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# ARTICLES

## FEDERAL INDIAN LAW AS PARADIGM WITHIN PUBLIC LAW

*Maggie Blackhawk*

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# FEDERAL INDIAN LAW AS PARADIGM WITHIN PUBLIC LAW

*Maggie Blackhawk*[*]

*U.S. public law has long taken slavery and Jim Crow segregation as a paradigm case through which to understand our constitutional law: cases adjudicating issues of slavery and segregation form the keystones of our constitutional canon. Reconstruction, or the so-called "Second Founding," and the Civil Rights Era periodize our constitutional histories. Slavery and Jim Crow segregation supply normative lessons about the strengths and failings of our constitutional framework. This paradigm teaches that if there is too much power in the states and not enough limitation on state power in the form of national power or rights, America might again reenact similar atrocities. Although there is much to learn from the United States' tragic history with slavery and Jim Crow segregation, resting our public law on this binary paradigm has led to incomplete models and theories. This Nation's tragic history of colonialism and violent dispossession of Native lands, resources, culture, and even children offers different, yet equally important, lessons about our constitutional framework.*

*In this Article, I argue for a more inclusive paradigm that reaches beyond the black/white binary, and I highlight the centrality of federal Indian law and this Nation's tragic history with colonialism to public law. Currently, to the extent that federal Indian law is discussed at all within public law, it is generally considered sui generis and consigned to a "tiny backwater." While I concede that the colonial status of Native peoples and*

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[*] (Fond du Lac Band of Lake Superior Ojibwe) Assistant Professor, University of Pennsylvania Law School. This Article is dedicated to the memory of Philip P. Frickey (1953-2010), scholar and friend to Indian Country. My thanks to those generous souls who have pored over these words and offered their keen insights, among them Greg Ablavsky, Regina Austin, Monica Bell, Dorothy Brown, Josh Chafetz, Guy Charles, Cary Coglianese, Phil Deloria (Dakota), Ryan Doerfler, Laura Edwards, Bill Eskridge, Bill Ewald, Bridget Fahey, Eric Foner, Jean Galbraith, Heather Gerken, Abbe Gluck, Sally Gordon, Fred Hoxie, Pam Karlan, Doug Kiel (Oneida), Seth Kreimer, Naomi Lamoreaux, Sophia Lee, Dan Lewerenz (Iowa), Michael McConnell, Tracey Meares, Martha Minow, Sam Moyn, Mark Nevitt, Nick Parillo, K-Sue Park, Juan Perea, Judith Resnik, Dorothy Roberts, Bill Rubenstein, Ted Ruger, Miriam Seifter, Reva Siegel, Joe Singer, Fred Smith, Cathie Struvie, Karen Tani, Gerald Torres, and Rob Yablon. As the great Sandro Duranti once taught: "The audience is always a co-author of a text." Thanks are due to the many audiences who joined me in collectively crafting and revising these arguments, including the Conference on Reconstruction at Duke Law School, Northwestern Law School Faculty Workshop, University of Wisconsin Law & Society Speaker Series, Culp Colloquium, Princeton Indigenous/Settler Conference, Villanova Law School Faculty Workshop, American Historical Association Annual Conference, Legislation Roundtable, University of Pennsylvania Law School Faculty Workshop, and Penn Law's Writers Bloc(k) Workshop. Neil Deininger, Samuel McHale, and Susan Gaultier provided expert research assistance, along with fascinating discussion. Finally, I am grateful to the editorial team of the *Harvard Law Review* for their patient, rigorous attention to every detail during the final leg of this journey. Ned Blackhawk (Western Shoshone), ninaabem, maamawi giinawind wii-ozhichigan mino bimaadiziwin. Chi-miigwech nimaamaa gikinoo'amaage niin mashkawizii. Ndinawemaaganag.

*the recognition of inherent tribal sovereignty do render aspects of federal Indian law exceptional, federal Indian law and Native history have much to teach about reimagining the constitutional history of the United States. Interactions between the national government and Native Nations have shaped the warp and woof of our constitutional law from the Founding across a range of substantive areas, including vertical and horizontal separation of powers, the Treaty Clause, war powers, executive powers in times of exigency, and many others. I aim to open a conversation as to whether these doctrines ought to take their rightful place in the canon or, perhaps, the anticanon.*

*Beyond simple canonization, federal Indian law offers paradigmatic lessons about the strengths and failings of our constitutional framework. Broadening the binary paradigm to include federal Indian law could allow interventions into a range of general principles of public law. It has often been said that federal Indian law is "incoherent" and in need of reform, because the doctrine does not comport with general public law principles. But perhaps it is the general principles of public law, and the incomplete paradigm of slavery and Jim Crow segregation on which those principles rest, that are in need of reform.*

*More than simple canonization, the inclusion of federal Indian law as an additional paradigm case could lead to fundamental reformulation. A full catalogue is beyond the scope of this Article, but I offer an example here in the hope that it will invite more. As I'll show, federal Indian law leads public law to a very different set of principles in the context of minority protection, unsettling reigning theories of how best to distribute and limit power in order to prevent government abuse of minorities. Unlike slavery and Jim Crow segregation, federal Indian law teaches that nationalism is no panacea for majority tyranny, and that rights can wound as well as shield minorities.*

## INTRODUCTION

*Slavery was the original sin in the New World garden, and the Constitution did more to feed the serpent than to crush it.*
— Akhil Reed Amar[1]

*Binary thinking can easily allow one to believe that America made only one historical mistake — for example, slavery.*
— Richard Delgado[2]

*The situation of [descendants of slaves] was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes and governed by their own laws. Many of these political communities were situated in territories to which the White race claimed the ultimate right of dominion.*
*— Dred Scott v. Sandford*[3]

At the heart of constitutional law is the question of how best to constitute, distribute, and limit government power.[4] To better understand our constitutional framework both descriptively and normatively, our canon has long drawn on the paradigm case of slavery and Jim Crow segregation.[5] Our constitutional histories are periodized by this paradigm case — envisioning a wholly distinct constitutional law from the Founding until the nationalist Marshall Court (1787–1835); from the Jacksonian Era of states' rights to the Civil War (1836–1863); from the Civil War to the Reconstruction Era or the so-called "Second Founding" (1863–1877); from the Jim Crow Era to the New Deal Era (1878–1953); and from the Civil Rights Era to the conservative backlash of the Burger and Rehnquist Courts (1954–2001).[6] Our understanding of constitutional law often involves principles of national power and rights derived from the context of slavery or Jim Crow segregation, or

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[1] AMERICA'S CONSTITUTION: A BIOGRAPHY 20 (2005).

[2] *Derrick Bell's Toolkit, Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 297 (2000).

[3] 60 U.S. (19 How.) 393, 403–04 (1857).

[4] *See, e.g.*, Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33 (2016).

[5] *See, e.g.*, Jack M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 994 (1998) (identifying this Nation's "sorry history" with slavery as establishing African Americans as the "canonical example of a disadvantaged or oppressed minority").

[6] *See generally, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES (3d ed. 2011).

from explicit constitutional reference to slavery.[7] Across a range of constitutional questions, slavery and Jim Crow segregation take center stage in defining the history, principles, doctrine, and the constitutional values at stake around the distribution and limitation of government power under our Constitution.

This paradigm functions in the background of our public law as a normative lodestar against which to evaluate constitutional theory, values, and design.[8] *Brown v. Board of Education*[9] has become the "crown jewel" of our constitutional doctrine against which all constitutional theory is evaluated.[10] By contrast, distributions of power that

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[7] *See generally* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1239–52 (1997) [hereinafter Perea, *The Black/White Binary Paradigm*] (identifying the paradigm and conducting a review of the current literature, including a constitutional law casebook). *See* Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 571–72, 572 n.2 (1995) [hereinafter Perea, *Ethnicity and the Constitution*] (criticizing the black/white binary and calling for a broader paradigm of race and ethnicity within constitutional law, yet explicitly omitting Natives from his paradigm). Constitutional law casebooks have maintained the binary paradigm twenty years later. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 249–300, 347–67, 648–58, 660–89, 1215–28 (6th ed. 2015) (focusing on slavery and Jim Crow segregation in the context of constitutional history, the Reconstruction Amendments, rights, Article I Commerce Clause power, congressional enforcement power, and criminal justice); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 33–36, 45–46, 59, 70, 80, 176–80, 251–54, 261–71, 556–58, 754–60, 768–91, 803–80, 1373–76, 1400–11, 1671–73 (5th ed. 2017) (same in the context of congressional limits on judicial power, justiciability and judicial review, the Commerce Clause, Reconstruction Amendments, and the First Amendment); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES — COMMENTS — QUESTIONS 18–19, 103–08, 351, 582–606, 897–920, 1309–24, 1332–53, 1494–95, 1518–40, 1649–52, 1655–66, 1675–76, 1588–94, 1604–24, 1626–30, 1706–19 (11th ed. 2011) (same in the context of judicial review, the Commerce Clause, substantive due process, the Eighth Amendment, the First Amendment, equal protection, fundamental rights, state action, congressional enforcement power, and justiciability); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 73–135, 211–25, 232–81, 291–99, 301–67, 748–53, 788–90, 821, 829, 924–29, 941–55, 1397–403 (5th ed. 2013) (same in the context of the Commerce Clause, the First Amendment, congressional enforcement power, justiciability, judicial review and the role of the Supreme Court, and the Constitution's relationship to racial discrimination); MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 391–403, 530–33, 709–20, 730–56, 1038–43, 1249–310, 1336–80, 1387–430 (3d ed. 2017) (same in the context of judicial review, federalism, full faith and credit, privileges and immunities, citizenship, the First Amendment, and the Reconstruction Amendments).

[8] This result was not without effort. Professor Sanford Levinson opened the call in the early 1990s to incorporate slavery into the canon, apparently with great success. *See* Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087, 1087 (1993). Professor Levinson's review of five popular constitutional law casebooks revealed nary a mention of slavery beyond inclusion of *Dred Scott*. *Id.* at 1089–91. Professor Juan Perea's research, a mere three years later, documents how quickly at least one set of casebook editors responded. Perea, *The Black/White Binary Paradigm*, *supra* note 7, at 1241–42.

[9] 347 U.S. 483 (1954).

[10] Pamela S. Karlan, *What Can* Brown® *Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009) ("Precisely because *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for

resemble those that allowed for slavery and Jim Crow segregation are inherently suspect.[11] Too much power in the states and not enough federal oversight or constraints, the paradigm teaches, and America might reenact this or a similar atrocity. Professor Juan Perea coined the term "black/white binary paradigm of race" in the late 1990s to describe what he and other critical race scholars saw as a narrow racial discourse that excluded other racialized communities.[12] Perea documents how the binary paradigm has taken hold across a range of disciplines, from law to political science to history. This binary paradigm serves as a foundation to our public law, as constitutional law and theory have adopted implicitly a focus on slavery and Jim Crow as the sole paradigm case to understand how to avoid subordination of minorities.[13]

Although there is much to learn from this Nation's tragic history with slavery and Jim Crow segregation, resting our public law on a single paradigm case that is defined by the black/white racial binary has led to incomplete models and theories. This Nation's tragic history with colonialism and the violent dispossession of Native lands, resources, culture, and even children offers different, yet equally important, lessons about how to distribute and limit government power.

In this Article, I explore how this Nation's history with Native Nations and indigenous peoples could offer an additional paradigm case for public law. A survey of canonical constitutional texts reveals a state

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itself. A constitutional theory that cannot produce the result reached in *Brown* . . . is a constitutional theory without traction.").

[11] *See, e.g.*, Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1963 (2014) ("Nationalists have a bad habit of conflating 'Our Federalism' with your father's federalism. State sovereignty looms large whenever nationalists discuss federalism, with many viewing federalism as a code word for letting racists be racists."); Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010) [hereinafter Gerken, *Foreword*] (outlining the two recurring arguments against federalism: "The first is the worry that local power is a threat to minority rights. The second is a fear of insulating local decisions from reversal even when they fly in the face of deeply held national norms. Both find their strongest support in the tragic history of slavery and Jim Crow. And both are exceedingly persuasive to anyone influenced by a sovereignty account.").

[12] Perea, *The Black/White Binary Paradigm*, *supra* note 7, at 1214 n.2 (reviewing the literature).

[13] Some casebooks adopted the "Black/White" binary explicitly. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 471 (1991).

of near erasure[14] of Native Nations and indigenous peoples.[15] To the extent that federal Indian law is discussed at all within public law, the field is often marginalized into a "tiny backwater."[16] Because the federal government recognizes the inherent sovereignty of Native Nations, federal Indian law and policy are largely viewed as sui generis.[17] Although the colonized status of Native peoples does render certain aspects of

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[14] Theorists of colonialism have observed this erasure outside of law — across American histories, politics, literature, public discourse, map-making, and even art — and consider it a byproduct of an ongoing American colonial project. Lisa Kahaleole Hall, *Strategies of Erasure: U.S. Colonialism and Native Hawaiian Feminism*, 60 AM. Q. 273, 275 (2008) ("The myth of a (mostly) empty North American continent waiting for (European) settlement and 'development' is foundational to the origin story of the United States as a 'nation of immigrants' developing an untamed wilderness. This continental origin story requires the denial of more than five hundred years of contrary facts beginning with the existence of millions of indigenous people inhabiting North America at the time of European contact and continuing through to the present with the struggles of more than 562 currently federally recognized tribal entities fighting to maintain their limited sovereignty and promised treaty rights in the context of complete public ignorance and complaints about their 'special rights.'"). Scholars of settler colonialism refer to this erasure as the "logic of elimination." Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 388 (2006) ("The logic of elimination . . . is an organizing principle of settler-colonial society rather than a one-off (and superseded) occurrence. The positive outcomes of the logic of elimination can include officially encouraged miscegenation, the breaking-down of native title into alienable individual freeholds, native citizenship, child abduction, religious conversion, resocialization in total institutions such as missions or boarding schools and a whole range of cognate bicultural assimilations. . . . Settler colonialism destroys to replace.").

[15] *See, e.g.*, BREST ET AL., *supra* note 7, at 177–81, 400–03, 1348–51 (providing the most comprehensive mention of Native peoples focused primarily on the Jacksonian Era and on the distinctive constitutional treatment of Natives and African Americans); CHEMERINSKY, *supra* note 7, at 276–80, 1732–40 (relying on cases that involve Native people and Native Nations when the seminal case on point happens to involve them — for example, the Eleventh and First Amendments); CHOPER ET AL., *supra* note 7, at 350, 1245–57 (same in the context of the First Amendment and substantive due process); FARBER ET AL., *supra* note 7, at 842–46, 981–83 (same in the context of the Eleventh and First Amendments and, notably, omitting all mention of Native Nations from the section on constitutional history); PAULSEN ET AL., *supra* note 7, at 1100–11 (same in the context of the First Amendment); *see also* AMAR, *supra* note 6, at 28, 46, 141, 251, 270–302, 473 (mentioning Native peoples on thirteen pages of a five-hundred page book); UROFSKY & FINKELMAN, *supra* note 6, at 22–23, 258–61, 304–06, 550–52 (mentioning Native Americans on twenty-seven pages of a twelve-hundred page, two-volume history).

[16] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993). One of the lone voices to the contrary is that of Professor Judith Resnik, who has argued over the years to include federal Indian law within federal courts theory and pedagogy. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 675–80 (1989) [hereinafter Resnik, *Dependent Sovereigns*]; Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 118–19 (1995) [hereinafter Resnik, *Multiple Sovereignties*]. Following 9/11 and the growth of the War on Terror, Resnik increased the urgency of her call to incorporate federal Indian law into substantive areas where power was "claimed by force and justified by necessity." Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 77 (2004) [hereinafter Resnik, *Tribes, Wars, and the Federal Courts*].

[17] *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 440 (2005); Angela R. Riley, *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality*," 130 HARV. L. REV. F. 173, 199 (2017).

federal Indian law exceptional, public law still has much to learn from federal Indian law. In fact, if we define federal Indian law as the law of national power and rights developed in the context of Native Nations and Native peoples, much of constitutional law actually *is* federal Indian law.

Interactions with Native Nations, Native peoples, and Native lands were central to the development of many public law doctrines. The Civil War and Reconstruction Amendments did fundamentally reshape the federalist framework, requiring translation of constitutional values into radically changed circumstances. But so, too, did westward expansion through colonial rule shape the earliest meaning of the Constitution and require translation of that meaning into radically changed circumstances. The United States of the early nineteenth century was entirely changed from the United States of the early twentieth century, and that difference is attributable in large part to our constitutional framework's facilitation of the colonial project.

Chief Justice John Marshall and his "nationalist" Court no doubt reaffirmed national power vis-à-vis the states in *McCulloch v. Maryland*[18] and *Gibbons v. Ogden*.[19] However, it is challenging to grasp the breadth of Chief Justice Marshall's nationalist project, and his motivation, without the so-called "Marshall Trilogy" — the set of cases that forms the foundation of Indian law doctrine.[20] In these cases, Chief Justice Marshall rooted the power over Indian affairs and Indian lands firmly in the national government, providing fuel for the engine of westward expansion and its radical transformation of the national and constitutional landscape. Placing the Trilogy at the center of antebellum nationalism is also more historically accurate: throughout the 1820s and 1830s, "issues of Indian policy and Indian removal received more attention in the nation's periodicals than did issues of tariffs and the Bank of the United States."[21] Moreover, our modern constitutional doctrines often contain analogues within federal Indian law. Although controversial, the Court has adopted a highly deferential approach to the Commerce Clause in the context of Native Nations,[22] similar to its deferential approach to the Commerce Clause in the context of Jim Crow

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[18] 17 U.S. (4 Wheat.) 316 (1819).

[19] 22 U.S. (9 Wheat.) 1 (1824).

[20] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[21] Mary Hershberger, *Mobilizing Women, Anticipating Abolition: The Struggle Against Indian Removal in the 1830s*, 86 J. AM. HISTORIANS 15, 17 (1999).

[22] Other scholars have noted the similarities between the Court's determination of congressional "plenary power" over Indian affairs, rooted in the Commerce Clause, and congressional "plenary power" over immigration. Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 U. COLO. L. REV. 1127, 1142–49 (1999).

segregation.[23] The domestic power of the President in the context of war, treaty making, detention, and recognition developed in the context of Indian affairs in the nineteenth and twentieth centuries.[24] Modern administrations continue to draw on this historical precedent in arguing for an expansive domestic presidential power in the War on Terror.[25] While the recognition of inherent tribal sovereignty may be "exceptional," the paradigm of colonialism and federal Indian law is not, and it provides a range of similar interventions across public law.[26]

Many of these doctrines belong in the canon. Federal Indian law even has its own *Brown* to offer. Federal recognition of inherent tribal sovereignty and of each Native Nation's ability to self-govern should form a "crown jewel" in our constitutional canon on par with *Brown*. The United States is the only country in the world to recognize the inherent sovereignty of Native Nations within its borders and to recognize the ability of Native Nations to regulate and govern reservation lands. However imperfect, our constitutional law with respect to Native Nations is cause for similar celebration. Akin to *Brown*, recognition of inherent tribal sovereignty should serve as lodestar to evaluate constitutional theory. Similarly, "[a] constitutional theory that cannot" support the recognition of inherent tribal sovereignty, should be "a constitutional theory without traction."[27]

However, many other doctrines belong in the anticanon. Like slavery and Jim Crow segregation, the 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 and, in particular, the Indian reservation and boarding school system. From the Founding, the national government has had a direct hand in the violent dispossession of Native peoples, the internment of Natives into reservation camps, and efforts to "kill the Indian and save the man" by

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[23] *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (upholding application of Title II of the Civil Rights Act against a challenge that the application to private conduct extended beyond Congress's Commerce Clause power); Katzenbach v. McClung, 379 U.S. 294, 303–05 (1964) (same).

[24] *See infra* Parts I & II, pp. 1800–46.

[25] Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists (Nov. 6, 2001).

[26] Although never intended to be exhaustive, notably absent from the survey that follows is the field of international law. That field is undoubtedly part of public law and undoubtedly impacted by colonialism, but this Article focuses its attention on matters more domestic and reserves those worldlier — and thornier — interventions for future work.

[27] Karlan, *supra* note 10, at 1060.

forcing Indian children into boarding schools run by the federal government.[28] The constitutional law underlying these tragedies — specifically, the "plenary power" or "inherent powers" doctrine recently reaffirmed to uphold Executive Order 13,769, or the so-called "travel ban"[29] — should be reevaluated following recognition of its deep colonial roots. Centering federal Indian law demonstrates that *Korematsu v. United States*,[30] decided in 1944, continued a common practice of federal concentration camps and was not an outlier case attributable to the exigency of war. *Korematsu* should not comprise the sole mention in our canon of the inherent dangers of unchecked national power in the context of war and race.

Beyond simple canonization, the paradigm of colonialism and federal Indian law could contribute to a fundamental rethinking of public law principles. It has often been said that federal Indian law is "incoherent" and in need of reform, because the doctrine does not comport with general public law principles.[31] But perhaps it is the general principles of public law, and the incomplete binary paradigm on which those principles rest, that are in need of reform. A full catalogue is beyond the scope of a single Article, but I offer a case study here in the hope that it will invite more. In particular, the paradigm of Indian law unsettles many of public law's current presuppositions about how best to distribute and limit power in order to protect minorities.[32] Constitutional theory generally presumes that minorities are best protected with national oversight, rights-based frameworks, and judicial solicitude.[33] But strengthening national power was no panacea for the subordination

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[28] *See, e.g.*, ROBERT ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 124–26 (3d ed. 2015).

[29] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2408–10, 2421–23 (2018) (applying a deferential review of the executive order and discussing the President's authority under applicable statutes).

[30] 323 U.S. 214 (1944).

[31] *See, e.g.*, United States v. Lara, 541 U.S. 193, 214–25 (2004) (Thomas, J., concurring in the judgment) ("[T]he time has come to reexamine the premises and logic of our tribal sovereignty cases. . . . [U]ntil we begin to analyze these questions honestly and rigorously, the confusion . . . will continue to haunt our cases."); Frickey, *supra* note 17, at 434.

[32] Given the variety of characteristics and experiences of communities who have suffered state abuse and the difficulty of capturing that variety in a single term, a quick definitional point is in order. *See, e.g.*, Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987) (turning reluctantly to the term "minority" to capture the range of experiences of racialized minorities, but noting that "if one adds up all the shades of yellow, red and brown . . . we are in fact not" a numerical minority). The discussion that follows will have a certain relevance for the theorization of numerical minorities generally and, particularly, those numerical minorities who rarely wield political power because of their entrenched minority status. Accordingly, I rely on the term "minority" as a shorthand for these politically powerless groups. However, I emphasize the importance of the discussion that follows to minorities who have been historically subordinated, marginalized, and racialized by those in power, even when their numbers don't necessarily place them in the status of a numerical minority.

[33] *See infra* Part III, pp. 1846–1876.

of Native peoples. The intervention of national power into federal Indian law and policy in the late nineteenth century actually furthered majority tyranny through the implementation of allotment and the reservation system.[34] Integrationist, rights-based frameworks like that of *Brown* are feared in Indian law, rather than celebrated.[35] National constitutional rights have long been used as a tool to further the colonial project against Native peoples — first as a tool of dispossession during the allotment era[36] and more recently as a means to undermine tribal sovereignty by using the force of national rights to disrupt the power of tribal governments.[37]

Instead, the national government has best protected Native peoples by bestowing power, not rights, through the recognition of inherent tribal sovereignty. Contrary to the tenets of "[our] father's federalism,"[38] localism has empowered Native Nations through the ability to self-govern. Recently, public law scholars have begun to identify non-rights-based or structural forms of protection for minorities like federalism, unions, and petitioning.[39] However, much of this scholarship is still rooted in the binary paradigm.[40] Scholars have been increasingly calling

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[34] FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 315–916 (1984).

[35] *See* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1187 (2010) [hereinafter Berger, *Reconciling Equal Protection*]; Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 593 (2009) [hereinafter Berger, *Red*]; Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1390–93 (2002); Sarah Krakoff, *Constitutional Concern, Membership, and Race*, 9 FLA. INT'L U. L. REV. 295, 296 (2014) [hereinafter Krakoff, *Constitutional Concern*]; Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1043 (2012) [hereinafter Krakoff, *Inextricably Political*]; Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 543–47 (2017) [hereinafter Krakoff, *They Were Here First*]; *see also* Rice v. Cayetano, 528 U.S. 495, 514 (2000) (rejecting, as an improper proxy for race, the government's use of ancestry and applying strict scrutiny).

[36] See *infra* section II.D, pp. 1829–39.

[37] Krakoff, *They Were Here First*, *supra* note 35, at 501–25; *see also* Morton v. Mancari, 417 U.S. 535, 552 (1974) (noting that a holding of invidious discrimination under the Equal Protection Clause for the exceptional treatment of Indians would "effectively erase[]" the "entire Title of the United States Code (25 U.S.C.)" structuring the recognition of tribal sovereignty and the trust relationship).

[38] Gerken, *The Loyal Opposition*, *supra* note 11, at 1963.

[39] *See, e.g.*, Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1291 (2012) (defining "votes" or structural forms of representation for minorities broadly to include "not just ballots but also any form of representation or direct participation in processes of collective decisionmaking").

[40] *See, e.g.*, Gerken, *The Loyal Opposition*, *supra* note 11, at 1968. History has reinforced the nationalists' blind spots or, more accurately, created them in the first place. For many, the story of racial progress is the story of *Brown*. For the more discerning, the story of racial progress is the story of social movements and the Civil Rights Acts. In either case, the means for achieving integration and its appropriate measure are clear. Nationally enforced rights are what mattered for racial progress. And the touchstone for measuring success is diversity. Jim Crow's despicable legacy runs so deep that it is inscribed in our vocabulary. We classify institutions as *diverse* or *segregated*. "Diverse" institutions mirror the polity. "Segregated" institutions are those where racial

for a paradigm that looks beyond rights and toward power; a paradigm that provides the language to talk about majority-minority institutions as not simply "segregated" and one that envisions minority rule as a natural and integral aspect of our democracy. Federal Indian law could provide that paradigm.

The paradigm of federal Indian law offers equally surprising lessons on which branch is best suited to protect against majority tyranny. The judiciary, long viewed as the ideal branch to empower in order to protect minorities, has been devastating to Indian law.[41] Throughout the twentieth century, it has often been Congress and the Executive — and the ability to access the lawmaking process through petitioning and lobbying[42] — rather than the courts, that have provided sanctuary.[43] Debates over the role of the judiciary and judicial review should look beyond antidiscrimination law and the paradigmatic case of slavery and Jim Crow segregation in order to better articulate the Court's role as arbiter of our constitutional values. Much of federal Indian law is absent from the constitutional law canon because much of it exists outside the courts.[44] This is largely the result of the Supreme Court often declining to adjudicate questions of national power over Indians — holding out the very question of colonialism as a political question.[45] As our modern understanding of constitutional law reaches beyond the simple court-centric model of constitutional meaning,[46] federal Indian law might find a more natural fit within our canon. But that incorporation should not also preempt critique of the Court's role vis-à-vis constitutional values in the context of colonization. Modern Elysians might view clearing discrimination from the channels of democracy as sufficient to address the artifacts of slavery and Jim Crow segregation,[47] but the channels of

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minorities dominate. We have no laudatory term for heterogeneous institutions where racial minorities are in the majority and Whites are in the minority; those get lumped together with "segregated" institutions. As a result, we have no means of distinguishing between the racially homogenous enclaves of Jim Crow and heterogeneous institutions where racial minorities wield majority power.

[41] *See infra* Part II, pp. 1806–46.

[42] FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 22–23 (2009).

[43] Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 81 (2015).

[44] *See infra* Part I, pp. 1800–06.

[45] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 592–93 (1832).

[46] *See generally, e.g.*, SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT (2014); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016); Sotirios A. Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. 267 (2000).

[47] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–79 (1980) (crafting a careful analysis of how to best "facilitat[e] the representation of minorities," but viewing "minorities" entirely through the black/white binary paradigm).

political change, clear or not, do little to address the artifacts of colonialism. Forcing colonized peoples to engage in our democratic process to avoid subordination only furthers the colonial project.

This Article proceeds in three parts. Part I introduces the central thesis of this Article in offering federal Indian law and this Nation's history with colonialism as a paradigm case within our public law. Part II notes a range of substantive public law areas in which the Native Nations and colonialism have been central to the development of those doctrines and opens a discussion as to whether certain federal Indian law doctrines belong in the canon or anticanon. Part III provides an example of how federal Indian law might contribute to a fundamental rethinking of certain general public law principles and, in particular, the distribution and limitation of power in order to prevent government abuse of minorities.

## I. FEDERAL INDIAN LAW AS PARADIGM

The word "slavery," like the word "colonialism," appears nowhere in the Constitution.[48] Yet, like America's other original sin, traces of America's history with colonialism are woven in like threads to the fabric of the document. The Founding Constitution explicitly referenced Indians twice. The first reference was in the Commerce Clause, which provided Congress with the power in Article I, Section 8 to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" and again to explicitly "exclud[e] Indians not taxed" from Article I's apportionment scheme.[49] The Second Founding brought an additional reference to Indians in the Reconstruction Amendments: in addition to reaffirming Article I's earlier exclusion of "Indians not taxed," the Fourteenth Amendment excluded Indians implicitly from the Citizenship Clause in Section I as Natives were not then "subject to the jurisdiction" of the United States.[50] However belied by the lack of ubiquitous mention, interactions between the national government and Native Nations shaped the warp and woof of United States constitutional law from the Founding. The following sections introduce federal Indian law and the history of colonialism as a paradigm case to structure our constitutional histories, add depth to our understanding of constitutional law doctrines, and inform the theorization of general principles of public law.

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[48] *See* FREDERICK DOUGLASS, *The Meaning of July Fourth for the Negro* (July 5, 1852), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188, 204 (Philip S. Foner ed., 1999).

[49] U.S. CONST. art. I, § 8; *id.* art. I, § 2.

[50] *Id.* amend. XIV.

### *A. Colonialism and Constitutional History*

Felix Cohen, often called the father of federal Indian law,[51] once presciently referred to Natives as America's miner's canary[52] — seeing treatment of Natives as a barometer for the constitutional soul of the United States. For the field of public law, Cohen's prediction could serve as more than a quaint warning. Constitutional law scholars necessarily study constitutional dynamics over time — periods of crisis, reaction, retrenchment, and redemption. At present, our constitutional histories by which scholars study these dynamics are focused on and periodized by the paradigm case of slavery and Jim Crow segregation.[53] Those familiar with this paradigm will find the narrative arc of American federal Indian law a familiar one. However, colonialism periodizes our constitutional histories earlier in time — as moments of questioning, crisis, and conflict over constitutional meaning and values occurred years earlier in the context of colonialism than they had in the context of slavery and Jim Crow — and it offers unconventional examples of enduring constitutional solutions.

The issue of American colonialism was born into the Constitution at the Founding with a compromise between those who aimed to constitutionalize colonialism and those who saw colonialism as an abomination and incompatible with constitutional democracy.[54] The battle between these two perspectives took shape over the long nineteenth century, as the practices of American colonialism and its opponents helped structure executive, legislative, and judicial power vis-à-vis each other and the states.[55] In the midst of this constitutional dispute arose the Marshall Trilogy.[56] The Trilogy comprised three cases that, like the three Reconstruction Amendments, attempted to reconcile the inherited atrocity of colonialism with the principles of constitutional democracy.[57] This reconciliation, however imperfect, laid the constitutional foundation for the field of federal Indian law.

Yet, once the foundation was built, the Marshall Trilogy began a period of dormancy similar to that experienced by the Reconstruction Amendments in the late nineteenth century. During this time, American colonialism transformed from direct violence to structural violence as

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[51] *See* Jill E. Martin, *The Miner's Canary: Felix S. Cohen's Philosophy of Indian Rights*, 23 AM. INDIAN L. REV. 165, 165 (1998).

[52] Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

[53] *See, e.g.*, AMAR, *supra* note 6; UROFSKY & FINKELMAN, *supra* note 6, at 377–537.

[54] *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1084–85 (2014).

[55] *See infra* section II.B, pp. 1815–25.

[56] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[57] *See* Frickey, *supra* note 16, at 384–85 (describing the Marshall Trilogy as a compromise and an effort to mitigate between the realities of colonialism and the values of a constitutional democracy).

the national government established the reservation system, forced Native children into boarding schools, and attempted to break up tribal sovereignty under the auspices of paternalism.[58] Rather than rooting the power to enact these policies in the enumerated powers of the national government and the text of the Constitution, the Court sanctioned a doctrine of national power inherent to the notion of sovereignty.[59] These powers, the Court reasoned, were preconstitutional and were, thus, unchecked by constitutional limitation — including judicial review.[60] Like the Black Codes and Jim Crow segregation, transition from the removal era to the reservation system was, to borrow a term from Professor Reva Siegel, "preservation-through-transformation."[61] Subordination of Native peoples remained, but it transformed into institutionalized and more quotidian forms of violence.

Like slavery and Jim Crow segregation, colonialism also experienced its moment of constitutional redemption following dormancy. After decades of studying the effects of the reservation era on Native peoples and, especially, Native children, federal Indian law saw temporary salvation in its analogue to *Brown*: the Indian Reorganization Act of 1934[62] (IRA). The IRA ushered in a new era aimed at mitigating the effects of colonialism by recognizing and facilitating the power of Native Nations to self-govern. Pursuant to the IRA, the United States would recognize inherent tribal sovereignty as established by the Marshall Trilogy and facilitate local control by Native Nations.[63] Like the ebb and flow of the years following *Brown*, the decades following the IRA have seen their successes and failures. But recent years have followed the familiar pattern of post–Civil Rights Era social reform — specifically, that of legislative successes soon subject to judicial dismantling.[64] There are deep lessons in the parallels between these two histories that have yet to be explored. However, despite the similarities between federal Indian law and our constitutional history of slavery and Jim Crow, there is as much to learn from their differences as from their similarities.

For scholars trying to make sense of constitutional dynamics over time and to document struggles over constitutional meaning, the *longue durée* of colonialism could shed light on later constitutional struggles. The Civil War was not the first constitutional crisis over deep values

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[58] *See* ANDERSON ET AL., *supra* note 28, at 80, 91–105, 124–26.

[59] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25 (2002).

[60] *See id.* at 46–47.

[61] Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997).

[62] Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5129 (2012)).

[63] *See infra* section II.B, pp. 1815–25.

[64] *See infra* section II.B, pp. 1815–25.

and Reconstruction was not the first failure to enforce constitutional compromise. The Court's deference to presidential pressure in *Dred Scott v. Sandford*[65] could have been inspired, at least in part, by the earlier confrontation over constitutional values that the Court mounted and lost against President Jackson in *Worcester v. Georgia*.[66] Conflict over constitutional values with respect to colonialism preceded the Civil War conflict over slavery by almost exactly thirty years. Both conflicts resulted in compromise and in periods of détente and dormancy due to lack of enforcement.

But the shift from overt violence to institutionalized violence — or from the Indian Wars to the reservation era — began about thirty years earlier for colonialism than it did for slavery. Compromise over colonialism also ended its period of dormancy much earlier than the compromise over slavery. In 1934, the IRA disavowed the reservation system and built a statutory framework for the ongoing recognition of inherent tribal sovereignty twenty years before *Brown*, while *Plessy v. Ferguson*[67] remained good law.[68] Beyond periodization, federal Indian law teaches us that changes in constitutional meaning could be more stable when implemented by statute than by judicial opinion. Not only was the IRA implemented earlier, but it has also outlived the affirmative promises of *Brown*. Conservative challenges to remedial legislation began earlier in the context of colonialism — *Morton v. Mancari*,[69] a challenge to the Bureau of Indian Affairs's hiring preference for tribal members by a non-Native, predated *Regents of the University of California v. Bakke*[70] by four years. Yet, these challenges have been overall less successful. Although trouble looms on the horizon, unlike *Brown*, the IRA has yet to see functional reversal.

### *B. Colonialism and Federal Indian Law as Paradigm Case*

Professor Thomas Kuhn, most notably, defined paradigms as exemplar problem-solutions that are used to socialize members of a discipline into the basic theories and presuppositions of that discipline.[71] Put simply, paradigms are the model examples relied on by a discipline to teach how the world works.[72] These model examples are also used to

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[65] 60 U.S. (19 How.) 393 (1857).

[66] 31 U.S. (6 Pet.) 515 (1832); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 352 (1998) (comparing presidential reactions to *Worcester* and *Dred Scott*).

[67] 163 U.S. 537 (1896).

[68] *See infra* Part II, pp. 1806–46.

[69] 417 U.S. 535 (1974).

[70] 438 U.S. 265 (1978).

[71] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 186–90 (4th ed. 2012).

[72] *Id.*

make sense of new situations by analogizing them to the model examples.[73] Scholars, practitioners, and courts draw similarly on paradigm cases and model examples in the stories we tell about the Constitution and how constitutional law works. It is through these stories that we convey and discuss questions of constitutional theory and that we build our constitutional canon and anticanon. In offering American colonialism and federal Indian law as a paradigm case for public law, this project has three primary aims: First, I aim to demonstrate that federal Indian law is already central to many areas of public law; I aim to combat the current erasure of Native Nations and Native peoples from our constitutional law and theory by highlighting this centrality. Many areas of constitutional law were built and refined by interactions with Native Nations, Native peoples, and Native lands. In particular, federal Indian law and colonialism have shaped deeply the treaty power, the war powers, the plenary power doctrine, our federal structure, as well as a range of other public law doctrines. Recognizing the central role of Native Nations and Native peoples to our public law could deepen our understanding of these doctrines and could begin a process of combatting the active erasure of our colonial past and present.

Second, I aim to open a conversation about how federal Indian law ought to fit within the constitutional canon and anticanon, offering the doctrines of colonialism as constitutional failure. Centering federal Indian law in our discussion and theorization of many constitutional law doctrines could, at minimum, contribute new authorities to the canon across a range of substantive areas.[74] Beyond better understanding of

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[73] *Id.*

[74] Following his successful campaign to bring slavery into the constitutional canon, Sanford Levinson joined Professor Jack Balkin in articulating the intricacies and dynamics of canonization writ large within our constitutional law. *See, e.g.*, Levinson, *supra* note 8, at 1087, 1091; Balkin & Levinson, *supra* note 5, at 987–95. Levinson's later effort to include the *Insular Cases* and American "expansionism" was less successful. *See generally* Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000). Levinson and Balkin describe three distinct areas of canonicity: pedagogy, or the canon that we teach; cultural literacy, or the canon that drives public discourse; and academic, or the canon on which rests constitutional theory. Balkin & Levinson, *supra* note 5, at 975–76. What they call "deep canonicity" would not only contribute to all three but would also shape the practices, culture, and world view of a particular constitutional community. *Id.* at 984–85. Notably, Levinson and Balkin draw parallels between "deep canonicity" and the Kuhnian notion of paradigm. *Id.* at 986.

Levinson and Balkin's canon includes "canonical narratives" and "canonical examples." *Id.* at 987, 992. Canonical narratives are the "stock stories" that every society tells and retells about itself until those stories become myth. *Id.* at 987. These narratives help shape a society's self-conception, frame its past, and predict its future. *Id.* Canonical examples are paradigmatic cases of an issue or problem that are used to reason through that issue or problem. *Id.* at 992.

Notably, the authors identify "America's sorry history of slavery and racism" as the canonical example to reason through the issue of minority protection and representation, an example they identify as structuring and motivating Justice Stone's influential footnote four reasoning and as providing later minority movements a model for reform efforts. *Id.* at 994. Levinson and Balkin

the doctrines, identifying colonialism at the heart of our constitutional law doctrines ought to open a conversation as to whether those doctrines should remain good law or should be discarded alongside *Dred Scott* and *Plessy v. Ferguson* as constitutional failures. To date, erasure has allowed us to avoid the tough normative questions that arise from recognition. The developmental arc of federal Indian law takes a familiar form: one of compromise to contestation to failure to progress. We began with a Constitution compromised by contested constitutional values, contestation largely motivated by the inherited reality at the Founding: the United States began as both an empire and a state that sanctioned and supported human slavery. But we have since structured our constitutional law to at times further and at other times mitigate these realities. I will argue that doctrines that furthered colonialism ought to take their place in the anticanon and doctrines that mitigated colonialism ought to take their place in the canon. Incorporating slavery and Jim Crow segregation into the canon fundamentally reshaped our understanding of the Constitution because it offered canonical examples of failure and success in protecting fundamental constitutional values. So, too, should federal Indian law reshape fundamentally our understanding of the Constitution. No reasonable constitutional theory would recognize *Dred Scott* or *Plessy v. Ferguson* as embodying our constitutional values. Constitutional law compromised by colonialism, like that compromised by slavery, should be identified as constitutional failure. At minimum, these doctrines should take their place within the anticanon, thus rendering policy and doctrine from those periods — the removal and reservation periods, most notably — as mistakes made as we muddled toward progress, banishing them from our law.

Finally, I aim to apply the lessons from federal Indian law to reshape the general principles of public law. At first blush, this project might seem a simple one of canonization or, some might argue, one of anticanonization.[75] But the "canonization" of federal Indian law could prove far from simple. More than providing additional cases and statutes to the canon, canonizing colonialism and federal Indian law as on par with that of slavery and Jim Crow segregation could bring to the fore new constitutional dynamics, values, and lessons. Like slavery and Jim Crow segregation, this Nation's history with colonialism could serve as a "master narrative" within the canon and could, thus, also form the descriptive and normative "ocean of common sense in which our fellow

identify the canonical example of slavery as overly narrow and a poor fit for the issues faced by other minority groups. *Id.* The paradigm of federal Indian law provides a new canonical narrative and a new canonical example, in addition to expanding the textual canon to include additional Supreme Court doctrine, executive action, and statutes.

[75] *Cf.* Balkin & Levinson, supra note 5; Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381–83 (2011).

citizens swim."[76] The U.S. Constitution contained more than one compromise and more than one original sin at the Founding. Lessons drawn from understanding the role of colonialism and its tension with constitutional democracy could provide descriptive and normative guidance to a range of general principles within public law — most notably, how to prevent constitutional failure and the abuse of state power. On a more fundamental level, a deeper reflection on federal Indian law could also clarify understandings of constitutional values and could provide lessons as to how best to structure our government to protect those values. Importantly, foregrounding and problematizing the centrality of Indian law to public law could reify the view that not only is colonialism a moral abomination, it is also inconsistent with our constitutional democracy and an anachronistic artifact of empire.

## II. THE CENTRALITY OF FEDERAL INDIAN LAW TO PUBLIC LAW

Colonialism, like slavery, was an original sin in the "New World Garden." The garden, it turns out, was not at all "new," and the colonists inherited both an empire and a slave state along with their independence. While the colonists had inherited vast swaths of land under the 1783 Treaty of Paris, Native Nations asserted domain over much of that land and still occupied many of the original thirteen colonies.[77] This complicated inheritance meant that the young nation was born into a struggle between a vision of American governance that transcended the practices of imperialism and a vision of America as empire. Before independence, Britain had forbidden the colonists from entering or settling upon Native land.[78] Following independence, the Articles of Confederation adopted a vague compromise approach that appeased all,

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[76] Philip J. Deloria, *American Master Narratives and the Problem of Indian Citizenship in the Gilded Age and Progressive Era*, 14 J. GILDED AGE & PROGRESSIVE ERA 3, 5 (2015). A master narrative, in Professor Phil Deloria's words, is one of the few "big stor[ies]" that "has grown from historiographical roots to generate such meaning and power within American culture that it often escapes the complicating work of historians." *Id.* According to Deloria, master narratives often emphasize progression in that "they make progress central to their story lines"; "[t]hey emphasize agency"; and "[t]hey have intelligible (if teleological) goals: liberty, recognition, civil rights, economic survival (and perhaps even prosperity), collective healing from historical trauma, and a more just and equitable world." *Id.* at 7. These master narratives function as both canonical narrative and canonical example, as they often capture deep values over the course of our entire constitutional history and provide lessons across a range of doctrines for how we can better structure our constitutional law to achieve those values.

[77] Brian DeLay, *Independent Indians and the U.S.-Mexican War*, 112 AM. HIST. REV. 35, 68 (2007) ("By the early 1820s . . . [Native communities] still controlled between half and three-quarters of the continental landmass claimed by the hemisphere's remaining colonies and newly independent states.").

[78] *See, e.g.*, Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 354–56 (1989).

but settled nothing. The Articles provided power over Indian affairs to the Confederation Congress, while simultaneously limiting national power to Indians "not members of any of the states" and retained explicitly the "legislative right" of a state within its borders.[79] The Articles soon foundered under confusion as states asserted their claims to Indian land under colonial charters and as squatters, emboldened by independence, flooded Indian Country.[80] The Confederation Congress aimed to do the impossible: exercise its weak national power to prevent the encroachment of squatters, resolve competing land claims, and lay claim to Indian land itself through treaties and conquest in order to fill the nation's empty coffers and dispense with its nearly $40 million in Revolutionary War debts.[81] Disarray within the realm of Indian affairs, including broken treaties and unauthorized wars with Native Nations, ranked high on the list of failures that motivated the formation of a stronger national government and the drafting of the new Constitution.[82]

As documented by Professor Greg Ablavsky, Indian affairs and the fears of Indian war took center stage at the Founding.[83] Debates coalesced around two divergent constitutional solutions: One view advocated for a diplomatic constitution with a strengthened treaty power with Native Nations, greater national power to enforce and protect those treaty promises against state encroachment, exclusive national power over territories and newly acquired lands, and an explicit prohibition on state power to form independent treaties with Native Nations.[84] The other view advocated for colonialism by conquest.[85] The constitutional vision for conquest envisioned a strong domestic military power in both Congress and the Executive, national direct taxation power to fund standing armies and militias, a guarantee of national protection to state governments against "invasion," reaffirmation of state power through Senate apportionment and supermajority treaty requirements, and a prohibition of the formation of states within the borders of preexisting states.[86] Both views articulated the character of Native Nations in the same light, as sovereign governments (albeit ones that deserved less respect than their White counterparts), but the views parted ways on the constitutional character of the United States. It remained an open question at the Founding whether the United States

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[79] ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

[80] *See* Ablavsky, *supra* note 53, at 1018–27.

[81] *See* RICHARD M. SALSMAN, THE POLITICAL ECONOMY OF PUBLIC DEBT: THREE CENTURIES OF THEORY AND EVIDENCE 58–59 (2017).

[82] See Ablavsky, *supra* note 54, at 1033.

[83] *See id.* at 1035–38; *see also* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1018–19 (2015).

[84] Ablavsky, *supra* note 54, at 1035–37.

[85] *See id.* at 1037–38.

[86] *See id.* at 1007, 1046–47, 1049–50.

would become an imperfect diplomat or would become an unabashed conqueror. Ablavsky's history describes the conquest view carrying the debates at ratification.[87] But the text of the Constitution, like in the case of slavery, reveals a compromise document: one that codified both visions into its text and referenced colonialism only implicitly as a means to secure ratification.

Compromise in the context of colonialism resulted in as much constitutional clarity as compromise in the context of slavery. Both the diplomat and colonizer view of the Constitution scored victories and losses as debates over constitutional meaning were cast and recast across the long nineteenth century and into the twentieth century. It was the battle between these two viewpoints that laid the foundations of our constitutional law across a range of areas.

In the sections that follow, I put forth the claim that this Nation's history with colonialism and federal Indian law is central to public law. However, a few threshold points of clarification are in order. In offering Indian law as central to public law, I do not take the position that tribal governments are governed by the Constitution; they are not.[88] Nor do I take the position that tribal governments are simply extensions of the national government or delegations of federal power; they are not.[89] No doubt, the primary aim of the Constitution was to constitute, distribute, and limit the power of the national government. So, as separate sovereigns, tribal governments share the characteristic of foreign governments in that they are "extraconstitutional," or not bound by the specific text of the Constitution. However, tribal governments are not "extraconstitutional," in the sense that the U.S. Constitution has no relevance to them or no effect on them. Like the relationship between the national government and other sovereigns, the national government as constituted by the Constitution still wields incredible power over Native Nations and Native peoples.[90] Thus, like this Nation's history with slavery and Jim Crow segregation, the national government and its constitutional framework have shaped and have been shaped by this Nation's history with colonialism and the subordination of Native peoples.[91] In fact, because our constitutional law shifted power over Natives up the vertical separation of powers to the national government, the exercise and development of national power played a more direct role in colonialism than it did in the context of slavery and segregation,

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[87] *Id.* at 1050–76.

[88] *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 384–85 (1896) (holding that the Fifth Amendment did not apply to Native governments).

[89] *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 321–22 (1978) (holding that the Double Jeopardy Clause did not bar a successive federal prosecution for conduct already held to be a crime under tribal law, because the tribal prosecution originated from a distinct sovereign); United States v. Lara, 541 U.S. 193, 210 (2004) (reaffirming the holding of *Wheeler*).

[90] *See supra* Part I, pp. 1799–1806.

[91] *See* Ablavsky, *supra* note 54.

where constitutional law shifted power over enslaved peoples down to the states. Yet, the paradigm of slavery and Jim Crow segregation dominates our constitutional canon, while, inexplicably, federal Indian law hardly receives mention.

### *A. The Treaty Power*

The diplomatic and colonial views may have agreed on a strong national power, but the views parted ways when it came to the character of that power. Alongside the view of the United States as conqueror, the diplomatic view reigned in the first hundred years of this country's birth and has survived in different forms into the twenty-first century. The relationship between Native Nations and the nascent governments of the United States was a topic of deep interest at the Founding. Because the United States recognized the inherent sovereignty of Native Nations, there was "widespread agreement" in the late eighteenth century that this relationship was governed by the law of Nations.[92] Thus, the Washington Administration turned to international law for resolution. Incorporating into domestic law the "doctrine of discovery," the Washington Administration recognized a more expansive view of tribal sovereignty than the states had recognized under the Articles of Confederation.[93] Pursuant to this view, the "discovery" of Native lands within its territorial limits provided the United States with the power to exclude other European nations from engaging in direct diplomacy with Native Nations only.[94] Native Nations would retain domain and jurisdiction over their lands until the Nations voluntarily ceded those lands to the United States.[95] The Washington Administration recognized Native Nations as "foreign nations, not as the subjects of any particular state"[96] and in possession of "full, undivided and independent sovereignty as long as they choose to keep it, and that this might be forever."[97] Recognition of inherent tribal sovereignty has taken many forms over the last two hundred years, but it remains a central and exceptional feature of American constitutional law. This exceptional feature of United States constitutional law should take its rightful place in the canon beside *Brown*. It has fostered a range of doctrines that provide the infrastructure for a collaborative lawmaking process with Native

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92 Ablavsky, *supra* note 83, at 1061.

93 *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790–1834, at 140–41 (1962).

94 *See id.*

95 PRUCHA, *supra* note 34, at 60.

96 COLIN G. CALLOWAY, PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY 98 (2013) (quoting Letter from Henry Knox to George Washington (July 7, 1789), *in* 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 138 (Dorothy Twohig ed., 1989)).

97 PRUCHA, *supra* note 93, at 141 (quoting WRITINGS OF THOMAS JEFFERSON (memorial edition), I, 340–41, XVII, 328–29).

Nations, and it has helped mitigate the realities of American colonialism. In addition to recognition of inherent tribal sovereignty, these doctrines should be better understood within their historical context and, perhaps, even celebrated.

Given the recognition of Native Nations as independent sovereigns, the national government asserted its treaty power as the primary means of engagement in Indian affairs in its first century. Regulation by treaty, at its best, offered a collaborative process for the development of federal Indian law through negotiation between the United States and Native Nations and was overseen by at least two branches of the federal government: the Executive and the Senate.[98] Treaties with Native Nations were, like all others, negotiated between the President and the Native Nations and, when ratified under the advice and two-thirds consent of the Senate, became the "supreme Law of the Land" under the Supremacy Clause.[99]

Through practice, Indian affairs shaped the reach and meaning of the Treaty Clause from the very beginning. Because Indian affairs dominated the federal policymaking docket, the over 350 treaties between the United States and Native Nations constituted more than half of the treaties ratified by the United States in its first hundred years.[100] The very first treaty signed by the newly formed Continental Congress was with the Delaware Nation in 1778, and the first treaty negotiated by the Washington Administration was with the Creek Nation in 1789.[101] The earliest treaties signed with Native Nations established longstanding treaty practice and provided a pragmatic gloss to the sparse text of the Treaty Clause.[102] For example, President Washington's early adopted practice of consulting the Senate only after concluding negotiations with the Creek and other nations established a narrow reading of the constitutional requirement to obtain "advice" from the Senate.[103] The Supreme Court reinforced this narrow interpretation of the Treaty Clause over a hundred years later in *United States v. Curtiss-Wright Export Corp.*,[104]

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98 U.S. CONST. art. II, § 2.

99 *Id.* art. VI, cl. 2.

100 *See* Arthur Spirling, *U.S. Treaty Making with American Indians: Institutional Change and Relative Power, 1784–1911*, 56 AM. J. POL. SCI. 84, 86 (2012) (noting that there are 367 treaties with Native Nations that were created between 1778 and 1868); Quincy Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 345 (1944) (identifying 275 treaties with non-Native Nations from 1789 to 1889).

101 Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 258 (2012).

102 *Id.* at 258–59.

103 *Id.* at 259. The Washington Administration feared that other sovereigns — the British, in particular — would learn of early treaty efforts with Native Nations, often their allies in wars against the fledgling United States, and meddle in negotiations. *Id.* Moreover, members of the Senate were appointed by the very state legislatures, hungry for land, that had much to lose from treaty negotiations with Native Nations.

104 299 U.S. 304 (1936).

proclaiming that although "[the President] *makes* treaties with the advice and consent of the Senate[,] he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[105]

Administration of treaties with Native Nations revealed nascent bodies of administrative law, and centering federal Indian law within public law could deepen our understanding of the administrative state. Rather than statutes, a complex web of treaty law formed the infrastructure of Indian law across the long nineteenth century.[106] Although treaties were born of a different process than domestic legislation, after birth they were treated interchangeably. Nineteenth-century treaties with Native Nations were assumed to be self-executing and had domestic legislative effects "without implementing legislation, other than appropriations."[107] It was only in the 1870s and 1880s that the parlance of "self-executing" and "not self-executing" took hold in the Supreme Court.[108] As Professor Jean Galbraith observes, the 1854 second Treaty of La Pointe afforded the President the power to make "rules and regulations" in managing the lands and natural resource holdings of the Lake Superior Ojibwes, resembling an organic statute conferring regulatory power on the Executive.[109] Courts upheld treaties against delegation challenges and deferred to Department of Interior interpretations of treaty provisions.[110]

After nine decades of American governance, the national government turned increasingly to conquest over diplomacy with Native Nations.[111] Rather than fostering the treaty power and collaborative lawmaking, Indian law and policy was constituted in the main by unilateral executive and congressional action. By 1871, the House of Representatives had tired of funding the development of extensive infrastructure — both administrative and military — that Indian affairs required, development over which the House had little to no say.[112] To address these concerns, Congress passed an appropriations rider that provided:

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105 *Id.* at 319.

106 *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200–05 (1984).

107 Jean Galbraith, *Making Treaty Implementation More Like Statutory Implementation*, 115 MICH. L. REV. 1309, 1337 (2017) (citing Ablavsky, *supra* note 54, at 1080–81).

108 *Id.* at 1341. *But see* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (describing in dicta treaties as non-self-executing and treaty enforcement as a project for Congress or the courts).

109 Galbraith, *supra* note 107, at 1337; *see also* ANTON TREUER, THE ASSASSINATION OF HOLE IN THE DAY 111–13 (2011).

110 Galbraith, *supra* note 107, at 1337–38 (citing Hitchcock v. United States *ex rel.* Bigboy, 22 App. D.C. 275, 287 (D.C. Cir. 1903)).

111 Newton, *supra* note 106, at 205.

112 *Id.* at 200–01 n.23.

> [N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty. . . . [N]othing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.[113]

Since that time, the political branches have departed from the formal treaty process.[114] For the latter years of the nineteenth century, this generally meant unilateral lawmaking by Congress and the Executive, and the oppressive imposition of policies upon Native Nations without any collaboration or consent.[115]

During the twentieth century, however, the collaborative model of lawmaking born of the treaty power resurfaced. Rather than dismantle the earlier institutionalization of colonialism and reinstitute the formal treaty process, Congress reshaped those institutions to foster power and to promote collective action by Native Nations. Alongside the development of an administrative apparatus that facilitated participation, the political branches created a broad range of institutions that fostered collaborative lawmaking and self-governance within Indian Country. The Indian Reorganization Act[116] (IRA), also known as the centerpiece of the Indian New Deal, was the fount of those collaborative institutions. Created following more than one hundred years of trial and error over how to resolve the inherited artifacts of colonialism, the IRA was a product of deep deliberation into the character of the United States with respect to its Native peoples. The legislation took the form of a super-statute[117] in that it resolved longstanding issues of constitutional values and provided a constitutional framework to govern the relationship between the United States and Native Nations. Like *Brown*'s rejection of the "separate but equal" doctrine, the IRA began with a full-throated

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113 Act of March 3, 1871, ch. 120, 16 Stat. 566. Justice Thomas has been the lone voice in questioning the constitutionality of this provision. *See, e.g.*, United States v. Lara, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in the judgment) (calling the rider "constitutionally suspect").

114 Newton, *supra* note 106, at 206.

115 *Id.* at 206, 223 (describing the "Era of Allotment and Assimilation" that emerged after the Act of March 3, 1871, *id.* at 206, and explaining that the "dissolution of tribal governing structures was a cardinal aim" of that period, *id.* at 223).

116 Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5129 (2012)).

117 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216–17, 1260 n.201 (2001) (defining "super-statutes" as "quasi-constitutional" laws, *id.* at 1217, that "seek[] to establish a new normative or institutional framework" that cements within law and effects broad change, *id.* at 1216, and noting the Indian Reorganization Act as a super-statute, *id.* at 1260 n.201); *see also* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 7–8 (2010).

rejection of the status quo within federal Indian law and policy.[118] The statute formally ended the allotment era and rejected the earlier vision of a reservation system reliant on invasive and limitless federal oversight and control.[119] Although the IRA did not herald a full-fledged return to the treaty era, the Act was developed in consultation with Native Nations and the Act itself, along with a number of particular provisions in the Act, required consent before it would apply.[120] The Act attempted to rebuild and recognize the Native governments that had made the treaty process possible. To this end, the IRA provided formal federal recognition for each Native Nation to organize and, by majority vote, form institutions to self-govern.[121] The Act offered the Native Nations the opportunity to ratify a written constitution, which the United States would recognize as governing within each Nation's territory, and to form a separate corporate charter in order to foster economic development and manage natural resources.[122]

Over one hundred Native Nations opted to draft and ratify written constitutions under the IRA, making it one of the most generative constitutional moments in history. The recognized governments of each Native Nation would then be able to engage in government-to-government relationships and collaborative lawmaking with state, local, and federal governments. Under the IRA, Native Nations, like state governments, were not afforded formal representation in the federal electoral branches. Instead, Native Nations would engage with state, local, and foreign governments through nonelectoral mechanisms — such as lobbying, regulatory actions, compacting, litigation, and historically, petitioning and treaty making.[123] Much like the modern "marbled" federalism of states, the IRA envisioned each Native Nation as deeply entrenched in systems of federal subsidization and compacting. The IRA also ended allotment of reservations, established a framework to restore lands to each Native Nation, and instituted a hiring preference for Natives within the Department of the Interior.[124]

To historians of the New Deal Era and scholars of labor law, the structure of the IRA might feel familiar. Like the National Labor

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[118] 48 Stat. at 984 ("[H]ereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.").

[119] *Id.* (describing the IRA as a tool for reinstating Indian "home rule"); *see also id.* § 3 (authorizing the Department of the Interior to "restore to tribal ownership the remaining surplus lands of any Indian reservation").

[120] ANDERSON ET AL., *supra* note 28, at 130; 48 Stat. at 988, § 18 ("This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election called by the Secretary of Interior, shall vote against its application.").

[121] ANDERSON ET AL., *supra* note 28, at 130.

[122] *Id.* at 130–31.

[123] 48 Stat. at 987, § 16.

[124] ANDERSON ET AL., *supra* note 28, at 130–31.

Relations Act, passed one year later,[125] the IRA aimed to solve the longstanding subordination of an entrenched minority group — colonized peoples, in this instance — by fostering local control and self-governance.[126] The scheme reflected the constitutional thinking of the era in that it aimed to mitigate the tension between the reality of American colonialism and American constitutional values by using the tools of corporatism and administrative infrastructure.

The IRA has served as the primary legislative scheme governing interactions between the United States and hundreds of federally recognized Native Nations for the last eighty years. Like other super-statutes, the IRA has become deeply entrenched within our structures of governance and its normative value of collaboration has spread beyond the statute into other pieces of legislation.[127] Over the twentieth century, the collaborative government-to-government relationship fostered by the IRA between Native Nations and both Congress and the President had generated a range of laws supporting self-determination. The 1970s alone saw major legislative reforms that allowed Native Nations to take over the administration of reservation services from the federal government, enhanced the economic development loan scheme established by the IRA, regulated the practice of removing Native children from their families, and established a formal administrative process for Native Nations to seek federal recognition.[128] Later pieces of legislation strengthened the control of Native Nations over reservation housing programs, strengthened control over reservation environmental standards, and facilitated economic development.[129] Successful statutory reforms have meant that, in the latter half of the twentieth century, governance in Indian Country has flourished. Native Nations have established sophisticated court systems and lawmaking institutions to regulate conduct and commerce in Indian Country.

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[125] CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 28 (2010) (describing the NLRA as the "'constitution' of the private-sector workplace — a framework for self-governance supported by a set of individual and group rights and an administrative enforcement scheme").

[126] Newton, *supra* note 106, at 272. There are, of course, important differences between the labor laws and the IRA that bear mention. Unlike the labor laws of the early twentieth century, the IRA recognized the inherent sovereignty of Native Nations to govern over Indian Country — a sovereignty that predated the formation of the United States Constitution. By contrast to the associational structure of unions, which provided the disadvantaged worker power to vote and to collectively set the terms of their employment through private law, *see* ESTLUND, *supra* note 125, at 27–28, Native peoples would wield a power more similar to that of the states. Native Nations could construct governance institutions, establish and enforce the law within their lands, raise revenue and provide support to residents within Indian Country, and engage with other sovereigns — like states and the national government — in a government-to-government relationship.

[127] *See* Eskridge & Ferejohn, *supra* note 117, at 1216.

[128] *See, e.g.*, ANDERSON ET AL., *supra* note 28, at 152–54.

[129] *Id.* at 152–53.

The Supreme Court interpreted the shift away from formal Article II treaty making as strong evidence that the sovereignty of Native Nations, at least the sovereignty recognized by the United States, had been diminished.[130] Yet, in many ways, the trajectory of treaty practice follows that of international lawmaking generally — from a system at least minimally adhering to Article II treaty requirements to a process dominated solely by the executive acting unilaterally.[131] As Professor Oona Hathaway has observed, twentieth-century international lawmaking is made largely by ex ante congressional-executive agreements — that is, agreements constituted by the President acting with Congress's implied consent.[132] From 1980 to 2000, for example, the United States government formed over three thousand executive agreements and only 375 treaties.[133] Just as international law was shaped by executive action pursuant to an earlier ratified treaty, "inherent" constitutional authority, or a broad delegation of discretionary authority, Indian law was similarly shaped by the executive branch. Indian affairs after the 1870s therefore foreshadowed the changes in international lawmaking practice that began to take root in the 1890s and to spread broadly into the twentieth century.[134] There are none who would argue, however, that the use of an executive agreement to resolve an issue with Saudi Arabia or Vietnam, rather than an Article II treaty, would somehow indicate that the sovereignty of these nations was diminished.

### *B. Separation of Powers*

At the heart of our constitutional theory rests the question of how power ought to be distributed in order to optimize representation, avoid corruption, and prevent abuse. Framers of the Constitution sought to divide and balance power both horizontally — between the executive, legislative, and judicial — but also vertically — vis-à-vis the national government and the states. They feared the concentration of power into a single source as the "very definition of tyranny."[135] Constitutional text provided the broad outlines of this framework. But the real distribution and balancing of power became visible as the institutions created by the U.S. Constitution began to exercise that power independently and with respect to one another across the long nineteenth century. As it had under the Articles of Confederation, the acquisition and management of

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[130] *See* United States v. Kagama, 118 U.S. 375, 382 (1886).

[131] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[5] (Nell Jessup Newton et al. eds., Univ. of N.M. Press 1941) (2005).

[132] Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 155 (2009).

[133] *Id.* at 150.

[134] *Id.* at 150, 173–74. It bears noting that, by contrast to twentieth-century international lawmaking, the Court began in earnest to reassert control over unilateral executive action in Indian affairs.

[135] THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003).

land became one of the primary aims of the United States for its first hundred years. The territorial land area of the United States increased from just over 850,000 square miles in 1790 to four times that amount in 1900, or just over 3.5 million square miles.[136] In order to claim title to millions of square miles of land from the myriad sovereigns that occupied North America, the United States engaged with some of its European neighbors — like France, when it made the Louisiana Purchase — albeit from a distance. But the lion's share of power exercised by the United States, as it chased its manifest destiny westward, was toward the Native Nations and Native peoples who occupied the lands and called those acres their homelands since time immemorial.

It was in the context of its engagement with Native peoples that the United States built and solidified its separation of powers between the branches of the national government and between the national government and the states. With respect to federalism, the first hundred years of westward expansion strengthened and militarized the national government and built a federal infrastructure that reached from coast to coast. As historian Richard White describes, "the West itself served as the kindergarten of the American state."[137] The national government not only strengthened its powers overall by occupying the West, it began to take modern forms. In the East, state governments exercised local control, the military consisted of state militias, and federal bureaucracy was limited to the Post Office and the customs house.[138] In the West, the federal government governed all the way down to the local, the military consisted of federal agents, and an expansive and growing federal bureaucracy governed everyday life.[139] With respect to horizontal separation of powers, the growth of national power concentrated into the Congress and the Executive, leaving behind the only branch that did not follow the others out West — that is, the judiciary. A weak federal judiciary ensured that the Court would not hold power against full-throated opposition by the political branches — especially in resolving questions of constitutional values.[140]

*1. Federalism.* — Despite their differences, both the diplomatic and colonial views advocated for a strong national government, ensuring robust development of national power and federal infrastructure

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136 U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 8 tbl.1 (2011).

137 RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A NEW HISTORY OF THE AMERICAN WEST 58 (1991).

138 *Id.* (describing the East and West during the long nineteenth century, and particularly, in the antebellum era).

139 *Id.*

140 *See* Felix Frankfurter, *The Business of the Supreme Court of the United States — A Study in the Federal Judicial System*, 39 HARV. L. REV. 35, 40–44 (1925); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004).

regardless of which view held dominance at the time. Congress ensured that the national government would reign supreme in Indian affairs by legislatively drawing the boundaries by which the states and individuals could interact with Native Nations. In a series of acts passed between 1790 and 1834, the so-called Indian Trade and Intercourse Acts,[141] Congress reaffirmed the national government's role as the sole power governing Indian affairs, Indian treaties, and Indian properties.[142] The Acts implemented a national licensing scheme to limit trade with Native peoples replete with civil penalties, prohibited the sale of Indian lands without the consent of the United States government, and supplemented tribal criminal penalties with federal criminal penalties for any non-Indian who committed a crime in Indian Country.[143] Not only did the concentration of national power over Indian lands ensure that the national government could control and oversee westward expansion, it also meant that the national government governed Indian lands within the borders of a state. All new states had admission to the Union conditioned upon recognition of federal power over Indian Country.[144]

The Supreme Court also strengthened national power in the name of regulating Indian affairs and, primarily, Indian land. Seven years after *Marbury v. Madison*,[145] the Supreme Court asserted its powers of judicial review and the supremacy of the U.S. Constitution over the states.[146] In the 1810 case of *Fletcher v. Peck*,[147] the Court struck down a state statute for the first time, holding a Georgia statute rescinding an earlier land grant as unconstitutional under the Contract Clause.[148] The Court adjudicated the Georgia legislature's sale by statute of millions of acres of western lands and the legislature's subsequent efforts to undo the sale, also by statute, following overwhelming evidence that the sale was corrupt.[149] In an effort to quiet title, the plaintiff argued that Georgia lacked the power to sell the lands in the first instance because the land was acquired by the United States following the Revolutionary War and because Native Nations occupied the western lands.[150] The defendant argued that not only did Georgia have the power to sell the lands in the first instance but that Georgia's efforts to undo the sale by

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141 *See, e.g.*, William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 457 (2016) (describing the series of intercourse acts, which are also known as the "Nonintercourse Acts").

142 *See* William E. Dwyer, Jr., *Land Claims Under the Indian Nonintercourse Act: 25 U.S.C. § 177*, 7 B.C. ENVTL. AFF. L. REV. 259, 269, 272 (1978).

143 *See* United States v. Sandoval, 231 U.S. 28, 47–49 (1913); Dwyer, *supra* note 142, at 269–71.

144 *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 131, § 6.01 n.83.

145 5 U.S. (1 Cranch) 137 (1803).

146 *Id.* at 176.

147 10 U.S. (6 Cranch) 87 (1810).

148 *Id.* at 142–43.

149 *Id.* at 129–30.

150 *Id.* at 128, 141–42.

subsequent statute violated the Contract Clause.[151] The Court ultimately concluded that Georgia did hold title to the western lands, because it determined that a state could hold simultaneous title to lands on which Native Nations also held title.[152] But it struck down Georgia's legislative efforts to reverse the sale as unconstitutional.[153] In reviewing the state statute the Court not only positioned itself as the final arbiter of land acquisition and sale within the expanding borders of the United States, but also reaffirmed national supremacy in the federalist framework.

The Court in *Fletcher* may have asserted national power vis-à-vis the states through the supremacy of the United States Constitution, but Chief Justice Marshall began to assert and articulate a national power that extended beyond the Constitution in the first pillar of the Marshall Trilogy: *Johnson v. M'Intosh*.[154] The 1823 case arose at the height of Manifest Destiny. The case involved a land dispute over 11,000 acres in Virginia between a purchaser who held title purchased directly from the Native Nations and a purchaser who held title purchased from Congress.[155] The Court reaffirmed national power over Indian affairs and held that only the national government could negotiate for and alienate Indian title.[156] The desire to build a national economic power in 1819 may have pushed Chief Justice Marshall beyond the enumerated powers of Article I to the Necessary and Proper Clause in *McCulloch v. Maryland*.[157] But the desire to expand the nation-state westward pushed Chief Justice Marshall beyond the text of the Constitution in *Johnson*. The Chief Justice rooted national power over Indian affairs not in constitutional text or principles, but in domestic incorporation of the so-called "doctrine of discovery" — a public international law doctrine that gave the right to Christian and civilized societies to assert domain over "discovered" lands and the power to exclude "all other Europeans" from so acquiring.[158] Chief Justice Marshall developed the

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[151] *Id.* at 136.

[152] *Id.* at 142.

[153] *Id.* at 142–43.

[154] 21 U.S. (8 Wheat.) 543 (1823).

[155] *Id.* at 571–72, 585.

[156] *Id.* at 604–05.

[157] Chief Justice Marshall's investment in a constitutional law that facilitated Manifest Destiny was apparent even in his non-Indian law cases. In *McCulloch*, for example, Chief Justice Marshall wrote:

> Throughout this vast republic, from the St. Croix to the Gul[f] of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, *that* raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive?

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819) (writing in 1819, when the borders of the United States did not yet reach as far west as the Pacific).

[158] *Johnson*, 21 U.S. (8 Wheat) at 572–73.

"doctrine" through the analysis of the historical practice of European nation-states with respect to indigenous land. Yet, as our Supreme Court often does, Chief Justice Marshall modified the international doctrine as he domesticated it. First, he read the doctrine of discovery narrowly to serve as a restraint on only European sovereigns and to limit only their powers vis-à-vis one another.[159] The doctrine of discovery, according to Chief Justice Marshall, was silent with respect to the indigenous inhabitants of the "discovered" land and provided no guidance as to how the young nation ought to treat Native Nations once discovered.[160] Second, he created out of whole cloth "Indian title" — or the notion that Native Nations retained their inherent sovereignty and retained domain over their lands after discovery.[161] Finally, Chief Justice Marshall laid the question of how the United States would treat the sovereignty of Native Nations squarely within the domain of domestic law. The doctrine of discovery may have given the United States a monopoly on the exercise of power over Native Nations and Native lands, but how the national government chose to wield that power and what limits existed on that power were, according to the Court, questions answered by the constitutional law of the United States and not international law.[162]

Just as the Court positioned itself as the final arbiter over disputes involving Indian lands between national and state power, the Court also attempted to position itself in *Johnson* as the final arbiter of disputes between national power and the power of Native Nations. By bringing the Constitution back into Indian affairs, the Court attempted to provide two important limits to national power over Native Nations: First, it brought the international power from the doctrine of discovery within constitutional limits, because the power would necessarily be exercised by the government constituted by that document. Second, it reinforced the protection of separation of powers at the national level through judicial review. However, the Court would soon discover that the national power it had fostered within the political branches would push back on the Court's attempt to limit the exercise of that power.

*2. Judicial Review.* — In what some Supreme Court historians have called "the most serious crisis in the history of the Court,"[163] tension between the diplomatic and colonial views arrived at the door of the judiciary during the debates around removal of the "Five Civilized Tribes" — the Chickasaw, Creek, Choctaw, Cherokee, and Seminole — from the South and, in particular, from the state of Georgia.[164] The

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159 *See id.* at 603.
160 *Id.* at 591–92.
161 *Id.* at 592.
162 *See id.* at 595.
163 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 189 (1922).
164 *See, e.g.*, ANDERSON ET AL., *supra* note 28, at 50–53.

Court's failed attempt to resolve this tension with a compromise doctrine provides paradigmatic lessons on the limitations of judicial review in the context of highly contested constitutional meaning. After a failed attempt to sell its claims to land within Indian Country, adjudicated in *Fletcher v. Peck*, Georgia formed a compact in 1802 with the United States, ceding its claims beyond the Mississippi in exchange for $1.25 million and a federal guarantee to extinguish Indian title to lands within the borders of Georgia "as soon as it could be done 'peaceably, and on reasonable terms.'"[165] The national government began with the diplomatic view and sent federal treaty commissioners during the 1810s and 1820s.[166] But the Native Nations resisted. In its 1827 constitution, for example, the Cherokee Nation reaffirmed its sovereign borders "which shall forever hereafter remain unalterably the same."[167] Georgia responded to the Cherokee Constitution in 1828 by declaring Cherokee lands to be part of Georgia's territory and in 1829 with legislation that purported "to extend the laws of this state over [the Cherokee Nation], and to annul all laws and ordinances made by the Cherokee nation of Indians."[168] Georgia's nullification law was soon followed by similar acts by the Alabama legislature and then similar acts by other southern states.[169] In 1829, a delegation from the Cherokee Nation sought support from the national government against Georgia's nullification law. The passage of the Indian Removal Act of 1830[170] turned them away. This statute concentrated power over Indian affairs solely in the hands of a hostile executive, rather than in the jointly held treaty power.[171] Specifically, the Act authorized President Jackson to unilaterally exchange land in the unorganized territories for land occupied by Native Nations within the borders of the states and appropriated $500,000 to facilitate the exchange.[172] Unlike treaty practice, which operated under the watchful eye of separation of powers and was conducted collaboratively between the national government and Native Nations, the Removal Act specified a narrow exchange of land for land and authorized the President to impose the exchange without collaboration.

The U.S. Supreme Court was soon called on to mediate between the diplomatic and colonial views. It was against the backdrop of this dispute that Chief Justice Marshall drafted the other two pillars of the

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165 *Id.* at 50.

166 *Id.*

167 *Id.* at 52–53.

168 *Id.* at 53.

169 *Id.*

170 Act of May 28, 1830, ch. 148, 4 Stat. 411.

171 *Id.* §§ 2, 7.

172 *Id.* §§ 2, 8. Yet, it bears mention that the Act also attempted to maintain the diplomatic view by omitting any mention of authorization of violent removal and by disclaiming explicitly any violation of an earlier ratified treaty. *Id.* § 7.

Trilogy, both arising from the conflict between Georgia and the Cherokee Nation: *Cherokee Nation v. Georgia*[173] and *Worcester v. Georgia*. In 1830, the Cherokee delegation turned directly to the U.S. Supreme Court and sought an injunction against Georgia.[174] The delegation argued that the Court had original jurisdiction over the claim because Article III provided original jurisdiction over suits between Georgia, a state, and the Cherokee Nation, a foreign state.[175] Chief Justice Marshall, writing for the Court, recognized that treaties and laws of the United States had treated Native Nations as foreign states and that the courts were, of course, bound by those treaties and laws.[176] But the question before the Court, according to Chief Justice Marshall, was more difficult: generally, whether Native Nations "constitute a foreign state in the sense of the constitution" and, in particular, whether the Cherokee Nation constituted a "foreign state" for purposes of Article III.[177] Chief Justice Marshall wrote for the majority and — relying on text, history, and the doctrine of discovery — held that it did not.[178] In so holding, the Court reasoned that Native Nations were sovereign and distinct governments.[179] But they were rendered "domestic dependent nations" by virtue of their discovery and, thus, exercised a sovereignty distinct from the "foreign nations" that were noted separately from "Indian tribes" in the Commerce Clause.[180] Holding to the contrary would have meant that the Supreme Court would become the front line in disputes between Native Nations and states. Chief Justice Marshall was willing to position the Court as having some power within Indian affairs to review the conduct of state and national governments, but he approached the power cautiously. It was soon revealed that this caution was warranted.

The Court didn't reach the merits of the question whether Georgia could extend its laws over the Cherokee Nation until a year later in a suit between the state of Georgia and Samuel Worcester, a missionary who lived in the Cherokee Nation.[181] Worcester had refused to obtain a license required by the new Georgia law that made licenses mandatory for all "white persons" entering the Cherokee Nation. To obtain a license, an applicant had to swear allegiance to the state of Georgia and submission to its laws.[182] Georgia prosecuted Worcester, sentenced him

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[173] 30 U.S. (5 Pet.) 1 (1831).
[174] *Id.* at 15.
[175] *Id.* at 15–16.
[176] *Id.* at 16.
[177] *Id.*
[178] *See id.* at 17–20.
[179] *Id.* at 16.
[180] *Id.* at 17–19.
[181] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538–39 (1832).
[182] *Id.* at 537, 542.

to four years' hard labor, and then offered a pardon if Worcester left.[183] Worcester refused and raised a constitutional challenge to the Georgia nullification law — reaching the Court through the proper channels.[184] In 1832, Chief Justice Marshall again wrote for the Court in *Worcester v. Georgia*.[185] This time, in striking down the law, the Court began to articulate constitutional limits on the doctrine of discovery and national power over Indian affairs.

The doctrine of discovery, the Court held, meant that the United States had inherited the artifacts of colonialism by inheriting domain over Native lands. But the doctrine solely provided the United States with the ability to exclude other European sovereigns from purchasing Native lands.[186] It did not "affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."[187] Beyond the power to exclude other European states, the doctrine of discovery provided no guidance. The Court reflected on the fact that no sovereign had, under the doctrine of discovery, intruded into the internal affairs or questioned the sovereignty of Native Nations.[188] Moreover, according to the Court, it was the Constitution and not the doctrine of discovery that governed the relationship between the United States and Native Nations. The Constitution "confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians."[189] The Court recognized that Native Nations had been "considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial" and that the government constituted by the Constitution had continued this tradition by recognizing tribal sovereignty in statutes and executive acts and by forming treaties with Native Nations as nations.[190] The laws and treaties of the United States recognized the Cherokee Nation as an independent political community and, thus, not subject to the laws of Georgia.[191] Because the laws of Georgia conflicted with recognition of inherent tribal sovereignty under federal law, in which the Constitution vests all power to regulate relationships

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183 Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J. SOUTHERN HIST. 519, 519, 531 (1973).

184 *See id.* at 522, 526–27.

185 *Id.* at 519.

186 *Worcester*, 31 U.S. (6 Pet.) at 544.

187 *Id.*

188 *Id.* at 547.

189 *Id.* at 559 (emphasis omitted).

190 *Id.* at 559; *see id.* at 583 (M'Lean, J., concurring).

191 *Id.* at 561 (majority opinion).

between the states and Native Nations, the Court held the Georgia laws unconstitutional.[192] Thus, in *Worcester v. Georgia* the Court attempted to settle the dispute between constitutional values and codify the diplomatic view into constitutional doctrine.

The power of judicial review and the Supreme Court's codification of the diplomatic view wasn't enough to resolve the debate over colonialism and constitutional values. President Jackson refused to enforce the ruling and Georgia courts followed the President's lead by refusing to release Worcester on the Supreme Court's mandate.[193] In defiance, President Jackson ordered all federal troops to withdraw from Georgia that year[194] and Georgia moved forward with its land lottery, awarding at random Cherokee lands to any White man with $4.00.[195] Emboldened White settlers began to claim Cherokee Nation lands. The colonial view survived in the discourse and practice of states' rights and unfettered executive power. Six years after the Court issued its decision in *Worcester*, federal soldiers and state militiamen forced the Cherokee people down the Trail of Tears to the Oklahoma Territory pursuant to the controversial Treaty of New Echota — a treaty signed not by Cherokee Nation leadership, but by a few individual Cherokee citizens.[196] Over the following decades, thousands more Native peoples would face removal by coerced "treaty" or military violence to lands beyond the Mississippi River.[197]

A mere twelve years later, the Supreme Court reversed course. In an opinion drafted by Chief Justice Taney, the Court began to ratify the colonial view supported by the political branches into constitutional doctrine. In *United States v. Rogers*,[198] the Court declared that Congress held limitless power to regulate Indian Country and rooted this limitless power not in the Constitution, but in the doctrine of discovery and, in particular, the powers and practices of the imperial sovereigns that shared the North American continent with the United States.[199] The cornerstone of this power was complete freedom from judicial review. The Court affirmatively removed itself from the role of evaluating the exercise of this sovereign national power.[200] Yet, even as it spent the balance of the nineteenth century ratifying the acts of Congress and the

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192 *Id.*

193 PRUCHA, *supra* note 34, at 212.

194 Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 520 (1969).

195 STEPHEN BREYER, AMERICA'S SUPREME COURT: MAKING DEMOCRACY WORK 29 (2010).

196 PRUCHA, *supra* note 34, at 237–40.

197 *Id.* at 78–107.

198 45 U.S. (4 How.) 567 (1846).

199 *Id.* at 572.

200 *See id.*

Executive, the Court still intervened to take the side of national power in disputes with the states.[201]

As with other areas of constitutional law, during the twentieth century the Court attempted to bring constitutional limits back into national power over Indian affairs, particularly through the doctrine of enumerated powers.[202] Following the *Insular Cases*,[203] the Court began rooting the power to govern Indian affairs within the Territories Clause and, following the "switch in time" and its extension of the commerce power, the Indian Commerce Clause.[204]

Providing a textual hook for national power over Indian affairs at least provided a nominal limit on limitless power. Like the Commerce Clause doctrine more generally, enumeration did not provide much of a limit in the post–New Deal era.[205] The Court largely deferred to Congress to determine the reach of its enumerated powers and, puzzlingly, the Rehnquist and Roberts Courts have not steadily constricted the Indian Commerce Clause power in the manner that they constricted the commerce power more generally.[206] But the enumeration doctrine

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[201] *See id.* at 571–72.

[202] *See, e.g.*, Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 998–99 (1981); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 132 (2006); Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 253 (1993); Newton, *supra* note 106, at 230–31; Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1079–81 (2004); Rachel San Kronowitz et al., Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 536 (1987); *see also* Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 764–65 (2017) (discussing enumerated powers doctrine's limited effect on immigration); Thomas Healy, Note, *Is* Missouri v. Holland *Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1741–42 (1998).

[203] *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922); Hawaii v. Mankichi, 190 U.S. 197 (1903); De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901).

[204] *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); Morton v. Mancari, 417 U.S. 535, 552 (1974); United States v. Celestine, 215 U.S. 278, 284 (1909).

[205] The difficulties in implementing enumeration as a limit on federal power have been documented across a range of public law doctrines. *See, e.g.*, Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1990–91 (2016); Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 27 (2005); Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus,* The Limits of Enumeration, 124 YALE L.J.F. 180, 181 (2014); H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 652–53 (1995); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 579 (2014); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 2–3 (2016); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 576 (2017); Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1391 (2010).

[206] *See infra* section II.E.1, pp. 1839–41.

nonetheless brought separation of powers back into Indian affairs. The textual hook allowed for judicial review of the political branches and, because both the Territories Clause and the Indian Commerce Clause found their home in Article I, congressional supremacy could check unilateral executive action. The Court has since limited the power of the Executive by applying the *Youngstown* framework to Indian affairs and has held as unconstitutional unilateral executive action.[207]

In addition to enumeration, the Court also began to articulate extraconstitutional limits on national power over Indian affairs. Specifically, the Court developed the "trust relationship" between the United States and Native Nations.[208] The trust doctrine incorporated the principles of equity and, particularly, fiduciary law as a limit on plenary power over Indian affairs — that is, the national government had the power to take and manage Indian lands and property, but only when it did so in the best interest of Native owners.[209] In addition to providing causes of action against the United States for mismanagement and a rational basis review of legislation governing Indian affairs, the trust doctrine has given rise to a complicated set of subconstitutional doctrines largely focused on procedure, much like that of *Carolene Products* footnote four,[210] that the Court has used to police the relationship between Native Nations and the United States. Most notably, the Court has imposed clear statement rules when Congress acts against the interest of Native Nations, forcing political accountability for colonial action, and it has developed canons of interpretation that recognize the imbalance of power and that read agreements in favor of Native Nations.[211]

### *C. The War Powers*

Elsewhere, the colonial view survived throughout the long nineteenth and twentieth centuries and ensured expansion through violence. The view largely manifested in the concentration of power over Indian affairs in a single branch, primarily a well-armed executive, unchecked by constitutional limit through separation of powers or rights. Indian affairs and practices of unchecked colonial violence across the nineteenth century shaped the meaning of presidential power and, in particular, national power in the context of war and exigency. Contemporary war powers were established in the earliest years of the Nation through

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[207] *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188–89 (1999).

[208] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 131, § 504[4].

[209] *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942); *see also* Seth Davis, *American Colonialism and Consitutional Redemption*, 105 CALIF. L. REV. 1751 (2018) (offering a recent and throughtful critique of the trust doctrine's ability to mitigate American colonialism).

[210] 304 U.S. 144, 152–53 n.4 (1938).

[211] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 131, § 2.02; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 609–11 (1992).

wars with Native Nations. President Washington held a moderately conservative view of executive power in that he declined to recognize any inherent war power in the Executive and sought instead formal authorization from Congress.[212] On numerous occasions, he refused to engage in violence against Native Nations without some form of authorization, because "[t]he Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."[213] But President Washington stopped short of requiring a formal declaration of war prior to engaging in violence; broad authorizations of discretion would suffice.[214] Even the first Congress was quick to authorize broad discretion on the President, delegating to him the power to call forth the state militia "as he may judge necessary" "for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians."[215] President Washington used this broad delegation for the first American war under the newly formed Constitution — the Northwest Indian War, 1790–1795, within the Northwest Territory.[216] Pursuant to the 1789 authorization, President Washington mounted major campaigns against Native Nations in the Northwest Territory.[217] He also relied on Congress's broad delegation to not only call forth the militia, but to increase the standing military by six times its size at the Founding.[218]

Concentration of power over Indian affairs and entrenchment of the colonial view of the Constitution accelerated during the nineteenth century. The year 1828 saw the election of President Jackson, the embodiment of the colonial view.[219] President Jackson had gained national recognition in his role as major general of the Tennessee militia.[220] In that role, President Jackson led successful, but brutal, campaigns against the Creek Nation during the War of 1812 and against the Seminole Nation in the First Seminole War.[221] The latter secured the annexation of Florida and President Jackson's position aside President Washington as a national war hero; but the campaign strained the laws of war when

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[212] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 962 (2008).

[213] *Id.* at 962 n.48 (quoting Letter from President George Washington to Gov. William Moultrie (Aug. 28, 1793), *in* THE WRITINGS OF GEORGE WASHINGTON 73, 73 (John C. Fitzpatrick ed., 1940)).

[214] *Id.*

[215] Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96.

[216] Adam Mendel, Comment, *The First AUMF: The Northwest Indian War, 1790–95, and the War on Terror*, 18 U. PA. J. CONST. L. 1309, 1309–10 (2016).

[217] *Id.* at 1318–22.

[218] *Id.*

[219] PRUCHA, *supra* note 34, at 195.

[220] *Id.* at 79.

[221] *Id.* at 79–80.

a military tribunal authorized by President Jackson tried and sentenced to imprisonment two British subjects for aiding and abetting tribal governments.[222] President Jackson then unilaterally overturned the sentence imposed by the tribunal and had the subjects executed.[223] The laws of war, President Jackson insisted, "did not apply to conflicts with savages."[224] Some historians have marked the end of President Jackson's successful campaigns and, particularly, the War of 1812 as the dawn of the "Jackson Doctrine."[225] The Jackson Doctrine capitalized on efforts to undermine tribal sovereignty in order to secure recognition of United States sovereignty[226] and advocated "force, rather than negotiation, to get what was wanted out of the Indian country."[227] The Doctrine launched an era that "witnessed the withering away of the old norms of negotiation."[228] After a close, but ultimately unsuccessful, campaign in 1824, President Jackson aimed again to bring his doctrine to the White House.[229] As a candidate, President Jackson campaigned on a ticket of strong states' rights and a promise to resettle Native Nations in the western territories, outside of the borders of the states.[230] Following a landslide election to office, President Jackson began to codify his doctrine into constitutional law in his first State of the Union. He did so by describing the conquest of Native Nations through the doctrine of discovery as complete and by pointing to the prohibition in Article IV of erecting a new state "within the jurisdiction of any other state"[231] as constitutional prohibition against the recognition of tribal sovereignty.[232] With the force of westward expansion, many Native Nations were located within state borders at the time.[233] According to President Jackson, even if discovery had failed to extinguish the final flame of

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[222] JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 98–99 (2012).

[223] *Id.* at 99.

[224] *Id.*

[225] LEONARD J. SADOSKY, REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA 200 (2009) (identifying the "Jackson Doctrine" as a perspective on Indian policy that aimed to isolate Native Nations from the international sphere).

[226] In order to protect Native lands from further encroachment by settlers, many Native Nations joined the British in the War of 1812, leaving the United States wary of direct diplomacy between Native Nations and other European sovereigns. PRUCHA, *supra* note 34, at 78 (discussing Indian alliances with Great Britain); *id.* at 83 (discussing post-war American efforts to cut off trade between tribes and Great Britain).

[227] SADOSKY, *supra* note 225, at 204–05.

[228] *Id.* at 204.

[229] *See* J.M. OPAL, AVENGING THE PEOPLE: ANDREW JACKSON, THE RULE OF LAW, AND THE AMERICAN NATION 198 (2017).

[230] SADOSKY, *supra* note 225, at 204.

[231] U.S. CONST. art. IV, § 3.

[232] Andrew Jackson, State of the Union Address (Dec. 8, 1829), http://www.presidency.ucsb.edu/ws/index.php?pid=29471 [https://perma.cc/3ETH-27VZ].

[233] *Id.*

"Native title," if any such concept had ever existed, the U.S. Constitution had wholly conquered Native Nations in order to preserve the sanctity of the states.[234]

Because much of the nineteenth century involved use of the military to engage in violent actions against Native peoples and Native Nations, executive practice from that time period still continues to implicitly animate contemporary views of the war powers. Most notably, consensus among scholars of the war powers still views as unnecessary a formal declaration of war from Congress in order for the President to engage in hostilities.[235] Additionally, explicit mention of the colonial view in the context of the war powers has reemerged in twenty-first-century administrations. Most notably, the last three presidential administrations have invoked the Indian Wars of the nineteenth century to argue for similar powers in the context of the War on Terror. Following 9/11, the Bush Administration argued for parallels between tactics used by suspects of terror and by Native Nations and pointed to the Indian Wars as a model for response.[236] A number of Office of Legal Counsel memos drew on the Indian Wars as precedent for applicability of the war powers against actors not recognized as foreign states, as support for the President to direct the military unilaterally and offensively on domestic soil, as justifying a standing army solely under the President's control, and as authority to try suspects of terror by domestic military commission.[237] The Obama Administration continued to draw these connections by referring to Osama bin Laden by the code name "Geronimo," the name of the citizen of the Apache Nation held indefinitely by the United States government in the late nineteenth century.[238] Most recently, the Trump Administration cited to the Indian Wars as precedent for the power of the Executive to exercise war powers without any congressional authorization and as justification for its unilateral action directing airstrikes in Syria.[239] Parallels between executive practice then

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[234] *Id.*

[235] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2059 (2005).

[236] Memorandum from John C. Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, to Alberto R. Gonzales, Counsel to the President & William J. Haynes, II, General Counsel, Dep't of Def., Authority for Use of Military Force to Combat Terrorist Activities Within the United States 3–4, 8, 10 (Oct. 23, 2001), https://nsarchive2.gwu.edu//torturingdemocracy/documents/20011023.pdf [https://perma.cc/SH8T-5ZPA].

[237] OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, LEGALITY OF THE USE OF MILITARY COMMISSIONS TO TRY TERRORISTS (2001), https://www.justice.gov/olc/opinion/legality-use-military-commissions-try-terrorists [https://perma.cc/SN8C-MLGM].

[238] *See* Mark Mazzetti et al., *Behind the Hunt for bin Laden*, N.Y. TIMES (May 2, 2011), https://nyti.ms/2Yg8DKo [https://nyti.ms/2kkUoiq].

[239] OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, APRIL 2018 AIRSTRIKES AGAINST SYRIAN CHEMICAL-WEAPONS FACILITIES 6 (2018), https://www.justice.gov/olc/

and now have led scholar of Indian law Professor Matthew Fletcher to question whether the War on Terror is "The New Indian War."[240]

The twenty-first-century turn toward the valorization and, even, replication of violence against Native peoples should give public law scholars some pause. In the context of other constitutional wrongs, like slavery and segregation, nineteenth-century public law practices, reasoning, and doctrine are viewed with suspicion.[241] It is not clear why similar suspicions and concerns are not raised by this country's history of violence against Native peoples and with colonialism. Given its colonial roots, a war powers doctrine grounded in the Indian Wars as historical precedent should take its place in the anticanon.

### *D. Powers Inherent in Sovereignty*

Marshall's Trilogy and the diplomatic view it reflected fell into dormancy for over a hundred years as the colonial view of the United States as conqueror dominated and transformed in the late nineteenth century. Failure to uphold and enforce treaty promises left Native Nations at the mercy of speculators and squatters hungry for land and natural resources. The Indian Wars, domestic wars against Native Nations that were fought by the President without congressional authorization and with the use of military tribunals, had been devastating to Indian Country. Unchecked executive war power was followed by unchecked executive administrative power and unchecked power in Congress to regulate Indian Country. In 1846, just twelve years after *Worcester v. Georgia* and eleven years before *Dred Scott v. Sandford*, the Supreme Court, in an opinion drafted by Chief Justice Taney, began to ratify the political branches and to codify the colonial view in a doctrine later termed the "inherent powers doctrine" or the "plenary power doctrine."[242] In contrast to Chief Justice Marshall's efforts to cabin the doctrine of discovery with enumerated constitutional limits, the inherent powers doctrine articulated a national power wholly separate from and not limited by the Constitution. According to the Court in *United States v. Rogers*, the constitutional democracy of the United States was no different from the monarchies of Europe.[243] In exercising its sovereign powers of empire, the United States simply "maintained the doctrines upon this subject which had been previously established by other nations, and insisted

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opinion/april-2018-airstrikes-against-syrian-chemical-weapons-facilities [https://perma.cc/H3CX-UWXV].

[240] Matthew L.M. Fletcher & Peter S. Vicaire, *Indian Wars: Old & New*, 15 J. GENDER, RACE & JUST. 201, 223 (2012).

[241] *See, e.g.*, MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 15–18 (2006); Greene, *supra* note 75, at 381–83.

[242] *See* United States v. Rogers, 45 U.S. (4 How.) 567, 571–74 (1846).

[243] *Id.* at 572.

upon the same powers and dominion within their territory."[244] As noted by Professor Sarah Cleveland in her detailed excavation of the doctrine, Justice Taney established in *Rogers* the two cornerstones of the inherent powers doctrine: first, limitless national power rooted not in the Constitution, but in an "extraconstitutional, inherent" notion of sovereignty that existed beyond constitutional limits; and, second, "a presumption against judicial review" of that power.[245] The political branches quickly embraced the new doctrine, finding that the Supreme Court had "conclusive[ly]" established "original power" of the United States.[246]

In the winter of 1848, the national government began to exercise this colonizer's "original power" in its development of the "reservation system," a system some have called the precursor to the modern administrative state[247] and others have speculated formed the basis for the Nazi concentration camps.[248] As described by William Medill, Commissioner of Indian Affairs and architect of the reservation system, the aim was to "colonize our Indian tribes beyond the reach, for some years, of our White population; confining each within a small district of [the] country, so that, as the game decreases and becomes scarce, the adults will gradually be compelled to resort to agriculture and other kinds of labor to obtain a subsistence."[249] Native peoples would be confined in groups to small plots of land under the oversight of an Indian superintendent, an agent of the Department of the Interior. Within the borders of the reservation, executive power would be unchecked; like the military commissions that preceded them, the "Courts of Indian Offences" on the reservation adjudicated "Indian Offenses" like traditional spiritual and kinship practices; and detailed regulations governed pervasively the everyday lives of Native residents. Natives were unable to leave many reservations — and their limitless executive oversight — without permission from the superintendent.[250] Beginning in 1851, Congress ratified the Executive's reservation system by appropriating funds for the establishment of reservations in the West.[251]

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[244] *Id.*

[245] Cleveland, *supra* note 59, at 46–47.

[246] *Id.* at 47.

[247] STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY 1–8 (2010).

[248] *See, e.g.*, JOHN TOLAND, ADOLF HITLER: THE DEFINITIVE BIOGRAPHY 202 (1991); JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 115–16 (2017).

[249] WAR DEP'T, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 386 (1848).

[250] *See, e.g.*, EDWIN L. CHALCRAFT, ASSIMILATION'S AGENT: MY LIFE AS A SUPERINTENDENT IN THE INDIAN BOARDING SCHOOL SYSTEM 41–42 (2004) (reproducing guidance issued by the Court of Indian Offences that Natives were not to leave the reservation without obtaining a pass from the superintendent).

[251] *See* Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 104 (2017) ("Just two years following the creation of the Department of the Interior,

The plenary power doctrine also inspired the federal government's first formal foray into the field of education. In order to train these future laborers, the Executive established and subsidized "manual labor" schools — day and boarding schools — on reservations.[252] Congress had taken an interest in off-reservation Indian education since the early nineteenth century, when it passed the Indian Civilization Act, which promised $10,000 per year to support schools run by missions and other individual organizations.[253] In 1879, the Executive founded its first off-reservation boarding school in an abandoned military barrack in Carlisle, Pennsylvania.[254] Lieutenant Richard Henry Pratt founded the Carlisle Industrial Indian School under the authorization of the Department of the Interior and the Department of War. Pratt had developed his model for the Carlisle School at Fort Marion, a detention center in Florida for seventy-two Native prisoners of the Southern Plains Indian Wars held without trial. It was at Fort Marion that Lt. Pratt refined the philosophy of "[k]ill the Indian and save the man" on which Carlisle and all of the federal boarding schools were modeled.[255] The boarding schools aimed to take Native children from their families in reservation communities and place them into boarding schools based in "white communities" where the children would be taught through violence to speak only English; eschew their Native language, clothes, and customs; and perform manual labor without compensation — often for White families near the boarding schools.[256]

The institutionalization of American colonialism was nearly perfected with a series of congressional acts in the late nineteenth century that purported to finally solve the "Indian problem" by allotting reservations and selling what was left of Native land. At the heart of the Dawes Act of 1887 was the idea that individual Natives could gain United States citizenship and all of the rights afforded by that status, if Natives would accept a tract of land and swear off allegiance to their Nation.[257] The aim was to break up reservation land into individual plots, which would eventually be alienable, and to sell the balance of

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Congress began creating the reservation system. It did so by allocating funds for reservations in the Indian Appropriation Bill of 1851.").

[252] Denise K. Lajimodiere, *American Indian Boarding Schools in the United States: A Brief History and Their Current Legacy*, *in* INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES 255, 257 (Wilton Littlechild & Elsa Stamatopoulou eds., 2014).

[253] *Id.* at 256.

[254] Bennett Collins et al., *The Maine Wabanaki–State Child Welfare Truth and Reconciliation Commission: Perceptions and Understandings, in* INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES, *supra* note 252, at 140, 145–46.

[255] *Id.* at 146.

[256] *See* Dawes Act, ch. 119, 24 Stat. 388 (1887).

[257] *See id.*

reservation land directly.[258] Sponsors of the allotment acts included "homesteaders, land companies, and perhaps railroads."[259] In particular, the Dawes Act authorized the President to, at his discretion, survey and allot the lands in severalty.[260] The reservations would be allotted in parcels depending on the Indian recipients' age and family status and held in trust for each Native for twenty-five years, after which time the Secretary of the Interior would issue a fee patent.[261] Upon a determination of "competence," the fee patent could issue early.[262] Unallotted lands would be opened to non-Indian purchase and settlement.[263]

As promised by *Rogers*, the Court met the subordination of Native peoples by the legislative and executive branches with deference. Following a determination in *Ex Parte Crow Dog*[264] that no federal statute or treaty authorized prosecutors to prosecute a murder in federal court of one Native by another in Indian Country,[265] Congress passed the Major Crimes Act of 1885,[266] which extended federal jurisdiction over certain "major crimes" committed between Natives in Indian Country.[267] Native defendants convicted under the Act on the Hoopa Valley Reservation the following year challenged the legislation as an unconstitutional extension of congressional power.[268] In *United States v. Kagama*,[269] the Supreme Court upheld the Major Crimes Act under the inherent powers doctrine first articulated in *United States v. Rogers*.[270] Although later courts would turn to the Indian Commerce Clause for support, Justice Miller considered and rejected a reading of "commerce" that encompassed federal criminal laws as a "very strained construction."[271] In fact, the Court held, it could not locate the legislative power for the law in either of the clauses of the Constitution that referenced Native Nations or any of its amendments.[272] Instead, the Court reasoned that Native Nations existed within the "geographical limits" of the United States and, therefore, that the inherent sovereignty of the

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[258] *See id.*

[259] D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS, at ii (Francis Paul Prucha ed., 1973).

[260] 24 Stat. at 388.

[261] *See id.* The President retained the discretion to extend this period. *Id.*

[262] Pub. L. No. 149, 34 Stat. 182 (codified as amended at 25 U.S.C. § 349 (1906)).

[263] *Id.*

[264] 109 U.S. 556 (1883).

[265] *Id.* at 570–72.

[266] 18 U.S.C. § 1153 (1885).

[267] *Id.*

[268] United States v. Kagama, 118 U.S. 375, 376 (1886).

[269] 118 U.S. 375.

[270] *Id.* at 385.

[271] *Id.* at 378–79.

[272] *Id.* at 379.

national government rendered national power over its territory plenary.[273] In support of its reasoning, the Court drew on *United States v. Rogers* and its articulation of the inherent powers doctrine.[274] According to Justice Miller in *Kagama*, the inherent powers doctrine restricted, within the "geographical limits" of the United States, recognition to only two sovereigns: that of the states and of the national government. "There exist within the broad domain of sovereignty but these two."[275] The power to regulate without limit within those geographical borders, Justice Miller articulated, arose "not so much from [a] clause in the Constitution," but "from the ownership of the country" and "the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else."[276]

Not only would the powers inherent in sovereignty supply the national government with powers potentially beyond constitutional limit, the Court presumed in *Kagama* that sovereign powers also provided the ability to amend constitutional law through simple legislation. In further support of its holding that legislative power was proper, the Court turned to the appropriations rider passed by Congress in 1871 that purported to limit the power to treaty with Native Nations.[277] The Court read this appropriations provision broadly to indicate that "after an experience of a hundred years of the treaty making system of government, Congress has determined upon a new departure — to govern them by acts of Congress."[278] Under the inherent powers doctrine, earlier ratified treaties would be upheld and enforced,[279] but Congress would have unchecked ability to govern Indian affairs, including the unilateral abrogation of treaties.[280]

Despite mounting criticism, the inherent powers doctrine has survived into the twenty-first century and was recently reaffirmed by the Court in reviewing the constitutionality of the Trump Administration's Executive Order 13780 — the so-called "travel ban" — in *Trump v.*

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[273] *Id.* at 379–80.

[274] *Id.* at 380–81.

[275] *Id.* at 379.

[276] *Id.* at 380.

[277] *Id.* at 382 (citing Act of March 3, 1871, ch. 120, 16 Stat. 566, Rev. Stat. § 2079). Justice Thomas has been the lone voice in questioning the constitutionality of this provision. United States v. Lara, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in the judgment).

[278] *Kagama*, 118 U.S. at 382.

[279] *See* United States v. Winans, 198 U.S. 371, 382 (1905).

[280] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (upholding the General Allotment Act against a challenge that it violated an 1867 treaty with the Kiowa, Comanche, and Apache Nations). The Court rested this unilateral abrogation power, in part, on *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581 (1889). *Lone Wolf*, 187 U.S. at 566.

*Hawaii*.[281] Some argue that the doctrine has expanded beyond the domains of Indians, immigration, and the territories to provide plenary power to the political branches over all forms of national security and exigency. Both Justice Sotomayor in dissent and amici raised parallels between the plenary power invoked by the Executive with respect to the travel ban and the military exigency power relied on to justify the Japanese internment camps challenged in *Korematsu*.[282] Although it disclaimed any connection between the doctrines, the Court found the criticisms sufficiently justified to warrant a response, and it took the opportunity in the majority opinion to explicitly overrule *Korematsu* as an outlier case.[283] Neither the Court, the dissenters, nor amici raised the deeper connection between the inherent powers doctrine, *Korematsu*, and American colonialism. However, the parallels between executive action taken pursuant to the inherent powers doctrine and that of military exigency are worth closer inspection.

Notably, both powers have been used to establish concentration camps on United States soil to subordinate racialized populations. In fact, two of the ten Japanese relocation camps challenged in *Korematsu* were located on Indian reservations.[284] Head of the War Relocation Authority, Dillon S. Myer, likely found the inherent and limitless federal power within reservations and the already existing infrastructure a good fit for a new form of concentration camp. For eight years, Myer oversaw the relocation of 120,000 Japanese Americans, their imprisonment within concentration camps, justification for the camps, and relocation of Japanese Americans following the end of the war.[285]

Given Myer's extensive experience in exercising inherent powers, President Truman then appointed him to head the Bureau of Indian Affairs in 1950.[286] At the time of his appointment, Myer's sole exposure to federal Indian law had been through the lens of the colonial view: reservations were prisons governed by limitless federal power, often used to subordinate reservation populations. Thus, Myer's solution to

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[281] 138 S. Ct. 2392 (2018) (beginning its Establishment Clause analysis with the recognition that "[f]or more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control,'" and citing to cases that drew directly on the *Chinese Exclusion Case*, among others, *id.* at 2418).

[282] *Id*. at 2447 (Sotomayor, J., dissenting); Brief of Karen Korematsu et al. as Amici Curiae in Support of Respondents at 8–9, *Trump*, 138 S. Ct. 2392 (2018) (No. 17-965).

[283] *Trump*, 138 S. Ct. at 2423.

[284] Kristen L. Michaud, Japanese American Internment Centers on United States Indian Reservations: A Geographic Approach to the Relocation Centers in Arizona, 1942–1945, at 8 (Sept. 2008) (unpublished masters thesis, University of Massachusetts Amherst), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1228&context=theses [https://perma.cc/W92J-YVCB].

[285] RICHARD DRINNON, KEEPER OF CONCENTRATION CAMPS: DILLON S. MYER AND AMERICAN RACISM 166–67 (1987).

[286] *Id.* at 166.

the "Indian problem" was to abandon efforts to recognize inherent tribal sovereignty and foster the self-governance of Native Nations; abrogate existing treaty obligations unilaterally; and once again harness limitless federal power to attempt to break up Native Nations, force integration, and further the American colonial project.[287] Myer's plans to terminate the recognition of tribal sovereignty and force the relocation of Natives off of tribal lands garnered public support given post-war efforts at integration.[288] However, criticisms of the "Termination Era" arose immediately among those familiar with the history of federal Indian law, and the architect of the Indian New Deal lamented the "erosion of Indian rights" and called termination policy "a case study in bureaucracy."[289] Later administrations soon repudiated termination policy, calling it "wrong"[290] and a failure to uphold treaty obligations.[291]

The plenary power doctrine had also been used in the twentieth century to justify abuse by the courts. At least through 1975, the Supreme Court saw itself as a partner to the political branches in mitigating colonialism through the preservation and recognition of inherent tribal sovereignty.[292] Since the late 1970s, however, the Court has begun to articulate a doctrine some call "common law colonialism,"[293] which reinvigorates and extends the most troubling aspects of the inherent powers doctrine. The contemporary Court has unearthed the reasoning of the Taney Court and has extended the doctrine to create, in essence, a "dormant" inherent powers doctrine. Like the Taney Court, the current Court has held that the President and Congress may exercise at their discretion limitless powers derived from inherent sovereignty. However, the current Court has further held that, even if the President and Congress have not yet exercised this authority, the Court may strike down *any* exercise of power by Native Nations inconsistent with those powers "inherently lost to the overriding sovereignty of the United

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[287] *Id.* at 233–46 (noting Myer accepted the offer after declining the position twice, *id.* at 166).

[288] *See id.* at 234.

[289] Cohen, *supra* note 52, at 348.

[290] President Richard Nixon, Special Message on Indian Affairs to Congress (July 8, 1970); *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 131, § 1.07.

[291] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 131, § 1.07.

[292] *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 545–46 (1975). Writing for a unanimous Court, then-Justice Rehnquist reasoned that a federal law that imposed criminal charges on merchants who did not comply with a Native Nation's licensing scheme was not an unconstitutional delegation of congressional commerce power. *See id.*; *see also* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that a state court had no jurisdiction over a civil action brought by a non-Indian merchant who ran a store in Indian Country against an Indian couple).

[293] Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 81 (1999) (coining the term "common law of colonization"); *see also* Resnik, *Tribes, Wars, and the Federal Courts*, *supra* note 16, at 88–89.

States."[294] What "inherent sovereign powers" Congress and the President possess, of course, rests with the Court. In manufacturing this doctrine, the modern Court has invoked the most egregious aspects of the Taney Court's colonialism, while abandoning any semblance of the Taney Court's deference.

The 1978 case of *Oliphant v. Suquamish Indian Tribe*[295] provides a fair illustration of the Court's dormant inherent powers doctrine. The case involved two non-Native petitioners who had been arrested on the Suquamish Nation reservation in Washington state, one for assaulting a tribal officer and resisting arrest and the other for reckless endangerment and injuring tribal property.[296] The question before the Court was whether the Nation could exercise criminal jurisdiction to prosecute crimes committed by non-Indians within Indian Country.[297] The Court held that it could not.[298] In writing for the Court, Justice Rehnquist reasoned that Native Nations had lost criminal jurisdiction over non-Natives, even for crimes committed within Indian Country, due to the fact that the borders of the United States had expanded to wholly enclose reservation lands.[299] The Court found the actions of the political branches inconclusive, and it could not find historical evidence within decades of treaties, statutes, and executive actions of the political branches precluding tribal criminal jurisdiction.[300] Citing to *United States v. Rogers*, the Court reasoned that the territorial sovereignty of the United States provided the national government with extra-constitutional and limitless power to regulate Indian Country.[301] However, here, unlike in *Rogers*, the political branches had not exercised that limitless power to preclude tribal criminal jurisdiction over non-Natives. Instead, the Court abandoned *Rogers*'s second principle — that the judicial branch should have no hand in determining the reach and limits of the power inherent in sovereignty — and began to determine the powers independently.[302] The Court reasoned that the very fact of westward expansion, a colonial enterprise, served as an authority to further

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[294] Nevada v. Hicks, 533 U.S. 353, 374–75 (2001); *see also* Duro v. Reina, 495 U.S. 676, 679 (1990); Montana v. United States, 450 U.S. 544, 564 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

[295] 435 U.S. 191.

[296] *Id.* at 194.

[297] *Id.* at 195.

[298] *Id.*

[299] *Id.* at 209.

[300] *Id.* at 208 ("By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction. But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.").

[301] *Id.* at 209.

[302] *See id.*

undermine the sovereignty of Native Nations.[303] Colonialism, it seems, begets colonialism.

In fashioning this judicial abrogation of inherent tribal sovereignty, the Court drew upon the Marshall Trilogy in a piecemeal fashion. Specifically, the Court revived the doctrine of discovery articulated in the Trilogy — namely, that other European sovereigns were preempted from engaging directly with Native Nations.[304] But it also extended the doctrine, by drawing on a concurring opinion in *Fletcher v. Peck*, to limit the ability of Native Nations to govern nonmembers.[305] In articulating this doctrine, the Court relied almost entirely upon nineteenth-century precedent and practice, including doctrine from the Taney Court holding that White persons could never be naturalized into a Native Nation because of their race,[306] reservation-era doctrine that reified the principle that sovereigns comprised of a particular race could not fairly treat individuals of another race,[307] and a revived — and distorted — doctrine of discovery.[308] The Court further reasoned that the rights of non-Natives would also limit the inherent sovereignty of Native Nations.[309] This is a puzzling bit of reasoning, given the fact that the Court has held on numerous occasions that individual rights must give way to the plenary power of inherent sovereignty.[310] Apparently, the Bill of Rights

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303 *See id.*

304 *Id.* (citing to only those portions of the Marshall Trilogy that articulated the doctrine of discovery and omitting mention of those portions that spoke of constitutional limits).

305 *Id.* at 209–10 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring)).

306 United States v. Rogers, 45 U.S. 567, 572–73 (1846) Writing for the Court, Chief Justice Taney — now infamous for his racial hierarchies — reasoned that the United States could exercise criminal jurisdiction over a "white man" who was a naturalized citizen of the Cherokee Nation and lived in Indian Country, because a "white man" could never become an "Indian." *See id.*

307 *See Ex Parte* Crow Dog, 109 U.S. 556, 571 (1883).

308 The Court focused primarily on the portions of the Marshall Trilogy that articulated the doctrine of discovery and ignored the portions that limited the doctrine of discovery solely to the ability of the United States to exclude other European sovereigns from engaging with Native Nations. *See, e.g.*, *Oliphant*, 435 U.S. at 209 ("[T]he Indian tribes' 'power to dispose of the soil at their own will, to whomsoever they pleased,' was inherently lost to the overriding sovereignty of the United States." (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823))); *id.* ("[S]ince Indian tribes are 'completely under the sovereignty and dominion of the United States, . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.'" (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17–18 (1831) (omission and alteration in original))). The Court omitted any reference to the constitutional limitations articulated by the Marshall Trilogy in *Worcester* and then relied on the doctrine of discovery to fashion judicial abrogation of tribal sovereignty through a common law doctrine of "inherent limitations" on the sovereignty of Native nations that went beyond "the tribes' power to transfer lands or exercise external political sovereignty." *Id.*

309 *Id.* at 210 ("But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.").

310 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign

limits the power of other sovereigns in a way that it does not limit the power of the United States. The Court has since extended the dormant plenary power doctrine into areas of civil jurisdiction over non-Indians[311] and even criminal jurisdiction over Indians who are not citizens of the Nation exercising jurisdiction.[312]

The political branches have continued to engage with Native Nations in a government-to-government relationship, and this collaboration has often provided administrative and legislative "fixes" to the Court's colonial handiwork.[313] But the Court has met these "fixes" with increasing skepticism over whether federal Indian law raises "constitutional" questions and, if it does, whether that means that the Court's federal Indian law opinions are beyond the reach of the political branches to repair.[314] The Court has also been increasingly skeptical regarding the foundations of federal Indian law, the existence of inherent tribal sovereignty, and the incoherence of federal Indian law doctrine.[315] Largely under the guise of protecting the constitutional rights of non-Indians, the Court has begun to constitutionalize the colonial view of America-as-empire. Beyond *Korematsu*, both the plenary powers doctrine and its late twentieth-century manifestation as the dormant plenary powers doctrine need to join *Dred Scott* and *Plessy v. Ferguson* in the anticanon.

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attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))); Shaughnessy v. United States *ex rel.* Mezei, 354 U.S. 206, 210 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950); Korematsu v. United States, 323 U.S. 214 (1944).

311 *See* Montana v. United States, 450 U.S. 544, 564 (1981) (holding that Native Nations could regulate only "what is necessary to protect tribal self-government or to control internal relations" and that regulation of anything beyond that and an explicit contractual relationship was "inconsistent with the dependent status of the tribes").

312 *See* Duro v. Reina, 495 U.S. 676, 685 (1990) (extending *Oliphant* to hold that a Native Nation cannot exercise criminal jurisdiction over a citizen of another Native Nation who commits a crime within the Nation's territory).

313 *See, e.g.*, United States v. Lara, 541 U.S. 193, 206–07 (2004) (upholding the *Duro* fix, recognizing that inherent sovereignty includes criminal jurisdiction over nonmember Indians, against constitutional challenge that the fix was beyond Article I power).

314 *See, e.g.*, *id.* at 215 (Thomas, J., concurring in the judgment) (questioning whether Congress has the power under Article I to override the Court's Indian law decisions). For a recent example, see the Court's questioning during oral argument in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), where a number of the Justices raised constitutional concerns around violation of Article III and due process when the courts of a Native Nation could exercise civil jurisdiction over a non-Native defendant. Transcript of Oral Argument at 54–55, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (2016) (No. 13-1496).

315 *See, e.g.*, United States v. Bryant, 136 S. Ct. 1954, 1968–69 (2016) (Thomas, J., concurring) (questioning the existence of inherent sovereignty and the plenary power doctrine); Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) (questioning the plenary power doctrine and whether Congress had the power to enact the Indian Child Welfare Act); *Lara*, 541 U.S. at 214 (Thomas, J., concurring) ("As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases.").

### *E. The Broad Reach of Federal Indian Law Within Public Law*

In addition to those substantive areas where the history of American colonialism forms the core of the doctrine, Native Nations and federal Indian law play an important — albeit less centralized — role across a range of other constitutional questions. The following survey is by no means intended to be exhaustive. Rather, it is meant to illustrate the broad reach of federal Indian law into many, if not most, contemporary debates within public law.

*1. Commerce Clause.* — In addition to the Treaty Clause, modern courts point readily to the Indian Commerce Clause as a source for congressional power to regulate Indian affairs. Scholars have raised the Indian Commerce Clause, its history, and its interpretation by the first Congress, as evidence for a more capacious original meaning of "commerce" than is recognized by the Court today. Most recently, Professor Jack Balkin, but also Professors Akhil Amar and Robert Clinton, identify the 1790 Trade and Intercourse Act[316] as regulation by the first Congress of noneconomic activity pursuant to its Commerce Clause power.[317] The 1790 Act reached well beyond activity that we would call "commercial" today to regulate criminal conduct by non-Indians within Indian Country. These scholars collectively argue that "commerce" ought to be understood within the eighteenth-century understandings of "interaction" and "intercourse," terms that encompassed all networks of transportation and communication.[318] Historian of early America, Professor Greg Ablavsky, has countered these arguments by undercutting the historical claim that Congress passed the 1790 Act pursuant to its Commerce Clause powers — offering instead that the Framers envisioned a less clause-bound source of federal power over Indian affairs, one that drew heavily on international law.[319]

Regardless of which position prevails, scholars and courts would do well to take notice of the Indian Commerce Clause in interpreting and understanding the Commerce Clause power more generally. Modern Indian Commerce Clause doctrine has been shielded from the constriction of federal power seen in most modern Commerce Clause doctrine.[320] Many attribute the distinctiveness of Indian Commerce Clause doctrine to federal Indian law's status as sui generis.[321] However, there

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316 Act of July 22, 1790, ch. 33, 1 Stat. 137 (current version at 25 U.S.C. § 177 (2000)).

317 AMAR, *supra* note 6, at 108; Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 24–25 (2010); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 133–34 (2002).

318 AMAR, *supra* note 6, at 108.

319 Ablavsky, *supra* note 54.

320 *See, e.g.*, *Lara*, 541 U.S. at 213 (Kennedy, J., concurring in the judgment).

321 *See* Frickey, *supra* note 17, at 436–37.

are areas of general Commerce Clause doctrine that share characteristics with doctrine developed under the Indian Commerce Clause. Those similarities bear further reflection, and understanding them may shed light on more nuanced dynamics at work within the Commerce Clause power.

The Supreme Court has developed an expansive interpretation of the Indian Commerce Clause that gives Congress broad powers to regulate and mitigate the artifacts of American colonialism.[322] It has largely held to this expansive view in recent years.[323] The Court has developed an analogous doctrine that allows Congress similarly broad powers to regulate and mitigate Jim Crow segregation and the artifacts of slavery. In *Katzenbach v. McClung*[324] and *Heart of Atlanta Motel v. United States*,[325] for example, the Court rejected challenges to provisions of the Civil Rights Act that prohibited racial discrimination by owners of public accommodations and held that Congress has the power under the Commerce Clause to regulate private conduct and to prohibit private discrimination. Some have observed that these cases rest on the Court's now dated, more expansive interpretation of the Commerce Clause and that the cases might have come out differently were they brought today.[326] Although the Court has not addressed the question directly since, it has resolved questions with respect to the Civil Rights Act without raising concerns about its unconstitutionality.[327] Doubting Congress's power to enact the Civil Rights Act remains a minority view. A deeper analysis of the Commerce Clause doctrine with respect to the mitigation of slavery and segregation — and the Commerce Clause doctrine with respect to the mitigation of colonialism — could better explain the Court's position in both areas. Rather than viewing *McClung* and *Heart of Atlanta Motel* as antiquated outliers of Commerce Clause doctrine, they could take their rightful place beside the Indian Commerce Clause as an independent strain of Commerce Clause doctrine, reflecting distinct constitutional values and dynamics.

*2. Administrative Law.* — As described in the above sections, much of executive action in the eighteenth and nineteenth centuries focused on Indian land and Native Nations.[328] Early statutory schemes provided the President with the power to make rules and regulations.

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[322] *See, e.g.*, *Lara*, 541 U.S. at 211 (Kennedy, J., concurring in the judgment); *see also* Nebraska v. Parker, 136 S. Ct. 1072, 1078, 1082 (2016); United States v. Mazurie, 419 U.S. 544, 554 (1975).

[323] *Parker*, 136 S. Ct. at 1078, 1082.

[324] 379 U.S. 294 (1964).

[325] 379 U.S. 241 (1964).

[326] *See, e.g.*, Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After* Morrison, 25 OKLA. CITY U. L. REV. 843, 867 (2000).

[327] *See, e.g.*, David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 14–15 (calling the constitutionality of Title II "beyond question").

[328] *See supra* sections II.A–D, pp. 1809–39.

Scholar of executive power Jean Galbraith has documented some of the early roots of administrative infrastructure and lawmaking within self-executing treaties made with Native Nations — highlighting an under-explored connection between the Treaty Clause and the administrative state.[329] Federal Indian law has much to contribute to modern discussions of administrative constitutionalism and the constitutional status of the administrative state. Although legal histories of the eighteenth and nineteenth centuries can provide descriptive arguments in support of the administrative state, it is not always clear how these histories cut normatively. Scholars have drawn preliminary connections between the modern administrative state and the unchecked unilateral executive power of the reservation system.[330] There exists in late nineteenth-century Indian affairs a latent, but potentially ferocious, critique of administrative constitutionalism. Linking unbridled executive power and congressional deference to the reservation system — including the detention of Native peoples without any avenue for redress, forced separation of Native families, criminalization of religious beliefs, and a violent "civilizing" process of Native adults and children — could offer a critique of executive primacy in defining constitutional meaning.

In addition to the historical roots and constitutional status of the administrative state itself, federal Indian law also has much to contribute to our understanding of the doctrine of administrative lawmaking. One recent example could provide fuel for the concerns over agency delegation, as well as shed light on the relationship between agency deference and the normative canons of interpretation.[331] There currently exists a circuit split on the question of whether *Chevron*[332] deference is applicable to contexts where the Indian canon of liberal interpretation applies. The D.C. Circuit[333] and the Tenth Circuit[334] have held agency deference — both *Chevron* and *Auer*[335] — inapplicable to cases involving Native Nations and the Indian canons; the Ninth Circuit has held

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329 Galbraith, supra note 107, at 1337 (citing Ablavsky, *supra* note 54, at 1080–81).

330 *See* ROCKWELL, *supra* note 247, at 2–5.

331 For a fairly recent review of the complex relationship between agency deference and the substantive canons, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 70–84 (2008). *See also* Note, Chevron *and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594, 599–615 (2010).

332 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

333 *See, e.g.*, Cobell v. Kempthorne, 455 F.3d 301, 304 (D.C. Cir. 2006); Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001); Massachusetts v. U.S. Dep't of Transp., 93 F.3d 890, 893 (D.C. Cir. 1996); Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C. Cir. 1991).

334 *See, e.g.*, S. Ute Indian Tribe v. Sebelius, 657 F.3d 1071, 1078 (10th Cir. 2011); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461–62 (10th Cir. 1997).

335 Auer v. Robbins, 519 U.S. 452 (1997).

that *Chevron* deference is a "substantive" body of law to which the canons, as mere "guidelines," must give way.[336] The D.C. Circuit's reasoning highlights the values at stake in the tension between the two doctrines: in *Cobell v. Norton*,[337] the D.C. Circuit held that it made little sense to defer to an agency's interpretation of an ambiguous statute when that interpretation harmed Native Nations.[338] This was because the Indian law canon of liberal construction required that all ambiguity in statutes be resolved in the favor of Native Nations.[339] That doctrine rests on a core principle at the heart of federal Indian law: that the national government is obligated to support Native Nations and Native sovereignty in order to mitigate its status as colonizer and to preserve its status as a constitutional democracy.[340] To the extent that the national government wishes to further American colonialism and to act against Native Nations, it is required to do so clearly and without any ambiguity.[341] Critics of the administrative state could seize on the Ninth Circuit's position as undermining our constitutional democracy in two ways: First, by further insulating administrative lawmaking from review and by supporting delegations of broad lawmaking power with ambiguous statutes. Second, by envisioning the mitigation of American colonialism as a mere "guideline" rather than an important Constitution-preserving value, and by removing barriers and providing incentives to further the colonial project.

*3. Citizenship Clause.* — Recent debates between the political branches, the academy, and the public on the reach and meaning of the Citizenship Clause with respect to birthright citizenship have revealed that both sides of the debate would benefit from a more meaningful engagement with federal Indian law. Although federal Indian law may not resolve the debate conclusively one way or the other, it may refine the discussion and force both sides to better engage with the real constitutional values at stake.

In 1985, Professors Peter Schuck and Rogers Smith published the argument that birthright citizenship, usually guaranteed by the Citizenship Clause, does not apply to children born within the territorial borders of the United States to parents who are unauthorized aliens.[342] Their argument was raised recently as a position of official executive policy, as the Trump Administration threatened to draft an executive order that

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[336] Williams v. Babbitt, 115 F.3d 657, 663 n.5 (9th Cir. 1997) (quoting Shields v. United States, 698 F.2d 987, 990 (9th Cir. 1983)).

[337] 240 F.3d 1081.

[338] *Id.* at 1101.

[339] *Id.*

[340] *See id.*

[341] *See id.*

[342] *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 91–103 (1985).

prevented those children from becoming citizens.[343] Schuck and Smith's argument rests on an interpretation of the phrase "subject to the jurisdiction thereof" that provides an exception to the Clause's otherwise sweeping grant of birthright citizenship.[344] In support of their argument that "subject to the jurisdiction thereof" excludes the children of undocumented parents, they offer precedent, history, and a consent-based value fundamental in American democracy.[345] The centerpiece of their argument is one of the two instances in which the Supreme Court has interpreted the Citizenship Clause — the one that often is wholly left out of public debate: *Elk v. Wilkins*.[346]

In *Elk v. Wilkins*, the Court held that the Citizenship Clause did not afford Natives birthright citizenship, because they were not "subject to the jurisdiction thereof."[347] Specifically, the Court held that, in 1884, the state of Nebraska in no way violated the Constitution by denying a resident of Omaha, who paid taxes and spoke English, the vote.[348] Nebraska asserted that it was right to deny Elk the vote because he was an Indian.[349] The Court agreed.[350] As an Indian, Elk was not a citizen, even though he was born within the territorial borders of the United States.[351] The Court reasoned that Elk was not "subject to the jurisdiction" of the United States at birth, because he was born to parents who were members of the Winnebago Nation of Nebraska.[352]

Schuck and Smith read much into this exclusion, including the general principle that United States citizenship must turn on consent of the governed and that the Constitution codified this consent principle into an ambiguous phrase addressing jurisdiction.[353] "Subject to the jurisdiction thereof," they argue, requires that parents must subject themselves to a sovereign through naturalization or legal residency in order for their children to obtain birthright citizenship.[354] Their view of these five words is capacious. Their ability to read benign, even deeply moral intent into a state's efforts to deny a political, ethnic, and racial minority

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343 *See, e.g.*, Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), https://nyti.ms/2CPJcGU [https://perma.cc/UN4J-XHDW].

344 Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenship*, NAT'L AFF., Summer 2018, at 51–54, https://www.nationalaffairs.com/publications/detail/the-question-of-birthright-citizenship [https://perma.cc/RF85-CQ9Z].

345 *Id.*

346 112 U.S. 94 (1884).

347 *Id.* at 102.

348 *Id.* at 109.

349 *Id.* at 99.

350 *Id.* at 109.

351 *Id.* at 102–04.

352 *Id.*; *see also id.* at 110 (Harlan, J., dissenting).

353 *See generally* SCHUCK & SMITH, *supra* note 342.

354 *See id.*

the right to vote in the late nineteenth century is nothing short of majestic.

However, recent critics of Schuck and Smith's capacious interpretation of "subject to the jurisdiction thereof" don't fare much better. Most notably, Amar mounted a thorough, public opposition to Schuck and Smith's interpretation of the Clause last fall.[355] Yet his argument makes fundamental missteps that failed to meet Schuck and Smith's argument head on. Amar and co-author Professor Steven Calabresi forcefully argue that the original meaning of "subject to the jurisdiction thereof" was a set of narrow exceptions, meant to be exhaustive.[356] But they gloss over *Elk v. Wilkins* and the Court's alleged reasoning in that case that the exception of Native Americans from birthright citizenship rested on some general principle of consent-based governance. Instead, Amar and Calabresi simply noted that the children of diplomats were the only relevant exception, "given that Native Americans no longer live in the same kind of tribal regime that existed in the 1860s."[357] This statement is simply false. Because neither side of these recent debates has incorporated a fuller understanding of American colonialism, past and present, the debate risks reaching a level of absurdity on both sides that could frustrate resolution. One side fails to recognize the constitutional failure of late nineteenth-century Indian law policy, a policy that put Natives in camps and forcefully removed Native children from families in order to "[k]ill the Indian in him, and save the man."[358] The other side fails to recognize American colonialism at all and, in fact, takes part in furthering the colonial project by fostering the modern erasure of Native Nations.[359]

Both sides of the debate fail to recognize and reckon with American colonialism, the racial hierarchies it created to justify the project, and

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[355] *See, e.g.*, *Border Troops, Asylum Seekers, Birthright Citizenship: Immigration and the Midterms*, WBUR: ON POINT (Oct. 31 2018), https://www.wbur.org/onpoint/2018/10/31/midterms-immigration-trump-caravan-birthright-citizenship [https://perma.cc/7H88-7QH2]; *Does the Constitution Require Birthright Citizenship?*, NAT'L CONST. CTR. (Nov. 8, 2018), https://constitutioncenter.org/debate/podcasts/does-the-constitution-require-birthright-citizenship [https://perma.cc/T6NX-YFXK]; *see also* Akhil Reed Amar, *America's Equal Citizenship Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-xiv/americas-equal-citizenship-clause-by-akhil-reed-amar/clause/56 [https://perma.cc/FEW5-U5FF].

[356] Akhil Reed Amar & Steven G. Calabresi, *What the Constitution Really Says About Birthright Citizenship*, TIME (Oct. 31, 2018), http://time.com/5440454/constitution-birthright-citizenship/ [https://perma.cc/73XK-SU35]. It bears equal note that Amar and Calabresi overlook other colonized populations as well — including the inhabitants of American Samoa, who are still fighting for recognition and dignity. *See, e.g.*, Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015) (holding that the Citizenship Clause does not extend birthright citizenship to American Samoans).

[357] Amar & Calabresi, *supra* note 356.

[358] Richard H. Pratt, *The Advantages of Mingling Indians and Whites*, *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1990, at 260–71 (Francis Paul Prucha ed., 1973).

[359] *See* sources cited *supra* notes 14 and accompanying text.

the constitutional failure that resulted. As consequence, neither side is closer to the truth. Schuck and Smith gloss over the exclusion of communities from the body politic, not because of consent, but based on the color of their skin. Respect for the sovereignty of Native Nations and the consent of Native peoples could have been expressed in myriad ways — including the fulfillment of treaty promises, the return of Native land taken through violence, the decriminalization of Native governance and spirituality, and the withdrawal of deep federal intrusion that dominated the everyday lives of Native peoples. The Citizenship Clause was ratified as a constitutional "fix" for *Dred Scott*. In addition to addressing the racial hierarchy of American citizenship with respect to African Americans, Chief Justice Taney addressed the place of Native Americans in that hierarchy.[360] According to the Court in *Dred Scott*, though it could not naturalize African Americans, Congress could naturalize Native Americans. But, because of their race, it was up to the political branches to affirmatively decide:

> [I]n their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. . . . No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.[361]

The phrase "subject to the jurisdiction thereof" aimed to make clear that the Citizenship Clause corrected only the holding of *Dred Scott* with respect to African Americans and left intact the dicta of the Court with respect to Native Americans. Whether this language was included also as a means to reinforce the ongoing recognition of inherent tribal sovereignty is challenging to tease apart. But it does debate over constitutional values no justice to omit the realities and racism of American colonialism. Future critics of Schuck and Smith would do well to take notice of scholarship like the thoughtful work of Professor Bethany Berger, which situates the Citizenship Clause in its colonial and racialized historical context.[362]

## III. RETHINKING PUBLIC LAW PRINCIPLES: MINORITY PROTECTION WITH POWER, NOT RIGHTS

The previous sections provided a broad survey of the development of American public law and the centrality of Native peoples and Native Nations to that development. My hope is that public law scholars will put the survey to use by unearthing the colonial roots of their substantive areas, identifying new authorities from federal Indian law that might better illustrate and explain public law principles, and rethinking

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[360] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–04 (1857).

[361] *Id.* at 420.

[362] Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1196–97 (2016).

the foundations and presuppositions now taken for granted within public law. Identifying and charting every intervention that could be drawn from this survey would strain the bounds of a single article. Yet, as language has limits, there are certain truths that cannot be said and, instead, must be shown.[363] The following Part provides a case study to show how broadening the binary paradigm to include federal Indian law as an additional paradigm case could unsettle fundamental, often taken-for-granted public law principles. In particular, it reveals the inadequacy and historical contingency of public law's presumption that minorities are best served by rights and national power.

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Minorities are a puzzle for democracy. When considering what democracy owes its minorities, public law scholars often engage in "rights talk," or a fixation on rights as the ideal solution to minority subordination.[364] After the "rights revolution"[365] in the latter half of the twentieth century, rights and courts have dominated discussions of minorities within public law.[366] In the main, this "rights talk" has structured itself around the paradigm of slavery and Jim Crow. The pillar of the civil rights movement and the crown jewel of constitutional theory, *Brown*, ushered in an era. Under *Brown*, rights would serve as a limit on the power of state governments, enforced through national power and judicial solicitude, and would restructure daily life through integration, bringing an end to the de jure racial segregation that had been used to subordinate racial minorities. Movements that followed modeled themselves after *Brown* and aimed to garner similar solutions to subordination: rights as limits on government power, enforced through judicial solicitude, and a goal of integration or inclusion.[367]

In the wake of the rights revolution, "traditional civil rights thinking [deemed the experience of African Americans] paradigmatic, with the

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[363] LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 79 (Kegan Paul, Trench, Trubner & Co., Ltd. 1922) (1921).

[364] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 1–17 (1991).

[365] BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 1 (2014).

[366] GLENDON, *supra* note 364, at 4–7.

[367] *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 1–8 (2011) (documenting intentional duplication of the civil rights movement strategy by the feminist movement and the shortcomings of crafting constitutional meaning from analogy); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953–56 (2002) (documenting the Supreme Court's jurisprudence of sex discrimination as arising from an analogy to race).

experiences and concerns of other groups receiving attention only insofar as they may be analogized to those of this group."[368] According to the binary paradigm, the primary struggle of minorities was segregation, as well as exclusion from democratic institutions like the vote. The root of the struggle was unchecked local power. The solution then became limits on state power and an increase in national power. National power would force integration and inclusion through "rights" and a vision of equality that aimed for "diversity" across institutions. National power could also force states and localities to extend to minorities the same voting privileges as those extended to Whites. Thus, according to the binary paradigm, the answers to the puzzle of minorities became rights, national power, and judicial solicitude.[369]

A more inclusive paradigm, and particularly one that incorporates federal Indian law, complicates this simple answer. As I described in Part I, Native Nations were protected through a grant of power — specifically the recognition of inherent tribal sovereignty — not rights, and were provided solicitude in Congress. Rights-based frameworks, generally aimed at integration, were not only insufficient to protect Native Nations: they were used to further the colonial project. So, too, did the "least dangerous" branch[370] prove dangerous after its early decades by failing to provide solicitude to Natives, and it has become all the more dangerous in its recent development of the doctrine of common law colonialism. By contrast, Congress and the administrative state, with their mechanisms of petitioning and lobbying, proved better suited to build the complicated

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[368] Richard Delgado, *Derrick Bell's Toolkit — Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 290 (2000) (footnote omitted).

[369] It of course bears noting that many have criticized the binary paradigm for providing too simple a view of the civil rights movement and of the perspectives of Black Americans. In *Courage to Dissent*, Professor Tomiko Brown-Nagin documents how *Brown*, far from celebrated, was deeply contested within the African American community during the 1960s and 1970s. *See* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 427 (2011). Professor Derrick Bell identified Blacks at the time as only concerned with "equal resources, good teachers, and control over school governance," rather than integration. *Id.* Scholars reflecting on *Brown*'s fifty-year legacy in the late 1990s lamented the destruction caused by integration on the Black community's power over their children's education. *See, e.g.*, Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133, 178–87 (1999). The work of Professor Michele Foster, Professor Pamela Smith, and others documented that *Brown*'s plan of integration moved the locus of power over the educational lives of Black children from the Black community to White educators. *See, e.g.*, MICHELE FOSTER, BLACK TEACHERS ON TEACHING, at xxxvii (1997). Immediately following the decision, schools terminated sixty-five percent of the Black teachers in the South — more than 30,000 individual teachers. Smith, *supra*, at 180–81. By the 1970s, "almost 71,000 Black teachers were displaced due to desegregation" in the South. *Id.* at 181. By the mid-1990s, over eighty-four percent of school administrators for public elementary and high schools were White. *Id.* at 184. Some might argue that, once we look beyond the overly simplistic view of the binary paradigm, rights have been as disempowering to the Black community as they have been for Natives.

[370] THE FEDERALIST NO. 78, *supra* note 135, at 464 (Alexander Hamilton).

infrastructure needed to solve the particular puzzle of minority protection in the context of colonialism. These distinctive lessons are not cabined to the specific facts of colonialism and could broaden our horizons as to how to better address the puzzle of minorities overall.

### *A. Protecting Minorities with Power, Not Rights*

Despite minorities being "the darlings of most intellectuals,"[371] these darlings have spent much of their lifetime confined. Although increasingly controversial, constitutional law remains a house divided. On one side of the house is the study of "structure," and on the other is that of "rights." As Professor Daryl Levinson describes, a "central organizing principle of doctrine, scholarship, and curriculum" within constitutional law "is the distinction between the 'structural' provisions of the Constitution, which create the institutional framework of democratic government, and the 'rights' provisions, which place limits on what that government is permitted to do."[372] Constitutional theorists most often confine their discussion of minorities to their theorization of rights — at most, minorities deserve to enforce limits on government power; they ought not wield that power. In contrast, minorities are seldom discussed and rarely centered in the theorization of "structure" or power. In recent years, however, calls to reject the false dichotomy of structure and rights have laid seed and borne fruit, as scholars have begun the slow project of integration. A byproduct of integration has been an increased attention to minorities in the theorization of American governance and a nascent body of literature on minorities and power — a literature in contrast to the rights-based frameworks most often invoked as the primary tool for minority protection.

Bestowals of power to minorities can take a range of forms — many of them not yet identified — and can be seen most readily in recent scholarship on federalism and unions,[373] as well as my own work on petitioning.[374] The following sections chart the genealogy of this nascent literature and conclude that the blurring of the structure/rights dichotomy presents a natural progression in our public law scholarship. This nascent literature refines the model of democracy underlying our public law theories and incorporates recent developments from our sister disciplines of political science and political theory. However, much of this nascent literature was born of a public law tradition firmly rooted in the paradigm of slavery and Jim Crow segregation and carries with it the presumptions of that paradigm case: that minorities are best

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[371] Heather K. Gerken, *Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on a Festschrift*, 48 TULSA L. REV. 535, 536 (2013).

[372] Levinson, *supra* note 39, at 1288.

[373] *See, e.g.*, Gerken, *Foreword*, *supra* note 11, at 4.

[374] *See* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018).

served through national power and the integrative force of rights. This literature has begun to strain the bounds of the binary paradigm, as scholars have struggled to convey the constitutional value of majority-minority institutions and have begun to more readily identify the weaknesses of rights-based frameworks in certain contexts. But, viewed through the lens of the binary paradigm, our constitutional law currently views majority-minority institutions with suspicion and, given this country's history with Jim Crow segregation, it is challenging to see these institutions as anything but segregated. Federal Indian law provides a paradigm that recognizes majority-minority institutions — Native Nations, most notably — as an inherent part of our federalist framework and the bestowal of power a necessary solution to certain kinds of minority subordination.

*1. The Genealogy of the Power/Rights Dichotomy.* — The ideal model of democracy drawn on by political theorists — that of the direct democracy of ancient Athens — envisioned a structure of governance in which the entire body politic would gather, deliberate, and make laws through majority vote.[375] In this way, power was distributed to each individual, and political equality formed the foundation of this lawmaking process in that each adult, male, non-enslaved Athenian possessed the equal right to participate in lawmaking, *isonomia*, and the equal right to speak in public fora, *isegoria*.[376] In a direct democracy, minorities are only a concern if they wield inordinate power. That is, minority rule is antithetical to this form of democracy in that it subverts the equal distribution of power. If the votes of a minority govern, then the power of those who comprise that minority necessarily outweighs the power of all citizens who do not comprise the minority. Under the majoritarian decision rule of the vote, the minority view rightly loses. The only injustice against minorities, if recognized at all, is to provide them with unequal power by excluding them from the process entirely — in Athens it was the women, children, foreign-born, and enslaved.[377] Because political theorists predominantly point to direct democracy as the ideal case, theorists often classify modern representative-democratic governments as "a mixed constitution (a kind of 'machinery that combines democratic and undemocratic parts') rather than a democracy per se."[378]

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375 *See* NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY 2 (2006).

376 *Id.*

377 *See* 5 DEMONSTHENES, ORATIONS 147 (A.T. Murray trans., Harvard Univ. Press 1939) (n.d.); ARISTOTLE, THE ATHENIAN CONSTITUTION 33–34 (Frederic G. Kenyon trans., Merchant Books 2009) (n.d.).

378 URBINATI, *supra* note 375, at 2 (quoting BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 237 (2010)).

Public law has modeled itself on this divide: declaring the study of democratic parts of American institutions that of "structure" and the study of the undemocratic parts that of "rights."[379] Because direct democracy tends to focus on majority rule, the study of minorities has been relegated largely to the undemocratic parts or the rights side of the Constitution only.[380] To the extent that the study of "structure" or power addresses minorities at all, it is largely in advocating for limitations on power by one institution over another in order to check abuse and overreach. There is little to no study of whether those minorities ought to wield power directly.

In the 1960s, building upon the seminal work of Professor Hanna Pitkin,[381] a growing number of political theorists began "the third great wave of democratic theory," envisioning our representative democracy as more complex and equally as valuable as direct democracy.[382] "'[R]epresentative democracy is neither an oxymoron nor a merely pragmatic alternative for something we, modern citizens, can no longer have, namely direct democracy.' It is rather a democratic form of its own, to be assessed therefore on its own terms."[383] This third wave began to reinvigorate the perspectives of Founding-era thinkers, like Thomas Paine and James Madison, who helped shape the United States into a representative democracy rather than a direct or "pure" democracy, in part because it afforded protection for minorities.[384] As Madison described in his *Federalist 10* and *Federalist 51*, one of the primary responsibilities of democratic government is the protection of minorities against the tyranny of the majority.[385] Madison saw the structure of republican democracy — that is, a democracy governed through representation — as the sole form of democracy that would satisfy this responsibility.[386] Because representative democracy protected minorities, Madison viewed government by representation not as a second-best solution to direct democracy, made necessary out of the impossibility of

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[379] *See, e.g.*, Gerken, *The Loyal Opposition*, *supra* note 11, at 1966–67; Levinson, *supra* note 39, at 1288–97.

[380] *See, e.g.*, Gerken, *The Loyal Opposition*, *supra* note 11, at 1966–67; Levinson, *supra* note 39, at 1288–97.

[381] HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 1 (1967).

[382] Monica Brito Vieira, *Introduction*, *in* RECLAIMING REPRESENTATION: CONTEMPORARY ADVANCES IN THE THEORY OF POLITICAL REPRESENTATION 5 (Monica Brito Vieira ed., 2017).

[383] *Id.* (quoting URBINATI, *supra* note 375, at 10) (internal citations omitted).

[384] *See* URBINATI, *supra* note 375, at 4. The Founding generation had tried a form of direct democracy under the Articles of Confederation and it had failed. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 189–90 (1969).

[385] THE FEDERALIST NO. 10, *supra* note 135, at 71–79 (James Madison); THE FEDERALIST NO. 51, *supra* note 135, at 317–21 (James Madison).

[386] THE FEDERALIST NO. 10, *supra* note 135, at 71–79 (James Madison).

governing directly across such a large, geographically disparate, and heterogeneous population.[387] Rather, Madison criticized "pure democracy" or a scheme of direct democracy as failing by design to satisfy the responsibility of protecting minorities.[388] According to Madison, in constructing "[a] republic, by which I mean a government in which the scheme of representation takes place" America would find a "cure" for the problem of minority oppression.[389] Building upon these Founding-era thinkers, third-wave democratic theorists began to ask whether our republican democracy was truly representative and how best to structure our democratic institutions to ensure representation broadly, including minorities.[390]

The 1960s and the civil rights revolution inspired also a parallel wave of inquiry by public law theorists into the representation of minorities.[391] This wave focused predominantly on rights.[392] The framework of *Carolene Products*'s footnote four and the power of *Brown* transfixed the attention of a generation of public law scholars on the ways that rights could protect minorities against the tyranny of democratic majorities.[393] Rights scholars praised the power of rights to invoke national power against local prejudice, to integrate communities still segregated by the racial hierarchy undergirding slavery and Jim Crow, and to police the channels of politics.[394] Rights were valued largely for acting as a limit on power and "remov[ing] entire areas of legislation from the concept of majoritarian supremacy" by placing questions governing minorities into the hands of the courts through judicial review.[395] To a lesser extent, scholars of this wave focused on power. Rather than challenging the false dichotomy between minority-protecting rights and majority-protecting structure, however, scholars focused on ways to provide minorities with the power that had been previously denied to them.[396] Predominantly, this meant a focus on the

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387 *Id.*

388 *Id.* at 76.

389 *Id.*

390 *See* URBINATI, *supra* note 375, at 4; Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441, 443–45 (2013); Vieira, *supra* note 382, at 7.

391 *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); ELY, *supra* note 47; JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); RICHARD E. FLATHMAN, THE PRACTICE OF RIGHTS (1976); CHARLES FRIED, RIGHT AND WRONG (1978); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988).

392 GLENDON, *supra* note 364, at 1–17.

393 *See, e.g.*, ELY, *supra* note 47, at 135–81.

394 *Id.*

395 Gordon v. Lance, 403 U.S. 1, 6 (1971).

396 LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 7 (1994).

franchise.[397] The late nineteenth and early twentieth century had marked a broad formal extension of the franchise to groups excluded previously from the electoral process.[398] The same period saw the simultaneous rise of informal barriers at the local and state level.[399] States enacted poll taxes, literacy tests, racialized primaries, and civilization tests.[400] The civil rights movement aimed to deconstruct these local barriers with national power.[401] The mid-1960s saw the passage of the Voting Rights Act,[402] which "outlawed literacy tests, brought federal registrars to troubled districts to ensure safe access to polls, and targeted for federal administrative review many local registration procedures."[403]

However, the divide between power and rights, and the presumption at the center of the divide — that majoritarianism governed power — still held.[404] Critics painted rights theorists as antidemocratic, and these criticisms gave rise to the "countermajoritarian difficulty" debate that transfixed public law scholars for decades.[405] Efforts to challenge the majoritarian core of the "structure" side of the Constitution were rare.

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[397] *Id.* (describing the "first generation" of voting rights litigation as "focused directly on the access to the ballot on the assumption that the right to vote by itself is 'preservative of all other rights'").

[398] *See* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1348–53 (2003).

[399] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 142–71 (2000).

[400] *Id.*

[401] *Id.* at 256–315.

[402] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

[403] GUINIER, *supra* note 396, at 7; *see also id.* at 7–8 (describing the "second generation," *id.* at 7, of voting rights litigation as focused on vote dilution — a generation that "continue[s] today," *id.* at 8).

[404] *See, e.g.*, ELY, *supra* note 47, at 7–8 ("Our constitutional development over the past century has therefore substantially strengthened the original commitment to control by a majority of the governed. Neither has there existed among theorists or among Americans generally any serious challenge to the general notion of majoritarian control. . . . Thus the recurring embarrassment of the noninterpretivists: majoritarian democracy is, they know, the core of our entire system, and they hear in the charge that there is in their philosophy a fundamental inconsistency therewith something they are not sure they can deny. . . . The tricky task has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule: in law as in logical theory, anything can be inferred from a contradiction, and it will not do simply to say 'the majority rules but the majority does not rule.'").

[405] Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155–76 (2002). Building upon the foundational work of Alexander Bickel, theorists of this strain focused on how democracy could be squared with judicial review, an integral part of the enforcement of minority rights. *Id.* The central puzzle was how rights could protect minorities, while still ensuring that majorities wield power. *Id.* The so-called "countermajoritarian difficulty" took issue with the ability of minorities to trump majorities through judicial review and constitutional rights. *Id.* Although criticized for its simplicity, the "countermajoritarian difficulty" forms a core of our constitutional law curriculum and still contributes to the ongoing divide in constitutional law scholarship between the study of "structure" and the study of "rights." *Id.*

For the few scholars who did challenge this presumption, critics were quick to paint their efforts as radical. For example, the pathbreaking scholarship of Professor Lani Guinier, which aimed to redesign the electoral process to better represent a heterogeneous polity and entrenched racial minorities by "disaggregating the majority at the center of our conception of representation,"[406] was branded undemocratic and anti-American.[407] Underlying the criticism was an ideal that majorities should wield power and that minorities could limit that power with rights. To critics, protections for minorities should be limited to rights and to the undemocratic parts of our "mixed constitution." Allowing minorities to wield power, critics feared, could mean no democracy at all.

*2. Early Critiques of Rights.* — Despite the early successes of the civil rights movement in leveraging "rights talk" into incremental reforms, not all legal scholars celebrated the power of rights. The Critical Legal Studies (CLS) movement began in the 1980s a full-throated critique of "rights" as a tool of progressive reform.[408] Professors Catherine MacKinnon, Alan Freeman, Bob Gordon, Mark Kelman, and others crafted careful critiques of the limited successes of rights to reform subordination that operated largely in private or through institutional, rather than individual forces.[409] Rights were harbingers of neoliberal individualism and destroyers of the very communities who ensured our humanity.[410] This critique did not aim, as Guinier and others later would, to dissolve the false dichotomy between power and rights. But it instead aimed to dissolve legal discourse entirely and offered the demise of rights as a radical "Schumpeterian act of creative destruction that may help us build societies that transcend the failures of capitalism."[411] Among CLS scholars, Professor Mark Tushnet offered

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406 GUINIER, *supra* note 396, at 6.

407 *See, e.g.*, Michael E. Lewyn, *How Radical Is Lani Guinier?*, 74 B.U. L. REV. 927, 950–51 (1994) (book review); Anthony Lewis, *The Case of Lani Guinier*, N.Y. REV. BOOKS (Aug. 13, 1998), http://www.nybooks.com/articles/1998/08/13/the-case-of-lani-guinier/ [https://perma.cc/JX4R-6XDH]; Lally Weymouth, *Lani Guinier: Radical Justice*, WASH. POST (May 25, 1993), https://wapo.st/2SU4YTn [https://perma.cc/72PL-JLVV].

408 *See, e.g.*, Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 714, 715 n.8, 716 n.13 (2011) (reviewing the literature and describing the 1980s as the genesis of the "rights critique" by CLS scholars, whom others sometimes called "rights critics").

409 *See, e.g.*, Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 93 (1987); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053–54 (1978); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 198–99 (1987).

410 Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1520–28 (1991); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1384 (1984).

411 Tushnet, *An Essay on Rights*, *supra* note 410, at 1363 (footnote omitted).

one of the most damning and most sustained critiques of rights, declaring them unstable, indeterminate, abstracting of real experience, and inhibitive of real advancement.[412] To CLS scholars, it was the engagement of legal discourse and the ongoing participation in the construction of legal ideologies that was the root of oppression, and the only real reform would be found in casting off these legal ideologies.[413] In place of rights, Tushnet offered oppressed communities the opportunity to "demand" the fulfillment of "needs."[414]

Scholars of race and of the civil rights movement were quick to respond. Professor Patricia Williams eloquently put the shallow critique of rights to rest with a critique of CLS writ large.[415] The CLS movement, Williams described, had long lost touch with movement dynamics and communities of color on the ground.[416] CLS advocacy against formal institutions and belief in the power of informal institutions belied the experience of most racialized individuals, who sought solace in formal protections against the informal harms of bias and discrimination.[417] Tushnet's critique of rights as indeterminate abstractions perhaps held true for White citizens, but it overlooked the deep connection with rights felt by Black communities.[418] These communities had taken an indeterminate and empty concept, that of "rights," and breathed life and real political power into what was an empty shell of unfulfilled promises.[419] Tushnet's replacement for "rights" — informal demands to have "needs" met — rang hollow to Williams.[420] Anyone familiar with the history of American subordination would likely agree. Demands to have "needs" met by particular communities "ha[ve] been a dismal failure as political activity."[421] To claim that subordination would have ended, if only enslaved Africans or Native children in federal boarding schools had demanded their needs be met, would be to overlook this history. Moreover, it overlooks the long and sustained history of resistance by subordinated communities. Rather than ending subordination, state violence tends to double down in reaction to agency by racialized communities. Rights might not be the perfect mechanism

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412 *Id.* at 1363–64.

413 *See id.* at 1398–1402.

414 *Id.* at 1394.

415 *See* West, *supra* note 408, at 715 (calling Williams's critique of CLS "influential — and unwittingly fatal").

416 Williams, *supra* note 32, at 403–05.

417 *Id.*

418 *Id.* at 406–08 (describing the difference in the experience of renting an apartment between Williams, who sought formality, and her White, male colleague, who sought informality).

419 *Id.* at 430.

420 *Id.* at 410, 424.

421 *Id.* at 412.

for reform. But Williams saw the solution in finding "a political mechanism that can confront the *denial* of [that] need," and not in deconstruction of rights.[422]

Professor Kimberlé Williams Crenshaw followed Williams's eloquent critique with a detailed deconstruction of the CLS campaign against rights.[423] Although Crenshaw conceded that rights might provide indeterminate, and perhaps inadequate results, she took issue with the presuppositions underlying the CLS campaign: that is, that rights were insufficient by comparison to the transformative possibility of critically engaging with legal discourse and ideology.[424] Rights were not perfect by any means, but they were made insufficient only in comparison to a better solution.[425] CLS offered as its only alternative solution that of deconstructing legal ideology in order to end domination entirely.[426] Crenshaw joined Williams in identifying the failure of CLS to engage directly with the subordination of communities of color and with racism in their analysis of domination.[427] Because CLS had not incorporated racism into its analysis, Crenshaw and Williams failed to see the "transformative significance of the civil rights movement in mobilizing Black Americans and generating new demands."[428] CLS instead located the oppression of the state in the mass consent of a public to a legal system that perpetuated subordination. The solution to this problem of consent, CLS scholars argued, was to bring these legal systems to the foreground and openly deconstruct their oppressive features. These presuppositions excluded from their analysis those racialized communities who never consented to the legal system that oppressed them.[429] It also disregarded the use of formal legal tools by racialized communities to undermine ideologies of racism and White supremacy.[430] It was this oversight, Crenshaw determined, that led to fundamental flaws in Tushnet's critique of rights: Tushnet argued that rights were

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[422] *Id.* at 413.

[423] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364–66 (1988).

[424] *Id.*

[425] *Id.* at 1366–67 ("[The CLS] focus on delegitimating rights rhetoric seems to suggest that, once rights rhetoric has been discarded, there exists a more productive strategy for change, one which does not reinforce existing patterns of domination. Unfortunately, no such strategy has yet been articulated, and it is difficult to imagine that racial minorities will ever be able to discover one." *Id.* at 1366.).

[426] *Id.*

[427] *Id.* at 1356 ("While Critical scholars claim that their project is concerned with domination, few have made more than a token effort to address racial domination specifically, and their work does not seem grounded in the reality of the racially oppressed. . . . The result is that Critical literature exhibits the same proclivities of mainstream scholarship — it seldom speaks to or about Black people.").

[428] *Id.* at 1356.

[429] *Id.* at 1358–59.

[430] *Id.*

incompatible with solidarity, community, and collective action.[431] But, as Crenshaw rightly identified, history had shown rights rhetoric as a powerful force to organize and inspire Black communities to aim for radical reform.[432] To Crenshaw, whether rights rhetoric ever achieved those reforms made the empowering force of rights no less radical.[433]

A deeper engagement with race and the history of American racism would no doubt have refined these early debates over the critique of rights. Looking beyond the black/white binary paradigm to federal Indian law and the history of American colonialism could both revive the debate and offer fodder for both sides.[434] CLS scholars could draw on federal Indian law for a definitive example that rights are incompatible with solidarity, even in racialized communities: the national government used rights to, quite literally, undermine Native Nations and Native communities.[435] Scholars of race could point to the effective use by Native Nations of legal discourse and formal legal institutions — including legislative advocacy and other formal legal channels like treaty law — to achieve real reform.

In fact, legal discourse and legal ideology have been far more transformative in Indian Country than the ephemeral language of rights. Subordination in Indian Country more often resulted from the failure of those in power to conform to their own legal rules, rather than the oppressive structure of law itself. The plenary power doctrine is the paradigmatic example of how the law of subordination had to leave the Constitution entirely in order to thrive.

But, most importantly, federal Indian law offers both sides an additional tool to empower minorities and offers an alternative to rights. Rather than "deconstruction as *the* vehicle for liberation,"[436] the history of American colonialism offers power as an alternative political mechanism for productive change, and power may be the natural end of Crenshaw and Williams's critiques. Interestingly, both scholars praised the benefit of rights not necessarily in their ability to enact real results, but in their ability to empower Black communities.[437] Both Crenshaw and

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[431] *Id.* at 1365 ("Because Tushnet's critique of rights is not sufficiently related to racism, his prescriptive comments are unpersuasive.").

[432] *Id.* at 1364–65.

[433] *Id.*

[434] As Robin West observed in 2011, "[t]he rights critique ha[d] . . . virtually disappeared from contemporary legal scholarship and pedagogy." West, *supra* note 408, at 715 (tracing the disappearance to "approximately 1990").

[435] *See supra* Part II, pp. 1806–46. Yet, it bears noting that rights are far more determinate when used as a sword against subordinated communities rather than a shield against subordination.

[436] Crenshaw, *supra* note 423, at 1366.

[437] *Id.* at 1364 ("Perhaps the action of the civil rights community was effective, for example, because it raised the novel idea of Blacks exercising rights."); Williams, *supra* note 32, at 416–17, 431 ("This icon of [Dr. Martin Luther] King is a testament to the almost sacred attachment to the transformative promise of a black-conceived notion of rights, which exists, perhaps, somewhat

Williams offered empowerment as an independent good that arose from the exercise of rights, even when those rights may be indeterminate and prone to manipulation by those who wield power.[438] However indeterminate rights may be, federal Indian law offers an alternative solution to deconstruction of the legal system writ large. Rather than rights, subordinated communities ought to demand the power to define their own laws, their own systems of governance, and their own rights. Power may provide these communities with "a political mechanism that can confront the denial of need."[439]

*3. The Nascent Literature on Power in Public Law.* — In recent years, public law scholars have begun to join the third wave of political theorists in studying power and representation as distinct from majoritarianism. Rather than envisioning the American republic as a mix of democratic and undemocratic parts — meaning structure and rights, respectively — they have begun to see past the false dichotomy.[440] Increasingly, the study of constitutional law is becoming a holistic enterprise, as public law scholars have expanded their loci of inquiry from those traditional undemocratic aspects of public law to focus instead on how power ought to be distributed.[441] Public law theorists have also brought the puzzle of minorities to bear on domains defined previously as "structure." Recent scholarship has reinvigorated the importance of the question "[w]ho governs?" or *who* wields power, rather than focusing solely on *how* that power is exercised and limited.[442] Scholars of the "new federalism," for example, study the particular form of power wielded by minorities within our federalist structure and celebrate the ability of minorities to rule through decentralized authority.[443] By decentralizing power, federalism provides the opportunity for entrenched

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apart from the day-to-day reality of their legal enforcement, but which gives rise to their power as a politically animating, socially cohesive force. . . . 'Rights' feels so new in the mouths of most black people. It is still so deliciously empowering to say.").

438 Crenshaw, *supra* note 423, at 1365; Williams, *supra* note 32, at 416–17, 431.

439 Williams, *supra* note 32, at 413 (emphasis omitted).

440 *See* Gerken, *The Loyal Opposition*, *supra* note 11, at 1988 ("At the most abstract level, normalizing federalism would mean thinking of decentralization as we do rights — as part of the warp and woof of any well-functioning democracy. We would understand structure to be every bit as important as rights for generating discourse and furthering integration.").

441 *See, e.g.*, Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1101–02 (2004); Levinson, *supra* note 39, at 1288–95; Levinson, *supra* note 4, at 39 (quoting ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (David Horne ed., 1961)).

442 Levinson, *supra* note 4, at 141 (quoting ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (David Horne ed., 1961)).

443 *See, e.g.*, Gerken, *Foreword*, *supra* note 11, at 8; Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1759 (2005); Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1351 (2013); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1910 (2013); Abbe Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2032–35 (2014).

minorities to rule at the local level even in the face of opposition by national majorities.

Moreover, scholars have begun an extensive comparative project on the protective value of rights versus power in solving the puzzle of minorities. Rights-based strategies regularly come up short. For example, Professor Cynthia Estlund praised New Deal labor legislation for establishing muscular forms of power for workers.[444] Unions, in her view, established a form of constitutional self-governance for the workplace that allowed workers to legislate and participate in making the laws of the workplace.[445] She contrasted that framework against the lack of participation afforded by the "highly truncated" rights-based regime that comprises our modern employment law.[446] My work on petitioning also brings the puzzle of minorities into the study of power.[447] Historically, petitioning provided individuals and minorities a means of driving the lawmaking process in legislatures that was not contingent upon the vote and wielding majority power.[448] By contrast to rights, which "saw discrete and insular minorities essentially as objects of judicial solicitude, rather than as efficacious political actors in their own right,"[449] bestowing power to minorities allows minorities to rule and to engage with the political branches as efficacious political actors.[450]

*4. A Theory in Search of a Paradigm.* — To better understand how power ought to be distributed within our constitutional framework, we must first move beyond the binary paradigm of slavery and segregation to a more inclusive paradigm — one that recognizes the full range of historical successes and failures of our Constitution. Much of the nascent literature on minorities and power has begun to strain the boundaries of the binary paradigm. Federalism, as Professor Heather Gerken described, is something even the most progressive among us ought to celebrate because it allows minorities to rule at the local level and provides real-world examples of minority policies and minority worldviews.[451]

But we have lost the ability to distinguish between spaces of minority power and spaces of segregation and subordination. A school board dominated by African American parents, for example, is challenging to

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444 ESTLUND, *supra* note 125, at 27.

445 *Id.*

446 *Id.* at 11.

447 *See* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1184 (2016); McKinley, *supra* note 374, at 1604.

448 McKinley, *supra* note 447, at 1184; McKinley, *supra* note 374, at 1604.

449 Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1332 (2005).

450 Levinson, *supra* note 4, at 128.

451 *See* sources cited *supra* note 441.

distinguish from *Plessy*'s separate but equal doctrine, despite the fact that the parents exercise majority power. So too, in the context of unions and petitioning, we are unable to articulate the constitutional value of empowering minorities, and the relationship between minority power and minority rights is underexplored. The inability to distinguish minority empowerment from minority subordination has contributed to the presumption that minority empowerment is mutually exclusive of democracy. Levinson, for example, described in his recent comprehensive study of power in public law the distribution of power to minorities as a "road not taken" in American democracy[452] and disclaimed the very existence of these structures within public law — distinguishing such "consociational innovations" from our republican form of government.[453] Viewing the puzzle of minorities solely through the binary paradigm of slavery and Jim Crow segregation prevents us from seeing how minorities wield power, and it leads public law scholars to focus on narrow solutions — most often, that of rights. Although a thicker conception of rights might offer a more robust solution to subordination, this thick conception seems less and less tenable.

Rather, rights have been whittled away to offer a limit on government action only. Rarely do rights require affirmative government action and, to the extent that they do, the action is towards integration or "diversity." Integration and "diversity" often work to disempower minorities by keeping subordinated groups from achieving majority status. For example, "diversifying" institutions actually undermines minorities by forcing institutions to mirror the composition of the general population, thereby ensuring that minorities will remain numerical minorities, and by breaking up institutions where "minorities" form the majority — even those spaces that are not a result of subordination. Federal Indian law and, in particular, the empowerment of Native Nations could help broaden the horizons of public law theory beyond that of the binary paradigm, and its fixation on rights-based frameworks, to incorporate the empowerment of minorities.

*5. Federal Indian Law & Rights.* — By contrast to other "minority" communities, rights are feared in Indian Country rather than sought. In fact, for much of this Nation's history, United States constitutional rights were absent from the everyday lives of Native people. The Supreme Court held in the nineteenth century that the Bill of Rights did not limit the power of Native Nations,[454] that the Reconstruction Amendments did not apply to Native peoples or Native Nations, and that the Constitution provided no limit on the power of the national

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[452] Levinson, *supra* note 4, at 100.

[453] *Id.* at 99.

[454] Talton v. Mayes, 163 U.S. 376, 385 (1896).

government over Native people — leaving the redress for government overreach to the political branches and to tribal governments.[455] To the extent that rights did play a role, it was largely in the furtherance of the American colonial project. During the reservation era, the United States dangled rights over Indian Country like a carrot, promising to end the violence in exchange for Native land and sovereignty. If only Native people would relinquish citizenship in Native Nations, surrender tribal land, and embrace the "civilization" of White communities, they could claim the protection of constitutional rights.[456]

Rights still posed a threat to the power of Native Nations over a hundred years later. In 1974, federal Indian law came into direct conflict with the civil rights movement, and the applicability of federal rights to Native peoples and tribal governments was again challenged.[457] The 1934 Indian Reorganization Act had included a provision that required the Bureau of Indian Affairs (BIA) to hire Native peoples to staff the Bureau.[458] The provision was aimed at fostering the self-governance of Native Nations and Native peoples, including over those segments of the national government rooted deeply in Indian affairs. Non-native employees of the BIA challenged the preference as a violation of the Equal Employment Opportunity Act of 1972 and of the equal protection component of the Due Process Clause.[459] The Court upheld the provision, holding that the preference "does not constitute 'racial discrimination,'" because "it is not even a 'racial' preference."[460] Staffing the BIA with Native people was, the Court explained, akin to a residency requirement for Senate candidates.[461] The preference was not afforded to Indians because of their status as "a discrete racial group," but as "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."[462] Local rule and self-government, not integration, were the

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[455] *See* Elk v. Wilkins, 112 U.S. 94, 98 (1884) (holding that the Citizenship Clause of the Fourteenth Amendment did not apply to Natives born within the territorial borders of the United States, but not wholly "subject to the jurisdiction thereof" because of their tribal citizenship). This holding drew heavily on the language of the Civil Rights Act of 1866. *Id.* at 103 (looking to "the language used, about the same time, by the very Congress which framed the Fourteenth Amendment . . . declaring who shall be citizens of the United States") (citing Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).

[456] But even citizenship was qualified — the federal government retained unlimited inherent powers to regulate Native people who were citizens. *See, e.g.*, United States v. Nice, 241 U.S. 591, 601 (1916) (upholding the application of a federal criminal statute prohibiting the sale of alcohol to an "Indian," including a Native person who accepted citizenship under the Dawes Act).

[457] *See* Morton v. Mancari, 417 U.S. 535, 552 (1974).

[458] *Id.* at 537–38 (quoting The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5129 (2012))).

[459] *Id.* at 537.

[460] *Id.* at 553.

[461] *Id.* at 554.

[462] *Id.*

aims of the provision. Thus, the solution to the tensions between Indian affairs and the burgeoning doctrine on "race" was to simply distinguish it.

Activist scholars of the day noted the tension between "rights" and Indian affairs. In *Custer Died for Your Sins: An Indian Manifesto*, political theorist and Dakota citizen Vine Deloria observed in 1969 that contemporary social movements were "preoccup[ied] with race" and had systematically excluded Indians from consideration "[b]y defining the problem as one of race and making race refer solely to black."[463] By focusing on "Race Relations," the movement had confused the issue with a focus on civil rights, rather than a "power movement" aimed at reclaiming homelands and the political and economic power sufficient to govern them.[464] Civil rights promised only equality as sameness, Deloria noted, and "legal equality and cultural conformity were identical."[465] "Rights" were not only a distraction for the movement, the integration and cultural conformity they required were antithetical to the Indian movement's goals of "mutual respect with economic and political independence."[466] Thus, despite the fact that Indian status was deeply racialized — racial hierarchies formed whatever heart imperialism has — the historical conflation of race with black/white relations has divided the struggle for racial justice from the struggle against colonialism. Since Deloria wrote his manifesto, there have been decades of incredibly thoughtful scholarship and doctrine that has tied itself in proverbial knots in the effort to disentangle and distinguish race and Indian status.[467]

It comes as a relief, then, to realize that the goal is not to disentangle the two, but to see past the binary paradigm that conflates all subordination of racialized communities with slavery and Jim Crow segregation. The goal is to broaden the paradigm that currently sees only the struggles and failures of black/white relations when formulating public law principles and sees all constitutional solutions through the lens of solutions to these particular struggles. Colonialism and the failure of federal Indian law and policy should inform our general principles of

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463 VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 168 (1969).

464 *Id.* at 168–96.

465 *Id.* at 180.

466 *Id.* at 184.

467 *See* Berger, *Reconciling Equal Protection, supra* note 35, at 1187–88; Berger, *Red, supra* note 35, at 592–93; Goldberg, *supra* note 34, at 1390–93; Krakoff, *Constitutional Concern*, *supra* note 35, at 295–96; Krakoff, *Inextricably Political*, *supra* note 35, at 1043; Krakoff, *They Were Here First, supra* note 35, at 543–47. *But cf.* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 1 (2005) (charting the deep impact of race and racism upon the field of Indian law); Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 967–68 (2011) (arguing that the two are impossible to disentangle).

public law as extensively as the failures of slavery and Jim Crow segregation. The recognition of inherent tribal sovereignty and the use of power to mitigate colonialism and subordination should take its place aside *Brown* and the celebration of rights as a vital way to mitigate constitutional failure and to protect minorities from subordination. This is not to say that rights, integration, and national enforcement have no place in remedying subordination. Later movements have "reason[ed] from race"[468] and the Supreme Court has interpreted the Fourteenth Amendment expansively, however imperfect the fit, to force the inclusion of a wide range of subordinated groups who had been excluded. But exclusion is not the only means of subordinating racialized or other marginalized communities and, thus, integration ought not be the only solution. There are some forms of subordination that power is better suited to solve.

*6. Federal Indian Law & Power.* — Within Indian law, the federal government has used power to mitigate the colonization of Native Nations and the subordination of Native peoples. The United States was the first, and remains the only country in the world, to recognize the inherent sovereignty of Native Nations within its borders and to foster self-governance by Native citizens of Native lands, resources, and communities.[469] Other countries, Canada and New Zealand among them, have borrowed from the federal Indian law of the United States, but the version incorporated into their domestic law stops short of recognizing inherent tribal sovereignty.[470] Since 1934, with the passage of the Indian Reorganization Act, the United States has fostered the self-government of Native Nations, including the ratification of constitutions; the establishment of courts, legislatures, and executive councils; and the governing of Indian Country by its citizens and residents.[471] Many Native Nations have assumed control wielded previously by the federal and state governments of hospitals, schools, courts, police forces, and other social services within tribal lands.[472] Tribal governments deal directly with state and federal governments through compacts and agreements, and can represent the collective needs of their citizens both in courts and before the Congress and the executive.[473] Through the power of local governance, Native Nations have begun language revitalization efforts, established highly successful business enterprises,

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468 MAYERI, *supra* note 367, at 1–8.

469 *See, e.g.*, CHRISTIAN W. MCMILLAN, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY 91–98, 177–82 (2007) (documenting the adoption of the Marshall Trilogy internationally).

470 *Id.* at 178–80.

471 *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 131, § 1.07.

472 MCMILLAN, *supra* note 469, at 100–06.

473 *Id.* at 97–99.

fortified traditional forms of governance, and have become the "laboratories of democracy" to which the federalism of the United States aspires.

However imperfect, the structure of federal Indian law has allowed Native Nations to achieve, and preserve, the "economic and political independence" aspired to by Deloria.[474] As Chief Justice Marshall described one hundred years before the passage of the IRA, the United States inherited the artifacts of colonialism, and the imperialist doctrine of discovery provided the United States with the monopoly among European nations to treat with Native Nations.[475] But it was our constitutional law, Marshall observed, that would resolve *how* the United States would treat Native Nations.[476] Like the other crown jewels of our constitutional law — *Brown* and the divided sovereignty of federalism,[477] for example — the recognition of inherent tribal sovereignty and the fostering of Native self-governance should be celebrated as an innovation within our constitutional law, rather than marginalized.

The empowerment of minorities should not only be celebrated, it should also be recognized as something foundational to American constitutional democracy. The grant of power to Native Nations provided by the recognition of inherent tribal sovereignty is often considered sui generis within public law.[478] But devolving power to subnational polities and leveraging local control to mitigate subordination is not so foreign to our democracy as some might presume. Similar grants of power appear across a range of other substantive areas of public law — including federalism, unions, and petitioning, to name just a few. Although seldom viewed as related and even less frequently recognized as constitutional "structure," these grants of power could be seen as similar tools used to distribute power at the level of the body politic. Since the Founding, our Constitution has governed a large, heterogeneous, and plural polity and has developed innovative measures to ensure broad representation across those communities. Native Nations were one plural community among many within the territorial borders of the United States. With each tool — federalism, federal Indian law, unions, and petitioning — power or sovereignty is decentralized and distributed to these plural groups or individuals to affect the lawmaking process.

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474 *See* DELORIA, *supra* note 463, at 184.

475 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542–52 (1832).

476 *Id.* at 561.

477 Gregory Evans Dowd, *Indigenous Peoples Without the Republic*, 104 J. AM. HIST. 19, 37–41 (2017) (identifying early American acceptance of divided sovereignty as providing the unique opportunity for recognizing the inherent sovereignty of Native Nations within the United States' federal system).

478 *See* Frickey, *supra* note 17, at 433–37; Riley, *supra* note 17, at 199.

These tools often afford more power over particular questions of governance to one group over another because those questions affect that group more than others.

These tools have also often fostered democratic legitimacy by addressing the problem of "entrenched" minorities — that is, communities that would be consistently disempowered from making the laws that govern their daily lives. It is uncontroversial to say that democracies lack legitimacy if ruled solely by elite minorities. Majority rule is a simple way to distinguish democracies from monarchies.[479] Yet, however necessary majority rule might be, it is insufficient to support democratic legitimacy in large and plural societies. Democracies similarly lack legitimacy when they fail to represent the entire "demos" and when entrenched minorities are blocked from ever participating meaningfully in governance.[480] Empowering minorities to rule is part and parcel of American democracy. We have developed innovative tools like federal Indian law, federalism, unions, and petitioning to provide communities with the power to govern or to be heard in the lawmaking process in areas of law and policy most relevant to their daily lives. Although many of these grants of power are not referenced explicitly in constitutional text, some are and others are supported either by the structure of the Constitution or by decades of historical practice.

Recognizing and understanding the empowerment of minorities throughout our constitutional framework might help us better understand the function of the structural side of our Constitution. It might also shed light on what James Madison meant when he said that the "only effectual safeguard to the rights of the minority, must be laid in the basis and structure of the Government itself."[481] In order to protect minorities, they must occasionally wield power. These particular grants of power — federalism, federal Indian law, unions, and petitioning — take a range of forms and distribute varying levels of power to communities. At one end of the spectrum, federalism allows minorities, who might lose at the national level, to rule at the state and local levels.[482] Federalism allows minorities to tangibly communicate their worldview and policies to other jurisdictions and to national majorities, and it allows minorities to have a greater say in laws that govern their own communities.[483] Federalism also allows for representation of plural communities as a collective before other governments and provides

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[479] See Saffon & Urbinati, *supra* note 390, at 442.

[480] URBINATI, *supra* note 375, at 2; *see* Saffon & Urbinati, *supra* note 390, at 443–45, 447.

[481] James Madison, Speech to the Virginia Constitutional Convention of 1829 (Dec. 2, 1829), *in* SELECTED WRITINGS OF JAMES MADISON 355 (Ralph Ketcham ed., 2006).

[482] Gerken, *Foreword*, *supra* note 11, at 6, 9.

[483] *Id.* at 6–7, 9.

formal procedures of collective decisionmaking.[484] Similarly, federal Indian law provides Native Nations with the ability to constitute a government, ratify constitutions, and formally make law within Indian Country.[485] It provides Native people the ability to govern their daily lives and to regulate their communities.[486] Much has been written on the parallels between state and local governments and tribal governments, and many argue persuasively for greater parity between the two.[487]

Other mechanisms provide minorities with a say in governance without granting them formal lawmaking power. Like federalism and tribal governments, unions allow workers to constitute a government, ratify a constitution, and elect representatives.[488] The power of unions does not extend to formally making law, but unions have an important collaborative role in making the law of the workplace.[489] Unions also provide workers with infrastructure for collective decisionmaking and allow for representation of the group before employers and other governments. Petitioning resembles the power of unions in that it provides individuals and minorities with a particular role in the lawmaking process.[490] Historically, petitioning a legislature would trigger a formal process whereby petitioners could have their grievances heard by lawmakers and the lawmakers would respond — either by passing a law to remedy the grievance or with reasons for the decline.[491] Although the petition process did not guarantee a substantive outcome, it provided the procedural power to meaningfully intervene in the lawmaking process; petitions drove the agenda in colonial and state legislatures.[492] Petitioning did not provide individuals and minorities with the power of formal lawmaking or governance, but it provided the means

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484 *See id.* at 11–12.

485 *See supra* section II.A, pp. 1809–15 (discussing the Indian Reorganization Act and subsequent supplements to its framework).

486 *See supra* section II.A, pp. 1809–15.

487 *See generally, e.g.*, Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994); Resnik, *Multiple Sovereignties*, *supra* note 16, at 118; Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006).

488 ESTLUND, *supra* note 125, at 28.

489 *Id.* at 9 (observing that the collective bargaining process is a mechanism of self-governance).

490 *See* McKinley, *supra* note 447, at 1136–37.

491 *Id.* at 1144–47; McKinley, *supra* note 374, at 1547–48.

492 *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1463 (1998); Alison G. Olson, *Eighteenth-Century Colonial Legislatures and Their Constituents*, 79 J. AM. HIST. 543, 556–57 (1992); Alan Tully, *Constituent-Representative Relationships in Early America: The Case of Pre-Revolutionary Pennsylvania*, 11 CAN. J. HIST. 139, 143–45 (1976).

to organize and to be represented as a collective before formal institutions of governance.[493] Groups could petition on their collective interests and could be represented collectively before Congress and administrative agencies.[494]

These tools are related to, but distinct from the vote — the archetypal tool used under the binary paradigm to distribute power among the polity. The vote aims to distribute equal power to each individual and then rely on majority rule to resolve conflicts between the exercise of that equal power.[495] It assumes heterogeneity in the population and that general laws will affect a population equally.[496] These grants of power are also related to, but distinct from the tools used by our Constitution to distribute power horizontally between the branches and to limit that power with interbranch checks and balances.[497] Instead, these tools aim to distribute power at the level of the polity, to empower communities to govern themselves, and to center the locus of decisionmaking within the community most affected by those decisions.[498] These tools are based on "the most widely held view" of political equality — namely, "that democratic institutions should provide citizens with equal procedural opportunities to influence political decisions."[499]

"[T]he most widely held view" of political equality through equal access to the vote is insufficient, however. A more nuanced view of political equality would recognize that even general laws often affect some portions of the polity more than others and would recognize the need to provide more political power to those communities more affected. Although often overlooked, it makes intuitive sense that I should have a greater say over the regulation of my daily life than the lives of others many jurisdictions away. It is also true that the United States has always been constituted by an incredibly diverse and large-scale polity. Even the most general laws affect diverse populations in different ways and to different degrees — with some devastated and some affected not at all.[500] The need to balance American democracy with the reality of American pluralism requires tools that distribute power to particular communities in order to empower those communities, prevent the entrenchment and subordination of minorities, and facilitate democratic legitimacy.

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493 *See* McKinley, *supra* note 374, at 1555–60.

494 *See* McKinley, *supra* note 447, at 1145–46.

495 *See* CHARLES R. BEITZ, POLITICAL EQUALITY 4–9 (1989).

496 *See id.*

497 *See* Gerken, *Foreword*, *supra* note 11, at 9.

498 *See id.* at 9–10; McKinley, *supra* note 447, at 1145–46.

499 BEITZ, *supra* note 495, at 4.

500 For example, the "disparate impact doctrine" was a codification of the principle that general laws could still entrench existing status hierarchies by harming subordinated communities to a greater degree than others. *See, e.g.*, Siegel, *supra* note 61, at 1144–46.

From the Founding, the United States has been a nation of divided sovereignty and distributed authority.[501] Structural constitutional law purports to put the study of power at its center, but it attends little to how power is distributed among the governed.[502] Concerns over inordinate political power exercised by elites through lobbying and campaign contributions are often dismissed as political and not constitutional questions.[503] Levinson recently called on the field of public law to remedy this oversight and to turn its attention back toward Professor Robert Dahl's classic question of "[w]ho governs?"[504] and to look beyond questions of how power is being exercised to examine *who* is wielding power.[505] Understanding the grants of power in federal Indian law as an example of a broader phenomenon within our constitutional framework begins to address the question of "who governs" and begins to identify some of the ways that our constitutional law distributes power among the governed.

*7. Isn't Power Just "Group Rights" by Another Name?* — No. However, scholars of federal Indian law have not been careful in emphasizing this distinction.[506] The group right to sovereignty is distinct from sovereignty itself: a right — or the appeal to a moral or legal principle, often embodied in the ability to make a claim to a government — is distinct from the ability to exercise sovereignty once successfully claimed. As Williams described, asserting rights may be empowering for a community, as it was for Black Americans during the Civil Rights Movements.[507] But the exercise of rights and the exercise of sovereignty are wholly different practices. This distinction holds whether the rights are held by an individual or by a group. Because most rights are not appeals for power, the distinction between rights and power is often lost. However, the multisovereign context of federal Indian law lays the differences between these practices bare: To illustrate, if a Native Nation exercises its right to sovereignty, the Nation makes a claim to another sovereign — in federal Indian law most often the United States — to recognize its self-governance and to not interfere. If a Native Nation exercises sovereignty — or the power of self-government — it constitutes and manages a government of its own making, without the involvement of a separate sovereign. There even exists a real question

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501 *See, e.g.*, THE FEDERALIST NO. 51, *supra* note 135, at 320–22 (James Madison); Levinson, *supra* note 4, at 33–34.

502 *See* Levinson, *supra* note 4, at 33–38.

503 *See id.* at 37–38.

504 DAHL, *supra* note 441, at 7.

505 *See* Levinson, *supra* note 4, at 38–39.

506 *See, e.g.*, Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 48–49 (1996) ("The most protective aspects of federal Indian law have thus viewed Indians as having group rights — indeed, group sovereignty.").

507 Williams, *supra* note 32, at 416–17, 431.

as to whether indigenous communities must successfully exercise a right at all before exercising sovereignty. The Ganienkeh Territory of Kanienkehake Nation (Mohawk), a member of the Iroquois Confederacy established in 1974, illustrates.[508] There, the members of the Kanienkehake Nation, primarily from the First Nation reserves of Kahnawake and Akwesasne, established a settlement in what was part of their historic territory, an area that the United States considers northern New York State.[509] Following a series of armed standoffs, then–New York Secretary of State Mario Cuomo signed an agreement with the Kanienkehake Nation that quieted the tensions.[510] The Kanienkehake Nation has governed its territory ever since and was joined in 1993 by another settlement of members of the Mohawk Nation in the Mohawk Valley near Fonda, New York.[511] Neither Nation enjoys official recognition from the United States or Canada, and the Kanienkehake at least disclaim any need to seek recognition as anything other than a fully separate and independent nation.[512] Nor — as Deloria described as fundamental to the American Indian Movement — would either Nation find any need for "rights" in order to exercise their sovereignty.[513] Power, it seems, does not require permission.

This is not to say that Native Nations eschew rights entirely. Rather, the theoretical thicket between rights, group rights, and sovereignty would benefit immeasurably from clearing. For clarity, I offer some preliminary clearing of the underbrush here: Despite being distinct, sovereignty and group rights are not mutually exclusive. Native Nations and their members can hold group rights and can assert those group rights to control the behavior of other sovereigns. Many scholars of federal Indian law — Professors Kristin Carpenter, Sonia Katyal, and Angela Riley most recently and most notably — have theorized the need for the United States and other sovereigns to recognize the group rights of Native Nations of various kinds — group rights to cultural property

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[508] *See, e.g.*, GAIL H. LANDSMAN, SOVEREIGNTY AND SYMBOL: INDIAN-WHITE CONFLICT AT GANIENKEH (1988); Gail Landsman, *Ganienkeh: Symbol and Politics in an Indian/White Conflict*, 87 AM. ANTHROPOLOGIST 826, 826–39 (1985); Gail H. Landsman, *Indian Activism and the Press: Coverage of the Conflict at Ganienkeh*, 60 ANTHROPOLOGICAL Q. 101, 101–13 (1987) [hereinafter Landsman, *Indian Activism*].

[509] *See* Landsman, *Indian Activism*, *supra* note 508, at 102–03, 108.

[510] *Id.* at 104, 108.

[511] Samuel W. Rose & Richard A. Rose, *Outside the Rules: Invisible American Indians in New York State*, 30 WICAZO SA REV. 56, 60 (2015).

[512] *Id.* at 58–60; *see also* GANIENKEH TERRITORY COUNCIL, GANIENKEH MANIFESTO (1974), http://www.ganienkeh.net/images/manifesto_web.pdf [https://perma.cc/VAS2-TQTF]; *Ganienkeh — 33 Years Later,* GANIENKEH (2007), http://www.ganienkeh.net/33years/ [https://perma.cc/XE4A-4QV6].

[513] *See* DELORIA, *supra* note 463, at 179–80.

among them.[514] Again, group rights are most often exercised against other sovereigns and are distinct from the belief in and exercise of sovereignty. Individual members of Native Nations may also hold individual rights (and group rights, as well).[515] Those individuals would exercise those rights as a claim against their own sovereign Native Nation.[516] One of the primary benefits of multisovereign regimes is that power, including its distribution and limits, can be varied and defined by the community closely governed by that sovereign. This means that the communities define both the structure of their governing institutions and the rights that they hold against that sovereign. Decentralized power allows communities to define rights for themselves.

Understanding the distinction between group rights and power allows us to avoid — or, at the very least, add nuance to — longstanding debates about the tensions between liberalism's commitment to individual rights and claims by minority communities for group rights and differential group treatment. This debate has most often been framed in terms of liberalism versus communitarianism and has positioned "group rights" as in deep tension with liberal values of equality and freedom.[517] To afford rights to some groups different from those afforded other individuals who are not members of that group is to violate liberalism's commitment to equal citizenship. I concede that there are many areas in which group rights and individual rights display tensions with equal citizenship — much of United States history is replete with examples of White citizens demanding more rights as a group than their non-White counterparts. However, in demanding and receiving power, rather than rights, federal Indian law provides us with an example of how unequal distributions are not necessarily in tension with liberalism. Multisovereign regimes — or regimes that distribute more power to a local community to make the laws that govern them — are the very

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[514] Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1050–59 (2009); *see also* Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 178 (2000).

[515] *See, e.g.*, JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 242–92 (2d ed. 2010); Kristen A. Carpenter, *Considering Individual Religious Freedoms Under Tribal Constitutional Law*, 14 KAN. J.L. & PUB. POL'Y 561, 590 (2004); Patrick M. Garry et al., *Tribal Incorporation of First Amendment Norms: A Case Study of the Indian Tribes of South Dakota*, 53 S.D. L. REV. 335, 363 (2008); Robert Miller, *Tribal Constitutions and Native Sovereignty*, *in* OXFORD HANDBOOK OF INDIGENOUS PEOPLE'S POLITICS (José Antonio Lucero et al. eds., 2013); Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269 (1989); Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV. 392, 445 (2010).

[516] RICHLAND & DEER, *supra* note 515, at 259–75.

[517] *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 34–48 (1995) (acknowledging though criticizing the perception of tension).

essence of liberalism, rather than in tension with it.[518] Professor Will Kymlicka termed this distinction one of "group-differentiated citizenship" rather than "collective rights."[519] In the context of the former, Kymlicka saw no tension with liberalism, including individual rights, because "group-differentiated citizenship" is liberalism mediated by the realities of pluralism.[520] "Group-differentiated citizenship" allows individuals who belong to communities with different values in a society to construct their own government, to define rights pursuant to their local values, and to construct their own vision of the good.[521] Affording one group more power to make its own laws is an "external protection" — or a shield that protects self-governance against decisions made by the external world — that does not necessarily result in "internal restrictions" — or the ability to prohibit dissent within the group.[522] These external protections are not communitarian, nor illiberal per se. Because the distribution of power is justified by the fact that individuals will be provided equal liberty, in allowing them participation in the making of laws that govern them and their community, the distribution is not in tension with liberalism's values of freedom and equality. Rather, facilitation of the goal of self-governance, including the ability of individual members to define their governing institutions and rights, is the very essence of liberalism in a plural society.

Naming and defining the acts of Native Nations as exercises of power or sovereignty gives us the language that captures the relationship between these multisovereign regimes, minority rule, and liberalism. Individuals within minority communities retain rights and the ability to define those rights within their own systems of governance and decisionmaking. A multisovereign regime distributes power in a way that allows those communities more equality and freedom, by allowing individuals within those communities more control over the local definition of equality and freedom. The latter is simply a form of liberalism that recognizes and compensates for the realities of pluralism.

Recognizing power as power, and not group rights, does not end all concerns that particular distributions of power — to Native Nations or

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[518] *See, e.g.*, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (documenting the value of local power, or sovereignty, to define policy on immigration as an important aspect of multisovereign regimes). Theorists of federal Indian law have generally referred to the status of independent governance within Indian Country as a "measured separatism" — a term that may capture the separateness of tribal governance, but may fail to capture the importance of sovereignty and local power. CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14–19 (1987). Perhaps both fields would benefit from a deeper engagement with the concept of "sovereignty" and with each other.

[519] KYMLICKA, *supra* note 517, at 46.

[520] *Id.* at 44.

[521] *Id.* at 35–44.

[522] *See id.* at 35–39.

otherwise — could result in that power being abused. There is always a risk that those who wield power will use that power to subordinate with internal restrictions — particularly restrictions on dissenters or minority members of their own communities. To put this simply, there is always a risk that empowering minority governance will result in illiberal acts by minority groups. Riley framed this debate more than a decade ago, when she wrote that the growing cry by non-Native political theorists to impose liberalism on Native Nations was "a mistake."[523] As documented by Riley, illiberal acts by Native Nations were rare, and focusing on a single example of an illiberal act by a single Native Nation failed to recognize the incredible variety between the over five hundred federally recognized Nations.[524] Moreover, Riley argued, imposing a homogenous vision of rights on Native Nations would undermine the pluralism found within Indian Country.[525] Thus, liberalism's value of equality would subsume liberalism's value of pluralism.[526] Riley deftly positioned herself and the field of Indian law on the side of the debate that valued pluralism. But her arguments may have done less to persuade those theorists not so enamored with pluralism to value it over liberalism.

Framing the discussion in terms of power may not wholly resolve disagreements, but it could move the debate forward. Even those theorists who see little to no value in respecting pluralism, especially when those plural societies violate equality principles, may be persuaded that imposing national or universal values on local communities does more harm than previously recognized. Federal Indian law puts this harm in sharp relief; yet, the dynamics witnessed within Indian Country are seen across communities. For Native Nations, the imposition of universal values is quite literally disempowering. A Native woman, for example, who experiences gender discrimination at the hands of her Native Nation would lose the power to define rights for her community if the United States were to impose federal constitutional rights on that Native Nation. She may obtain rights protection in an immediate sense, but she loses the additional power of self-governance afforded by her membership in a Native Nation that has the power of local control. Her ability to define her rights locally, an act that some might call liberty, is lessened by the imposition of these external rights. Had the United States instead exercised its diplomatic powers to shape the decisionmaking processes of the Native Nation — that is, imposed process norms, rather than substantive values — the Native woman may have retained the ability to define her rights locally *and* had those rights protected without experiencing the harm of disempowerment. Recognizing

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523 Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 847 (2007).
524 *Id.* at 816–20.
525 *Id.* at 803.
526 *Id.* at 845–47.

the harm to minority communities caused by disempowerment and the imposition of external rights-based frameworks could prove persuasive that rights recognition alone is insufficient to warrant the further disempowerment of subordinated communities. This is, of course, not to say that disempowerment is never warranted. There are likely scenarios so egregious as to justify disempowerment. But framing the debate in terms of power highlights the harm caused when the power to define rights locally is lost to rights defined by national or global communities. At the very least, this harm ought to be considered and weighed in the debate over individual rights within minority and, particularly, colonized communities. For colonized communities, imposing rights defined by the colonial power causes harm and furthers the colonial project in two ways: First, by undermining the sovereignty of the colonized community. Second, by forcing the colonized community to integrate into the polity of colonial power in order to have a say in the definition of their rights.

*8. Congress and the Administrative State as the "Least Dangerous Branches"?* — In 1951, then–special counsel for the National Association for the Advancement of Colored People, Thurgood Marshall, drafted *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*.[527] In his article for the American Academy of Political and Social Sciences, Marshall extolled the virtues of the U.S. Supreme Court in enforcing the values of the Constitution and in protecting racial minorities. The Supreme Court, "far removed from the stresses which keep racial animosity alive," was a better arbiter than the electoral branches in evaluating whether government action abided by the Constitution.[528] Marshall captured the spirit of a moment and of a movement that leveraged the courts to great success over the next few decades. With the "rights revolution" of the late twentieth century, public law scholars turned their attention to the courts.[529] Scholars celebrated the courts as institutions designed as minority sanctuaries and defended judicial review against the charge that it was antidemocratic.[530] Chief among the defenders of judicial review was Professor John Hart Ely. In his classic *Democracy and Distrust*, Ely offered a theory of judicial review that was rooted in a deep concern for the equality of minorities and envisioned the Court as the ideal referee of the

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[527] Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 101 (1951).

[528] *Id.* at 102.

[529] GLENDON, *supra* note 364, at 5.

[530] *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 440 (2005); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 3 (1996).

political process.[531] This focus on courts, however, tended "to obscure the important roles that federalism, legislation, and the separation of powers still can and must play in safeguarding rights and freedom."[532]

The history of federal Indian law dampens the celebratory view that the courts are best suited to the protection of minorities. Over the last two hundred years, the judiciary has alternated between indifference to the treatment of Native Nations and Native peoples to active conquest of Indian Country.[533] The Marshall Trilogy notwithstanding, the Court spent much of the nineteenth century explicitly ratifying the conduct of the political branches without any substantive, or even procedural, review.[534] The "least dangerous"[535] branch revealed itself as the "least courageous" branch. Because the Court could not hide behind doctrines of federalism like it had with slavery, it created out of whole cloth a political question doctrine that shielded the very question of colonialism from judicial review.[536] As a result, much of federal Indian law is absent from our canon, because much of it exists outside the courts.[537] As our public law scholarship develops in greater depth both administrative and legislative constitutionalism,[538] scholars are more likely to identify constitutional doctrines that pertain to Native Nations and Native peoples within Congress and the Executive. At the same time, debates over the role of the judiciary and judicial review should not overlook the Court's retreat from questions over fundamental constitutional values.

Federal Indian law also reveals the shortcomings in Ely's view of the Court as referee of the political process due to his view's reliance on the binary paradigm. Ely offers the "heightened judicial solicitude" of the courts as a solution to the problem that "discrete and insular minorities" often lose interest in the political process[539] and details a process by which the Court could oversee distributions by ensuring that the process that determines those distributions fairly included minorities.[540] But the channels of political change, clear or not, do little to address the artifacts of colonialism. Colonialism is, by definition, a process by which people are forced to join a nation-state without their consent. Forcing Native peoples to join the colonial polity and engage in our electoral process to avoid subordination only furthers the colonial project. Unlike slavery

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[531] ELY, *supra* note 47, at 101–04, 135–79.
[532] GLENDON, *supra* note 364, at 5.
[533] *See supra* section II.B.2, pp. 1819–25.
[534] *Id.*
[535] THE FEDERALIST NO. 78, *supra* note 135, at 464 (Alexander Hamilton).
[536] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–60 (1832).
[537] *See supra* Part II, pp. 1805–46.
[538] *See generally* sources cited *supra* note 46.
[539] ELY, *supra* note 47, at 76, 151 (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971)).
[540] *See id.* at 74–75.

and Jim Crow segregation, militating colonialism requires more than simply allowing colonized individuals access to the democratic process.

Moreover, to the extent that the Court has involved itself with Indian law in the late twentieth century, it has largely proved hostile. The modern Court has struggled to address even the simplest normative questions, often invoking explicitly racist nineteenth-century doctrines as justification for its normative positions. The Court's struggle with these normative questions has not followed the predictably political lines of the conservative Burger and Rehnquist Courts's backlashes against other civil rights questions. To provide just a few examples, liberal lion Justice Brennan, when once assigned to write a federal Indian law case, notoriously referred to it as a "chickenshit case,"[541] Justice Stevens joined the conservative wing against Native Nations in a sweeping majority of cases that went before the court in the 1980s and 1990s,[542] and the beloved Justice Ginsburg fashioned out of thin air the doctrine of "Indian law laches"[543] — a doctrine that rested on the simple principle that Native Nations, as Indians, couldn't obtain the remedy they deserved.[544] Justice Marshall's Court, far removed from racial animosity and well designed to resolve sweeping normative questions, seems more and more an anomaly of Justice Marshall's era.

Rather than the courts, throughout the twentieth century it has often been Congress and the Executive — and the ability to access the lawmaking process first through the treaty process, and later through petitioning and lobbying[545] — that have provided sanctuary to Native Nations and Native peoples.[546] Unlike the courts, Congress and the Executive offer collaborative processes that involve minority communities within lawmaking. Early on, Native Nations were offered a literal

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[541] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 359 (1979).

[542] Matthew L.M. Fletcher, *The Indian Law Legacy of Justice Stevens*, TURTLE TALK (Apr. 9, 2010), https://turtletalk.wordpress.com/2010/04/09/the-indian-law-legacy-of-justice-stevens/ [https://perma.cc/V6Y2-3LB3]; *see also* JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 54 (2012) (noting that modern Supreme Court clerks refer to federal Indian law cases as "dogs"); Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justice's Votes on Indian Law in the Modern Era*, 43 U. TOL. L. REV. 267, 292 tbl.1 (2012) (noting that Justice Stevens voted for tribal interests in thirty-six percent of the cases he heard).

[543] Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375, 377 (2011).

[544] City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 221 (2005); *see also* Sarah Krakoff, City of Sherrill v. Oneida Indian Nation of New York*: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 10–11 (2005); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 607–12 (2006); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 434–35 (2007).

[545] POMMERSHEIM, *supra* note 42, at 39 (coining the term "Indian law federalism").

[546] *See* Carlson, *supra* note 43, at 87–88.

seat at the table in lawmaking through the treaty process. When the treaty process broke down or states failed to honor treaty conditions, Native Nations could petition Congress and the Executive for intervention and redress. Sovereigns had used petitions throughout history as a political technology whereby one sovereign could communicate with another sovereign without either side undermining its equal sovereign status.[547] The petition process in Congress offered Native Nations a tool to engage with the colonial government without submitting to its jurisdiction and gave Native peoples power within the lawmaking process without having to engage in the electoral process. In the twentieth century, Native Nations focused their advocacy on Congress and the Executive.[548] The federal government had instituted miscellaneous hiring preferences for Native peoples to run Native programs since the antebellum era,[549] and section twelve of the Indian Reorganization Act instituted an Indian hiring preference for the Bureau of Indian Affairs.[550] The hiring preference ensured a Native voice within the operations of the administration and that the administration would consult properly with Native Nations in promulgating regulations and executing policy.[551] Within Congress, the committee on Indian Affairs in each chamber provided a direct contact for petitions and lobbyists on behalf of Native Nations.

Unlike the Supreme Court, the other branches were forced to engage directly with Native Nations and Native peoples and to form practices of collaboration and consultation. These relationships have been far from perfect, as the history of the twentieth century and especially the

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[547] McKinley, *supra* note 447, at 1181; Daniel Carpenter, Indigenous Representation by Petition: Transformations in Iroquois Complaint and Request, 1680–1760, at 8 (Mar. 2019) (unpublished manuscript) (on file with author).

[548] Kirsten Matoy Carlson, Tribes Lobbying Congress: Who Wins and Why (Nov. 4, 2016) (draft report presented at the 13th Annual Indigenous Law Conference), https://ssrn.com/abstract=3043226 [https://perma.cc/H5LQ-CJ3C]; *cf.* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2012).

[549] The 1834 Federal Statute organizing the Department of Indian Affairs included this language:

> And in all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties. And where any of the tribes are, in the opinion of the Secretary of War, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.

Act of June 30, 1834, ch. 162, 4 Stat. 735, 737 (1834) (entitled "An Act to provide for the organization of the department of Indian affairs"). For additional discussion, see Steven J. Novak, *The Real Takeover of the BIA: The Preferential Hiring of Indians*, 50 J. ECON. HIST. 639, 640 (1990).

[550] Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, § 12, 48 Stat. 984, 986 (codified as amended at 25 U.S.C. §§ 461–79 (2000)).

[551] *See* Morton v. Mancari, 417 U.S. 535, 553–54 (1974).

termination era reveals. But, by comparison with the Court, the political branches have developed better tools to recognize and consult with minority communities than has the insulated Court. In recent years, the Court has seen pressure toward descriptive representation of minority groups — including pressure to appoint justices who are racial minorities and women.[552] But the institution has also seen the limits of descriptive representation in a nine-member body, especially in as diverse of a polity as the United States.[553] Given the flexibility and size of Congress and the administrative state, as well as the deep values of collaboration and consultation that both have developed over the twentieth century, they may be better suited in certain instances to offer solicitude to minority communities than are the courts. At the very least, theorists of constitutional law who specialize in the plight of minorities might want to look beyond the courts to these coequal branches in developing and refining their theories.

## CONCLUSION

Rather than declaring federal Indian law as sui generis and consigning it to a tiny backwater, scholars of public law must recognize the centrality of federal Indian law to their field. Across a range of substantive areas, the constitutional law, development, and history of the United States has been shaped by its interaction with Native Nations and Native peoples. This is not an easy history to face, but there are lessons in its failures and there is more to celebrate than we now recognize. Many of the models and theories now taken for granted within public law rest on the binary paradigm of black/white relations and, although there is much to learn from this Nation's history with slavery and Jim Crow segregation, it has led to incomplete models and theories. The history of American colonialism and its treatment of Native Nations and Native peoples offers different, yet equally important, lessons on the strengths and failings of our constitutional framework.

Centering federal Indian law could also reveal the colonial roots of certain doctrines, allowing public law scholars to build and refine the canon and anticanon. This Article provides a roadmap by which these scholars might trace their way back to the roots of their fields within

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[552] *See generally* A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 235–57 (2015) (citing instances of past Presidents being encouraged to nominate Justices who were women or minorities).

[553] The Supreme Court has yet to see a Native American justice and only last year saw its first Native American law clerk, hired by Justice Gorsuch. Staci Zaretsky, *Justice Neil Gorsuch Hires First American Indian Law Clerk in SCOTUS History*, ABOVE THE LAW (Apr. 16, 2018, 1:13 PM), https://abovethelaw.com/2018/04/justice-neil-gorsuch-hires-first-native-american-law-clerk-in-scotus-history/ [https://perma.cc/5A4S-F3N6].

colonialism and federal Indian law. With respect to the canon, recognition by the United States of inherent tribal sovereignty should be included within our canon and as celebrated as *Brown*. The Court's recent decision in *Trump v. Hawaii*, for example, relied on the doctrine of inherent powers to uphold the so-called travel ban. Given that the source of inherent power sprung from the Taney Court's articulation of the imperialist doctrine of discovery and that the power has been used over the last two centuries to justify concentration camps of all kinds on United States soil, perhaps it is time to rethink the doctrine's vitality. Similarly, invocation of nineteenth-century war power and practice with respect to Native peoples ought to inspire similar debate over whether these colonial doctrines should join *Dred Scott* and *Plessy v. Ferguson* within our anticanon.

Moving beyond the binary paradigm and centering federal Indian law within public law could not only add greater context and accuracy to a wide range of substantive areas, it could fundamentally reshape many of the general presuppositions and principles upon which public law rests. Federal Indian law is often declared "incoherent," because much of it is at odds with general public law principles. But it is instead our general principles of public law that are in need of reform. For example, national power is generally presumed to be the best solution to minority oppression. But this presumption arises from examining the history of slavery and ignores the history of colonialism. By contrast to Reconstruction, intervention of the national government into Indian affairs in the late nineteenth century only furthered the oppression of Native peoples under the reservation system. In particular, federal Indian law also has important lessons for public law and the puzzle of minorities. It teaches public law that power, and not simply rights, can be used to protect minorities. The recognition of the inherent tribal sovereignty of Native Nations mitigates colonialism and shields Native peoples from further subordination by fostering self-governance. Recognizing the grant of power to Native peoples as an integral and longstanding aspect of our constitutional framework could help scholars recognize these grants of power across public law generally. From federalism to unions to petitioning, there is a range of tools by which our constitutional law distributes power among the polity. Centering federal Indian law within public law allows us to better recognize, identify, and understand these tools within our constitutional framework.