

[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, senior director of town hall programs. November is Native American Heritage Month. To celebrate, we convene a conversation to explore the influence that Indigenous people and tribal governments had on the US Constitution and American democracy, from before the revolution to today.

Joining us are four experts. Maggie Blackhawk, professor law at NYU, and an award-winning interdisciplinary scholar and teacher of constitutional law, federal Indian law, and legislation; Donald Grinde, professor in the department of Africana and American Studies at the University at Buffalo, and co-author of Exemplar of Liberty: Native America and the Evolution of Democracy; Gregory Dowd, professor of Native American and early American history at the University of Michigan; and Woody Holton,

[00:01:00] Tanaya Tauber: professor of early American history at the University of South Carolina, and author of Liberty Is Sweet: The Hidden History of the American Revolution. Jeffrey Rosen, president and CEO of the National Constitution Center moderates. This conversation was streamed live on November 19th, 2021. Here's Jeff to get the conversation started.

Jeffrey Rosen: Our goal in our precious hour together is for you to teach us, to, to spread learning and light about the influence, not only of, uh, Native American agency, but also of colonialism and western expansion on the founding of the Constitution and on American constitutional development. So Maggie Blackhawk, I'll, uh, begin with you. Give us, uh, a- an overview about the influence of colonialism and western expansion on the founding of the Constitution.

Maggie Blackhawk: Thank you so much for having me, and, uh, for focusing on a topic that I think needs much more attention, which is not only the [00:02:00] influence of Native people on the constitutional framework that we have now, but also American colonialism. And so with respect to the Constitution and the founding, um, at the time the Constitution began, uh, being drafted, it was broadly believed that the current governing document, the Articles of Confederation had failed in a very particular way, which is it had failed to resolve the issue of how to acquire and distribute lands along the western front.

And so part of the revolution, of course, was a deep concern on the part of the colonists that Britain was going to keep them from, uh, taking the largess of the, what was the American west and the Ohio River Valley, and the Articles of Confederation essentially split the baby and tried to make everyone happy, by allowing both the state governments and, uh, a very weak national government the ability

[00:03:00] Maggie Blackhawk: to acquire land simultaneously. And so, uh, land was often seen as at the heart of how the new constitutional framework needed to be formed, and the view was that a stronger national government would be able to more, uh, methodologically and more economically be able to acquire those lands in the west without provoking very expensive wars

with, uh, very formidable Native people who lived on those lands and believed, quite rightly, that through treaty as well as through, uh, long-time historical possession, that those lands were their homelands.

And so the Constitution, its structure was in many ways an effort to take the treaty power, for example, solidly away from the states. And that was, um, actually if you look at the work of, very recent work of Mary Sarah Bilder, there, there were Native delegates that went to the convention and lobbied

[00:04:00] Maggie Blackhawk: for a stronger national treaty power. Um, and so you have a treaty clause that made very clear that the states could not form treaties, and that the national government would take the lead, in, in large part to be able to, uh, acquire those lands. And so you end up with a stronger executive, um, a stronger vision of a military force, as well as, uh, the ability of Congress to take over territories, manage those territories, and to set laws for them in order to s- give structure to western expansion, which everyone expected, but no one really had a sense of what form it would take. They knew it would go one direction or the other, whether it was going to be violent, militaristic dispossession or a diplomatic, treaty-based, um, negotiation, but western expansion was really at the heart of debates around the founding and a, and a need for a stronger national government that the Constitution structured. And so both American colonialism and Native agency, uh, were at the heart of the

[00:05:00] Maggie Blackhawk: drafting and passing of that document.

Jeffrey Rosen: Thank you so much for that fascinating explication of how colonialism and western expansion i- influenced things, from the treaty power to the nature of the executive. A wonderful introduction to the topic. Gregory Dowd, you have argued against the commonly-held belief that the American Revolution intensified the danger of colonialism posed to Native Americans, and instead you've argued that the American Constitution granted Native Americans some sovereignty, while the British Constitution did not. Tell us more about that argument and how the Native American experience and agency influenced the American founding.

Gregory Dowd: Yeah, I'd be happy to do that. And interestingly enough, I can do that without disagreeing with anything Maggie has said. I, I entirely support every- everything she said. Um, the way I would put it is that Native Americans have been able to seize from the Constitution an interpretation, a powerful interpretation and a still-powerful and, and working **[00:06:00]** interpretation of sovereignty, um, which is not p- really possible in a, um, British colonial situation or a c- less possible in a commonwealth situation.

In brief, under the Crown, and I, I do not see the Crown as a friend of Native Americans, and I, I, I don't think that Indigenous peoples necessarily in, uh, former British colonies see the Crown as a friend of Native Americans or Indigenous peoples. Uh, the Crown, Crown sovereignty, Crown sovereignty embodied in Parliament in a, uh, modern system, uh, is unitary. And really, there's not much of an opportunity for Indigenous peoples to claim, to, to register, to assert their preexisting sovereignty. But in the US system, uh, because, peculiarly, we allow for the division of sovereignty, we allow for, um, preexisting sovereignty. Sovereignities of the state, sovereignty of the Indigenous peoples, sovereignty of the federal government, you know, of th- of the, of the people as

[00:07:00] Gregory Dowd: a whole, the, the national people as a whole. These three existing sovereignties still, still exist, and y- you know, I'm not arguing that the situation is better for Indigenous people in the United States. Indigenous people in Canada, in New Zealand, in Australia have managed to assert, in their own ways, their independence and autonomy. But in the US we have this system in which the preexisting sovereignty, the ancient sovereignty is still acknowledged. Granted, it's under a great deal of Congressional sufferance, but Congress has not taken it away, Congress is not likely to, um, because Indigenous peoples have been able to assert their power and their authority, and to retain these elements.

[00:08:00] Gregory Dowd: But I, I do not disagree that, um, that western expansion was a potent force, um, driving the American Revolution. I do not, uh, disagree that what ... But, but it would've happened anyway. I mean, in other words, under the British, there was considerable western expansion, it happened elsewhere in the British Empire, the, the same kind of expansion over Indigenous peoples happened elsewhere in the British Empire where there was no American Revolution. So I, I, I would argue that, um, there, there's this, what we should attend to is the way in which American Republicanism and the peculiar dimensions of American federalism opened up a space that Indigenous peoples, especially in the second half of the 20th century to our own time have grabbed, and, uh, really asserted in, in very important ways.

Jeffrey Rosen: Thank you so much for that. Donald Grinde, you have argued, uh, with Bruce Johansen, that the Iroquois Grand Council had

[00:09:00] Jeffrey Rosen: 50 members, and that Benjamin Franklin's 1754 Albany Plan was influenced by it, and you've noted other influences of the Iroquois Constitution on the US Constitution, and of Native American impact on the development of the Constitution more generally, including the first words of the Constitution, "We the people," separation of powers, and basic procedures. Tell us more about the influence of Native American constitutionalism on the American Constitution.

Donald Grinde: Well, you have to realize that Native Americans at key times are invited to, uh, particularly the, the Iroquois or Haudenosaunee people, at the Albany Plan of Union, they were there, and Franklin was there, and they proposed this, uh, e- you know, union, uh, and it's not just me that argues that the Iroquois influenced ... Uh, the editor of Thomas Jefferson's papers, [laughs] who was a mentor of mine, also points that out. Uh,

[00:10:00] Donald Grinde: and, um, then, of course, uh, the, um, Articles of Confederation incorporate almost verbatim seven or eight articles of the Albany Plan of Union. Other times, when there's Iroquois influence, uh, although Ronald Reagan has denied, I don't know if that's been reversed now, but at the time of the Declaration of Independence, the Iroquois chiefs were invited to Philadelphia, and they were, the chiefs were in the top floor, and the other members that came were on the, uh, lawn outside while the Declaration of Independence was debated and declared. Another thing you need- you need to, to realize here is that Benjamin Franklin became the equivalent of a multibillionaire

[00:11:00] Donald Grinde: primarily for printing Indian treaties. He made a hell of a lot of money on it, and, uh, so he knew that, uh, because they were bestsellers, that, uh, white people, uh, were interested in the way Indians did things, and their views on so on. And, uh, you know,

it's not just him, but James Madison, who was sympathetic to some things, but he objected to others. He said that the Iroquois government was a government of skirts, which was his way of talking about the power of women. At the Constitutional Convention, John Adams's defense, uh, was, uh, the hand book that they used. Uh, it was passed out to every delegate walking into the Co- Constitutional Convention, and their ... And w- and Adams

[00:12:00] Donald Grinde: was commissioned to do that because Harvard had the best library, and [laughs] he was, d- developed a compendium of government analysis around the world, and in that is the Iroquois, uh, government and several other native governments and so on. And Adams points out that the separation of powers in the Iroquois government is, uh, uh, one of the best examples. Uh, Thomas Jefferson, uh, talked about how Indian government, uh, the only government that has less powers than the American government is Indian nations. Um, so the bi- the, the major influences at the Constitutional Convention are, "We the people." Uh, the idea of vesting sovereignty in the people, see. The British government vested

[00:13:00] Donald Grinde: sovereignty in the monarch, and God gave that to the monarch, and the monarch passed it on to Parliament. Many people pointed out that, uh, although God didn't give Indians, uh, power, they did pretty well with the government, see, and so that was o- because some people wanted to make Washington a monarch, and some bishop crowned him, and, so that God granted power to the government. But "We the people" is sovereignty rests in the people. Another area is federalism, which is really important. Uh, the Iroquois have that, the Six Nations, and so on. Uh, and this is important, that people don't often, uh, misunderstand. You got Puritans in the north, Quakers in Pennsylvania, Catholics in Maryland, and Church of England or Episcopalians

[00:14:00] Donald Grinde: in the South. And they all are fleeing, uh, England, and they don't like it, and they all have some trouble getting along with each other. But the Iroquois provided a thing where people with different languages and so on, uh, the Tuscarora, the Oneidas, and so on, can still get along, see? Even amongst their differences. And another thing that's important is that the government stretches from New Hampshire to Georgia, and, uh, in the past, uh, a government with that size was almost always an empire, and, uh, that meant some kind of top-down autocracy and so on, and this promised not to do that, so that was a way of union as well. And so, uh, "We the people," sovereignty in the people, separation of

[00:15:00] Donald Grinde: powers, uh, is the next one, uh, i- in addition to federalism, uh, and again, Adams and others point out that the separation of powers is distinct in Native American, especially Iroquois

[inaudible 00:15:16] Donald Grinde: that, you know, war and diplomacy is the national government's role, and you get down to the local government, divorce and child custody is in the community, you know. And points in between, with regards to that, so that states could say they still had some power. They weren't just giving it all up in this process. So this is really, really important, and Native Americans provide the alternative to the British, uh, way of doing things. Two things I think it's important to point out here. At the time of the American Revolution, that, and it still is the bloodiest

[00:16:00] Donald Grinde: war in American history. The British killed 1% of all Americans. So the founding fathers know an appeal to the British form of government is not gonna be very popular, because, uh ... And remember also, royalists were shipped off to Nova Scotia. [laughs] So there's a strong anti-British sentiment, uh, that's there, and so an alternative to the British system is really politically popular, see, in terms of, of this. Another thing that I counter people that argue that we basically got a system from the British, I says, "Have you ever seen the American Constitution alongside of the British Constitution?" [laughs] And of course, they say no. Um, you d- you don't realize that the British Constitution is simply the sum total of all the laws enacted since Magna Carta. Uh,

[00:17:00] Donald Grinde: there is no Article I, Section II and so on and so forth.

Jeffrey Rosen: Thank you so much for all that, thank you for calling our attention to the connection between Iroquois thought and John Adams's defense on the Constitution, and we'll look forward to exploring those connections further. Woody Holton, in *Forced Founders*, and in your latest book, *Liberty Is Sweet*, you argue, as your colleagues have suggested as well, that the rise of the Native American coalition, and the prevention of the United States from expanding west and seizing Indian lands was one of the primary crises that produced the ratification and creation of the Constitution, and the inability of Congress to survey and secure western lands made them unable to realize their plan to deal with the massive federal war debt, and y- and you focus in particular on the experience in Georgia and Virginia, which is very illuminating. Tell us more about that central argument of your important books.

Woody Holton: Well, thanks for the question. And

[00:18:00] Woody Holton: that takes us back to the origins, not of the Constitution, which I'll get to quickly, but to the origins of the revolution. The British in 1763 tried, and I'll emphasize the word tried, to draw a line along the crests of the Appalachian Mountains, and say, "You cannot go west of this line." Now, they didn't build a Great Wall of China there, so actual settlers could go west o- of that line, and did. But in the same way that you or I, if you wanna sell your car, you kinda have a piece of paper. You gotta have the title. I t- can't just walk up to somebody downtown and sell them my car, I gotta sign the title over to them. And this is where the proclamation line of 1763 was effective, in that land speculators couldn't get title to land west of the line, and I've been into the archives and seen, "Patent issues, patent issued, patent issued," and then

[00:19:00] Woody Holton: suddenly no patents issued, and that's because it took a long time in Virginia, the largest of the North American colonies, for it to actually, uh, take effect, but once it did, um, that shut down the business of getting title to western land. Given, it doesn't stop actual settlers from getting out there, but in a sense that makes it worse for speculators because that means settlers who they had intended to sell land to are now able to go west, swipe land from Indians, and not have to pay somebody like George Washington or Thomas Jefferson for it. And of course Washington, uh, said that, um, Wash- "The greatest estates we have in this colony were made by taking up the rich back lands." And Jefferson denied, after the revolution, being involved in land speculation, but I found seven different land speculation firms that he was involved in. Before the revolution, they saw that as the

[00:20:00] Woody Holton: way to wealth, and the proclamation line shut that down. And it would still be shut down today, it's hard to imagine, if the British had remained and had kept to that policy. And in fact, Greg knows this better than me and can talk about it when, when we come back to him, but they still quote the proclamation of 1763 in Canadian law, uh, today. So, uh, there's one way in which Native Americans helped bring on the revolution, not talking about the Constitution yet, but the revolution. And I have to mention another one I just discovered while researching the latest book, and that is the Native American impact on the Stamp Act. You know, that's the one law, if you know one law that led to the revolution, you know, "Oh yeah, taxation without representation," the Stamp Act. I finally got around to reading it, and it says where the money goes. The money goes to fund 10,000 troops, British troops that will be left in North America, some in the Caribbean, some in Canada, but the bulk on the border between the colonists

[00:21:00] Woody Holton: and places like Pennsylvania, where you are, South Carolina, uh, where I am, between the colonists and the Indigenous people west of them, and they are there to prevent the Natives from attacking the colonists, but they're also there to prevent the colonists from attacking the Indigenous people, not because the British government had suddenly become enlightened and realize these are human beings who we- whose land we shouldn't steal, none of that, but because the most expensive thing governments did then, as now, was go to war. And so the British government essentially put those British troops out there as peacekeeping troops to keep both sides from starting a war against the other side that the British Army would have to come in and finish it. So I like to say that the British government put a human wall of troops on the western border, and then thought it was quite reasonable to make the colonists pay for it, and that's the Stamp Act. And so

[00:22:00] Woody Holton: I think they had, Native Americans had a huge impact on the origins of war and then throughout the war, I was struck by how many references there are in the, in the, in military history of the war, both loyalists and patriots, but not so much British troops, going into battle and giving the war whoop. Uh, I think people reading it in my book will be bored, uh, they'll see it so many times. "And of course he gave the Indian war whoop," uh, as they had

[inaudible 00:22:28] Woody Holton: whether it's George Rogers Clark out at Vincennes or, or loyalist soldiers here in South Carolina.

Um, now, they thought they were copying Indians in giving the, the war whoop. I think it's probably the roots of the Rebel Yell from that later war as well, but it goes to an issue that Prof. Blackhawk mentioned, and that is colonialism, that this copying of Indians is part of the colonial project. Um, I think it's kinda cool to see that Natives had such an impact on them, but,

[00:23:00] Woody Holton: uh, people use the term cultural appropriation now, uh, and I think it's appropriate for that as well, and the classic example of that would be the Boston Tea Party. Those guys dressed as so-called Mohawks, not because they actually thought they were gonna convince anybody that Mohawk Indians had crossed all the way from upstate New York, all the way across Massachusetts to Boston, but because Mohawks were, for the guys who dumped those 342 chests of tea into Boston Harbor, Mohawks and other Native Americans were, and I think you w- said it wonderfully in your book, uh, Prof. Grinde, exemplars of liberty. They stood for strength in the colonial mind, and they stood for liberty. And so I think there's all these

influences in the origins of revolution, in the war itself, which, by the way, I think it's fair to say the Natives won the war in the west, lots of historians say that, and I really became more persuaded of that researching this. 'Cause what's the

[00:24:00] Woody Holton: number one objective of the Americans? New York. They never captured New York City after the British took it in September 1776, the Americans never took it back, they still won the war. What's their big objective in the west? Detroit. And I found about a dozen plans to capture Detroit, 'cause that's the great armory where the British are handing out guns, and, even more importantly, ammunition to their Indigenous allies. And so in the r- letter where he "coined the term," actually stolen from a, a lady in Philadelphia, Jeff, but where he supposedly co- coined the term empire of liberty, Jefferson wrote that letter in December of 1780, "We're gonna establish an empire of liberty," and that specifically was a letter telling George Rogers Clark, "We can't do any of that until we capture Detroit, and thereby disarm our Indigenous opponents." So I'll just lay a little bit of groundwork that Native people had influenced the origins of the war and the war itself, as well.

[00:25:00] Jeffrey Rosen: All fascinating, thank you so much for that, and for teaching us so well. Uh, Prof. Blackhawk, I'm gonna ask you a big question, which is to give us a sort of Constitution 101 of the most important, uh, Supreme Court cases, uh, grappling with the question of, uh, colonialism and the Constitution. Uh, in your article, Federal Indian Law as a Paradigm Within Public Law, you note that famous cases like Creek Nation v. Georgia and Worcester v. Georgia forced the Court to grapple with the power of colonialism and the Constitution. You also note the important case of Elk v. Wilkins, where the Court blessed Nebraska's refusal to allow a Native American to vote, 'cause he wasn't subject to the jurisdiction thereof, as required by the 14th Amendment. And in a recent New York Times piece, you, uh, note, uh, what you call the Dred Scott of federal Indian law, United States v. Rogers in 1846, uh, drafted by the infamous Chief Justice Taney,

[00:26:00] Jeffrey Rosen: which established the plenary powers doctrine, where the United States could wield power over the "unfortunate race" of Native Americans without constitutional limit. I know th- there's a lot there, but it's so important to, to teach our audience about those landmark cases, give us a sense of what was going on in them and, and what the Court h- held, and what their significance was.

Maggie Blackhawk: Bringing the history of Native peoples as well as American colonialism into the study of the Constitution expands our constitutional theory and constitutional history in two large ways. So the first is that it expands our vision of the constitution and who makes constitutional law well beyond the court. And if you look at the long 19th century, the majority of constitutional law was really made by Congress and the executive. The Court did little to review during that period, and so if you want to understand the Constitution, you really need to look well beyond the courts and Supreme Court decisions to, to understand how that constitutional framework was made. So American

[00:27:00] Maggie Blackhawk: federalism, for example, is the easiest example to say, "Look, the, the formation of a strong national government was reinforced by the Supreme Court," um, and Chief Justice John Marshall in those, uh, Marshall trilogy cases that established federal power over the, a- any dispute over Indian lands, taking squarely that power away from the states

and, and placing it within the national government. However, the building up of the strength of the national government was really an executive and congressional project in the west, um, whom Richard White describes, uh, as the kindergarten of the American state, where the form of the national government took modern forms by allowing the national government to not just make court cases, the Court actually just ran away from, uh, the executive and the Congress when ... 'Cause it has no army and no power. Um, but the Congress and the executive really got its sea legs in governing all the way down to the local. And so if you look beyond that,

[00:28:00] Maggie Blackhawk: we start to understand that the Constitution is so much more than the Supreme Court, and that continues on in the context of federal Indian law, and the expansion of another doctrine that I think is central and important to highlight, which is the plenary power doctrine, which Chief Justice Taney really brought a- and domesticated in *US v. Rogers*, the case that you describe. But that doctrine not only allowed, um, and gave the federal government license to begin the reservation era, which was an era in which the national government essentially built the tension camps on reservation lands, where Native people couldn't even leave without getting a pass from a federal agent, and the federal government ran courts and schools and hospitals, uh, in ways that subordinated Native people and split up Native families. And that was, um, essentially a doctrine that Justice Taney captured from

[00:29:00] Maggie Blackhawk: international law and brought into US constitutional law that said the national political branches had extraconstitutional power, so it arose not from an enumerated source, but from outside the Constitution, and so thus was not limited by any Constitutional limit, including judicial review. So the court's supposed to back away from it. And that doctrine, the plenary power doctrine is still very much good law. Not only was it used during the reservation era, but over the long 20th and 21st century, it's been expanded to add machinery to all sorts of areas of constitutional law. So the other way that understanding Native history and American colonialism shapes, reshapes our vision of American constitutional law is that it, it changes the canon to be able to understand why immigration law, and foreign affairs, and governance of the territories really should be central to our understanding of what constitutional law is. So when we have conversations about good governance, it shouldn't just be

[00:30:00] Maggie Blackhawk: Reconstruction amendments and the original failure of, of human enslavement, in that progress narrative, we need to also talk about American colonialism and a doctrine that's still live, that in the 20th century has been used, um, as the foundation for our immigration law, for foreign affairs, um, and to, to fuel all sorts of forms of militarism under executive power. And it h- actually has been used even most recently in *Hawaii v. Trump* to uphold the, the travel ban. So this is not a doctrine that has gone away. This is a doctrine that also underlied *Korematsu* and the detention of Japanese Americans after World War II. Two of those camps were actually on Indian reservations, so the same detention machinery that was used in the late 19th century was used to detain Japanese Americans in the 20th century, the same machinery to use, to house immigrant families intergenerationally was used to detain Native people in the so-called Indian Wars of the 19th century, and to,

[00:31:00] Maggie Blackhawk: to actually detain families intergenerationally as so-called war criminals, including children. And so the, if we look at the Constitution through that lens, we actually start to see an entirely different constitutional narrative form, one that doesn't have that same progressive thrust to it, in one way, but it does also have the vision of the recognition of

inherent tribal sovereignty that Prof. Dowd described, that is exceptional to North America. So in a- in addition to having our Dred Scott, there's also essentially a, a Brown v. Board of looking at this other form of, of constitutional narrative, this other history, and that is the recognition of inherent tribal sovereignty, which is exceptional to the constitutional power of the United States. It's, it's part of the recognition power, and unlike Canada, or New Zealand, or Australia, these commonwealth countries that we think are so progressive on Native issues, the United States is, is alone in having this incredible

[00:32:00] Maggie Blackhawk: framework of federal Indian law, that is deeply flawed and imperfect, but it is a- at the forefront [laughs] of the mitigation of American colonialism as another constitutional failure. So we get both the dark story and the positive story, but neither of which have been explored in any depth, because our canon just leaves all of these areas out.

Jeffrey Rosen: Thank you so much for that, so fascinating describing the influence of the plenary powers doctrine on current questions like the travel ban case, and on Korematsu, and just as you showed us the influence of the Native American agency and colonialism on the development of executive power and the Constitution itself, so you really have, are changing the way we think about its influence on the development of constitutional law. Prof. Dowd, um, you also have played such an important role, as Prof. Blackhawk said, in helping us understand recognition of Native American sovereignty. And in your article, Indigenous Peoples Without a Republic, you conclude

[00:33:00] Jeffrey Rosen: that in the American context, Indians achieved through organizing violence and litigation a slippery but important variety of sovereignty, making claims on the peculiarities of American republicanism and federalism, and you talk about leading Supreme Court cases from, uh, Johnson and M'Intosh to the o- ones that Prof. Blackhawk has just been discussing, the, the Marshall Court Cherokee nation and Worcester and Georgia cases, to help us understand how this notion of Native sovereignty was developed. So tell us more about what the idea is, how the Supreme Court recognized it, and what its strengths and limitations are.

Gregory Dowd: It is central, really, to a lot of the activities of federally-recognized Native American, uh, nations today. The notion of sovereignty, I, I would argue, and I argued in War Under Heaven, has Indigenous analogs. Um, the western notion of sovereignty has Indigenous analogs that, uh, one finds in statements, um, made

[00:34:00] Gregory Dowd: by, uh, leaders confronting colonialism in the middle of the 18th century. I mean, Minwehweh, an Ojibwe leader, confronting British colonizers said quite simply, "God gave us this country." [laughs] And in a way, that is a, that is a statement of sovereignty. It is, "We have inherent possession, we have inherent powers, they do not derive from you. Uh, we have them." You know, I would not argue that the framers had that necessarily in mind themselves, but I would argue that they set up a republic, um, in which it is possible to have sovereignty emanate from several sources. From the people of the nation as a whole, from the people of the states, and, as Indigenous peoples have come to insist, uh, from their tribal nations. And, uh, so Native Americans were, I would say, though, on the minds of the founders, and, um,

[00:35:00] Gregory Dowd: on the minds of the founders in some of the ways, uh, Maggie and Woody have pointed to, especially, as well as Don, that they were, uh, both, um, exemplars of

liberty, but at the same time, they were a challenge. Um, they were formidable, as Maggie said. Their powers were, uh, militarily, formidable. North of the Ohio River, there was a confederacy organizing that was defeating American, uh, forces, regularly, um, Georgia was confronting a powerful Muskogee Nation. And if you look at the Constitution, it's fascinating to me that Native Americans are mentioned. Only three other peoples are mentioned. "We the people," "people of the states," and "foreign powers." That's it. Enslaved people are buried under an amazing, uh, proliferation of words in the Three-Fifths Clause, whereas in that same clause, "Indians not taxed" appear, they're named. Indians without the jurisdiction

[00:36:00] Gregory Dowd: of, uh, the states are named. Um, so Native Americans clearly on the minds of the founders, um, as a challenge, and I, I agree that this is why, um, the treaty-making power was put into the central government, the commerce powers of regulating commerce with Indian tribes restricted to the federal government, in many ways mimicking the efforts of the British in the 1760s, so trying to centralize control of Indigenous policy and take it away from the colonies in the 1760, the federal government does that effectively, uh, under the Constitution, but in a system, a republican system, that is based on popular sovereignty, that is based on sovereignty that emanates from the people, people of the states, people of the nation as a whole, and also, as Indigenous peoples have come to assert and to claim, and to get, the people of the, uh, tribal nations. If you look

[00:37:00] Gregory Dowd: at cases throughout the Supreme Court, many of them, uh, you know, right up to *McGirt*, one of the more recent celebrated cases, which has a Janus face, I think, this recent case out of Oklahoma has a, um, a dimension that very much enforces or reinforces tribal sovereignty, but at the same time, there's the sense Congress has not ended the reservation. Implicitly, Congress can act, implicitly that plenary power that, uh, Maggie refers to is still a sword of Damocles possibly hanging over, it's possibly there. But I suspect the strength of Indigenous peoples, the continuing strength, will continue to resist [laughs] this. It isn't a neat picture, it's a very messy picture. But there is, th- that tension remains.

Jeffrey Rosen: Thank you very much for that, thanks for calling attention to the ambiguous status of the *McGirt* case, and also for really helping us, uh, understand how debates

[00:38:00] Jeffrey Rosen: about sovereignty, which were so central at the time of the framing, uh, for the framers themselves were influenced by conceptions of Native American sovereignty. Uh, Donald Grinde, before the panel started, we were talking about James Wilson's original draft of the Constitution, which we have the honor of displaying at the Constitution Center, thanks to the Pennsylvania Historical Society, which owns the draft. And you said that Wilson's draft and Wilson's footnotes show some influence of Native American experience and thinking. Tell us more about that, and of other influences of the Native American experience and agency on American constitutional development?

Donald Grinde: Wilson's draft, uh, was ignored, w- well, couldn't, was not seen by constitutional scholars for 125 years, because Madison said that everything should be destroyed. But James Wilson could not destroy the first draft that was at his committee meetings in

[00:39:00] Donald Grinde: August of 1787. And so it remained in the family until the early 20th century, and then descendants, uh, the grandchildren or whatever of James Wilson gave tha-

that to the Historical Society of Pennsylvania, and that's when it emerges into constitutional law. So that's an important thing to understand about a- all of this, is that Madison wanted everybody just to look at his book [laughs] on the Constitution. Uh, but this is an alternative, and it shows more influence by Native people, and it also shows directly how they used Locke and Rousseau and, and others, uh, in that. It's really funny, because when I was doing my initial research in the 1980s, just before the bicentennial of the constitution, I went to the

[00:40:00] Donald Grinde: Historical Society of Pennsylvania and checked out the draft, uh, actually they wouldn't, they said initially they wouldn't let me look at it, that they had a Xerox of it. And it's four, four foot by six foot, you know? So I said, "No, I must look at the original," and so they brought it out, uh, put it on the table, and two guys on either side of the table kind of turned it and stuff open source I could see it. The lady who was the head of the thing, before I finally did that, she put her hands on her hip and says, "Prof. Grinde, you realize you're requesting to see the original document of the original first draft of the Constitution?" I said, "Yes," you know. So I think it's important to understand that, but it's also important to connect with some of the other panelists here that Native Americans also exhibit a very strong economic bond here. When you talk about the frontier, and the British wanting to draw the proclamation line, part of that is revenue for the fur trade, a

[00:41:00] Donald Grinde: chief source of revenue is the fur trade, for the British, to maintain the army and so on. And the British don't get any money for people that go to western Pennsylvania or into Kentucky, uh, and set up a farm. [laughs] Uh, the revenue comes from trade with Indians. And that's a big deal. Then it changes with the founding of the American nation, and, uh, it's important to understand that the first 30 or 40 years, the federal government was funded by Indian land. What are they doing? They are buying,

[00:42:00] Donald Grinde: through treaties, Indian land in Ohio, Kentucky, and other places, for two or three cents an acre, then they're turning around and selling it for a dollar an acre to settlers, in order that they get their piece of paper [laughs] that says this is their farm. And that's a politician's dream, right? You, uh, have the Post Office, the Army, and so on, and yet for the first 30 or 40 years of the, of the development of American government, you don't have any taxes on white people. Uh, and, uh, that's a really important contribution, I suppose [laughs] you could say, that Native people paid in terms of that development. Uh, and also, of course, another thing is, uh, the popula- white population is exploding. Jefferson says that Native

[00:43:00] Donald Grinde: women very seldom have more than two or three children because of noxious weeds. That's herbs that are the equivalent of the morning-after pill, [laughs] but white women had all these kids. And these kids need a job. And most of them, that job at that time, 200 years or more ago, is go west. You know, 19 year old boy marries a 16 year old farmgirl, and they head out from Virginia to Kentucky. That's, uh, also another important kind of thing, that this westward expansion is jobs for white people, and people that have jobs are more politically stable than people that are jobless. [laughs] So all of these politics play out as a result of r- relations with Native people, and the, uh, uh, you know,

[00:44:00] Donald Grinde: kinds of changes that come about. The, the British depended on taxes on tea and, uh, the fur trade, uh, and then the, the Americans, uh, turn around and said, "We can go tax-free for a while by, you know, taking Indian land and then turning around and giving

a piece of paper and saying 'You can have it for \$1 an acre.'" Uh, so those are important contributions, I think, a- as well. And then the legal stuff plays out, o- one the economic and political stuff starts going, is, is one of the ways that I've always talked about this.

Jeffrey Rosen: Thank you so much for that. Well, we have, uh, just a few more minutes, e-eight, to be precise, and we always, uh, end on time in, in NCC panels. So Woody Holton, this may be the last intervention. I'm gonna ask you to tell us more about your really

[00:45:00] Jeffrey Rosen: important argument in your recent books, that states like Georgia and Virginia moved from having questions about ratification of the Constitution to supporting it, partly because of concerns about Native American experience and, uh, you even quote the Federalist Papers, uh, in reassuring skeptics of the Constitution that a strong national government was necessary to fortify states against what they perceived to be the challenges posed by, uh, Native Americans. So, so tell us more about that, and help us bring that story to life, as you do so well in your, in your books.

Woody Holton: I like to ask students a trivia question. So the first three states to ratify the Constitution are Delaware, Pennsylvania, New Jersey, all on the banks of the Delaware River. What gets us out of the middle colonies, what's the first other state to ratify the Constitution? And of course, as you suggested, the answer is Georgia. Um, we don't think of Southern states as being big on the federal

[00:46:00] Woody Holton: government, they certainly aren't gonna be 100 years later, but Georgia, as Greg mentioned, was caught up in a battle, o- ongoing battle with the Muskogeas, which had lar- powerfully influenced Georgia's participation in the revolution, that almost kept them outta the revolution 'cause they needed British help, it's now keeping them in, or making them very interested in having, as, uh, Prof. Blackhawk mentioned at the very beginning, the Articles of Confederation weren't doing it for people who wanted to take land from Indians, they needed a powerful national government. So th- we get Georgia voting unanimously in the legislature to call a ratification convention, and in the ratification convention, also voted unanimously to ratify the Constitution, and lots of people in Georgia and elsewhere were very clear that they did it because they needed help a- against the Muskogeas. Um, in Virginia, it's a little more comple- there's that, but there's also a more complex factor at work which is

[00:47:00] Woody Holton: d- the treaty with Britain required that the British leave those forts like Detroit that I mentioned before, um, but it also required that Virginians and others pay their debts. And so the people, especially in th- what we call the Valley of Virginia, between the Blue Ridge Mountains and the Allegheny, um, people there voted almost unanimously for the Constitution at Virginia's ratifying convention, and provided the, the margin of victory, and that's because they really wanted the British outta those forts. The Constitution would make sure that the British creditors got their debts paid back, and that would trigger British compliance with their part of the, uh, 1783 treaty, which was that they evacuate Detroit, Niagara, and those other forts. So in very different ways, Georgia and Virginia signed onto the Constitution, and we can say this more broadly, and I wanna pick up on something that, uh, that Don just said, that federal government was funded

[00:48:00] Woody Holton: by Indian land. We could add tariffs on imported goods, but I think your point is really good, Don, uh, follow the money. We can follow not only the incoming money to the federal government, that it made by selling Indian land, but also the outgoing money. And I'll give you a stat and finish on this, an amazing number, I- I'm quoting John Chester Miller's book called The Federalist Era. So the biggest thing that the federal government did once it had its own authority to tax was pay off the war debt. That's a whole different conversation I'd love to have with you. But of the operating expenditures spent by the federal government during its first six years of operation, say, 1790 to 1796, out of the money the federal government spent, five out of every six dollars was spent fighting Native Americans, that coalition that Greg Dowd mentioned north of the Ohio Rivers.

[00:49:00] Woody Holton: Follow the money. If you follow the money, as Don mentioned, you see that that's where the money's coming into the federal government, a lot of it, and if you follow the money going out of the federal government, it's also where the, the federal government is spending its money. And if you follow the money, you come to the same conclusion that Prof. Maggie Blackhawk just stressed, talking about Indian-related Supreme Court cases still affecting us now, right, up through the, President Trump's travel ban, you can't understand the mainstream of American history, why the Constitution was adopted. You know, uh, j- you started us off, Jeff, by giving us the mission statement of the, of the Constitution Center. I don't know if other people can see it on their screens, but I can on mine, the mission statement of the country, one of those provisions is provide for the common defense. And the only thing I'm gonna do when I come to Philadelphia is a little bit of graffiti, change that to provide for the common offense. Follow the money. They spent five out of every six dollars in their

[00:50:00] Woody Holton: first six years of operation fighting Indigenous people.

Jeffrey Rosen: What a superb note to end on, to, to remind us that that central text in the preamble really was centrally influenced by Native American agency, the Native American experience, and the colonial and western expansion, which, as all of you have helped us understand in your pathbreaking scholarship, was central to American constitutional development. I have to thank you so much, Maggie Blackhawk, Gregory Dowd, Donald Grinde, W- Woody Holton, for teaching us, for all the light you spread, and friends, thank you for taking an hour in the middle of your day to learn about this crucially important topic. All of us have so much more learning to do, and our homework, and I'm gonna take it on for myself as well, is to read more of the scholarship and books of our phenomenal panelists, who are helping us understand American constitutional history and the Native American experience in the new light. Maggie Blackhawk, Gregory Dowd, Donald Grinde, Woody Holton.

[00:51:00] Jeffrey Rosen: On behalf of the Constitution Center, thank you so much and have a great weekend.

[silence]

Tanaya Tauber: This episode was produced by Lana Ulrich, John Guerra, Melody Rowe, and me, Tanaya Tauber. It was engineered by the National Constitution Center's A/V team. This episode was made possible through the generous support of TD Bank. Visit

constitutioncenter.org/debate to see a list of resources mentioned throughout this episode, find the full lineup of our upcoming shows, and register to join us virtually. You can join us via Zoom, watch our live YouTube stream, or watch the recorded videos after the fact in our media library at constitutioncenter.org/constitution. As always, we'll share those programs on the podcast too. So be sure to subscribe so you never miss an episode. If you like this show, you can help us out by rating and reviewing us on Apple Podcasts, or by

[00:52:00] Tanaya Tauber: following us on Spotify. Find us back here next week.