

BOOK REVIEW

WHO WERE THE REAL FOUNDERS?

Federal Ground: Governing Property and Violence in the First U.S. Territories

By Gregory Ablavsky. New York: Oxford University Press, 2021.
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Gregory Ablavsky's Federal Ground explains how the national government and American law were transformed in the federal territories that compose modern Ohio and Tennessee. Ablavsky's careful research and fresh perspective will make his work a vital reference for historians, but this Book Review also highlights the book's significance for legal academics and lawyers. Ablavsky has collected extraordinary evidence about property pluralism, intercultural violence, and disputed forms of statehood, all of which show that the United States' legal system was founded in the Northwest and Southwest Territories, not simply in urban centers like Philadelphia and New York. Federal Ground's analysis of the Early Republic has strong implications for modern legal debates. Conflicts over federal title in the territories show that property law can be used to support governmental sovereignty just as much as the other way around. Ablavsky's research also affects modern disputes about administrative government: Administrative structures in the federal territories were vitally important, widely publicized, and constitutionally undisputed during the Early Republic. Additionally, this detailed history of territorial government highlights tensions in modern originalism, especially with respect to constitutional statehood and federalism. Most important, Ablavsky's analysis of federal territories emphasizes the strength and influence of Native people during a crucial period of American legal history. Statehood, territorial government, and national creation all occurred in historical landscapes that were occupied by Native owners and residents. If modern lawyers and academics forget those historical dynamics, they will misperceive the origins of American law and ignore continuing responsibilities to respect and support Native people today.

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INTRODUCTION

Gregory Ablavsky’s *Federal Ground* seeks to change how American lawyers think about the Founding Era, as almost everything that is central for ordinary histories has been pushed aside.¹ Ablavsky does not mention the Constitutional Convention or the Federalist Papers, nor does he discuss Lockean liberty or Montesquieu’s separated powers.² The focus is intercultural conflict with Native people and frontier governments, which determined where “American country” was located and who would thrive in that

1. Gregory Ablavsky, *Federal Ground: Governing Property and Violence in the First U.S. Territories* (2021). More conventional sources that are familiar to legal readers include Akhil Reed Amar, *America’s Constitution: A Biography* (2005); Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* (2016); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996); Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1969); Gordon S. Wood, *The Radicalism of the American Revolution* (1993); see also Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (2018).

2. Authors that emphasize ideological pamphlets and political philosophers include Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); Alison L. LaCroix, *The Ideological Origins of American Federalism* (2010); Donald S. Lutz, *The Origins of American Constitutionalism* (1988). Ablavsky cites John Locke only once, referring to his ideas about occupying and improving land. See Ablavsky, *supra* note 1, at 40 (“Though few on the late eighteenth-century frontier had read John Locke, they unwittingly echoed him when they described the West as ‘almost a State of Nature,’ with land free for the taking.”).

kind of place.³ Ablavsky's *Founders* were not obsessed with political theory, and most of them did not live in capital cities.⁴ The book explores American law from the outside in, and its results challenge assumptions about the United States' original structure.⁵

This Book Review uses Ablavsky's research as a chance to raise normative questions during a moment when law schools—and America itself—are reconsidering people and histories that have been marginalized for too long. In dialogue with worldwide protests, activists and scholars of color have demanded racial justice for African Americans,⁶ and law schools have responded with programming, scholarship, and institutional reforms.⁷ Those phenomena have required and also produced significant

3. The term "American country" is mine, indicating a deliberate contrast with the commonly used legal phrase "Indian country." See, e.g., 18 U.S.C. § 1151 (2018) (defining "Indian country"); Ablavsky, *supra* note 1, at 5 (referencing "Indian country"); cf. *id.* at 1 (describing "two newly established jurisdictions in the so-called western country"). The use of terms like "Native," "Native American," "Indian," and "Indigenous" is inevitably complicated by historical and current conditions that surround racial hierarchy and colonial empire. See Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America*, at xii–xiii (2012) ("Terminology is always a rascal."); David E. Wilkins & Heidi Kiiwetinepinesik Stark, *American Indian Politics and the American Political System*, at xvi (4th ed. 2018). This Book Review uses "Native people" and "Native American" interchangeably, despite the terms' imperfections, to promote accessibility for a legal readership.

4. Ablavsky, *supra* note 1, at 4 ("[I]n both personnel and authority, the early federal government was most present not in state capitals but in the liminal spaces around the nation's ragged edges, where states' authority was thin and where the supposed territory of the United States butted up against the jurisdictions of other sovereigns."); *id.* at 211 (noting that, even when leading businessmen in Tennessee invoked the high rhetoric of sovereignty, they often "sought to benefit themselves, not Tennessee").

5. Other scholars have taken a similar approach, with appreciably less emphasis on legal materials. See, e.g., Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion 24–25* (2017); Bethel Saler, *The Settlers' Empire: Colonialism and State Formation in America's Old Northwest 1* (2014).

6. See Alexandra Filindra, *Who Are We? How Did We Get Here? And Where Are We Going? New Questions, New Concepts, New Ideas and the Role of Ascriptive Categories in Political Life: A Special Edited Collection of Essays*, 6 *J. Race, Ethnicity & Pol.* 1, 1–2 (2021) ("In response to yet more brazen police shootings of Black people, a multiracial movement led by Black Lives Matter activists took to the streets to demand racial justice, economic fairness, equality, and an end to all forms of state violence."); Oluwakemi Aladesuyi, *How Black Lives Matter Went Global*, by Co-Founder Patrisse Cullors, *Fin. Times* (Dec. 4, 2020), <https://www.ft.com/content/c6eac3c7-3f38-49be-9caa-f3aa1248184a> (on file with the *Columbia Law Review*) ("The fight for racial justice, as embodied by BLM, compelled communities to take to the streets en masse this year.").

7. See, e.g., Blair Chavis, Kevin Davis & Liane Jackson, *Moment or Movement? Lawyers Involved in Civil Rights Battles Reflect on Recent Demands for Racial Justice*, *A.B.A. J.*, Oct.–Nov. 2020, at 34; Max Marbut, *Florida Coastal School of Law Joins State Consortium*, *Jacksonville Daily Rec.* (July 1, 2020), <https://www.jaxdailyrecord.com/article/florida-coastal-school-of-law-joins-state-consortium> [<https://perma.cc/484Z-2J52>] (describing an interstate entity promoting racial justice); Karen Sloan, *Law Schools Unite With ABA to Take on Racist Policing*, *Law.com* (Oct. 14, 2020), <https://www.law.com/2020/10/14/law->

changes in perceptions of American history, as modern institutions and practices have been reconnected with exclusion and violence from the past.⁸

Most law schools have not paid comparable attention to issues concerning Native people,⁹ but books like *Federal Ground* reinforce calls for systemic change by describing the historical preconditions of modern American law. Descriptions of history always have implications for the present, legitimating some actors and outcomes while diminishing others.¹⁰ Ablavsky's account of the past—emphasizing Native people and their rivals—generates an opportunity for readers to rethink current conditions and, perhaps, to imagine a better future.¹¹ This is the kind of scholarship that a broad legal audience needs to read, and it charts a path for other writers to follow.

This Review has three parts. Part I describes Ablavsky's work, which involves scholarship and primary materials that will be unfamiliar to many legal readers. Ablavsky identifies a chaotic mix of “property pluralism” and

schools-unite-with-aba-to-take-on-racist-policing/ (on file with the *Columbia Law Review*) (describing a collaborative initiative between law schools and the American Bar Association to improve police practices).

8. Cf. Sarah Ellison, *How the 1619 Project Took Over 2020*, Wash. Post (Oct. 13, 2020), https://www.washingtonpost.com/lifestyle/style/1619-project-took-over-2020-inside-story/2020/10/13/af537092-00df-11eb-897d-3a6201d6643f_story.html (on file with the *Columbia Law Review*). As David Scott has argued, “[M]orally and politically what ought to be at stake in historical inquiry is a critical appraisal of the present itself, not the mere reconstruction of the past.” David Scott, *Conscripts of Modernity: The Tragedy of Colonial Enlightenment* 41 (2004).

9. See, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1794 (2019) [hereinafter Blackhawk, *Paradigm*] (“To the extent that federal Indian law is discussed at all within public law, the field is often marginalized into a ‘tiny backwater.’” (quoting Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 383 (1993))); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 Calif. L. Rev. 1751, 1753 (2017) (“[T]he law of American colonialism is not part of the constitutional canon taught to first-year law students or discussed by constitutional scholars.”); K-Sue Park, *This Land Is Not Our Land*, 87 U. Chi. L. Rev. 1977, 1982 (2020) (“The challenge of building productive dialogue on [our past] continues to plague . . . the legal community.”); Angela R. Riley, *Native Nations and the Constitution: An Inquiry Into “Extra-Constitutionality”*, 130 Harv. L. Rev. Forum 173, 173 (2017) (“American Indians are—metaphorically and literally—outside the standard frame of American law.”).

10. See Jill Lepore, *This America: The Case for the Nation* 15 (2019) (“Nations are made up of people but held together by history, like . . . bricks and mortar.”); Robert W. Gordon, *Taming the Past: Essays on Law in History and History in Law* 7 (2017) (“Almost every important political or legal controversy brings forth arguments for preserving or recovering—or discarding or revising—something in the past . . .”).

11. See Frederick E. Hoxie, *This Indian Country: American Indian Activists and the Place They Made* 13 (2012) (“The American habit of disregarding living Indians is not founded in ignorance or prejudice; it is the product of history—of decisions made at the time of the nation’s founding, then etched into policy and absorbed into popular belief.”); *id.* at 401 (suggesting that historical study can also “open[] a doorway to the discovery of a new place: this Indian country”).

intercultural violence along the American frontier, which in turn affected the emergence of constitutional statehood. Part II describes implications for three areas of mainstream legal discourse: property, administrative law, and constitutional originalism. Each of those modern topics is transformed and developed by Ablavsky's history of territorial government. Part III explains how scholarship like *Federal Ground* can influence national legal communities that exist at the intersection of doctrine, scholarship, and education. Legal history always affects the present, and Ablavsky's choice to emphasize Native experiences represents a timely and important contribution to legal culture writ large.

I. THE CENTER MIGHT NOT HOLD, YET STILL IT GRASPS¹²

Federal Ground studies the Southwest Territory that became Tennessee and parts of the Northwest Territory that became Ohio. The book is organized around three concepts—property, violence, and statehood—but its main goal is to analyze the federal government's development. Ablavsky begins with statutes that mischaracterized western lands as a “blank canvas on which to plot the future.”¹³ In practice, however, the government's task was to manage conflicts among a range of Native and Euro-American residents who lived and died with social dynamics that were mostly unmapped.¹⁴

Ablavsky uses the term “adjudicatory state” to describe a wide range of governmental actions that attracted legal claimants and displaced local forms of justice, even though most of those decisions concerning rights claims were produced outside the courts.¹⁵ He concludes that “in attempting to transform the early American West, the federal government was itself

12. This subtitle refers to a Yeats poem published after the horrors of World War I, amid violence in Ireland, and during a flu pandemic that infected the author's pregnant wife. See William Butler Yeats, *The Second Coming*, in 1 *The Collected Works of W.B. Yeats: The Poems 189, 189–90* (Richard J. Finneran ed., Scribner 2d ed. 1997) (“Things fall apart; the centre cannot hold.”). Such layers of destruction might have seemed familiar to some Native people during the late 1700s. See Susan Sleeper-Smith, *Indigenous Prosperity and American Conquest: Indian Women of the Ohio River Valley, 1690–1792*, at 11 (2018) (discussing the destruction of Native American village life in the 1780s and 1790s). The subtitle's use of the verb “grasps” implies that the United States government was not always a stabilizing “center” that might “hold.” In Yeats's terminology, it was also a “rough beast, its hour come round at last, [that] slouches toward Bethlehem to be born.” Yeats, *supra*, at 189–90.

13. Ablavsky, *supra* note 1, at 1.

14. See *id.* at 1–3 (“Because the territories' existing residents refused to be ignored, federal officials would . . . have to grapple with them and their claims.”); *id.* at 34 (noting that state officials “knew virtually nothing of the vast territory they claimed to own, and the [land claim] entries they made in the state land office reflected this ignorance”).

15. *Id.* at 12 (“Federal law and adjudication did come to play an outsized role in the early territories, albeit more through federal officials' ersatz resolution schemes than in courts.”). One territorial governor described the situation with undue optimism: “There is perhaps nothing that contributes more to induce an affectionate Submission to any power,” Arthur St. Clair opined, “than the habit of looking up to that power as the depository and dispenser of Justice in the last resort.” *Id.* (internal quotation marks omitted) (quoting

remade.”¹⁶ Before addressing modern implications, this Part describes three major elements of Ablavsky’s story: (1) property pluralism, which affected the creation of federal title; (2) sovereignty pluralism, which produced overlapping waves of violence; and (3) statehood, which was expected to resolve territorial disputes.

A. *Property Pluralism*

Ablavsky describes federal territories as a realm of “property pluralism” that was “cobbled together” in a “patchwork” or “crazy quilt” of “jurisdictional chaos.”¹⁷ In practical terms, social groups interacted without agreeing about who owned land, or even about who should resolve property disputes. These were not clichéd conflicts between “formal” Euro-American law and “informal” Native law.¹⁸ Every cultural group relied on different kinds of law over time, which produced fine-grained controversies over which particular

Letter from Arthur St. Clair, Governor, to Edmund Randolph, Sec’y of State (Dec. 15, 1794), *in* 2 *The Territorial Papers of the United States: The Territory Northwest of the River Ohio, 1787–1803*, at 499, 499–500 (Clarence Edwin Carter ed., 1934). Ablavsky describes a diverse group of administrative and statutory mechanisms concerning territorial residents’ rights claims as producing “a sense of the state” among various territorial stakeholders, which let “the federal government set the terms and language of the debate, even when it could not prescribe the result.” *Id.* at 13.

16. *Id.* at 2; cf. *id.* at 6 (“[I]n governing the Northwest and Southwest Territories, the federal government was plotting its, and the nation’s, future.”); *id.* at 3 (“As a result, a government distrusted by the people exploiting it, and rarely able to control events or dictate outcomes, slowly transformed a continent.”). For a recent summary of scholarship about early American government, see Gautham Rao, *The New Historiography of the Early Federal Government: Institutions, Contexts, and the Imperial State*, 77 *Wm. & Mary Q.* 97, 99–102 (2020).

17. Ablavsky, *supra* note 1, at 3, 14, 19–20. Ablavsky’s ideas about pluralism—and also my own—are profoundly influenced by Hendrik Hartog. See generally Hendrik Hartog, *Pigs and Positivism*, 1985 *Wis. L. Rev.* 899, 935 (“[Viewing a case as a conflict between contending normative orders] depends on a recognition of the implicit pluralism of American law—its implicit acceptance of customs founded on multiple sources of legal authority.”). Ablavsky references Hartog in various instances. See, e.g., Ablavsky, *supra* note 1, at 256 n.29, 267 n.79. For further discussion of the porous boundaries among different sources of law in legally pluralistic societies, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*, at 7–12 (2002).

18. Ablavsky, *supra* note 1, at 20–21. The line between formal and informal law has often been used to diminish Indigenous authority. See Allan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* 1–4, 13 (2018) (“European and Native American approaches to property diverged in one important respect: the former tried to reduce property to a set of formal rules, ‘the law,’ while the latter, on the whole, did not.”); Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory*, at xiii (2007) (“Proving property rights for indigenous people has been tough. It still is: indigenous people worldwide, especially hunting and gathering peoples, . . . have tremendous difficulty winning land claims cases.”); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* 6 (1990).

examples of formal or informal law should be authoritative in specific contexts.¹⁹ By modern standards, territorial law was a mess.

Very different sources of property law were mixed together. Native land claims—frequently purchased by Euro-American investors or occupants—were originally based on custom, occupancy, use, and improvement, though they also found support in formal agreements.²⁰ *Habitants* were leftover residents of the old colony New France, and they claimed land under a combination of French, federal, and international law.²¹ State title holders cited cession agreements and federal statutes.²² Other Euro-Americans bought property from land companies.²³ Veterans were rewarded for military service, and “squatters” used unauthorized occupancy to delay or displace other instruments of legal power.²⁴

Conflicts over pluralistic property long predated the United States, but Ablavsky’s story starts with the Constitution’s ratification.²⁵ The federal government was a new actor that used complex legal mechanisms to regulate longtime Native residents, along with Euro-American migrants who are sometimes called “settlers.”²⁶ Federal treaties, land companies, and

19. See Ablavsky, *supra* note 1, at 21 (“[T]he key question was not whether Native peoples ‘owned’ land in some abstract sense, but which rights of ownership Anglo-American law would recognize.”).

20. *Id.* at 21 (“[M]ost claimants, even Native nations invoking immemorial title or would-be settlers citing improvement or occupancy, could point to some piece of government-sanctioned paper—a grant, deed, warrant, or treaty—that purported to give them ownership.”).

21. *Id.* at 91–93.

22. *Id.* at 47.

23. *Id.* at 51–79.

24. See *id.* at 20–21, 40, 99.

25. See *id.* at 7 (describing relevant areas in North America as “[l]ong the graveyard of empires,” in which “would-be sovereigns [like] France, Britain, Spain, Virginia, [and] North Carolina . . . come and go, constantly redrawing boundaries of jurisdiction and property”). For other timelines and landscapes, see Saliha Belmessous, Introduction: The Problem of Indigenous Claim Making in Colonial History, *in* *Native Claims: Indigenous Law Against Empire, 1500–1920*, at 3, 3 (Saliha Belmessous ed., 2012) (“[I]ndigenous peoples made claims to territory and forced Europeans to make rival claims, from the moment European expansion commenced in the fifteenth century through to the final great expansion of the nineteenth century.”); Juliana Barr, Geographies of Power: Mapping Indian Borders in the “Borderlands” of the Early Southwest, 68 *Wm. & Mary Q.* 5, 43 (2011) (“Who had the power to draw borders in early America? Indians. Throughout the eighteenth century, provincial and viceregal Spanish officials’ territorial visions came smack up against the bounded landscape of native Texas.”).

26. For a powerful critique of using the word “settlers” for Euro-American migrants, see James H. Merrell, Second Thoughts on Colonial Historians and American Indians, 69 *Wm. & Mary Q.* 451, 473–76 (2012) (“[E]ven when a region did become, to [Euro-American] newcomers, satisfactorily settled, what happened to it was profoundly destructive—in a word, unsettling—not just to Natives but to the land itself.”). For a modern example of terribly distortive political labels, see David McCullough, *The Pioneers: The Heroic Story of the Settlers Who Brought the American Ideal West* (2019).

particularized statutes added overlapping layers of regulation and complexity to land disputes, but none of them alone was enough to resolve pluralist disputes.

1. *United States Treaties*. — Federal treaties were the most self-consciously direct legal tool for transcending private interests and achieving public goals, but this most straightforward mechanism for creating “federal ground” did not yield clear or lasting results.²⁷ Diplomatic aspirations to develop intentional and collective solutions were often compromised by unreliable officials, pervasive fraud, linguistic failures, cultural obstacles, and substantive disputes about the practical application of theoretical ownership.²⁸ Territorial problems could never be solved by simply putting words on a page or lines on a map.²⁹ Treaties often ignored large groups of borderland residents, and abstract legal fantasies were never enough to change Indian country into American country.³⁰

Some issues surrounding federal treaties derived from the internal mechanics of American law, and constitutional statehood posed special complications. Several states had already granted individual land claims based on “indiscriminate location,” which let individuals describe the shape of property rights in their own terms.³¹ The result was a splotched field of oddly shaped land plots that geometrically deviated from the federal government’s otherwise applicable grid-based surveys.³² One might wonder which system should prevail in a grid-oriented federal territory that included land cessions from indiscriminate-location states.³³ The short answer was “both.” Even though federal law was constitutionally supreme, the United States’ legal authority in federal territories was formally

27. See Ablavsky, *supra* note 1, at 24.

28. See *id.* at 25–31.

29. See *id.* at 2 (“[The] tedious labor of administration, rather than faraway imaginings traced on a map, proved the foundation for the new government’s authority in the territories.”); *id.* at 6 (“Proclaiming new jurisdictions did not alter . . . preexisting realities. Both territories remained what they had been since time immemorial: Native homelands.”).

30. See *id.* at 21 (“[T]he past still weighed heavily on regions imagined as the proving ground for new ideas of ownership.”).

31. *Id.* at 32 (“The statutes . . . left claimants to locate lands and avoid conflicting claims on their own. This lax oversight frustrated critics—one congressman of the era complained that the system ‘create[d] law-suits’ . . . —but others argued this loosely controlled process served administrators and claimants alike.” (alteration in original)).

32. For rigorously organized federal plans for allocating property rights, see *id.* at 58 (describing land companies’ dedication to “prior rectangular survey[s]”); *id.* at 62 fig.2.3 (showing a “Plan of the Ohio Company’s Purchase”); *id.* at 69 (describing the company’s “elaborate scheme”); *id.* at 99 (describing the federal government’s “rectangular grid” for allocating property); *id.* at 104 (describing that grid’s application during the 1800s); see also Hildegard Binder Johnson, *Gridding a National Landscape*, in *The Making of the American Landscape* 142, 142–49 (Michael P. Conzen ed., 2d ed. 2010) (tracing federal grid-based surveys back to the Land Ordinance of 1785).

33. Ablavsky, *supra* note 1, at 31–34.

derived from state land cessions.³⁴ The documents that originally transferred land from states to the federal government mandated that vested property rights could not be altered by the transfer, which explained “[t]he paradoxical existence of state title schemes” in territories that were “the only parts of the United States *outside* state borders.”³⁵ Such dynamics meant that complexities of pluralist property extended backward in time—unsolved by simple federal edicts—and such challenges were fundamentally tied to the emergent federal–state system. Even today, an airplane flight from Virginia to Ohio would show the intersection of indiscriminate-location claims and grid-based lands from east to west.³⁶

Even worse, state laws granted “first occupancy” rights that allowed otherwise unauthorized Euro-American migrants to purchase land if they “improved” it.³⁷ By design, Euro-American improvements made regional landscapes increasingly habitable for white occupants and decreasingly habitable for Native people, which is one reason that territorial planners preferred to reward buyers who would actually occupy land instead of non-resident owners.³⁸ Euro-American migrants who supported their property claims by “clearing, planting, or building on land” could facilitate agricultural production while indirectly supporting larger local populations, transportation networks, and long-distance merchants.³⁹ When Euro-Americans

34. See Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 *Mich. L. Rev.* 1, 39–41 (2020) [hereinafter Green, *United/States*] (describing such land cessions in detail); see also Ablavsky, *supra* note 1, at 46 (describing North Carolina’s cession agreement).

35. Ablavsky, *supra* note 1, at 32; see also *id.* at 21, 34.

36. See Norman J.W. Throver, *Original Survey and Land Subdivision: A Comparative Study of the Form and Effect of Contrasting Cadastral Surveys 1* (1966) (presenting two photographs that illustrate this difference).

37. Ablavsky, *supra* note 1, at 40–45.

38. Cf. María Josefina Saldaña-Portillo, *Indian Given: Racial Geographies Across Mexico and the United States* 74 (2016) (“[T]he seemingly innocuous spatial practice of introducing livestock production . . . changed both the natural and the social organization of space in the region: where there was game, there was now livestock, and thus where there was hunting for exchange, there was now appropriation for exchange.”); Sleeper-Smith, *supra* note 12, at 11 (“The sustainability of [the Ohio Valley’s] village world was severely threatened in the 1780s and 1790s, when the terrorizing and plundering of Indian villages disrupted agrarianism and, subsequently, the fur trade.”). For a description of European perceptions of Native land use, see Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865*, at 137–38 (2010) (describing older English images of Native inhabitants as “almost parasitical, a burden upon the land from whom the land itself sought relief,” from whom “the English would take possession,” thereby enabling “the land to achieve its reason for being”).

39. Ablavsky, *supra* note 1, at 40; see also Joyce E. Chaplin, *Subject Matter: Technology, the Body, and Science on the Anglo-American Frontier, 1500–1676*, at 202 (2001) (“Settlement culture required significant changes in the landscape: land divided into units of property and cleared for long-term use, fences and European-style buildings, domestic livestock, and water-powered mills. Indian country lay outside this Europeanized landscape and represented many natives’ desire to retain indigenous methods of hunting, agriculture, and settlement.”); Sleeper-Smith, *supra* note 12, at 60–61 (“[D]ramatic degradation by Americans [who made ‘improvements’ during] the nineteenth and twentieth centuries

improved land, they achieved one set of economic opportunities immediately while facilitating the achievement of other opportunities over time.

Federal officials worried that this cycle might run too fast. Insufficiently strong legal standards for proprietary “improvement” might allow massive Euro-American migration by people who did not adequately transform the landscape or generate government funds.⁴⁰ One senator described that scenario, noting that “[a]ll our acts of No. Carolina seem to favour intruders . . . under the appellation of occupants.”⁴¹ The result would allow people “violating a solemn treaty” with Native people simply to “acquire this *right of occupancy*.”⁴²

Intruding migrants used widely various arguments about natural rights, self-sovereignty, the Declaration of Independence, and state constitutional law to project first-occupancy claims onto otherwise inhospitable federal law.⁴³ The system of pluralist property became only riskier and more complicated as commercial markets resold property claims to non-resident speculators that included European investors and American politicians.⁴⁴ The line between legal property and illegal property was always difficult to draw, and it was often unclear whose hand held the pen. As a result, the federal government’s direct efforts to specify land rights through treaties failed and succeeded with comparable frequency.

2. *Federal Land Companies*. — Land companies were another feature of property pluralism. Similar to colonial corporations from the British Empire, land companies were intermediate institutions that combined public law and private rights.⁴⁵ They promised to mobilize private capital

makes it difficult now to understand how [the Ohio River valley] had so successfully supported a large Indian population The Ohio River valley was one of the most fertile landscapes in North America.”).

40. Ablavsky, *supra* note 1, at 41 (noting that commonly accepted “improvements” include “marking or deadening a few trees, or throwing a few logs together in the [sic] form of a cabin” (internal quotation marks omitted) (misquotation) (quoting Letter from Arthur St. Clair, Gen., to Robert Buntin (Sept. 19, 1796), *in* 2 *The St. Clair Papers: The Life and Public Services of Arthur St. Clair: Soldier of the Revolutionary War; President of the Continental Congress; and Governor of the North-Western Territory: With His Correspondence and Other Papers* 411, 412 (William Henry Smith ed., 1882) [hereinafter *St. Clair Papers*])).

41. *Id.* (internal quotation marks omitted) (quoting Letter from Benjamin Hawkins, Sen., North Carolina, to William Blount (Mar. 10, 1791) (on file with the Library of Congress)).

42. *Id.* (internal quotation marks omitted) (quoting Letter from Benjamin Hawkins, Sen., North Carolina, to William Blount (Mar. 10, 1791) (on file with the Library of Congress)).

43. *Id.* at 44–45. For a subsequent, and more famous, example of Euro-American migrants with eclectic claims to land, see James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* 3 (1964) (“They were squatters; put less sympathetically, they were trespassers.”).

44. Ablavsky, *supra* note 1, at 70–71, 76, 103.

45. See Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth*

and leadership to supplement or supplant governmental bureaucracies whose personnel and financial resources were badly overstretched.⁴⁶ The process for seeking federal authorization led private companies to embrace public values and raise expectations, especially with respect to managing Native and Euro-American “squatters.”⁴⁷ One government official described a particular land company as “the best [plan] ever formed in Amer[ic]a,” capturing “the advantages of *System* in a new Settlement”⁴⁸ and representing “one of the greatest undertakings ever yet attempted in America.”⁴⁹ A proprietor enthused that this marked the birth of a new western world.⁵⁰ Land companies treated territorial government as a business.

Even as land companies represented new mixtures of public and private power, they also generated new public and private problems. When investment funds grew scarce, company leadership became ineffective or unscrupulous, requiring intervention from the federal government to put matters right.⁵¹ Companies routinely failed to constrain lawless Euro-American migrants, who sparked violence with Native residents, and those conflicts triggered demands for federal law, federal armies, and federal cash.⁵² The national government supported private companies in order to

Century, 26 *Law & Soc. Inquiry* 315, 328–47 (2001) (using the charter of Virginia as an example to show how chartering was “a legalized strategy of colonial planning and implementation”).

46. Ablavsky, *supra* note 1, at 10 (“The interaction between . . . multiple sites of authority, spread thinly across vast distances and mediated through a constant flow of paper, collectively constituted the federal government in the territories.”); *id.* (“Federal representatives thought themselves besieged and powerless before the demands of the borderlands’ residents.”); *id.* at 11 (“[T]he federal government could only rarely impose its will directly through violence, and only at tremendous cost in both money and legitimacy.”); *id.* at 13 (“Rarely could the federal government dictate outcomes in the territories; often it could not even stop its resources from supporting goals officials abhorred.”).

47. *Id.* at 57–59.

48. *Id.* at 58 (alteration in original) (internal quotation marks omitted) (quoting An Account of Dr. Cutler’s Work for the Ordinance of 1787 (July 13, 1787), *in* 63 *Manasseh Cutler Papers* (Charles C. Dawes ed., 1942)).

49. Diary Entry of Manasseh Cutler (July 25, 1787), *in* 1 *Life, Journals and Correspondence of Rev. Manasseh Cutler, LL.D.* 299, 300 (William Parker Cutler & Julia Perkins Cutler eds., 1888) (describing a conversation with Samuel Osgood).

50. Ablavsky, *supra* note 1, at 62.

51. *Id.* at 52–57, 60–61.

52. Ablavsky’s book describes several component parts of this cycle, though it does not entirely link them together. See *id.* at 53 (noting that the land companies’ “promise of re-made Indian affairs collapsed into open violence,” even as investors claimed that the federal government had not provided the financial and military “support they believed implicit in the partnership”); *id.* at 66 (describing uncontrolled violence despite land companies’ aspiration to yield Euro-American migration and residence that was systematic, orderly, peaceful, and constrained); *id.* at 183–87 (describing federal expenditures that became necessary to establish and reestablish this cycle of intercultural peace and violence). For a tightly focused account of war in the Ohio River valley, see Colin G. Calloway, *The Victory With No Name: The Native American Defeat of the First American Army* 9 (2015) [hereinafter Calloway, *The Victory With No Name*] (“The war against the Ohio Indians was, above all

sell land quickly, but those companies remained dependent on public support.⁵³ Efforts to transfer proprietary regulation to the private sector displaced governmental burdens only temporarily because even the “best” private plans did not yield lasting solutions.⁵⁴

3. *The Adjudicatory State.* — A third federal tool for regulating land and migrants was the allocation of particular property rights through what Ablavsky calls “the adjudicatory state.”⁵⁵ Those property claims did not match modern images of legal rights with a “libertarian smack as limitations on governments.”⁵⁶ Instead, they were rights as “an appeal to government, a craving for official validation to help ward off challenges to ownership and autonomy.”⁵⁷ Although legal scholars and political scientists sometimes view rights as fundamentally different from issues of governmental policy,⁵⁸ Ablavsky explains that “control over the distribution of rights, particularly property, was arguably the paradigmatic form of policy-making in the early United States.”⁵⁹ For this account of pluralist property, federal officials were important because “they controlled the alchemy by which territorial residents’ *claims* became *rights* under federal law.”⁶⁰

Military officials, territorial judges, and federal bureaucrats all acted within the “adjudicatory state” to allocate territorial lands among statutorily designated groups of people.⁶¹ One example involved “bounty lands”

else, a war over real estate. The U.S. government, land speculators, and individual settlers all demanded that tribal homelands be transformed into American Territory.”); *id.* (“[O]ur pretensions to the country [Native people] inhabit have been made to them in so unequivocal a manner, and the consequences are so certain and so dreadful to them, that there is little probability of there ever being any cordiality between us.” (internal quotation marks omitted) (quoting Letter from Arthur St. Clair, Governor, to Henry Knox, Sec’y of War (July 5, 1788), *in* St. Clair Papers, *supra* note 40, at 48, 48–49)); *id.* at 61–63 (“What the United States regarded as a necessary application of force to bring order . . . , the Indians regarded as an illegal invasion of their homelands Unless the settlers were removed from the north side of the Ohio, [Shawnee war chief] Blue Jacket said, there could be no peace.”).

53. Ablavsky, *supra* note 1, at 65–69.

54. See *id.* at 53, 72–73, 78–79.

55. *Id.* at 12.

56. *Id.* at 13.

57. *Id.*

58. See Karen Orren & Stephen Skowronek, *The Policy State: An American Predicament* 27–32 (2019) (arguing that policy is forward-looking and made “on behalf of a given entity or collectivity,” whereas rights are backward-looking “claims” made by individuals); cf. Jamal Greene, *Foreword: Rights as Trumps?*, 132 *Harv. L. Rev.* 28, 34 (2018) (describing and criticizing the tendency of conventional rights analysis to “favor rhetoric over judgment, simplicity over context, homogeneity over diversity”).

59. Ablavsky, *supra* note 1, at 256 n.30 (citing Hendrik Hartog, *Public Property and Problem Power: The Corporation of the City of New York in American Law, 1730–1870* (1983)).

60. *Id.* at 13.

61. See *id.* at 5, 12, 232.

that were awarded to military veterans.⁶² This policy served many goals at once. Veterans were compensated without tapping the United States' liquid assets, which reduced political problems in the east.⁶³ Bounty lands also solidified the public image of the western empire as a synthetic project that concerned America as a whole.⁶⁴ When veterans migrated to bounty lands, they formed a demographic reservoir of potential violence that was presumptively loyal to the United States.⁶⁵ The government's hope was to influence or deter conflicts with Native groups and other westerners while also projecting an image of safety and security for investors and migrants from the east.⁶⁶ However, bounty lands—like other federal policies—seldom worked as planned, and most of the “U.S. Military District” was bought by a small number of nonveterans, alongside influential politicians.⁶⁷

Regardless of whether the government operated through treaties, land companies, or the “adjudicatory state,” the results mixed together a wide range of ambitions, failures, and consequences that were simultaneously unintended and predictable. Ablavsky characterizes the “rise of federal title” as “ironic, perhaps even perverse,” because it displaced the Native, French, and other Euro-American residents who helped make such federal regulations possible.⁶⁸ With respect to federal bureaucrats, “even well-intentioned officials . . . often could not control the processes they

62. *Id.* at 79; see also Michael A. McDonnell, *The Politics of War: Race, Class, and Conflict in Revolutionary Virginia 480–82* (2007) (describing the shift from money-based bounties to land-based bounties).

63. See Ablavsky, *supra* note 1, at 99–103 (discussing how bounty lands aimed to satisfy federal promises made to recruits during the Revolution); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s*, 130 *Yale L.J.* 1288, 1318–21 (2021) [hereinafter Parrillo, *A Critical Assessment*] (discussing political controversies surrounding federal finances and taxation in the 1780s and 1790s). The effects of American political resistance to taxation were particularly notable during Shay's Rebellion, which involved unpaid veterans. Max M. Edling, *A Hercules in the Cradle: War, Money, and the American State, 1783–1867*, at 92 (2014).

64. See Laura Jensen, *Patriots, Settlers, and the Origins of American Social Policy* 12 (2003) (“The first American entitlements thus played a major role in the constitution of a distinctly American, exceptional state: one that largely was organized . . . around the selective entitlement of certain citizens who advanced the diverse goals and purposes of the Federal government.”).

65. See *id.* (“Congress created and disbursed particular entitlements in order to recruit people to do the Government's bidding, whether that was fighting foreign enemies [or] exterminating Native Americans . . .”).

66. Ablavsky, *supra* note 1, at 64, 99; see also Jensen, *supra* note 64, at 9–12; John Resch, *Suffering Soldiers: Revolutionary War Veterans, Moral Sentiment, and Political Culture in the Early Republic* 5–6 (2000) (“[T]he image of the suffering soldier became a powerful force forging the nation into a democratic republic.”).

67. Ablavsky, *supra* note 1, at 103.

68. *Id.*

purportedly oversaw.”⁶⁹ Only decades of struggle allowed the federal government to ultimately channel property pluralism in the territories through the deployment of federally regulated land offices and redrawn grid-based maps.⁷⁰ Ablavsky’s story ends with the Harrison Land Act of 1800, whose procedural system of federal regulation over people and land claims “pushed [American] institutions westward across the continent into new federal territories.”⁷¹ Property pluralism thus receded in Tennessee and Ohio, even as comparable systems were simultaneously inaugurated and transformed in lands farther west.⁷² The latter dynamic was never a “manifest destiny” or an empire by accident.⁷³ On the contrary, it resulted from hard-fought struggles over pluralist legal structures that governed remarkably diverse populations at the same time.

B. *The Laws of Blood*⁷⁴

Alongside its analysis of property, *Federal Ground* explores the visceral and bloody consequences of territorial government. Violence was a dominant feature of Euro-American migration in the Northwest and Southwest Territories, and such violence implicated many kinds of law.⁷⁵ Ablavsky describes violence among Native people and Euro-Americans as “inherently political,” such that “cross-cultural bloodshed was a form of diplomacy that . . . affected relations among sovereigns.”⁷⁶ But participants had different ideas about basic principles of sovereignty as well as its practical operation.⁷⁷ One could call such multilayered conflicts “violence pluralism”

69. *Id.* at 104.

70. *Id.*

71. *Id.* at 105.

72. *Id.* at 234–35; see also *id.* at 104–05.

73. See Alan Taylor, *American Republics: A Continental History of the United States, 1783–1850*, at xxiv (2021) (describing “Manifest Destiny” as “the most misleading phrase ever offered to explain American expansion”).

74. This subtitle is borrowed from John Philip Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (1970).

75. See Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* 4 (2007) (observing that every land transfer from Indians to whites included elements of both law and power); Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* 152–54 (2007) (“[T]he transition . . . to unfettered violence—a change settlers helped precipitate—created violent disaffection with authority Men increasingly acted without the blessing of sanctioned authority.”).

76. Ablavsky, *supra* note 1, at 109; see also Chaplin, *supra* note 39, at 82–83 (“For effective battle between two cultural groups to proceed, there must be some basis (real or imagined) of mutual intelligibility [W]arfare between North American Indians and the English was continual [W]hile warfare . . . indicated antipathy, it by no means implied incomprehension, which might have prevented any continued interaction, however violent.”).

77. See Ablavsky, *supra* note 1, at 229 (“The United States created the Southwest and Northwest Territories in large part to resolve the seemingly interminable struggles over sovereignty, jurisdiction, and property in the early American West.”); *id.* at 24, 261 n.19 (discussing conquest-based theories of sovereignty); *id.* at 29–31 (describing Cherokee leaders’

or “sovereignty pluralism” because the categories of law and lawlessness were so often blurred and blended. This section describes three overlapping categories of law—treaties, nonintercourse statutes, and criminal punishment—that simultaneously mitigated, channeled, and caused violence in the early federal territories. The section concludes by describing the warfare and monetary compensation that occurred after and alongside those legal mechanisms.

1. *The Legal Channels of Violence.* — Treaties in federal territories did not merely resolve or prevent conflicts; they also relocated and reproduced violence.⁷⁸ Intercultural treaties were created by the American institutions that regulated war and sovereignty—the President, diplomatic corps, and Senate—without reference to its key legislative actor, the House of Representatives.⁷⁹ And although these treaties often included effusive rhetoric about eternal friendship and peace, they were embedded in recurrent patterns of invasion and violence.⁸⁰ The basic format of treaty law illustrated complex ideas about Native sovereignty within the legal boundaries of U.S. sovereignty.⁸¹

One recurrent goal of federal treaties was to weaken or destroy Native land claims, and every time federal negotiators delineated a new lawful

opinion that treaties cannot be binding unless they represent an ongoing commitment to “justice and humanity”); *id.* at 89 (supporting Creek land claims based on violent “depre-dations” against Euro-American migrants); *id.* at 156 (suggesting that the United States’ passivity in defending the Southwest Territory might remove such land from the United States’ authority and protection). Even within Euro-American law, there were multiple efforts to pursue “self-sovereignty” and renounce established federal and state government. See *id.* at 44 (describing one migrant’s “undoubted right to pass into every vacant country, and there to form [one’s own] constitution” (internal quotation marks omitted) (quoting John Emerson, Advertisement (Mar. 12, 1785), *in* St. Clair Papers, *supra* note 40, at 5, 5)); *id.* (describing violent secessionists in the self-proclaimed “State of Franklin” that was located on the east side of modern Tennessee); *id.* at 211 (describing a different secessionist movement as “epitomiz[ing] the grandiose and nebulous dreams of sovereignty that had long marked the borderlands”).

78. Colin G. Calloway, *Pen & Ink Witchcraft: Treaties and Treaty Making in American Indian History 2* (2013) [hereinafter Calloway, *Pen & Ink Witchcraft*] (“Wars and treaties—violence and law—worked hand in hand in taking America from the Indians.”). See generally Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1085 (1984) (“[Adjudicators’] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes . . .”).

79. See U.S. Const. art. II, § 2.

80. See Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly 21–22* (1994) (describing the “treaty system” that emerged during the Early Republic); see also *id.* at 2 (warning that “American Indian treaties have . . . exhibited irregular, incongruous, or even contradictory elements and did not follow the general rule of international treaties”).

81. *Id.* at 2–9.

realm for Euro-American migration, the agreement also prompted aggressively unlawful migration beyond the borderline.⁸² In 1789, Secretary of War Henry Knox explicitly connected law and violence, insisting that “all treaties with the Indian nations,” no matter how equal or just in principle, “will not only be nugatory but humiliating to the [United States] unless they shall be guaranteed by a body of troops.”⁸³ Knox specifically condemned one instance of illegal migration, explaining that “[i]f so direct and manifest contempt of the authority of the United States be suffered with impunity, . . . [t]he Indian tribes can have no faith in such imbecile promises, and the lawless whites will ridicule a Government which shall[,] on paper only, make Indian treaties and regulate Indian boundaries.”⁸⁴

Knox later acknowledged that even the federal military could not guarantee treaty enforcement and peace, noting that U.S. soldiers were “often sacrificed to the resentments of the Indians, which they have had no agency in exciting.”⁸⁵ In theory, Knox believed that Indian affairs must be “conducted by fixed principles established by [federal] Law, . . . which being published should be rigidly enforced.”⁸⁶ Yet as a practical matter, such “principles” and violent “enforce[ment]” were rarely “fixed,” “established,” or “published” under “Law.”⁸⁷ Beneath every treaty lurked the perennial threat of Euro-American migration, which was punctuated by “genocidal . . . attacks without parallel in Native culture.”⁸⁸ Federal treaties drew plenty of sharp lines on Euro-American maps, but negotiating and implementing legal regimes in practice were always more complex.⁸⁹

Federal statutes promised to control Euro-American migratory violence by regulating the treaty-based boundaries of Indian country and limiting cross-border interactions. For example, “nonintercourse” laws from

82. Calloway, *Pen & Ink Witchcraft*, *supra* note 78, at 99 (“Treaties established boundaries but the boundaries became ever more permeable and impermanent.”).

83. Letter from Henry Knox, Sec’y of War, to George Washington, President (July 7, 1789), *in* 3 *The Papers of George Washington, Presidential Series*, June–September 1789, at 134, 136 (W.W. Abbot & Dorothy Twohig eds., 1989).

84. *Id.* at 137.

85. Henry Knox’s Notes on the State of the Frontier (Jan. 1790), *in* 5 *The Papers of George Washington, Presidential Series*, January–June 1790, at 76, 76 (Dorothy Twohig, Mark A. Mastromarino & Jack D. Warren eds., 1996).

86. *Id.*; see also Ablavsky, *supra* note 1, at 109.

87. Ablavsky, *supra* note 1, at 109.

88. *Id.* at 112; see also Jeffrey Ostler, *Surviving Genocide: Native Nations and the United States From the American Revolution to Bleeding Kansas* 4–5 (2019) (“As the United States expanded and pursued the elimination of Native people, it unleashed a variety of destructive forces on Indian communities: war and violence, disease, material deprivation, starvation, and social stress.”); Claudio Saunt, *Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory*, at xv (2020) (describing as “unprecedented” the “state-administered mass expulsion of indigenous people” in the early nineteenth century).

89. Ablavsky, *supra* note 1, at 144 (“[U]ncertainty cloaked all interactions between Native and federal leaders in a heavy blanket of distrust and suspicion. Most damagingly, it undercut . . . a shared discourse of diplomatic negotiations and treaty-making.”).

1790 to 1834 heavily regulated intercultural trade and land sales.⁹⁰ Those statutes were the products of violence, including the violence of the Revolutionary War, in which the newly independent nation claimed swaths of Native territory for itself.⁹¹ Nonintercourse statutes echoed the federal Constitution's identification of "Indian tribes" and "Indian country" as objects of federal regulation, yet the new legal regime also generated newly devastating violence.⁹²

One kind of violence stemmed from failures to enforce nonintercourse statutes. Josiah Harmar, a leading official in the United States Army, described a mass of lawless Euro-American "banditti" and "adventurers" whose defiance of established authority indicated a "wish to live under no government."⁹³ Ablavsky notes that intruders cited their own purportedly "legal" ideas about property and self-governance.⁹⁴ But that cannot obscure the formal illegality of their disregard for federal law, and Native people likewise perceived illegality when migrants traded and fought in zones where the federal government had promised protective insulation.⁹⁵

Ablavsky quotes federal officials who felt frustrated and exhausted by Euro-American intruders' violation of treaties, statutes, and other prohibitions.⁹⁶ Yet federal enforcement of nonintercourse statutes failed so badly—and across such a long period of time—that the resultant permeable boundaries, commercial exchange, invasion, and violence among Euro-Americans and Natives cannot be dismissed as an entirely unintended or inadvertent glitch.⁹⁷ Just as the British Empire's Proclamation

90. *Id.* at 114–16.

91. See Calloway, *Pen & Ink Witchcraft*, *supra* note 78, at 96–106 ("Because the United States had pledged grants of land to veterans of the Revolutionary War . . . the Indians would be required to give up land as atonement for their participation and barbarities in the war.").

92. See U.S. Const. art. I, § 8 (providing Congress with the power "[t]o regulate Commerce . . . with the Indian Tribes"); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *Yale L.J.* 1012, 1023 (2015) (noting extensive federal power over "Indian country" that is "only ambiguously and partially" connected to the Indian Commerce Clause).

93. Ablavsky, *supra* note 1, at 42 (internal quotation marks omitted) (quoting Letter from Josiah Harmar, Colonel, to Henry Knox, Sec'y of War (May 14, 1787), *in* *St. Clair Papers*, *supra* note 40, at 19, 22).

94. *Id.*

95. See U.S. Const. art. VI; Ablavsky, *supra* note 1, at 143 ("I was convinced it was not the wish of them [the governmental officials] or my self to go to war,' the Cherokee leader Kunokeski wrote, 'but was afraid that the Lawless Men living on our lands & the frontiers, Would be the occasion [sic] of all Mischief.'" (first alteration in original) (quoting Letter from John Watts to John Sevier (Mar. 4, 1797) (on file with the Tennessee State Library and Archive))).

96. See Ablavsky, *supra* note 1, at 41–42 (discussing warnings and concerns of George Washington and Thomas Jefferson).

97. A similar point was made by Nicholas Parrillo in comments at a roundtable discussion hosted by Stanford Law School, February 16, 2021. Nicholas Parrillo, *Yale L.*, Panel Conversation With Author Gregory Ablavsky: Federal Ground: Governing Property and Violence in the First U.S. Territories (Feb. 16, 2021), <https://law.stanford.edu/event/federal-ground-governing-property-and-violence-in-the-first-u-s-territories/> [<https://perma.cc/>

of 1763 did not succeed in stopping lawless Euro-American migrants, for example, the United States' Nonintercourse Act of 1790 could not stop "the lure of private purchases from Native nations" even with respect to the United States' own territorial officials.⁹⁸ On the contrary, the nonintercourse statutes' failures were highly consistent, and federal officials predicted such violent malfeasance almost as often as they complained about it.⁹⁹

Almost all Euro-Americans who enforced and violated nonintercourse statutes believed that Native land should be taken; disagreements concerned how fast, by what mechanisms, and for whose benefit.¹⁰⁰ This shared consensus explains how someone like George Washington could at once lament Native people's condition as "poor wretches" who suffered "the continual pressure of land Speculators [and] settlers on one hand; [and] by the impositions of unauthorised, [and] unprincipled traders . . . on the other," while simultaneously celebrating American military victories as proof that "republicanism is not the phantom of a deluded imagination: on the contrary, . . . under no form of government, will laws be better supported—liberty and property better secured—or happiness

/2XUTY2XN]. Individuals and groups who violated nonintercourse statutes were often called "banditti" or "intruders," and federal officials at the highest levels lamented their illegal conduct. See Ablavsky, *supra* note 1, at 41–42, 143–44 ("[I]n their more candid moments, Native leaders and Anglo-American officials alike acknowledged that the barriers to peace were closely parallel—that in neither society could ostensible leaders compel obedience.").

98. Ablavsky, *supra* note 1, at 23. For a discussion of the Proclamation of 1763, see Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* 92 (2006) ("In the fall of 1763, Britain attempted to impose a new imperial order in North America and to prevent the outbreak of bloody frontier conflicts like Pontiac's War The concept of an Indian boundary line was established [by the Proclamation], but the line was porous and impermanent."). Ablavsky describes federal nonintercourse statutes as producing "mixed" results because, although they failed to stop individual private purchases, they prevented large land sales that required the legitimacy of formal lawfulness. Ablavsky, *supra* note 1, at 23; *id.* at 46 ("[Even the] raw exercise of federal power was often unavailing. Despite repeated expulsions, settlers returned, sometimes two or three times . . ."); *id.* ("The federal government could not prevent crude huts [from being rebuilt], but [there were other owners who] wanted to do more than just hold the land; as their repeated petitions [to Congress] demonstrated, they wanted title. Federal actions long denied them this resource."); *id.* at 111 ("The Trade and Intercourse Acts did not end centuries of violence and discord, as their drafters hoped. But they did channel contentions over Indian affairs into federally defined legal language and fora."); *id.* at 215–18 (describing another only partially effective federal effort to enforce nonintercourse legislation).

99. See Ablavsky, *supra* note 1, at 41, 52, 57, 59, 109, 146–50.

100. See Colin G. Calloway, *The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation* 3 (2018) ("Washington's entire Indian policy and his vision for the nation depended on the acquisition of Indian territory, but in 1793–94 he insisted that no one talk to the visiting Indians about buying their lands."); *id.* at 9 ("When Washington looked at Indian country, he saw colonial space temporarily inhabited by Indian people.").

be more effectually dispensed to mankind.”¹⁰¹ The kinds of republicanism, rule of law, liberty, property, and happiness that Washington prioritized did not include Native people in Indian country. Nonintercourse statutes—despite and because of their imperfect enforcement—served such racially and culturally narrowed interests exceptionally well.

As a final territorial example, Ablavsky describes the particularly multilayered violence of criminal law. Crimes were the immediate product of illegal and violent acts by private individuals, and Ablavsky quotes several territorial residents to show that “towns like Knoxville, Cincinnati, and Vincennes were hard-drinking, violent places where drunken men, and sometimes women, regularly slandered, assaulted, and killed one another. Alcohol-fueled camaraderie quickly turned to killing even when whites drank only amongst themselves.”¹⁰² Even the most commonplace episodes of violence could cause intercultural escalation, as “ordinary conflicts between neighbors took on political and diplomatic importance when set against the broader territorial background of low-level warfare, racial tension, and diplomatic negotiation Often, it was difficult to tell whether any given death should be regarded as an ordinary crime or an act of war.”¹⁰³ Intercultural criminal activity stemmed from social and economic interaction, and those dynamics often crossed treaty lines irrespective of nonintercourse statutes.

Criminal punishment was also an act of collective violence directed against individual miscreants. Nonintercourse statutes created federal jurisdiction over crimes committed in Indian country and over Native defendants who committed crimes outside Indian country.¹⁰⁴ By comparison, Native people at least occasionally imposed criminal punishment on white defendants.¹⁰⁵ Both scenarios inflicted explicitly communal violence that could produce conflict across the cultural divide as well as inside societies. Native and non-Native societies had different ideas about collective retribution, including what should constitute public offenses and who should be punished,¹⁰⁶ but there were also parallels in their understandings. For

101. Letter from George Washington to Edmund Pendleton (Jan. 22, 1795), *in* 17 *The Papers of George Washington, Presidential Series*, 1 October 1794–31 March 1795, at 424, 425–26 (David R. Hoth & Carol S. Ebel eds., 2013).

102. Ablavsky, *supra* note 1, at 119.

103. *Id.* at 119–20.

104. *Id.* at 124, 233 (noting the extension of federal criminal jurisdiction in 1817 to cover Native defendants, with non-Native victims, inside Indian country).

105. *Id.* at 113 (“[T]he Creeks had publicly executed six men, including one white man for murder, which [federal Indian agent Ben Hawkins] stated ‘gives a hope that the right of revenge might be transformed from private hands to a public jurisdiction.’” (quoting Letter from Benjamin Hawkins to James McHenry, Sec’y of War (Mar. 1, 1797), *in* 1 *Letters, Journals, and Writings of Benjamin Hawkins, 1796–1801*, at 85, 85–87 (C.L. Grant ed., 1980))).

106. Katherine A. Hermes, *The Law of Native Americans, to 1815*, *in* 1 *The Cambridge History of Law in America: Early America, 1580–1815*, at 32, 40–41 (Michael Grossberg & Christopher Tomlins eds., 2008) (noting the “strong belief” in most Indian societies “that

example, there were longstanding debates in both communities about the legitimacy of vigilante violence. Euro-American territorial leaders struggled against local residents who “thirst[ed] for revenge, or, what is here termed, satisfaction.”¹⁰⁷ Likewise, the Cherokee leader Bloody Knife argued that Tribal members should not kill a federal official after a murder committed by Euro-American hunters: “[S]uppose a mad dog should bite one of your children, would you kill all the dogs?”¹⁰⁸ Such efforts at mollification were only sometimes successful.¹⁰⁹

Under most circumstances, the immediate operation of federal criminal law was insignificant in the federal territories, which itself is a lesson about national sovereignty.¹¹⁰ For example, Ablavsky reports that prosecutions against Native American defendants were almost nonexistent, in part because federal authorities would not or could not detain perpetrators.¹¹¹ By comparison, it was relatively common to prosecute Euro-Americans for crimes against Natives, yet jury convictions were vanishingly rare.¹¹² One territorial governor complained, “I have never heard that any person was ever brought to due justice and punishment” for having “abused, cheated,

harm to an individual member was harm to all and that the individual should not have to face his victimization alone”); James H. Merrell, “The Customes of Our Country”: Indians and Colonists in Early America, *in* *Strangers Within the Realm: Cultural Margins of the First British Empire* 117, 142–46 (Bernard Bailyn & Philip D. Morgan eds., 1991).

107. Ablavsky, *supra* note 1, at 113 (alteration in original) (internal quotation marks omitted) (quoting Letter from William Blount to Sec’y of War (Nov. 8, 1792), *in* 4 *The Territorial Papers of the United States: The Territory South of the River Ohio, 1790–1796*, at 208, 215 (Clarence Edwin Carter ed., 1936) [hereinafter 4 *Territorial Papers*]).

108. *Id.* (alteration in original) (internal quotation marks omitted).

109. *Id.* at 111–12.

110. *Id.* at 122 (“[T]he federal government largely failed in its efforts to punish Natives as well as U.S. citizens for crimes committed against each other.”).

111. *Id.* at 123 (describing a prosecution against Abongphohigo, a Creek man, as “the only recorded prosecution of a Native in the Southwest Territory” and noting that “[t]he Northwest Territory was similar,” with “records surviv[ing] of a single capital prosecution,” against the Delaware man Wapikinomouk); *id.* at 127 (“Wapikinomouk’s prosecution, just like Abongphohigo’s, demonstrated how much the exercise of federal criminal jurisdiction over Natives depended on the cooperation of other jurisdictions.”); *id.* at 127–28 (“[F]ederal authority in the borderlands remained tentative and dependent on Native power The early federal territories were literal borderlands, in that they contained and coexisted alongside the territories of other, formally recognized sovereigns.”).

112. *Id.* at 128 (“Prosecutions of Natives in territorial courts were rare, but prosecutions of territorial citizens for crimes committed against Natives were not However, few of these prosecutions produced convictions Juries proved a particular challenge, routinely nullifying federal efforts to prosecute crimes against Natives.”).

robbed, plundered, and murdered [Native American victims] at pleasure.”¹¹³ A military officer likewise complained that it was “the prevailing opinion of the people . . . that it is no harm to kill an Indian.”¹¹⁴

Racism and social animus pervaded criminal justice in the territories, from episodic jury nullification to the categorical exclusion of Native American testimony.¹¹⁵ Yet Ablavsky notes that cultural animosity did not bar all forms of law enforcement, nor was racism the only problem facing territorial government.¹¹⁶ Regional and class divisions were mixed together with principles of local republicanism, and correspondence from federal officials describes their resultant frustrations at length.¹¹⁷ All of these factors substantially weakened criminal law’s capacity to address private violence.

Euro-American and Native leaders also deployed collective mechanisms to deflect or displace strict application of criminal punishment. Sometimes material goods were offered by one side or another as bereavement, or perhaps as compensation.¹¹⁸ There is suggestive evidence that Native groups voluntarily delivered particular individuals for federal criminal punishment while withholding other possible defendants as something of a compromise.¹¹⁹ These represented efforts to shift episodes of violence outside the ordinary structures of criminal law.

2. *The Results of Intercultural Violence: Warfare and Payments.* — Intercultural violence either by or against criminal defendants could quickly escalate to intercultural war, but property disputes caused by Euro-American migration were almost always the root cause. Sometimes “speculators and settlers who pushed into the Northwest Territory saw themselves bringing order and civility and conducting even-handed relations

113. *Id.* (internal quotation marks omitted) (quoting Arthur St. Clair, Governor, Address to the Territorial Legislature at the Opening of the Second Session at Chillicothe (Nov. 5, 1800), *in* St. Clair Papers, *supra* note 40, at 501, 503).

114. *Id.* (internal quotation marks omitted) (quoting Letter from Josiah Harmar to Henry Knox (Mar. 18, 1787), *in* 28:B The Papers of General Josiah Harmar 55, 59 (Howard Henry Peckham ed., 1937) (on file with the William L. Clements Library, University of Michigan)).

115. *Id.* at 128–32.

116. See *id.* at 131–32.

117. See *id.* at 120, 132–35.

118. See *id.* at 171–78 (“The failure of federal criminal law to stanch frontier violence placed federal officials in a difficult position Most Native communities favored resolving disputes through compensation over employing physical punishment, which they abhorred Soon, federal officials were routinely doling out goods to compensate Natives for white attacks.”); Nancy O. Gallman & Alan Taylor, *Covering Blood and Graves: Murder and Law on Imperial Margins*, *in* *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* 213, 216–17 (Brian P. Ownesby & Richard J. Ross eds., 2018) (“Recognizing the limits of their power, New Yorkers never judicially executed any Haudenosaunee—despite several murders of colonists. And the natives sought no revenge on the colonists who killed natives. Instead, both sides preserved their alliance . . . by ceremonially covering the graves with presents for the kin.”).

119. Ablavsky, *supra* note 1, at 127.

with the Indians.”¹²⁰ For Native leaders, however, “it was difficult to see the pacific intent in American empire building.”¹²¹ Ablavsky describes territorial violence outside formal legal mechanisms, comparing the Northwest Indian War of 1785–1795 with unauthorized brutality in the Southwest Territory to illustrate how otherwise criminal acts—from trespass to murder—could spiral beyond legal notions of individual accountability or monetary compensation toward broader ideas of collectivized bloodshed.¹²²

In addition to those prominent events, smaller episodes of violence were characteristic elements of territorial life. Allegedly retaliatory attacks on northern Shawnee towns included a militia’s murder of one chief who raised the American flag and displayed a federal treaty of “peace and friendship” that he had previously signed.¹²³ Euro-Americans killed a southern Cherokee leader under a white flag before proceeding to murder helpless women and children.¹²⁴ State and interstate governments sometimes denounced such episodes.¹²⁵ Nevertheless, because most Americans were so enthusiastic about Euro-American empire, the most destructive forms of violence were always organized against Native Americans instead of against “lawless whites.”¹²⁶

Conflict in the Northwest and Southwest Territories increased even though correspondence from U.S. officials, including President Washington, echoed the same urgent fears as Shawnee and Cherokee leaders.¹²⁷ Everyone understood the relevant patterns and dynamics, yet practical circumstances did not improve.¹²⁸ A Native confederacy gathered north of the Ohio River was briefly strong enough to defeat local Euro-

120. Calloway, *The Victory With No Name*, supra note 52, at 60.

121. *Id.* (“To the Indians, an invasion was an invasion.”).

122. *Id.* (“The Indians prepared to attack the [territorial] settlements and made it known that they ‘were resolved to fight for their land, and then if they lost it they would lose it like men.’” (quoting *Thirty Thousand Miles with John Heckewelder, or Travels Among the Indians of Pennsylvania, New York & Ohio in the 18th Century* 242 (Paul A. Wallace ed., 1998))); see also *id.* at 61 (“What the United States regarded as a necessary application of force to bring order to its territory [in Ohio], . . . the Indians regarded as an illegal invasion of their homelands by an aggressive foreign power.”); *id.* at 140; cf. Ablavsky, supra note 1, at 110–11 (“[T]he sword of the Republic only[] is adequate to guard a due administration of Justice, and the preservation of the peace.” (internal quotation marks omitted) (quoting Letter from Henry Knox, supra note 83, at 136)). For background on these conflicts, see Fred Anderson & Andrew Cayton, *The Dominion of War: Empire and Liberty in North America, 1500–2000*, at 192–95 (2005) (discussing the Northwest Indian War); Wiley Sword, *President Washington’s Indian War: The Struggle for the Old Northwest, 1790–1795*, at xiii (1985) (same); Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* 238 (2006) (describing the “surprising strength of the Indian confederation” in the Ohio conflict).

123. Ablavsky, supra note 1, at 142.

124. *Id.*

125. *Id.* at 143 (describing concerns of Henry Knox).

126. Griffin, supra note 75, at 242, 258–60.

127. Ablavsky, supra note 1, at 144–47.

128. *Id.* at 145–47.

Americans as well as the federal army.¹²⁹ This prompted massive aggregations of federal soldiers and money, and the resultant warfare killed thousands on both sides while transforming the imperial landscape forever.¹³⁰ The Northwest Indian War ended with American victories at the Battle of Fallen Timbers and the Treaty of Greenville, but the consequences of those events rippled for generations through the United States and beyond.¹³¹ Although individual criminal acts sometimes sparked other local violence, it was only the interjection of federal soldiers and money that dramatically changed the stakes and results.¹³² This was government by war.

In the Southwest Territory, such highly organized federal violence was neither feasible nor necessary. Territorial officials asked the central government for troops and dollars, but bureaucrats and politicians did not cooperate.¹³³ One militia group transgressed federal prohibitions by attacking a Cherokee village at the same moment that other Euro-American officials were trying to negotiate peace.¹³⁴ Another militia group relied on authority from a territorial commander, ignoring orders from the territorial governor, to attack Cherokee towns and kill mostly women and children.¹³⁵ A central official responded that “such crimes [must] be punished in an exemplary manner,” but no punishment was ever imposed.¹³⁶ The official breathlessly complained that “[t]reaties will be at an end and violence and injustice will be the Arbiters of all future disputes . . . and of consequence much innocent blood will be shed, *and the frontiers depopulated.*”¹³⁷ The official’s prediction of the depopulation of the frontiers proved false—such lands were relentlessly populated, repopulated, and overpopulated—yet he was correct that the cyclical shedding of innocent blood would continue for generations afterward.¹³⁸

129. *Id.* at 147–48; see also Calloway, *The Victory With No Name*, *supra* note 52, at 9 (“The war against the Ohio Indians was, above all else, a war over real estate.”).

130. Ablavsky, *supra* note 1, at 149.

131. Calloway, *The Victory With No Name*, *supra* note 52, at 153 (“The Treaty of Greenville opened the floodgates to emigration and settlement in Ohio. The land rush that the government and land companies had tried to control and channel became a tsunami.”); Gregory Evans Dowd, *A Spirited Resistance: The North American Indian Struggle for Unity, 1745–1815*, at 113–14 (1992) (noting the divisive effects of the Treaty of Greenville in the years following its adoption).

132. Ablavsky, *supra* note 1, at 147, 149.

133. *Id.* at 149–60.

134. *Id.* at 151–52.

135. *Id.* at 152.

136. *Id.* at 153. (internal quotation marks omitted) (quoting Letter from Sec’y of War to William Blount, Governor (Aug. 26, 1793), *in* 4 *Territorial Papers*, *supra* note 107, at 299, 299).

137. *Id.* (emphasis added) (internal quotation marks omitted) (quoting Letter from Sec’y of War to William Blount, Governor (Aug. 26, 1793), *in* 4 *Territorial Papers*, *supra* note 107, at 299, 299).

138. See Ned Blackhawk, *Violence Over the Land: Indians and Empires in the Early American West 1–9* (2006) [hereinafter *Blackhawk, Violence*]; Brian DeLay, *War of a*

The commonplace intersection of law and violence was unmistakable, as territorial leaders and the regional public deployed legal rhetoric to justify violence against Native groups.¹³⁹ Euro-American migrants were certain that they were somehow conducting a defensive war to safeguard their own legalized homeland, and the federal government's inaction or incompetence only bolstered their justifications for unauthorized violence.¹⁴⁰ National actors claimed that they could not control individual criminal behavior because malfeasants were too hard to find, yet they also failed to punish collective Euro-American violence because malfeasants were too prominent and numerous.¹⁴¹ Ablavsky emphasizes that the federal failure to respond raised disturbing questions about whether the Southwest Territory was even a part of the United States.¹⁴² Yet the same ambiguities that created unwanted costs for Euro-American migrants also freed them from certain kinds of governmental control.¹⁴³ For example, even as Euro-Americans celebrated a formal peace among Creeks and Chickasaws negotiated by federal officials under federal law, the contemporaneous eulogy also reflected federal institutions' limited role in ordinary life: "Peace with the Indians exists now not only in name, or upon paper in form of treaty, but in fact."¹⁴⁴ Such peace-in-fact emerged only occasionally and for

Thousand Deserts: Indian Raids and the U.S.–Mexican War, at xv (2008); Karl Jacoby, *Shadows at Dawn: A Borderlands Massacre and the Violence of History*, at xiv–xv (2008); Jill Lepore, *The Name of War: King Philip's War and the Origins of American Identity* 7 (1998) (discussing New Englanders' fear, in the late seventeenth century, that "they themselves were becoming Indianized, contaminated by the influence of America's wilderness and its wild people"); Ostler, *supra* note 88, at 375–82; Saunt, *supra* note 88, at xiii–xix; Peter Silver, *Our Savage Neighbors: How Indian War Transformed Early America* 125–60 (2008); Elliott West, *The Contested Plains: Indians, Goldseekers, and the Rush to Colorado* 46–47, 92–93 (1998).

139. Ablavsky, *supra* note 1, at 111, 120, 188, 216–17.

140. See *id.* at 130, 218–19.

141. Compare *id.* at 130 ("Like Natives, territorial citizens readily took advantage of their borderland location to hop jurisdictions In one instance, federal soldiers entered a Kentucky town to try to apprehend a man who had allegedly murdered a Native in the Northwest Territory. The result was a near riot"), with *id.* at 218 ("With [Tennessee's] entire congressional delegation constantly agitating on the subject, the Adams administration decided that abandoning Cherokee land rights was the easier course. Congress authorized another treaty with the Cherokees, one that would 'give a more convenient form to the State of Tennessee,' . . . [and permit illegal] intruders to return" (quoting Instructions from James McHenry, Sec'y of War, to Alfred Moore, George Walton & John Steele (Mar. 30, 1798), in 4 *American State Papers: Indian Affairs* 639, 639 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832))), and *id.* at 219 (discussing George Washington's admission that he could not adhere to existing treaties because of his "strongest obligations to hear the complaints, and relieve, as far as is in my power, the distresses of my white children, citizens of the United States").

142. *Id.* at 156.

143. See *id.* at 157.

144. *Id.* at 166. (internal quotation marks omitted) (quoting Letter from William Blount to Joseph Dorris, Reverend (Oct. 11, 1795), in 3 *Am. Hist. Mag.* 363, 364 (1898)).

a short while, as the first hundred years of American history witnessed repeated cycles of treaties, statutes, crimes, and wars from coast to coast, with devastating consequences and extraordinary resistance.¹⁴⁵

A final complexity concerning pluralist sovereignty and violence emerged after the guns fell silent. Ablavsky describes two petitions that sought monetary compensation from Congress: one from a Cherokee woman whose husband was killed by unauthorized militia attacks, and another from Euro-American soldiers who wanted payment for perpetrating those same violent raids.¹⁴⁶ From a certain viewpoint, this legal episode could have forced Congress to decide whether the national government should condemn or approve violent behavior by “lawless whites.” Congress instead paid each of these petitioners, apparently perceiving good and deserving claimants on both sides.¹⁴⁷

Similar examples of monetized violence pervaded North America’s imperial history, as many treaties promised trade goods to compensate for Euro-American violence.¹⁴⁸ By statute, the federal government also paid for intercultural thefts of horses and enslaved people, and a revised non-intercourse statute gave reimbursement for goods that were stolen from Euro-Americans or Native Americans.¹⁴⁹ Much like other instruments of territorial governance, all of these legal mechanisms were affected by idiosyncratic enforcement, political distortion, and financial constraints.¹⁵⁰

Efforts at compensation mixed legality with lawlessness, violence with peace, and order with chaos. Ablavsky nonetheless argues that federal pay-

145. See, e.g., Kevin Kokomoor, *Of One Mind and of One Government: The Rise and Fall of the Creek Nation in the Early Republic* 272 (2019) (“With orders to broach the subject direct from then secretary of war James McHenry, and with state pressure that only increased with time, [Benjamin] Hawkins began floating the idea of another land cession as early as 1797 . . .”); *id.* at 297 (“In 1806 Georgians ‘were no sooner on their borders of Ocmulgee than they began to trespass on Indian rights,’ headmen were complaining. This was the clearest, most obviously illegal kind of settler expansion . . .” (footnote omitted) (quoting Letter from Benjamin Hawkins to John Milledge (June 9, 1806), *in* 2 *Letters, Journals, and Writings of Benjamin Hawkins, 1802–1816*, at 505, 506 (C.L. Grant ed., 1980))); *id.* at 319 (“[Hawkins explained that Americans] considered all Native lands east of the Mississippi ‘as a part of themselves born on the same lands with them and entitled to the same rights with them.’ . . . Creeks, in other words, did not actually control their own territory at all . . .” (footnote omitted) (quoting Letter from Benjamin Hawkins to Alexander Cornells (Sept. 25, 1810), *in* *Letters, Journals, and Writings of Benjamin Hawkins*, *supra*, at 568, 568)); *id.* at 330 (“A little more than a year after the [Red Stick War] began [in 1813] . . . Creek Country was in shambles. Close to a thousand warriors were dead and more were on the run, half of Creek Country was a wasteland, and American authorities walked away with much of what remained.”).

146. Ablavsky, *supra* note 1, at 169.

147. *Id.*

148. Calloway, *Pen & Ink Witchcraft*, *supra* note 78, at 19–22.

149. Ablavsky, *supra* note 1, at 173–78.

150. *Id.* at 177–78.

ments were important because they induced diverse groups near the borders of American authority to lean closer toward the center.¹⁵¹ Even when the federal government could not satisfy its own standards as an “adjudicatory state”—failing to achieve stability, impartiality, or rule of law—it still could determine whose violence and suffering would receive compensation. Territorial residents were at least sometimes drawn toward the centralized federal government to obtain its money.

Ablavsky explains that particular compensatory payments were functionally comparable to Native annuities, hospitality at treaty conferences and forts, as well as military salaries themselves.¹⁵² All of those expenditures were performative acts by the federal government, and none of the payments stayed in just one set of hands. As happened with most economic assets, recipients used federal money to buy and sell goods, to acquire and “improve” land, to raise families in comfort or deprivation, and to obtain laborers through markets, sex, or slavery.¹⁵³ Because money was always in motion, federal payments were never merely threads that tied the periphery to central government. They were tangled spiderwebs in the wind, or bright-colored dye in a pool. The same institutional and political mechanisms that collected and distributed federal payments changed the government forever, and the mixture of governmental payments with private capital transformed America in the broadest sense of the word. One territorial governor wrote that “all the Stirrings of Industry [were] set in Motion by the circulation of [federal] Money,” which “fertilize[d] and beautif[ied] the whole Country” like “a gentle stream.”¹⁵⁴ But federal money also scarred lands and residents like a hurricane. For better and for worse, episodes of pluralist violence and sovereignty in the federal territories were repeatedly linked together with broader institutions of national finance under law.

C. *The Politics of Statehood*

Ablavsky’s story ends with the transformation of federal territories into states. Tennessee came first, as Euro-American residents in Tennessee hoped that statehood might annihilate federal authority over public lands and Native American diplomacy.¹⁵⁵ But fundamental questions about state boundaries and title obligations were just as complicated as anyone would expect. Congressional advocates and opponents of statehood cited treaties

151. *Id.* at 178–95.

152. *Id.*

153. See Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* 5 (2013); Susan E. Klepp, *Revolutionary Conceptions: Women, Fertility, and Family Limitation in America, 1760–1820*, at 22 (2009); Sven Beckert & Seth Rockman, Introduction, *in Slavery’s Capitalism: A New History of American Economic Development* 1, 1–4 (Sven Beckert & Seth Rockman eds., 2017).

154. Ablavsky, *supra* note 1, at 195 (second, third, and fourth alterations in original) (quoting Letter from Arthur St. Clair to Unknown (Jan. 24, 1790) (on file with the Ohio Historical Society)).

155. *Id.* at 201.

with Native Americans, nonintercourse statutes, and North Carolina's land cessions in legal debates over whether and how private property law might change after statehood.¹⁵⁶ Yet only weeks after Tennessee's admission to the Union, the state assembly voiced an exceedingly simple framework for lawful title, relying on state sovereignty that allegedly survived from the Revolution.¹⁵⁷ Tennessee concluded "that the Indians have no fee simple If the Indians have any kind of claim to the lands . . . , it is believed to be the lowest kind of tenancy, namely that of tenants at will."¹⁵⁸ This would have effectively eliminated Native land and made all Native rights subject to state law. Tennessee's new congressman, Andrew Jackson, likewise undermined federal claims to public lands, invoking the state's "right to the Soil" under "Constitutional principles and by the law of nations."¹⁵⁹ He insisted that the United States could not own land in Tennessee because, "[i]f the right of soil was in the united federal head, we could not be said to Enjoy all the rights and privileges the original states Enjoy."¹⁶⁰

These could have been major steps toward a regime of non-pluralistic property and sovereignty, but in fact, legal statehood did not resolve any of those vitally disputed issues. Although modern statehood is often analyzed in terms of political representation and vertical federalism, its historical consequences for unrepresented Native American residents and contested federal lands were profoundly uncertain. As with federal territories, Euro-American efforts to control land in new states involved treaties, nonintercourse statutes, criminal law, payments, and military violence.¹⁶¹ Pluralism was restructured and revised under new conditions of statehood, but it was not displaced.

Ablavsky's final chapter describes statehood's implications for territorial governance, and he repeatedly notes that state citizens—unlike territorial residents—elected federal politicians who controlled the national purse.¹⁶² Even after the admission of Tennessee and Ohio as states, however, individuals continued to experience and pursue various forms of property and sovereignty pluralism. For example, Zachariah Cox bought land rights from one of the original states, Georgia, while arguing that his resultant efforts to colonize the new federal territory of modern Alabama would benefit the new state of Tennessee.¹⁶³ Cox pitched standard theories of Euro-

156. See *id.* at 203–04.

157. *Id.* at 204.

158. Address and Remonstrance of the General Assembly of the State of Tennessee (Aug. 9, 1796), reprinted in *Journal of the Senate of the State of Tennessee* 20, 22 (McKennie & Brown 1852) (1796).

159. Letter from Andrew Jackson, Rep., Tennessee, to John Sevier (Jan. 18, 1797), in 1 *The Papers of Andrew Jackson, 1770–1803*, at 116, 117 (Sam B. Smith & Harriet Chappell Owsley eds., 1980).

160. *Id.*

161. Ablavsky, *supra* note 1, at 205–24.

162. *Id.* at 194–95, 218, 220.

163. *Id.* at 207.

American migration and Native dispossession to Andrew Jackson, claiming that “Government will find it a better policy to people a country with their own citizens . . . than to reserve it as an asylum for savages.”¹⁶⁴ When federal resistance thwarted Cox’s plans, however, he shifted to Kentucky and announced a government of “Smithland” with its own independent laws and courts.¹⁶⁵ The town of Smithland has survived to the present—now fully integrated with state law—and some of Cox’s original shareholders were eventually compensated by Congress.¹⁶⁶ All of those results emerged from longstanding dynamics of legal pluralism that were affected but never simply determined by the replacement of territories with states.

Another illustration of post-statehood pluralism involved William Blount, the Southwest Territory’s former governor and Tennessee’s newly elected senator, who planned to attack Spanish Louisiana, transferring land to Great Britain in exchange for “high expectations of emolument and command.”¹⁶⁷ Blount was turned in and punished because he tried to recruit a federal Indian interpreter, asking him to persuade Blount’s Indian allies to join the effort.¹⁶⁸ “Blount’s Conspiracy,” as it was called, aptly illustrates territorial complexities during this era. Blount was a federal official from a newly admitted state, who sought to mobilize Native and local violence to accomplish a transfer of international sovereignty and realize personal financial gain along the way. Blount was ultimately snared in a web of bureaucratic politics, and he was impeached but not convicted for violating the federal nonintercourse act and a United States treaty with the Cherokee, which Blount himself had helped to negotiate.¹⁶⁹

Ablavsky’s research shows that other pluralist dynamics also survived in this new historical context. He characterizes “the new federal government [as] less an institution than a resource, a font of law and money.”¹⁷⁰ Yet before and after statehood, the status of federal institutions and resources—federal law and also federal money—were more often “unum in

164. *Id.* (internal quotation marks omitted) (quoting Letter from Zachariah Cox to Andrew Jackson (Apr. 27, 1797), *in* 1 *The Papers of Andrew Jackson, 1770–1803*, *supra* note 159, at 131, 131).

165. *Id.* at 207–08 (“Cox ran the town as his own fiefdom, enacting ‘laws of Smithland’ and creating his own courts to enforce them Cox insisted that ‘every man has a right to make himself laws of his own house, and that the houses there were his.’” (quoting Deposition of Martin H. Wickliff (Aug. 9, 1978), *in* *Documents Relating to Zachariah Cox*, at 106, 108 (Isaac Joslin Cox & Reginald Charles McGrane eds., 1913))).

166. *Id.* at 209. See generally History, Livingston Cnty. Gov’t, <http://livingstoncountyky.org/history.php> [<https://perma.cc/4PYR-56YN>] (last visited July 30, 2021).

167. Ablavsky, *supra* note 1, at 210.

168. *Id.* at 210–11.

169. *Id.* at 210–12.

170. *Id.* at 2.

multis” rather than “e pluribus unum.”¹⁷¹ Euro-American migrants continued to invade Native land, for example, prompting diverse reactions from states, federal officials, and Native groups. Ablavsky concludes that “the sole organizing principle of [Tennessee’s] chaotic politics was resistance to federal control,” but some of his historical sources describe areas of pluralist chaos from start to finish.¹⁷²

With various levels of skill and misfortune, all of Ablavsky’s characters used complex mechanisms of legal government to pursue their own objectives and live their own lives. Sometimes they delivered speeches to mischaracterize newly improvised ideas as immovably ancient, especially on issues of state sovereignty and federal authority.¹⁷³ Other times, individuals wrote venally corrupt letters to evade public scrutiny altogether.¹⁷⁴ Ablavsky has canvassed a remarkable range of historical materials, including published records and manuscript archives, to construct an image of early America that was complex and scattered in some respects, yet inexorably murderous in others. Idiosyncratic contingencies coexisted with sweeping patterns, and legal pluralism was a vital feature throughout. This Review’s next step is to consider what lessons modern legal communities might draw from Ablavsky’s distinctive image of the Founding Era.

II. EARLY FEDERAL GROUND AND MODERN AMERICAN LAW

Ablavsky’s work has immediate relevance for scholars of American government and historians of the Early Republic,¹⁷⁵ but this Part suggests that Ablavsky’s research also illuminates topics of broader legal interest. American property law—including Claire Priest’s book *Credit Nation*¹⁷⁶—looks different if one incorporates eighteenth-century territorial history. Theories of administrative law likewise must integrate Ablavsky’s lessons about territorial government. And constitutional originalism will need to grapple with historical episodes and practices from the Founding Era that

171. See generally Rosalind S. Helderman, *One Good Motto Begets Another: Group Wants Schools to Post a U.S. Original*, Wash. Post, July 14, 2002, at 16 (on file with the *Columbia Law Review*) (“‘E pluribus unum,’ which means ‘out of many, one,’ was proposed to grace the Great Seal of the United States by John Adams, Benjamin Franklin and Thomas Jefferson in 1776 and was meant to show how the 13 colonies had joined to form one nation.”). “Unum in multis” is Latin for “one among many.”

172. Ablavsky, *supra* note 1, at 221.

173. See, e.g., *id.* at 144 (quoting a Shawnee leader’s perception that American political speeches contradict each other); *id.* at 226–27 (describing a territorial official’s speech defending supposedly longstanding principles of local autonomy).

174. See, e.g., *id.* at 23 (describing territorial officials’ efforts to purchase land “in letters that they urged be burned after reading”); *id.* at 210 (discussing an official’s conspiratorial letter that was supposed to be burned).

175. See, e.g., Rao, *supra* note 16, at 97–105.

176. Claire Priest, *Credit Nation: Property Laws and Institutions in Early America* (2021).

are frequently ignored. This Part briefly addresses each of these subjects in sequence.

Daniel Richter's award-winning monograph, *Facing East from Indian Country*, used historical research to reorient American geography.¹⁷⁷ Instead of characterizing the St. Louis Arch from the Euro-American perspective as the "gateway to the west," Richter described that same land from a Native viewpoint as a gateway to the east.¹⁷⁸ Ablavsky's book has similar ambitions to reform the geography of national legal communities. It is wrong to view the Northwest and Southwest Territories as simply venues for "expansion." For Native people, these were lands of eastern encroachment, even though the historical regimes that navigated such competing visions have been erased from most modern lawyers' perceptions. Ablavsky parallels the transformative ambitions of his mentor Richter in showing that, "[f]or better or worse, this [legal] history belongs to us all."¹⁷⁹

A. *Borderland Property*

Ablavsky describes property law—like federal governance itself—as a "resource" that various groups contested and channeled while pursuing divergent objectives, and his thesis contributes to one of property law's oldest theoretical debates: the link between property and sovereignty.¹⁸⁰ The nouns "property" and "sovereignty" are most often used in contexts of presumed stability or consensus. For example, Jeremy Bentham wrote that "[p]roperty and law are born together, and die together."¹⁸¹ Yet Bentham described that codependence in a particular sequence: "Before laws were made there was no property; take away laws, and property ceases."¹⁸² Bentham contrasted his own life and experiences, which were dominated by legal property rights, with supposed "savages" who have only a "feeble and momentary expectation" of keeping possessions.¹⁸³ "I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me."¹⁸⁴ For Bentham and countless lawyers afterward, property has represented a certain kind

177. Daniel K. Richter, *Facing East From Indian Country: A Native History of Early America* (2001).

178. *Id.* at 1–11.

179. *Id.* at 11.

180. E.g., Felix S. Cohen, *Dialogue on Private Property*, 9 *Rutgers L. Rev.* 357, 371 (1954); Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L. Rev.* 8, 8–9 (1927); Joseph William Singer, *Sovereignty and Property*, 86 *Nw. U. L. Rev.* 1, 51 (1991) ("[P]roperty rights are delegations of sovereign power, giving owners an ability, limited but real, to induce others to do what the owner wants. . . . Property is derived from sovereignty, but also creates sovereignty.").

181. Jeremy Bentham, *Theory of Legislation* 113 (R. Hildreth trans., 1908).

182. *Id.*

183. *Id.*

184. *Id.* at 112.

of stability that relies upon the presumed coherence of legally established sovereignty.

Modern property scholars often use the pronoun “we” in their legal analysis for reasons that echo Bentham’s, limiting discussion to only one framework of asserted sovereignty.¹⁸⁵ If the same “we” that administers the government is also the “we” that regulates property law, it becomes easier to imagine that “[p]roperty is the law of democracy.”¹⁸⁶ “Because we live in a free and democratic society that treats each person with equal concern and respect, we must interpret the fundamental values of liberty, equality, and democracy to define the set of property rights that we can recognize.”¹⁸⁷ Under this approach, sovereignty and democracy were first and foremost, with property law tailored to fit or perhaps following in tow.

Ablavsky’s story inverts that sequential reasoning. If anyone in the Early Republic wished to achieve liberty, equality, democracy, or sovereignty, such aspirations required a certain kind of property system.¹⁸⁸ Complicating Bentham’s thesis, it would be just as accurate to say that there were no federal laws before federal property—without property, there would not have been federal government—and no one in American borderlands could “count upon the enjoyment” of government if the latter

185. E.g., Joseph William Singer, Property as the Law of Democracy, 63 Duke L.J. 1287, 1289 (2014) [hereinafter Singer, Property as the Law of Democracy] (“[W]e face hard choices in defining property rights.”). Singer’s career has also included remarkable commitment to the amplification of Native American issues within law schools and beyond. E.g., Joseph William Singer, The Indian States of America: Parallel Universes and Overlapping Sovereignty, 38 Am. Indian L. Rev. 1 (2013); Joseph William Singer, Well Settled?: The Increasing Weight of History in American Indian Land Claims, 28 Ga. L. Rev. 481 (1994). Other uses of “we” in property scholarship are easy to collect. See, e.g., Jedidiah Purdy, This Land Is Our Land: The Struggle for a New Commonwealth, at x (2019) (“Land is perennially the thing we share that holds us apart.”); Mark Verstraete, Inseparable Uses, 99 N.C. L. Rev. 427, 430 (2021) (“[E]ither we grant property rights in data . . . or we abandon the intuitive and foundational notion of a connection that links a person to their data.”). There are also studies surrounding conflicts of law and the transnational or international law of property. See, e.g., Priya S. Gupta, Globalizing Property, 41 U. Pa. J. Int’l L. 611, 615 (2020) (asserting that “current common law conceptions of property and doctrinal frameworks are *by definition* transnational, which . . . implies that they were largely formed as a result of encounters between domestic and foreign actors”).

For general critique of the carelessly overused pronoun “we,” see David J. Silverman, This Land Is Their Land: The Wampanoag Indians, Plymouth Colony, and the Troubled History of Thanksgiving 17 (2019) (suggesting that teaching students to refer to both pilgrims and Indians impartially as “they” instead of “we” would be a crucial step toward a better understanding of history in which all actors are seen as fully human).

186. Singer, Property as the Law of Democracy, supra note 185, at 1291.

187. *Id.*

188. Of course, it is true that interpretations of those aspirational nouns in the Early Republic would hardly qualify under the same labels today. Cf. Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709, 1716 (1993) (“[I]t was not the concept of race alone that operated to oppress Blacks and Indians; rather, it was the *interaction* between conceptions of race and property that played a critical role in establishing and maintaining racial and economic subordination.”). In the context of American empire, one could supplement the influential title of Harris’s article by likewise describing the “whiteness of property.”

failed to navigate property pluralism. For the territorial legal system, the control of land through property was simultaneously foundational and vulnerable.

Property in Ablavsky's historical context cannot match conventional images of law as "resolving disputes."¹⁸⁹ Quite the opposite, establishing federal ground in the territories created more disputes than it resolved, and the goal was never simply to eliminate or reduce disputes. The shared objective of property law and sovereignty was to structure institutions and principles that would cause disputes to emerge, persist, disperse, and reemerge over time. This was property as empire, and controlling property was just as essential to new forms of sovereignty as the other way around.¹⁹⁰ Insofar as modern scholars have adopted Bentham's sovereignty-first view of property law, they misperceive the historical interrelationship of public and private law. In the federal territories that ultimately composed most of the modern United States, the government was composed and reformed by its ability to support stable legal titles just as much as notions of title were determined by contested claims of sovereignty.

A second use of Ablavsky's research concerns the history of American property law, with Claire Priest's *Credit Nation* as a useful point of comparison. Like Ablavsky, Priest transforms ideas about the geography of property law, and she accomplishes this by highlighting links between property and credit.¹⁹¹ In the Early Republic—and also today—property was not merely something to use or occupy. It was a vital form of investment, and the purchasing funds came not only from buyers and occupants, but also from lenders and mortgagors.¹⁹² According to Priest, property laws could never be entirely at rest in a local landscape. American property was always moving, and it followed a trajectory of existing transatlantic credit networks.¹⁹³ In this sense, Ablavsky's and Priest's research complement one another. Ablavsky's book is focused on federal title's relationship to government and public law, paying special attention to federal payments over

189. See Henry E. Smith, Property as the Law of Things, 125 Harv. L. Rev. 1691, 1691–94 (2012) (describing property law principally as a response to information costs).

190. Cf. Harris, *supra* note 188, at 1730 ("In creating property 'rights,' the law draws boundaries and enforces or reorders existing regimes of power." (citing Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 650–52 (1988))).

191. Priest, *supra* note 176, at 1.

192. See *id.* ("In the United States today, there is a vast credit economy that almost anyone who owns property . . . can access by obtaining home mortgages and car loans [O]btaining credit requires having property Two centuries of American economic prosperity have been based on the laws governing credit and property.").

193. *Id.* at 5–7. For another excellent study of transnational credit, in a very different historical context, see Fahad Ahmad Bishara, *A Sea of Debt: Law and Economic Life in the Western Indian Ocean, 1780–1950*, at 56 (2017) ("[I]ndebtedness in the Indian Ocean meant inclusion—inclusion into a marketplace of commercial relationships, into the circuits through which goods and money traveled, and into the dense webs of economic, social, and political obligation that characterized life all around the Indian Ocean.").

time. Priest's book is focused on property law's relationship to private capital, channeling or restricting risk and reward to make land a more or less desirable asset or investment. Neither of those dynamics operated in separation from the other.

Priest emphasizes vital differences between English and American law concerning property's alienability for sale and its use as collateral for credit. Traditional English law sought to shelter land inside the family unit by making land harder to buy, sell, and use as security for loans.¹⁹⁴ Land was an incrementally preferable investment choice for owners who wanted to protect real estate from market forces and creditors. But that also necessarily implied that landowners could not so easily access credit markets, whether they wanted to borrow money for the purchase of new land or to leverage land ownership and fund other financial projects. Early English law gave landowners a tighter grasp on their own real estate, but it was correspondingly harder for landowners to use those assets to access credit.

By contrast, North American governments eliminated the fee tail and increased land recording to facilitate property transfers.¹⁹⁵ Colonial laws in North America echoed reformist policies of eighteenth-century Britain that boosted colonial residents' access to credit by supporting transatlantic creditors' access to land.¹⁹⁶ Priest suggests that technical features of American property law—especially in the context of widespread slavery—were important to basic social structures.¹⁹⁷ Facilitating land sales increased the commercial value of property, analogous to a modern reduction in interest rates, even as greater access to credit allowed the creation of larger plantations and the purchase of more enslaved labor.

Prior scholarship has shown that the federal government itself needed credit in European financial markets to finance public debts from the Revolutionary War.¹⁹⁸ By comparison, Priest shows that early property law increased private Americans' access to capital by mobilizing the greatest financial assets on the continent: land and profits under slavery's capitalism.¹⁹⁹ Those dynamics pulled larger amounts of money into land markets,

194. Priest, *supra* note 176, at 59–73.

195. *Id.* at 99–113.

196. *Id.* at 74–89.

197. *Id.* at 128–45.

198. See Edling, *supra* note 63, at 94–99 (discussing Alexander Hamilton's efforts, following the example of European practice, to refinance the Revolutionary debt in the 1790s); Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State 173–74* (2003) (discussing the Federalists' view that the federal government needed the authority to levy taxes in order to establish credit in Europe).

199. See Priest, *supra* note 176, at 25 (“Land was the principal asset that could be doled out to incentivize crown officials to immigrate to the colonies. . . . Throughout the colonial era, a segment of the elites connected to government was able to amass large land parcels.”); *id.* at 138 (“America . . . is of necessity a borrower. The extent of her lands . . . , her commerce . . . , and her manufactures . . . require assistance and credit. . . . By running in debt with the mother country, America increased really in power.” (internal quotation marks

and they also inspired various Euro-American migrants who purchased and occupied the land.

Priest's analysis necessarily leans eastward, highlighting the shift from colonies to states—from the British Empire to the American Republic—but this means that her project cannot give close attention to Native American title or territorial government.²⁰⁰ By comparison, Ablavsky's book emphasizes governmental events in the borderlands, but it mostly ignores lines of private capital and migration from east to west and from Europe to America. Viewed as intellectual complements, Ablavsky and Priest provide an important new framework for understanding the early American empire that highlights the combination of public law and private institutions. Ablavsky shows how public officials shifted governmental policy and funds to serve personal interests, and Priest shows how the fundamental basis of property law intersected with private economic forces. Viewed together, such research demonstrates that ostensibly neutral legal institutions were powerful engines of credit, markets, migration, governance, and dispossession all at once. Ablavsky shows how any legal system that aspires to create and control property can create cycles of *ever-increasing opportunities* to create and control property: Territorial property law served as a contested mechanism for creating the federal government which, in turn, wielded its authority to reinforce the underlying property regime. However, Priest's economic focus emphasizes that such mutually reinforcing cycles of property law are never self-perpetuating or straightforwardly political; they are fueled by access to private capital markets, buyers, and migrants. Ablavsky and Priest have both "followed the money" in order to describe the founding history of American law, yet each author has emphasized a different set of financial materials and resources, leaving opportunities for future research to analyze the important combination of public funds and private capital in creating federal territories.²⁰¹

omitted) (quoting A True Friend, to the Inhabitants of Virginia, Va. Indep. Chron., Nov. 14, 1787, reprinted in *The Documentary History of the Ratification of the Constitution* Digital Edition 159 (2009)); see also Beckert & Rockman, *supra* note 153, at 27 (noting "the impossibility of understanding the nation's spectacular pattern of economic development without situating slavery front and center").

200. See Priest, *supra* note 176, at 24 ("There is much more work to be done by historians on how land was taken and purchased from Native Americans and distributed to immigrants. It is beyond the scope of this book to address land acquisition from Native Americans, which is worthy of its own book.").

201. See, e.g., Michael A. Blaakman, *The Marketplace of American Federalism: Land Speculation Across State Lines in the Early Republic*, 107 *J. Am. Hist.* 583, 585 (2020) (arguing "that federalism—the existence of multiple sovereignties within an evolving political union—organized the late eighteenth-century land business, and that land-dealing elites fashioned this federal reality into a versatile financial, political, and legal tool kit in ways that helped fuel speculation"); Stephen Mihm, *Follow the Money: The Return of Finance in the Early Republic*, 36 *J. Early Republic* 783, 783 (2016) ("Until recently, finance has hardly been a hot topic, despite the great amount of ink spilled documenting the larger economic transformations of the era: the 'market revolution' and the rise of capitalism . . . [S]cholars have . . . generally relied on secondary sources that were fifty, even one hundred years

Especially when read together, Ablavsky's and Priest's research invites modern readers to rethink American property regimes that are often taken for granted. Ablavsky shows that federal territories were never the product of yeoman farmers pulling upward on their bootstraps, and western migration was not a natural expansion of republican liberty from coast to coast. The creation of "federal ground" required blood, violence, and government spending, along with ramshackle and makeshift categories of law—and this creation unfolded in perpetual dialogue with images of private interests and the public good. Priest followed a different path, highlighting private investors and credit to understand more fully who was funding the United States' "empire project" in federal territories.²⁰² It should be obvious that current regimes of American property law are supported by relationships that are similar to and different from those of the Early Republic. Borrowing Ablavsky's approach, "life, liberty, or property" remain intermingled elements of American government today, including complex forms of legal invention and violence that rest on the fundamental reality of Native dispossession. Priest's book is more direct in addressing current circumstances: "We take access to credit for granted but, in fact, decisions made centuries ago set the stage for our modern economy."²⁰³ From this broader perspective, projects like Ablavsky's and Priest's do more than examine how current regimes emerged from the past; they also suggest a group of structural and theoretical issues for present scholars to consider as they chart property's future.

B. *Administering Borderlands*

Ablavsky's research about federal governance in the territories also affects the modern tumult surrounding administrative law. Current disputes about administrative law have exceeded all expectations, witnessing constitutional arguments about deference and governmental structure that would have seemed impossible a decade earlier.²⁰⁴ One academic has

old."); Sharon Ann Murphy, *Banks and Banking in the Early American Republic*, 10 *Hist. Compass* 409, 411 (2012) ("[L]awmakers feared the influence of the increasing numbers of foreign stakeholders in the [Second United States] bank Although foreigners were prohibited from voting for the board of directors, critics argued that [they] . . . were reaping the majority of profits from the bank and potentially exerting undesired influence over its policies.").

202. See John Darwin, *The Empire Project: The Rise and Fall of the British World-System, 1830–1970*, at 20 (2009); Adam Smith, *The Wealth of Nations: Books IV–V* 550 (Andrew Skinner ed., Penguin Books 1999) (1776) ("The rulers of Great Britain have . . . amused the people with the imagination that they possessed a great empire on the west side of the Atlantic. This empire, however, has hitherto existed in imagination only. It has hitherto been, not an empire, but the project of an empire").

203. Priest, *supra* note 176, at 1.

204. See, e.g., Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 *Geo. Wash. L. Rev.* 654, 656 (2020) ("[T]he current probability of overturning *Chevron* is higher than anyone could have imagined a few years ago."); Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation*

recently argued that the whole field of administrative law is unlawful, members of the Supreme Court have challenged foundational judicial precedents, and the legal community has incrementally normalized once-radical critiques of the administrative state.²⁰⁵ Crucial aspects of anti-administrativism are historical in nature, claiming that modern governmental structures have violated primordial legal principles and lack historical precedents.²⁰⁶ Ablavsky's research contributes to those modern debates in some ways that will seem familiar and other ways that will not.

One implication of Ablavsky's scholarship is to supplement the massive literature describing the federal government's history.²⁰⁷ Scholars have spent decades contradicting simplified claims that the Early Republic's government "of courts and parties" lacked significant administrative structures or institutions.²⁰⁸ Prior research about "big" federal government contradicts anti-administrativist claims that large fractions of the American legal experience are unlawful, un-American, or unconstitutional.

Ablavsky's research speaks to those debates. In an earlier article, Ablavsky explained that territorial government "strongly resembled the modern administrative state" because "it explicitly empowered federal officials within the executive branch to exercise 'binding legislative and judicial power' over U.S. citizens."²⁰⁹ *Federal Ground* further describes the

of Constitutional Politics, 101 B.U. L. Rev. 619, 621 (2021) ("[O]stensibly apolitical arguments against *Chevron* are actually part of a recent phenomenon that has mirrored changes in partisan politics."); Gillian E. Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State under Siege, 131 Harv. L. Rev. 1, 2 (2017) ("[W]e are seeing a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal.").

205. See, e.g., *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari) (claiming that administrative deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "compels judges to abdicate the judicial power without constitutional sanction"); *Gundy v. United States*, 139 S. Ct. 2116, 2133–42 (2019) (Gorsuch, J., dissenting) ("This mutated version of the 'intelligible principle' remark . . . has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional."); Philip Hamburger, Is Administrative Law Unlawful? 493 (2014) ("Administrative power . . . is dangerous and unlawful in ways not conventionally recognized."); Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490, 1494 (2021) ("[T]here is significant evidence that the Founding generation adhered to a nondelegation doctrine, and little evidence that clearly supports the proposition that the Founding generation believed that Congress could freely delegate its legislative power.").

206. See Metzger, *supra* note 204, at 8–46 (describing the political history and recent attacks on the administrative state, especially in political, judicial, and academic spheres).

207. A solid introduction to this literature is Rao, *supra* note 16.

208. That widely quoted phrase comes from Steven Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*, at 39 (1982).

209. Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. Pa. L. Rev. 1631, 1633 (2019) [hereinafter Ablavsky, *Administrative Constitutionalism*] (quoting Hamburger, *supra* note 205, at 4); see also Stephen J. Rockwell,

variety of improvised governmental structures that were used in federal territories.²¹⁰ All of those unorthodox institutions rebut anti-administrativist presumptions that the three branches of government have remained, until recently, theoretically pure and hermetically sealed.²¹¹ On the contrary, the history of territorial government shows that “a category of positive law akin to modern administrative law not only existed during the creation of the United States, but was explicitly sanctioned by its foundational documents.”²¹² Alongside a mass of recent scholarship,²¹³ Ablavsky challenges anti-administrativism by showing that diverse governmental forms have extraordinarily deep historical roots. He explains that any “denial of this history rests on a tendentious, results-oriented narrative that is constrained to ignore or distinguish away substantial contradictory evidence.”²¹⁴ The history of territorial government adds new factual research to undermine the modern anti-administrativist movement.

A second implication of Ablavsky’s work concerns administrative law and empire. Modern images of administrative government are typically centered on twentieth-century experiences with the New Deal and the Great Society, when new federal institutions emerged to serve relatively leftist goals, including economic distribution, safety standards, racial justice, and environmental regulation.²¹⁵ Territorial government was nothing like that. On the contrary, the central bureaucracy’s financial, military, and diplomatic goals for federal territories always connected to Euro-American migration and investment.²¹⁶ During the late eighteenth century, those dynamics were fundamentally based on Native dispossession, displacement, and violence.²¹⁷

Indian Affairs and the Administrative State in the Nineteenth Century 37 (2010) (“No person in North America in the nineteenth century could have avoided regular contact with forms of government, public policy, regulation, and control A sense of the state came with the territory.”).

210. See *supra* Part I.

211. See Metzger, *supra* note 204, at 17–28.

212. Ablavsky, *Administrative Constitutionalism*, *supra* note 209, at 1666.

213. E.g., Parrillo, *A Critical Assessment*, *supra* note 63 (contributing to those debates, as well as collecting extensive citations to other commentary).

214. Ablavsky, *Administrative Constitutionalism*, *supra* note 209, at 1666.

215. See, e.g., Romain Huret, Nelson Lichtenstein & Jean-Christian Vinel, Introduction: The New Deal: A Lost Golden Age?, *in* *Capitalism Contested: The New Deal and Its Legacies* 1, 1 (Romain Huret, Nelson Lichtenstein & Jean-Christian Vinel eds., 2020) (“[T]he New Deal was first and foremost an attempt to put an end to inequality in U.S. society.”); Julian E. Zelizer, *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society* 2 (2015) (“Johnson had started in politics as a New Deal liberal, and over the years he had grown ever more determined to deal with . . . civil rights and health care.”).

216. See Ablavsky, *supra* note 1, at 5, 11, 233; William H. Bergmann, *The American National State and the Early West* 1–8 (2012) (“Since 1789, the federal government had deployed fiscal and military powers granted to it by the Constitution to transform the early western economy through land acquisitions, infrastructure, commerce, and communication.”).

217. See Ablavsky, *Administrative Constitutionalism*, *supra* note 209, at 1666–67; Rockwell, *supra* note 209, at 7–8 (“Removals and reservations would today be called ethnic

Ablavsky has written that administrative government in the territories “proved a particularly congenial tool for serving normatively undesirable ends,” but the implications run much deeper.²¹⁸ Ablavsky’s book joins other scholarship debunking myths that early America was originally perched along the Atlantic before sweeping west through the force of adventurers and destiny.²¹⁹ He shows that governmental instruments were always present in the territories, along with centralized money and troops.²²⁰ Territorial governments could not authorize Euro-American residents to vote in federal elections, and Native residents could not vote at all,²²¹ thereby creating two levels of unrepresentative imperial governance. When modern debates about administrative law overlook or minimize the Early Republic’s imperial objectives, they not only distort the ambitious realities of eighteenth-century government; they also distort the normative stakes of the United States itself.

Administrative institutions in the United States have always pursued goals that are exploitative as well as protective, stabilizing as well as disruptive, humane as well as merciless.²²² Ablavsky’s effort to more accurately describe administrative government yields broader insights about the complex path of American law’s institutional history. It also offers an opportunity to rethink arguments about anti-administrativism in the modern context, when administrative law stretches from left-leaning public welfare to right-wing immigration law and everything in between.²²³ Conservative

cleansing The rapidity and thoroughness with which the federal government pacified, removed, contained, and dispossessed American Indians and tribes across North America is an awesome display of coordinated public administration at the national level.”).

218. Ablavsky, *Administrative Constitutionalism*, supra note 209, at 1666.

219. E.g., Kathleen DuVal, *The Native Ground: Indians and Colonies in the Heart of the Continent* 10–11 (2006) (“Early American history is too rich for the old narrative that presumes the inevitability of European colonial success Anglo-Americans came west with a developing ideology of their own *innate, biological* superiority[,] [and] they persuaded the federal government to muster its resources on behalf of their dreams of landholding”); Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* 19 (1987); Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815*, at 366–68 (2d ed. 2011) [hereinafter White, *The Middle Ground*]; Pekka Hämäläinen & Samuel Truett, *On Borderlands*, 98 *J. Am. Hist.* 338, 351–52 (2011).

220. Ablavsky, supra note 1, at 11–12 (“As the leading edge of U.S. colonialism, the territories more closely resembled a garrison state than anywhere else in the early United States.”); *id.* at 15 (observing that the “crude, expensive, and often ineffective tool” of federal money “reoriented the territories, as both Natives and non-Natives looked to the federal treasury for redress of wrongs committed by the other”).

221. U.S. Const. art. I, §§ 2–3; *id.* art. II, § 1; cf. *Elk v. Wilkins*, 112 U.S. 94, 99–100 (1884) (describing Native people’s original status as “not part of the people of the United States,” while also refusing to protect Native voting rights under the Fifteenth Amendment).

222. See Daniel Immerwahr, *How to Hide an Empire: A History of the Greater United States* 24 (2019).

223. Cf. Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 *Emory L.J.* 1, 72 (2019) (“Modern politics poses a very real threat to the U.S. administrative state. Ideological positions are further apart, and swings between

Republicans sometimes support big government in modern times, just as progressive Democrats sometimes attack it.²²⁴ The racist and imperialist history of Framing Era administrative structures illustrates a longstanding feature of territorial governance and the United States more broadly.²²⁵

A third feature of Ablavsky's research concerns the importance of peripheral governance in the territories for officials of the central administration. Although many individuals who participated in territorial governments were self-consciously distant from capital cities, Ablavsky gathers extensive correspondence from George Washington, James Madison, Alexander Hamilton, Henry Knox, and other officials who were concerned or even obsessed with territorial regulation.²²⁶ Modern lawyers might view the Northwest and Southwest Territories as "anomalous zones" that escape close attention, but that was not true at the time.²²⁷ Today's disputes about administrative power are dominated by state and federal actors, yet eighteenth-century territorial governments were widely understood as an essential third category of legal administration.²²⁸

Central bureaucrats had countless opportunities—in official reports and private correspondence—to debate whether territorial governments violated the United States' constitutional order.²²⁹ During the eighteenth

them are increasingly common. Cooperative incentives are low, and national partisan conflict extends to the states and the courts.”).

224. See, e.g., Rebecca Klar, Senate Confirms Lina Khan to the FTC, Hill (June 15, 2021), <https://thehill.com/policy/technology/558478-senate-confirms-biden-nominee-lina-khan-to-the-ftc> [<https://perma.cc/PLP8-GED2>] (“Republican Sen. Josh Hawley (Mo.), a leading GOP Big Tech critic, voted in favor of Khan’s nomination. Hawley has proposed his own bill that would revamp antitrust laws, with a target on the tech giants.”); Jessica Kwong, Alexandria Ocasio-Cortez Sheds Tear, Says ‘We Are Standing on Native Land’ as She Calls to Defund ICE, Newsweek (Feb. 7, 2019), <https://www.newsweek.com/alexandria-ocasio-cortez-ice-native-land-1322850> [<https://perma.cc/C6F6-KH3X>] (“Representative Alexandria Ocasio-Cortez . . . called on Congress to cut funding to U.S. Immigration and Customs Enforcement (ICE) and accused the agency of criminalizing Latinos in the United States, which she called ‘native land.’”).

225. See, e.g., Blackhawk, Paradigm, supra note 9, at 1840–42 (arguing that congressional deference to “unbridled executive power” in late nineteenth-century Native affairs led to abuses that provide “a latent, but potentially ferocious, critique of administrative constitutionalism”); Craig Green, Indian Affairs and Administrative Law, Yale J. on Regul.: Notice and Comment (Aug. 25, 2020), <https://www.yalejreg.com/nc/indian-affairs-and-administrative-law-by-craig-green/> [<https://perma.cc/CBE8-TESV>] (discussing Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (2010)).

226. See, e.g., Ablavsky, supra note 1, at 12, 22–23, 55, 75–76.

227. See Ablavsky, *Administrative Constitutionalism*, supra note 209, at 1634–35 (rebutting this characterization); Gerald L. Neuman, *Anomalous Zones*, 48 *Stan. L. Rev.* 1197, 1201 (1996) (describing “anomalous zone” as “a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended”); *id.* at 1233 (“The creation of geographical exceptions to policies otherwise regarded as fundamental is a dangerous enterprise. Anomalous zones may become, quite literally, sites of contestation of the polity’s fundamental values.”).

228. See Ablavsky, *Administrative Constitutionalism*, supra note 209, at 1635.

229. See, e.g., Ablavsky, supra note 1, at 10 (documenting the formidable mass of correspondence and political debates that took for granted the constitutional existence of territorial governance).

century, that did not happen.²³⁰ Objections about territorial government were instead voiced by territorial residents and officials who viewed the American empire's new administrative government as a tyrannical departure from republican principles.²³¹ This means that the only people who complained about federal territories' diminished constitutional status were the same people who chose to migrate away from states to occupy federal territories. Such complaints were crocodile tears, as objections about dependent colonial status were used strategically to gain even more support from the imperial federal government.²³² Ablavsky characterizes the drive for statehood itself as one more tool that borderland residents and officials used to increase access to federal resources.²³³ Statehood, nationhood, and territory were under development simultaneously, and such disputes often concerned the administration of territorial governments that modern lawyers have ignored or forgotten.

Ablavsky's research therefore unsettles several prevalent ideas about administrative law. One historian has described the west as "the kindergarten of the modern American state"—a venue for bureaucratic innovation and governmental development—but in fact such metaphors of childhood are twisted and complex.²³⁴ To regulate newly acquired territories, the federal government used administrative structures that modern observers would call immature and undeveloped. At the same time, Americans also characterized territorial governments at the periphery as a "Child . . . Nursed with such tenderness" by the paternalistically adult and mature United States.²³⁵ The reality was that federal and territorial governments grew up not in a hierarchical relationship of parent and child, but rather as siblings or friendly enemies—at once working together and acting as intramural rivals.²³⁶ From every perspective, *Federal Ground* refutes efforts to deny the scope of administrative law in the Early Republic. Perhaps even more importantly, it illustrates how rhetoric describing government as small or large—childlike or grownup—was mobilized in the past to serve political purposes, even as scholars use

230. See *id.* at 1, 15, 58.

231. See *id.* at 5, 14, 115, 170–71, 187–88.

232. See *id.* at 14, 187.

233. See *id.* at 194 (noting that "the newly 'independent' state of Tennessee proved its autonomy by lapping at the federal trough").

234. Richard White, *The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865–1896*, at 592 (2017).

235. Ablavsky, *supra* note 1, at 188 (omission in original) (internal quotation marks omitted) (quoting Petition to Congress of the Inhabitants of the Territory Northwest of the Ohio (Dec. 24, 1801) (on file with the Ohio Historical Society)).

236. See *id.* at 2–3 (describing the stumbling complexity of federal governance); *id.* at 187–91 (describing the complex relationship between territorial and central governments).

similar arguments to debate administrative law's status and legitimacy today.²³⁷

C. *Originalism's Boundaries*

The term "originalism" has grown powerful in recent years, aided by an increasingly conservative judiciary and the Federalist Society.²³⁸ In part because of that political ascent, originalism's intellectual content has become more contested and less determinate.²³⁹ This Review has already described the challenge that *Federal Ground* presents to purportedly "original" understandings of administrative law and government.²⁴⁰ This section is focused on consequences for originalism's analysis of statehood and federalism.

Modern originalism has numerous and diverse adherents, yet its methodological coherence as an "-ism" requires two characteristics.²⁴¹ First, originalism must highlight the narrow time period around a constitutional provision's "origin" as having unique or distinctive significance for legal interpreters. It is not enough for originalism to cite historical evi-

237. See Metzger, *supra* note 204, at 9–17 (explaining that administrations from Nixon to Trump ran on platforms emphasizing deregulation and downsizing of government as a way to politically attack their opponents).

238. See, e.g., William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *Nw. U. L. Rev.* 1455, 1458 (2019) (“[O]ur legal system reflects a deep commitment to our original law, publicly displayed in our legal practice. Indeed, originalism could aptly be called the “deep structure” of our constitutional law, present in our frequent practices of identifying, justifying, and debating the content of our law.”); Logan Everett Sawyer III, *Method and Dialogue in History and Originalism*, 37 *Law & Hist. Rev.* 847, 849 (2019) (calling originalism a “theory of unquestioned importance”). For broad introductions to the field, see generally *Originalism: A Quarter-Century of Debate* (Steven G. Calabresi ed., 2007) (collecting significant speeches and writings on originalism to commemorate the founding of the Federalist Society in 1982); *The Challenge of Originalism: Theories of Constitutional Interpretation* (Grant Huscroft & Bradley W. Miller eds., 2011) (describing the history and evolution of originalism).

239. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 *Va. L. Rev.* 1, 44–46 (2020) (asserting that “originalism cannot establish its own validity”).

240. See *supra* section II.B.

241. See generally Craig Green, *Originalism Without the -ism* (unpublished manuscript) (on file with the *Columbia Law Review*) (describing the significance of originalism as an “-ism”). Prominent modern arguments for originalism include Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1 (2018); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 *Notre Dame L. Rev.* 1921 (2017); William Baude, *Is Originalism Our Law?*, 115 *Colum. L. Rev.* 2349 (2015); Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 *Nw. U. L. Rev.* 1419 (2019); Stephen E. Sachs, *Originalism Without Text*, 127 *Yale L.J.* 156 (2017); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 *Nw. U. L. Rev.* 1243 (2019).

dence—even from an “original” period—as merely one source of constitutional meaning among many.²⁴² That would be historical pluralism.²⁴³ Second, the constitutional provision’s “original” meaning must become distinctively or uniquely fixed during that same delimited period. It is not enough for originalists to claim that constitutional meaning eventually became settled at some “non-original” moment after the moment of constitutional ratification.²⁴⁴ That would be traditionalism.

Originalism’s distinctive intellectual features—putting aside its modern politics—are its connection to a narrow “originalist window” of time and its view that legal ideas from that era must not change over time. Whatever was authoritative in the originalist window must remain authoritative forever, and whatever was not constitutionally determined must remain undetermined.²⁴⁵

242. See William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1, 3 (2019) (“Historical practice is not quite the same as originalism, . . . because it frequently looks to what has happened in the generations *after* a text was originally written.”).

243. See Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 *Tex. L. Rev.* 1753, 1753 & n.3 (1994) (collecting arguments for pluralist constitutional methodologies from Philip Bobbitt, Robert Post, and Richard Fallon); Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 *J. Am. Hist.* 1013, 1014 (1987) (“Constitutional rights consciousness suggests a faith that the received meanings of constitutional texts will change when confronted by the legitimate aspirations of autonomous citizens and groups.”); *id.* at 1034 (advocating a pluralist “understanding of the moral complexity of American constitutional experience . . . as well as the costs of commitment to American constitutional values”); Keith E. Whittington, *On Pluralism Within Originalism, in The Challenge of Originalism: Theories of Constitutional Interpretation*, *supra* note 238, at 70, 70–71 (seeking to reconcile originalism with limited forms of pluralism).

244. It may be useful to say that a “fixed” legal meaning does not require the existence of a “specific” or “certain” legal meaning. No one claims that the Framers offered identifiable constitutional answers for every legal question. An originalist might just as easily believe, for example, that the Constitution originally authorized the federal government to implement the so-called Fugitive Slave Clause, that it did not authorize such federal enforcement, or that it did not answer the question. See *Ableman v. Booth*, 62 U.S. (21 How.) 506, 508 (1858) (reversing a state court decision that refused to accept such federal power); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 567–68 (1842) (holding that the Constitution did grant such federal power); Letter from Abraham Lincoln, Rep., Illinois, to Salmon P. Chase, Governor (June 20, 1859), *in* 3 *The Collected Works of Abraham Lincoln, 1858–1860*, at 386, 386 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds., 1953) (“The U.S. constitution says the fugitive slave ‘*shall be delivered up*’ but it does not expressly say *who* shall deliver him up.”). Likewise, this Review’s description of originalism is broad enough to encompass any range of originalist sources, which have been variously described to include the drafters’ intentions, the drafters’ statements, inferences about function or structure, ratification debates, and “original public meaning.” See generally Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 *U. Pa. L. Rev.* 261 (2019) (proposing a corpus linguistics approach to originalism); Keith E. Whittington, *The New Originalism*, 2 *Geo. J.L. & Pub. Pol’y* 599 (2004) (tracing some of originalism’s various emphases).

245. See, e.g., *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“[Our ancestors] left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society . . . into our Basic Law.”).

Ablavsky's research illuminates original understandings of constitutional statehood. Other scholarship has shown that basic legal characteristics of statehood—including boundaries and political economy—remained unresolved and controversial throughout the 1770s and 1780s.²⁴⁶ Ablavsky's analysis of Tennessee and Ohio represents another part of that narrative, suggesting that fundamental disputes about statehood persisted during the 1790s and 1800s—including controversies about public lands, Native affairs, and conditional admission to the union.²⁴⁷

The persistence of such disagreements about the constitutional category of "statehood" is problematic for originalist claims about a substantially determinate, fixed framework of federalism. There were certainly some narrow issues about the constitutional status of states that properly qualify as "original meaning." For example, states have explicitly guaranteed roles in composing the Congress and choosing the President, and they also received special access to the Supreme Court.²⁴⁸ But Ablavsky's work also shows that many aspects of statehood remained complex and contested two decades after ratification, including the sovereign control of land inside the state and the authority to negotiate boundaries with Native people.²⁴⁹ Originalist claims about constitutional statehood would require somehow locating clarity in the same period of history where Ablavsky has discovered confusion and tumult.

The stakes concerning constitutional federalism are quite serious with respect to originalism's status and coherence as an "-ism." Originalism's identity as a political and intellectual movement emerged during the Reagan era, developed by judges like Robert Bork and Antonin Scalia, and perhaps especially by Attorney General Edwin Meese.²⁵⁰ Meese delivered a landmark speech to the American Bar Association about his "Jurisprudence of Original Intention," which highlighted constitutional federalism as the first legal topic that needed originalist revision.²⁵¹ If originalist methodologies cannot deliver expected results with respect to states' rights and federalism as "the oldest question of constitutional law," that might raise new questions about originalism's applicability to other politically charged

246. See Green, *United/States*, *supra* note 34, at 15–17 (examining the complex origins of preconstitutional statehood).

247. See Ablavsky, *supra* note 1, at 201–30.

248. See U.S. Const. art. I, §§ 2, 4 (Congress); *id.* art. II, § 1 (President); *id.* art. III, § 2 (Supreme Court).

249. See Ablavsky, *supra* note 1, at 201–30 (discussing disputes over statehood when the Southwest Territory joined the Union).

250. See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *Fordham L. Rev.* 375, 376 (2013) ("Attorney General Edwin Meese, Judge Robert Bork, and then-Judge Antonin Scalia became the high-profile advocates for originalism.").

251. Edwin Meese III, *Att'y Gen.*, *Speech to the American Bar Association* (July 9, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> [<https://perma.cc/NX5U-TE2W>].

issues that originalist proponents highlight today.²⁵² Ablavsky's contribution to originalist debates about federalism sets a pattern that scholars should use throughout constitutional law: refusing to overlook historical evidence that does not fit into national myths and east-oriented geographies.

* * *

Some readers will be surprised that Ablavsky's legal history about federal territories could have wide-ranging implications for private property, public administrative law, and constitutional interpretation. But *Federal Ground* insists, alongside other constitutional history, that the 1790s and 1800s are just as important for American law as 1776 or 1787.²⁵³ *Federal Ground* joins a broader historical movement calling attention to western migration, capital, and violence as decisive elements of the American experience.²⁵⁴ For legal readers, the special power of Ablavsky's work—supplementing and synthesizing its precursors—is to provide a loud and overdue wake-up call concerning basic historical realities of the American legal system.

III. THE STAKES OF LEGAL HISTORY

This Review concludes by discussing how historical research like Ablavsky's might affect national legal communities that are organized around a triumvirate of judicial doctrine, commentary, and formalized education. One question is whether the general category of legal history is important for contemporary law and lawyers. Another is whether Ablavsky's particular scholarship matters for modern legal communities. The answer to both questions is emphatically yes.

Law and legal practice are cultural phenomena that have changed over time, and of course, they continue to change today.²⁵⁵ During each historical era, lawyers and judges debate and reconsider what qualifies as proper judicial decisionmaking instead of "activism," what legal sources are appropriate to consider, and what legal results are "on the wall" or "off the wall."²⁵⁶ For

252. See *New York v. United States*, 505 U.S. 144, 149 (1992) (describing "perhaps our oldest question of constitutional law" as "discerning the proper division of authority between the Federal Government and the States"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 688–89 (1993).

253. See, e.g., Gienapp, *supra* note 1, at 7 ("In 1787, . . . [t]he written constitution was not a discrete, self-sufficient thing; embedded within a wider, dynamic, indivisible field of action, it was a script awaiting enactment."); *id.* at 8 ("[T]he American constitutional revolution of the 1770s and 1780s spilled over into the 1790s." (footnote omitted)).

254. See Blackhawk, *Violence*, *supra* note 138, at 1–15; White, *The Middle Ground*, *supra* note 219, at 1–8.

255. See Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *Law & Soc'y Rev.* 719, 719–23 (1973).

256. See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *Yale L.J.* 1407, 1444–47 (2001); Craig Green, *An Intellectual History of Judicial Activism*,

the immediate purposes of practicing litigators, such questions are answered by judicial opinions that channel governmental power and violence. Winners win, losers lose, and that is that. Across a longer temporal arc, however, professional criticism can affect the results and arguments that lawyers and judges will accept. In the longest term, each new generation of jurists must be taught through formal schooling what law and lawyering are supposed to mean. All of these mechanisms and timeframes represent vital opportunities for diverse legal communities to struggle over legal stasis, fortification, and sometimes transformative change. From their own diverse perspectives, readers and editors of this Review are necessarily participating in such professional and cultural struggles, and so is its author as well.

For every lawyer, the decision to operate inside a legal community entails some level of complicity or acceptance. At the same time, American law has long traditions of reform and critique.²⁵⁷ Legal history is vital for conservative and reformist purposes alike. Priya Satia's work about the British Empire explains that "[h]istorians are storytellers, custodians of the past, repositories of collective memory Whether explaining our present or understanding the past on its own terms, their work critically shapes how the past infuses our present."²⁵⁸ Similar comments hold true for America's legal empire, as there is no way to discuss American law or the Constitution without legal history.²⁵⁹ Satia claims that historical scholarship "has the power to shape our future by informing debates on subjects like the war on terror, gun control, race, women in science, immigration, and so on."²⁶⁰ Likewise, America's legal past is always present, regardless of whether it is described explicitly or otherwise, intentionally or by accident, with details or generalities, amid celebration or critique. At the broadest theoretical level, law's essential claim to provide relatively systematic stability relies on self-conscious connections between the present and the past.²⁶¹

58 Emory L.J. 1195, 1222–24 (2009); Craig Green, What Does Richard Posner Know About What Judges Think?, 98 Calif. L. Rev. 625, 660–64 (2010) (reviewing Richard Posner, *How Judges Think* (2008)); Alan Watson, Legal Change: Sources of Law and Legal Change, 131 U. Pa. L. Rev. 1121, 1151 (1983).

257. See Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 Harv. L. Rev. 1, 1–5 (1987) (discussing the progress of the Constitution throughout history and the "role legal principles have played throughout America's history in determining the condition" of Black Americans).

258. Priya Satia, *Time's Monster: How History Makes History* 1 (2020).

259. Cf. Gordon, *supra* note 10, at 7 ("*Every* legal text is a historical artifact that must be brought into the present in order to be applied; every argument from tradition, precedent, or the authority of an old text wrenches that text from its prior context and puts it to novel uses").

260. Satia, *supra* note 258, at 1.

261. See Gordon, *supra* note 10, at 5 (arguing that, "in conventional legal argument," even moves that are critical of law's "overdependence on past authority" are usually made under the assumption that "we are part of a broader process of development that preserves continuity with the good parts of the past while . . . shedding the bad parts"); A.W.B.

Notwithstanding history's capacity to influence potential discussion, Satia explains that "[during] much of the modern period, historians have not been critics but abettors of those in power Historians were prominent among the architects of British power . . . until very recently, as . . . the rule of historians coincided with the era of British imperialism."²⁶² By contrast, she notes that modern scholarship about the British Empire "so often casts a critical light on the political order that policymakers often willfully ignore it."²⁶³ Most American lawyers and historians are—as they have been—conservative political actors who explicitly or implicitly support the dominant regime alongside minor proposals for incremental reform.²⁶⁴ There have always been dissidents, however, and some of those dissidents have risen to power.²⁶⁵

Ablavsky's research offers several opportunities to challenge dominant legal ideologies, but the most important is his deliberate inclusion of Native American legal history as part of America's Founding Era. Even though Ablavsky's research is mostly about the federal government, it includes a greater number of Native American actors and voices than most legal scholarship.²⁶⁶ That inclusive step is an essential byproduct of focusing on federal territories—where everyone understood the immediate power of Native leadership—and the legal academy could use many more examples of that approach. A standard tactic for normalizing empire has always been to focus attention on the political metropole, instead of the borderlands or so-called backcountry.²⁶⁷ Yet ignoring the empire of territorial law distorts American history by erasing or overlooking many of the ideas, people, episodes, and

Simpson, *Legal Theory and Legal History: Essays on the Common Law*, at ix (1987) (opining that "legal history and jurisprudence are not wholly separable disciplines").

262. Satia, *supra* note 258, at 1–2.

263. *Id.* at 1.

264. Gordon, *supra* note 10, at 5 ("[O]ne of the main uses of history in legal argument is to relegate the bad parts of our legal-historical experience, . . . like the past of legalized subordination of African-Americans and women[,] . . . to a thoroughly dead past that is over and done with.").

265. See, e.g., Marshall, *supra* note 257, at 1 (expressing a self-consciously dissident view of constitutional history from his legally powerful position as a Supreme Court Justice); cf. Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, in Frederick Douglass: *Selected Speeches and Writings* 380, 388 (Philip S. Foner & Yuval Taylor eds., 1999) ("[The American people] have given the Constitution a slaveholding interpretation They have committed innumerable wrongs against the Negro in the name of the Constitution But it does not follow that the Constitution is in favour of these wrongs because the slaveholders have given it that interpretation.").

266. E.g., Ablavsky, *supra* note 1, at 7, 83–84, 169; Blackhawk, *Paradigm*, *supra* note 9, at 1793–94 ("A survey of canonical constitutional texts reveals a state of near erasure of Native Nations and indigenous peoples.").

267. Cf. Immerwahr, *supra* note 222, at 400 ("[T]he history of the Greater United States tells us . . . that [federal] territory matters The war on terror started with a military base. The birth control pill, chemotherapy, plastic, Godzilla, the Beatles, . . . the name *America* itself—you can't understand the histories of any of those things without understanding territorial empire.").

laws that made the United States what it became: a continental, capitalist, multicultural, hierarchical, and racialized behemoth.²⁶⁸

Even during modern times, the legal academy and most law schools have neglected legal issues surrounding Native people and experience, thus reproducing what Ned Blackhawk called “the iron cage of erasure.”²⁶⁹ That omission has distorted legal topics, including property law, administrative law, constitutional law, territorial sovereignty, criminal law, international law, federal courts, civil procedure, and federal taxation.²⁷⁰ Excluding Native experience has also warped normative ideas about justice, equality, and the United States itself. The reassuringly optimistic song “This Land Is Your Land” feels very different alongside unapologetic historical arguments that, in fact, “this land is not our land.”²⁷¹

All participants in the national legal community have a symbiotic relationship with American law and legal institutions. In Charles Hamilton Houston’s words, this means that lawyers are of necessity “social engineers,” or else they will be mere “parasites.”²⁷² The important question is, engineers for whom, and for what purpose? Modern misrepresentations

268. Even those important generalizations from the text need caveats. See, e.g., James Baldwin, *A Talk to Teachers*, in *James Baldwin: Collected Essays* 678, 685–86 (Toni Morrison ed., 1998) (“[J]ust as American history is longer, larger, more various, more beautiful, and more terrible than anything anyone has ever said about it, so is the world larger, more daring, more beautiful and more terrible . . .”); Jacoba Urist, *Artist Jeffrey Gibson’s Artwork Activates Overlooked Histories and Marginalized Identities*, *Smithsonian Mag.* (May 21, 2019), <https://www.smithsonianmag.com/smithsonian-institution/artist-jeffrey-gibsons-artwork-activates-overlooked-histories-and-marginalized-identities-180972255/> [<https://perma.cc/NY2L-WG2B>] (describing a 2015 multicolored museum wall hanging that incorporated Baldwin’s quote).

269. See Ned Blackhawk, *The Iron Cage of Erasure: American Indian Sovereignty in Jill Lepore’s *These Truths**, 125 *Am. Hist. Rev.* 1752, 1754–55 (2020) [hereinafter *Blackhawk, Iron Cage of Erasure*] (arguing that “impassioned pleas to broaden versions of American race relations and to emphasize their mutually constitutive inter-relatedness seem only to strengthen the binaries within them”); Satia, *supra* note 258, at 10 (“History was remade in the crucible of twentieth-century anticolonialism, but the discipline has yet to come to terms with its role as time’s monster.”).

270. See, e.g., *Blackhawk, Paradigm*, *supra* note 9, at 1792–93 (“Resting our public law on a single paradigm case . . . defined by the black/white racial binary has led to incomplete models and theories. This Nation’s tragic history with colonialism and [Native Nations and Indigenous peoples] . . . offers . . . important[] lessons about how to distribute and limit government power.”).

271. See, e.g., *Park*, *supra* note 9, at 1985 (“The perspectives and ideas that [Jedediah] Purdy acknowledges . . . reflect a failure to engage with the indigenous call to recognize that this land is not our land.”); *Silverman*, *supra* note 185, at 9 (discussing a Wampanoag woman’s fraught memory of having to sing the Woody Guthrie song to her grade school class); David E. Wilkins, *Hollow Justice: A History of Indigenous Claims in the United States I* (2013) (suggesting that the song’s title should have been “This Land Was Our Land” and describing the federal government’s dispossession of Native territory).

272. Richard Kluger, *Simple Justice: The History of *Brown v. Board of Education* and Black America’s Struggle for Equality* 128 (1975) (quoting Justice Thurgood Marshall’s recollection of Houston); Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 84 (1983) (“A lawyer’s either a social engineer or he’s a parasite on society.”).

and oversights concerning Native American legal history are neither new nor surprising. Even though the estimated population of American Indians and Alaska Natives is above five million and growing fast, with an estimated buying power of \$115 billion, the idea of “vanishing Indians” has remained a dominant feature of American mythology for centuries.²⁷³ Ignoring Native American experiences is—today as always—one important part of the imperial and exclusionary architecture itself.²⁷⁴

CONCLUSION

Many social justice projects—inside law schools and otherwise—emphasize historical events that have been typically marginalized or overlooked.²⁷⁵ If modern legal communities wish to consider anti-racist, anti-colonial perspectives that include Native Americans who have suffered, endured, overcome, and adapted to hardships throughout American history and across the continent, an important step is to develop and support accurate depictions of the past that affect the present. As a researcher and author, Gregory Ablavsky has performed his role admirably. This Review has called attention to his book for its intrinsic value (Part I), its contributions to modern debates (Part II), and its implications for legal professional culture (Part III). The next chapter is of necessity one that readers will write for themselves.²⁷⁶

273. Indian Country Demographics, Nat'l Cong. of Am. Indians, <https://www.ncai.org/about-tribes/demographics/> [<https://perma.cc/T42Y-2UXM>] (last updated June 1, 2020); see also Alan Trachtenberg, *Shades of Hiawatha: Staging Indians, Making Americans, 1880–1930*, at 3–5, 9 (2004) (“The earliest experience of the tribes with the new federal government set a fatal pattern: fierce struggle . . . defeat, removal, and in many cases, annihilation. The theory of the ‘vanishing race’ became a convenient rationale for the nation’s refusal to meet the tribes halfway on common ground.”).

274. See Blackhawk, *Iron Cage of Erasure*, *supra* note 269, at 1752; Blackhawk, *Paradigm*, *supra* note 9, at 1796 (“[T]he failings of federal Indian law can inform our debates over constitutional values and, in particular, about the abuse of state power. It strains reason that public law debates over the distribution and limitation of executive and legislative power do not involve deep reflection about America’s history with colonialism . . .”).

275. See, e.g., Stephanie M. Wildman, *Democracy and Social Justice: Founding Centers for Social Justice in Law Schools*, 55 *J. Legal Educ.* 252, 253 (2005) (“Leaders in legal education and the bar have been calling on law schools to make consciousness about social justice pervasive in law schools and accessible to all students . . .”); Jason Young, *Four Hundred One and Counting*, 105 *J. Afr. Am. Hist.* 650, 650–54 (2020) (describing The 1619 Project and the significance of 1619).

276. See Nick Estes, *Our History Is the Future: Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* 21 (2019) (“Settler narratives use a linear conception of time to distance themselves from the horrific crimes committed against Indigenous peoples . . . Indigenous notions of time consider the present to be structured entirely by our past and our ancestors. There is no separation between past and present . . . Our history is the future.”).