CHAPTER 1

Pre-USA Foundations

The roots of American federal Indian law and policy are found in the earliest origins of what we now call international law. Starting in the Middle Ages through the Renaissance, the colonial empires of Europe began to spread across the globe in an effort to expand their empires. With each new voyage the whole world changed quickly and irrevocably, and the colonial powers needed not only rules to govern activities and conflicts between each other as they raced to lands they had previously not encountered, but also rules and methods for contemplating the Indigenous peoples of the lands that they "discovered."

There were already centuries of colonialism-fueled exploration, interaction, trade, warfare, and other experiences in the Americas and elsewhere around the globe before there was a United States. There are many fine books, articles, and other scholarly works that examine the colonial history of the North American continent prior to the American Revolution and that history's continuing legacy. While this text cannot do justice to the many aspects of this lengthy and complex history, a brief examination of the legal and political legacy of two of the most influential colonial forces on the North American continent—the Spanish and English—will yield a few crucial points necessary for beginning to understand federal Indian law and policy as the United States developed into its own and into the present day.

The law was an indispensable tool to the process of colonization. Rapidly developing law and legal theory offered rationales for the incursions into the lands of Indigenous peoples across the globe, and the legacy of this intellectual and legal groundwork remains central to the relationship between the colonizers and colonized today. Simply put, colonizing powers created law to justify their activities to themselves and to others.

One of the many unfortunate consequences of this colonial legal legacy has been the obscuring of Indigenous legal traditions. Indigenous peoples, in the Americas as well as elsewhere around the globe, were regularly categorized by

colonial powers as inferior, savage, and without governance, religion, and other aspects of civilized life in an effort to justify the law and legal theory that the colonial powers were creating. Yet, Indigenous peoples very much had their own structures, rules, societies, methods of dispute resolution, and ways of understanding the world in which they lived and relationships that they maintained. In short, pre-contact Indigenous peoples had their own law.

This chapter will demonstrate. . .

- ***The legacy of Spanish colonialism***
- ***The legacy of English colonialism***
- ***The existence of pre-contact Native governmental systems***

SPANISH COLONIALISM

The origins of Western conceptions of non-Western peoples can be traced back centuries before Christopher Columbus's voyages to the "New World." Nonetheless, Columbus's exploration beginning in the late fifteenth century moved Spain to the forefront of colonization in the Americas and sparked the development of a body of Spanish law to reconcile with the presence of the inhabitants of the Americas. Spain's legal developments concerning the peoples of the Americas in this era have served as the foundation for subsequent discussions even into the present day about the rights of Indigenous peoples around the world.

Sailing under the support of the Spanish crown, the Italian sailor Christopher Columbus "discovered" land in North America in October of 1492 after five weeks at sea. Columbus brought what was already a long-developing Western conception of non-Europeans when he set foot on land in what is now the Bahamas. He noted what he considered the simple and easily malleable nature of the Indigenous peoples that he met. As you read this excerpt from the journal of his first voyage, ask yourself what Columbus's description about his first encounters with Indigenous North Americans reveals about his perspective about non-Western peoples. What are the motivations for engaging in his endeavor? What potential outcomes does he envision for Indigenous peoples?

JOURNAL OF CHRISTOPHER COLUMBUS (DURING HIS FIRST VOYAGE)[1]

"I . . . gave to some of them red caps, and glass beads to put round their necks, and many other things of little value, which gave them great pleasure, and made them so much our friends that it was a marvel to see. They afterward came to the ship's boats where we were, swimming and bringing us parrots, cotton threads in skeins, darts, and many other things. . . . It appeared to me to be a race of people very poor in everything. They go naked as when their mothers bore them, and so do the women. . . . They are very well made, with very handsome bodies, and very good countenances. Their hair is short and coarse, almost like the hairs of a horse's tail. They wear the hairs brought down to the eyebrows, except a few locks behind, which they wear long and never cut. . . . They neither carry nor know anything of arms, for I showed them swords, and they took them by the blade and cut themselves through ignorance. . . . They should be good servants and intelligent, for I observed that they quickly took in what was said to them, and I believe that they would easily be made Christians, as it appeared to me that they had no religion. I, our Lord being pleased, will take hence, at the time of my departure, six natives for your Highness, that they may learn to speak."

Columbus's description of this early encounter is emblematic of two key characteristics of the colonial period, for Spain and for other colonial powers as well. First, the earliest explorers, and later colonists, were interested in exploiting the resources of the New World, including Indigenous peoples themselves. This is most obvious in Columbus's plan to "take" six of the Arawak people that he encountered with him back to Spain, clearly without any consultation or consent from those individuals or the community. Although more subtle, Columbus's repeated statements on value—such as stating that "things of little value" gave the Arawak "great pleasure" and that the Arawak were "very poor in everything"—also speak to a perspective that was focused on measuring everything, including people, in terms of their potential as resources as determined by Western markets and standards.

The second characteristic that the journal excerpt reveals is a description of Native peoples that is both contradictory and consistent at the same time. At first blush, the journal seems to offer a perplexing mix of descriptions of Native peoples. On one hand, Columbus described the Arawak in negative terms—they did not know the value of the gifts that were being exchanged, they were "very poor in everything," and they were ignorant enough to grab swords by the blade.

On the other hand, Columbus describes them in positive terms—they were generous, they were "very well made" with "handsome bodies" and "very good countenances" and they were "intelligent."

These types of contradictory descriptions became commonplace among Europeans writing about Indigenous populations. Indigenous peoples were either "noble"—generous, brave, one with nature, and so on—or "ignoble"—fierce, warlike, untrustworthy and so on. Many modern scholars have noted that European writings during this period (and well after this period) were often not particularly accurate descriptions of real Indigenous peoples, but rather vehicles for writers to advance their own agenda. For example, writers who sought to critique their own societies might point to the "noble" Indians who were supposedly more in touch with their environment and led simpler, happier lives, while writers who sought to justify the acquisition of Indigenous lands might point to the "ignoble" Indians to explain the seeming necessity of the use of force against them.

Whether "noble" or "ignoble," European descriptions of Native peoples shared one common characteristic: Indigenous peoples were regarded as simpler and less advanced than the supposedly more civilized peoples who were commentating upon them. In essence, they were either noble savages or ignoble savages, but they were certainly savages. This characteristic of European writing helps to explain the seeming contradiction in Columbus's description. It is easier to contemplate what looks like a set of oppositions if one conceptualizes it less as a rumination on a different culture of human beings and more as a cataloging of livestock. Columbus was able to reconcile these differing statements in the same way one might recognize the intelligence of a horse or dog without conceding the animal as an equal.

In response to the opportunities that it saw in the wake of Columbus's voyages, the Spanish crown sent *conquistadors*—military leaders tasked with the process of colonization—to the Americas on behalf of the crown to claim lands and resources for Spain. Aided by soldiers, missionaries, and disease that decimated Indigenous populations, the *conquistadors* often violently exerted authority over peoples and territories. Shortly after Columbus's arrival, Spain began profiting from the fruits of the Americas.

Despite the immediate desire and rush to colonize, these early explorations in the New World created a number of vexing questions for Spain: On what authority could the Spanish crown claim right to the lands and resources of the New World? What rights, if any, did the Indigenous inhabitants of the Americas hold? What process, if any, should Spanish colonizers engage in to legitimize their

activities in the Americas to itself and to the rest of Christendom? Although a dominant force in global politics, Spain was not content to exhume resources from the Americas through force alone. Rather, it sought to justify its efforts at colonization through legal and moral means.

The earliest efforts at establishing a legal basis for the colonization of the Americas resulted in the *Requerimiento*. Developed in 1513, the *Requerimiento* formalized a process to assert Spanish authority in the New World. *Conquistadors* were required to read the *Requerimiento* to Indigenous peoples before engaging in any forceful action towards colonization. The *Requerimiento* offered, in theory, an Indigenous group the opportunity to follow the law as established by Western Christendom. As you read this excerpt from the *Requerimiento*, ask yourself what are the justifications that Spain sets forth for claiming a legal right to Indigenous territory. What obligations does the *Requerimiento* seek to place on Indigenous peoples? What are the consequences of non-compliance for Indigenous peoples?

THE *REQUERIMIENTO*[2]

"On the part of the King, Don Fernando, and of Doña Juana I, his daughter, Queen of Castille and León, subduers of the barbarous nations, we their servants notify and make known to you, as best we can, that the Lord our God, Living and Eternal, created the Heaven and the Earth, and one man and one woman, of whom you and we, all the men of the world, were and are descendants, and all those who come after us. But, on account of the multitude which has sprung from this man and woman in the five thousand years since the world was created, it was necessary that some men should go one way and some another, and that they should be divided into many kingdoms and provinces, for in one alone they could not be sustained.

Of all these nations God our Lord gave charge to one man. . . . And he commanded him to place his seat in Rome, as the spot most fitting to rule the world from; but also he permitted him to have his seat in any other part of the world, and to judge and govern all Christians, Moors, Jews, Gentiles, and all other sects. This man was called Pope. . . .

One of these [Popes] . . . made donation of these isles . . . to the aforesaid King and Queen and to their successors, our lords, with all that there are in these territories, as is contained in certain writings which passed upon the subject as aforesaid, which you can see if you wish.

. . . Wherefore, as best we can, we ask and require you that you consider what we have said to you, and that you take the time that shall be necessary to

understand and deliberate upon it, and that you acknowledge the Church as the Ruler and Superior of the whole world, and the high priest called Pope, and in his name the King and Queen Doña Juana our lords, in his place, as superiors and lords and kings of these islands . . . by virtue of the said donation, and that you consent and give place that these religious fathers should declare and preach to you the aforesaid.

If you do so, you will do well, and that which you are obliged to do to their Highnesses, and we in their name shall receive you in all love and charity, and shall leave you your wives, and your children, and your lands, free without servitude, that you may do with them and with yourselves freely that which you like and think best, and they shall not compel you to turn Christians, unless you yourselves, when informed of the truth, should wish to be converted to our Holy Catholic Faith, as almost all the inhabitants of the rest of the islands have done. And, besides this, their Highnesses award you many privileges and exemptions and will grant you many benefits.

But, if you do not do this, and maliciously make delay in it, I certify to you that, with the help of God, we shall powerfully enter into your country, and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their Highnesses; we shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them as their Highnesses may command; and we shall take away your goods, and shall do you all the mischief and damage that we can, as to vassals who do not obey, and refuse to receive their lord, and resist and contradict him; and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their Highnesses, or ours, nor of these cavaliers who come with us. And that we have said this to you and made this Requisition, we request the notary here present to give us his testimony in writing, and we ask the rest who are present that they should be witnesses of this Requisition."

The *Requerimiento* was problematic on a number of levels and a classic example of form over function. Its major problem is also its most obvious: the document was written and spoken in Spanish, a language of which newly encountered Indigenous peoples would have had no knowledge. Additionally, even if the *Requerimiento* had been presented in a language that was intelligible to newly encountered Indigenous peoples, it concerned social and religious precepts and conceptions that were also foreign to Indigenous groups. Despite these problems, or perhaps because of them, the actual process of reading the

Requerimiento to Indigenous peoples was lax at best. When it was dutifully read (which was not always the case), it was often done so under conditions that fulfilled the letter of the law while violating its spirit. Despite its problematic nature, the *Requerimiento* was instrumental in justifying the early efforts at Spanish colonization.

Aided in great part by diseases that the Indigenous populations had yet to encounter and which decimated their populations, Spanish colonists were often (though not always) able exert force over Native populations and to claim lands throughout the Americas. As a result of these efforts, Spanish authorities instituted the *encomienda* system in the early 1500s. Whereas the *Requerimiento* offered a justification for the invasion of Indigenous lands, the *encomienda* system sought to justify the continued presence of the colonizers. Under the *encomienda* system Spanish landholders in the Americas, or *encomenderos*, were placed in charge of a number of Indigenous peoples and tasked with providing those under their charge with wages for their work, Christianity, and other aspects of Spanish civilization. In return, the *encomenderos* received labor and resources—or tribute—from their Native charges. Conceptualized as a system of *quid pro quo* in which each side profited equally, the practice on the ground was usually brutal and exploitative and the Native charges were generally regarded as slaves by the *encomenderos*.

Although Spain had adopted the *Requerimiento* and the *encomienda* system to manage its legal and moral duties to the Indigenous peoples in the Americas, debate about the rights of the inhabitants of the Americas and the responsibilities of the Spanish monarchs and *conquistadors* toward them continued throughout the sixteenth century. Perhaps the most influential scholar of this era was Franciscus (or Francisco) de Victoria, a Dominican theologian.

Regarded by many as the "father of international law," Victoria's lectures on the Indigenous peoples of the New World as well as other subject matter have contributed to his status as a critical thinker in the early colonial period whose influence continues to be felt today. He delivered his lecture, "On the Indians Lately Discovered," in 1532, in which he sought to establish a moral and legal basis for interacting with the people of the New World. More specifically, he sought to outline what rights Indigenous peoples had that were to be respected by Spain and other colonial powers and under what circumstances Spain could claim Indigenous lands and make war against Indigenous peoples. Victoria used a number of sources to ground his argument, including the Bible and the works of Aristotle, Thomas Aquinas, Pope Innocent IV, as well as other prominent philosophers who had contemplated human rights. As you read, consider both what limitations and what opportunities Victoria sought to establish for colonial

engagement in the New World. Also consider what sorts of concerns that Victoria might have had in mind as he sought to bring order and lawfulness to a rapidly changing world.

ON THE INDIANS LATELY DISCOVERED[3]

Francisco de Victoria

. . . The whole of this controversy and discussion was started on account of the aborigines of the New World, commonly called Indians, who came forty years ago into the power of the Spaniards, not having been previously known to our world.

. . . For, at first sight, when we see that the whole of the business has been carried on by men who are alike well-informed and upright, we may believe that everything has been done properly and justly. But then, when we hear of so many massacres, so many plunderings of otherwise innocent men, so many princes evicted from their possession and stripped of their rule, there is certainly ground for doubting whether this is rightly or wrongly done. . . .

* * *

. . . Returning now to our main topic . . . I ask first whether the aborigines in question were true owners in both private and public law before the arrival of the Spaniards. . . . Unless the contrary is shown, they must be treated as owners and not be disturbed in their possession unless cause be shown. . . .

. . . Now, some have maintained that grace is the title to dominion and consequently that sinners, at any rate those in mortal sin, have no dominion over anything. . . .

. . . I advance the proposition that mortal sin does not hinder civil dominion and true dominion. . . .

. . . Unbelief does not prevent anyone from being a true owner. . . .

. . . From the standpoint of the divine law a heretic does not lose the ownership of his property. . . .

From all this the conclusion follows that the barbarians in question can not be barred from being true owners, alike in public and in private law, by reason of the sin of disbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands. . . .

It remains to ask whether the Indians lacked ownership because of want of reason or unsoundness of mind. . . .

The Indian aborigines are not barred on this ground from the exercise of true dominion. This is proved from the fact that the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. . . . Accordingly, I for the most part attribute their seeming so unintelligent and stupid to a bad and barbarous upbringing, for even among ourselves we find many peasants who differ little from brutes. . . .

* * *

It being premised, then, that the Indian aborigines are or were true owners, it remains to inquire by what title the Spaniards could have come into possession of them and their country. . . .

Now there are seven titles, which might be alleged, but which are not adequate, and seven or eight others, which are just and legitimate. . . . [*Victoria details the inadequate titles.*]

* * *

I will now speak of the lawful and adequate titles whereby the Indians might have come under the sway of the Spaniards. (1) The first title to be named is that of natural society and fellowship. And hereon let my first conclusion be: (2) The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them. . . .

Second proposition: The Spaniards may lawfully carry on trade among the native Indians, so long as they do no harm to their country. . . . Neither may the native princes hinder their subjects from carrying on trade with the Spanish; nor, on the other hand, may the princes of Spain prevent commerce with the natives. . . .

Third proposition: If there are among the Indians any things which are treated as common both to citizens and to strangers, the Indians may not prevent the Spaniards from a communication and participation in them. . . . Inasmuch as things that belong to nobody are acquired by the first occupant according to the law of nations, it follows that if there be in the earth gold or in the sea pearls on in a river anything else which is not appropriated by the law of nations those will vest in the first occupant, just as the fish in the sea do. . . .

Fourth proposition: If children of any Spaniard be born there and they wish to acquire citizenship, it seems they can not be barred either from citizenship or from the advantages enjoyed by other citizens. . . .

Fifth proposition: If the Indian natives wish to prevent the Spaniards from enjoying any of their above-named rights under the law of nations . . . the Spaniards ought in the first place to use reason and persuasion in order to remove scandal. . . . But if, after this recourse to reason, the barbarians decline to agree and propose to use force, the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force. And not only so, but, if safety can not otherwise be had, they may build fortresses and defensive works, and, if they have sustained a wrong, they may follow it up with war on the authorization of their sovereign and may avail themselves of the other rights of war. . . .

It is, however, to be noted that the native being timid by nature and in other respects dull and stupid, however much the Spaniards may desire to remove their fears and reassure them with regard to peaceful dealings with each other, they may very excusably continue afraid at the sight of men strange in garb and armed and much more powerful then themselves. And therefore, if, under the influence of these fears, they unite their efforts to drive out the Spaniards or even to slay them, the Spaniards might, indeed, defend themselves but within the limits of permissible self-protection, and it would not be right for them to enforce against the natives any of the other rights of war. . . . Accordingly, the Spaniards ought to defend themselves, but so far as possible with the least damage to the natives, the war being a purely defensive one.

There is no inconsistency, indeed, in holding the war to be a just war on both sides, seeing that on one side there is right and on the other side there is invincible ignorance. . . .

Sixth proposition: If after recourse to all other measures, the Spaniards are unable to obtain safety as regards the native Indians, save by seizing their cities and reducing them to subjection, they may lawfully proceed to these extremities. . . .

Seventh proposition: If, after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, then they can make war on the Indians, no longer as on innocent folk, but as against forsworn enemies, and may enforce against them all the rights of war. . . .

Another possible title is by way of propagation of Christianity. In this connection let my first proposition be: Christians have a right to preach and declare the Gospel in barbarian lands. . . . Second proposition: Although this is

a task common and permitted to all, yet the Pope might entrust it to the Spaniards and forbid it to all others. . . . Third proposition: If the Indians allow the Spaniards freely and without hindrance to preach the Gospel, then whether they do or do not receive the faith, this furnishes no lawful ground for making war on them and seizing in any other way their lands. . . . Fourth proposition: If the Indians—whether it be their lords or the populace—prevent the Spaniards from freely preaching the Gospel, the Spaniards, after first reasoning with them in order to remove scandal, may preach it despite their unwillingness and devote themselves to the conversion of the people in question, and if need be they may then accept or even make war, until they succeed in obtaining facilities and safety from preaching the Gospel. . . .

Another title there may be. . . If any of the native converts to Christianity be subjected to force or fear by their princes in order to make them return to idolatry, this would justify the Spaniards, should other methods fail, in making war and in compelling the barbarians by force to stop such misconduct. . . .

Another possible title is the following: Suppose a large part of the Indians were converted to Christianity . . . so long as they really were Christians, the pope might for a reasonable cause, either with or without a request from them, give them a Christian sovereign and depose their other unbelieving rulers. . . .

Another possible title is founded either on the tyranny of those who bear rule among the aborigines of America or on the tyrannical laws which work wrong to innocent folk there, such as that which allows the sacrifice of innocent people or the killing in other ways of uncondemned people for cannibalistic purposes. I assert also that without the Pope's authority the Spaniards can stop all such nefarious usages and ritual among the aborigines, being entitled to rescue innocent people from an unjust death. . . .

Another possible title is by true and voluntary choice, as if the Indians, aware alike of the prudent administration and the humanity of the Spaniards, were of their own motion, both rulers and ruled, to accept the King of Spain as their sovereign. . . .

Another title may be found in the cause of allies and friends. For as the Indians themselves sometimes wage lawful wars with one another and the side which has suffered a wrong has the right to make war, they might summon the Spaniards to help and share the rewards of victory with them. . . .

There is another title which can indeed not be asserted, but brought up for discussion, and some think it is a lawful one. I dare not affirm it at all, nor do I entirely condemn it. It is this: Although the aborigines in question are (as

> has been said above) not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful state up to the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs. . . . It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit.

Victoria helped to establish the template used by Western colonizers for wrestling with the competing interests that have come to define federal Indian law and policy in the present day. On one hand, Victoria made a powerful argument on behalf of what we now call tribal sovereignty and Indigenous rights. While careful in his criticism, Victoria nonetheless was disturbed by the reports of the actions of Spanish colonizers and gave serious contemplation to the rights of Indigenous peoples. Victoria concluded that not only did Indigenous peoples have rights that needed to be respected, but that many of the arguments in favor of the use of Spanish force to overtake Indigenous peoples and lands were invalid. For example, Indigenous peoples maintained their sovereignty despite not practicing Christianity.

On the other hand, again establishing a template that others would follow, Victoria argued that the rights of Indigenous peoples were limited by Western epistemologies that made little, if any, sense in the Indigenous context. For example, Victoria argued that Spanish colonizers were justified in using force if Indigenous peoples refused to engage in trade, limited Spanish access to "things which are treated as common both to citizens and to strangers" such as gold and pearls, or denied the Spanish the authority to preach Christianity. While Victoria attempted to soften the sharper edges of his proclamations, they nonetheless required that Indigenous peoples open their land, resources, and even themselves to the colonizers for the preferred ends of the colonizers. Failure to do so would eventually lead to the justified use of force against Indigenous peoples. In this respect, Victoria's argument does little to protect Indigenous rights. As such, it is fair to ask whether, much like the *Requerimiento*, Victoria's argument did anything more than establish a legally permissible path to continue the exploitation of the New World.

Victoria's lectures went far in establishing the groundwork for international and colonial law. Nonetheless, serious debate about the legal rights of Indigenous peoples—as well as the very nature of their humanity—continued. The most

famous of example of the enduring discourse was the Valladolid Debate of 1550 between Juan Ginés de Sepúlveda and Bartolomé de las Casas. Sepúlveda, a theologian who had never been to the Americas, argued that Spanish military action in the Americas was just because the Indigenous peoples of the Americas were, by their nature, slaves who committed barbarous acts. As a consequence, it was Spain's right to conquer them and their lands. Las Casas, a Dominican friar who had been to the Americas and seen many atrocities committed against Indigenous peoples, argued that they were free beings who were capable of rationality and conversion to Christianity and against whom war could not be declared without a true just cause and respect for their rights. Although many historians believe that there was no clear winner in the debate, what is clear are the parameters of this and other debates of the time: Indigenous peoples on one side were sub-human savages whose very nature and actions permitted, and often required, brute military force and conquest of their lands; on the other side, while nonetheless savage and ignorant, Indigenous peoples were capable of rational thought and decisions and their rights in international law required respect. More succinctly, they were either noble savages or ignoble savages, with important consequences flowing from either conclusion.

The repercussions of Spanish colonialism in the New World cannot be understated. Spain left both a lasting legacy and a legal regime that continues to shape our geography, identity, and federal Indian law and policy to this day.

ENGLISH COLONIALISM

By the time that England began establishing a serious colonial presence in North America in the 1600s, a pattern of diplomacy with Indigenous peoples had already emerged. While European subjects still regularly regarded Indigenous peoples as savage and inferior to themselves, they nonetheless increasingly recognized that Indigenous peoples held at least some rights and sovereignty over their territories. This sovereignty needed to be respected, even if, for some Europeans, it was more of a sign of acquiescence to the newly developing international law than an appreciation for Indigenous sovereignty.

Treaties between tribal nations and European colonizers increasingly became a central tool for diplomacy on the North American continent (for example, the Pilgrims negotiated a treaty in 1621 with the local Wampanoags). Although English and other European commentators would often describe European claims to land in grandiose and all-encompassing terms—which left little in the way of tribal rights—the reality on the ground did not support these claims. Nor did the actions of the colonies reflect a true belief that they held a superior right

to tribal lands than Indigenous peoples. European colonists needed treaties with tribal nations to protect themselves in an often-hostile environment against other colonial powers and unfriendly tribal nations. The English, in particular, desired treaties as they sought to acquire land for colonial settlements. Tribal nations, for their part, agreed to treaties to establish relations with useful trade partners and to create alliances against their own enemies.

Early treaties with the English and other European colonists regularly reflected these many interests. In addition, the process by which treaties were made also revealed a developing system of diplomacy that was neither dictated exclusively by any one side nor by a uniform standard of procedure, but was rather a product of negotiation and circumstance itself. As you read the following early colonial treaty, consider the goals that each side is seeking to achieve. What do the English want? What do the Wabanakis want? How does this document reflect the power relations between the parties to the treaty and the world in which they lived? How does the fact that it was written in English alter how we might read it?

TREATY BETWEEN THE ENGLISH AND WABANAKI[4]

September 8–19, 1685

Articles of peace agreed upon the eight day of September, in the year of our Lord, 1685, between the subjects of his majesty, king James the second, inhabiting the provinces of New-Hampshire and Maine, and the Indians inhabiting the said provinces.

It is agreed there shall be for the future, a lasting peace, friendship, and kindness, between the English and the Indians, and that no injury shall be offered by the one to the other.

That if any Englishman doth any injury to an Indian, upon complaint made to any justice of the peace, the Englishman shall be punished, and the Indian shall have present satisfaction made him. And if any Indian doth an injury to the English, or threaten to do any injury, the sagamore to whom that Indian doth belong, shall punish him in presence of one of the king's justices of the peace.

That if any other Indian shall design any mischief or harm to the English, the Indians inhabiting the aforesaid provinces shall give present notice thereof to the English, and shall assist the English.

That so long as the aforesaid Indians shall continue in friendship with the English, they shall be protected against the Mohawks, or any others, and may

freely and peaceably set down by the English near any their plantations.

[*There are both English and Native signatures*]

We whose names are hereunto written, do freely consent and engage to comply and perform the within written articles, as our neighbors have done, and do further engage as followeth:

Lastly, That the Indians shall not at any time hereafter remove from any of the English plantations, with their wives and children, before they have give fair and timely notice thereof, unto the English, from whence they do so remove; and in case the said Indians shall remove with their wives and children, without such fair and timely notice given to the English, that then it shall be taken pro confesso that the Indians do intend and design war with the English, and do thereby declare that the peace is broken; and it shall and may be lawful to and for the English, or any on their behalfs, to apprehend said Indians, with their wives and children, and to use acts of hostility against them, until the sagamores shall make full satisfaction for all charge and damage that may arise thereby.

[*There are additional English and Native signatures*]

The characteristics of this treaty, including its form, are both common for the time and reveal the stakes of diplomacy for both the English and Wabanaki. The treaty began with a promise from both sides to punish wrongdoers in their own community if they commit bad acts against those of the other community. In essence, both the English and the Wabanaki committed to being good neighbors as they attempted to forge a shared living space. While those sections of the treaty were inward-looking, the next sections were outward-looking. Both communities pledged to protect each other against outsiders, particularly the Mohawks, again in an effort to preserve a shared living space.

After some signatures, there is additional language stating that Wabanakis who move from the shared living space without notice will be treated as hostiles. The nature of this language, as well as its placement after previous signatures, also testifies to some critical aspects of diplomacy in this period and for the English and Wabanaki in particular. Both the Wabanaki and the English were desirous of allies, but perhaps most particularly the English. Not knowing where their allies were at a given time was frightening enough to the English to alert their allies that they could be regarded as hostile. In short, the English felt that they were in a more precarious position than the Wabanaki. In addition, diplomacy was fluid and needed to respond to changing circumstances. The placement of this additional language as well as the additional signatures makes clear that it was negotiated

after the main body of the treaty. Conversations continued and there was enough desire within both parties to quickly amend the document.

Treaty making was not one-sided during this period, nor was it uniform or unalterable. Rather, it was the product of communities coming together and looking out for themselves and each other. It was not the singular imposition of a colonial force, but the negotiation between parties that had both much to gain and much to lose during the early colonial era. Although the tone and substance of treaties would gradually change once the United States became the dominant military force on the North American continent, their history, particularly with the English, reveals the necessity of diplomacy for the colonizers.

NATIVE GOVERNANCE

While European colonists routinely described Indigenous peoples as savage and uncivilized, tribal nations had very sophisticated modes of government, law, and self-regulation prior to and after contact. Generally dissimilar to European models and often not obvious to European observers, tribal methods of governance functioned well for the communities that they served. However, like European nations, tribal nations had rules and structures that members of the nations understood, generally abided by, and passed down through generations. Also like European (and Asian and African) nations, there was and is much diversity within Native America and it is impossible to identify one system or method that accurately or appropriately describes the governance structure of all tribal nations. Each tribal grouping expressed its sovereignty in its own way; although both individual autonomy and familial and clan connections were often highly regarded and respected among many tribal nations.

Perhaps the most famous example of Native governance during the colonial era was the Haudenosaunee, also known as the Iroquois Confederacy. Already hundreds of years old prior to sustained contact with European colonists, the Haudenosaunee originally consisted of five powerful northeastern tribal nations centered near the eastern Great Lakes—the Mohawk, Onondaga, Oneida, Seneca, and Cayuga. A sixth nation, the Tuscarora, joined later. Iroquois historical sources explain that the Haudenosaunee was formed to prevent the constant warfare among the constituent nations and to provide protection against other common enemies. Within the Haudenosaunee, each nation maintained its autonomy concerning internal affairs. However, they came together in council on matters concerning the greater whole, with each nation playing a different and unique role within the confederacy. Some scholars have argued that the Haudenosaunee

influenced the American founding fathers as they sought to establish a new political order in the wake of the American Revolution.

The Haudenosaunee was organized under the Gayanashagowa, or the Great Binding Law. Iroquois historical sources explain that an unusually powerful man, Dekanahwideh, led the five nations together and established the Iroquois Confederacy under the Great Binding Law. The Gayanashagowa created a council in which each of the five nations had a responsibility. The Onondaga representatives organized the council. When there was a subject of debate it was first discussed among the representatives of the "Older Brothers"—the Mohawk and the Seneca. Then the subject passed to the representatives of the "Younger Brothers"—the Oneida and Cayuga. If consensus was not reached between the Older Brothers and Younger Brothers, the Onondaga sought to moderate a compromise. Discussion continued until a consensus was reached.

Originally promulgated through oral tradition and wampum beads, the Gayanashagowa was eventually written and translated into English. In this excerpt the representatives of the tribal nation are referred to as "lords." In 1900 several prominent members of the Haudenosaunee organized to produce a tribally-centered English language version of the Gayanashagowa. As you read this excerpt of the Gayanashagowa, ask yourself what similarities and differences you see to the American model of government. Also consider why the English and the Wabanaki, both neighbors to the powerful Iroquois confederacy and the subject of the previous excerpt, might have been willing to engage in a treaty with each other.

GAYANASHAGOWA, THE GREAT BINDING LAW[5]

Then Dekanahwideh again said: "We have completed the Confederation of the Five Nations, now therefore it shall be that hereafter the lords who shall be appointed in the future to fill vacancies. . . .

Then Dekanahwideh further added: "I now transfer and set over to the women who have the lordships' title vested in them, that they shall in the future have the power to appoint the successors from time to time to fill vacancies caused by death or removals from whatever cause."

* * *

Then Dekanahwideh further said: "The lords have unanimously decided to spread before you on the ground this great white wampum belt Ska-no-dah-ken-rah-ko-wah and Ka-yah-ne-ren-ko-wah, which respectfully signify purity and great peace, and the lords have also laid before you this great wing, Ska-

weh-yeh-she-ko-wah, and whenever any dust or stain of any description falls upon the great belt of white wampum, then you shall take this great wing and sweep it clean." (Dust or stain means evil of any description which might have a tendency to cause trouble in the Confederate Council.)

Then Dekanahwideh said: "The lords of this confederacy have unanimously decided to lay by you this rod (Ska-nah-ka-res) and whenever you see any creeping thing which might have a tendency to harm our grandchildren or see a thing creeping toward the great white wampum belt (meaning the Great Peace), then you shall take this rod and pry it away with it, and if you and your colleagues fail to pry the creeping, evil thing out, you shall then call out loudly that all the Confederate Nations may hear and they will come immediately to your assistance."

Then Dekanahwideh said: "Now you, the lords of the several Confederate Nations, shall divide yourselves and sit on opposite sides of the council fire as follows: [*The division is described prior to this excerpt.*]

Then Dekanahwideh said: "We have now completed the system for our Confederate Council."

Then Dekanahwideh further said: "We now, each nation, shall adopt all the rules and regulations governing the Confederate Council which we have here made and we shall apply them to all our respective settlements and thereby we shall carry out the principles set forth in the message of Good Tidings and Peace and Power, and in dealing with the affairs of our people of the various dominions, thus we shall secure to them contentment and happiness."

* * *

Then Dekanahwideh said: "We have now completed arranging the system of our local councils and we shall hold our annual Confederate Council at the settlement of Thadodahho, the capitol or seat of government of the Five Nations' Confederacy."

Dekanahwideh said: "Now I and you lords of the Confederate Nations shall plant a tree Ska-renj-heh-se-go-wah (meaning a tall and mighty tree) and we shall call it Jo-ne-rak-deh-ke-wah (the tree of the great long leaves).

Now this tree which we have planted shall shoot forth four great, long, white roots (Jo-doh-ra-ken-rah-ko-wah). These great, long, white roots shall shoot forth one to the north and one to the south and one to the east and one to the west, and we shall place on the top of it Oh-don-yonh (an eagle) which has great power of long vision, and we shall transact all our business beneath the

shade of this great tree. . . . The nations of the earth shall see it and shall accept and follow the roots and shall follow them to the tree and when they arrive here you shall receive them and shall seat them in the midst of your confederacy. The object of placing an eagle on the top of the great, tall tree is that it may watch the roots which extend to the north and to the south and to the east and to the west, and whose duty shall be to discover if any evil is approaching your confederacy, and he shall scream loudly and give the alarm and all the nations of the confederacy at once shall heed the alarm and come to the rescue."

Then Dekanahwideh again said: We shall now combine our individual power into one great power which is this confederacy and we shall therefore symbolize the union of these powers by each nation contributing one arrow, which we shall tie up together in a bundle which, when it is made and completely tied together, no one can bend or break. . . .

Then Dekanahwideh continued his address and said: We shall tie this bundle of arrows together with deer sinew which is strong, durable and lasting and then also this institution shall be strong and unchangeable. This bundle of arrows signifies that all the lords and all the warriors and all the women of the confederacy have become united as one person."

* * *

Then Dekanahwideh said: "We have now completed our power so that we the Five Nations' Confederacy shall in the future have one body, one head, and one heart."

Then he (Dekanahwideh) further said: If any evil should befall us in the future, we shall stand or fall united as one man."

As noted above, some scholars have argued that the Gayanashagowa was a model for the U.S. Constitution. While this assertion remains controversial, it is nonetheless useful to compare the two, particularly the original U.S. Constitution that came into force in 1789. What similarities do they hold? What differences are there? What insights might be gained by reflecting on the fact that the Gayanashagowa is significantly older than the U.S. Constitution? Beyond a comparison to the U.S. Constitution, what other features distinguish the Gayanashagowa? What roles do men and women play?

While the Gayanashagowa is probably the most famous example of Native law and governance prior to contact, it was and is not an outlier. Tribal nations across the Americas had their own rules, governed themselves, proscribed roles

for members of the community, made alliances with other peoples, and made war as well. In short, they behaved in some similar manners to their European counterparts as well as with other peoples around the globe.

SUGGESTED READINGS

- *Savage Anxieties: The Invention of Western Civilization.* Robert A. Williams, Jr. New York: Palgrave Macmillan, 2012.
- *The White Man's Indian.* Robert F. Berkhofer, Jr. New York: Vintage Books, 1979.
- "Spanish Indian Policies." Charles Gobson. In *Handbook of North American Indians, Vol. 4, History of Indian-White Relations.* Washington D.C.: Smithsonian Institution, 2001, 96–102.
- "British Colonial Indian Treaties." Dorothy v. Jones. In *Handbook of North American Indians, Vol. 4, History of Indian-White Relations.* Washington D.C.: Smithsonian Institution, 2001, 185–194.

[1] Christopher Columbus, *The Journal of Christopher Columbus (during his First Voyage, 1492–93): And Documents relating to the Voyages of John Cabot and Gaspar Corte Real*, trans. Clements R. Markham, Hakluyt Society, First Series, Volume 86 (Farnham, England: Ashgate, 2010), 37–38.

[2] This translation is from Arthur Helps, *The Spanish Conquest in America, vol. 1* (New York: John Lane, 1900), 264–67.

[3] Franciscus de Victoria, *De Indis et de Ivre Belli Relections*, trans. John Pawley Bate, ed. James Brown Scott (Washington: Carnegie Institution of Washington, 1917), 115–62.

[4] Daniel R. Mandell, ed., "Treaty, English and Wabanakis," in *Early American Indian Documents, Treaties, & Laws, 1607–1789, Vol. XX New England Treaties, North and West, 1650–1776* (Bethesda, MD: University Publications of America, 2003), 42.

[5] Arthur C. Parker, *The Constitution of the Five Nations* (Albany, NY: The University of the State of New York, 1916), 97–102.