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## **ARTICLES**

### CONSTITUTIONALISM IN UNEXPECTED PLACES

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*Before, during, and after the ratification of the Federal Constitution of 1787, Americans believed that they were governed under an unwritten constitution, a constitution that described an arrangement of power, confirmed ancient rights, and restricted government action. The existence of this unwritten constitution, and particularly its continuity, is something legal scholars have not adequately understood. Instead, both originalists and scholars of the “living” constitution think of 1787 as a hard break from the past and a starting point for their investigations.*

*But Americans of the Founding generation did not share our view that the only constitution that mattered was the one the Framers designed. This Article focuses on a feature of American colonial life that reappeared with striking continuity for three generations after Independence—the vindication of unwritten constitutional rights by mob action, and specifically, the tradition of mobs turning to Indian costume to express a specific series of constitutional grievances. During the age of the Revolution, many Americans believed that mobs in the streets performed a legitimate role in the enforcement of their unwritten constitution. These mob actions involved ritualistic violence*

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*and consistent, non-linguistic symbolism. The endurance of this form of constitutional engagement, employing the same symbols to assert the same suite of legal claims, is simply astonishing. It is evidence of the tenacity of a series of constitutional commitments predating the Founding that were not encompassed by, or replaced with, a written constitution.*

*This Article also makes a methodological point. An exclusive focus on official texts and the words, pamphlets, and letters of great men robs historical investigation of its depth and risks missing crucial insights about the past. Important evidence revealing how Americans conceived of their constitution and of themselves as legal actors can be found in their customs, in behavior, in performances in public spaces, and in the life of important ideas in literature and art. This Article focuses on a peculiar phenomenon as a way of modeling this point. The white protestor in Indian costume may seem like an oddity, but a deeper investigation reveals him to be a missing link, a key to how Americans believed their society was constituted, how they thought about justice, and how they understood the obligations the Revolution laid upon its inheritors.*

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INTRODUCTION

What every schoolchild learns about the Boston Tea Party is that a group of men dressed themselves as Indians and dumped tea into the Boston Harbor. If the social studies teacher is good and the child is paying attention, the lesson will also connect those actions to the proto-Revolutionary slogan, “no taxation without representation.” But why do we teach the Boston Tea Party this way? We do not remember what other men were wearing when they did other historically significant things. For this event, however, the choice of costume has always been an integral element of the story. In the 1830s, an old shoemaker looking back on his role in the Tea Party began his recollections of that night this way:

It was now evening, and I immediately dressed myself in the costume of an Indian, equipped with a small hatchet, which I and my associates denominated the tomahawk, with which, and a club, after having painted my face and hands with coal dust in the shop of a blacksmith, I repaired to Griffin's wharf, where the ships lay that contained the tea. When I first appeared in the street after being thus disguised, I fell in with many who were dressed, equipped and painted as I was, and who fell in with me, and marched in order to the place of our destination.<sup>1</sup>

A legal scholar reading this should immediately have a few questions. He dressed as an Indian, complete with a symbolic weapon that was not a tomahawk but that he decided to *call* a tomahawk. He painted his skin, and not just his face in order to disguise himself, but his hands, too. This was a performance meant to express something. If the shoemaker's recollection is accurate, then the blacksmith from whom he borrowed coal dust would have understood its message and so would all of the men out that night in the streets of Boston. And whether accurate in every detail or not, there is significance in his choice to remember it that way. Those mechanics, artisans, and labor organizers who discovered and elevated this shoemaker in the 1830s as one of the last surviving members of a heroic generation, and who promoted his memoir as part of an elaborate Independence Day commemoration, must have understood the message he conveyed by making Indian costume so central to the story.<sup>2</sup> They must, in fact, have meant to amplify it. But from this distance of time, *we* no longer understand it.

Scholars know (or should know) the Boston Tea Party as a legal event. The Tea Party protestors asserted that their constitutional rights had been violated and demanded redress. But what we have failed to appreciate is that the Bostonians believed that their costumes added something to that claim.<sup>3</sup> It is important that Americans dressed up to assert their rights and it is just as important that Americans remembered the costume as integral,

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<sup>1</sup> A Citizen of New York, *A Retrospect of the Boston Tea Party, with a Memoir of George R.T. Hewes, a Survivor of the Little Band of Patriots Who Drowned the Tea in Boston Harbour in 1773*, at 38 (New York, S.S. Bliss 1834).

<sup>2</sup> See Alfred F. Young, *George Robert Twelves Hewes (1742–1840): A Boston Shoemaker and the Memory of the American Revolution*, 38 *Wm. & Mary Q.* 561, 619–20 (1981).

<sup>3</sup> For another consideration of the importance and legal significance of clothing in early America, see Laura F. Edwards, *James and His Striped Velvet Pantaloon: Textiles, Commerce, and the Law in the New Republic*, *J. Am. Hist.* (forthcoming) (arguing that “[t]extiles . . . mattered” and that “[w]hen draped in this form of property, people of marginal status assumed distinct legal forms that were difficult to ignore”).

although we may not understand why. And the mystery of it grows in importance when we realize that the costume element of the Boston Tea Party demonstration was far from unique to that event. From the 1760s through at least the 1840s, this was a common element in many protests against sheriffs bearing eviction notices or threatening action from a creditor. White Americans would dress up in Indian costume, make up their faces with their idea of Indian war paint, and participate in destructive and sometimes violent demonstrations.

This is a strange fact about the past, and difficult to square with our lionization of that group of ordinary men now ennobled by the title, “the Founding generation.” But this oddity, and others like it, are critical evidence if we are to understand the constitutional ideas and legal imaginations of men of that generation and those that followed. The Boston Tea Party participants thought they were making a constitutional argument and so did the all of the protestors dressing in costume to assert their claims in the decades that followed. But what did “constitution” mean? We are accustomed to using that word in one way before the Founding-era, and in a completely different sense as soon as Americans began writing their plans of government down. But the longevity and apparent power of this protest symbol attests to the endurance of a British North American form of constitutional expression that did not die out at the Founding and that was not successfully replaced by written constitutions for several generations.

Before, during, and after the ratification of the Federal Constitution of 1787, Americans believed that they were governed under an unwritten constitution, a constitution that confirmed ancient rights and that restricted government action. In discussing an “unwritten constitution,” this Article does not draw the distinction that some scholars have between the text of the written Constitution and the policies and principles that underlie it. Nor does it mean to invoke the distinction between the text of the Constitution and the penumbra that has developed around it since. To Americans of the Founding generation, the unwritten constitution was simply the fundamental law: the law of their forefathers, the law justifying their pride in their English heritage, the law that they fought to defend in the Revolution.

The existence of this unwritten constitution, and particularly its continuity, is something legal scholars have not adequately understood.<sup>4</sup> Originalists have missed its importance because of their focus on the meaning of ratified constitutional text. They believe that the moment of ratification “fixed” constitutional rights and obligations, and that these may be found in the Constitution’s words. The main branches of originalist debate concern where to find the meaning of those words, whether in convention debates or in the ratification debates or elsewhere.<sup>5</sup> A premise underlying this view is that Founding-era Americans would have agreed that the written Constitution was the be-all-end-all, at least as far as constitutions go.<sup>6</sup>

Non-originalist scholars, on the other hand, have sought to identify values that have come into the Constitution over its two hundred year “life.”<sup>7</sup> Building on the concept of a “penumbra” around constitutional

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<sup>4</sup> In discussing the existence of an unwritten constitution at the Founding, I do not take sides in debates over “popular constitutionalism,” the idea that “the public generally should participate in shaping constitutional law more directly.” Mark Tushnet, *Taking the Constitution Away from the Courts* 194 (1999); see also Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *Harv. L. Rev.* 1594, 1616 (2005) (reviewing Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004)); Larry Kramer, *Response*, 81 *Chi.-Kent L. Rev.* 1173, 1182 (2006); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 *Const. Comment.* 461, 462–63 (2009). Those debates focus on how the written Constitution is implemented—and specifically on the role of “the people,” in ensuring it is “properly interpreted.” Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 5–7 (2004). This Article, by contrast, focuses on a separate source of law entirely, an unwritten constitution, and how citizens both understood and enforced it during the Founding period.

<sup>5</sup> It has become commonplace to remark on the size of the literature on originalism. See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *Ohio St. L.J.* 1085, 1085 (1989) (systemizing the “voluminous” literature in existence thirty years ago); Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. Rev.* 1, 3 (2009) (citing Farber and noting the literature’s multi-fold growth in the ensuing twenty years). I cannot convey the nuances of this literature here, but for an overview, see, e.g., Robert W. Bennett & Lawrence B. Solum, *Constitutional Originalism: A Debate* (2011). I mention originalism here only to bring out what I see as its undisputed premise: that its goal is to discover the content of a constitution created at a single moment in time—at its “origination.”

<sup>6</sup> See generally Antonin Scalia, *Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation*, Address at the Catholic University of America (Oct. 18, 1996), transcript available at <https://www.proconservative.net/PCVol5Is225ScaliaTheoryConstInterpretation.shtml>; see also Randy E. Barnett, *Underlying Principles*, 24 *Const. Comment.* 405, 413 (2007) (“To remain faithful to the Constitution when referring to underlying principles, *we must never forget it is a text we are expounding.*”).

<sup>7</sup> Bruce Ackerman is perhaps the most prominent current theorist of “living constitutionalism.” See, e.g., Bruce Ackerman, *The Living Constitution*, 120 *Harv. L. Rev.* 1737 (2007). Bill Eskridge, who has argued that certain “super-statutes” have become so

terms, these scholars observe that the Constitution's words have thickened with meaning over time and through their use by an evolving society.<sup>8</sup> Akhil Amar's recent book, *America's Unwritten Constitution*, is a prime example of this genre: he argues that that through court cases and rights movements, Americans have built interstitial meanings into the Constitution.<sup>9</sup> But even those scholars start from the premise that all of this development *began* in 1787.

In short, originalist and non-originalist scholars share a perspective on the written Constitution: that it operated as a hard break.<sup>10</sup> Even when scholars and jurists look back further than the 1780s, they do so largely to learn whether certain terms contained in constitutional text incorporated a pre-existing common law meaning.<sup>11</sup> They do not look

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essential that they are now within the "working constitution," also belongs among the greats. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1216–17 (2001); see also Ernest A. Young, *The Constitution Outside the Constitution*, 117 Yale L.J. 408, 413–14 (2007) (defining the "functional" constitution to include formal practices, norms, and structures of government). My project departs from these now familiar forms of living constitutionalism. It is not about a written Constitution that evolves because it is "alive," but about a separate and supplementary unwritten constitution that existed before and persisted through the social and legal changes of the 1780s. Some of the values of that unwritten constitution were also reflected in our written Constitution and some of them were not.

<sup>8</sup> This idea's scholarly heritage goes back at least to Karl Llewellyn, see K.N. Llewellyn, *The Constitution as an Institution*, 34 Colum. L. Rev. 1, 28 (1934), and its judicial heritage is arguably much older, see Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. Rev. 1089, 1092–93 (1997) (arguing that *McCulloch v. Maryland* is "the quintessential example of penumbral reasoning").

<sup>9</sup> Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By*, at ix–xi (2012).

<sup>10</sup> See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 6–7 (2015) (explaining that a "core idea[]" of originalist constitutional theory is that "the original meaning . . . of the constitutional text is fixed at the time each provision is framed and ratified"). The originalist shares this focus on that one moment with, for instance, Akhil Amar's premise in *America's Unwritten Constitution*. There, too, the critical question is, "[h]ow can Americans be faithful to a written Constitution"? Amar, *supra* note 9, at x. The difference between them is the belief that as Americans "venture beyond" the writing, they create what Amar calls an "unwritten Constitution" that "supports and supplements the written Constitution without supplanting it." See *id.* at x–xi. This brand of "living constitutionalism" agrees with the premise that the only important American constitution was "born" in 1787 and began to develop from there. It does not address the topic of this Article: a strong heritage of constitutional values that were not included in the text, but that Americans continued to defend as their fundamental rights in the years after 1787.

<sup>11</sup> See, e.g., Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745, 1756–57 (2015) ("The Seventh Amendment and the Habeas Corpus Clause have consistently been interpreted in light of the common law as of 1791."); Bernadette Meyler, *Towards a Common Law Originalism*, 59 Stan. L. Rev. 551, 552 (2006) ("[O]riginalists urge

back to a constitution that exists separately from our written one. They share a view that whatever American colonial subjects believed a “constitution” was before the Revolution, Americans altered that idea completely once the property-holding gentlemen among them met and decided to write something down.

This Article starts from a different premise: that Americans of the Founding generation did not share our view that the only “constitution” that mattered was the one the Framers designed. Instead, having grown up as Britons, and having lost friends and family in a war to defend their rights as such, they still thought of themselves as the beneficiaries of a constitution of customary right. This is not to deny the importance of the written Constitution, or to dispute that it was significant that the Founders decided to write something down.<sup>12</sup> It is only to assert, as does the written Constitution itself, that the Founders did not intend that “[t]he enumeration in the Constitution[] of certain rights” would “be construed to deny or disparage others retained by the people.”<sup>13</sup>

The way legal scholars ask historical questions has hindered our ability to appreciate the endurance and the continuity of unwritten constitutionalism. It is common for a legal scholar to plumb the historical record to either confirm or deny a theory about what the Constitution means for us right now. But the archive does not function well as a magic eight ball. The yes/no/maybe/ask again approach to historical research, by fixating on narrow questions about constitutional text, forecloses really interesting questions about what a constitution is.

The problem with the way legal scholars use history is not only the questions we ask, it is also our methodology.<sup>14</sup> As any historian can tell

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that particular terms and phrases—including ‘law of nations,’ ‘habeas corpus,’ ‘privileges and immunities,’ ‘otherwise re-examined,’ and ‘assistance of counsel’—should be interpreted in light of their connotations under the common law.”); see also *Saenz v. Roe*, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting) (“The colonists’ repeated assertions that they maintained the rights, privileges, and immunities of persons ‘born within the realm of England’ and ‘natural born’ persons suggests that, at the time of the founding, the terms ‘privileges’ and ‘immunities’ (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons.”).

<sup>12</sup> See Nikolas Bowie, *Why the Constitution Was Written Down*, 71 *Stan. L. Rev.* 1397, 1400 (2019).

<sup>13</sup> U.S. Const. amend. IX.

<sup>14</sup> Even a small sampling of the most recent articles doing originalist work reveals the sources they find relevant. See, e.g., Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 *Stan. L. Rev.* 443, 445 (2018) (canvassing legal dictionaries, convention debates, “The Federalist Papers,” and “Correspondence and Writings from Founding-Era Figures”). So closely tied is the project of originalism to these types of sources that there is a secondary

you, going into an archive can be a humbling experience. What one finds in a historical record provides a small window onto the past, through which we can dimly perceive only a part of the action. When a legal scholar goes into the archive with a fixed question in mind, she must dismiss as irrelevant anything that is not responsive, along with anything that she does not understand. But given the very limited view the historical record provides, dismissing any evidence at all risks missing important truths. The puzzles one encounters during primary research are actually the archives' greatest prizes. Instead of skipping over these to chase after hints in the records that might confirm a favorite hunch or cherished thesis, it is worthwhile to linger on the oddities. Exploring these reveals the past on its own terms, allowing the record to propose its own questions, and suggest its own answers.

This Article is about a protester that I will call the “white Indian,” because that is what this man would have called himself. He emerged again and again from archival research while I was hunting for something else. Wherever conflicts arose over the fairness of a law pitting owners or creditors against renters and debtors, whether in staid newspaper debates or in all-too-frequent armed insurrections, this white man in moccasins, or with a blanket around his shoulders, or with a painted face, or wielding a tomahawk, appeared as the avatar of the honest debtor or the dispossessed squatter. I was so puzzled by him that I stopped what I was doing and gave this recurring figure a closer look. I found that at least two scholarly works had already lingered over white Indians: an elegant short essay by Alan Taylor, written when he was still a graduate student, and a thoughtful full-length intellectual history by Philip Deloria.<sup>15</sup> But given my preoccupations as a legal historian, I read these figures in a different light. I came to understand that they represented a series of interconnected ideas about authentic American identity and virtue.<sup>16</sup> And more than this,

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literature debating how best to use each of them. See, e.g., Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 *Geo. Wash. L. Rev.* 358, 360 (2014); cf. Jennifer L. Mascott, *The Dictionary as a Specialized Corpus*, 2017 *BYU L. Rev.* 1557, 1561.

<sup>15</sup> Philip J. Deloria, *Playing Indian* 5 (1998); Alan Taylor, “Stopping the Progress of Rogues and Deceivers”: A White Indian Recruiting Notice of 1808, 42 *Wm. & Mary Q.* 90, 94 (1985).

<sup>16</sup> This Article does not fully explore import of this custom to the history of American racism, or its connections, such as they are, to the blackface tradition. For a cultural history starting point, see *Dressing in Feathers: The Construction of the Indian in American Popular Culture* 2–3 (S. Elizabeth Bird ed., 1996); Deloria, *supra* note 15, at 5.



the Indian dress was a potent *legal* symbol, both for the people who wore the costume and the people who saw it.

I came to see the white man in Indian dress as an assertion of rights under America's unwritten constitution. This Article will explain why, and in the process, model an alternative way of bringing history into legal scholarship. To take Americans' unwritten constitution seriously, one has to see as relevant behaviors, norms, and cultural practices typically invisible to the legal scholar. Scholars parsing and reparsing text, opinions, dictionaries, and the like have missed the unwritten constitution because its defenders often made their claims out of court. My goal is not to resolve the relationship between the unwritten constitution and the written one. My goal is simply to convince you that it exists, to suggest that the relationship between it and the written Constitution is important, and to begin looking for this constitutionalism, which appears more often than not in unexpected places.

This Article proceeds in three parts. First, it explains why this strange artifact, mob action by white men in Indian costume, should be read as an expression of unwritten constitutionalism. Then, it will sound a theory on some of the specific constitutional rights this costume invoked. And finally, it will show how long this form of constitutional expression persisted and discuss some of the implications of this long life for how we should understand our legal past.

#### I. THE CONSTITUTIONALISM OF CROWD ACTIONS

The men engaged in the civil unrest that led to the new American Republic were asserting their entitlement to the “essential privileges of the British constitution.”<sup>17</sup> It was the constitution whose principles, John Adams asserted, were “intimately known, . . . sensibly felt by every Briton [and] it is scarcely extravagant to say, . . . drawn in and imbibed with the Nurses Milk and first Air.”<sup>18</sup> But their constitution was not written, had not been deliberated upon, had no specific origin point. As Bernard Bailyn described it, what they meant by the term “constitution” was “the constituted—that is, existing—arrangement of governmental

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<sup>17</sup> Thomas Fitch et al., *Reasons Why the British Colonies in America Should Not Be Charged with Internal Taxes (1764)*, reprinted in 1 *Pamphlets of the American Revolution, 1750–1776*, at 378, 388–89 (Bernard Bailyn ed., 1965).

<sup>18</sup> John Adams, *Adams' Diary Notes on the Right of Juries (1771)*, in 1 *Legal Papers of John Adams* 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

institutions, laws, and customs together with the principles and goals that animated them.”<sup>19</sup>

John Adams would compare the British constitution to the “Constitution of the human Body,” which included “certain Contexture[s] of Nerves, fibres, Muscles, or certain Qualities of the Blood and Juices” whose end was life and health, and to the constitution of a watch, which had “a certain Combination of Weights, Springs, Wheels and Levers” whose “Use and End is the Mensuration of Time.”<sup>20</sup> Government was “a Frame, a scheme, a system, a Combination of Powers,” including those of “the King, the Lords, the Commons, and the People.”<sup>21</sup> What was special about the British constitution, Adams wrote, was that

the preservation of Liberty is its End, . . . as much as Life and Health are the Ends of the Constitution of the human Body, as much as the Mensuration of Time is the End of the Constitution of a Watch, as much as Grinding Corn is the End of a Grist Mill, or the Transportation of Burdens the End of a Ship.<sup>22</sup>

The Founders conceived of rights under this constitution, not as a list of agreed-upon immunities from the power of normal legislation or executive command, but rather, as any of the “essentials and Fundamentals” that guaranteed the efficacy of this constitution for its grand purpose.<sup>23</sup>

British North Americans shared with fellow Britons a legal culture of self-congratulation, a belief that the way power had traditionally been arranged in British government, as between the Lords and People, King and Commons, landowner and tenant, defendant and jury, colony and metropole, was sufficient, without amendment, to guarantee the most perfect liberty to which they could aspire. The legal case Americans made in the Declaration of Independence was simply that their settled expectations had been disappointed. The word “constitution,” therefore, designated a status quo under a system of law that Dirk Hartog has described “not as an instrument of state policy but as . . . a reflection and

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<sup>19</sup> 1 Pamphlets of the American Revolution, *supra* note 17, at 45.

<sup>20</sup> 1 Diary and Autobiography of John Adams 296–97 (L.H. Butterfield ed., 1961).

<sup>21</sup> *Id.* at 297–98.

<sup>22</sup> *Id.* at 298.

<sup>23</sup> *Id.* at 297.

a defender of community, customary authority.”<sup>24</sup> One found this constitution, like other law, in “custom and community consensus,”<sup>25</sup> to use J.R. Pole’s formulation, in prerogatives continuously asserted and continuously accepted.

A mob in the streets represented a rupture in that community consensus. Such a rupture provided both the irrefutable proof of constitutional disorder and its remedy. And indeed, historians have accumulated a substantial record of the vindication of custom in eighteenth-century crowd actions, and of mobs gathering to conserve existing power arrangements. Pauline Maier has written about mobs sometimes using “extralegal means to implement official demands or to enforce laws not otherwise enforceable” or to “extend[] the law in urgent situations beyond its technical limits.”<sup>26</sup> These “uprisings” she wrote, complemented existing law and power structures, proving “*extra-institutional* in character more often than they were anti-institutional.”<sup>27</sup> Gordon Wood also emphasized that eighteenth-century American mobs “were not the anarchic uprisings of the poor and destitute.”<sup>28</sup> He found that they “were not only excused but often directed and abetted by respectable members of the community” and that their behavior was marked by “discrimination in the choice of victims and force.”<sup>29</sup> Likewise, John Phillip Reid has offered one anecdote after another showing eighteenth-century American mobs’ restrained application of law-like discretion: an incident in which a mob avoided destroying the wrong victim’s property; engaged in parlay with a sheriff and agreed to temporary forbearance; or gave legal justifications for its actions and notice that the violence would escalate if certain conditions weren’t met, among other examples.<sup>30</sup>

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<sup>24</sup> Hendrik Hartog, *Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History*, in *Law in the American Revolution and the Revolution in the Law* 229, 241 (Hendrik Hartog ed., 1981).

<sup>25</sup> Jack P. Greene, *Law and the Origins of the American Revolution*, in 1 *The Cambridge History of Law in America* 447, 470 (Michael Grossberg & Christopher Tomlins eds., 2008).

<sup>26</sup> Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 *Wm. & Mary Q.* 3, 4 (1970).

<sup>27</sup> *Id.* at 7–8.

<sup>28</sup> Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 320–21 (2d ed. 1998).

<sup>29</sup> *Id.*

<sup>30</sup> John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 *N.Y.U. L. Rev.* 1043, 1055–57 (1974).

The Revolutionary Whig understanding was that these mobs were not apolitical, but rather, were the work of “groups who could find no alternative institutional expression for their demands and grievances, which were more often than not political.”<sup>31</sup> A political grievance shared by a sufficient number of “the people” to result in a mass demonstration is, in the context of the constitution we’ve been discussing, a demand for constitutional redress. Indeed, “Good Whigs,” Gordon Wood tells us, sometimes were “willing to grant a measure of legitimacy to” mob actions because they “recognized and appreciated the political existence of the people ‘out-of-doors,’ that is, outside of the legal representative institutions.”<sup>32</sup>

Initially, the scholarship on American colonial mobs contrasted these features with the horrors of popular uprisings in Europe, including the bread riots of England and crowd actions in Revolutionary France. Richard Hofstadter once summarized the observations of so-called “consensus” historians when he wrote of eighteenth-century American riots that they were “low-key and almost charmingly benign.”<sup>33</sup> But a 1974 masterwork on the European crowd by George Rudé rejected earlier European scholars’ descriptions of crowd actions as animalistic responses to provocation, “the instinctive reaction of virility to hunger.”<sup>34</sup> Instead, Rudé painted them too as purposeful, restrained, and nonviolent.<sup>35</sup> The eighteenth-century American asserting his legal rights by rallying out-of-doors was hardly unique; he shared a culture of political engagement with European cultural cousins like the French, and of course, with his fellow Briton.

In fact, American mobs demonstrated the qualities E.P. Thompson described as hallmarks of late eighteenth-century crowd actions in England, especially their “countertheatre.”<sup>36</sup> Like their contemporaries in England, Americans employed a “language of crowd symbolism” using

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<sup>31</sup> Wood, *supra* note 28, at 320.

<sup>32</sup> *Id.* at 320–21.

<sup>33</sup> Richard Hofstadter, Reflections on Violence in the United States, *in* American Violence: A Documentary History 3, 10 (Richard Hofstadter & Michael Wallace eds., 1970). Later “New Left” historians challenged this thesis by showing that the eighteenth century saw its share of violent and uncontrolled mob actions instigated by economic complaints against the rich. See, e.g., Jesse Lemisch, Jack Tar in the Streets: Merchant Seamen in the Politics of Revolutionary America, 25 *Wm. & Mary Q.* 371, 406 (1968).

<sup>34</sup> T.S. Ashton & Joseph Sykes, *The Coal Industry of the Eighteenth Century* 131 (1929).

<sup>35</sup> George Rudé, *The Crowd in History: A Study of Popular Disturbances in France and England, 1730–1848*, at 254 (2d ed. 1981).

<sup>36</sup> E.P. Thompson, *Customs in Common* 57 (1993).

violence against property with “an almost ritualistic significance,” in order to perform a “theatre of threat and sedition.”<sup>37</sup> They also displayed the other two characteristics Thompson noted as typical: a remarkable “capacity for swift direct action,” which involved responding on the spot and with decisive force to perceived invasions of customary rights or privileges, and, key for our analysis, a version of “the anonymous tradition,” that is, covering their faces and acting under cover of night.<sup>38</sup> Masks, in other words, were a characteristic element of the mob actions through which subjects prosecuted constitutional grievances on both sides of the Atlantic.

But there was more to the white Indian than E.P. Thompson’s descriptions of British crowd actions capture. Thompson describes his crowds’ tendency to operate under cover of darkness as a symptom of “a society of total clientage and dependency,” in which “any open, identified resistance to the ruling power may result in instant retaliation—loss of home, employment, tenancy, if not victimization at law.”<sup>39</sup> By contrast, the costume of the American Indian, at once noble and terrifying, was not about concealment. It contained within it what the Russian theorist Mikhail Bakhtin has described as the carnivalesque tradition, a boisterous throwing-off of social hierarchy and mores, a world “upside-down.”<sup>40</sup> It is fitting that Ebenezer Macintosh, the tradesman who led the mob in Boston protesting the Stamp Act and claimed a role in the Boston Tea Party, got his training, as it were, as an organizer of Boston’s annual Pope’s Day celebration, with its ritual costuming, effigies, crownings, and debasements.<sup>41</sup>

Indian costume was a critical part of how the “people out-of-doors” made known their constitutional claims: not just with violence, but with theater.<sup>42</sup> While the Boston Tea Party is the most well-remembered

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<sup>37</sup> *Id.* at 67.

<sup>38</sup> *Id.* at 66, 69.

<sup>39</sup> *Id.* at 66.

<sup>40</sup> Mikhail Bakhtin, *Rabelais and His World* 426 (Helene Iswolsky trans., 1968).

<sup>41</sup> See Brendan McConville, *The King’s Three Faces* 56–63, 69 (2006); Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early American Republic* 21–22 (1997); William Pencak, *Play as Prelude to Revolution*, in *Riot and Revelry in Early America* 125, 133–34 (William Pencak et al. eds., 2002).

<sup>42</sup> The Indian dress tradition also shared something in common with “rough music,” also called “skimmington” or “shivaree,” the American custom of enforcing social and sexual mores through loud and boisterous rituals meant to publicly embarrass transgressors. See, e.g., Thomas J. Humphrey, *Crowd and Court: Rough Music and Popular Justice in Colonial New York*, in *Riot and Revelry in Early America*, *supra* note 41, at 107; Brendan McConville, *The*

instance of mob action in Indian dress, another episode in nearby Weston, Massachusetts, in which a mob destroyed the home and business of an innkeeper selling tea, more clearly demonstrates that disguise alone was not the goal of the costume. First, a crowd gathered in front of the Inn and issued “a loud Indian WHOOP, and immediately went off without speaking.”<sup>43</sup> They returned that night, “disguised with Paints, Paper Visages, &c” and methodically “ransacked” the building.<sup>44</sup> They did not call attention to themselves, leave, and then return with different clothes in a cartoonish attempt to avoid recognition. In fact, a newspaper report mentions that as mob participants destroyed the inn’s contents, “[s]everal of them were known by the [p]eople in the [h]ouse and called to by [n]ame.”<sup>45</sup> The Indian costume was not a bid for anonymity so much as a claim to universality; it was not a self-protective gesture but rather a self-assertive one.

## II. THE MEANING OF INDIAN DRESS

To the Founding generation, the word “constitution” described the constituted arrangement of their community as it had developed over time. The word embraced the arrangement of institutions, the practices of political engagement, the doctrines of legal restraint on power, and the formal relations between the orders of society. Its aim was the preservation of all the accreted immunities and privileges contributing to their sense, specific culturally and specific in historical time, of what

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Rise of Rough Music: Reflections on an Ancient New Custom in Eighteenth-Century New Jersey, *in* *Riot and Revelry in Early America*, supra note 41, at 87; Steven J. Stewart, Skimmington in the Middle and New England Colonies, *in* *Riot and Revelry in Early America*, supra note 41, at 41.

Both in “rough music” and in the white Indian tradition, a crowd gathered to enforce a community sense of right and wrong. In both cases, there was an element of play. In the “rough music” tradition, just as in the Pope’s Day carnival, or in the ordered eighteenth-century riot, a purposeful crowd was often in equipoise between playfulness and violence, tipping easily in either direction. When I have presented this Article, a common observation is that the protesters I describe here seem pretty scary. But in saying that the white Indian tradition was unwritten constitutionalism, I am making a statement about its power, its legitimacy, and its status as “law.” I do not mean to say that it was “safe” or that it was “good,” whatever that might mean. As E.P. Thompson has pointed out, “the rituals of rough music and charivari, transposed across the Atlantic, contributed not only to the good-humored ‘shivaree’ but may also have given something to lynch law and the Ku Klux Klan.” Thompson, supra note 36, at 523–24.

<sup>43</sup> Mass. Gazette & Bos. Wkly. News-Letter, Mar. 31, 1774, at 3.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

“liberty” entailed. The claim American Revolutionaries made in the Declaration of Independence and elsewhere, that Parliament and the King had violated this unwritten constitution, was not just a negative. It also required Americans to engage in the collective project of asserting where Britain had gone wrong and what a constitution aimed at liberty really required. One consequence of the Revolution—and one that American elites would come to regret—was that it added ideas about economic justice to the American understanding of constitutional liberty.

The rhetorical association of burdensome debt and rapacious creditors with tyranny became a key theme in American justifications for the rebellion. But while other themes in the legal and intellectual case for independence, including those concerning standing armies, taxes, representation, jury trial, and legislative privilege, took their power from their connection to the past century and more of English political history, this economic theme was distinctly an outgrowth of the colonial relationship.

During the eighteenth century, British North America experienced what some historians have called a “consumer revolution,” a maturation of the market resulting in the proliferation of choice for all kinds of goods.<sup>46</sup> North American demand for manufactured goods created a trade imbalance, which drained the colonies of hard currency and kept Americans chained to British credit. Out of a belief that this market dynamic strengthened imperial control, Britain worked to maintain this imbalance through policies requiring British North Americans to trade only with the mother country and discouraging domestic manufacturing. The colonies must remain loyal to the empire, Daniel Defoe explained, while they are “ty’d down for ever to us by that immortal, indissoluble Bond of Trade,” and so long as they “must fetch from *Great Britain* only, their Cloths, Woollen, Linnen, Cotton, and Silk; all their Haberdashery” as well as “wrought Iron, Brass, Chains, Edg’d Tools, Jack-work, Nails, Bolts, Screws, &c. all their heavy Ware, such as cast Iron and Brass, Guns, Mortars, Shot, Shells, Pots, Caldrons, Bells, Battery, &c.” and even “all their Clock-Work, Watch-Work, even so much as their Toys and Trinkets; all their House Furniture, Kitchen Furniture, Glass Ware, Upholstery Ware, Tin Ware,” and so on.<sup>47</sup>

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<sup>46</sup> See Neil McKendrick et al., *The Birth of a Consumer Society: The Commercialization of Eighteenth-Century England* 1 (1982); T.H. Breen, “Baubles of Britain”: The American and Consumer Revolutions of the Eighteenth Century, 119 *Past & Present* 73, 74–75 (1988).

<sup>47</sup> Daniel Defoe, *A Plan of the English Commerce* 361 (London, Charles Rivington 1728).

But this bond of empire was tenuous. British political observers continually fretted that if the colonies started manufacturing finished goods, they might “set up for themselves, and cast off the *English* Government.”<sup>48</sup> Welsh economist Josiah Tucker counseled that if Britain feared “that one Day or other they will revolt, and set up for themselves,” the empire must keep its colonies well supplied.<sup>49</sup> “Let us not drive them to a Necessity to feel themselves independent of us,” he said, “As they will do the Moment they perceive, that they can be supplied with all Things from within themselves, and do not need our Assistance.”<sup>50</sup> Fulfilling American demand for manufactured goods did not prevent Americans from chafing at the trade restrictions, however. As Richard Henry Lee explained, Britain’s trade policies meant that she “not only received the entire produce of the lands . . . but has besides involved the people here in a heavy debt, which agriculture . . . will probably never pay.”<sup>51</sup>

Mid-eighteenth-century colonial commentary on the trade imbalance already hinted at the connection the American Revolutionaries would make, increasingly directly, between constitutional liberty and freedom from coercive debt. Americans turned to smuggling, explained New York grandee Archibald Kennedy, “for like the industrious Bee, no Stone is left unturn’d, or Port in *America* untried, to bring something home to the Hive, or in other Words to answer the Ballance due to *Great-Britain*.”<sup>52</sup> His 1750 essay echoed a common complaint: “In Debt we are, and in Debt we must be, for those vast Importations from *Europe*; . . . without, from the present Prospect of Things, ever being able to make suitable Returns; and of Course, we must become Bankrupts . . .”<sup>53</sup> British North Americans, he warned, would not put up with these policies indefinitely. “[W]here People in such Circumstances are numerous and free, they will push what they think is for their Interest,” opposing the “Oppression” of laws that

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<sup>48</sup> Joshua Gee, *The Trade and Navigation of Great-Britain Considered* 71 (London, Amen-Corner 1730); see also J.M. Bumsted, “Things in the Womb of Time”: Ideas of American Independence, 1633 to 1763, 31 *Wm. & Mary Q.* 533, 534 (1974) (discussing arguments for separation).

<sup>49</sup> Josiah Tucker, *A Brief Essay on the Advantages and Disadvantages Which Respectively Attend France and Great Britain, with Regard to Trade* 96 (London, T. Trye 1750).

<sup>50</sup> *Id.* (emphasis omitted).

<sup>51</sup> Richard Henry Lee, *The Farmer’s and Monitor’s Letters to the Inhabitants of the British Colonies*, at i, iii (Williamsburg, William Rind 1769).

<sup>52</sup> Archibald Kennedy, *Observations on the Importance of the Northern Colonies Under Proper Regulations* 8 (New York, New Printing Office 1750).

<sup>53</sup> *Id.* at 9–10.



“they have no Hand in the contriving or making” and that therefore failed to accord with “the Conceptions we have of *English Liberty*.”<sup>54</sup>

Resentment over the trade laws grew in the 1760s in the aftermath of the French and Indian War. New York and Philadelphia experienced an unprecedented number of foreclosures and actions for debt during that period.<sup>55</sup> At the same time, taxes to repay the war debt helped push record numbers onto the poor rolls in both cities.<sup>56</sup> The end of the war brought economic challenges in the South as well. Planters had used the easy credit in the lead-up to war to mortgage unplanted crops to pay for luxury imports from Europe. In 1762, British merchants suddenly tightened credit when the value of local money fell against the British pound.<sup>57</sup> By the time Parliament imposed the Stamp Act on the colonies, it was received as a calculated attempt, John Dickenson would write, to “draw[] off, as it were, the last drops of their blood.”<sup>58</sup>

Americans began to think of their indebtedness, and all the tricks and policies that created and maintained it, as another manifestation of imperial oppression. Looking back on this period, Thomas Jefferson accused British merchants of intentionally undermining their American trading partners. Having given “good prices and credit to the planter, till they got him more immersed in debt than he could pay without selling his lands or slaves” he explained, “[t]hey then reduced the prices given for his tobacco so that let his shipments be ever so great, and his demand of necessaries ever so economical, they never permitted him to clear off his debt.”<sup>59</sup> The result was that heavy debts became “hereditary from father to son for many generations, so that the planters were a species of property annexed to certain mercantile houses in London.”<sup>60</sup> And whereas in 1720, in an earlier credit crisis, the Virginian land baron Robert Carter felt he would rather “relye on the mercy of our Prince than . . . be subjected to the tyranny of the merchants who are daily encreasing their Oppressions

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<sup>54</sup> *Id.* at 10.

<sup>55</sup> See Gary B. Nash, *The Urban Crucible: Social Change, Political Consciousness, and the Origins of the American Revolution* 250 (1979) (describing an unprecedented number of actions for debt in New York).

<sup>56</sup> See Fred Anderson, *Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754–1766*, at 589 (2000).

<sup>57</sup> See, e.g., *id.* at 592.

<sup>58</sup> John Dickinson, *The Late Regulations*, in 1 *The Writings of John Dickinson: Political Writings 1764–1774*, at 207, 228 (Paul Leicester Ford ed., Philadelphia 1895).

<sup>59</sup> Thomas Jefferson, *The Article on the United States in the Encyclopédie Méthodique*, in 10 *The Papers of Thomas Jefferson* 3, 27 (Julian P. Boyd ed., 1954).

<sup>60</sup> *Id.*

upon us,” by the 1760s, his son, Landon Carter, would see “prince” and merchant as an allied interest.<sup>61</sup> The Currency Act and other measures placed the British government in cahoots with the merchant, whose very profession, the younger Carter said, “kick[ed] Conscience out of doors like a fawning Puppy,”<sup>62</sup> and with the broker, “a villain in the very engagements he enters into.”<sup>63</sup> Resistance to these venal creditors became a central rationale for rebellion.<sup>64</sup>

The growing belief that economic coercion was antithetical to constitutional liberty fueled the non-importation and non-consumption movements. These movements were hugely important. It was becoming clear, warned a Bostonian, that Americans’ “fondness” for imports was “the engine intended to be used to destroy the free constitution of [their] country.”<sup>65</sup> T.H. Breen has argued that these organized efforts laid critical groundwork for the coming Revolution by knitting Americans of different social classes and in far-flung settlements together in a community of interest.<sup>66</sup> Non-consumption taught Americans that they shared grievances and a common resolve to make open sacrifices in service of a cause. In the critical decade leading up to 1776, Breen explained, American society “defined political resistance” through the “consumer

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<sup>61</sup> Letter from Robert Carter to Micajah Perry (July 10, 1732), *quoted in* Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 *Harv. L. Rev.* 385, 427 (2006).

<sup>62</sup> 2 Landon Carter, *The Diary of Colonel Landon Carter of Sabine Hall, 1752–1778*, at 813 (Jack P. Greene ed., 2d ed. 1987).

<sup>63</sup> 1 *Id.* at 373.

<sup>64</sup> Jefferson was so convinced that indebtedness reduced freedom that he was ready to turn it as a weapon to use on others. As President, Jefferson wrote to the Governor of the Indiana Territory to explain that debt was part of his plan to undermine the independence of the Native nations with title to the land. First, they would persuade the Indians to try farming, and “they will perceive how useless to them are their extensive forests, and will be willing to pare them off from time to time in exchange for necessaries for their farms & families.” Letter from Thomas Jefferson to William Henry Harrison (Feb. 27, 1803), *in* 39 *The Papers of Thomas Jefferson* 589, 590–92 (Barbara B. Oberg ed., 2012). Then, “[t]o promote this disposition to exchange lands which they have to spare & we want, for necessaries, which we have to spare & they want, we shall push our trading houses, and be glad to see the good & influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop th[em off] by a cession of lands.” *Id.* at 590.

<sup>65</sup> Miles Standish, *To Every Freeholder in the Province of the Massachusetts-Bay, and All Other Persons Who Possess Any Kind of Property*, *Bos. Gazette & Country J.*, Feb. 19, 1770, at 2.

<sup>66</sup> T.H. Breen, *The Marketplace of Revolution: How Consumer Politics Shaped American Independence*, at xv–xvi (2004).

market.”<sup>67</sup> The boycott was “the distinguishing mark of colonial protest,” its “signature.”<sup>68</sup> Americans formed hundreds of organizations to ensure that local merchants complied with non-importation resolutions and signed thousands of petitions agreeing with their neighbors to forego imported goods, urging each other that these agreements would “prove a means of restoring our liberty.”<sup>69</sup>

Costume was these movements’ dominant mode of expression. Proponents of non-importation used the press to publicly shame neighbors who might “value liberty at so small a price as a ribbon . . . or a silk neckcloth.”<sup>70</sup> “[C]an he be a true lover of his country,” asked another writer, “who would sooner be seen strutting about the streets, clad in foreign fripperies, than to be nobly independent in the russet grey[?]”<sup>71</sup> By 1774, one Virginian observed, “People . . . will go naked rather than have any commerce or connection with Great Britain. . . . I never expected to see such a spirit of opposition and resistance.”<sup>72</sup>

Before long, Indian dress became a signal of the patriot cause. Newspapers carrying the story of the Boston Tea Party made the initial inter-colony connection between the imagery of Indian dress and constitutional protest. The non-consumption movement built on that theme. “Who that has the spirit of a man but would rather forego the . . . luxuries of life,” one pamphleteer asked, when those luxuries risked “enervating our constitutions and shrinking the human race into pigmies,” when the cost of those luxuries “entail[s] slavery on his unborn posterity to the end of time?”<sup>73</sup> He continued, “Nothing but custom makes the curl-pated beau a more agreeable sight with his powder and pomatum, than the tawney savage with his paint and bear’s grease.”<sup>74</sup> Another popular pamphleteer declared: “We engage to deprive ourselves of the

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<sup>67</sup> *Id.* at 20.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 24, (quoting *To the Inhabitants of the Province of South-Carolina, About to Assemble on the 6th of July (July 4, 1774)*, in 1 *American Archives* No. 4, at 508, 511 (M. St. Clair Clarke & Peter Force eds., Washington, D.C. 1837)); see also *id.* at 254.

<sup>70</sup> Farmer, *To the Printers, Mass. Spy*, Nov. 13, 1770.

<sup>71</sup> *To the Printers of the Providence Gazette, Providence Gazette*, Nov. 14, 1767.

<sup>72</sup> Letter from William Carr to James Russell (Oct. 23, 1774), *Russell Papers*, #2, *quoted in* Emory G. Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 *Wm. & Mary Q.* 511, 529 (1962).

<sup>73</sup> *To the Inhabitants of the Province of South-Carolina*, *supra* note 69, at 511.

<sup>74</sup> *Id.*

comforts of life . . . and to live like savages, if the Parliament will not consent to give up its authority.”<sup>75</sup>

**Figure 1: The Able Doctor, or America Swallowing the Bitter Draught<sup>76</sup>**



In Virginia, frontiersmen’s clothes, incorporating elements of Indian costume, became the uniform of the moment. When Lord Dunmore dissolved the Virginia assembly in 1774, an observer reported that a group of 1,000 men assembled in protest, “among which was 600 good Rifle men. . . . [E]vry Man Rich and poor with their hunting shirts Belts and

<sup>75</sup> Samuel Galloway, *What Think Ye of the Congress Now?* 36 (New York, J. Rivington 1775).

<sup>76</sup> *The Able Doctor, or, America Swallowing the Bitter Draught*, 43 *London Mag.* 184 (1774). America, depicted as a partly-draped Indian woman, is restrained by Lord Mansfield while Lord North pours the contents of a teapot into her mouth. America vomits the tea into Lord North’s face. Lord Sandwich, holding American by the ankle, and Lord Bute, holding a sword inscribed with “military law,” both assist in America’s subjugation. Another female figure representing Britannia averts her face and covers her eyes with her hand. Two men representing France and Spain look on with interest. The foreground features a torn document that reads, “Boston petition.” In the background, the miniature spires of a town surrounded by ships is labeled, “Boston cannonaded.”

Tomahawke fixed off[f] in the best manner.”<sup>77</sup> Lord Dunmore would not return to Williamsburg, complained a loyalist, until “these Shirt men” in “Virginia uniform,” that is, men “dressed with an Oznab[urg] Shirt over their Cloaths, a belt round them with a Tommyhawk or Scalping knife,” “are sent away.”<sup>78</sup> An article announcing a 1775 patriotic assembly recommended that Virginia burgesses attend in “shirtsmen’s” attire, “which best suits the times, as the cheapest, and the most martial.”<sup>79</sup> Many burgesses complied with this instruction, attending the assembly wearing “Coarse linnen or Canvass over their Cloaths and a Tomahawk by their Sides.”<sup>80</sup> By wearing these tomahawks to their first councils contemplating independence, Virginia’s elite could signal a range of virtues with one stroke, including a superior grasp of the natural law that, they believed, underpinned the English constitution and any fair government.

There was an irony to all of this, the historian Woody Holton has pointed out, as Indians east of the Mississippi “had become highly dependent on European manufactured goods,” and even their “famous hunting shirts and tomahawks were generally made in Europe.”<sup>81</sup> One wonders how many of the shirts the “shirt men” wore actually complied with the boycott of European articles. It hardly mattered. What was important about the costume was the signal it sent to other Americans about solidarity in a cause and commitment to a set of shared values. And, of course, British North Americans were not dressing up as actual Indians but idealized ones.

Rhetorically, the non-importation and non-consumption movements were as much about moral purification as economics—the belief that popular virtue would prove critical if Americans hoped to restore their constitution to its first principles.<sup>82</sup> Revolutionaries explained that it was

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<sup>77</sup> Rhys Isaac, *Dramatizing the Ideology of Revolution: Popular Mobilization in Virginia, 1774 to 1776*, 33 *Wm. & Mary Q.* 357, 380 (1976) (quoting Letter from Michael Brown Wallace to Gustavus Brown Wallace (May 14, 1775), in *Wallace Family Papers, 1750–1781* (on file with the Alderman Library, University of Virginia)).

<sup>78</sup> *Id.* at 381 (quoting Letter from James Parker to Charles Steuart (Jun. 12, 1775), in *Letters from Virginia*, 3 *Mag. Hist.* 151, 159 (1906)).

<sup>79</sup> *Id.* at 381–82 (quoting *An American*, *Va. Gazette*, May 19, 1775).

<sup>80</sup> *Id.* at 382 (quoting Letter from Lord Dunmore to Earl of Dartmouth (June 25, 1775) (on file with Dunmore Correspondence, Special Collections, John D. Rockefeller Jr. Library, Williamsburg, Va.)).

<sup>81</sup> Woody Holton, *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia* 104 n.58 (1999).

<sup>82</sup> Wood, *supra* note 28, at 34.

the “vigour of natural Principles” that “drew them to resist the *unnatural* violence of *Provincial* Government.”<sup>83</sup> Enlightenment thinkers like John Locke gave these words meaning, and native life (or their idea of it) had long provided their standard for the ideal “natural” society.<sup>84</sup> In indigenous society, St. John Crèvecoeur opined, “[t]here must be something more congenial to our native dispositions, than the fictitious society in which we live.”<sup>85</sup> Rousseau spoke of the “savages of America” as “those happy nations who did not even know the name of many vices which we find it difficult to suppress.”<sup>86</sup>

The enlightenment caricature of the noble savage was a fitting avatar for Americans’ grievances against economic subjugation. Whereas credit and debt are time-bound, receiving now and remitting later, the imagined Indian lived a life free from time. The Indian’s “soul, which nothing disturbs, is wholly wrapped up in the feeling of its present existence, without any idea of the future, however near at hand; while his projects, as limited as his views, hardly extend to the close of day.”<sup>87</sup> The fantasy also provided a foil for European materialism.<sup>88</sup> To keep himself supplied with luxuries, a man would “danc[e] the vilest pantomime,” Diderot said, echoing the sentiments of the non-importation movement.<sup>89</sup> “Whom does the savage beg from? The earth, the animals and fishes, the trees and plants and roots and streams.”<sup>90</sup> Rousseau added that the desire for unnecessary “things” created political dependence. By contrast, “[t]he American savages, who go naked, and live entirely on the products of the

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<sup>83</sup> T. Pownall, *A Memorial Addressed to the Sovereigns of America* 23 (London, J. Debrett 1783).

<sup>84</sup> John Locke, *Second Treatise of Government* (1689) 3–10 (Richard H. Cox ed., 1982). See Bernard Bailyn, *The Ideological Origins of the American Revolution* 27 (1967) (noting that the influence of “the European Enlightenment on eighteenth-century Americans . . . remains, and is profusely illustrated in the political literature” and that “[t]he ideas and writings of the leading secular thinkers of the European Enlightenment . . . were quoted everywhere in the colonies, by everyone who claimed a broad awareness”).

<sup>85</sup> J. Hector St. John Crèvecoeur, *Letters from an American Farmer* 306 (1904).

<sup>86</sup> Jean Jacques Rousseau, *The Social Contract and Discourses* 153 n.1 (G.D.H. Cole trans., 1950).

<sup>87</sup> *Id.* at 211.

<sup>88</sup> Denis Diderot, *Rameau’s Nephew and Other Works* xii, 186 (Jacques Barzun & Ralph H. Bowen trans., 2001). Diderot wrote this book during the 1770s, but it was only published after his death, in 1805. See Jack Undack, *Diderot at the Crossroads of Speech*, in *A New History of French Literature* 517, 519 (Denis Hollier ed., 1989).

<sup>89</sup> Diderot, *supra* note 88, at 84–85.

<sup>90</sup> *Id.* at 84.

chase, have been always impossible to subdue. What yoke, indeed, can be imposed on men who stand in need of nothing?”<sup>91</sup>

Indian costume also amounted to an assertion that colonial Americans were native here, and that they held a superior claim to the soil than their governors in London. But of course, many of the men dressing up in Indian costume had encountered actual native Americans and had grown to adulthood during a generation of violent war with Indian nations along the frontier. Some of them would participate, during the “closing years of the Revolution,” in “extraordinary anti-Indian violence.”<sup>92</sup> Americans were dressing up as Indians even as, historian Peter Silver has demonstrated, a “horror and fear” of Indian attacks “became a vital means of forming public coalitions,” knitting the various European groups of colonial society into a “new group” of interest: “the white people.”<sup>93</sup> Silver argues that this new way of thinking of whites as a cohesive, aggrieved community contributed to “a democratic revolution,” because part of the patriot’s case against the British was that they “car[ed] too much for Indians” and that they were “indifferent to or even complicit in ordinary country people’s sufferings at Indian hands.”<sup>94</sup> A central aspect of their complaint was, in the language of the Declaration of Independence, that the King had “endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”<sup>95</sup>

But the anti-Indian aspect of the Revolutionary cause was not in tension with the choice of Indian dress as the patriot’s costume. Rather, it added to the costume’s power. There was what the French theorist René Girard would call a “mimetic rivalry” inherent in the performance of Indian dress, amounting to a violent rejection of the claims of true natives.<sup>96</sup> The message of the costume to actual Native Americans who saw it would

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<sup>91</sup> Rousseau, *supra* note 86, at 14 n.1.

<sup>92</sup> Peter Silver, *Our Savage Neighbors: How Indian War Transformed Early America*, at xxiii (2008).

<sup>93</sup> *Id.* at xviii–xx.

<sup>94</sup> *Id.* at xviii, xxiii.

<sup>95</sup> The Declaration of Independence para. 29 (U.S. 1776).

<sup>96</sup> René Girard, *Mimesis and Violence: Perspectives in Cultural Criticism*, 14 *Berkshire R.* 9, 9 (1979) (“If the appropriative gesture of an individual named A is rooted in the imitation of an individual named B, it means that A and B must reach together for one and the same object. . . . Violence is generated by this process . . .”). Here, the “objects” are sovereignty over American soil, along with the claim to belonging or native status here, and authenticity as “Americans,” rather than Britons.

have been something like, “we will kill you and then dance around in your skin.” More menace, in other words, than praise. Michael Cresap, a frontiersman once reviled as barbaric for his role in a massacre of Indian women and children, would become a celebrated hero in the lead-up to Independence while wearing Indian clothing.<sup>97</sup> In 1775, Cresap paraded through the Northern colonies with “a formidable Company,” all “painted like Indians, armed with Tomahawk’s and Rifles, dressed in hunting Shirts and Mackasons.”<sup>98</sup> His men could surely overawe Lord North’s formal army, urged one newspaper account, because of their Indian-like qualities. “What would a regular army . . . in the Forest of America do with 1,000 of these Men,”<sup>99</sup> it asked,

[W]ho want nothing to preserve their Health and Courage, but Water from the Spring, with a little parched Corn, and what they can easily procure in Hunting; and who, wrapped in their Blankets in the Damp of Night, would choose the shade of a Tree for their Covering, and the Earth for their Bed?<sup>100</sup>

The former pariah became a champion of the cause as newspapers marked his progress through Pennsylvania and New York on his way to the front lines.

There is more to say about the white Indian as an expression of race and of racism, and to do those issues justice is beyond the scope of this Article. But I’ll note just one point here: patriots’ performance of Indian dress, which often including darkening their skin, likely contributed to the cultural transformations that preceded and help to explain the political Revolution. Again, Peter Silver has shown how, during the lead-up to the American Revolution, a very culturally diverse set of European peoples began to think of themselves as one aggrieved “white” people.<sup>101</sup> The invention of this new identity was hard work and it required imagination. Indians were no monolith, but there was a simplistic caricature of the Indian that denied their real differences, with which European-Americans were familiar. With Indian dress, patriots borrowed a monolithic racial identity from this caricature. Likewise, enslaved African Americans were

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<sup>97</sup> See Robert G. Parkinson, *From Indian Killer to Worthy Citizen: The Revolutionary Transformation of Michael Cresap*, 63 *Wm. & Mary Q.* 97, 97 (2006).

<sup>98</sup> Extract of a Letter from Frederick-Town, August 1, *N.Y. Gazette & Wkly. Mercury*, Aug. 21, 1775, at 2.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Silver, *supra* note 92, at xxii–xxiii.

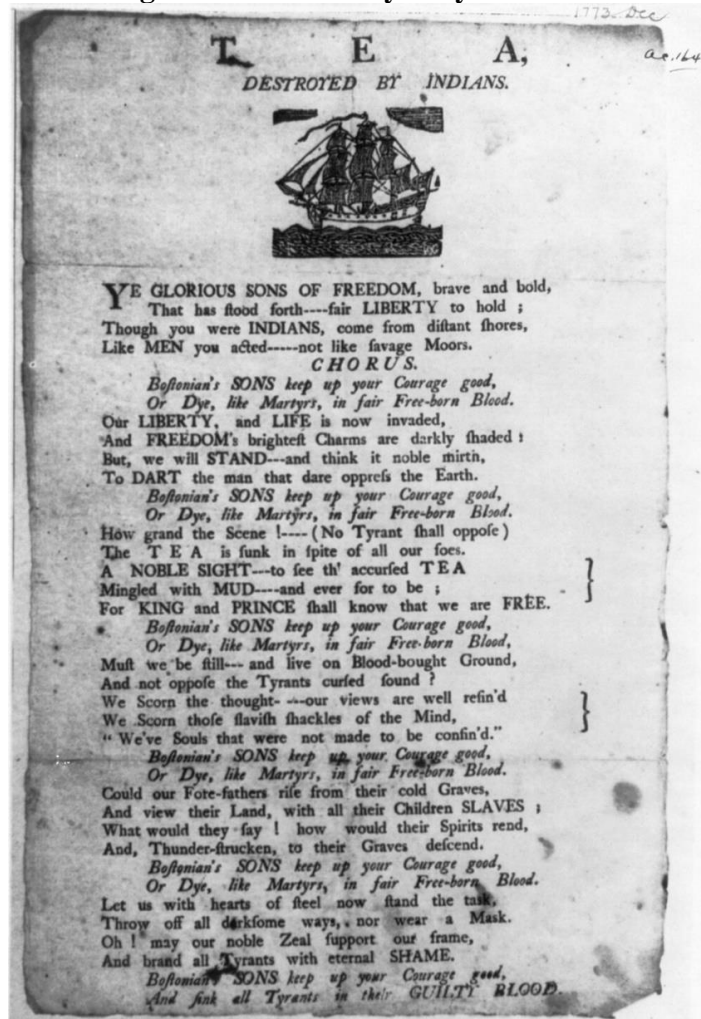


no cultural monolith, but European-Americans also had a singular caricature in mind when speaking of them. American patriots constantly warned each other that submission to Britain would make them “in no respect different from the sooty *Africans*, whose persons and properties are subject to the disposal of their tyrannical masters,” as Joseph Galloway put it.<sup>102</sup> Or, in George Washington’s words, submission would “make us as tame, & abject Slaves, as the Blacks we Rule over with such arbitrary Sway.”<sup>103</sup> In defining themselves both as comparators to an imagined monolith (the Indians) and against an imagined monolith (black slaves), the Revolutionaries achieved a new monolithic self-identity as “whites.”

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<sup>102</sup> F. Nwabueze Okoye, *Chattel Slavery as the Nightmare of the American Revolutionaries*, 37 *Wm. & Mary Q.* 3, 12 (1980) (quoting Joseph Galloway, *A Letter to the People of Pennsylvania* 38–39 (1760)).

<sup>103</sup> François Furstenberg, *Beyond Freedom and Slavery: Autonomy, Virtue, and Resistance in Early American Political Discourse*, 89 *J. Am. Hist.* 1295, 1301 (2003) (quoting Letter from George Washington to Bryan Fairfax (Aug. 24, 1774), in 10 *The Papers of George Washington: Colonial Series* (W.W. Abbot & Dorothy Twohig eds., 1995)).

Figure 2: Tea Destroyed by Indians<sup>104</sup>

Indeed, the power of Indian dress lay in its ability to express, all at once, high ideals about natural rights, a superior colonial claim to the soil,

<sup>104</sup> Author unknown, Song, Tea Destroyed by Indians (1773) (on file with the Library of Congress Prints and Photographs Division, Broadside collection), <https://perma.cc/ULT3-9ZE9>. The title and first stanza of this song commemorating the Boston Tea Party illustrates the type of racial positioning that preceded the Revolution and helped to construct a new American identity. The heroes destroying tea are like "Indians," and not "Moors."

the violent fantasies of the white subaltern, ritual purification from European luxuries, and the colonies' pressing economic grievances, including their rejection of unfair debt. It is no wonder Americans recurred to this symbol so often during their movement for independence. And it is no surprise that such a useful symbol endured. Seventy years after Independence, Indian costume would remain a powerful element of American "countertheatre."

### III. THREE GENERATIONS OF DEBTOR CONSTITUTIONALISM

The Whig legal philosophy that acknowledged the constitutional role of the people out-of-doors was at its height during the revolt that founded the nation.<sup>105</sup> A mob assembling to protest a constitutional injury had the same claim to legitimacy, after all, as that of patriots of all social classes who dared take up arms against their King. After peace with Britain, many Americans continued to believe that they had created a society in which the people out-of-doors had a legitimate place in constitutional governance. They may not have had their own article in the Federal Constitution—they may, in fact, have been relegated to mentions in the subsequent Bill of Rights—but that did not spell the end of what Alexander Hamilton would call "tumultuary assemblies of the collective body of the people."<sup>106</sup> That is because not everyone understood or agreed that the advent of written constitutions meant the death of the unwritten one.

To repeat John Adams' formulation, the unwritten constitution was "a frame, a scheme, a system, a combination of powers," with "the preservation of Liberty" as its "End."<sup>107</sup> But if this was so, Americans faced a dilemma: after all the Revolutionary rhetoric portraying their cause as anti-materialistic, pro-debtor, and connected to a fairness-based "natural law," they no longer agreed on what "liberty" entailed. The economic justifications for the war had always posed obvious risks to those who had enjoyed privileged positions in colonial society. In 1776, a loyalist responding to Paine's *Common Sense* had warned that separation from Britain would cause such market turmoil that "[a] war

<sup>105</sup> See Reid, *supra* note 30, at 1044.

<sup>106</sup> Alexander Hamilton, *The Continentalist* No. 1, *N.Y. Packet & Am. Advertiser*, July 12, 1781, *reprinted in* 2 *The Papers of Alexander Hamilton* 649, 651 (Harold C. Syrett ed., 1961).

<sup>107</sup> 1 *Diary and Autobiography of John Adams* 297–98 (L.H. Butterfield ed., 1961).

will ensue between the creditors and their debtors.”<sup>108</sup> Although this warning may have been overblown, the patriots’ emphasis on economic justice did affect some Americans’ subsequent views on the content of the unwritten constitution they had bled to defend. For those who took the pro-debtor aspect seriously, economic conditions after the Revolution left a lot to be desired, and amply justified continued armed protest.

Legislatures discarded the economic fairness agenda just as Americans were hit with a post-war economic slump. Unprecedented taxes and a scarcity of currency had figured high among the colonial complaints against Britain. But by one historian’s calculation, when Pennsylvanians complained about money scarcity on the eve of Revolution, there had been about \$5.30 per person of government paper in circulation. This figure declined to \$1.90 in 1786 and was down to 30¢ by 1790.<sup>109</sup> Furthermore, continental soldiers had accepted pay in the form of government bonds—essentially, promissory notes. When they returned home, soldiers who needed currency to pay their debts and buy food for their families began selling their bonds for whatever money they could get, always at prices far below their face value. Wealthier Americans bought up the bonds at discounted prices and then influenced the legislatures to levy taxes sufficient to redeem them at their full printed value.<sup>110</sup> Many Americans faced taxes averaging three or four times those of the colonial era.<sup>111</sup> To make matters worse, the courts reopened after the war, exposing debtors to the claims of foreign and domestic private creditors.

Some saw this redistribution of wealth from the taxed and indebted masses to the wealthy few as a good outcome. As one commentator put it, it was important to enforce judgements against delinquent debtors in order to “put the property into the hands of those who would manage it better.”<sup>112</sup> Robert Morris urged that the high taxes necessary to redeem the war bonds from speculators would benefit the country, by

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<sup>108</sup> James Chalmers, *Plain Truth: Addressed to the Inhabitants of America* 36 (Philadelphia, 1776).

<sup>109</sup> Terry Bouton, *Taming Democracy: “The People,” the Founders, and the Troubled Ending of the American Revolution* 91 (2007).

<sup>110</sup> Woody Holton, “From the Labours of Others”: The War Bonds Controversy and the Origins of the Constitution in New England, 61 *Wm. & Mary Q.* 271, 277 (2004).

<sup>111</sup> Woody Holton, *Did Democracy Cause the Recession That Led to the Constitution?*, 92 *J. Am. Hist.* 442, 445–47 (2005).

<sup>112</sup> *Amicus*, *Richmond Va. Indep. Chron.*, July 4, 1787, *quoted in* Holton, *supra* note 111, at 455.

“distributing property into those hands which could render it most productive.”<sup>113</sup> Others questioned this logic. According to George Mason, it was not uncommon to hear Virginians complaining: “If we are now to pay the Debts due to British Merchants, what have we been fighting for all this while?”<sup>114</sup> The scarcity of money meant freeholders had to give up their land, the most salient and tangible sign of true independence, to satisfy their debts. One contemporary reported having seen debtors “give up £50” worth of property “to pay £10. . . . Who will call this *Justice*?”<sup>115</sup> A Pennsylvania pamphleteer argued that these choices made little sense as a practical matter. To “lay the Burden on, and distress the Labourer,” would only “lessen our Stock of Property, and destroy that Fountain out of which it rises, and make good the Proverb, of killing the Hen that laid a golden Egg every Day.”<sup>116</sup> He urged that a policy enforcing creditors’ claims against this “labouring Part,” to the extent of auctioning off “their Implements of Labour, their Horses, Oxen, &c.,” amounted to a decision “to stab ourselves to the very Heart.”<sup>117</sup>

Legislatures exacerbated the economic hardships ordinary Americans faced, leaving many feeling betrayed. For many, the pro-debtor rhetoric of the Revolution had been about more than strategic pressure on a trading partner. Instead, it heralded a leveling of class distinctions and the radical promise of economic equality. It had meant, at the very least, that compassion for one’s fellow man must take precedence over timely remission of debts. After all, credit was an inescapable part of the economic cycle, and an inability to satisfy one’s obligations was often the result of a bad storm or a harvest-eating pest rather than profligacy. Everyone borrowed, and, in hard times, everyone defaulted.

It was not naïve to have expected a legal reorientation in favor of debtors after the Revolution. In other areas of the law, the historian Holly Brewer has argued, this period saw a meaningful shift in how Americans thought about culpability and assigned punishment. Before the Revolution, she shows, “[t]he question was less whether one meant to do

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<sup>113</sup> Letter of Robert Morris (July 29, 1782), in 22 *Journals of the Continental Congress 1774–1789*, at 429, 436 (Gaillard Hunt ed., 1914).

<sup>114</sup> Letter from George Mason to Patrick Henry (May 6, 1783), in 2 *The Papers of George Mason 1725–1792*, at 769, 771 (Robert A. Rutland ed., 1970).

<sup>115</sup> Holton, *supra* note 111, at 446 (quoting Americanus, *Letters to Messrs. Bowen and Markland*, *Columbian Herald*, Sept. 28, 1785, at 2).

<sup>116</sup> *Proposals to Amend and Perfect the Policy of the Government of the United States of America* 21 (Philadelphia, 1782).

<sup>117</sup> *Id.*

something than whether one actually had done it,” reflecting a sixteenth-century framework in which “guilt depended only partly on intention but more on direct causation and on status.”<sup>118</sup> In the decades after the Revolution, “[p]roof of criminal intent . . . was the general requirement,” including in “crimes against property or involving business dealings.”<sup>119</sup> But as other areas of law changed, imprisonment of the honest debtor, often to the utter ruination of his health and the destruction of his family, remained the norm.

The failure of the economically radical promises of the Revolutionary movement inspired many mob actions over the following decades. Shay’s Rebellion, the 1786 armed insurrection in Massachusetts, is only the most well-known of many conflagrations. In June of the same year, debtors also protested violently in Maryland, where “a tumultuary assemblage of the people” organized an assault and succeeded in closing the Charles County courthouse.<sup>120</sup> In September 1786, in Litchfield, Connecticut, “about 1500[] assembled in battle array, with an avowed design of preventing the sitting of the court of common pleas.”<sup>121</sup> The Litchfield “rioters broke the gaols, and released such prisoners as were confined for debt.”<sup>122</sup> Likewise, in May 1785, in Camden County, South Carolina, “[t]he sheriff & his officers were threatened in the execution of their duty; and at length the people . . . grew outrageous.”<sup>123</sup> A witness reported that when the sheriff dared to serve a writ on “one Col. Mayham,” the veteran “obliged [the sheriff] to eat it on the spot.”<sup>124</sup> Similar protests occurred in New Jersey, where debtors nailed up the doors of the courthouse, “impaled an effigy of [the] Governor,” forcibly stopped foreclosure sales, and refused to pay taxes.<sup>125</sup>

These conflicts represented a clash between those who expected continuity with the radical constitutional values of the Revolutionary era, along with that era’s mode of discerning and defending the Constitution,

<sup>118</sup> Holly Brewer, *By Birth or Consent: Children, Law, & the Anglo-American Revolution in Authority* 226 (2005).

<sup>119</sup> James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* 18 (1956).

<sup>120</sup> David P. Szatmary, *Shays’ Rebellion: The Making of an Agrarian Insurrection* 124 (1980).

<sup>121</sup> Litchfield, September 19, *Md. J. & Balt. Advertiser*, Oct. 10, 1786, at 2.

<sup>122</sup> *Id.*

<sup>123</sup> *Diary of Timothy Ford, 1785–1786* (Joseph W. Barnwell ed.), in *13 S.C. Hist. & Genealogical Mag.* 181, 193 (1912).

<sup>124</sup> *Id.*

<sup>125</sup> Szatmary, *supra* note 120, at 125.

and those who believed that the time for all that had passed. Some, even more conservative local leaders such as future Treasury Secretary Albert Gallatin, agreed that armed resistance might at some point become necessary. He counseled caution and compliance with the law simply because he did not think that the imposition of taxes alone was a sufficient threat to liberty to justify armed resistance *yet*.<sup>126</sup> To men like George Washington, on the other hand, the rebels were a “treason[ous] opposition . . . propogating principles of anarchy . . . [and] acts of insurrection.”<sup>127</sup> In the proclamation Washington issued as he marched out at the head of a 13,000-man army to subdue the Pennsylvania whiskey rebels, he explained that the Revolution had eliminated any moral justification for armed insurrection.<sup>128</sup> If the rallying cry had once been “no taxation without representation,” then the right to elect representatives had succeeded the right to take up arms. Even Samuel Adams, a great supporter of the mob in pre-Revolutionary Massachusetts, called for the leaders of Shay’s Rebellion to be hanged, explaining that “[i]n monarchies the crime of treason and rebellion may admit of being pardoned or lightly punished, but the man who dares rebel against the laws of a republic ought to suffer death.”<sup>129</sup>

It is tempting to see Washington and Adams’ as the winning argument simply because it is familiar. But as a practical matter, it is not clear that the vote resolved any of the issues rebels throughout the new states were complaining about. Many justly complained that voting was not worth much. The western Pennsylvanians could vote, but they found themselves effectively shut out of Pennsylvania politics since “eastern speculators in western lands . . . packed more clout in the assembly than frontiersmen.”<sup>130</sup> Pennsylvania was not the only state in which indifference to the unique grievances of frontiersmen led to interregional battles between the well-settled capitol and shoreline regions and more sparsely-settled frontiers.<sup>131</sup> And in other states, rebels may not have met

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<sup>126</sup> See Declaration of the Committees of Fayette County, September 1794, in 1 *The Writings of Albert Gallatin* 4, 6–7 (Henry Adams ed., Philadelphia, J.B. Lippincott & Co. 1879).

<sup>127</sup> Proclamation of Sept. 25, 1794, 3 *Annals of Cong.* 1413, 1414 (1849).

<sup>128</sup> *Id.* at 1415.

<sup>129</sup> William Pencak, Introduction: A Historical Perspective, in *Riot and Revelry in Early America*, supra note 41, at 4.

<sup>130</sup> Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* 37 (1986).

<sup>131</sup> *Id.*

the property qualifications to vote. Indeed, in North Carolina, the angry frontiersmen were not represented in their state legislature at all.<sup>132</sup> In the convention that would ultimately found the short-lived independent state of Franklin on North Carolina's western border, "[o]ne man rose, took from his pocket a copy of the Declaration of Independence, and angrily recounted the unfulfilled promises of the drafters. He then described parallels between the principles and grievances of the Declaration and those of frontiersmen."<sup>133</sup>

In the context of this argument over the Revolution's legacy, Indian costume took on new significance. Imbued with the rich associations it had gathered during the war, Indian dress now announced the wearers as the true defenders of the "Spirit of '76." It stood for the idea that, so long as economic abuses continued, so long as a distant government continued to exact oppressive taxes, the work of the Revolution was not finished. And it recurred again and again. In October 1791, a mob scared off an Albany sheriff's lieutenant when he tried to auction a local debtor's possessions. The sheriff and his brother rode to the site of the auction the next day to support the lieutenant, but the lieutenant never appeared with the writ of execution and the auction could not take place. An ambush prevented them from leaving town. As they rode away, the insolvent debtor "fired a pistol, at which signal seventeen men, painted and in Indian dress, sallied forth from the barn, fired and marched after them."<sup>134</sup> The unlucky sheriff did not survive the encounter.<sup>135</sup>

During the Whisky Rebellion of 1794, an eyewitness described "[l]iberty poles . . . raised every where," bearing messages like "an equal tax, and no excise," and "devices, such as a snake divided, with this motto, 'united we stand, divided we fall.'"<sup>136</sup> "[T]he people acted and spoke" said the witness, "as if we were in a state of revolution."<sup>137</sup> Of course, the whiskey rebels also took their Indian costumes out of chests and shook out the creases. An eyewitness described how protestors "were dressed in what we call hunting shirts," and that some of them "painted themselves black, as the warriors amongst the Indians do, when they go to war."<sup>138</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *American Intelligence*: Albany, October 31, 1791, *Western Star*, Nov. 8, 1791, at 3.

<sup>135</sup> *Id.*

<sup>136</sup> Hugh H. Brackenridge, *Incidents of the Insurrection in the Western Parts of Pennsylvania, in the Year 1794*, at 76 (Philadelphia, John McCulloch 1795).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 52, 54.



With familiar bombast, the rebels bragged to the Pennsylvanian authorities that “[i]t is a common thing for Indians to fight your best armies at the proportion of one to five; therefore we would not hesitate a moment to attack this army at the rate of one to ten &c.”<sup>139</sup> These men urged the cause of the hounded debtor, the squatter asserting a superior claim to the soil than the titular owner, and the beleaguered victims of what they saw as an exorbitant tax. Like the western patriots of the Revolution, “[t]o them, the link between Indian depredations and federal taxes seemed obvious.”<sup>140</sup> As “whites” who “lived in fear” because of their direct conflict with Indian nations along the frontier, they believed they were owed “an exemption from additional burdens.”<sup>141</sup> The connection between these claims and the constitutional grievances that had justified the American Revolution could not be clearer.

If elites rejected these claims, they could not deny their force. After a series of violent protests in the 1800s, the Massachusetts legislature, home of the Boston Tea Party, passed a statute “making it a high crime for any person to disguise himself in the likeness of an Indian, or otherwise, with intent to molest a sheriff or surveyor in the discharge of his duties.”<sup>142</sup> In a stark recognition of the symbol’s power, the law included harsh penalties for militiamen who refused to help officials enforce it.<sup>143</sup>

A larger pattern of official clemency and diplomatic engagement with protestors also suggests that elites understood that written law was not hegemonic, but instead competed and interacted with this unwritten understanding of fundamental law. In the 1790s, some of the Indian-costumed rebels were tried and sentenced to death for treason. But President Washington issued a pardon for the convicted traitors of the Whiskey Rebellion and Adams issued a general amnesty for anyone who might have been involved in the subsequent Fries Rebellion.<sup>144</sup> Likewise, the leader of the Indian-costumed Anti-Rent rioters of the

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<sup>139</sup> William Findley, *History of the Insurrection, in the Four Western Counties of Pennsylvania* 163 (Philadelphia, Samuel Harrison Smith 1796).

<sup>140</sup> Slaughter, *supra* note 130, at 93.

<sup>141</sup> *Id.*

<sup>142</sup> George J. Varney, *The Malta War in Court*, 7 *Green Bag* 476, 478 (1895).

<sup>143</sup> See *An Act for the More Speedy and Effectual Suppression of Tumults and Insurrections in the Commonwealth*, ch. 122, § 4, 1810 *Mass. Acts* 218, 220–21.

<sup>144</sup> See John Adams, *Proclamation, Granting Pardon to the Pennsylvania Insurgents* (May 21, 1800), *in* 9 *The Works of John Adams, Second President of the United States* 178 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854).

1840s was tried and given a life sentence, but he also received a pardon shortly after from the Governor of New York.<sup>145</sup>

All of this provides important context for the Tea Party shoemaker's recollections quoted at the start of this article. His memory of the Boston Tea Party and of his Indian costuming was amplified in the 1830s by working class groups who felt that the economic justice ideals of the Revolution, and the common man's centrality to the Republic, were being forgotten.<sup>146</sup> The white Indian symbol marked an ongoing conflict between those who could vote and serve on juries and whose interests were represented in state and federal government in the new nation, and those who continued to feel shut out. The American who continued to put on Indian costume to express himself was not participating in a mere social movement. He was continuing a constitutional tradition of the pre-Revolutionary era—in part because the new era had failed to provide him an adequate institutional alternative.

In short, the legal claims of those who rallied in Indian dress, raised liberty poles, and prepared to throw off United States authority during the Whiskey Rebellion in 1791 were not different or more radical than those of the patriots who had won independence from Britain. The rebels saw themselves as asserting the *exact same* claims. By defending the government's power to tax under the status quo, and by marching at the head of an army to suppress the insurrection of men who had inadequate representation in their government, Washington stepped into the role of the British, asserting that virtual representation should satisfy the colonies.<sup>147</sup> If we accept that American patriots fighting the British were, as they claimed, defending their constitution, then we must also accept that many of the men dressing up as Indians in subsequent years to protest high taxes, unfair creditors, or distant landowners believed they were defending the same constitution.

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<sup>145</sup> Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics 1839–1865*, at 252, 270–71 (2001).

<sup>146</sup> See Young, *supra* note 2, at 619.

<sup>147</sup> Also like the British, Washington's philosophical views on political rights may have been helped along by self-interest. Washington was, in addition to the Commander in Chief, a speculator in Pennsylvania's western lands who nursed a long-held "disdain for its inhabitants." Slaughter, *supra* note 130, at 88. He maintained, as a result of his investments, a "'personal economic stake' in the outcome of the Whiskey Rebellion." *Id.* at 89 (quoting James Thomas Flexner, *George Washington: Anguish and Farewell (1793–1799)*, at 163 (1972)).

The white man in Indian dress retained his power to evoke the constitutional grievances of the Revolutionary era because the symbol and its meanings never faded from public view. During the late 1780s and 1790s, an article titled “Letter from an Indian Chief to his Friend in the State of New-York” appeared and reappeared in newspapers across the country. Written in the voice of Joseph Brant, a Mohawk chief who had achieved fame for his military prowess on the British side during the Revolution, the elegantly written letter addressed “whether in [Brant’s] opinion civilization is favourable to human happiness.”<sup>148</sup> Echoing the non-consumption movement, “Brant” observed that “[c]ivilization creates a thousand imaginary wants, that continually distress the human mind,” whereas “[w]e do not hunger and thirst after those superfluities of life, that are the ruin of thousands of families among you.”<sup>149</sup> He then narrowed in on debtor-creditor relations. The Indians, he said, “have no robbery under the colour of law—daring wickedness here is never suffered to triumph over helpless innocence—the estates of widows and orphans are never devoured by enterprising sharpers.”<sup>150</sup> In comparison to debtor’s prison, he said, “Indian torture, is not half so painful to a well-informed mind.”

But for what are many of your prisoners confined? For Debt—Astonishing!—and will you ever again call the Indian nations cruel? . . . Let me ask, is there any crime in being in debt? . . . The debtor, suppose, by a train of unavoidable misfortunes, fails—Here is no crime, nor even a fault; and yet your laws put it in the power of that creditor to throw the debtor into jail, and confine him there for life: a punishment infinitely worse than death to a brave man. . . . Great Maker of the world! and do you call yourselves christians?<sup>151</sup>

This letter was reprinted over and over again during the next two decades, affirming the utility of the Indian, and especially this character—a man

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<sup>148</sup> Conn. Gazette, Mar. 20, 1789, at 1; see also From a Late Philadelphia Paper, *Indep. Chron.*, Dec. 20, 1792, at 1 (printing an abridged version of the same letter as the Connecticut Gazette); The Following Letter, Is Said to Have Been Written by the Celebrated Captain Brandt, an Indian Chief, *Pol. Gazette*, Sept. 15, 1796, at 1 (printing a letter that is more condensed than the Independent Chronicle); Letter of an Indian Chief to His Friend in the State of New-York, *Alexandria Gazette & Daily Advertiser*, June 15, 1818, at 2 (printing yet another version of the Brandt letter).

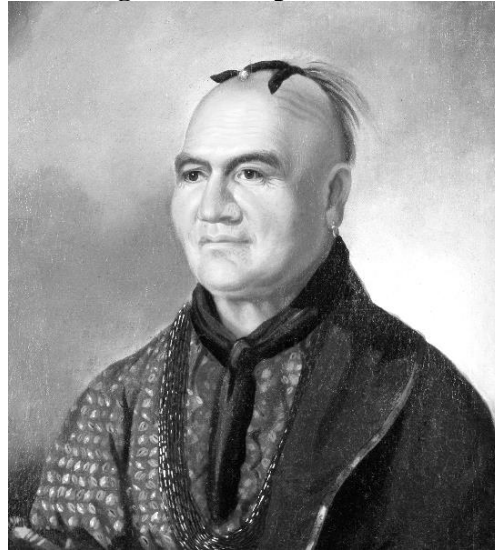
<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

European in elocution and dressed in Indian clothing—to recall the economic justice arguments that had animated the Revolution.<sup>152</sup>

**Figure 3: Joseph Brant<sup>153</sup>**



Debtors' prison was a frequent target of rebuke because it so obviously contravened the constitutional position on economic coercion that patriots had staked out during the war. It presented a bitter irony when the debtor

<sup>152</sup> See *id.*

<sup>153</sup> Ezra Ames, *Joseph Brant*, Oil on Canvas, 1806 (on file with Fenimore Art Museum, Cooperstown, New York). This photograph by Richard Walker invoked the power of these themes quite deliberately. Brant had the opportunity to sit for many portraits, and, although he wore the same style of clothing as his non-Native neighbors in day-to-day life, he insisted on putting on Native dress for these sittings. Elizabeth Hutchinson, "The Dress of His Nation": Romney's Portrait of Joseph Brant, 45 *Winterthur Portfolio* 209, 209 (2011). While on a trip visiting James Caldwell in Albany, Brant was invited to sit for this portrait by local artist Ezra Ames. Caldwell's daughter, remembering this visit, said that, at first, Brant "declined to do so on the score of having no indian dress with him." But her "grandmother, who had been a silent listener to the conversation, was not to be baffled by this excuse, and putting on her bonnet quietly slipped away to the store of Mr. Christian Miller, a few doors below her own house in State street, and purchased some calico which she quickly transformed into a sort of hunting-shirt—a few strings of wampum and a feather or two completed the needed costume." Catharine E. Van Cortlandt, *An Original Portrait of Joseph Brant*, 2 *Am. Hist. Rec.* 318, 318 (1873). This portrait therefore depicts Brant, not in his own clothes, but in an Indian costume hastily put together by his white hosts.

was also a veteran, said one popular essayist: “[D]raw a hero of the American revolution, covered with wounds gained in the service of his country’s liberty, expiring in prison, for the loss of his own.”<sup>154</sup> This writer’s columns appeared frequently in newspapers around the country in the early nineteenth century, emphasizing that “the laboring man who has obtained credit, may by sickness and misfortune, innocently become insolvent,” and arguing that “[i]f imprisonment be sent as the punishment of guilt, the innocent man should not be exposed to it.”<sup>155</sup> “[O]ur present mode of imprisonment” is so inappropriate to the republican context, he said, “we rather think [it] . . . is one of the lingering relics of [an] exploded system.”<sup>156</sup> These sentiments were not just the stuff of the back-page editorial; a representative echoed these themes in an 1822 speech in Congress. He painted a picture of the honest debtor, “[t]he once prosperous citizen” who “looks to his family—to his social circle—to the delights of better days, which no act of folly or injustice have justly required the forfeit of.”<sup>157</sup> That citizen then “looks with ardent gaze at the constitution of his country—and he turns to ask you, shall these blessings be lost without crime, and the ignominy of imprisonment be incurred without fault?”<sup>158</sup>

Americans continued to express these ideas through an Indian mouthpiece. A parable about another Indian chief joined Brant as a newspaper regular in the 1810s and remained a recurring feature until the 1850s. This chief was uneducated and spoke in variable broken English:

‘Why do you shut white man up in the strong room?’ said an Oneida Indian, to a sheriff, who was conveying an unfortunate debtor to prison. ‘Because,’ replied the officer, ‘he does not pay the skins he owes:’—alluding to the furs collected by the natives, which constituted their principal article of trade. ‘Ah!’ rejoins the humane son of the forest, with a sympathy which shames the charity of ‘pale men’—‘but he can catch no skins in prison.’ This was nature’s answer—there was no appeal.<sup>159</sup>

<sup>154</sup> Howard, Howard No. X, *Columbian*, Jan. 3, 1811, at 2.

<sup>155</sup> Howard, Howard—No. 9, *Berkshire Star*, Oct. 5, 1820, at 2.

<sup>156</sup> *Id.*

<sup>157</sup> See *Proceedings of Congress, Balt. Patriot & Mercantile Advertiser*, Jan. 23, 1822, at 2.

<sup>158</sup> *Id.*

<sup>159</sup> *Imprisonment for Debt*, *Conn. Mirror*, Feb. 4, 1832, at 2 (appending the story to news of a Kentucky Congressman’s bill for the abolition of imprisonment for debt); see also Howard, *supra* note 155 (briefly recounting the story as part of a longer article about the injustice of

In these meditations on debt, Brant and the unnamed chief were useful caricatures. They called into service once again the idealized savage to explain American grievances about unfair debt and to reinvoke enlightenment themes about natural law's basis in volition.

Natty Bumppo, the central character in James Fenimore Cooper's popular *Leatherstocking Tales*, is another figure in this mold. Cooper introduced his character in *The Pioneers*, wearing a coat "made of dressed deer-skin, with the hair on . . . deer-skin moccasins, ornamented with porcupines' quills, after the manner of the Indians," and his legs "guarded with long leggings of the same material as the moccasins, which . . . had obtained for him . . . the nick name of Leather-stocking."<sup>160</sup> The climax of *The Pioneers* came toward the end, when Bumppo clashed with the law by hunting for deer out of season. A townsman reminded Bumppo of the prohibition, but he shook him off, asking "[W]hat has a man who lives in the wilderness to do with the ways of the law?"<sup>161</sup> When the constable came to Bumppo's cabin with a warrant to search for a buck's carcass, Bumppo refused to submit to the search, threatening him with a gun. Here Cooper echoed the righteous stance of white Indian squatters, who evicted sheriffs from their land by asserting legal rights under an alternative form of law. As a result of this standoff, Bumppo was arrested and convicted of using his rifle against an officer. The judge sentenced him to a fine of \$100 and added a month in jail, stipulating that he must pay the fine before his release. Bumppo's answer echoed the newspaper story of the Indian chief visiting a debtors' prison:

Where am I to get the money? Let me out into the woods and hills, where I've been used to breathe the clear air, and though I'm three score and ten, if you've left game enough in the country, I'll travel night and day but I'll make you up the sum afore the season is over. Yes, yes—you see the reason of the thing, and the wickedness of shutting up an

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debtor's prison). The last version I found was printed in 1851. This one was much terser, reporting,

[A] good remark of an Indian, apropos of imprisonment for debt.—One of his tribe, acquainted with civilization, was showing him through a jail. "What him do?" asked the savage, pointing to a debtor. "He no pay his skins," said the other, alluding to the Indian currency. "Well," said the questioner, "how him get skins, locked up in great house?"

Imprisonment for Debt, N.H. Patriot & St. Gazette, Sept. 24, 1851.

<sup>160</sup> 1 James Fenimore Cooper, *The Pioneers*, in *The Leatherstocking Tales* 1, 21 (1985) (1823).

<sup>161</sup> *Id.* at 314.

old man, that has spent his days, as one may say, where he could always look into the windows of heaven.<sup>162</sup>

In other words, Natty Bumppo said, he can “catch no skins in prison.”

The symbol of the white man in Indian dress also animated political campaigns and formed the basis of important nineteenth-century public personas. Daniel Boone, whom John James Audubon described as “a stout, hale, and athletic man, dressed in a homespun hunting-shirt, bare-legged and moccasined” is an early prototype.<sup>163</sup> Like the enlightenment natural man, he scoffed at material possessions: “No populous city, with all the varieties of commerce and stately structures, could afford so much pleasure to my mind, as the beauties of nature . . . .”<sup>164</sup> In a popular autobiography, Boone recalled, “I often observed to my brother, You see now how little nature requires to be satisfied. Felicity, the companion of content, is rather found in our own breasts than in the enjoyment of external things.”<sup>165</sup>

Although renowned for fighting against the British-allied Indian tribes in the American Revolution, Boone also followed Enlightenment writers by romanticizing Indians as more just. “[I]t was frequently remarked by him that while he could never with safety repose confidence in a Yankee,” an early biographer wrote, “he had never been deceived by an Indian.”<sup>166</sup> The biographer recalled Chief Brant in saying that Boone “should certainly prefer a state of nature to a state of civilization, if he was obliged to be confined to one or the other.”<sup>167</sup> This choice was informed in part by his experience with insolvency. Indeed, it may have been the prospect of debtor’s prison that prompted this famous frontiersman’s original decision to move west.<sup>168</sup>

A tale from Boone’s brief stint as “syndic” of Spanish-controlled Missouri contains some of the Revolutionary themes he invoked by assuming the white Indian persona. Between 1799 and 1804, he served as

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<sup>162</sup> *Id.* at 376.

<sup>163</sup> John James Audubon, *Delineations of American Scenery and Character* 61 (1926).

<sup>164</sup> Daniel Boone, *The Adventures of Col. Daniel Boon*, in John Filson, *The Discovery, Settlement and Present State of Kentucke* 49, 56 (Wilmington, James Adams 1784).

<sup>165</sup> *Id.* at 53.

<sup>166</sup> Continuation of the Life of Colonel Boon, in Daniel Boone, *Life and Adventures of Colonel Daniel Boon: The First White Settler of the State of Kentucky* 27, 33 (Brooklyn, C. Wilder 1823).

<sup>167</sup> *Id.*

<sup>168</sup> John Mack Faragher, *Daniel Boone: The Life and Legend of an American Pioneer* 88, 110 (1992).

a judge for petty criminal cases and property disputes. In one case that came before him, a “miserly fellow” sued to seize an indigent widow’s last cow to satisfy an unpaid debt.<sup>169</sup> Boone said to the miser, “The widow owes you, Tom Turley; yet you are a scoundrel to take her only cow to pay the debt. The law says you shall have it. Take it and go, but never look an honest man in the face again.”<sup>170</sup> The legend goes that the next day, Boone gave the widow one of his own cows as a replacement.<sup>171</sup>

The symbol of the white man in Indian dress also played into Andrew Jackson’s public image. Jackson first gained prominence as a representative to the Tennessee constitutional convention. A eulogist numbered him among frontiersmen whom he described as “sons of nature, . . . educated only by the spirit of freedom” who “longed to come together in organized society.”<sup>172</sup> Out of this desire, those “[d]wellers in the forest, freest of the free . . . came up by their representatives . . . through the forest, along the streams, by the buffalo traces, by the Indian paths, . . . to meet in convention.”<sup>173</sup> And “Andrew Jackson was there, the greatest man of them all.”<sup>174</sup>

Jackson campaigners made use of this image throughout his public career. It was common for Jackson supporters to vow that they would never leave him “whilst ‘woods grow and waters run,’” an “Indian” phrase suited to the character he played.<sup>175</sup> In lauding his virtues, admirers often compared him to his Indian adversaries. “The red braves of the wilderness confessed that in . . . their highest virtues, General Jackson equalled the most celebrated of their Chiefs.”<sup>176</sup> When he left office in 1837, his followers called him a man “straight as an Indian’s arrow,” who appealed to “the principles of the People,” not their “pockets.”<sup>177</sup> In keeping with the symbol’s Revolutionary heritage, Jackson’s Indian

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<sup>169</sup> John R. Musick, *Stories of Missouri* 55–57 (N.Y.C., Am. Book Co. 1897).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Mr. Bancroft’s Eulogy, *Ga. Telegraph & Republic*, July 15, 1845, at 2.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *The Elections in the West*, *The Age*, Sept. 19, 1832.

<sup>176</sup> *Funeral Obsequies in Philadelphia*, *The Sun*, June 28, 1845, at 1. Even his critics found the Indian imagery inescapable. One opponent described Jackson as the creation of political visionaries, “who so assiduously labored to disguise his Indian Warrior in the trappings of a civilized patriot, and invest him with the robes of a perfect statesmen, the grossness of the error common to all his supporters.” *On the Presidential Elections of 1824 and 1828*, *Easton Gazette*, Nov. 5, 1831, at 1.

<sup>177</sup> *Andrew Jackson*, *Patriot & Democrat*, Apr. 1, 1837, at 1.



mystique did not suffer as a result of his crimes against the Creek and the Cherokee.

To Jackson and his supporters, this white Indian costuming signaled a suite of constitutional commitments that rejected unfair and “unnatural” credit relationships. Jackson’s youthful experiences with insolvency fostered a life-long hatred of creditors’ instruments and his political agenda centered on his “oppos[ition] to the U. States Bank, nay all Banks.”<sup>178</sup> Banks, he charged, exercised a “corrupting influence” by encouraging people to get in over their heads to the benefit of the banking and creditor classes.<sup>179</sup> His bank veto message of 1832 accused bankers of oppressing the poor.<sup>180</sup> Laws benefitting the creditor class added “artificial distinctions” and “exclusive privileges” that would “make the rich richer and the potent more powerful,” to the detriment of “the humble members of society—the farmers, mechanics, and laborers.”<sup>181</sup> In another message to Congress, he inveighed against debtor’s prison. “The personal liberty of the citizen seems too sacred,” he said in that address, “to be held . . . at the will of a creditor to whom he is willing to surrender all the means he has of discharging his debt.”<sup>182</sup> As his followers triumphantly put it, Jackson’s Democracy was “a government of *men*, and not *property*.”<sup>183</sup>

The longevity and consistency of the symbol of the white Indian, its enduring usefulness as a bearer of Revolutionary values, is simply astonishing. Henry David Thoreau relied on it as late as the 1850s. In

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<sup>178</sup> Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 361 (2006) (quoting Letter from Andrew Jackson to James K. Polk (Dec. 23, 1833), in 5 *Correspondence of Andrew Jackson, 1833–1838*, at 235, 236 (John Spencer Bassett ed., 1931)).

<sup>179</sup> *Id.* at 361. This emphasizes the aspect of Jackson’s position most relevant to this Article, but it should not be taken as a summary of his objections to the Bank of the United States. Jackson’s war against Biddle’s bank was personal, political, and based on constitutional objections born of the bank’s interference with presidential elections. It also involved the clash of two incompatible visions for the economic future of the United States. For a neat overview, see *id.* at 360–74.

<sup>180</sup> Andrew Jackson, Veto Message (July 10, 1832), in 3 *A Compilation of the Messages and Papers of the Presidents* 1139, 1153 (James D. Richardson ed., New York, Bureau of Nat’l Literature 1897), reprinted in Wilentz, *supra* note 178, at 370.

<sup>181</sup> *Id.*

<sup>182</sup> President’s Message, *Eastern Argus*, Dec. 13, 1831, at 2.

<sup>183</sup> *The Sixtieth Anniversary of American Independence*, *Eastern Argus*, July 12, 1836, at 1. Jackson’s critic, Davy Crockett, also benefitted from the frontiersman’s trope. His politics were concerned more with home rule and squatter’s rights than debtor freedom, however. See David Crockett, *A Narrative of the Life of David Crockett* 133–35 (Philadelphia, E.L. Carey & A. Hart 1834).

*Walden*, he decried Americans' desire for luxuries, the dominion of creditors, the misappropriation of the property honest labor should earn, and the moral burden of insolvency. "I have no doubt," Thoreau told his reader, "that some of you who read this book are unable to pay . . . for the coats and shoes which are fast wearing or are already worn out, and have come to this page to spend borrowed or stolen time, robbing your creditors of an hour."<sup>184</sup> Because of credit relationships, "[i]t is very evident what mean and sneaking lives many of you live . . . always on the limits, trying to get into business and trying to get out of debt . . . still living, and dying, and buried by this other's brass; always promising to pay, promising to pay, tomorrow, and dying today, insolvent; seeking to curry favor."<sup>185</sup> This "quiet desperation," he said, is born of the chase after "the so called comforts of life," which are "not only not indispensable, but positive hinderances to the elevation of mankind."<sup>186</sup>

Like proponents of non-importation, Thoreau found a central symbol of the degradation of civilized man in his costume. "[T]here is greater anxiety, commonly, to have fashionable . . . clothes, than to have a sound conscience," and "[i]t would be easier for [an American] to hobble to town with a broken leg than with a broken pantaloons."<sup>187</sup> Similarly, "our houses are such unwieldy property that we are often imprisoned rather than housed in them."<sup>188</sup> But, he asked, "[I]f the civilized man's pursuits are no worthier than the savage's, if he is employed the greater part of his life in obtaining gross necessities and comforts merely, why should he have a better dwelling than the former?"<sup>189</sup> After identifying the main ailments of American culture, *Walden's* central prescription is the exchange of a house for a "wigwam."<sup>190</sup> To achieve moral independence, to free himself from the injustice of unequal credit relationships, Thoreau advised, the white man must purge himself of European luxury and put on the trappings of Indian life.

The symbol's use and reuse in nineteenth-century American culture is undeniable. As we have seen, it became a fixture in politics, literature, and in the rhetorical toolkit of anyone arguing about economic justice in

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<sup>184</sup> Henry David Thoreau, *Walden and Civil Disobedience: Complete Texts with Introduction* 41–42 (Paul Lauter ed., 2000).

<sup>185</sup> *Id.* at 42.

<sup>186</sup> *Id.* at 43, 47.

<sup>187</sup> *Id.* at 53.

<sup>188</sup> *Id.* at 61.

<sup>189</sup> *Id.* at 62 (emphasis omitted).

<sup>190</sup> *Id.* at 59.

the public sphere. But it also survived because it remained a potent tool of political engagement. Men continued to put on Indian dress and participate in mob actions to defend their constitutional rights generations after Independence.

In 1808 and 1809, a town in what is now central Maine experienced a civil war. The “Malta War,” as residents remembered it, was a conflict over land titles that turned into an armed insurrection.<sup>191</sup> Farmers squatting on land owned by the absentee Plymouth Company began to clear parcels of timber, resulting in confrontations, court cases, and eviction notices. When sheriffs presented the squatters with writs enforcing the Plymouth Company’s rights, those who resisted were jailed. This led to further escalation. In March 1808, local papers reported that “Indians, otherwise [known as] squatters, were coming down in great force . . . to liberate the prisoners, to seize and destroy the gaoler’s papers, together with the records of the court, and set fire to the court-house and gaol.”<sup>192</sup> In 1809, a Maine citizen wrote that again, “[t]he inhabitants of this town for about a week past have been kept in a continual state of requisition and alarm, by bodies of armed men skulking in the neighboring woods, disguised as Indians, and threatening to liberate the prisoners in our goal.”<sup>193</sup> This “body of between 5 or 600 men, in Indian guise, called squatters,” said another report, was “determined to rescue” their jailed confederates “or perish in the attempt.”<sup>194</sup> Over the course of these confrontations, the protesters murdered the man the Plymouth company had employed to make a land survey and damaged the local jail.<sup>195</sup>

The disguises were elaborate. These costumes, said one witness, “were decorated with the most uncouth images imaginable. The masks were some of bearskin, some sheepskin, some stuck over with hog’s bristles &c. . . . The frantic imagination of a lunatic in the depth of desperation could not conceive of more horrid or ghastly spectres.”<sup>196</sup> The father of a

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<sup>191</sup> Varney, *supra* note 142, at 477–78.

<sup>192</sup> Maine, Augusta, March 18, *New-Bedford Mercury*, Apr. 8, 1808, at 4.

<sup>193</sup> Insurrection, *Merrimack Intelligencer*, Oct. 14, 1809, at 3.

<sup>194</sup> Extract of a Letter from a Gentleman in Hallowell, to his Friend in Portland, Dated Oct. 5, 1809, *Pa. Herald & Easton Intelligencer*, Oct. 25, 1809, at 2.

<sup>195</sup> See *More of the Squatters*, *Portland Gazette, & Me. Advertiser*, Oct. 23, 1809, at 3 (reporting that men in Indian dress had shot a land surveyor); *New-Bedford Mercury*, *supra* note 192 (“Indians . . . set fire to the court-house and gaol.”).

<sup>196</sup> Letter from Pitt Dillingham to Arthur Lithgow, Jan. 30, 1808, *quoted in* Taylor, *supra* note 15, at 94.

Maine sheriff reported a personal encounter with the “squatters” when they came to his house at midnight intending to destroy writs of execution:

[S]ome body knocked at the kitchen door . . . on opening the door, four persons rushed into the room, in Indian garb. One of them presented a musket at my breast. I inquired to know the cause of all this—They demanded my papers—(I imagined they mistook me for my son).<sup>197</sup>

When a member of the household tried to light a candle, the intruders protested with “Indians no have light!”<sup>198</sup> When another tried to light the hearth, the intruders prevented him too, saying “Indians have no fire.”<sup>199</sup> The patriarch told them that he didn’t have the papers and that his son was out for the evening.<sup>200</sup> The “Indians” accordingly changed their demand, and then wanted the “Plan” (perhaps the surveyor’s map of the disputed territory), threatening that “‘Indian do much damage—Indian burn um house—Indian burn um barn,’ &c.”<sup>201</sup> Their costume was both visual and oral. Alan Taylor, who wrote an article about this episode, found that some of the protesters actually “affected a guttural, broken English . . . enhanced by placing a wood chip in [their] mouth[s].”<sup>202</sup>

But these men did not need spoken English to explain themselves. When they turned up in the home of the local sheriff, their costumes communicated their views. The white Indians in this Maine rebellion had been recruited through an advertisement calling on settlers to “aquipp thimselves with a Capp and blanket and a gun and tommahawk” and join the “indians” in the effort to secure their “right and privlidges and libertys.”<sup>203</sup> The notice contained, in its unpunctuated, 570-word sentence, nearly a complete list of the grievances the Indian costume had come to represent.

It was a rare written exegesis of the white Indian position. In a “for us or against us” manifesto, the broadside warned settlers that anyone who didn’t join in would reveal himself as an “English subject[,]” “friend to poopery,” and “supportr of the devil and a brother to rogues.”<sup>204</sup> It called

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<sup>197</sup> Alarm!, *Portland Gazette & Me. Advertiser*, Dec. 19, 1808, at 3.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Taylor, *supra* note 15, at 94.

<sup>203</sup> *Id.* at 102.

<sup>204</sup> *Id.*

on settlers to protest the Plymouth Company and its agents, explaining that the company was “trying to git away all that” the settlers “have got and to turn them out of house and home by a pollitick Craft of roguery.”<sup>205</sup> Specific grievances included that the owners of the Plymouth Company “pick up all the land and Call it theirs.”<sup>206</sup> After “people settles on the land as they are Cultivators of soil and Dont git their living by making monney nor Drawing sallaries nor fees” these evildoers then “Come and Demand pay for the land [at] a price of their own and so gits all their monney back into their own hands again.”<sup>207</sup> The result was that when taxes were levied, and when “all the debts of the Community that coms by trading must be paid and their must be monney[,]” the settlers suffered because there was no hard currency in circulation—“their is none in the COUNTRY.”<sup>208</sup> Lawyers and courts only made matters worse:

[T]hen Comes law Charges and fees and and the honest Debt together in an execution and Vendues and demands monney and for want of it they take all a man has and give it to another for a third part of its Value and so robs him and turns him out of house and home for he gits no title to the land only a quit Claim or a teen year leas.<sup>209</sup>

Here we have in one breath the debtors and squatters’ lament, a rallying cry to join in “Defenc of Justice,” rehearsing arguments about economic fairness that predated the Revolution.<sup>210</sup>

The symbol of Indian dress and the constitutional claims it represented remained fully legible to the Revolutionaries’ grandchildren and great-grandchildren. The symbol reappeared, replete with all of its traditional meanings, in the Anti-Rent protests of the 1840s. The Anti-Rent War was a tenant’s revolt that took place on one of the only feudal land holdings in the United States.<sup>211</sup> Threatened with eviction because they refused pay their rent, Anti-Renters gathered at sheriffs’ vendue sales in Indian dress to intimidate potential buyers. They threatened officers and surveyors and attacked emissaries of the patroons and the governor. One official recounted that

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 103.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 102.

<sup>211</sup> McCurdy, *supra* note 145, at xiii.

[t]he Indians are called out whenever it is understood that any proprietor of lands has come into the county. . . . A hundred absurd reports about landlords, sheriffs, &c, are constantly sent through the country to fan the excitement. Tarring and feathering and other kindred outrages, are frequently committed.”<sup>212</sup>

When a sheriff went to finalize the sale of a foreclosed property, said another reporter,

[The sheriff] was met by a body of Indians before he reached the place, escorted to the place of sale, and there, under a threat of personal violence, gave up all his papers, and they were burned in his presence. The sheriff reports that there were on the ground over 200 men in Indian dress, and 1500 citizen spectators, called there by the novelty of the occasion. When the papers were burned the whole assemblage gave three cheers, and the sheriff left the ground without any adjournment of sale . . . .<sup>213</sup>

Again, Indian dress became a powerful performative counterpoint. The patroon’s leases, tying farmers to the land and imposing a duty of fealty to the lessor, were antithetical to the values of 1776. By dressing as Indians, the tenants asserted that they weren’t just protesting their own leases, they also were defending a broader set of authentic American ideals.

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<sup>212</sup> Important from the Insurrectionary Counties, *Wkly. Herald*, Dec. 21, 1844, at 402.

<sup>213</sup> *Id.*

**Figure 4: Disguises of the Anti-Renters<sup>214</sup>**

It may seem bizarre to find this eighteenth-century style of political engagement, the mobbing of “groups who could find no alternative institutional expression for their demands and grievances, which were more often than not political,” enduring into the 1840s.<sup>215</sup> We are used to celebrating, along with the Founders, the creation of a rational, participatory government in which law is based on the consent of the governed. The white Indian tradition is, by contrast, a carnivalesque spectacle, involving ritualistic demonstrations of the people’s raw physical power, and it seems a relic of a legal regime characterized by hierarchy and inherited position. Its continued usefulness suggests that many Americans—even white, male Americans—did not experience the transition from status to contract, from hierarchy to equality, from the politics of deference to the politics of reasoned persuasion. If, indeed, this is part of the explanation, the symbol’s late appearance in the context of the feudal estates of upstate New York makes perfect sense.

<sup>214</sup> *Disguises of the Anti-Renters (1845)*, in *Delaware County, New York: History of the Century, 1797–1897*, at 249 (David Murray ed., Delhi, William Clark Publisher 1898). The costumes of these white Indians incorporate feathers, sticking out of their masks here and there. Their aesthetic also reaches back in time, to the costumes of the medieval carnival, as well as forward in time to the costuming of the Ku Klux Klan.

<sup>215</sup> Wood, *supra* note 28, at 320.

## CONCLUSION

The white Indian offers some insights about American constitutionalism, about the relationship between the unwritten constitution and the written, and about methods for future investigation in legal scholarship.

First, on constitutionalism. This Article necessarily provokes more questions than it resolves, but one thing is clear: the unwritten constitution of British North America endured, strengthened and enriched by the Revolution, to affect how American citizens interacted with their government and with each other for at least fifty years after the Founding. The endurance of unwritten constitutionalism, of British-style legal thinking, should not come as a surprise. While we are accustomed to thinking of 1787 as a hard break, that is an unreasonable and unhistorical expectation. The ancient does not become the modern overnight. Human beings reared in one culture tend not to experience “hard breaks” from that culture and willy-nilly adopt a completely different one. The shift to the kind of positivist constitutional culture we are familiar with today required generational change.

It is equally clear that this unwritten constitutionalism interacted with what we think of as positive law. Andrew Jackson’s embodiment of the white Indian’s interconnected constitutional ideas could hardly be more complete. His political commitments included his sympathy for the honest debtor, suspicion of entrenched credit relationships, his endorsement of the 1830 Preemption Act and successive legislation protecting squatter’s rights, and, of course, his commitment to white supremacy—in particular, the white American’s destiny as the Indian’s replacement. It may seem that Jackson’s orientation toward the Cherokee, for example, was lawless. But my research suggests another view: that Americans of the nineteenth century were able to keep an alternative vision of fundamental law alive, a constitutionalism so potent that it was able to reenter positive law through the electoral process. Jackson’s presidency represents, therefore, not so much a lawlessness, as the unwritten constitution reentering the weave of positive law. This thought is just a start, but there is more work to be done on the interaction between written and unwritten fundamental law during this period.

There is also much more to say about the import of this symbol to the intellectual history of race in America. In the white Indian, we see just how fraught the relationship has been between the American ideal of freedom, actual freedom, and race. In the 1850s, Congress commissioned



a sculpture finial for the Capitol dome.<sup>216</sup> There was a back and forth about which symbol to use: “We have too many Washingtons, we have America in the center of your Senate pediment. Victories and Liberties are rather pagan emblems. Liberty I fear is the best we can get,” said the superintendent of construction.<sup>217</sup> When the Rome-based American sculptor chosen for the job sent over his initial design for approval, it had predictable elements: Liberty would be a monumental female figure with a classical European face, in the style of a Marianne, robed, bearing the symbols of the Republic, and crowned with a liberty cap surrounded by stars. It was Jefferson Davis, then Secretary of War and later President of the Confederacy, who quibbled with this first design. The Phrygian cap, or liberty cap, had been called into use as a visual shorthand for republican freedom during the French Revolution. It stood for freedom because it recalled the caps worn by emancipated slaves in ancient Rome. This history, Davis believed, “renders it inappropriate to a people who were born free and would not be enslaved.”<sup>218</sup> The sculptor’s amended design put the Liberty statue into a crested version of a Roman helmet, “the crest [of] which is composed of an Eagles head and a bold arrangement of feathers suggested by the costume of our Indian tribes.”<sup>219</sup> Davis accepted this version. It is worth pausing over this, that the Capitol building’s most overt symbolic feature still reflects the aesthetic and philosophical views of *Jefferson Davis* on the question of how to depict American freedom—the views of a man who would dedicate his life to the perpetuation of southern slavery. His judgement, and the one still reflected there, is that Europe’s Marianne could become a distinctively American symbol of freedom by putting on Indian costume.

But wait, there’s more: when the full-size plaster model arrived from Rome, it had to be taken apart and cast into bronze. An enslaved black man, Philip Reid, was critical to this work, solving the engineering problem of how to dismantle the model without cracking it, and then toiling seven days a week to keep the fires burning in the local foundry so that the bronze version could be completed. An exhibit at the National Archives memorializes Philip Reid’s contribution, which is worthwhile

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<sup>216</sup> Vivien Green Fryd, Political Compromise in Public Art: Thomas Crawford’s Statue of Freedom, *in* *Critical Issues in Public Art: Content, Context, and Controversy* 105, 105 (Harriet F. Senie & Sally Webster eds., 1992).

<sup>217</sup> *Id.* at 106.

<sup>218</sup> *Id.* at 108.

<sup>219</sup> *Id.*

simply to add non-white efforts and presence into the nationalistic narrative officially presented and preserved there.<sup>220</sup> But the exhibits do not seem to have fully digested what that contribution means: the work of a slave on a monument to freedom, which is presented as a white ideal dressed up in the costume of an Indian ideal. There is plenty of scope for more writing and more thought on these issues.

Finally, a word on methodology. Maybe it isn't surprising that the white Indian has attracted so little scholarly attention. It is such a peculiar phenomenon that anyone encountering a single instance might be tempted to shrug it off as an isolated incident. But an American of the nineteenth century would have recognized the symbol as shorthand for a suite of legal claims with roots in the eighteenth century and earlier. I can't help but think that, given the amount of attention we lavish on the late-eighteenth and early-nineteenth century, a symbol with such a clear and consistent legal meaning should have come to light before. The reason we have not noticed the white Indian is that legal scholars rarely attend to this kind of evidence. We should. What looks at first like a dusty item for the curio cabinet turns out to provide a missing link, a key to how Americans believed their society was constituted, how they thought about justice, and how they understood the obligations the Revolution laid upon its inheritors.

Attention to cultural trends, to behavior, to performances in public spaces, to the life an idea may have in literature and other art, requires a kind of historical investigation legal scholarship rarely attempts. That's a deficit that we should address. The problem with the way legal scholars typically plunder the historical record is not only that the methodology amounts to "looking over a crowd and picking out your friends."<sup>221</sup> To restrict one's focus to official texts, the published letters of great men, legal opinions, and the like, is to approach the legal world of the past as though it necessarily shares an anatomy with ours. The premise of such investigations is that the differences between now and then are superficial—a matter of word choice. But the past, even our own, is a foreign country.<sup>222</sup> It is unfortunate that the Founders spoke English,

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<sup>220</sup> Author visit to National Archives, Aug. 2019.

<sup>221</sup> Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *Iowa L. Rev.* 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague [Judge] Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

<sup>222</sup> See L.P. Hartley, *The Go-Between* 9 (1953).

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because it tempts us to believe we share a language with them. We do not. Comprehending their words requires immersion. It is impossible otherwise to appreciate the immensity of our more than two centuries, or to grasp how dramatically our legal culture and institutions have transformed.