

## Beyond Settler Colonialism

### **State Sovereignty in Early America<sup>1</sup>**

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§. In 1789, spurred by violence between settlers and Indians along the Wabash River, the U.S. Secretary of War, Henry Knox, composed a memo for George Washington that sought a solution to the problem of 'Indian Affairs'. He saw two possible courses of action. The first entailed a military response to Indian attacks, 'by Raising an Army and extirpating the refractory tribes entirely'.<sup>2</sup> But Knox rejected this approach on two grounds. First, it would tarnish the reputation of a new and democratically-formed nation that was committed to 'justice'; second, it would likely produce a wider and more destructive war among Indians; third, broad

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<sup>2</sup> *Early American Indian Documents, Vol. 18: Revolution and Confederation*, ed. Colin G. Calloway (Maryland: University Publications of America, 1994), 521.

recognition of tribal rights to the soil meant that dispossession by means other than a 'just war' violated the law of nations; and fourth, the government simply could not pay for such an operation.

§. This left the alternative of diplomacy, the preferable option since it was determined by 'policy and justice'. Knox, like many British and American colonial officials before him, argued while gifts, trade goods, and land purchases were expensive, they were certainly cheaper than war. He therefore proposed a 'conciliatory system' that earmarked resources for diplomacy and which recognized that Indian territorial claims could be gradually absorbed through a fifty-year program of the regulated purchase of Indian land. Knox's specific language merits quotation in full:

As the settlements of the whites shall approach near to the Indian boundaries established by treaties, the game will be diminished, and the lands being valuable to the Indians only as hunting grounds, they will be willing to sell further tracts for small considerations. By the

expiration, therefore, of the above period, it is most probable that the Indians will, by the invariable operation of the causes which have hitherto existed in their intercourse with the whites, be reduced to a very small number.<sup>3</sup>

§. It is tempting to conclude that Knox was simply seeking to have it both ways: to systematize a method for gaining control of Indian land in ways that avoided conflict, promoted orderly settlement in lands with agreed boundaries, and that satisfied the mandates of justice. Yet he also clearly wanted Indian land, and settled on the option with the least risk. Later in the memo, Knox pulled back from the Northwest to consider the coastal states that had their origins as British colonies. As he informed Washington, ‘the Indian tribes, once existing in those States now the best cultivated and most populous, have become extinct’. If the expansion of the U.S. continued, ‘the idea of an Indian on this side of the Mississippi will only be found in the pages of the historian’.<sup>4</sup>

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<sup>3</sup> *Revolution and Confederation*, 523, 524.

<sup>4</sup> *Revolution and Confederation*, 529.

§. Knox's words are often cited as an example of the desire of U.S. officials to obtain Indian land in a manner that did not risk a wholesale Indian war.<sup>5</sup> In particular, his advocacy of the 'gradual dispossession' of Indians suggests a project of settler-driven transformation of indigenous spaces that is indicative of a process of settler colonialism.<sup>6</sup> But while Knox, Washington and other officials often saw settlers as disruptive to an orderly process of the purchase of Indian land, they also understood that they were instrumental to a state-driven policy of securing these territories by settlement. Knox's memorandum reveals the way in which early republican officials wielded state powers of war and treaty in a settler colonial mode, in order to secure possession of indigenous land.

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<sup>5</sup> Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion* (Princeton University Press, 2017), ch. 2; Stuart Banner, *How the Indians Lost their Land: Law and Power on the Frontier* (Harvard, 2005), 130-35; Colin G. Calloway, *The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation* (Oxford, 2018), ch. 14.

<sup>6</sup> Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Harvard, 2010), p. 20.

§. Settler colonialism has taken the academic world by storm. It has spawned a minor flood of publications; is increasingly represented on conference panels; has its own journal; and has generated a parallel theoretical literature that traces its origins and permutations; it is the go-to theoretical framework for injecting some critical energy into established, yet separate, narratives of social formation in the American interior. As a historically-grounded contemporary critique, it sees large swaths of the present-day globe as the product of settler violence, which remains embedded in contemporary structures of power and expressions of culture.<sup>7</sup>

§. Settler colonial interpretations are prominent in the imperial, colonial and indigenous history of what are known as CANZUS states, the former imperial territories of the British Crown where state formation coincided with the violent dispossession of indigenous populations. All of these states have accepted their post-colonial

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<sup>7</sup> Aimee Carillo Rowe and Eve Tuck, "Settler Colonialism and Cultural Studies: Ongoing Settlement, Cultural Production, and Resistance", in *Cultural Studies↔Critical Methodologies* 17, no. 1 (2017): 3-13.

status, while at the same time seeking to actively right the wrongs of the imperial past. They share a keen awareness of the historical and legal continuities that connect former colonies with present states, and take care to place discussions of contemporary indigenous rights within an historical narrative that explicitly acknowledges dispossession and the harm done by intrusive and sometimes violent assimilationist policies.<sup>8</sup>

§. Less clear is where the colonial experience of the United States fits into treatments of settler colonialism among the CANZUS states. Notwithstanding Walter Hixson's *American Settler Colonialism* (2013), and essay forums published in three leading journals, the question remains: were American colonists 'settler colonial' or

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<sup>8</sup> Kirsty Gover, "Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples", in *The European Journal of International Law* 26, no. 2 (2015): 345-73; Margaret Moore, "The Taking of Territory and the Wrongs of Colonialism", in *The Journal of Political Philosophy* 27, no. 1 (2019): 87-106; Penelope Edmonds, *Settler Colonialism and (Re)conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Palgrave, 2016); Mark D. Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada", in eds. Will Kymlicka and Bashir Bashir, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008), 165-91; Annie E. Coombes (ed.), *Rethinking Settler Colonialism: History and Memory in Australia, Canada, Aotearoa New Zealand and South Africa* (Manchester University Press, 2006).

not?<sup>9</sup> The answer to this question varies. For Daniel Richter, the power of multiple Native sovereignties in seventeenth century America meant that settler colonialism could ‘not take coherent form’.<sup>10</sup> Looking over the longer term, historians of Native America have emphasized the violence of colonialism that accelerated after American independence, citing dispossession, cultural assimilation, massacre and wholesale marginalization – all hallmarks of settler colonialism.<sup>11</sup> By contrast, recent work on colonial political thought refers to ‘settler sovereignty’, characterizes the American Revolution as a ‘setter revolt’, and describes the political

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<sup>9</sup> Walter L. Hixson, *American Settler Colonialism: A History* (Palgrave, 2013); “The Significance of the Frontier in an Age of Transnational History”, in *Settler Colonial Studies* 4, no. 2 (2014); Special issue, “Settler Colonialism and the American West”, ed. Janne Lahti, *Journal of the West* 56, n. 4 (2017); “Settler Colonialism in Early American History”, ed. Jeffrey Ostler & Nancy Shoemaker, *The William and Mary Quarterly* 76 n. 3 (2019): 361-450.

<sup>10</sup> Daniel Richter, “His Own, Their Own: Settler Colonialism, Native Peoples, and Imperial Balances of Power in Eastern North America, 1660-1715”, in ed. Ignacio Gallup-Diaz, *The World of Colonial America: An Atlantic Handbook*, (New York, 2017), p. 212.

<sup>11</sup> Ned Blackhawk, *Violence Over the Land: Indians and Empires in the Early American West* (Harvard, 2008), 1-15; Roxanne Dunbar-Ortiz, *An Indigenous Peoples History of the United States* (Beacon Press, 2014); Jeffrey Ostler, *Surviving Genocide: Native Nations and the United States from the American Revolution to Bleeding Kansas* (Yale, 2019).

society that succeeded it as a 'settler's empire'. Here, the emphasis is not on the 'elimination' or wholesale replacement of the 'native', but rather on the formation by settlers of political and legal orders that blend republican ideals with rapid territorial expansion.<sup>12</sup>

§. In this essay, I approach settler colonialism from the perspective of the history of political thought, confining the discussion to the Anglophone colonies that were transformed into states by a secessionist revolution against the British imperial state. This choice is determined by that fact that these colonies had long experience of relations with Native polities, and predicated their arguments for independence on the articulation of powers that were honed in the context of Indian affairs. Jefferson listed these in the Declaration of Independence as the powers of war, peace, alliance and commerce. It was the independent exercise of these

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<sup>12</sup> Aziz Rana, *The Two Faces of American Freedom* (Cambridge, MA: Harvard University Press, 2010), ch. 1; Bethel Saler, *The Settler's Empire: Colonialism and State Formation in America's Old Northwest* (University of Pennsylvania Press, 2015), ch. 1-2; Adam Dahl, *Empire of the People: Settler Colonialism and the Foundations of Modern Democratic Thought* (University Press of Kansas, 2018), ch. 3.

sovereign powers, Jefferson claimed, that distinguished colonies from states.

§. By contrast, theoretical accounts of settler colonialism define sovereignty as ‘distinct’ from the state, and characterised by ‘self-government’ and ‘suzerainty’.<sup>13</sup> Settlers form enclaves and seek to exercise political powers in ways that are separate from the state and which have affinities with classical republicanism, but these affinities end on the question of domination and exclusion.<sup>14</sup> There is a marked contrast here with discussions of the formation and character of early modern English sovereignty, which is concerned with the nature and location of legitimate power *within* the state. The seventeenth century was a proving ground for theories of ‘popular’ sovereignty that based ultimate power in the people; a monarchical version that placed all legitimate power in the hands of the Crown; and a

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<sup>13</sup> Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (Palgrave, 2010), 54.

<sup>14</sup> Rana, *Two Faces of American Freedom*, 11-12; Jack P. Greene, “The American Revolution”, in *The American Historical Review* 105 no. 1 (2000): 93-102; J. Matthew Hoye, “Migration, Membership, and Republican Liberty”, in *Critical Review of International Social and Political Philosophy*, <https://doi.org/10.1080/13698230.2018.1532228>

constitutionalist account that proposed the common law as supreme over all political questions.<sup>15</sup>

§. Just as the expansion of England's empire demanded a different account of sovereignty, drawn from the *jus gentium*, colonies within empire developed theories that legitimized their activities in a context of plural sovereignties, where European power was negotiated as much as it was imposed.<sup>16</sup> My argument here is that the early American account of sovereignty was necessarily statist in orientation. Legal and political jurisdiction was channeled through colonial governments which evolved into states, and were defined by a cluster of sovereign powers gradually formed in the context of war and

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<sup>15</sup> Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford, 2016), ch. 3-4; Richard Bourke & Quentin Skinner (eds.), *Popular Sovereignty in Historical Perspective* (Cambridge & New York: Cambridge University Press, 2016), ch. 6-8; Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge, 2006).

<sup>16</sup> Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge, 2006), ch. 1; Pekka Hämäläinen, "The Shapes of Power: Indians, Europeans, and North American Worlds from the Seventeenth to the Nineteenth Century", in ed. Juliana Barr & Edward Countryman, *The Contested Spaces of Early America* (University of Pennsylvania Press, 2014), 31-68.

diplomacy with Indian nations. Second, the sovereign powers of colonies, states and the federal republic were not exclusively directed to the elimination of Native Americans, but was shaped as a set of responses to Indian presence, Indian power, and Indian sovereignty.

§. In the first section of the paper, I consider how historians of colonial thought have presented settlers and settler ideas within the broader contours of imperial and colonial history. The integration of Native American history at key points of the development of these interpretations has been decisive in revealing how competition between indigenous and European social formations was *the* shaping dynamic of early American sovereignty. The next section makes the case for treaty diplomacy as the prime location for the inter-cultural negotiation of sovereignty, and the emergence of colonies as ‘virtual sovereigns’ whose powers were honed in diplomatic contexts, rather than being derived from the traditions of English constitutional republicanism.

§. The Declaration of Independence represents an important refinement of this account of sovereignty,

which coalesced out of a long history of localized colonial struggles in an Indian landscape of power. The final section considers the early republican period as defined by the question of where Indian power sat in relation to the sovereign claims of states and the weak federal power. Rather than being 'excluded' or 'eliminated', Indigenous sovereignty shaped its colonial and imperial counterpart. By this I mean that, despite attempts by a host of imperial and colonial thinkers to impose a uniform rule over indigenous spaces, their conceptions of sovereign power were shaped and diluted by reciprocal expressions and actions of indigenous power.

### **From Conquest to Sovereignty**

§. With a few exceptions, studies of the ideology and political culture of the British empire have not presented it as anything like a settler colonial formation.<sup>17</sup> Instead, the empire has most often been defined as an 'extended

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<sup>17</sup> Zoë Laidlaw, "Breaking Britannia's Bounds?: Law, Settlers, and Space in Britain's Imperial Historiography", in *The Historical Journal* 55, no. 3 (2012): 807-30.

polity', a projection of the power of the British state beyond its immediate borders.<sup>18</sup> This model of extension and projection focusses attention on the linguistic, cultural, historical, and legal ties that bound together the constituent Anglo-phone elements of the empire.

Territory was understood as part of the wider domains of the Crown, and British officials marveled at the extent of land gained from the French in the Treaty of Paris in 1763. It seemed that the entire Continent beckoned.

Thomas Hutchinson, giving no thought to the indigenous populations of the interior, observed that there was 'nothing to obstruct a gradual progress from the Atlantic to the pacific Ocean'.<sup>19</sup> As they were claimed, surveyed, and mapped, these lands became public domains, acquired by the combined efforts of Crown, colonists, and imperial officials as part of a great national project.<sup>20</sup>

Colonists related to the imperial state as subjects within an extended set of Crown dominions, and carefully

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<sup>18</sup> J. G. A. Pocock, *The Discovery of Islands: Essays in British History* (Cambridge, 2005), ch. 9.

<sup>19</sup> Thomas Hutchinson, *The History of the Colony and Province of Massachusetts Bay*, 3 vols. (London, 1828), vol. 3, 85.

<sup>20</sup> S. Max Edelson, *The New Map of Empire: How Britain Imagined America before Independence* (Harvard, 2017), ch. 1, 2, 4.

guarded their inherited rights to liberty and property.

Politically, the empire was defined by shared values: it was Protestant, maritime, commercial, and free, while in the eighteenth century the blue water empire was superintended by a patriot King, who rose above the factionalism of the 'rage of parties' in parliament.<sup>21</sup>

Above all, it was a peaceful empire, and as George Savile observed in 1696, 'Our Scituation hath made Greatnesse abroad by land Conquests unaturall things to us'.<sup>22</sup>

§. Arguably, therefore, settler colonialism in the British Atlantic case was a process *within* empire, rather than a process *of* empire. The imperial state sought to restrict

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<sup>21</sup> H. V. Bowen, "British Conceptions of Global Empire, 1756-1783", in *The Journal of Imperial and Commonwealth History* 26, no. 3 (1998): 1-27; David Armitage, *The Ideological Origins of the British Empire* (Cambridge, 2000), ch. 1; Eliga Gould, *The Persistence of Empire: British Political Culture in the Age of the American Revolution* (University of North Carolina Press, 2000), ch. 1-2; Elizabeth Mancke, "The Languages of Liberty in British North America, 1607-1776", in ed. Jack P. Greene *Exclusionary Empire: English Liberty Overseas, 1600-1900* (Cambridge, 2010), 25-49; Jack P. Greene, *Evaluating Empire and Confronting Colonialism in Eighteenth-Century Britain* (Cambridge University Press, 2013), ch. 2; Hannah Weiss Muller, *Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* (Oxford, 2017), ch. 1-2.

<sup>22</sup> George Savile, *A Rough Draft of a New Model at Sea* (London, 1694), 296.

settlement, most notably through the Royal Proclamation of 1763, and to defend its territory by taxing and ruling subjects in order to support the vast and costly structure of backcountry forts and garrisons. Opposition to these policies – epitomized by the Stamp Act and a succession of controversial statutes – was collective, and its violence was directed toward the imperial state on the grounds that the Crown and parliament acted in ways that undermined the hard-won liberties of colonists.

§. By contrast, the particular hallmark of settler colonialism as a set of actions is racialized violence, driven by ‘self-possessive’, ‘self-governing’, and ‘self-cultivating’ settlers.<sup>23</sup> The main target of this aggression are indigenous peoples. Yet, where historians of Native America have demonstrated the adaptability and resilience of Indian social formations, settler colonialism instead emphasizes the violent, and permanent, transformation of political and social spaces. Settlers

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<sup>23</sup> Matthew Crow, “Atlantic North America”, in eds. Edward Cavanagh & Lorenzo Veracini, *The Routledge Handbook of the History of Settler Colonialism* (Routledge, 2016), 93; Veracini, *Settler Colonialism*, 3, 6, 53, 56-7.

'replace' Indians, either by genocide or through the 'eliminary logic' inherent in legal orders that negate Indian sovereignty while establishing a condition of 'interior exclusion'.<sup>24</sup> In some guises, this emphasis on indigenous removal, combined with the portrait of settlers as 'founders' of political orders, looks like a reification of the myth of the 'vanishing Indian'.<sup>25</sup> However, recent critical engagements with settler colonialism have challenged the extent to which a focus on the 'elimination of the native' serves to obscure broad strategies of indigenous adaptation.<sup>26</sup>

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<sup>24</sup> Patrick Wolfe, "Settler Colonialism and the Elimination of the Native", in *Journal of Genocide Research* 8, no. 4 (2006): 388; Hixson, *American Settler Colonialism*, 17-20; Daragh Grant, "On the 'Native Question': Understanding Settler Colonialism's Logics of Domination", (PhD diss, University of Chicago, 2012), 1-50.

<sup>25</sup> James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld* (Oxford, 2009), ch. 1-2; Veracini, *Settler Colonialism*, p. 53.

<sup>26</sup> Lisa Ford & Tim Rowse (eds.), *Between Indigenous and Settler Governance* (Routledge, 2013), Introduction, ch. 2, 3; Tim Rowse, "Indigenous Heterogeneity", in *Australian Historical Studies* 45, no. 3 (2014): 297-310; Miranda Johnson, "Writing Indigenous Histories Now", *Australian Historical Studies* 45, no. 3 (2014): 317-30; Corey Snelgrove, et al, "Unsettling Settler Colonialism: The Discourse and Politics of Settlers, and Solidarity with Indigenous Nations", in *Decolonization: Indigeneity, Education & Society* 3, no. 2 (2014): 1-32. For a response, see Lorenzo Veracini, "Defending Settler Colonial Studies", in *Australian Historical Studies* 45, no. 3 (2014): 311-16.

§. Conquest – a feature of settler colonialism – is more prominent in histories of the American West than it is in studies of the pre-revolutionary colonies.<sup>27</sup> Historians of law have explored what ‘conquest’ meant in the writings of jurists such as Edward Coke and William Blackstone who, in the midst of the Stamp Act crisis, wrote that the colonies were ‘obtained in the last century by right of conquest’.<sup>28</sup> Yet in recent analyses of colonial political thought, conquest is the least prominent of a number of justifications of territorial claims. Craig Yirush has traced a ‘conquest’ doctrine’ in English colonial thought, that based ‘superior title’ to land on the premise that settlers had defeated Indians in war, but he suggests that settlers rejected it in favour of an argument for Indian ‘purchase’. Similarly, Andrew Fitzmaurice traces the long history of

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<sup>27</sup> Stephen Aron, “Lessons in Conquest: Towards a Great Western History”, in *Pacific Historical Review* 63, no. 2 (1994): 125-47; Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford, 1996), ch. 1-2.

<sup>28</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols., ed. Stanley N. Katz (University of Chicago Press, 1979), vol. 1, 105; Gavin Loughton, “Calvin’s Case and the Origins of the Rule Governing ‘Conquest’ in English Law”, in *Australian Journal of Legal History* 8, no. 2 (2004): 143-80; Mark Janis, *America and the Law of Nations, 1776-1939* (Oxford, 2010), 7.

an argument for ‘occupation’ that in eighteenth-century America was ‘used to make a claim to property and to a political space that was at least semi-autonomous from the Crown and Crown charters’.<sup>29</sup>

§. One of the principal intellectual sources of claims to the occupation of territory are the writings of John Locke. As James Tully has shown, Locke’s writings link and unify two vital ideas in what he calls a ‘delegation theory of popular sovereignty’, which holds that political society is a manifestation of the delegated powers of individuals, who remain free to recover their natural liberty and to frame forms of government that protect it. On this view, colonisation is an active demonstration of a commitment to defend a set of core political values. According to what Yirush describes as ‘settlement doctrine’, individuals are free to leave their homelands, and enter a ‘state of

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<sup>29</sup> Christopher Tomlins, “The Legalities of English Colonizing: Discourses of European Intrusion upon the Americas, ca. 1490-1830”, in eds. Shaunnagh Dorsett and Ian Hunter, *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave, 2010), 53; Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (Cambridge, 2011), 18, 37-7; Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge, 2014), 183.

nature', which is then transformed into a political space through the framing of social orders that protect life, liberty, and the pursuit of happiness.<sup>30</sup> A second feature of the Lockean position concerns property. As Tully suggests, society is predicated on the property of individuals', and in Locke's formulation property is formed when individuals, for example, cultivate a patch of ground.<sup>31</sup> This 'agriculturalist' account of property formation was employed to frame a theory of colonization that was based on the 'actions of the settlers themselves' and an account of the development of civil society that was based in a 'settler contract'.<sup>32</sup> Yet these actions are largely benign: occupation, purchase, and the formation of property are presented as legitimate transactions within a Lockean theory of property

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<sup>30</sup> Yirush, *Settlers, Liberty, and Empire*, 42.

<sup>31</sup> James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge, 1993), 137.

<sup>32</sup> See Barbara Arneil, *John Locke and America* (Oxford, 1996), ch. 7; Bruce Buchan, "The Empire of Political Thought: Civilization, Savagery and Perceptions of Indigenous Government", in *History of the Human Sciences* 18, no. 2 (2005): 1-22; Carole Pateman and Charles Mills, *Contract and Domination* (Polity Press, 2007), 35-78; David Armitage, *The Foundations of Modern International Thought* (Cambridge, 2013), 124-31.

formation, an account that leaves very little room for violent conquest.<sup>33</sup>

§. One objection to the prevailing Lockean account that underpins the case for colonial ‘presence’ is that it is a theory that is too distant from the realities of actual processes of colonisation. By the time of Locke’s writing, the question of legitimate power concerned the more complex matter of the positive powers of states: these were also based on ‘actions’, and the primary context for these actions was the relationship between the Crown, colonial officials, settlers and the dominant Indian confederacies of the Northeast. A second and closely related point is that to base our understanding of settler sovereignty on the narrative of an ‘agrarian’ civilization displacing ‘savages’ in a ‘wilderness’ is to confuse history with myth. This myth is deeply engrained in texts that frame modern understandings of sovereignty and rights by dismissing Indians as ‘savage’ and stateless nomads

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<sup>33</sup> In fact, Locke explicitly rejected conquest: ‘Conquest is as far from setting up any Government, as demolishing an House is from building a new one in the place’. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1988), §. 175, 385.

with no recognisable form of government. To take two prominent examples: Hobbes noted that the ‘savage people in many places of America . . . have no government at all’, while for Locke, in the beginning, ‘all the world was America’. In each case, the peoples of America existed outside the history of the development of European states, and served as living illustrations of the early points in a stadial history of the development of civil society.<sup>34</sup>

§. An alternate view, that foregrounds violence and conquest as organising themes in early American history, has been stated and re-stated, but blind spots persist. As Patricia Limerick argued in 1987, to the American public the ‘legacy of slavery was serious business, while the legacy of conquest was not’.<sup>35</sup> A decade later, Andrew

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<sup>34</sup> Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (Oxford, 1997), ch. 1; Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge, 1991), 89; Locke, *Two Treatises*, 301.

<sup>35</sup> Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987), 18. See also Donald Worster, “Beyond the Agrarian Myth”, in eds. Patricia N. Limerick, Clyde A. Milner II, & Charles E. Rankin, *Trails: Toward a New Western History* (University Press of Kansas, 1991), 3-25.

Cayton and Fredrika Teute insisted that historians could no longer deny ‘that the European conquest of North America, and the frontiers it created, must be at the center’ of all histories of the American continent.<sup>36</sup>

Notwithstanding these calls to contend with violence, the standard ‘public’ narratives of early American history foreground migration, rather than ‘colonization’ and ‘appropriation’. Democracy is established in the wilds of early Virginia, ‘pioneers’ open roads West in the public imagination, and the national story is still defined by the ‘truths’ of the founding.<sup>37</sup> The events of 1776, combined with Emancipation, continue to orient the narrative around democratic ideals and achievements, but both the Revolution and Civil War can also be seen as ‘acts of

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<sup>36</sup> “Introduction: On the Connection of Frontiers”, in eds. Andrew R. L. Cayton & Fredrika J. Teute, *Contact Points: American Frontiers from the Mohawk Valley to the Mississippi, 1750-1830* (University of North Carolina Press, 1998), 2.

<sup>37</sup> David Brooks, “The American Land”, in *New York Times* 25 August 2017, A27; Jill Lepore, *These Truths: A History of the United States* (New York, 2018); James Horn, *1619: Jamestown and the Forging of American Democracy* (New York, 2018); David McCullough, *Pioneers: The Heroic Story of the Settlers Who Brought the American Ideal West* (New York, 2019).

appropriation' and contests for sovereignty.<sup>38</sup>

Throughout American history, the key object of appropriation was Indian land, a theme that has its roots in English colonisation that placed 'land over people as the primary objective of the colonizers attention'.<sup>39</sup>

§. Rather than conquest, historians of early American colonial ideas have focused on the formation of sovereignty, but tend to define it as the application of law over previously lawless spaces. Current and influential interpretations of colonial law and political thought juxtapose the term 'settlers' with an explicit acknowledgement of Indian 'sovereignty'. In common with standard accounts of settler colonialism, they posit a 'triangular' relationship between settlers, a metropolitan

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<sup>38</sup> Christopher Tomlins, "Law's Wilderness: The Discourse of English Colonizing, the Violence of Intrusion, and the Failures of American History", in ed. John Smolenski, *New World Orders: Violence, Sanction and Authority in the Early Modern Americas, 1500-1825* (U. Penn., 2005), 35, 36; Pekka Hämmäläinen, "Reconstructing the Great Plains: The Long Struggle for Sovereignty and Dominance in the Heart of the Continent", in *The Journal of the Civil War Era* 6, no. 4 (2016): 481-509.

<sup>39</sup> Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge, 2010), 133; Fitzmaurice, *Sovereignty*, 25.

government, and indigenous peoples.<sup>40</sup> For Lisa Ford, 'settler sovereignty' does not denote a program of settler aggression, but the extension of legal jurisdiction in a context where indigenous and settler sovereignties are 'deeply intertwined', and negotiated 'in dialogue' with indigenous people, rather than being the 'result of conquest'. Paradoxically, North America was at once a site of 'cooperation' and 'gradual dispossession', in which land speculators upheld Indian claims to territory in order to challenge the Crown's title and free themselves from the control of imperial agents.<sup>41</sup>

§. Craig Yirush has argued that settlers were 'agents of empire in their own right, appropriating native land and establishing local authority in a quasi-autonomous manner'. And, in contrast with the tenets of settler colonialism, Yirush notes, referring to the Mohegan Case, that 'settlers had to think about the rights of the

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<sup>40</sup> Gregory Evans Dowd, "Indigenous Peoples without the Republic", in *Journal of American History* 104, n. 1 (2017): 21.

<sup>41</sup> Ford, *Settler Sovereignty*, 19, 20, 21; Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford, 1990), 255-307.

indigenous peoples of North America'.<sup>42</sup> Similarly, Andrew Fitzmaurice and the late Leonard Sadosky have suggested that the claims to territory advanced by settlers were 'modulated' by the claims of Indians, who were 'players' in the 'complex negotiation' and 'struggle over American sovereignty', which took place according to the 'norms of borderlands diplomacy'.<sup>43</sup> The rituals and conduct of this diplomacy, moreover, required that Europeans adapt to 'tribal approaches to achieving law and peace'.<sup>44</sup>

§. These interpretations, which duly acknowledge instances of settler violence while at the same time emphasizing the importance of intercultural diplomacy,

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<sup>42</sup> Yirush, *Settlers, Liberty, and Empire*, 14.

<sup>43</sup> Fitzmaurice, *Sovereignty*, 185; Leonard J. Sadosky, *Revolutionary Negotiations: Indians, Empires, and Diplomats in the Founding of America* (University of Virginia Press, 2009), 8.

<sup>44</sup> Williams, *Linking Arms Together*, 5; Ford, *Settler Sovereignty*, 18; Andrew Fitzmaurice, 'Powhatan Legal Claims', in ed. Saliha Belmessous, *Native Claims: Indigenous Law Against Empire* (Oxford, 2012), 102; Craig Yirush, "'Since We Came Out of This Ground': Iroquois Legal Arguments at the Treaty of Lancaster", in eds. Brian P. Owensby and Richard J. Ross, *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York University Press, 2018), 118-50.

reveal the limits of the settler colonial paradigm when it is applied to the pre-Revolutionary east, where the sovereignty of the Crown was thinly applied, and where Indian power was preserved by and projected through networks of kinship, trade, alliance, underpinned by a careful balance of war and diplomacy. Historians acknowledge that colonial land was sometimes taken as the result of 'conquest' and punitive treaties, but these episodes were single components of a larger process of the formation of sovereignty, sometimes through war, and at others through negotiation and purchase.<sup>45</sup> Instead of the negation of Indian sovereignty, settlers had to contend with its reality, and did so from the precarious vantage point of an interpolity zone of overlapping power and jurisdiction.<sup>46</sup> In that sense, Gregory Dowd is right to suggest that 'particular competition among empires and indigenous formations should factor into

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<sup>45</sup> For conquest see, Allan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (Cambridge, 2018), 200-1; Yirush, *Settlers, Liberty, and Empire*, 18, 36-7; Ford, *Settler Sovereignty*, 74, 136, 142, 155-56, 165-66.

<sup>46</sup> Lauren Benton, "Made in Empire: Finding the History of International Law in Imperial Locations", in *Leiden Journal of International Law* 31, n. 3 (2018): 3-4.

discussions of settler colonialism and indigenous power'.<sup>47</sup> The locus of this competition was sovereignty.

### **Imperial Colonies, Settler States**

§. Standard accounts of colonial ideas are concerned with inheritances. The seminal work of Bernard Bailyn, Jack Greene and Gordon Wood recovered deep resonances between colonial political thought and its antecedents in the English common law, the 'ancient' constitution, and in the 'radical' ideas generated by the civil wars and revolutions of the seventeenth century.<sup>48</sup> From the point of view of political thought, historians have sought to recover the genealogy of the ideas that colonists took with them. That view has been gradually influenced by work on legal pluralism, so that now the focus is less on the transmission and application of inherited ideas and

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<sup>47</sup> Dowd, "Indigenous People", 41. For interpolity zones, see Benton, "Made in Empire", 3; Hämäläinen, "The Shapes of Power", 37.

<sup>48</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution: Fiftieth Anniversary Edition* (Harvard, 2017); Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and United States, 1607-1788* (University of Georgia Press, 1986); Gordon Wood, *The Radicalism of the American Revolution* (New York, 1992).

more on structural issues like 'jurisdictional plurality and contested sovereignty'.<sup>49</sup> Until Colin Calloway's *American Revolution in Indian Country*, none of the classic studies was concerned with establishing links between colonial Indian relations and tensions over 'sovereignty, territory, and jurisdiction' that emerged in response to the hardening of imperial policy after 1763.<sup>50</sup>

§. To move beyond the limitations of settler colonialism as an interpretive device, we need to revisit the structuralist account of the 'triangular' relationship of 'metropolitan, settler, and indigenous agencies', and consider what sort of agency was exercised by each point of the triangle.<sup>51</sup> Not only this, we need to square the triangle by recognizing colonies acted as quasi-imperial powers, and as such wielded the sovereign powers of war, peace, alliance, and commerce. In the east and trans-Appalachian region, the effective jurisdiction of the imperial state over the lands and peoples outside urban

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<sup>49</sup> Yirush, *Settlers, Liberty, and Empire*, 6.

<sup>50</sup> Ford, *Settler Sovereignty*, 20, 21; Colin Calloway, *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities* (Cambridge, 1995), xii, n. 2.

<sup>51</sup> Veracini, *Settler Colonialism*, 3.

centers was minimal.<sup>52</sup> As a consequence, colonial governors and Crown officials operated with a wide degree of latitude, leading one superintendent of Indian Affairs to observe that ‘every Governor acts as if he were sole Agent’.<sup>53</sup> Colonial governments were the oldest Anglophone political units in the American east, and they acted as ‘virtual sovereigns’ within their own fluid borders. Most importantly, they exercised ‘local agency’, in particular over positive state powers such as diplomacy with Indian nations, the organization of defence, and the regulation of commerce.<sup>54</sup>

§. Sovereignty was formed in the context of Indian affairs, which coalesced around treaty councils that were

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<sup>52</sup> Rachel St. John, “State Power in the West in the Early American Republic”, in *Journal of the Early Republic* 38, no. 1 (2018): 88.

<sup>53</sup> John Stuart to William Johnson, in *The Papers of William Johnson*, 14 vols. (Albany, 1921-65), vol. 12, 15.

<sup>54</sup> Jack P. Greene, “Colonial History and National History: Reflections on a Continuing Problem”, in *The William and Mary Quarterly* 64, no. 2 (2007): 241, 246, 249; Ford, *Settler Sovereignty*, 20; Saler, *Settler’s Empire*, 2; Ken MacMillan, *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World* (Palgrave, 2012), 26; Gould, *Persistence of Empire*, 113; Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673-1800* (Cambridge, 1997), 191.

conducted according to the rituals and protocol of Iroquoian diplomacy. As James Logan informed William Penn, 'If we lose the Iroquois, we are gone by land'.<sup>55</sup> That ethos underpinned diplomatic relations through the eighteenth century. Imperial officials sought to harmonise their relationships with Indian nations that were situated within and alongside the territories that it claimed as parts of the dominions of the Crown. In response to wars between colonists and the Susquehannock in Virginia, and the Wampanoag in New England, the Crown formally entered the Covenant Chain with the Iroquois in 1677. Iroquois speakers at a council in New York noted that Indians and colonists alike sheltered under the great tree of peace, whose roots and branches extend 'unto the utmost limit of our great Kings Dominion of this Continent of America'.<sup>56</sup> From this point, diplomacy became one of the most important conduits for the extension of imperial sovereignty over peoples that were not directly ruled, and territories that

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<sup>55</sup> Logan to Penn, 2 March 1702. *Correspondence between William Penn and James Logan*, ed. Edward Armstrong (Philadelphia, 1870), 88.

<sup>56</sup> *Propositions made by the Five Nations of Indians to his Excellency Richard Earl of Bellomont*, (New York, 1698), 4.

were claimed but not occupied. However, diplomacy and violence were both intensely local affairs, and it was in these local contexts that colonial officials, diplomats, land speculators and others pursued activities that led to the formation of sovereignty.<sup>57</sup>

§. Remote from Britain, and governed loosely by state mechanisms with limited jurisdictional reach, colonies formed their own legal regimes, guided not by the timeless precedents of the English common law, but by the necessity of local circumstances. Eliga Gould has pointed to the 'law-bound character' of colonial America, whose interactions were structured by treaties with Indians and regulated by 'customs' that governed relations of 'war and commerce'.<sup>58</sup> As an anonymous author writing in 1620 put it, in early Virginia laws were framed according to 'nature of the place, the nouitie of the Colony' and what 'other important circumstances should necessarily require'.<sup>59</sup>

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<sup>57</sup> Ford, *Settler Sovereignty*, 4.

<sup>58</sup> Eliga Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (Harvard, 2012), 3.

<sup>59</sup> *A Declaration of the State of the Colonie and Affaires in Virginia* (London, 1620), 6, 8.

§. The importance of the local contexts of colonial and imperial politics was partly obscured by the historiographical shift to global and cosmopolitan perspectives on colonial formation, intended to counteract entrenched nationalist and ‘exceptionalist’ narratives.<sup>60</sup> In order to recover ideas of colonial and pre-statist sovereignty and self-determination over the entire colonial period, it is necessary to address the local contexts in which this self-determination took place: conflict and diplomacy with Indians, and the framing of legal orders in which security and secure possession to land were key organizing principles. The exceptionalist tendencies of settler colonialism can be overcome, in part, by situating the localist and individualist actions of settlers within broader contexts of negotiation and dispute over the powers of colonies within a complex of indigenous and European imperial domains.<sup>61</sup>

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<sup>60</sup> Johann N. Neem, “American History in a Global Age”, in *History and Theory* 50, no. 1 (2011): 41-70.

<sup>61</sup> Charles W. A. Prior, “Settlers Among Empires: Conquest and the American Revolution”, in ed. Edward Vallance, *Remembering Early Modern Revolutions: England, North America, France and Haiti* (Routledge, 2018), 79-93; Ford, *Settler Sovereignty*, 18, 20; Hinderaker, *Elusive Empires*, 191.

## Sovereignty and Revolution

§. Jeffrey Ostler and Nancy Shoemaker have argued that historians working in archives seldom encounter the ‘confident’ and ‘efficient’ protagonist of settler colonial theory.<sup>62</sup> But they are there, nevertheless. In early American history, violent speech and action are easily found. Historians remain fascinated by Indian war, and employ conflict-centred approaches in which the ‘frontier’ persists alongside middle grounds and porous borderlands as a space of violence between colonists and their Indian neighbours.<sup>63</sup> Some early promoters of colonisation regarded Indians as adversaries and competitors, and appealed to classical and scriptural points of reference in seeking to justify (to themselves) a

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<sup>62</sup> Jeffrey Ostler & Nancy Shoemaker, “Settler Colonialism in Early American History: Introduction”, in *The William and Mary Quarterly*, 76, no. 3 (2019): 363.

<sup>63</sup> Patrick Spero, *Frontier Country: The Politics of War in Early Pennsylvania* (University of Pennsylvania Press, 2016); Patrick Griffin, *American Leviathan: Empire, Nation, and the Revolutionary Frontier* (New York, 2007), 15; Patrick Griffin (ed.), *Between Sovereignty and Anarchy: The Politics of Violence in the American Revolutionary Era* (University of Virginia Press, 2015); Peter Silver, *Our Savage Neighbours: How Indian War Transformed Early America* (New York, 2008).

policy of violent dispossession.<sup>64</sup> The closest thing we have to a settler colonial manifesto before independence is the ‘Apology’ of the Paxton raiders, or the essays of Hugh Brackenridge, published in the United States Magazine in 1779. In a broad argument for the possession of territory based on discovery, Brackenridge noted that he did not seek to ‘justify the waging an unnecessary war against the natives’, but rather ‘I would justify encroachment on the territory claimed by them, until they are reduced to smaller bounds’.<sup>65</sup>

§. For contemporaries, settlers existed outside a state of sovereignty, violating imperial norms of subjecthood and undermining hard-won diplomatic agreements with Indian confederations. In his narrative of the Indian wars of late seventeenth century New England, William

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<sup>64</sup> Samuel Fisher, “Fit Instruments in a Howling Wilderness: Colonists, Indians, and the Origins of the American Revolution”, in *The William and Mary Quarterly* 73, n. 4 (2016): 647-80.

<sup>65</sup> “The Apology of the Paxton Volunteers”, in John Raine Dunbar (ed.), *The Paxton Papers* (The Hague, 1957), 185-204; “Establishment of These United States. An American Account”, in *The United States Magazine* April 1779; [Hugh Brackenridge], *Narratives of a Late Expedition against the Indians* (Philadelphia, 1783); Griffin, *American Leviathan*, 176-77.

Hubbard complained that settlers sought to 'shake off all Yoake of Government'. Thomas Pownall, writing in 1756, warned against the 'fatal effects' of scattered frontier settlements, while William Johnson complained to Thomas Gage of the 'Frontier People' who waged indiscriminate attacks on Indians in amity with the Crown, and who 'laid Aside all obedience to the Laws, or public Authority'. Washington and other land speculators regarded settlers as social inferiors who violently usurped their rightful claims to land in the western reaches of Virginia and Pennsylvania.

Meanwhile, Indian council speakers frequently urged colonial officials to restrain settlers. In 1768, an Iroquois speaker at Fort Pitt – through a translator – informed colonial officials that since 'You have Laws amongst you to govern your People', those laws should be used to 'remove the People from our Lands'.<sup>66</sup> On this view, colonial governments were responsible for ensuring that

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<sup>66</sup> William Hubbard, *The History of the Indian Wars in New England*, ed. Samuel Drake (Roxbury, MA, 1865), 256; Thomas Pownall, *Proposals for Securing the Friendship of the Five Nations* (1756), 3; *Papers of William Johnson*, vol. 12, 665; Calloway, *Indian World of George Washington*, 122-3, 198-9, 285-6; Alden T. Vaughan (gen. ed.), *Early American Indian Documents: Treaties and Laws*, 20 vols. (Washington, 1979-85), vol. 3, 731.

their people respected binding diplomatic agreements that demarcated Indian land.

§. If we proceed from the proposition that settlers were aloof from the state, then how was the American Revolution the first ‘full-throated expression of settler colonial ideologies’?<sup>67</sup> Some historians have characterized the eastern colonies as ‘settler republics’. Aziz Rana has argued that a ‘unique settler ideology’ fused ethnic nationalism, Protestantism and republicanism, combining ‘freedom as self-rule with a commitment to territorial empire’.<sup>68</sup> But that commitment, as Knox’s advice to Washington revealed, was tempered by the power of Native polities. When contemporaries mentioned Indians before the Revolution, they tended to speak of them as either allies to be courted, or adversaries to be feared. In diplomatic contexts, colonial officials took pains to acknowledge Indian territoriality. At Fort Pitt, council speakers for a thousand-strong delegation of

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<sup>67</sup> Jack P. Greene, “The American Revolution”, in *American Historical Review* 105, no. 1 (2000): 98; Jessica Choppin Roney, “1776, Viewed from the West”, in *Journal of the Early Republic* 37, no. 4 (2017): 659; Dowd, “Indigenous People”, 22.

<sup>68</sup> Rana, *Two Faces of American Freedom*, 12.

Haudenosaunee, Delaware, Shawnee, and Ohio Indians informed the English that they were not ‘Masters of this Country’. The only discussion of ‘removal’ at the council related to settlers, and George Croghan reported that ‘the driving of White People away from their settlements was a Matter which no Indians could with any satisfaction be concerned in, and they thought it most proper for the English themselves to compel their own people to remove from Indian lands’.<sup>69</sup> By compelling colonial governments to restrict settlement, Indians achieved the protection of their territory without having to resort to violence, and enhanced their diplomatic standing in the process.

§. Instead of using a settler colonial paradigm to alter the standard portrait of the American Revolution as being driven by an ‘eclectic’ blend of ideas – comprising classical republicanism, English constitutionalism, and Lockean natural rights – historians have written ‘to’ and

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<sup>69</sup> *Early American Indian Documents, Volume 3: Pennsylvania Treaties, 1756-1775*, ed. Alison Duncan Hirsch (Maryland, 2004), 732, 743-44

'from' the Revolution.<sup>70</sup> Moreover, many studies of revolutionary ideology continue to be underpinned by a historical narrative in which violence is peripheral: migrants become colonists, and colonists become revolutionaries. In the only reference made in the Declaration of Independence to the complex relations between Indians and Europeans in the colonial east, it is the King who exposed colonial frontiers to attacks by 'merciless Indian savages'.<sup>71</sup> Here, settlers are the victims of violence, rather than its agents.

§. A more intriguing line of interpretation is opened up if we consider the account of autonomous state power that underpins the political logic of the Declaration of Independence. This document has been read from a number of angles. It provides an iconic statement of the sanctity of natural rights, 'these truths' of life, liberty and the pursuit of happiness. It is also a document rooted in the legal and political tradition of England, listing the

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<sup>70</sup> See the joint issue, "Writing to and From the Revolution", in *William and Mary Quarterly* 74, no. 4 (October 2017), *Journal of the Early Republic* 37, no. 4 (Winter 2017).

<sup>71</sup> *Jefferson: Political Writings*, ed. Joyce Appleby and Terence Ball (Cambridge, 1999), 104.

abuses of George III as crimes against 'our Constitution'. And the Declaration is framed by the law of nations, declaring colonies to be states, 'among the powers of the earth'. As Benjamin Franklin remarked in 1775, 'the circumstances of a rising State made it necessary frequently to consult the law of nations'.<sup>72</sup> In many senses, however, colonies had acted among the powers of the American east since their foundation, and so the Declaration can be approached as a codification of a set of historic acts of sovereignty.

§. As author of the Declaration, Thomas Jefferson was keenly aware of arguments that predicated colonial autonomy on processes of settlement. His 'Notes' to the Virginia delegation attending the Continental Congress argued that 'conquest' established 'effectual' possession and conveyed the 'right to hold'. This was a standard defence of territorial sovereignty in the law of nations, which based rightful possession on a combination of conquest and 'effectual' occupation of territory, that is by

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<sup>72</sup> Quoted in Janis, *America and the Law of Nations*, 25.

fortification, cultivation, and settlement.<sup>73</sup> He returned to this argument in the Congressional ‘Declaration’ of July 1775, which justified taking up arms against Britain. There, he presented what was by then a durable mythology of settlement, in which colonists ‘effected Settlements in the Distant and inhospitable Wilds of America’, teeming with ‘warlike Nations of Barbarians’.<sup>74</sup> That narrative of settlement might have been largely fiction, but it contained an account of the development of very real sovereign powers.

§. For example, Jefferson continued the argument in defence of taking up arms by noting that settlers made laws through ‘perfect Legislatures’ and established an ‘harmonious Intercourse’ with Britain. In his initial draft of what became the Declaration, he described settlement established at ‘the expense of our own blood and treasure’, and the creation of ‘several forms of

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<sup>73</sup> Thomas Jefferson, *A Summary View of the Rights of British America* (Williamsburg, 1774), 16; MacMillan, *Sovereignty and Possession in the English New World*, 43-7; Ian Hunter, “Vattel in Revolutionary America: From the Rules of War to the Rule of Law”, in Lisa Ford and Tim Rowse (eds.), *Between Indigenous and Settler Governance* (Routledge, 2012), 15.

<sup>74</sup> *Political Writings*, 81.

government' that were the basis for a 'perpetual league & amity' with Britain. In both examples, Jefferson is moving toward the argument that would be refined in the final draft of the Declaration. There, he buried references to conquest, blood, and the right to hold beneath the anodyne phrase that asked his British audience to recall 'the circumstances of our emigration and settlement here'.<sup>75</sup>

§. These 'circumstances' were the local contexts in which colonial governments framed and widened their sovereign powers. Jefferson listed these as the power to 'levy war, conclude peace, contract alliances, establish commerce'.<sup>76</sup> Indian wars were so common to the colonial experience that the first histories of Virginia and New England were, in essence, histories of war. Yet colonies and the Crown operated within the structure of the Covenant Chain, and also according to treaties agreed between individual colonies and Indian nations. Colonial alliances – formed in 1643, mooted at Albany in 1754, and formalised by Articles of Confederation in 1776 – were all

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<sup>75</sup> *Political Writings*, 81, 100, 105.

<sup>76</sup> *Political Writings*, 105.

influenced by the gravitational pull of Indian diplomacy. In his draft proposal for the Articles of Confederation, Franklin recommended, 'A perpetual Alliance offensive and defensive, is to be enter'd into as soon as may be with the Six Nations; their Limits to be ascertain'd and secur'd to them'.<sup>77</sup> Although Franklin's proposals were not adopted, they nevertheless reveal that the question of the sovereignty of Indian nations was taken up in the context of framing what was, in effect, a 'treaty' between colonies as they declared themselves to be states. Finally, throughout their history colonial governments produced a profusion of law that related to the regulation of local affairs. Legislatures and general courts produced over 80 separate constitutional documents that set out parameters of law, trade, and military affairs, and more than 400 laws specifically relating to Indian affairs and the regulation of trade.<sup>78</sup> In short, colonial governments had, from the outset, operated in a context of laws and within the customs of Indian diplomacy.<sup>79</sup>

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<sup>77</sup> "Benjamin Franklin, Articles of Confederation, July 21, 1775", in ed. Barry Alan Shain, *The Declaration of Independence in Historical Context* (Yale, 2014), 642, 643, 644.

<sup>78</sup> See *Early American Indian Documents*, vols. 15-17.

<sup>79</sup> Gould, *Among the Powers*, 3

## Diplomacy and Law in the Early Republic

§. Viewed through the lens of sovereignty, therefore, the Revolution was a juncture where a statist account of the powers of war, peace, alliance and commerce was declared and refined. A second continuity is evident in the persistence of conquest, colonization and territorial control as state-driven projects.<sup>80</sup> As Jessica Roney has argued, contests over land, the dispossession of Indians, struggles to establish ‘consistent legal forms’, and tensions between local and imperial sovereignty are themes that connect the period of initial colonial foundations with processes of state-formation in the 1780s and 90s.<sup>81</sup> Yet another, and overlooked, continuity is evident in the gradual process of the articulation and

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<sup>80</sup> Margaret D. Jacobs, “Seeing Like a Settler Colonial State”, in *Modern American History* 1, no. 2 (2018): 257-70; Kathleen DuVal, *Independence Lost: Lives on the Edge of the American Revolution* (New York, 2016), xxv-xxvi; Johann Neem, “From Polity to Exchange: The Fate of Democracy in the Changing Fields of Early American Historiography”, in *Modern Intellectual History* (2018).  
DOI: <https://doi.org/10.1017/S1479244318000495>

<sup>81</sup> Roney, “1776, Viewed from the West”: 659.

amplification of state power over military affairs, commerce, and territory – all of which were refracted through the question of where Indians stood as sovereign powers in relation to state and Congressional governments.

§. Accounts of the spatial character of relationships between Indians and Europeans in the trans-Appalachian emphasise the mingling of defined and autonomous indigenous and colonial / imperial social formations.<sup>82</sup>

As I have suggested, the focal point of these relationships, the points at which there is a documentary record that allows us to see their operation, is in the field of diplomacy. Indian nations, though considered as sovereign entities in the context of diplomacy, were not involved in the complex negotiations that produced the U. S. Constitution, which meant that their relationship to

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<sup>82</sup> Kathleen DuVal, *The Native Ground: Indians and Colonists in the Heart of the Continent* (University of Pennsylvania Press, 2006); Michael Witgen, *An Infinity of Nations: How the Native World Shaped Early North America* (University of Pennsylvania Press, 2012); Michael A. McDonnell, *Masters of Empire: Great Lakes Indians and the Making of America* (New York, 2015); Kate Fullagar & Michael A. McDonnell (eds.), *Facing Empire: Indigenous Experiences in a Revolutionary Age* (Johns Hopkins University Press, 2018), ch. 2, 6.

the newly-formed republic comprised a spectrum. They were considered as defeated enemies, as dependents, or as independent nations.<sup>83</sup> Surveying the history of treaty relations, Vine Deloria suggested that, given that they were a site of intersectional relations between peoples, there is no question that treaties ‘had international scope’.<sup>84</sup> Yet this internationalism was particular to the peoples and nations of the American continent, which formed a kind of ‘state system’ comprised of both indigenous and Anglophone federal orders.<sup>85</sup>

§. The decentring of the classic interpretation of the American Revolution as an assertion of democratic republicanism in opposition to monarchical tyranny has generated more nuanced interpretations of what was going on among the former colonies and their Indian

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<sup>83</sup> Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford, 2009), ch. 2-3.

<sup>84</sup> Vine Deloria, Jr and Raymond J. DeMallie (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements and Conventions, 1775-1979*, 2 vols. (University of Oklahoma Press, 1999), vol. 1, 6.

<sup>85</sup> Robbie J. Totten, “Security, Two Diplomacies, and the Formation of the U.S. Constitution: Review, Interpretation, and New Directions for the Study of the Early American Period”, in *Diplomatic History* 36, no. 1 (2012): 80, 110.

neighbours. Recent work by diplomatic historians has pursued the logic of the assertion that colonies had become 'states', among the 'powers of the earth'. This international and diplomatic turn has also displaced a narrative of uncomplicated westward expansion.

Frontiers are now 'international zones' where no single power was dominant, and the complex interior history of the indigenous and colonial Continent placed within the context of international history.<sup>86</sup> Treaties continued to be mechanisms of political formation, giving individual states power over land, commerce, and the settling of boundaries. Here, foundational colonial treaties, such as the Treaty of Hartford (1638) reveal the long term development of an account of colonial sovereignty that is defined against the reality of its Indigenous counterpart.<sup>87</sup> This dynamic interplay of sovereignties is something that settler colonialism disallows.

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<sup>86</sup> Rachel St John, "Contingent Continent: Spatial and Geographic Arguments in the Shaping of the Nineteenth-Century United States", in *Pacific Historical Review* 86, no. 1 (2017): 18-49.

<sup>87</sup> See essays in a path-breaking forum: Emily S. Rosenberg, "A Call to Revolution: A Roundtable on Early U.S. Foreign Relations", Jay Gitlin, "Private Diplomacy to Private Property: States, Tribes and Nations in the Early National Period", in *Diplomatic History* 22, no. 1 (1998): 65, 69, 94, 99. For the early colonial context, see Daragh Grant,

§. From a legal and political point of view, the status of Indian nations in relation to the republic was a vital question, in a context where 10% of federal expenditure was directed toward Indian polities.<sup>88</sup> According to Henry Knox, the first Secretary of War, ‘the independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular state’. By contrast, James Duane, a member of Congress and chairman of the committee on Indian affairs, argued that the new republic should do away with ‘the disgraceful system of pensioning, courting and flattering them as great and mighty nations’.<sup>89</sup> A Congressional Ordinance of July 1786 established an Indian department, on the grounds that ‘the safety and tranquillity of the frontiers of the United States, do in some measure depend on the maintaining a good correspondence between the citizens and the several nations of Indians in

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“The Treaty of Hartford (1638): Reconsidering Jurisdiction in Southern New England”, in *William and Mary Quarterly* 72, no. 3 (2015): 461-98.

<sup>88</sup> Brian Delay, “Indian Polities, Empire, and the History of American Foreign Relations”, in *Diplomatic History* 39, no. 5 (2015): 934.

<sup>89</sup> Quoted in Colin Calloway, *Pen and Ink Witchcraft: Treaties and Treaty-Making in American Indian History* (Oxford, 2013), 98, 99.

amity with them'.<sup>90</sup> Indian affairs also defined one line of tension between the authority of states and that of the Federal government, in cases where individual states refused to cede power over Indian affairs and treaties.<sup>91</sup>

§. Yet the amity between new states and Indian nations was short-lived, owing to pressures of settlement and the re-emergence of the view – which can be traced to the early seventeenth century – that Indians were competitors, rather than allies. As James Madison put it in Federalist 24, 'The savage tribes on our Western frontier ought to be regarded as our natural enemies'.<sup>92</sup> In debates on ratification, the determination of the status of Indian nations was tightly bound up with the question of the relative powers of states and the Congressional government, which exercised power over Indians 'not

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<sup>90</sup> Continental Congress, *An ordinance, &c.* (1786), unpaginated broadside.

<sup>91</sup> James Madison, "The Vices of the Political System of the United States", in *The Papers of James Madison: Presidential Series*, 9 vols., ed. Robert Allen Rutland (University Press of Virginia, 1984), vol. 9, 348-9.

<sup>92</sup> *Hamilton, Madison, and Jay: The Federalist, with Letters of 'Brutus'*, ed. Terence Ball (Cambridge, 2003), 113.

members of any of the States'.<sup>93</sup> Perhaps the most overtly 'settler colonial' element of early republican history is the Northwest Ordinance, that tied the constitutional process for determining statehood to a process of mass settlement of former Indian territories.<sup>94</sup> Here, settlement and the dispossession of Indians became a process of state-building.

§. The Northwest Ordinance marks a juncture at which there is a recognisable amplification of consolidated state power over Indian affairs. But it is also notable that, just as early colonies refined and expanded their sovereign powers in the course of their complex relationships with Indian nations, the newly-consolidated republic's powers over war, commerce, and law were applied most intensely as it sought solutions to Indian affairs. Not only this, but the very framework of early constitutional definitions of sovereignty, from the separation of powers, to commerce, treaties, and the prosecution of war, were

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<sup>93</sup> St. John, "State Power": 87-94.

<sup>94</sup> Peter Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Indiana University Press, 1987), ch. 1-3; Saler, *Settler's Empire*, ch. 1-2; Ostler, *Surviving Genocide*, ch. 3.

formed and framed within an implicitly colonial context, and an explicitly indigenous one. Paradoxically, and as legal scholars such as Judith Resnick, Aziz Rana, Gregory Ablavsky and Maggie Blackhawk have shown, Indian sovereignty was intrinsically bound up with – and interior to – the processes by which the sovereign powers of the U.S. government were formed.<sup>95</sup> This intermingling of sovereignties, amplified by alliances and trade, severed by war, and bound together in cultures of diplomacy, is a powerfully coherent theme that cut settler and ‘classic’ colonialism down to size.

§. I have argued that settler colonialism, with its focus on the elimination of the native, is an interpretive paradigm that has limited explanatory power when applied to the

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<sup>95</sup> See Judith Resnick, “Multiple Sovereignties: Indian Tribes, States, and the Federal Government”, in *Judicature* 79, no. 3 (1995): 118-25; Aziz Rana, “Colonialism and Constitutional Memory”, in *U. C. Irvine Law Review* 263, no. 5 (2015): 263-88; Gregory Ablavsky, “The Savage Constitution”, in *Duke Law Journal* 63, no. 5 (2014): 999-1089; Maggie Blackhawk, “Federal Indian Law as a Paradigm within Public Law”, in *Harvard Law Review* 132, no. 7 (2019): 1787-1877. See also Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (University of Georgia Press, 2002); Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship* (University of Nebraska Press, 2007).

early American context. It obscures the extent to which the colonial setting was a site of sovereign formation, in which colonial and indigenous modes of sovereignty overlapped and coalesced. These points of intersection – interpolity zones – were sites of trade, alliance, war, and diplomacy. We can see the texture of these interactions as they were recorded in the records of treaty councils, which adhered to long-established modes of metaphorical speech, the exchange of ceremonial gifts, the record of wampum, and the renewing of bonds and alliances.<sup>96</sup> Sovereignty was formed, articulated, defended and lost in these settings, in which a precarious peace was preserved amid episodes of violence. The dynamics of power in the American interior were defined by the encounter between European colonial expansion, and ‘older histories’ of the formation and reshaping of indigenous power.<sup>97</sup>

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<sup>96</sup> David Andrew Nichols, *Red Gentlemen & White Savages: Indians, Federalists and the Search for Order on the American Frontier* (University of Virginia Press, 2008), ch. 1-3; Sadosky, *Revolutionary Negotiations*, ch. 4-5.

<sup>97</sup> Hämäläinen, ‘Shapes of Power’, 65-68.

§. None of what I have argued about settler colonialism is intended to diminish the fact that, like many of the pre-revolutionary British colonies, the U.S. Government employed its judicial and military powers to advance policies that culminated in the Indian Removal Act of 1830. Rather, I want to suggest that the interaction of sovereign formations – imperial, settler, colonial, and indigenous – reveals a complexity that is flattened out by the essentialist and schematised tendencies of settler colonialism, which in some guises destroys and replaces the very historical experiences that it purports to illuminate, and reifies aspects of the master narrative that it seeks to transcend.