship policy, therefore, is inconsistent with a persistent vision of White citizenship. It is, however, consistent with a vision of White power. Citizenship was understood to subject Native individuals to full state and federal law, remove federal protections for their land, and prevent tribal power.¹¹⁶ Although some Native individuals did seek citizenship, many resisted it and many to whom it was extended petitioned with the United States to take it back.¹¹⁷

CONVERSATION (Apr. 22, 2016, 6:03 AM), <https://theconversation.com/who-was-the-first-woman-depicted-on-american-currency-58245> [<https://perma.cc/E5LC-W244>].

111. See, e.g., Treaty with the Cherokees, Cherokee Nation-U.S., art. 8, July 8, 1817 (removal treaty promising 640 acres and citizenship to those who wished to remain east of the Mississippi); Treaty with the Choctaws, Choctaw Nation-U.S., art. XIV, Sept. 27, 1830, 7 Stat. 333 (removal treaty promising the same); Treaty with the Wyandotts, U.S.-Wyandott Tribe, art. 1, Jan. 31, 1855, 10 Stat. 1159 (dissolving tribe and declaring all its members “citizens of the United States ... entitled to all the rights, privileges, and immunities of such citizens”); Treaty with the Kickapoo Indians, Kickapoo Tribe-U.S., art. III, June 28, 1862, 13 Stat. 623 (providing citizenship for those who accepted patents, swore oath of allegiance for aliens, and provided evidence “that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families”).

112. Dawes Allotment Act of 1887, ch. 119, § 6, 24 Stat. 388, 390.

113. Act of Aug. 9, 1888, ch. 818, 25 Stat. 392.

114. Berger, *supra* note 10, at 1241.

115. Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2218 n.5 (2021) (discussing the political career of Charles Curtis, a Kaw citizen, who served as vice president from 1928 to 1933).

116. See *In re Heff*, 197 U.S. 488, 509 (1905) (holding citizenship ended federal power), *overruled by* *United States v. Nice*, 241 U.S. 591 (1916); Berger, *supra* note 10, at 1205-06 (discussing citizenship as “the end point of federal plans to end the ‘Indian problem’ by ending Indian tribes”).

117. Berger, *supra* note 10, at 1208-09.

The policy therefore served the ultimate goal of consolidating power over all people and territory in the United States.¹¹⁸

At the same time, there is a more honorable side to this history. The lack of automatic citizenship reflected respect for both tribal sovereignty and tribal voices.¹¹⁹ The ultimate extension of citizenship, while it would facilitate the end of tribal sovereignty and territory, was also part of a noble if misguided desire to benefit Indigenous people. As with the policy reflected in the Trade and Intercourse Act, this history is neither all good nor all bad, combining at once despicable and admirable motivations and results.¹²⁰

CONCLUSION

The Janus-faced nature of citizenship continues to haunt Indigenous people today. Opponents of the legal recognition of tribal sovereignty continue to argue that Indigenous people's U.S. citizenship invalidates this recognition.¹²¹ Even as Supreme Court guards asserted that Samantha Maltais's traditional regalia was too political to wear at the Supreme Court, petitioners were preparing to argue that U.S. citizenship rendered the Indian Child Welfare Act unconstitutional.¹²²

What light can the events of 1790 and their aftermath shed on these arguments? First, that citizenship is not a simple dividing

118. *See id.* at 1210.

119. *See* Magliocca, *supra* note 97, at 520-21.

120. *Cf.* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1796 (2019) (noting that federal Indian law cases provide doctrines that "should form a 'crown jewel' in our constitutional canon on par with *Brown* [v. *Board of Education*]," as well as many doctrines that belong in the anti-canon).

121. *See, e.g.,* *Duro v. Reina*, 495 U.S. 676, 692 (1990) (relying on Indian citizenship to hold tribes lacked criminal jurisdiction over Indians who were not members of the governing tribe); *Wash. State Com. Passenger Fishing Vessel Ass'n v. Tollefson*, 571 P.2d 1373, 1376 (Wash. 1977) (en banc) (relying in part on citizenship of Indians and non-Indians to find treaty rights unconstitutional), *vacated sub nom. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979); *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 382-408 (Minn. Ct. App. 1996) (Randall, J., dissenting) (arguing that citizenship of American Indians made tribal courts, sovereign immunity, and sovereignty generally illegal).

122. Reply Brief for Individual Petitioners at 18, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 5247146 *18-19 (arguing that because Indians are U.S. citizens, the Indian Child Welfare Act could not constitutionally treat them differently than others).

line between racial and non-racial, equal and unequal. Instead, citizenship was a tool used to preserve the Whiteness of power; although withholding citizenship was the most frequent use of this tool, extending it could facilitate White power as well. Second, because of this, our attention should be on the actual levers of power as well as on its formal manifestations such as citizenship. In this light, as Professor Chen writes, formal citizenship is a necessary but not sufficient condition for equality for immigrants.¹²³ In addition, as the specific history set forth in this Comment shows, regardless of citizenship, tribal separateness and sovereignty are necessary conditions to address the unequal subjugation of Indigenous people in the United States.

123. Ming Hsu Chen, Comment, *The Road Not Taken: A Critical Juncture in Racial Preferences for Naturalized Citizenship*, 65 WM. & MARY L. REV. 1137, 1157 (2024).