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THE SUPREME COURT
2022 TERM

FOREWORD:
THE CONSTITUTION OF AMERICAN COLONIALISM

Maggie Blackhawk

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FOREWORD:
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*Maggie Blackhawk**

For my part I am not prepared for citizenship in the United States. I do not want it. . . . It takes greed of gain to make a successful citizen of the United States.

— Walter Adair Duncan, father of the Cherokee social welfare system, in *Statehood* (1893)¹

Thus far [I've written] of the dependencies whose population is in a sufficiently advanced state to be fitted for representative government; but there are others which have not attained that state, and which . . . must be governed by the dominant country

— John Stuart Mill in *Considerations on Representative Government* (1861)²

INTRODUCTION

The United States holds hundreds of governments in subordination. Not historically. Today. It dominates these governments and their

* (Fond du Lac Band of Lake Superior Ojibwe) Professor of Law, New York University. This Foreword was written with and for nindinawemaaganidog, especially our Kānaka Maoli relatives who have taught me the meaning of ua mau ke ea o ka ‘āina i ka pono (the sovereignty of the land continues through justice and proper acts). I dedicate this Foreword to my son, Evan Aaron, and to his children with the hope that they will always know mino-bimaadiziwin: Gagwe-minjimendan apane mii giinawaa aawi Newe miinawaa Anishinaabeg. Many talented souls tempered this Foreword through the fire of their brilliance, among them Monica Bell, Ben Coates, Adam Cox, Ryan Doerfler, Yaseen Eldik, David Engerman, Sam Erman, Bill Eskridge, Barry Friedman, Abbe Gluck, Sally Gordon, Oona Hathaway, Helen Hershkoff, Hi‘ilei Hobart, Adam Hosein, Dan Hulsebosch, Sam Issacharoff, Kēhualani Kauanui, Emma Kaufman, Paul Kramer, Christina Ponsa-Kraus, Sophia Lee, Daryl Levinson, Martha Minow, Sam Moyn, Erin Murphy, Rick Pildes, Robert Post, Aziz Rana, Dorothy Roberts, Reva Siegel, and Joe Singer. My sincere thanks for the generous research support of Helen Malley, Erica Liu, Olivia Nohealani Guarna (Kānaka Maoli), Emma Barudi, Ashlee Fox (Cherokee), Justin Cole, Andrew Hamilton, Meghan Gupta (Anishinaabe), David Kerry (Yaqui), Sophie Pu, Kyle Ranieri (Diné), and Talia Rothstein — overseen by Leah Shrestinian. Finally, I owe a great debt to the editorial team of the *Harvard Law Review* for shepherding this unruly draft toward publication. Chi-miigwech, Ned Blackhawk (Western Shoshone), gizaagi‘in.

¹ W.A. Duncan, *Statehood*, CHEROKEE ADVOC., Oct. 14, 1893, at 1.

² JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 345 (New York, Henry Holt & Co. 1873) (1861).

peoples, exploits their resources, prohibits political independence, withholds representation, and imposes its own laws, values, and norms upon these governments without consent. Mere decades ago, the United States forcefully sterilized citizens of these nations³ and removed a quarter or more of Native children from their families.⁴ At the same time, the Supreme Court stripped these governments of the ability to police crimes in their own communities,⁵ unleashing widespread sexual violence and leaving more than one in three Native women vulnerable to rape.⁶ Just over a hundred years ago, the United States invaded these nations and held them under decades of martial law before unilaterally

³ See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., HRD-77-3, INVESTIGATION OF ALLEGATIONS CONCERNING INDIAN HEALTH SERVICE 3 (1976) ("Indian Health Service records show that 3,406 sterilization procedures were performed on female Indians in the Aberdeen, Albuquerque, Oklahoma City, and Phoenix areas during fiscal years 1973–76."). For the history of forced sterilization of Native women in the United States, see generally, for example, BRIANNA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY 1, 8, 72, 86, 89–98, 147–72 (2019). For a discussion of forced sterilization in Puerto Rico, see, for example, LAURA BRIGGS, REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO 107, 127, 142–61 (2002). For a discussion of forced sterilization in the United States more broadly, see generally, for example, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997); ELENA R. GUTIÉRREZ, FERTILE MATTERS: THE POLITICS OF MEXICAN-ORIGIN WOMEN'S REPRODUCTION (2008); JAE SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE (Haymarket Books 2016) (2004); REBECCA M. KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950–1980, at 73–113 (2009).

⁴ See, e.g., MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 93 (2014) ("[I]n most Indian communities, 25–35 percent of all Indian children were living apart from their families."); see also MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940, at 151–70 (2009) (describing coercive federal practices used to remove Native children from their families to off-reservation boarding schools); KATHRYN E. FORT, AMERICAN INDIAN CHILDREN AND THE LAW 3–28 (2019) (describing how federal child welfare systems became tools of mass removal of children). This history was recognized by Congress in passing the Indian Child Welfare Act of 1978 (ICWA), Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963), which gave tribal governments exclusive jurisdiction over child custody proceedings involving children domiciled on a reservation in an attempt to rectify the past separation of Native children from their families, 25 U.S.C. § 1911(a).

⁵ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribal courts "do not have inherent [criminal] jurisdiction to try and punish non-Indians"); see also Victor H. Holcomb, *Prosecution of Non-Indians for Non-serious Offenses Committed Against Indians in Indian Country*, 75 N.D. L. REV. 761, 761–73 (1999) (discussing the history of punishing non-Indians committing crimes against Indians and the constitutional implications of the issue).

⁶ See AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007), <https://www.amnestyusa.org/wp-content/uploads/2017/05/mazeofinjustice.pdf> [<https://perma.cc/4XFL-EDRL>]; see, e.g., Kelly Gaines Stoner & Lauren van Schilfgaarde, *Addressing the Oliphant in the Room: Domestic Violence and the Safety of American Indian and Alaska Native Children in Indian Country*, 22 WIDENER L. REV. 239, 240–44 (2016) (describing the implications of *Oliphant* for Native women and children).

appointing civil governments.⁷ It ran detention camps on the lands of these governments⁸ and forced their children into boarding schools that promised to “[k]ill the Indian in [them], and save the man.”⁹ Federal agents beat Native children in such schools for speaking Native languages,¹⁰ held them in unsanitary conditions,¹¹ and forced them into

⁷ See DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 17 (2019); SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* 5 (2018); PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES* 1–6, 149–51 (2006).

⁸ See STEPHEN J. ROCKWELL, *INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY* 263 (2010) (describing how Native people had to get passes to leave their reservations to be able to sell their produce or other products at locations off the reservation); see also, e.g., EDWIN L. CHALCRAFT, *ASSIMILATION’S AGENT: MY LIFE AS A SUPERINTENDENT IN THE INDIAN BOARDING SCHOOL SYSTEM* 41–42 (Cary C. Collins ed., 2004) (recounting the development of the pass system that restricted Native mobility on the Chehalis Reservation in 1884).

⁹ R.H. Pratt, *The Advantages of Mingling Indians with Whites*, in *PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION* 45, 46 (Isabel C. Barrows ed., 1892); see also DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928*, at 52–55 (1995) (describing the assimilationist logic behind Indian boarding schools). On the establishment of off-reservation boarding schools, see *Civilization Fund Act (Indian Civilization Act)*, ch. 85, 3 Stat. 516 (1819) (codified at 25 U.S.C. § 271), which authorized the Executive Branch to create educational programs for Native children and appropriated ten thousand dollars annually for that purpose. See also SAMANTHA M. WILLIAMS, *ASSIMILATION, RESILIENCE, AND SURVIVAL: A HISTORY OF THE STEWART INDIAN SCHOOL, 1890–2020*, at 17–26 (2022) (describing the boarding school system); ANDREW WOOLFORD, *THIS BENEVOLENT EXPERIMENT: INDIGENOUS BOARDING SCHOOLS, GENOCIDE, AND REDRESS IN CANADA AND THE UNITED STATES* 66–74 (2015) (discussing the “institutionalization of assimilative education as a solution to the Indian Problem,” *id.* at 66).

¹⁰ See BRYAN NEWLAND, *U.S. DEP’T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT* 7–8 (2022) (“The Federal Indian boarding school system deployed systematic militarized and identity-alteration methodologies to attempt to assimilate American Indian, Alaska Native, and Native Hawaiian children through education, including . . . discouraging or preventing the use of American Indian, Alaska Native, and Native Hawaiian languages . . .” *Id.* at 7.); see also WILLIAMS, *supra* note 9, at 54 (“Howard Rogers, who attended [a boarding school] around 1915, recalled that . . . one teacher, Mr. McLean, would ‘beat the hell out of you for speaking your own language.’”).

¹¹ See *INST. FOR GOV’T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION* 314–25 (1928) [hereinafter *MERIAM REPORT*] (describing overcrowding, water contamination, and inadequate ventilation, heating, and soap in boarding schools); see also NEWLAND, *supra* note 10, at 57 (describing the continued deficiencies in conditions outlined in the Meriam Report); BRENDA J. CHILD, *BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940*, at 67 (1998) (“[S]erious diseases flourished in the overcrowded classrooms and dormitories. The diseases became a threat not only to the boarding school pupils but also to the reservation population as returning students carried sicknesses home.”).

manual and dangerous forms of labor.¹² Thousands died.¹³ Federal law also criminalized political and spiritual practices¹⁴ and outlawed traditional marriage and family structures.¹⁵ In the last two hundred years, the United States has engaged in campaigns of mass execution¹⁶ and slaughter against citizens of these governments to a level that many have called genocide.¹⁷

¹² See MERIAM REPORT, *supra* note 11, at 323, 331 (detailing how boarding schools overworked children); see also KEVIN WHALEN, NATIVE STUDENTS AT WORK: AMERICAN INDIAN LABOR AND SHERMAN INSTITUTE'S OUTING PROGRAM, 1900–1945, at 4 (Charlotte Cotè et al. eds., 2016) (noting that labor was a way of showcasing “the progress students made in their alleged march away from Indianness and toward whiteness” and that “student laborers performed the vast majority of work as the school expanded”); VICTORIA K. HASKINS, MATRONS AND MAIDS: REGULATING INDIAN DOMESTIC SERVICE IN TUCSON, 1914–1934, at 2–3 (2012) (describing the placement of Indian girls and young women in homes as domestic servants).

¹³ Preston Scott McBride, A Lethal Education: Institutionalized Negligence, Epidemiology, and Death in Native American Boarding Schools, 1879–1934, at iii (2020) (Ph.D. dissertation, University of California, Los Angeles) (eScholarship); see also NEWLAND, *supra* note 10, at 9.

¹⁴ See General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.) (creating subdivision of landholdings within reservations designed by Indian agents, breaking apart the traditional system of land tenure and ending the Native peoples' own systems of government); HIRAM PRICE, U.S. DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., RULES GOVERNING THE COURT OF INDIAN OFFENSES 3–6 (1883) (enacting the Code of Indian Offenses based upon suggestions from the Secretary of the Interior, which made specified tribal dances, uses of ritualized devices, and activities of “medicine men,” *id.* at 4, offenses that could result in withheld rations or incarceration).

¹⁵ See PRICE, *supra* note 14, at 6–7 (establishing plural marriages and dowry payments as offenses under the Code of Indian Offenses, each punishable by a fine, hard labor, incarceration, or withheld rations); see also COMM'R OF INDIAN AFFS., ANNUAL REPORT 213 (1888) (discussing how judges in the Court of Indian Offenses “promptly suppress and punish all cases that are against the rules, particularly plural marriages”); COMM'R OF INDIAN AFFS., ANNUAL REPORT 87 (1887) (“[T]here is not now a single case of polygamy on this reservation The court of Indian offenses has punished several offenders of this kind, and the Indians have all been notified that it is necessary to secure a divorce from the court before being permitted to marry again.”); COMM'R OF INDIAN AFFS., ANNUAL REPORT 31 (1885) (“This evil [plural marriage] is gradually disappearing as the result of our Indian court of offenses . . .”).

¹⁶ See ARI KELMAN, A MISPLACED MASSACRE: STRUGGLING OVER THE MEMORY OF SAND CREEK 4 (2013) (noting that Sand Creek was “the first unit within the National Park System to label an event in which federal troops killed Native Americans a ‘massacre’”); KARL JACOBY, SHADOWS AT DAWN: AN APACHE MASSACRE AND THE VIOLENCE OF HISTORY 103–04, 117–18 (2009); GARY CLAYTON ANDERSON, MASSACRE IN MINNESOTA: THE DAKOTA WAR OF 1862, THE MOST VIOLENT ETHNIC CONFLICT IN AMERICAN HISTORY 254–63 (2019); CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY 154–55, 279–81 (2021).

¹⁷ See BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846–1873, at 7 (2016) (“*Genocide* is a term of awful significance, but one which has application to the story of California’s Native Americans.” (quoting William T. Hagen, *How the West Was Lost*, in INDIANS IN AMERICAN HISTORY: AN INTRODUCTION 193 (Frederick E. Hoxie & Peter Iverson eds., 2014))); ROBERT AQUINAS MCNALLY, THE MODOC WAR: A STORY OF GENOCIDE AT THE DAWN OF AMERICA’S GILDED AGE 36, 86 (2017) (noting that the situation in Modoc country rose to the legal definition of genocide set by the United Nations); BRENDAN C. LINDSAY, MURDER STATE: CALIFORNIA’S NATIVE AMERICAN GENOCIDE, 1846–1873, at 3–9 (2012) (highlighting the works of various scholars on the history of California’s Native American genocide); NICK ESTES, OUR HISTORY

But we do not consider these problems to be problems of constitutionalism. We do not invoke this history when considering questions of good governance, citizenship, representation, the ideal design of our governing institutions, or the best distribution of power across the national government and within “our federalism.” Constitutional scholars rarely discuss the problem of American colonialism at all. We lack the very language to confront these problems in a constitutional register. Our common parlance of rights, equality, and integration fails us. Our anti-subordination discourse runs out. The limits of our constitutional language are seemingly the limits of our world.¹⁸

Instead, we call the component parts of American colonialism *sui generis*.¹⁹ We banish each to its silo. The United States did not engage in a structured and mass campaign to remove, detain, assimilate, and destroy these governments and their peoples in the name of “civilization.” Rather, we have federal Indian law;²⁰ the law of the territories;²¹

IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 74–76 (2019) (describing the acts of settlers and the United States as genocide); PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION 4, 23 (2017) (describing the final years of incorporation of the Northwest Territory as “marked by what current-day international law defines as genocide,” *id.* at 4). See generally JEFFREY OSTLER, SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS 383–87 (2019) (arguing that genocide is a part of the history of U.S. expansion).

¹⁸ Cf. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 149 (1922) (“*The limits of my language mean the limits of my world.*”). But, like Wittgenstein recognized in the context of language more generally, the limits of our constitutional language are not necessarily the limits of our world but reflect our limited engagement with a particular world. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 8 (G.E.M. Anscombe et al. eds., G.E.M. Anscombe trans., 3d ed. 1968) (defining the reach and meaning of language as captured within “language-games” played by each particular linguistic community). Following Wittgenstein, if a colonized person speaks, should we not be able to understand them?

¹⁹ See sources cited *infra* notes 85–90.

²⁰ See, e.g., Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended in scattered sections of 25 U.S.C.); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–1304); Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 25 and 42 U.S.C.); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963).

²¹ See, e.g., Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900); Philippine Organic Act of 1902, Pub. L. No. 57-235, 32 Stat. 691; Organic Act of Puerto Rico, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified as amended in scattered sections of 48 U.S.C.); Organic Act of the Virgin Islands of the United States, Pub. L. No. 74-749, 49 Stat. 1807 (1936) (codified as amended at 48 U.S.C. §§ 1405–1406m); Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421–1424b); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, 68 Stat. 497 (1954) (codified as amended at 48 U.S.C. §§ 1541–1644).

foreign relations law;²² treaty law;²³ the war powers;²⁴ and the laws of naturalization, immigration, and citizenship.²⁵ We have the puzzle of

²² See, e.g., Treaty with the Cherokees, Cherokee Nation-U.S., art. 7, Dec. 29, 1835, 7 Stat. 478 (documenting the unfulfilled promise to the Cherokee Nation that it be “entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same”); Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified as amended at 48 U.S.C §§ 1901–1912, 2001–2004) (regulating the relationship between the United States and the freely associated foreign states of the Marshall Islands and the Federated States of Micronesia and discussing the impact of the compact on U.S. territories in the Pacific); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 572–73, 585 (1823) (adopting the Doctrine of Discovery, an international law doctrine that “discovery [of land] gave title to the government by [whom] it was made, against all other European governments,” *id.* at 573, in the domestic context to establish national power over Indian affairs). The Executive’s power over foreign relations has been defined by the Supreme Court as “plenary.” E.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (considering “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”). See generally Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999) (describing the roots of the plenary power doctrine in foreign relations law that preceded *Curtiss-Wright*).

²³ See, e.g., Treaty with the Cherokees, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 18; Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71) (ending the formal process of treaty-making with Native nations via an appropriations rider); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (presenting the last-in-time rule, which “place[s] treaties] on the same footing . . . with an act of legislation” such that “the last one will control the other” and allows Congress to unilaterally abrogate treaties); *United States v. Dion*, 476 U.S. 734, 738 (1986) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903)) (citing *Lone Wolf*, 187 U.S. at 566; *Goldwater v. Carter*, 444 U.S. 996 (1979) (mem.)) (justifying Congress’s ability to unilaterally abrogate treaties with Native nations). Treaties with Native nations at the Founding — which were more numerous than were treaties with other foreign nations — were instrumental in elaborating the meaning of the Treaty Clause. 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 the 367 treaties with Native nations between 1778 and 1868); Quincy Wright, *The United States and International Agreements*, 38 AM. J. INT’L L. 341, 345 (1944) (noting the 275 treaties with non-Native nations between 1789 and 1889); see also Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT’L L. 247, 258–59 (2012) (describing President Washington’s practice of consulting the Senate only after treaty negotiations with Native nations and, in doing so, defining the “advice” requirement of the Treaty Clause).

²⁴ See, e.g., Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96 (authorizing the President to call forth state militias “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”); Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (designating the Secretary of the Department of War to perform “such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeably to the Constitution . . . relative to Indian affairs”); LEONARD J. SADOSKY, *REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA* 200 (2009) (describing the “Jackson Doctrine,” an outgrowth of President Jackson’s campaign against the Creek Nation during the War of 1812, as an approach to Indian affairs defined by force rather than negotiation).

²⁵ See, e.g., Organic Act of Puerto Rico § 5 (extending U.S. citizenship to Puerto Rico); *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (confirming the scope of birthright citizenship under the Fourteenth Amendment, which “affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country”); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 301–307, 66 Stat. 163, 235–38 (codified as amended at 8 U.S.C. §§ 1401–1407) (establishing that individuals born in U.S. territories are naturalized citizens of the United States); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 377–90 (2004) (discussing the plenary power doctrine in the context

Puerto Rico,²⁶ the fascinating but marginalized question of Native nations,²⁷ and the forgotten history and ongoing struggles of the state of Hawai‘i.²⁸ All of these puzzles are seen as so illogical and alien as to withstand theorization, defy understanding, and refuse any common logic. Rather than engage with questions born of American colonialism, we have instead declared these puzzles as beyond our constitutional theory and left them to the “plenary power” of the political branches to solve.²⁹

Yet, these colonized nations and peoples have lived on and continue to shape the government, the Constitution, and the empire we live with today.

* * *

I begin this Foreword with the observation that a body of law within the United States comprises the constitutional law of American colonialism.³⁰ Conventional wisdom generally draws a distinction between

of immigration law); Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, §§ 701–705, 122 Stat. 754, 853–67 (codified as amended in scattered sections of 8 and 48 U.S.C.) (extending United States immigration law to the Northern Mariana Islands territory).

²⁶ See, e.g., Samuel Issacharoff et al., *What Is Puerto Rico?*, 94 IND. L.J. 1, 1 (2019) (describing “the island’s ongoing crisis of constitutional identity”).

²⁷ See, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1863 (2019) (“[T]he 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.”); N. Bruce Duthu, *The New Indian Wars: Tribal Sovereignty, The Courts and Judicial Violence*, 144 REVUE FRANÇAISE D’ÉTUDES AMÉRICAINES 78, 79–80 (2015) (arguing that “the arc of federal political activity in Indian affairs has lately tilted sharply and demonstrably in favor of tribal nations and their rights of self-governance,” *id.* at 79, and yet “the modern court has embraced [a] posture of judicial violence toward the tribal nations and their sovereign status,” *id.* at 80); Alexander Tallchief Skibine, *The Supreme Court’s Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 COLUM. J. RACE & L. 277, 282 (2018) (“[T]he Court has had difficulties upholding the federal policy of respecting tribal sovereignty and encouraging tribal self-government.”).

²⁸ See generally Melody Kapilialoha MacKenzie & D. Kapua‘ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai‘i’s Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481 (2017) (discussing important events in Hawaiian history often left out by non-Native historians); BRIAN IRELAND, *THE US MILITARY IN HAWAII: COLONIALISM, MEMORY AND RESISTANCE* 1–3 (2011) (describing the history of U.S. colonialism in Hawai‘i); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 96–147 (1998) (discussing how Native Hawaiians hold a different status than Indian tribes under the law and arguing that they should be treated similarly).

²⁹ See generally 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 (2002) (tracing the development of the plenary power doctrine in the Supreme Court as it regards both Native nations and the U.S. territories and noting that the Court has made plenary powers “relatively insulated from judicial review,” *id.* at 8).

³⁰ I use the terms “American” and “America” here and throughout to recognize and critique the imperial nature of referring to the United States of America as simply “America” — the name of two continents, not a nation. As John Locke described in 1690, “in the beginning, all the world was

constitutionalism and empire.³¹ A constitution is presumed to serve as the fundamental law of a nation. It is established to set and maintain

America,” drawing on the sense of Manifest Destiny latent in the term. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 29 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690). Yet, as Professor Daniel Immerwahr documents, the term “America” arose in common usage to refer to the United States only in the twentieth century and as a response to American empire. See IMMERWAHR, *supra* note 7, at 76 (“[O]ne can search through all the messages and public papers of the presidents — including annual messages, inaugural addresses, proclamations, special messages to Congress, and much more — from the founding to 1898 and encounter only eleven unambiguous references to the country as America, about one per decade. . . . Somewhere around the turn of the century, though, all that changed.”); see also Daniel Immerwahr, *When Did the US Start Calling Itself “America,” Anyway?*, MOTHER JONES (July 4, 2019), <https://www.motherjones.com/politics/2019/07/when-did-the-united-states-start-calling-itself-america-anyway> [https://perma.cc/R22A-HDTB]. Thus, I use the term “American colonial project” to highlight this history and to draw attention to the ways that erasure continues to operate in our everyday language and practice.

³¹ We have all benefited from the tireless work of scholars who have long committed to bringing the attention of the field to the relationship between constitutionalism and colonialism. First among them are two preeminent jurists, the late Judge Juan Torruella and Judge José Cabranes. See generally José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450 (1986) (book review); José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391 (1978); Juan R. Torruella, Commentary, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of “Territorial Federalism,”* 131 HARV. L. REV. F. 65 (2018). Within Indian law, the late, great Professor Philip Frickey maintained that constitutionalism and colonialism were separate. He argued instead that the “incoherent” nature of federal Indian law was the product of efforts to resolve the tensions between constitutionalism and colonialism — famously defining the modern Supreme Court Indian law doctrine as “common law of colonialism.” Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 433 (2005) [hereinafter Frickey, *(Native) American Exceptionalism*]; see also *id.* at 461. See generally, e.g., Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) [hereinafter Frickey, *Marshalling Past and Present*]; 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 (1999) [hereinafter Frickey, *A Common Law for Our Age of Colonialism*]; Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996). Working alongside Professor Frickey initially, Professor Sanford Levinson has pressed constitutional scholars for decades to include American expansion and the *Insular Cases* in the canon. See Christina Duffy Burnett, *The Constitution and Deconstitution of the United States*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898*, at 198–203 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) [hereinafter AMERICAN EXPANSION]. 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, 243 (2000). Most recently and most dazzlingly, Professor Aziz Rana has offered the field a seminal theory of the interrelationship between constitutionalism and colonialism — bringing the pathbreaking work of Professor Patrick Wolfe and the burgeoning field of settler-colonial studies to constitutional theory. See AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 9–10 (2010); Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 267 (2015); Aziz Rana, *Settler Wars and the National Security State*, 4 SETTLER COLONIAL STUD. 171 (2014); Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 YALE L.J.F. 312, 318, 330–31 (2020); Aziz Rana, *Law and Empire in the American Century*, 67 UCLA L. REV. 1432, 1440–41 (2021). These scholars have fostered a growing interest by constitutional historians and theorists in the study of United States constitutionalism and colonialism. See generally, e.g., Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014); Seth Davis, Essay, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751 (2017); Gregory Ablavsky, *Two Federalist Constitutions of Empire*, 89 FORDHAM L. REV. 1677 (2021); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE

borders. But it primarily focuses inward on a federalist, but unitary, legal and constitutional culture that aspires to equality, justice, republicanism, and liberal values. In this view, colonialism is constitutionalism's opposite. Empire is outward-facing and focused not on a nation, but on expansion and conquest. It governs not through consent, but through force. Rather than create a unitary constitutional culture, colonialism fosters legal variation and constitutional pluralism.

The distinctions between the United States Constitution and colonialism have been overstated. Like many constitutions of empire during the eighteenth and nineteenth centuries,³² the United States Constitution had two faces³³: one for the colonizing polity and the other for the colonized. The United States Constitution with which we are most familiar would govern the colonizing polity. But the Constitution would also provide the national government with the power to govern others, "Indians," in spaces of liberal constitutional exception. In these spaces, the national government built a constitution of empire: a vast and intricate web of relationships between the central government and those it colonized. Within this outward-facing or "external" constitution,³⁴ American colonialism has thrived — like the tentacles of an

L.J. 999 (2014); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45 (2012); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675 (2012); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

³² See DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 207–08 (Thomas A. Green et al. eds., 2005); Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750–1777*, 16 LAW & HIST. REV. 319, 321 (1998); LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900, at 3 (2009); LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900, at 21 (2001); Lauren Benton, *Just Despots: The Cultural Construction of Imperial Constitutionalism*, 9 LAW CULTURE & HUMANS. 213, 215 (2013); Lauren Benton, *Colonizing Hawai'i and Colonizing Elsewhere: Toward a History of U.S. Imperial Law*, 38 LAW & SOC'Y REV. 835, 837 (2004).

³³ Reference to the "two faces" of the United States Constitution is, of course, an homage to the sweeping and seminal study of the "two faces" of "American freedom" by Rana. In *The Two Faces of American Freedom*, Rana documents the interrelated development of the "settler empire" of the United States alongside visions of liberty that were dependent upon dispossession of Native peoples and enslavement of human beings. RANA, *supra* note 31, at 9–10.

³⁴ As I describe throughout this Foreword, "external" is a shifting and contested category, and more often uttered to create a reality than to describe it. But I also aim here to describe and draw attention to an "external constitution" that has taken particular forms and been more and less visible at different points. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318–19 (1936) (citing *Jones v. United States*, 137 U.S. 202, 212 (1890); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)) (establishing a sharp distinction between "external" constitutional powers — including "powers to acquire territory by discovery and occupation," "the power to expel undesirable aliens," "the power to make international agreements as do not constitute treaties in the constitutional sense," as well as the "powers . . . to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties," as derived from "the law of nations," not from the Constitution and, thus, limited only by international law and not limited by domestic constitutional values and principles — and "internal" constitutional powers, *id.* at 318); see also George

octopus,³⁵ it constructed colonies and the jurisdictions they inhabit as the borderlands of the United States.

These borderlands are simultaneously familiar and foreign to the constitutional framework, subject to its power often without its protections.³⁶ They are domains and peoples over which the United States has extended its jurisdiction unilaterally, often unlawfully and violently, on the grounds that the peoples within those borderlands require civilization before they achieve self-government. Paradoxically, borderlands are spaces of both subordination and empowerment.³⁷ They are areas where “universal” rules of liberal constitutionalism apply selectively or not at all to “savages.” But they are also spaces of legal and constitutional pluralism that allow colonized peoples some powers to govern and innovate. Borderlands are where permanent “strangers” to the United

Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373, 373–74 (1910) (developing his theory of a sharp distinction between “internal” and “external” constitutional powers of the national government later codified in then-Justice Sutherland’s majority opinion in *Curtiss-Wright*).

³⁵ I draw upon Frank Norris’s “octopus” metaphor for the railroads — described by some as the infrastructure of colonialism in the West — as an apt description also of the constitutional technologies built to facilitate the American colonial project. FRANK NORRIS, *THE OCTOPUS: A STORY OF CALIFORNIA* 51 (1901); see MANU KARUKA, *EMPIRE’S TRACKS: INDIGENOUS NATIONS, CHINESE WORKERS, AND THE TRANSCONTINENTAL RAILROAD* 144–47 (Earl Lewis et al. eds., 2019); see also Ned Blackhawk, *The Tracks of Settler Colonialism*, 47 REVS. AM. HIST. 564, 565 (2019) (book review).

³⁶ See generally Samuel Truett, *Settler Colonialism and the Borderlands of Early America*, 76 WM. & MARY Q. 435 (2019); Michiel Baud & Willem van Schendel, *Toward a Comparative History of Borderlands*, 8 J. WORLD HIST. 211 (1997), reprinted in MAJOR PROBLEMS IN THE HISTORY OF NORTH AMERICAN BORDERLANDS 3 (Pekka Hämäläinen & Benjamin H. Johnson eds., 2012); Jeremy Adelman & Stephen Aron, Essay, *From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History*, 104 AM. HIST. REV. 814 (1999), reprinted in MAJOR PROBLEMS IN THE HISTORY OF NORTH AMERICAN BORDERLANDS, *supra*, at 14; Benjamin H. Johnson & Andrew R. Graybill, *Introduction: Borders and Their Historians in North America*, in BRIDGING NATIONAL BORDERS IN NORTH AMERICA: TRANSNATIONAL AND COMPARATIVE HISTORIES 1 (Benjamin H. Johnson & Andrew R. Graybill eds., 2010), reprinted in MAJOR PROBLEMS IN THE HISTORY OF NORTH AMERICAN BORDERLANDS, *supra*, at 26; Mary L. Dudziak & Leti Volpp, *Introduction*, in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 1 (Mary L. Dudziak & Leti Volpp eds., 2006); Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005), reprinted in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS, *supra*, at 41. For an exploration of the legal and political liminality of borderlands peoples attempting to leave the borderlands through the Supreme Court case of *Gonzales v. Williams*, 192 U.S. 1 (1904), see Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898 to 1905*, 27 J. AM. ETHNIC HIST. 5, 5–8 (2008).

³⁷ To many, borderlands that empower may appear paradoxical. But to scholars of empire, “local agency in the form of collaboration has long been understood as central to the construction and dynamics of imperial systems.” Paul A. Kramer, Essay, *Power and Connection: Imperial Histories of the United States in the World*, 116 AM. HIST. REV. 1348, 1381 n.89 (2011) (surveying the literature).

States Constitution³⁸ and their worldviews remain, denaturalizing the seemingly stable borders of empires and nations.

We have yet to reckon with the constitution of American colonialism as an aspect of our constitutional law. No doubt there have been benefits to this oversight. Treating the law of American colonialism as fractured and siloed has increased the power of small but well-organized colonized groups within the borderlands to reclaim and reshape the principles, laws, and institutions of American colonialism to their benefit.³⁹ Lack of visibility has allowed them to work in the shadows, avoiding the backlash and retrenchment seen in areas of race, gender, and LGBTQIA+ constitutional reform.⁴⁰ This invisibility would likely be lost if the national public finally began to reckon with American colonialism. Avoiding constitutional framing has also allowed Native advocates and their allies to craft limits to American colonialism that defy the logic of United States constitutional law writ large — these limits sound in terms of constitutional structure, rather than rights, and avoid the failures of juricentric constitutionalism seen elsewhere⁴¹ by

³⁸ The term “strangers” is derived here from the work of Professor Michael Walzer, one of the few liberal philosophers to understand the constitution of a political community — most sharply between “members” and “strangers” — as raising questions central to constitutionalism. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31–63 (2008); see also GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 72–73 (1996) (discussing how constitutional law interacted with the nation as it expanded). The phrase “strangers to the constitution” was coined by Professor Gerald Neuman, drawing upon the work of Walzer to discuss questions of how the Constitution related to “strangers” or individuals outside the “social contract” or designated political community at the heart of constitutional theorization. See NEUMAN, *supra*, at 3; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 943–64 (1991). Neuman identified a “stranger to the constitution” as an individual deprived of the protections of the Constitution and, because of that deprivation, similarly stripped of the ability to participate in constitutional discourse to formally shape or dissent from that constitutional order. NEUMAN, *supra*, at 3.

³⁹ See, e.g., Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2219 (2023) (describing “the tactics, successes, and failures of Native advocates and their allies as they have forced Congress to recognize the constitutional failures of American colonialism and to mitigate these failures by treaty, statute, and regulation” in the context of federal Indian law); ALEXANDRA HARMON, RECLAIMING THE RESERVATION: HISTORIES OF INDIAN SOVEREIGNTY SUPPRESSED AND RENEWED 8–9 (2019) (discussing the tribal movements toward reclaiming sovereignty despite Supreme Court decisions like *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)); Maggie Blackhawk, *On Power and the Law: McGirt v. Oklahoma*, 2020 SUP. CT. REV. 367, 373–74 (2021) [hereinafter Blackhawk, *On Power and the Law*].

⁴⁰ For further discussion of the “reform/retrenchment dialectic,” see Devon W. Carbado, *Afterword, Critical What What?*, 43 CONN. L. REV. 1593, 1607–08 (2011). See also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1363 (1988) (critiquing one scholar’s failure to adequately analyze a “race-specific explanation of affirmative action retrenchment”); Kyler J. Palmer, *Bostock, Backlash, and Beyond the Pale: Religious Retrenchment and the Future of LGBTQ Antidiscrimination Advocacy in the Wake of Title VII Protection*, DEPAUL J. FOR SOC. JUST., Winter/Spring 2021–2022, at 114, 161 (discussing trends of religious retrenchment following the expansion of Title VII protections under *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)).

⁴¹ See Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 41 (2003).

empowering Congress to tackle the constitutional problems of American colonialism.⁴²

The consequences of not reckoning with American colonialism include burdens as well. Most relevant for this Foreword, not recognizing the law of American colonialism as constitutional law means that limits on American colonialism may be vulnerable to challenges couched in well-established constitutional discourses, values, and doctrines.⁴³ Unless we recognize colonialism as a distinctive struggle of fundamental practices, norms, and institutions within our society and recognize discourses around power, self-determination, sovereignty, jurisdiction, and community as a distinctive form of constitutional discourse, we leave the strategies that mitigate the American colonial project at risk of constitutional challenge.⁴⁴ We face the deeply ironic situation that the constitutional values we initially elevated to reckon with other constitutional failures — especially the institution of human enslavement and Jim Crow segregation⁴⁵ — might be used to further the colonial project today.

The Supreme Court put this dynamic in sharp relief this last Term when it upheld in *Haaland v. Brackeen*⁴⁶ a law that purported to respond to the forced separation of Native children from their families and communities.⁴⁷ Congress passed the law in 1978 after hearings and investigations revealed that state governments had removed approximately 100,000 Native children in the 1950s and 1960s.⁴⁸ The law, the

⁴² Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2216 (“Rather than packaging claims in terms of positive or negative rights and liberties, Native advocates have been able to directly address constitutional failures of representation, faulty structures of government, and the distribution of power. Most central to the mitigation of American colonialism, Congress offers Native advocates the promise of constitutional reforms in terms of ‘structure’” (footnotes omitted)).

⁴³ See Brief of Individual Respondents at 1, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378 & 21-380) (framing the question presented as whether the Indian Child Welfare Act of 1978 (ICWA), Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963), is “unconstitutional on Article I, anticommandeering, equal-protection, and nondelegation grounds”).

⁴⁴ See, e.g., *id.* (challenging ICWA on constitutional grounds).

⁴⁵ See, e.g., Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 63–64 (2019) (describing the making of constitutional meaning by Black freedom activists and their role in formal and informal amendment of the Constitution).

⁴⁶ 143 S. Ct. 1609.

⁴⁷ *Id.* at 1623 (quoting ICWA § 1901(4)); Transcript of Oral Argument at 103, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378 & 21-380), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-376_k5336.pdf [<https://perma.cc/S7J9-2ABU>].

⁴⁸ See 124 CONG. REC. 38102 (1978) (statement of Rep. Robert Lagomarsino) (“The record of nearly 5 years of congressional oversight on Indian child placements and adoptions shows a disproportionately high percentage of Indian families are broken up by the removal, often unwarranted, of their children by nontribal public and private agencies. More than 62,000 of the estimated 250,000 children whose parents live on or near reservations are currently in foster care or adoptive homes or institutions. Including those whose families live in urban areas or with rural

Indian Child Welfare Act of 1978⁴⁹ (ICWA), purported to end this policy by setting substantive standards for state courts when removing Native children from their families, including a preference to place these children with Native citizens and communities and a requirement that state governments attempt to keep Native families together.⁵⁰ The law also sought to empower tribal governments by strengthening tribal jurisdiction over family law, family court capacity, and child welfare programs.⁵¹

The Supreme Court upheld the statute.⁵² But it did so by declining to reach the thorniest constitutional challenge to ICWA and through a ringing affirmance of the “plenary power doctrine,” which gives Congress “plenary power” over Native peoples.⁵³ Equal protection challenges to federal Indian law were thus left for another day — keeping alive the threat that “an entire Title of the United States Code (25 U.S.C. [Indians]) would be effectively erased.”⁵⁴ The result in *Brackeen* is thus a moment for celebration. But it is also a lesson in how far our elite institutions have yet to go before they might reckon with American colonialism.

This distance was revealed by *Brackeen* itself — both in the opinion and the course of the litigation. The sole reference to the mitigation of American colonialism as a constitutional value came from Justice Kavanaugh.⁵⁵ He struggled in oral argument to articulate the problem in constitutional terms: “So, on the one hand, [this Court considers] the great respect for tribal self-government for the success of Indian tribes with — and Indian peoples with recognition of the history of oppression and discrimination against tribes and people.”⁵⁶ Justice Kavanaugh then turned to his vision of the constitutional value on the other side,

nonrecognized tribes, the number is closer to 100,000 children.”); *see also Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the U.S. S. Select Comm. on Indian Affs.*, 95th Cong. 1 (1977) (statement of Sen. James Abourezk, Chairman, S. Select Comm. on Indian Affs.) (“Recent statistics show, for example, that a minimum of 25 percent of all Indian children are either in foster homes, adoptive homes, and/or boarding schools, against the best interest of families and Indian communities.”).

⁴⁹ Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963).

⁵⁰ *See* ICWA § 105(a) (“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”). *But see* Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1288 (1980) (arguing that ICWA’s effectiveness is limited because of ambiguity in the law, which may exacerbate the issues it addressed).

⁵¹ *See* ICWA § 101 (recognizing tribal courts’ *exclusive* jurisdiction over certain child custody proceedings involving Indian children).

⁵² *Brackeen*, 143 S. Ct. at 1623.

⁵³ *See id.* at 1627, 1638.

⁵⁴ *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

⁵⁵ Transcript of Oral Argument, *supra* note 47, at 94.

⁵⁶ *Id.*

against which we should balance the value of mitigating American colonialism. His description, in many ways, revealed his preference:

On the other hand, [this Court considers] the fundamental principle we don't treat people differently on account of their race or ethnicity or ancestry, equal justice under law, I don't think we would ever allow, as the Court suggested in *Palmore* in 1984, Congress to say that white parents should get a preference for white children in adoption or that Latino parents should get a preference for Latino children in adoption proceedings. I don't think that would be permitted under that principle of equal justice that we recognized in *Palmore*.⁵⁷

In its only indirect reference, the mitigation of American colonialism was narrowed to a “respect for tribal self-government” and an amorphous history of “oppression and discrimination,” while the “fundamental principle” of “equal justice under law” included the broader principle that “we don't treat people differently” on account of race and a specific, recognized doctrinal application in *Palmore v. Sidoti*.⁵⁸ Justice Kavanaugh wrote separately in *Brackeen* to double down on his concerns over “bedrock equal protection principles” — omitting entirely any mention of colonialism.⁵⁹

Brackeen presents an example of the Supreme Court tussling with the mitigation of American colonialism as a constitutional value. It acts as a cautionary prelude to the difficulties presented by future equal protection challenges.⁶⁰ In *Brackeen*, the Court was asked to resolve the constitutional status of a law that was crafted specifically to mitigate paradigmatic dynamics of American colonialism.⁶¹ These dynamics were stark — in the years immediately predating the drafting and passage of the statute, state governments removed twenty-five to thirty-five percent of the next generation of Native nations.⁶² To scholars of empire, the removal of children from a colonized nation and forced resocialization of those children in the language, norms, and customs of

⁵⁷ *Id.* at 95.

⁵⁸ 466 U.S. 429, 430, 434 (1984) (holding that a child could not be removed from her birth mother on the grounds that the white mother had married a Black man).

⁵⁹ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1661 (2023) (Kavanaugh, J., concurring).

⁶⁰ Difficulties caused by equal protection challenges are not limited to Indian Country, but could have negative implications across the borderlands. See Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 COLUM. HUM. RTS. L. REV. 813, 836–37 (2022) (noting that “American Samoa is right to worry,” *id.* at 836, about an equal protection challenge to its traditional forms of government and life, rooted in communal land holdings led by family clan leaders called *matai*, and surveying recent constitutional challenges to these institutions and practices). For more on forms of government in Samoa writ large, see ALESSANDRO DURANTI, FROM GRAMMAR TO POLITICS: LINGUISTIC ANTHROPOLOGY IN A WESTERN SAMOAN VILLAGE 1–12 (1994) (describing the forms of government in Western Samoa, the *fono* in particular, and exploring the “ethnopragmatics” — or the study of pragmatics within cultural contexts — of Samoan political and linguistic practice).

⁶¹ *Brackeen*, 143 S. Ct. at 1623; see also sources cited *infra* note 63 (discussing child removal as a tool of colonization).

⁶² See H.R. REP. NO. 95-1386, at 9 (1978) (“[A]pproximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.”).

the colonizing nation are easily recognizable as tools of colonization.⁶³ Colonized nations cease to exist when stripped of their citizens.⁶⁴ Because the United States purports to limit the ability of Native nations to draw new membership from beyond those who are descended from political communities historically recognized by the United States,⁶⁵ taking descendant children away finally solves the “Indian Problem.”⁶⁶

Rather than identifying the preservation of colonized communities as a constitutional value, the well-established constitutional discourse around “equal justice,” crafted in the aftermath of human enslavement and Jim Crow segregation,⁶⁷ drove the legal arguments of advocates and, in turn, framed the issues before the Court.⁶⁸ Advocates defending the constitutional status of ICWA assumed a defensive crouch, arguing against constitutional relevance.⁶⁹ They argued instead that Native

⁶³ See, e.g., Christina Firpo & Margaret Jacobs, *Taking Children, Ruling Colonies: Child Removal and Colonial Subjugation in Australia, Canada, French Indochina, and the United States, 1870–1950s*, 29 J. WORLD HIST. 529, 531 (2018) (arguing that recognizing “child removal as a colonial tactic offers crucial insights into how colonial authorities gained and sustained power through intervention into the intimate lives of colonial subjects”); ADAMS, *supra* note 9, at 53–54 (describing the forced resocialization of children through boarding schools as an assimilationist tool of colonization). See generally ROBERT A. TRENNERT, JR., *THE PHOENIX INDIAN SCHOOL: FORCED ASSIMILATION IN ARIZONA, 1891–1935*, at 3–4 (1988) (highlighting one example of how the national assimilation policy was enacted through the creation and tenure of the Phoenix Indian School).

⁶⁴ Janine Jackson, “A Crucial Part of Colonization Is Taking Our Children,” FAIR (Dec. 13, 2022), <https://fair.org/home/a-crucial-part-of-colonization-is-taking-our-children> [<https://perma.cc/H5K5-H674>] (interviewing Jen Deerinwater, Founding Executive Director of Crushing Colonialism, who noted: “[A] crucial part of colonization, of the genocide of Indigenous people, is taking our children. If you take away our future generations, then we cease to exist as Indigenous people and as sovereign nations . . .”). See generally Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 161–83 (1999) (discussing the consequences of American citizenship for Indigenous peoples and the genocidal nature of forced American citizenship).

⁶⁵ See *United States v. Rogers*, 45 U.S. (4 How.) 567, 569 (1846) (adopting the view that “no white man can rightfully become a citizen of the Cherokee tribe of Indians, either by marriage, residence, adoption, or any other means”); see also 25 C.F.R. § 83.11(e) (2022) (requiring that a Native nation’s “membership consist[] of individuals who descend from a historical Indian tribe” in order to receive federal recognition).

⁶⁶ See MERIAM REPORT, *supra* note 11, at 429 (“[I]n the past forty or fifty years a body of experience in both education and social work has developed that can and should be applied in order to speed up the solution of the Indian problem.”).

⁶⁷ Transcript of Oral Argument, *supra* note 47, at 95 (discussing the principle of “equal justice” in *Palmore v. Sidoti*).

⁶⁸ For example, Matthew D. McGill, counsel for Chad Everet Brackeen and others, argued that ICWA “flouts the promise of equal justice under the law.” *Id.* at 5.

⁶⁹ See, e.g., Brief of Amici Curiae American Historical Association and Organization of American Historians in Support of Federal and Tribal Parties at 7–11, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378 & 21-380) [hereinafter Brief of Amici Curiae AHA and Organization of American Historians] (arguing that the federal government has long regulated Native families and children without constitutional issue).

children were uniquely not part of racialized communities,⁷⁰ that removal was not rooted in racism,⁷¹ and that federal “plenary” power was, on average, beneficial to Native nations.⁷² As an author of one of these briefs,⁷³ I am free to admit the lie. As I have written elsewhere, “racial hierarchies formed whatever heart imperialism has”⁷⁴ and “national power was no panacea for the subordination of Native peoples.”⁷⁵ But, again, what other option are we left with when the United States does not seem able to even admit its status as empire,⁷⁶ much less reckon with it as a problem of constitutional order?

Our founding myth is that we are a “nation of immigrants,”⁷⁷ a myth that erases the original, Indigenous inhabitants of North America and those communities brought to these lands in chains — a myth that conceals the countless foreign nations, lands, and peoples over which the United States asserted its power to govern and dispossess, without

⁷⁰ Federal Appellants’ En Banc Brief at 1, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479) (“ICWA’s protections are triggered not by any individual’s race but rather by the political fact of membership in a federally recognized tribe.”); *see also id.* at 27–32 (arguing that the challenged provisions of ICWA draw upon political, not racial, classifications); Petition for a Writ of Certiorari at 12, 26, *Brackeen*, 143 S. Ct. 1609 (No. 21-376) (urging the Supreme Court to hold that “ICWA’s Indian-based classifications are political, not racial, classifications”).

⁷¹ *See* Brief of Amici Curiae AHA and Organization of American Historians, *supra* note 69, at 23–25 (describing the “fiscal concerns” underlying Native child removal in the mid-twentieth century, as opposed to the influence of “a long-standing federal policy of assimilation and racism,” *id.* at 23).

⁷² *See* Transcript of Oral Argument, *supra* note 47, at 167 (“From the beginning, the . . . plenary power doctrine was used to protect Indians from non-Indians.”).

⁷³ *See* Brief of Amici Curiae AHA and Organization of American Historians, *supra* note 69, at 1–2.

⁷⁴ *Blackhawk*, *supra* note 27, at 1861.

⁷⁵ *Id.* at 1797–98.

⁷⁶ *Id.* at 1794 n.14 (citing 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.’”); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 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.” (footnotes omitted))) (surveying the literature on the erasure of colonialism).

⁷⁷ *See* Hall, *supra* note 76, at 275.

consent or negotiation and often by force.⁷⁸ It is difficult, if not foolish, to attempt to understand American history and the development of the United States without placing the constitution of American colonialism at the center of our constitutional theorization. Constitution, in this sense, takes on at least two meanings. On one hand, colonialism — or the unilateral expansion of jurisdiction over lands and peoples — was itself constituted or built through infrastructure, action, and law. On the other, the American colonial project was founded upon and continues to operate according to a range of highly contested but increasingly consistent fundamental principles.⁷⁹ These are principles distinct from those governing the metropole and often inflected with racialized hierarchy as justification for dispossession, exploitation, and elimination.⁸⁰ But these are also principles that have been tempered through contestation with borderlands peoples over the last two hundred years.⁸¹ Yet, because we have been unable to face the problematic and racialized doctrines that form the foundations of the constitution of American colonialism, we have abandoned colonialism to the plenary power of the political branches⁸² — and even theorized it as being beyond the reach of liberal constitutionalism entirely.⁸³

⁷⁸ Constitutional memory often diverges from constitutional history in ways that manufacture authority and consent. See Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 23–24 (2022); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism — Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1180–93 (2023) (discussing how the *Dobbs* majority “ventriloquize[d] historical sources,” *id.* at 1184, to justify overruling *Roe*); Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About “the Woman Question” in the Discourse of Sex Discrimination*, in HISTORY, MEMORY, AND THE LAW 131, 141 (Austin Sarat & Thomas R. Kearns eds., 1999) (detailing how “social memory . . . is shaped by acts of constitutional interpretation”).

⁷⁹ See *infra* note 113 and accompanying text.

⁸⁰ See *infra* note 113 and accompanying text.

⁸¹ See *infra* section II.B., pp. 81–89.

⁸² See *infra* section I.B., pp. 53–66.

⁸³ The statement from John Stuart Mill that opens this Foreword is illustrative of a liberal constitutional theory that created exception from its universal application to justify colonialism. See, e.g., MILL, *supra* note 2, at 345 (“Thus far [I’ve written] of the dependencies whose population is in a sufficiently advanced state to be fitted for representative government; but there are others which have not attained that state, and which . . . must be governed by the dominant country, or by persons delegated for that purpose by it.”). Mill’s statement was exemplary of the “liberal developmentalism” of his era — that is, the idea that liberalism was universal, except for those peoples deemed “uncivilized” and who would need to undertake a period of development to civilize them into the ability of self-government. See generally, e.g., WILLIAM HAZLITT, *THE SPIRIT OF THE AGE, OR CONTEMPORARY PORTRAITS* (William Hazlitt ed., London, C. Templeman 3d ed. 1858). Liberal developmentalism was a position Mill espoused even more firmly elsewhere. See, e.g., John Stuart Mill, *A Few Words on Non-intervention*, 60 FRASER’S MAG. 766, 772 (1859), reprinted in *THE SPIRIT OF THE AGE: VICTORIAN ESSAYS* 157, 166 (Gertrude Himmelfarb ed., 2007) (“[N]ations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners.”).

Recognizing the external constitution and the American colonial project it has fostered could help us understand that the so-called “plenary power doctrine” is not constitutional law, but the absence of constitutional discourse. Instead, reliance on the plenary power of the political branches obscures the constitutional law, principles, and values of American colonialism that continue to shape our colonial relationships today, without addressing difficult questions of justification.⁸⁴ It is an effort to fill the void left by the racialized hierarchy that many used to justify American colonialism and shield us from the difficult constitutional conversations that remain across the seemingly disparate, but ultimately connected “external” constitutional fields of federal Indian law,⁸⁵ immigration,⁸⁶ the law of the territories,⁸⁷ foreign relations law,⁸⁸ the treaty power,⁸⁹ and the powers of war and exigency.⁹⁰ Scholars have long drawn the plenary power doctrine as the common thread weaving together these fields but have puzzled over what we should make of the

⁸⁴ See Newton, *supra* note 31, at 197 (“History reveals that the original reasons for the doctrine are no longer applicable. . . . The music has stopped, but the melody lingers on.”).

⁸⁵ See Frickey, (*Native*) *American Exceptionalism*, *supra* note 31, at 436 (suggesting that “the Supreme Court has become increasingly troubled by . . . the extent to which [federal Indian law’s] doctrines deviate from general principles of American law”).

⁸⁶ See NEUMAN, *supra* note 38, at 13 (“Immigration law has become an isolated specialty within American law, where normal constitutional reasoning does not necessarily apply.”).

⁸⁷ See Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2455 (2022) (describing the “standard account” of the *Insular Cases* creating a “nearly extraconstitutional zone for the unincorporated territories” of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands).

⁸⁸ See Curtis A. Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1582–83 (2003) (“Foreign affairs exceptionalism is the idea that foreign affairs powers should be subject to different, and generally more relaxed, constitutional restraints than domestic powers.”); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1900 (2015) (describing the rise of “foreign relations exceptionalism” at the beginning of the twentieth century and its shift from a field of constitutional law to a field of international law).

⁸⁹ See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 393–94 (1998) (describing the “conventional wisdom” around treaty law as “treaty power exceptionalism” from certain constitutional limits, including federalism); see also Jean Galbraith, Response, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. SEE ALSO 121, 123 (2014) (defining treaty power exceptionalism as the “specialized constitutional practice in the context of foreign affairs” specifically involving treaty termination).

⁹⁰ See Charles E. Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 3, 4 (1917) (calling the war powers exercised by the political branches “plenary”); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 172 (1996) (identifying that there is “an unusual arrangement of ideology and constitutional interpretation” in the context of declaring war). See generally Janet Cooper Alexander, *John Yoo’s War Powers: The Law Review and the World*, 100 CALIF. L. REV. 331 (2012) (describing the influence of Professor John Yoo’s broad definition of executive power in war on the Bush Administration).

connection.⁹¹ I argue that the key is American colonialism — a constitution that we have yet to understand and explore.

Recognition of this external constitution and the colonial project within it could offer the means to move toward resolution of American colonialism. It could secure past efforts to mitigate the damage of colonialism through quotidian lawmaking⁹² and bring much-needed stability to these statutes. Federal Indian law is not alone in facing challenges. Similar constitutional challenges have been raised against the law of the territories, even this Term, calling into question the “plenary power” of the national government to regulate these other colonized peoples.⁹³

Instead, scholars and jurists should address the constitutional questions presented by American colonialism head on. They should provide distinctive constitutional solutions. Many of these bottom-up constitutional conversations are already underway in the borderlands. Borderlands constitutionalism initially borrowed heavily from the vocabulary of the law of nations — discourses of power, disempowerment, sovereignty, self-determination, development, citizenship, and nationhood. These discourses preserved several principles, including recognition of colonized peoples as political entities, preservation of those communities, support for self-determination, respect for the borders and jurisdiction of colonized peoples, collaborative lawmaking, and principles of nonintervention, that weigh against the imposition of the laws of one people upon another. Borderlands peoples then began translating these principles into the liberal constitutional discourse of the center — most notably, by advocating for self-government and limits on the

⁹¹ See Cleveland, *supra* note 29, at 13–15 (noting that the plenary power doctrine underlies Indian, territorial, and immigration law, but that scholars “had generally overlooked the interrelationship,” *id.* at 13, between these fields of law).

⁹² See 25 U.S.C. (entitled “Indians”).

⁹³ See *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1183 (2023). Justice Gorsuch has recently called for both a heavy limiting of the plenary power doctrine in the context of Indian law and an overruling of the plenary power doctrine entirely with respect to the territories. See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1657–60 (2023) (Gorsuch, J., concurring) (“Congress’s authority to legislate with respect to Indians is not unbounded, but instead comes with concrete limitations. To resolve the present dispute, the Court understandably sees no need to demarcate those limitations further. But I hope that, in time, it will follow the implications of today’s decision where they lead and return us to the original bargain struck in the Constitution — and, with it, the respect for Indian sovereignty it entails.” *Id.* at 1660 (citation omitted) (quoting *id.* at 1629 (majority opinion))); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1552–57 (2022) (Gorsuch, J., concurring) (“Because no party asks us to overrule the Insular Cases to resolve today’s dispute, I join the Court’s opinion. But the time has come to recognize that the Insular Cases rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them.” *Id.* at 1557.). But calls for simple overruling overlook the vital and distinctive constitutional questions raised by the constitution of American colonialism. These are questions that cannot be resolved by simply extending our current, and fundamentally limited, constitutional theory and doctrine over the borderlands — as *Brackeen* illustrates so poignantly. Nor can these questions, as Justice Gorsuch has so eloquently argued, be resolved by simply returning us to the Founding. See *id.* at 1554.

unilateral imposition of law without collaboration and consent, as well as respect for diverse legal structures and constitutional pluralism.⁹⁴

Because colonized communities have long engaged in their own constitutional discourse, many modern laws of American colonialism reflect the constitutional culture or vernacular constitutionalism of colonized peoples and their advocacy over the past two hundred years — statutes like the Indian Child Welfare Act.⁹⁵ Colonized peoples persuaded the political branches to codify their constitutional philosophies into law.⁹⁶ Rather than simply limiting or overruling the plenary power doctrine and leaving these constitutional principles unmoored, we should recognize their contribution to our constitutional discourse. Borderlands voices provide a foundation for the constitutional conversation that will replace the plenary power doctrine in the future.

This Foreword proceeds in three Parts. The first Part begins to draw the contours of the constitution of American colonialism, starting a conversation about the metes and bounds of a new field and bringing together seemingly disparate threads of law. The second Part offers a rediscovery of our modern borderlands and explores their role in shaping our external constitution and the American colonial project embedded within it, including the vital constitutional limits secured on the American colonial project over time. Part III explores the increasing conflicts between American colonialism and the United States Constitution — most recently and most notably, in the cases of *Brackeen*, *United States v. Vaello Madero*,⁹⁷ and *Oklahoma v. Castro-Huerta*.⁹⁸ It then turns to what could be gained from reckoning with the constitution of American colonialism. The ability to better mitigate American colonialism, I argue, as well as a broader vision of constitutionalism — one that presses beyond the erroneous limit between internal and external constitutionalism toward questions over community formation, expansion, and consent that rest within our constitutional borderlands — would be the result of such a long overdue reckoning.

⁹⁴ Much of the modern law passed according to this doctrine already aims to mitigate the American colonial project through innovative structures of federalism, forms of representation, collaborative lawmaking, redistribution of power, citizenship, and consent. Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2240–42.

⁹⁵ See generally Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History* (Indigenous L. & Pol’y Ctr., Occasional Paper 2009-04, 2009), <https://www.law.msu.edu/indigenous/papers/2009-04.pdf> [<https://perma.cc/FYA7-XX2T>].

⁹⁶ See Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2223–24. For an overview of tribal constitutional discourse, see Robert J. Miller, *American Indian Constitutions and Their Influence on the United States Constitution*, 159 PROC. AM. PHIL. SOC’Y 32, 43–56 (2015).

⁹⁷ 142 S. Ct. 1539 (2022).

⁹⁸ 142 S. Ct. 2486 (2022).

I. THE CONSTITUTION OF AMERICAN COLONIALISM

The United States Constitution is generally understood as the fundamental law of the nation.⁹⁹ It provides the blueprints for government, distributes power, and sets limits within that government, initially for those propertied, white men within the several states that deliberated over and consented to its adoption.¹⁰⁰ Drawing upon this consent, the national government, in turn, built a nation atop the several states and within its territorial borders.¹⁰¹ It established those borders.¹⁰² But the primary function of the United States Constitution was essentially inward-looking. Within its borders, the Constitution promised a nation that would be republican in nature and subject uniformly to the law and values of the national government.¹⁰³ Although subject to routine failures and ongoing contestation,¹⁰⁴ this constitutional culture idealized a range of predominantly liberal values surrounding representation, democracy, limited government, liberty, equality, inclusion, and justice.¹⁰⁵

⁹⁹ See THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“A constitution is, in fact, and must be regarded by the judges, as a fundamental law. . . . [I]n other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”); see also Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1793 (2009).

¹⁰⁰ Cf. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (arguing that “Governments are instituted among Men,” implicitly referencing solely white property owners, for the preservation of their rights); see also DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 3–5 (1997).

¹⁰¹ See U.S. CONST. art. IV, § 3.

¹⁰² *Id.* art. IV, §§ 3–4.

¹⁰³ *Id.* art. IV, § 4; see Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 2 THE WRITINGS OF JAMES MADISON, 1783–1787, at 336, 338 (Gaillard Hunt ed., 1901) (“[A] consolidation of the States into one simple republic is not less unattainable than it would be inexpedient. Let it be tried, then, whether any middle ground can be taken, which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful.”).

¹⁰⁴ Fascinating questions remain over the relationship between hierarchies within the Constitution of the center and the logics of hierarchies on the periphery, as well as the distinction between the two. See, e.g., Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 456 (2020) (describing the hierarchy of the Constitution at the Founding within the design of its governing institutions — especially the “household,” which preserved a similar hierarchy and constitutional exception over those contained within the “household” of white men). These questions are ones that I will, out of necessity, leave for another day. But I take care in the following sections to describe the relationship between the Constitution of the center and that of the periphery without presuming the internal constitutional culture is without hierarchy.

¹⁰⁵ See, e.g., U.S. CONST. amend. XIV, § 1. In describing idealized forms of constitutionalism and colonialism here, I strive for the impossible feat of making a broader point about the complexity of the relationship between constitutionalism and colonialism and of describing the history of this particular relationship — all without diminishing the complexities that exist within each system and without drawing too strict of a dichotomy between the dual constitutional natures of colonialism, as opposed to other forms of subordination and constitutional hierarchy undertaken by the United States. I will no doubt miss the mark. But to take better aim, as well as to highlight questions I hope to address in future work, I raise some nuance briefly here. There are deep similarities between the constitution of American colonialism and those dual and hierarchical

Colonialism is commonly assumed to be antithetical to the constitutionalism of the United States.¹⁰⁶ It is, in many ways, constitutionalism's opposite. It is fundamental law that is dedicated to building and maintaining an empire. Its function is not to set and preserve borders, but to expand them and to govern fragmented jurisdictions. The fundamental law of colonialism rejects equality for hierarchy. Colonialism builds power and infrastructure to allow the center to exert force over and govern others.¹⁰⁷ For those on the periphery, colonialism disempowers. The realities of far-flung, unilateral governance over nonconsenting “foreign” peoples, lands, and governments require a distinctive set of fundamental values — hierarchy, a strong military, a robust bureaucracy, and unrestrained power.

However, the distinctions between the United States Constitution and the fundamental law of colonialism should not be overstated.¹⁰⁸ The Constitution itself provided fertile ground for the American colonial project. Like many constitutions of empire, it provided the hierarchy and initial power necessary for colonialism. To the Founding generation, the United States Constitution was a written text that was thick with natural law, as well as the law of “civilized nations.”¹⁰⁹ The law

constitutions developed for Black people — those enslaved and those who were not — as well as women, the foreign-born, and others. In particular, the United States federal system pressed the most egregious constitutional issues away from the metropole and into the plurality of the states. Much of our constitutional history is informed by movements aiming to reform these spaces of constitutional exception by extending the Constitution of the metropole. Similarities between these constitutional histories and dynamics deserve deeper exploration, as well as theoretical synthesis into a richer account of constitutional law and lawmaking. But, as the following pages hopefully reveal, these constitutional frameworks have developed around distinctive constitutional histories and discourses and should not be wholly conflated.

¹⁰⁶ Rana, *Colonialism and Constitutional Memory*, *supra* note 31, at 275; see Henry Cabot Lodge, *Colonialism in the United States*, THE ATLANTIC (May 1883), <https://www.theatlantic.com/magazine/archive/1883/05/colonialism-in-the-united-states/521697> [<https://perma.cc/K58K-MZBW>] (“The neutrality policy of Washington’s administration was a great advance toward independence and a severe blow to colonialism in politics.”); see also Frickey, (*Native*) *American Exceptionalism*, *supra* note 31, at 434 (noting the “antinomy” of a “constitutional democracy that was built on top of the colonial process”).

¹⁰⁷ See President Andrew Jackson, Message to Congress on Indian Removal (Dec. 6, 1830) (transcript available at <https://www.archives.gov/milestone-documents/jacksons-message-to-congress-on-indian-removal#transcript> [<https://perma.cc/8Z7S-V6BZ>]) (“By opening the whole territory between Tennessee on the north and Louisiana on the south to the settlement of the whites it will incalculably strengthen the southwestern frontier It will relieve the whole State of Mississippi and the western part of Alabama of Indian occupancy, and enable those States to advance rapidly in population, wealth, and power. It will separate the Indians from immediate contact with settlements of whites; . . . enable them to pursue happiness . . . under their own rude institutions; . . . and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.”).

¹⁰⁸ See HULSEBOSCH, *supra* note 32, at 5.

¹⁰⁹ See Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 342 (2021); David M. Golove & Daniel J. Hulsebosch, *The Federalist Constitution as a Project*

of nations provided some comparative guidance toward building an internal national government.¹¹⁰ But it mainly provided the structure and contours of the “external” powers that the United States could exercise over others and in interactions with other nations — powers of foreign affairs, treaty, military, war, naturalization, and diplomacy.¹¹¹ This “external” constitutional law developed in conversation with broader discourse around the law of nations — a discourse that justified, empowered, and structured imperial governments.¹¹²

At the Founding, American colonialism was codified with the designation of “Indians” within the Constitution as a “savage” people over whom the United States would exercise power, but within a space of liberal constitutional exception. The Constitution essentially had two faces. One side recognized and preserved the fragmented jurisdictions, legal pluralism, and constitutional variation of Native nations. The other pressed the territorial center toward greater homogeneity, constitutional conformity, and centralized power.

Yet it soon outgrew the boundaries of this early arrangement, quite literally, as both economic concerns and efforts to remove Indians farther from the center grew in the early republic. At each pivotal moment when the United States extended its power over others, it could have invoked the liberal constitutional principles of the center — deliberation, consent, and formal process. At each pivotal moment, the United States turned instead toward its more flexible and capacious external constitutional principles and powers, principles that defined the reach and limit of American colonialism and its constitution over time.

The constitution of American colonialism, although largely overlooked, continues to flourish within this distinctive “external” constitutional space and within the shadow of the Supreme Court’s plenary power doctrine. This constitution deserves deeper exploration and articulation — I can merely scratch the surface here. But I begin by exploring three key moments in its development: the American colonial project focused initially on colonization of “Indians” within the original territorial borders of the United States, then on colonization of both

in International Law, 89 *FORDHAM L. REV.* 1841, 1853 (2021) [hereinafter Golove & Hulsebosch, *The Federalist Constitution*]; David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. REV.* 932, 935 (2010) [hereinafter Golove & Hulsebosch, *A Civilized Nation*].

¹¹⁰ Golove & Hulsebosch, *The Federalist Constitution*, *supra* note 109, at 1841.

¹¹¹ *See id.* at 1842; Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 *COLUM. L. REV.* 835, 846 (2020); Seth Davis et al., *Persisting Sovereignties*, 170 *U. PA. L. REV.* 549, 553–54 (2022).

¹¹² Golove & Hulsebosch, *The Federalist Constitution*, *supra* note 109, at 1869.

Indians and non-Indians outside those borders, and finally on colonization of far-flung, noncontiguous lands.¹¹³

At each of these key moments, legal elites, jurists, and government officials debated the constitutional questions raised by extension of United States jurisdiction over these peoples and lands¹¹⁴: Who are the “We” in “We the People”? What powers do “We” possess over others? How do “We” decide whom to include in our political community and on what terms? At each pivotal moment, these were questions that all too often our forebears, bent on furthering the American colonial project, answered through a form of external constitutionalism rooted in racialized hierarchy. Rather than extend the idealized liberal constitutional principles of the metropole to all lands and peoples governed by the United States, our forebears created convenient exceptions to these liberal principles and instead justified the power to colonize through reasons, principles, and doctrines resting on hierarchy, inspired by the law of nations — most centrally, the Doctrine of Discovery¹¹⁵ rooted in *terra nullius*,¹¹⁶ rights of conquest, as well as the power and duty to civilize “savages.”

The following sections explore the birth and constitution of American colonialism before turning to the twentieth century, when this constitution was further obscured by the rise of “plenary power.”

¹¹³ In focusing on these three particular moments within the constitution of American colonialism, I intend only to draw to the fore the connections and discontinuities between them. In no way do I intend to limit the study of the American colonialism to these moments — nor to these particular forms of violence, direct control, and subordination. One will notice a dearth of discussion of the twentieth and twenty-first centuries (aside from the borderlands constitutional principles that arose from these colonial contexts), as well as a near absence of discussion of “explicitly non-coercive modes of imperial power.” Kramer, *supra* note 37, at 1381. These omissions are born of necessity, and their absence should only highlight the need for broader scholarly conversation on the shape and reach of a field studying the constitution of American colonialism. There is much work to be done. This conversation should draw on the suggestions of Professor Paul Kramer, as I do here, to study the exercise of power within colonialism as it presents itself. *Id.* at 1380–81. Scholars should avoid assuming a “totalized, top-down power,” *id.* at 1378, and reflect also on the various forms of agency afforded by the colonial process — beyond resistance into negotiation and other forms of agency. *Id.* at 1378, 1380–81. The following sections address the development of legal, institutional, and constitutional structure in the making of American colonialism, but highlight the flexibility, contingency, and negotiated nature of this structure. In so doing, I hope to facilitate studies of connections between forms of American colonialism discussed here and those forms that are far more negotiated and potentially even less visible to our current legal and constitutional frameworks — including, but by no means limited to, militarization, the war on terror, economic coercion, and other forms of hegemony.

¹¹⁴ See, e.g., *infra* Part I.A.1, pp. 28–33.

¹¹⁵ See Robert J. Miller, *The Doctrine of Discovery: The International Law of Colonialism*, 5 UCLA INDIGENOUS PEOPLES’ J.L. CULTURE & RESISTANCE 35, 37–41 (2019).

¹¹⁶ See Benjamin A. Coates, *The United States and International Law, 1776–1939*, in A COMPANION TO U.S. FOREIGN RELATIONS 400, 405 (Christopher R.W. Dietrich ed., 2020) (identifying the term “Doctrine of Discovery” as “misleading, as there was no single ‘doctrine,’ and related jurisprudence developed over time,” noting that the title “Doctrine of Discovery” entered use only after 1823, and describing the several elements of the discovery “doctrine” — including *terra nullius* claims of lands “discovered” by civilized nations, followed by occupation or purchase, against Indians who were understood as “heathens” or unable to own property).

A. Constituting American Colonialism

Colonialism requires a tremendous, broad, and adaptive power to acquire, occupy, possess, dominate, and then govern foreign nations and lands.¹¹⁷ The strategies of American colonialism that these powers enabled varied based on the particular context of colonization — contexts that changed across the three pivotal moments explored in the sections that follow.

Initially, American colonialism focused on the colonization of Native nations and Indian Country that existed within the borders set by the Treaty of Paris of 1783¹¹⁸ and further clarified by the Northwest Ordinance in 1787.¹¹⁹ The early phase of American colonialism drew primarily on the Doctrine of Discovery rooted in *terra nullius* to lay sovereign claim to lands held by non-Christians.¹²⁰ These claims allowed the United States to draw its territorial borders around Native nations. The United States would then exercise its sovereign power toward strategies whereby “settler groups” would settle upon the lands of those nations and toward removing or eliminating Native peoples.¹²¹ Violence served as a companion to settlement in the process of colonization, and the United States claimed the lands of others through “conquest.”¹²² In part to facilitate this process, the United States also began the practice of creating “territories” and of governing those territories unilaterally and with the involvement of the military.

Decades after the Founding, the United States extended the American colonial project with the Louisiana Purchase and the colonization of peoples — largely Indians in the North, but also non-Indians in the South — beyond the original borders of the United States.¹²³ The

¹¹⁷ See, e.g., Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847, 849 (2011) (describing imperial countries’ reliance on the power behind “well-recognized procedures and rituals of Discovery [doctrine] to make claims to these territories and over Indigenous peoples”); Kramer, *supra* note 37, at 1371, 1381 (describing how colonial projects require dominance in, among other areas, military and culture). See generally Michael A. Blaakman & Emily Conroy-Krutz, *Introduction*, in *THE EARLY IMPERIAL REPUBLIC: FROM THE AMERICAN REVOLUTION TO THE U.S.-MEXICAN WAR I* (Michael A. Blaakman et al. eds., 2023) (investigating the “multiple forms and registers of imperial power — politics, culture, economy, and imaginaries — as well as their limits, vulnerabilities, unevenness, and failures,” *id.* at 3).

¹¹⁸ See Definitive Treaty of Peace, Gr. Brit.-U.S., art. I, Sept. 3, 1783, 8 Stat. 80 (Treaty of Paris).

¹¹⁹ See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.a (Northwest Ordinance, as codified into U.S. Constitution).

¹²⁰ See Miller, *supra* note 115, at 35, 40–41 (summarizing the Supreme Court’s early application of the doctrines to justify expropriation of land from tribes).

¹²¹ See RANA, *supra* note 31, at 9 (“[T]he basic logic of the early settler wave was not the exploitation of indigenous groups but rather native elimination.”); see also Wolfe, *supra* note 76, at 399–400.

¹²² RANA, *supra* note 31, at 109.

¹²³ *Id.* at 143–44. Several contemporaneously produced surveys of the Louisiana Territory found that the non-Indian settler population was predominantly concentrated in the southern territory, while “many and numerous” Native nations lived along the Missouri River in the northern territory.

expansion raised constitutional controversy — privately and in Congress — over the power of the national government to acquire “foreign territory” and “foreign nations.”¹²⁴ This debate reflected the shift from colonial practices focused on “Indians” to colonial practices that involved “non-Indians” also. The shift raised controversy over whether the national government could colonize non-Indian, but still “foreign,” people; how those foreigners would be governed; and their relationship to the United States. What would the United States do with these foreign peoples who would not be removed or eliminated?

Another pivotal moment of American colonialism began with the colonization of lands and peoples noncontiguous with the United States. This moment again raised constitutional controversy and debate. The recently ratified Reconstruction Amendments promised birthright citizenship and a powerful set of protections to those citizens.¹²⁵ But, by the late nineteenth century, the power and duty of civilized nations to govern uncivilized, racialized people on a path toward self-government was settled dogma. Constitutional debate, as well as the strategies of American colonialism, focused on the varied circumstances of each colonized nation. Certain colonized jurisdictions, Hawai‘i and Alaska, were eventually considered to be amenable to settlement and, thus, on a path to statehood. But many peoples and lands were seen as too far away and “foreign” to the United States. Governing these far-flung jurisdictions required additional power and resources and for an indefinite period, garnering distinctive legal and constitutional arguments.

See 2 FRANÇOIS-XAVIER MARTIN, *THE HISTORY OF LOUISIANA, FROM THE EARLIEST PERIOD 76–77* (New Orleans, A.T. Penniman, & Co. 1829) (contrasting the size of the non-Indian population in the Upper Louisiana Territory (less than 2,000) with the size of the non-Indian population in the Lower Louisiana Territory (over 27,000) in 1785); *id.* at 205 (providing a similar contrast in 1803, noting that only 6,028 of the nearly 50,000 non-Indian inhabitants of the Louisiana Territory lived in the north (for example, in Illinois and St. Louis)); Daniel Clark, *An Account of the Indian Tribes in Louisiana*, in 9 *THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, 1803–1812*, at 62, 64 (Clarence Edwin Carter ed., 1940) (describing the relative size of Native nations in the Lower Louisiana Territory at the time of the Louisiana Purchase, and noting that there were “many & numerous [Native] Nations” living along the Missouri River in the Northern Louisiana Territory); *id.* at 65 (“[T]he traders have been informed that many large navigable Rivers discharge their Waters into [the Missouri River] far above it and that there are many numerous Nations settled on them.”); see also ROBERT WILKINSON, *NORTH AMERICA* (London, Robert Wilkinson 1804), <https://searchworks.stanford.edu/view/10453894> [<https://perma.cc/NE84-ZRGZ>] (illustrating how the Louisiana Purchase extended the original borders of the United States, and noting the enduring presence of Native nations, particularly in the North).

¹²⁴ See Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), in 41 *THE PAPERS OF THOMAS JEFFERSON* 184, 186 (Barbara B. Oberg ed., 2018) (“[T]he constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our union.”).

¹²⁵ U.S. CONST. amends. XIII–XV; see also ERMAN, *supra* note 7, at 12.

I. *Colonization Within the Founding Borders.* — For Frederick Jackson Turner, American colonialism and its ever-moving frontier began in the early eighteenth century, with the gathering of colonial representatives that served as a prelude to revolutionary congresses:

The powers [proposed for the Albany congress of 1754] were, chiefly, the determination of peace and war with the Indians, the regulation of Indian trade, the purchase of Indian lands, and the creation and government of new settlements as a security against the Indians. . . . In this connection may be mentioned the importance of the frontier, from that day to this, as a military training school, keeping alive the power of resistance to aggression, and developing the stalwart and rugged qualities of the frontiersman.¹²⁶

In other words, the United States invaded Indian Country and dispossessed Native nations even before the United States took shape.¹²⁷ The American Revolution was motivated in large part by a desire to dispossess “merciless Indian Savages” of their lands¹²⁸ — that is, in the settler drive to cross over the boundary lines established to protect Indian Country from settlement by Great Britain in the Royal Proclamation of 1763 and extend the United States into the borderlands of the Ohio River Valley, eventually part of the Northwest Territory.¹²⁹ From the earliest days of the United States, illegal settlement and military violence disrupted Native nations and plundered Native lands — violence and dispossession justified, in part, under the “Doctrine of Discovery” rooted in *terra nullius*, a law-of-nations principle that lands held by non-Christian savages were “vacant,” eligible for “discovery” by civilized, Christian peoples, as well as the origins of conquest.¹³⁰

For the Founding generation, power over “Indian affairs,” which encompassed both the power to regulate relationships with Native nations and the power to colonize Indian Country, arose from the

¹²⁶ FREDERICK JACKSON TURNER, *The Significance of the Frontier in American History*, in THE FRONTIER IN AMERICAN HISTORY 6, 17 (1920).

¹²⁷ NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 193–243 (2023).

¹²⁸ See THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776) (“He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”).

¹²⁹ See ROYAL PROCLAMATION OF 1763, https://avalon.law.yale.edu/18th_century/procl1763.asp [<https://perma.cc/9DCC-JUEX>]; BLACKHAWK, *supra* note 127, at 141–42; Alexandria Mayfield, Note, *Generous, Not Just: What Feeds the River of Tribal Despair and Poverty*, 50 TULSA L. REV. 829, 833–34 (2015).

¹³⁰ See Miller, *supra* note 115, at 39–41; Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 509–12 (2011) (describing the consequences of the Doctrine of Discovery for Native nations, as illustrated by a discussion of the landmark decision in *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823)).

Constitution¹³¹ — not from a specific clause but from a holistic reading of the document against a backdrop of public international law.¹³² The “law of nations,” rather than forming a distinctive body of international law separate from domestic constitutional law, included laws that many of the Founding generation presumed were relevant to the Constitution.¹³³ With respect to “Indians,” the text of the Constitution reflected the hierarchies between “civilized” and “uncivilized” peoples in distinguishing between “foreign nations” and “Indian tribes.”¹³⁴ The latter were accorded only partial sovereignty, restricted by the sovereign power of the United States.¹³⁵

Early interpreters of the United States Constitution drew upon this thick Constitution to expand the territorial borders of the United States by laying claim to the lands of colonized peoples, while also extending the “external” constitutional powers of the United States over them. The United States Constitution recognized colonized peoples, “Indians,” as within the territorial borders of the United States and, thus, subject to these external powers.¹³⁶ No doubt, the fledgling United States was clamoring for recognition of its sovereignty on the international stage.¹³⁷ But it could have distinguished its own external constitutional law as it had attempted to do with its internal republican constitution. It could have extended those liberal ideals outward. Native nations could have

¹³¹ Cf. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1021, 1024, 1059 (2015) (arguing that the understanding of federal power over Indian affairs must be understood by looking not only to the Indian Commerce Clause but rather to a “holistic” understanding of views at the time of constitutional drafting, including views held by a diverse set of actors and arguments based on the law of nations and international law).

¹³² See generally *id.*

¹³³ See Gienapp, *supra* note 109, at 347–48; see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 733 (2012) (arguing that numerous “constitutional provisions can only be understood by reference to that body of law [(the law of nations)]” and that “a reasonable member of the Founding generation would have ascertained the details by reference to well-known principles of the law of nations” (footnote omitted)); Sam McMullan, *Recognition, Constitution Building and the Indian Nations of North and Northwest United States 1775–1795: The Importance of Indian Nations to the Framing of the U.S. Constitution*, 10 ALB. GOV’T L. REV. 318, 349 (2017) (describing the centrality of the law of nations to the Founding generation and the impact that its “preoccupation with recognition” had on Indian affairs); Ablavsky, *supra* note 131, at 1059–61 (describing the prominence of principles from the law of nations in postrevolutionary United States); Coates, *supra* note 116, at 403 (describing the “[i]nternational legal considerations” that “figured in the creation of the Constitution,” including the obligation to be a “civilized nation,” which some thought would require “additional [external] powers of government”).

¹³⁴ See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

¹³⁵ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing Native nations instead as “domestic dependent nations”); see also KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS* 3 (2007); *id.* at 6–8 (quoting ROY HARVEY PEARCE, *SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND* 49 (1988)).

¹³⁶ See Golove & Hulsebosch, *A Civilized Nation*, *supra* note 109, at 991–92, 992 n.251; see also U.S. CONST. art. I, § 8, cl. 3.

¹³⁷ See Golove & Hulsebosch, *A Civilized Nation*, *supra* note 109, at 952–53.

been recognized from the very beginning as foreign states existing alongside or even enclosed by, but not within the territorial borders of, the United States.

Instead, the United States Constitution claimed Indian Country as part of its territory, thus subject to the powers of the United States, but as spaces of exception from liberal constitutional values.¹³⁸ This exceptionalism cleared the way for the national government to exercise its more robust and adaptable “external” constitutional powers to build and maintain a distinctive colonial relationship with “Indians,” governed by an entirely different set of values.

In this way, the United States Constitution resembled other constitutions of empire during the same period — taking the form of an octopus, with the head providing one form of government for the colonizing government and arms that extended out from the center into distinctive constitutional forms for each colonized polity. Those who were colonized, Indians, were not part of the central Constitution and its liberal values of limited government, democracy, representation, equality, and consent of the governed. Instead, they were governed by a wholly distinctive constitutional law and constitutional culture. Indians remained foreign to the Constitution but nonetheless governed by the external powers of the United States and the constitution of American colonialism that the United States created.

Yet constitutional power over Indians, even those within the territorial borders of the United States, was presumed to be far more limited at the Founding than it became over the long nineteenth century.¹³⁹ Initially, national power over Indians was limited to regulating the external affairs of those nations.¹⁴⁰ In many ways, this status reflected the weaknesses of the United States itself.¹⁴¹ The national government could assert only the power to prohibit Native nations from forming allegiances with any other European power and from selling land to anyone other than the United States.¹⁴² These limits reflected the overlapping territorial claims of each sovereign, including the United

¹³⁸ This is evident in the language of Article I, Section 8, Clause 3, wherein “Indian Tribes” are named separately of “foreign Nations” in Congress’s power to regulate commerce.

¹³⁹ See Ablavsky, *supra* note 131, at 1075–82 (describing the evolution from the more limited understanding of federal power over Native nations at the time of the Founding to the rise of the plenary power doctrine).

¹⁴⁰ *Id.* at 1059 (describing how federal officials in the Washington administration “framed nearly all issues of Indian affairs . . . through the international law concept of sovereignty”).

¹⁴¹ See generally Ablavsky, *The Savage Constitution*, *supra* note 31 (analyzing the impact that the weakness of the federal government, especially vis-à-vis Native nations, had on the drafting of the Constitution).

¹⁴² See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834*, at 140–41 (1970) (excluding European nations from direct diplomatic relations with Native nations); see also *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574, 587 (1823) (holding that Native nations had occupancy rights to their land but not the “power to dispose of the soil at their own will,” *id.* at 574, because the United States held the “exclusive right to extinguish the Indian title of occupancy,” *id.* at 587).

States's claim to nonintervention, and the resolution of these competing claims through a hierarchy of "civilization."

Critics of European colonization of North America in the sixteenth, seventeenth, and eighteenth centuries drew on Enlightenment philosophies to argue that colonialism violated the rights of Native people to property, as well as the United States's claims to nonintervention.¹⁴³ Indigenous peoples were the original inhabitants of these lands and they had established stable societies. John Locke in his 1690 *Second Treatise on Government* and Emer de Vattel in his highly influential 1758 treatise *The Law of Nations* responded to critics with arguments for exception from the law of nations.¹⁴⁴ Indians were too "savage" or close to a state of nature to form governments capable of being legally recognized, nor could they make claims within the law of nations. Thus, when a conflict arose between the claims of a civilized nation and an uncivilized one, the law of nations would resolve those claims against the colonized.

Such arguments still reflected recognition of the sovereignty and self-determination of uncivilized peoples. This was a pragmatic recognition of the diplomatic and military strength of Native nations during the early period,¹⁴⁵ as well as a reflection of the legal acumen of Native advocates.¹⁴⁶ But, regardless of its source, it was a recognition that held for the early decades and has been reinvigorated again and again over the last two hundred years. It was recognition of tribal sovereignty that limited the United States initially to its foreign affairs powers — diplomacy, treaty, military, or otherwise. The United States could not regulate the internal affairs of colonized peoples. It also could not do so with unilaterally imposed domestic legislation.

Beyond creating a doctrine of colonization for a specific people, "Indians," the United States also began to create distinctive external spaces of colonization that it would call "territories." Territories within the early republic were formed around contested jurisdictions — jurisdictions, like the Northwest Territory, that contained predominantly

¹⁴³ See, e.g., ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY, AND EMPIRE, 1500–2000, at 22 (2014) (describing the Spanish theologian Francisco de Vitoria's argument that Indians had property rights and his criticism of Spanish conquest).

¹⁴⁴ See generally LOCKE, *supra* note 30; EMER DE VATTEL, LE DROIT DE GENS (1758).

¹⁴⁵ See Ablavsky, *The Savage Constitution*, *supra* note 31, at 1003–04 ("When the Constitution was written, powerful Native nations owned and governed much of the territory mapmakers labeled 'United States.'"); see also *id.* at 1078 (describing the United States's resounding defeat at the hands of the western Indian confederacy in 1790 and 1791).

¹⁴⁶ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (acknowledging the quality of Cherokee Nation's legal counsel and the strength of their argument that Cherokee Nation constitutes a foreign state); see also Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 8 (2004) (noting that *Cherokee Nation* was the "result of concerted Cherokee action to protect sovereign rights, by both the Cherokee leadership and the Cherokee people, for whom the briefs were reprinted in the Cherokee Phoenix, the tribal newspaper . . . [and] constructed a vision of complete independence of tribal territory from state jurisdiction and a federal obligation to protect tribal sovereignty").

Indians and Europeans.¹⁴⁷ Even before the drafting of the United States Constitution, the Confederation Congress began the practice of governing the Northwest Territory.¹⁴⁸ Before the Northwest Ordinance in 1787,¹⁴⁹ the area was governed by martial law.¹⁵⁰ Aspects of the Ordinance influenced the United States Constitution.¹⁵¹ But its influence on the development of American colonialism has generally been overlooked.¹⁵²

The Ordinance crafted a civil government for the territory — not elected by the people, but appointed unilaterally by the Congress.¹⁵³ The appointed government would give way to greater and greater forms of representation based on the “free male inhabitants” who settled the territory.¹⁵⁴ Five thousand “free male inhabitants” would result in an elected assembly and one voting delegate in Congress.¹⁵⁵ Settlement of the territory by sixty thousand “free male inhabitants” would culminate in statehood — after Congress reviewed and approved a constitution drafted by territorial residents and after those men petitioned Congress.¹⁵⁶ But representative government was not taken for granted. Instead, the Ordinance included incentives for settlers to settle the region, displacing and dispossessing the Native nations who called the territory their homelands.¹⁵⁷

Governance for the territory, beginning with martial rule and moving toward unilateral, nonrepresentative civil government, was a pattern then repeated throughout the borderlands. In setting this structure the Ordinance later served as a “blueprint for empire.”¹⁵⁸ The Ordinance also implied that the national government had the power to

¹⁴⁷ See Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 658–62 (2018) (describing competing claims to land by Indians and Europeans during the early days of the republic).

¹⁴⁸ PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 45 (Univ. of Notre Dame Press 2019) (1987); see also Ablavsky, *supra* note 147, at 636–44; William Wirt Blume, *Legislation on the American Frontier: Adoption of Laws by Governor and Judges — Northwest Territory 1788–1798; Indiana Territory 1800–1804; Michigan Territory 1805–1823*, 60 MICH. L. REV. 317, 317–19 (1962).

¹⁴⁹ For the original text of the Northwest Ordinance, see 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 334–43 (1787). For the text of the Ordinance with minor amendments after the adoption of the United States Constitution, see Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.a.

¹⁵⁰ See Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1638–41 (2019).

¹⁵¹ See *id.* at 1632 (“The Ordinance’s protections of freedom of worship, private property, and jury trials, and its ban on ‘cruel or unusual punishments,’ all prefigured, sometimes verbatim, the provisions of the Bill of Rights.”); see also *id.* nn.4 & 6 (surveying literature).

¹⁵² See *id.* at 1664.

¹⁵³ Act of Aug. 7, 1789, 1 Stat. at 51 n.a.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 53 n.a.

¹⁵⁷ FRYMER, *supra* note 17, at 9–10.

¹⁵⁸ ONUF, *supra* note 148, at xix.

impose government on peoples and lands within the territorial borders of the United States until the area reached a stage ready for representative government — all seemingly outside of the bounds of the liberal values and limits of the United States Constitution.¹⁵⁹ The American colonial project was underway.

2. *Colonization Beyond the Founding Borders.* — One of the most pivotal moments for American colonialism is often overlooked. It was not in 1789, nor 1868, and involved no muskets, secession, pamphlets, or deliberation. In 1803, congressional ratification of a treaty between the United States and France approved the Louisiana Purchase.¹⁶⁰ The United States acquired “title” to almost 530 million acres of land, nearly doubling the size of the country.¹⁶¹ It was the first time that those borders had changed since the polity had adopted the Constitution¹⁶² — a constitution drafted to govern within the borders negotiated with Britain by the Treaty of Paris¹⁶³ at the end of the Revolution and further settled by the Northwest Ordinance. In this moment, the power to colonize was refined as the constitution of American colonialism extended its reach far beyond the original borders of the United States.

The familiar shape of the United States on maps of North America was not anticipated by the Constitution. At the Founding, the Constitution contemplated a jurisdiction that did not reach west beyond the Mississippi, and maps of this period followed the original borders of the Treaty of Paris.¹⁶⁴ The familiar shape of our lower forty-eight states was crafted later, through a decades-long process begun well

¹⁵⁹ *Id.* at xxviii (describing the Northwest Ordinance as being considered a form of constitutional document in that the term “constitution” was used also by American Revolutionaries to describe “the organic acts — charters, covenants, or compacts — that originally gave political life to their communities”).

¹⁶⁰ Treaty Between the United States of America and the French Republic, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200 [hereinafter Louisiana Purchase].

¹⁶¹ *American Originals: Louisiana Purchase Exhibit*, NAT’L ARCHIVES & RECS. ADMIN. (Mar. 1996), https://www.archives.gov/exhibits/american_originals/loupurch.html [https://perma.cc/Q6DA-8LXJ] (noting that the United States acquired 828,000 square miles of land through the Louisiana Purchase, which is equivalent to 529.9 million acres); see also Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, Or How to Stop Engaging in Conquest*, 10 ALB. GOV’T L. REV. 1, 21–23 (2017) (distinguishing “title” from what the United States legally obtained over Native lands — that is, “a contingent future interest that would never become possessory without the voluntary assent of the Indian nations,” *id.* at 23, or, essentially, the assent by the other European powers not to intervene in the relationship between the United States and those colonized peoples).

¹⁶² See Louisiana Purchase, *supra* note 160, at 202.

¹⁶³ Definitive Treaty of Peace, Gr. Brit.-U.S., Sept. 3, 1783, 8 Stat. 80, 81.

¹⁶⁴ Compare *Results of the Revolutionary War, 1783*, in MCCONNELL’S HISTORICAL MAPS OF THE UNITED STATES (1919), <https://www.loc.gov/resource/g3701sm.gctoo482/?sp=19> [https://perma.cc/86BK-9YNV], with *Western Land Claims, Territorial Organizations, 1783–1812*, in MCCONNELL’S HISTORICAL MAPS OF THE UNITED STATES, *supra*, <https://www.loc.gov/resource/g3701sm.gctoo482/?sp=20> [https://perma.cc/R8XQ-7LML].

after the Founding.¹⁶⁵ That process was filled with discontinuity and constitutional contingency.¹⁶⁶ But the Louisiana Purchase set important precedent.

Altering the original borders of the United States — and increasing its population by thousands — was not without controversy.¹⁶⁷ Power to govern “Indians” and to acquire their lands by treaty arose from the territorial sovereignty of the United States — a power that presumably stopped at the Founding borders.¹⁶⁸ As President, Thomas Jefferson doubted that the national government held the constitutional power to colonize foreign territory or foreign nations, beyond the Founding borders of the United States, without a constitutional amendment¹⁶⁹ — in the case of the Louisiana Territory, lands predominantly governed by non-Indians in the South and Native nations in the North.¹⁷⁰ Amidst negotiations between the United States and France, President Jefferson raised concerns privately that the national government lacked authority to even acquire, by treaty or other means, “foreign territory” or “foreign nations.”¹⁷¹ As Jefferson described, such an acquisition necessarily

¹⁶⁵ See Paul Kens, *A Promise of Expansionism*, in AMERICAN EXPANSION, *supra* note 31, at 139, 141 (describing the acquisition of several large territories in the 1840s following the Louisiana Purchase).

¹⁶⁶ See generally *id.* at 143–49 (discussing debates across multiple administrations regarding the constitutionality of expansion). Scholars who have turned their attention to the period and process by which the United States ultimately reached from sea to shining sea call this process “expansion” and have largely focused on whether the process of expansion was consistent with the original meaning of the Constitution or whether it conflicted with it. See Gary Lawson & Guy Seidman, *The First “Incorporation” Debate*, in AMERICAN EXPANSION, *supra* note 31, at 19, 19–21, 25–26 (arguing that the Louisiana Purchase was constitutional based on an original understanding analysis of Congress’s treaty power). I do not take up these debates over original meaning here.

¹⁶⁷ See Robert Knowles, *The Balance of Forces and the Empire of Liberty: States’ Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 373 (2003).

¹⁶⁸ See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 25 (2004).

¹⁶⁹ Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in 10 THE WRITINGS OF THOMAS JEFFERSON 417, 418 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) (“But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing the intention was not to permit Congress to admit into the Union new States, which should be formed out of the territory for which, and under whose authority alone, they were then acting.”).

¹⁷⁰ See Knowles, *supra* note 167, at 393.

¹⁷¹ See Peter A. Appel, *The Louisiana Purchase and the Lewis & Clark Expedition: A Constitutional Moment?*, in LEWIS & CLARK: LEGACIES, MEMORIES, AND NEW PERSPECTIVES 87, 96–100 (Kris Fresonke & Mark Spence eds., 2004).

relied on implied powers¹⁷² — raising concerns for Jefferson as a “strict constructionist.”¹⁷³

Bringing “foreign” lands into the republican structure of the United States Constitution could dilute the power of the original polity, Jefferson lamented, changing its character entirely.¹⁷⁴ These lands included peoples who were not Indians and, thus, not necessarily excluded from the polity.¹⁷⁵ The treaty with France promised that the “inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution” and would be protected “in the mean time . . . in the free enjoyment of their liberty, property, and the religion which they profess.”¹⁷⁶ If the national government could bring any foreign territory or nation by simple treaty within the republican Constitution, it could presumably leverage treaties or legislation to bring into the union “England, Ireland, Holland.”¹⁷⁷ The United States had only recently shed itself of colonial rule.¹⁷⁸ How could it consent to a constitution that allowed foreign states to join the United States through treaty?¹⁷⁹

¹⁷² See *id.* Congressman Henry Clay made an implied powers argument thusly in the debates over the surveys for roads and canals in the House of Representatives:

Although commerce and revenue were at first very leading motives to the Federal Constitution, are we to limit the Constitution by this rule? Let us remember that then the country had scarcely any interior — there were few settlements, and but few settlers, beyond the Alleghany [sic] Mountain. The whole interior has grown up since the Constitution was adopted — and tho’ this gives no power, yet it may and ought to call forth every dormant power conveyed by that instrument, the exertion of which may tend to the public prosperity.

Henry Clay, Speech on Survey for Roads and Canals (Jan. 30, 1824), in 3 THE PAPERS OF HENRY CLAY: PRESIDENTIAL CANDIDATE, 1821–1824, at 619, 623 (James F. Hopkins & Mary W.M. Hargreaves eds., 1963).

¹⁷³ On Jefferson’s views on strict constitutional interpretation, see Knowles, *supra* note 167, at 362. On Jefferson’s turn away from strict constructionism in regards to the Louisiana Purchase, see TURNER, *supra* note 126, at 26 (“The purchase of Louisiana was perhaps the constitutional turning point in the history of the Republic, inasmuch as it afforded both a new area for national legislation and the occasion of the downfall of the policy of strict construction.”).

¹⁷⁴ See Knowles, *supra* note 167, at 386–89 (discussing the debates within the Jefferson administration over whether the admission of new territory would disrupt the balance of forces among the existing states); see also *id.* at 391 (“Jefferson knew that full incorporation of the entire Louisiana territory ‘would drastically alter the constitutional nature of the Union.’” (quoting FORREST McDONALD, THE PRESIDENCY OF THOMAS JEFFERSON 70 (1976))).

¹⁷⁵ See Letter from Thomas Jefferson to Thomas Paine (Aug. 10, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON, *supra* note 124, at 175, 175–76 (discussing the demographics of the population of the Louisiana Territory and noting that “we have stipulated that the Louisianians [sic] shall come into our union”).

¹⁷⁶ Louisiana Purchase, *supra* note 160, at 202.

¹⁷⁷ Letter from Thomas Jefferson to Wilson C. Nicholas, *supra* note 169, at 418; see also DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 249 (1994).

¹⁷⁸ See Knowles, *supra* note 167, at 412.

¹⁷⁹ Cf. WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803–1807, at 9 (Everett Somerville Brown ed., 1923) (voicing concerns about the Louisiana Purchase by analogizing the admission of Louisiana to the admission of the British provinces or the Republic of France to the United States).

Jefferson prepared multiple drafts of a proposed amendment to the Constitution that would admit the Louisiana territory, provide citizenship and rights to its white inhabitants on “the same footing” as other citizens, and make explicit that a constitutional amendment was required to add any additional states from the newly acquired territory into the union.¹⁸⁰ For Jefferson, the proposed amendments would properly apply the principles of the United States Constitution to resolve concerns raised by the Louisiana Territory. First, they would provide the national government with enumerated power to bring foreign territory and nations into the possession of the United States.¹⁸¹ They would also resolve problems of consent by allowing the original state governments to deliberate over and ratify decisions that could transform the United States fundamentally and potentially dilute their governing power.¹⁸² Finally, the amendments would also clarify the relationship between new lands and peoples and the Constitution.¹⁸³ They would put new “foreign” lands on equal footing with the original territory.¹⁸⁴

But the amendment process envisioned by Jefferson never took place. Instead, arguments for implied powers prevailed,¹⁸⁵ in part over concern that the opportunity to purchase the Louisiana Territory would

¹⁸⁰ Thomas Jefferson, Drafts of an Amendment to the Constitution (July 1803), in 10 THE WORKS OF THOMAS JEFFERSON 3, 3–4 (Paul Leicester Ford ed., 1905).

¹⁸¹ See Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON, *supra* note 124, at 169, 170 (“[O]ur confederation is certainly confined to the limits established by the revolution. [T]he general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, & still less of incorporating it into the Union. [A]n amendment of the constitution seems necessary for this.”).

¹⁸² Senator William Plumer of New Hampshire, for example, voiced significant concerns to President Jefferson, arguing that the Constitution could not be extended to new territory without an amendment and the consent of each of the states. See WILLIAM PLUMER, JR., LIFE OF WILLIAM PLUMER 262 (A.P. Peabody ed., Boston, Phillips, Sampson & Co. 1857). In a conversation with Plumer, Jefferson voiced agreement with this concern. *Id.* at 262–63. Jefferson also appears to have voiced similar hesitations to other advisors in the months preceding the Senate’s ratification of the treaty for the Louisiana Purchase. See Letter from Thomas Jefferson to William Dunbar (July 17, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON, *supra* note 124, at 73, 73 (“[Congress] will be obliged to ask from the people an amendment of the constitution authorising their receiving [sic] this province into the union, & providing for it’s [sic] government.”).

¹⁸³ See Letter from Thomas Jefferson to Benjamin Austin, Jr. (July 18, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON, *supra* note 124, at 83, 83 (discussing the need for “an amendment of the constitution adapted to the case” of the inhabitants of Louisiana).

¹⁸⁴ See Letter from Thomas Jefferson to Levi Lincoln (Aug. 30, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON, *supra* note 124, at 289, 290 (“On further consideration as to the amendment to our constitution respecting Louisiana I have thought it better . . . to give them the same powers they have as to other portions of the Union generally, and . . . [to place them] on the same footing with other citizens of the US.”).

¹⁸⁵ See José P. Laurel, *What Lessons May Be Derived by the Philippine Islands from the Legal History of Louisiana*, 2 PHILIPPINE L.J. 8, 16–20 (1915) (discussing the debates between the Federalists and the Republicans over the admission of the Louisiana Territory and how the Republicans’ theory of the power to admit new lands and peoples into the Union as a right “inherent to independent sovereignty,” *id.* at 20, ultimately prevailed).

be lost.¹⁸⁶ Pragmatism pushed Jefferson away from the principles and process that governed the Constitution and toward a constitutionalism that allowed for quotidian treaty law — treaties formed with “civilized” governments, like the French, only — to incorporate borderlands and restrict citizenship by race.¹⁸⁷ Rather than opening a deeper dialogue about the relationship between these new lands and the United States Constitution,¹⁸⁸ the Senate quietly ratified the treaty with France for the Louisiana Purchase,¹⁸⁹ which brought the lands and people into a constitutionally ambiguous relationship with the United States.

The Louisiana Territory illustrates the difficulties of engaging with and resolving the constitutional questions surrounding expansion and the incorporation of foreign peoples, lands, and governments.¹⁹⁰ The peoples of the New Orleans Territory had been governed by Spanish and French imperial rule and had a “long subjection to a form of government very different from our own,” as one commentator put it.¹⁹¹ Yet, decisions still needed to be made about what to do with the Louisiana Territory. What power did the national government have to occupy and govern the Louisiana Territory? How would they alter the character and distribution of power in a nation to which the original polity had consented?

¹⁸⁶ See Letter from Thomas Jefferson to Robert Smith (Aug. 23, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON, *supra* note 124, at 245, 245 (“There is reason to apprehend that the government of France, perhaps not well satisfied with it’s [sic] late bargain with us, will sieze [sic] any pretext which can be laid hold of, to annul the treaty.”); see also Sanford Levinson & Bartholomew H. Sparrow, *Introduction*, in AMERICAN EXPANSION, *supra* note 31, at 1, 9–10 (discussing the decision not to pursue the constitutional amendment process); MAYER, *supra* note 177, at 248–51.

¹⁸⁷ See Letter from Thomas Jefferson to Levi Lincoln, *supra* note 184, at 290 (“Louisiana, as ceded by France to the [U.S.,] is made a part of the [U.S.]. [I]t’s [sic] white inhabitants shall be citizens, and stand, as to their rights & obligations, on the same footing with other citizens of the U.S. in analogous situations.”).

¹⁸⁸ Jefferson himself ultimately encouraged his advisors to remain silent on the issue of constitutionality in order to ensure the ratification of the treaty. See, e.g., Letter from Thomas Jefferson to Robert Smith (Aug. 23, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON, *supra* note 124, at 245, 245 (“[I]t is best that as little as possible be said as to the Constitutional difficulty; and that on that Congress do [what] is necessary without any explanation.” (second alteration in original)); Letter from Thomas Jefferson to Levi Lincoln, *supra* note 184, at 290 (“[T]he less is said about any constitutional difficulty, the better: and that it will be desirable for Congress to do what is necessary, *in silence*.” (footnote omitted)).

¹⁸⁹ S. EXEC. J., 8th Cong., 1st Sess. 450 (1803) (ratifying the treaty with France with twenty-four yeas and seven nays).

¹⁹⁰ John Quincy Adams, for example, continued to criticize the Louisiana Purchase as an assumption of implied power for years to come. See 5 MEMOIRS OF JOHN QUINCY ADAMS 364–65 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875) (describing the Louisiana Purchase as “an assumption of implied power greater in itself and more comprehensive in its consequences than all the assumptions of implied powers in the twelve years of the Washington and Adams Administrations put together”). For more discussion of the controversy that followed the Louisiana Purchase, see generally Knowles, *supra* note 167, at 399–401.

¹⁹¹ EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803–1812, at 106 (1920).

Rather than resolve these lofty constitutional controversies through republican constitutional principles, Congress supported unbridled executive and military power, martial law, and force. On October 31, 1803, Congress passed a bill allowing the President to “take possession of, and occupy” the lands and people designated in the treaty with France and enabling him to use “any part of the army and navy” to facilitate the occupation and possession.¹⁹² The bill authorized the executive branch to exercise and direct “all the military, civil and judicial powers, exercised by the officers of the existing government.”¹⁹³ Critics called efforts to occupy and possess the Louisiana Territory unilaterally “a complete despotism” not authorized by the Constitution.¹⁹⁴ Congress deflected the attack by framing the bill to occupy and possess the Louisiana Territory as a stopgap measure.

Five months later, President Jefferson signed into law “An Act erecting Louisiana into two territories, and providing for the temporary government thereof.”¹⁹⁵ As titled, the law split the lands ceded by France into jurisdictions — Orleans, located below the thirty-third north latitude line,¹⁹⁶ which later became the border between Arkansas and Louisiana;¹⁹⁷ and Louisiana above.¹⁹⁸ For Louisiana, the Act established a civil, but unrepresentative, government.¹⁹⁹ The Territory of Orleans was to include an executive branch headed by a governor and secretary of the territory, legislative powers vested in the governor and in a legislative council of thirteen members, and a judicial branch.²⁰⁰ But none of these officials would be elected by the residents of the Territory. Instead, the President of the United States would appoint the Governor, Secretary, and legislative council with the advice and consent of the Senate.²⁰¹ The legislative council would then create the judiciary and the President would appoint judges.²⁰² Federal oversight of this

¹⁹² Act of Oct. 31, 1803, ch. 1, § 1, 2 Stat. 245, 245. My thanks to Professor Joseph Singer for raising the point that this statute provides further evidence that the United States did not hold “title” to the lands, but merely a right to conquer or colonize lands and peoples without French interference.

¹⁹³ *Id.* § 2, 2 Stat. at 245.

¹⁹⁴ 13 ANNALS OF CONG. 1063 (1804) (statement of Rep. Campbell).

¹⁹⁵ An Act Erecting Louisiana into Two Territories, And Providing for the Temporary Government Thereof, ch. 38, 2 Stat. 283 (1804).

¹⁹⁶ *Id.* § 1, 2 Stat. at 283.

¹⁹⁷ S. Charles Bolton, *Jeffersonian Indian Removal and the Emergence of Arkansas Territory*, 62 ARK. HIST. Q. 253, 260 (2003).

¹⁹⁸ An Act Erecting Louisiana into Two Territories, And Providing for the Temporary Government Thereof § 12, 2 Stat. at 287.

¹⁹⁹ *See id.* (preserving the governance structure from the Northwest Ordinance in the northern territory of Louisiana); *see also* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.a. (outlining a civil, initially unrepresentative, government).

²⁰⁰ An Act Erecting Louisiana into Two Territories, And Providing for the Temporary Government Thereof §§ 2–5, 2 Stat. at 283–84.

²⁰¹ *Id.* § 6, 2 Stat. at 284.

²⁰² *Id.* §§ 5–6, 2 Stat. at 284.

portion of the Louisiana Territory, governed by non-Indians, would ease the distinctive political and legal culture gently toward republicanism and statehood.²⁰³

The northern portion of the Louisiana Territory, governed predominantly by Native nations, was subject to the “blueprint for empire” established by the Northwest Ordinance.²⁰⁴ North of the thirty-third parallel, the Act extended the structures originally established for the remnants of the Northwest Territory, then termed the Indiana Territory.²⁰⁵ The Governor of the Indiana Territory would establish and oversee territorial courts and would facilitate the establishment of a militia to control settlement.²⁰⁶ An earlier draft of the Act contained the provision that the form of military government established by President Jefferson would continue, but with the primary military leaders replaced by civil servants.²⁰⁷ A few Senators had raised concerns that the “military despotism” of the proposed government was a violation of the treaty with France, promising the protection of non-Indian inhabitants.²⁰⁸ Objections rested on violation of treaty law, rather than liberal constitutional principle, and focused on the protection of non-Indians.²⁰⁹

It was difficult to argue for a republican constitutional rule — temporary or not — that allowed unilateral executive and military power. Concerns were met with arguments that the Constitution of the center simply did not apply to “foreign” lands and peoples,²¹⁰ the same arguments that had long justified European colonialism writ large. One Senator argued for the power to govern Louisiana by conquest.²¹¹ Others, including the territorial Governor appointed by Jefferson, argued that the residents of Louisiana were “next to a state of nature” and

²⁰³ BROWN, *supra* note 191, at 106 (explaining the view that “the representative element” of the U.S. government could “be introduced gradually and progressively” in the territory).

²⁰⁴ ONUF, *supra* note 148, at xix.

²⁰⁵ An Act Erecting Louisiana into Two Territories, And Providing for the Temporary Government Thereof § 12, 2 Stat. at 287.

²⁰⁶ *Id.*

²⁰⁷ Jefferson’s original proposal for the Act included a provision transferring the “paramount powers” exercised by former governors to the new governor appointed by the President. See Thomas Jefferson, Bill for the Organization of the Orleans Territory (Nov. 23, 1803) (on file with the National Archives), <https://founders.archives.gov/documents/Jefferson/01-42-02-0027> [<https://perma.cc/5G44-9TSR>]. When a later iteration of this provision came up for debate in the Senate, a majority agreed that this clause would establish a kind of military government in the Upper Louisiana Territory and ultimately voted to strike it. BROWN, *supra* note 191, app. at 227–30.

²⁰⁸ See BROWN, *supra* note 191, app. at 227–29 (referencing a statement by Senator Worthington on February 1 and statements by Senators Hillhouse, Anderson, and Pickering on February 2, 1804); see also Carl Evans Boyd, *Our Government of Newly Acquired Territory*, THE ATLANTIC, Dec. 1898, at 735, 737.

²⁰⁹ See BROWN, *supra* note 191, app. at 229.

²¹⁰ *Id.* at 69.

²¹¹ *Id.* app. at 229 (statement of Sen. Dayton) (“That Country is a purchased territory and we may govern it as a conquered one.”). See generally Miller, *supra* note 115; Robert J. Miller, *American Indians, The Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329 (2011).

unable to participate in republican self-government.²¹² These foreign territories required a “doctrine” whereby they must “pass through varying stages of progress before definite privileges were granted to them.”²¹³

Despite vigorous objections, unelected governors ruled the territory that became Louisiana for nine years²¹⁴ and, for portions of the territory more heavily populated with Indians (such as Oklahoma), for nearly a century.²¹⁵ Senator Joseph Anderson argued that the power to govern the Louisiana Territory was “derived from the constitution,” which required a “republican government” and “no other.”²¹⁶ Then-Senator John Quincy Adams was critical of President Jefferson’s decision to abandon calling for a constitutional amendment.²¹⁷ Adams continued to call for an amendment that gave the power to Congress to receive the lands and people of Louisiana after applying to those peoples for their consent.²¹⁸ Without these steps, Adams argued, Congress was guilty of creating “a Colonial system of government” for the first time — a step that would set “bad precedent” for the American colonial project, a project that the United States was sure to move forward and where “precedents are therefore important.”²¹⁹

Studying closely the moment of the Louisiana Purchase reveals the possible paths that the constitution of American colonialism could have taken, as well as the path ultimately charted: the United States could have invoked a process of constitutional amendment for each new territory. Each new state would have been offered consent, participation, and inclusion. For those who dissented, the United States could have recognized these peoples and their governments as independent. The aim of some to chart an empire of liberty, rather than simply a colonial

²¹² BROWN, *supra* note 191, at 106.

²¹³ *Id.* at 105.

²¹⁴ See An Act for the Admission of the State of Louisiana into the Union, And to Extend the Laws of the United States to the Said State, ch. 50, § 1, 2 Stat. 701, 703 (1812) (admitting Orleans to the Union as a state under the name of Louisiana).

²¹⁵ The borders of Indian Territory, which later became Oklahoma, were created by the Intercourse Act, ch. 161, § 1, 4 Stat. 729, 729 (1834). Territorial governance ended in 1907, following the enactment of the Oklahoma Enabling Act of 1906, ch. 3335, 34 Stat. 267 (codified as amended at 16 U.S.C. §§ 151, 153).

²¹⁶ BROWN, *supra* note 191, app. at 228 (statement to the Senate by Senator Anderson).

²¹⁷ 13 ANNALS OF CONG. 67 (1803) (statement of Sen. Adams); see also BROWN, *supra* note 191, at 30–31, 46 (referencing Senator Adams’s interactions with other governmental officials in pushing for a constitutional amendment).

²¹⁸ BROWN, *supra* note 191, at 30 (“It made a Union totally different from that for which the Constitution had been formed. It gives despotic power over territories purchased. It naturalizes foreign nations in a mass. It makes French and Spanish laws a large part of the laws of the Union. It introduced whole systems of legislation abhorrent to the spirit and character of our institutions, and all this done by an administration which came in blowing a trumpet against implied power. After this, to nibble at a bank, a road, a canal, the mere mint and cummin of the law was but glorious inconsistency.”).

²¹⁹ *Id.* app. at 234 (quoting Senator Adams from a statement to the Senate on February 18, 1804).

empire could have been better realized.²²⁰ The colonized periphery could have been included in the constitutionalism of the center — and those who dissented would not have been colonized. Instead, the history of American colonialism reveals a process that strengthened the colonial constitution by reinforcing the exception and distinctive constitutionalism of the periphery.²²¹

The Louisiana Purchase, as Adams had feared, set “bad precedent.”²²² The United States repeated the process again and again as it expanded across North America.²²³ It began by asserting the power to acquire “foreign territory” and “foreign nations,”²²⁴ then it turned to martial rule,²²⁵ followed by nonrepresentative government for a term of indefinite years.²²⁶ Only when the territory was deemed assimilated — through the process of settlement and following years and even decades of unilateral federal government — would the Congress approve the petition for admission as a state.²²⁷

The constitution of American colonialism resolved difficult questions of dispossession, incorporation, assimilation, and then statehood through the claim that the Constitution of the center did not apply to

²²⁰ See, e.g., *id.* app. at 233 (referencing statements by Senator Adams on February 18, 1804, opposing the bill for the governance of Louisiana and advocating for “consent” to governance and “the essential principles of genuine liberty”).

²²¹ See, e.g., Cleveland, *supra* note 29, at 255–56 (stating that Jefferson “invoked necessity not to justify the Louisiana Purchase’s constitutionality, but to explain the constitutional violation”).

²²² BROWN, *supra* note 191, app. at 234.

²²³ See also Levinson & Sparrow, *supra* note 186, at 13 (noting that the Purchase “led to the creation of an ‘American Empire’”).

²²⁴ See BROWN, *supra* note 191, at 88 (noting a position held by some representatives that “Congress . . . have a power in the Territories, which they cannot exercise in States, and the limitations of power, found in the Constitution, are applicable to States and not to Territories” (internal quotation marks omitted)); see also *id.* at 65, 196 (discussing U.S. land acquisitions of “foreign territory” and “foreign nations”); Robert J. Miller, *Agents of Empire: Another Look at the Lewis and Clark Expedition*, 64 OR. ST. BAR BULL. 35, 35–36 (2004) (discussing Jefferson’s use of the Doctrine of Discovery).

²²⁵ See Ablavsky, *supra* note 150, at 1638.

²²⁶ When it came to the governance of the acquired territories, Jefferson proposed an arrangement by which he would appoint a governor and three judges with the power to introduce the rights of American citizenship piecemeal — “by degrees as they find practicable without exciting too much discontent.” Letter from Thomas Jefferson to Albert Gallatin (Oct. 29, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON 274, 275 n.1 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1897) (further correspondence from Jefferson to Gallatin dated November 9, 1803). The irony is that “Jefferson, who had drawn up the Declaration of Independence . . . [was] planning a form of government in which the people to be governed were to have no voice whatever.” BROWN, *supra* note 191, at 97.

²²⁷ See Cleveland, *supra* note 29, at 196 n.1322 (“Taney also acknowledged that the United States could acquire territory with inhabitants unfit for immediate statehood and govern it as a territory ‘until it was settled and inhabited by a civilized community capable of self-government.’” (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 448 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV)).

the periphery.²²⁸ To the extent that reasons were provided at all, this process was rooted in a view that certain peoples were too foreign or too primitive to engage in self-government.²²⁹ Thus, the character of the colonized peoples themselves, like Indians, demanded a distinctive constitutionalism.

Outside of Indian Country, the constitution of American colonialism was largely accepted as temporary.²³⁰ In the main, settlement of these areas by U.S. citizens, predominantly white, would bring these lands under the auspices of the Constitution.²³¹ The presence of racialized and non-English-speaking communities across the West required variation in colonial strategies.²³² Federal oversight and territorial government in these areas became a process through which “foreign” communities could be overwhelmed by settlement, assimilated, or destroyed.²³³

The national government withheld statehood from certain territories and instead governed nonwhite, non-Anglophone, and non-Protestant states for longer periods than others in order to “civilize” them into the Union. Louisiana Territory lands, acquired in 1803, became the State of Oklahoma over one hundred years later in 1907.²³⁴ In 1912, New

²²⁸ See *id.* at 250 (explaining that within the territorial borders of the United States, the powers of the national government were limited, but beyond, the constitutional limit of enumerated powers fell away to allow broad federal authority over aliens and territories).

²²⁹ See *id.* at 178 (explaining that “[t]he Constitution’s inapplicability [to the territories] was often justified by nativist views regarding the . . . inhabitants’ incapacity for self-governance,” with members of Congress arguing that the Catholic “French and Spanish inhabitants [were] ‘next to a state of nature’”).

²³⁰ See Letter from Thomas Jefferson to DeWitt Clinton (Dec. 2, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 282, 283 (describing the populace of the territories to be “as incapable of self government as children”); see also WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, *supra* note 179, at 111 (statement of Sen. Samuel Smith of Maryland) (“Those people are absolutely incapable of governing themselves, of electing their rulers or appointing jurors. As soon as they are capable & fit to enjoy liberty & a free government I shall be for giving it to them.”); Cleveland, *supra* note 29, at 178 (stating that Jefferson did not argue for the populace to “be kept in second-class status indefinitely”).

²³¹ See FRYMER, *supra* note 17, at 10.

²³² Settler-colonial strategies included allotment, or the settlement of land; assimilation; and civilization — all of which operated in tandem. See FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 52–53 (1984).

²³³ See Cleveland, *supra* note 29, at 210 (noting the United States’s history of assimilation with “[t]he Louisiana Purchase and the acquisitions of Texas, New Mexico, and California from Mexico[, which] involved the incorporation of French, Hispanic, and mulatto populations with different religions, cultures, languages, and legal traditions”).

²³⁴ *Id.* at 64 n.409. Native nations in the Indian Territory drafted and ratified a constitution in 1905, and a vast majority of Native territorial residents approved the constitution and a petition for statehood. ROBERT L. TSAI, AMERICA’S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY 152–84 (2014). The statehood movement acted in the shadow of federal threats to terminate recognition of tribal governments in the territory. But the proposed state still reflected yet another path forward. The petitioned-for state would have been named Sequoyah, after the Cherokee Nation citizen who developed the Cherokee language syllabary, had Congress not denied the petition and annexed the Indian Territory in 1906. See ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 162–65 (1968).

Mexico and Arizona were the last two states to be admitted to the Union before Hawai‘i and Alaska, even though the territory was acquired in 1848,²³⁵ pursuant to the Treaty of Guadalupe Hidalgo.²³⁶ The federal government governed this area as a territory for nearly eighty years, despite at least one petition for statehood.²³⁷ Hawai‘i and Alaska were similarly delayed in admission to statehood — the latter governed as a territory for nearly one hundred years²³⁸ and the former for more than fifty.²³⁹

3. *Colonization of Noncontiguous Territory.* — Historians often refer to the period beginning with the “island land grab”²⁴⁰ of 1898 until 1912 as the “age of imperialism” in U.S. history.²⁴¹ This narrow view

²³⁵ *Territories to Statehood, The Southwest: Topics in Chronicling America*, LIBR. CONG., <https://guides.loc.gov/chronicling-america-southwest-territories> [<https://perma.cc/8M9J-8AN9>].

²³⁶ Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., art. 8, Feb. 2, 1848, 9 Stat. 922.

²³⁷ See Cleveland, *supra* note 29, at 210 n.1405 (“The predominance of Spanish-speaking Mexican Americans in New Mexico led to Arizona’s rejection of a proposal that the two territories be admitted as a single state and delayed New Mexico’s admission until 1912.”); Kristina M. Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 610 (2022) (“The concern that the citizens of the New Mexico Territory were too ‘foreign’ — even though those that were born in the territory were United States citizens at birth — demonstrates the implicit, and sometimes explicit, culture of white supremacy concerning the admission of new states to the Union.” (footnote omitted)).

²³⁸ See *Purchase of Alaska, 1867*, U.S. DEP’T ST., OFF. HISTORIAN, <https://history.state.gov/milestones/1866-1898/alaska-purchase> [<https://perma.cc/K2VR-5F22>].

²³⁹ See *The Last Time Congress Created a New State*, NAT’L CONST. CTR. (Mar. 12, 2023), <https://constitutioncenter.org/blog/the-last-time-congress-created-a-new-state-hawaii> [<https://perma.cc/PWV6-VZEA>] (“In January 1959, Alaska became the 49th state, which accelerated the Hawaii statehood process. On March 11, 1959: the Senate voted 75–15 in favor of the Admissions Act, with the House approving the same bill in a 323 to 89 vote on March 12, 1959.”). Hawai‘i had been a territory since 1900, *Annexation of Hawaii, 1898*, U.S. DEP’T ST., <https://2001-2009.state.gov/r/pa/ho/time/gp/17661.htm> [<https://perma.cc/R9QL-NDDW>], and the first bill for Hawaiian statehood was introduced in Congress in 1920, HAW. STATEHOOD COMM’N, HAWAII STATE ARCHIVES I (1947–59).

²⁴⁰ GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 319 (David M. Kennedy ed., 2008); cf. Peter Calvert, *The Future United States Role in Latin America*, 37 INT’L J. 76, 78 (1981) (“What got the United States a bad name was not just the exercise of power but the disproportionately small size of those against whom the power was being used.”).

²⁴¹ See, e.g., ENCYCLOPEDIA OF THE AGE OF IMPERIALISM, 1800–1914, at xxxv (Carl C. Hodge ed., 2007). U.S. imperialism also did not end in 1912, when historians generally mark the end of the “age of imperialism” by the United States. For one, the United States continued its project of overseas colonial expansion well into the twentieth century. In 1917, it obtained the Virgin Islands pursuant to a treaty with Denmark — again, without the consent of island residents. See *id.* at 179. Following World War II, the United States took possession of a range of Pacific islands that it occupied during the war to stave off Japanese invasion of the islands. See, e.g., MANSEL G. BLACKFORD, PATHWAYS TO THE PRESENT: U.S. DEVELOPMENT AND ITS CONSEQUENCES IN THE PACIFIC 127–63 (2007) (discussing the United States’s enduring presence in Okinawa after the end of World War II). Beyond overseas expansion, the United States also remains an imperial power, and it has continued to exercise its power to civilize the island nations it colonized into the twentieth and twenty-first centuries. See, e.g., H.R. Con. Res. 130, 31st Leg. (Haw. 2022) (describing the state-sanctioned prohibition against the Hawaiian language in schools in Hawai‘i into the late twentieth century).

overlooks domestic expansion and the colonization of Native peoples indigenous to North America.²⁴² But the late nineteenth century was a period when the constitution of American colonialism reemerged in elite public discourse. Acquisition of Puerto Rico, the Philippines, and Guam in 1898²⁴³ spurred yet another round of debate over the constitutional authority, as well as the wisdom, behind the acquisition of overseas colonies.²⁴⁴

By 1899, theories of “civilization” and the racialized hierarchies underlying those theories had risen to the level of dogma.²⁴⁵ Scholars of constitutional law moved toward a sharper division between “external” and “internal” constitutionalism. But the external constitution, born and raised in the context of colonialism and civilization discourse, continued to inflect these debates. Over the long nineteenth century, the national government exercised power to colonize outside the original territorial borders of the United States with the Louisiana Purchase²⁴⁶ and beyond, reaching toward far-flung, noncontiguous colonies like Alaska and the island borderlands.²⁴⁷ All along, officials drew upon — and contributed to — nineteenth-century international colonial discourses that developed around “civilization” and the power and duty to “civilize” others. Shortly after the acquisition of the Louisiana Territory, for example, the United States carved out “savages” from previously presumed universal liberal principles and rights, creating a vision of constitutionalism toward outsiders rooted in racism and racial hierarchy that took hold domestically and abroad.²⁴⁸

Over the nineteenth century, the relative equality and collaborative nature of the law of nations between all sovereigns — including Native nations — gave way to this hierarchy. It placed European and European-descent nations at a higher level than “savage” nations and

²⁴² Professor Christina D. Ponsa-Kraus has noted that this view overlooks the “practices of boundary management” that the United States used to initiate overseas territorial expansion much earlier in the mid-nineteenth century. See Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779, 782 (2005).

²⁴³ Cleveland, *supra* note 29, at 165.

²⁴⁴ These debates even surfaced in symposia hosted by such esteemed publications as the *Harvard Law Review* and *Yale Law Journal*. See *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616, 1617–19 (2017) (summarizing key early works in the *Harvard Law Review* discussing the territories); see also, e.g., Paul R. Shipman, *Webster on the Territories*, 9 YALE L.J. 185, 185 (1900).

²⁴⁵ MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 127–36 (2001).

²⁴⁶ Louisiana Purchase, *supra* note 160.

²⁴⁷ See, e.g., Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539 (1867) [hereinafter Treaty of Cession] (acquiring the territory of Alaska from Russia); Joint Resolution of July 7, 1898, 30 Stat. 750, 750 (1898) (providing for annexation of the Hawaiian Islands to the United States).

²⁴⁸ DEBORAH A. ROSEN, *BORDER LAW: THE FIRST SEMINOLE WAR AND AMERICAN NATIONHOOD* 146–47, 151 (2015).

gave them increasingly greater power over the internal governance of savages. As European nations, along with the United States, colonized densely populated urban centers, the law of nations followed with a commensurate duty to govern and civilize those savages toward self-government. It was the duty to colonize and civilize that the United States drew upon yet again to shape American colonialism in the late nineteenth century. During the same period as the “island land grab,” the national government intervened deeply into the lives, families, and homes of Native people during the Reservation Era, unilaterally violated treaties during allotment,²⁴⁹ and ended the formal treaty-making period with Native nations.²⁵⁰

These philosophies, as well as the experience of over one hundred years of American colonialism, informed the positions of those debating the constitutional status of the island borderlands. They did not spring whole cloth from the great minds at Harvard and Yale Law Schools. But these minds did help to resolve a particular post-Reconstruction colonial puzzle. The progress of American colonialism confronted a new challenge following ratification of the Reconstruction Amendments and, particularly, the Fourteenth Amendment in 1868 with its promise of birthright citizenship.²⁵¹ Indians were, of course, carved out from this promise²⁵² with the inclusion of “subject to the jurisdiction thereof.”²⁵³ But the colonization of non-Indian peoples raised the specter that the citizenship and, thus, the constitution of the center would extend to the children of colonized peoples.²⁵⁴

Professor James Bradley Thayer may have personally opposed colonization of the territories.²⁵⁵ But he also made clear in the pages of the *Harvard Law Review* that, although contested, American colonialism remained visible, and central, to constitutional theorists.²⁵⁶ “Petty judicial interpretations” of the document were too narrow.²⁵⁷ The external constitution, to Thayer, provided colonial power over the islands.²⁵⁸ Would birthright citizenship extend? Thayer again drew on the broader constitution, particularly the example of Indians, to answer “no” — Congress had long controlled the citizenship status of colonized peoples.²⁵⁹

²⁴⁹ BLACKHAWK, *supra* note 127, at 335.

²⁵⁰ *Id.* at 351.

²⁵¹ ERMAN, *supra* note 7, at 12.

²⁵² *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (quoting *McKay v. Campbell*, 16 F. Cas. 161, 167 (D. Or. 1871) (No. 8,840)).

²⁵³ *Id.* at 98.

²⁵⁴ ERMAN, *supra* note 7, at 12.

²⁵⁵ James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 464–65 (1899).

²⁵⁶ *See id.* at 467.

²⁵⁷ *Id.* at 469.

²⁵⁸ *Id.* at 467 (“Let me at once and shortly say that, in my judgment, there is no lack of power in our nation, — of legal, constitutional power, to govern these islands as colonies . . .”).

²⁵⁹ *Id.* at 471.

Would not this constitution conflict with the constitution of the center and its principles of popular sovereignty? Again, Thayer answered “no.”²⁶⁰ Colonialism had never been “un-American.”²⁶¹ External constitutionalism operated according to its own principles. Drawing upon the “entire recent history of England and of the United States,” Thayer argued that “colonial administration” was “one of the most admirable contrivances for the improvement of the human race and their advancement in happiness and self-government.”²⁶² Territorial governance and the British imperial constitution, Thayer stressed, meant that the “territories are, and always have been, colonies, dependencies”²⁶³ and that “[t]here is no essential difference between them and the leading colonies of England, except that England does not, and would not dare to exercise as full a control over her chief colonies as we do over ours.”²⁶⁴

Professor Christopher Columbus Langdell joined Thayer in arguing for a distinctive constitutionalism between the center and its colonies — in particular, he drew a distinction between the “United States” acting as an empire over territory and the “United States” as a union of states.²⁶⁵ But his approach to the Constitution differed from Thayer’s in ways not unexpected for the father of the modern case method. Langdell derived his theory of a distinctive internal and external constitutionalism from an exhaustive study of the uses of “United States” within the text of the Constitution,²⁶⁶ coupled with a broader study of the document, constitutional practice, and judicial precedent.²⁶⁷ For the states, Langdell determined that the written, republican Constitution would govern.²⁶⁸ But the Constitution also created national political branches that were “sovereign” and could exercise that sovereignty outside the several states²⁶⁹ — a term nowhere mentioned within the Constitution.

Colonialism — or the assertion of sovereignty by the U.S. political branches over others — was, according to Langdell, within the power of a sovereign; it did not extend the principled limitations of the Constitution of the center to the periphery.²⁷⁰ Instead, Langdell offered

²⁶⁰ See *id.* at 474–75.

²⁶¹ *Id.* at 474.

²⁶² *Id.* at 475.

²⁶³ *Id.* at 473.

²⁶⁴ *Id.* at 473–74.

²⁶⁵ See Christopher Columbus Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 368–71 (1899).

²⁶⁶ See, e.g., *id.* at 367, 372–76.

²⁶⁷ See, e.g., *id.* at 368–71, 377–78.

²⁶⁸ *Id.* at 371.

²⁶⁹ See *id.* at 379–80.

²⁷⁰ *Id.* at 388 (“[A]s all the limitations imposed upon the United States by the Constitution have reference primarily to the States, and owe their existence primarily to the fact that the sovereignty over the territory of each State is divided between the State and the United States, there is a strong

that the application of constitutional limits on power exercised externally should be determined by looking to constitutional text, on a case-by-case basis, with reference to whether those limitations were intended to apply to colonized peoples.²⁷¹ To do otherwise, Langdell feared, would be to impose constitutional principles that would be a poor fit with the peoples colonized by the United States, which “would furnish as striking a proof of our unfitness to govern dependencies, or to deal with alien races, as our bitterest enemies could desire.”²⁷²

In contrast, Judge Simeon Baldwin, who also served as a professor at Yale Law School, and Carman Fitz Randolph²⁷³ argued against the existence of a permanent and unprincipled external constitutionalism. They both argued that central constitutional principles must, eventually, apply to the periphery.²⁷⁴ But the differences in position between Professors Thayer and Langdell and Judge Baldwin and Randolph have been overstated. Judge Baldwin interrogated colonialism only of a certain kind: should the process of colonization reach toward civilization of a colonized community — and, thus, necessarily face some form of temporal limit — or could the United States colonize people permanently to gain economic or military advantage?²⁷⁵ It was only the latter power with which Baldwin took issue.²⁷⁶ With respect to the former, he found no constitutional objection to the United States acquiring territory, occupying foreign lands, subjecting them to military government, and imposing whatever form of government it “may think proper,” until “the inhabitants may be fit to govern themselves.”²⁷⁷ Baldwin counseled that some constitutional limits should apply to the form of unilaterally imposed government, but he gestured approvingly to the decades-long territorial government of New Mexico where “the character and traditions and laws of a Latin race are still so deeply stamped upon her people and her institutions.”²⁷⁸

Randolph alone took a stance against a distinctive external constitutional framework for the territories. The Constitution and its promise of birthright citizenship could ultimately extend to the children of

presumption that such limitations have no application to territory which is subject to no State sovereignty, and in which the United States can exercise all the power which can be exercised within a State either by the State or by the United States . . .”).

²⁷¹ See *id.* at 377.

²⁷² *Id.* at 386.

²⁷³ Randolph was a graduate of Harvard Law School and had recently published a legal treatise on the law of eminent domain. See generally CARMAN F. RANDOLPH, *THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* (Fred B. Rothman & Co. 1991) (1894).

²⁷⁴ Simeon E. Baldwin, *Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 404–05 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 304 (1898).

²⁷⁵ Baldwin, *supra* note 274, at 409 (“To acquire, of course, is one thing, and to keep, another.”).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 411.

²⁷⁸ *Id.*

millions of colonized peoples once the war power to govern temporarily ran out.²⁷⁹ But Randolph did not oppose an external, unprincipled constitution for everyone within the territory. Rather, Randolph suggested that birthright citizenship in the Philippines could be staved off by classifying as many Filipinos as possible as “Indians,”²⁸⁰ providing for treating the Filipino people as “wards” without birthright citizenship.²⁸¹ Randolph’s suggestion was never explicitly embraced. But U.S. officials, including the first military governor of the Philippines and its first civil governor, William Howard Taft, implemented similar civilizing policies abroad as they had within Indian Country — most notably, the residential boarding school system.²⁸² Many also continue to assume that the Birthright Citizenship Clause does not extend to territorial residents, like “Indians.”²⁸³

The received wisdom is that Professor Abbott Lawrence Lowell carried the debate, in that he eventually won the favor of the Supreme Court with his “Third Way” view.²⁸⁴ This Third Way argued that colonies that were “incorporated” were subject to the Constitution of the center.²⁸⁵ Colonies that were “unincorporated” were subject to the constitution of American colonialism.²⁸⁶ Lowell’s distinction between “incorporated” and “unincorporated” territories arose in a concurrence from a fractured Court in *Downes v. Bidwell*,²⁸⁷ the first of the so-called *Insular Cases*²⁸⁸ that determined the constitutional status of Puerto Rico and other islands colonized by the United States in the “island land

²⁷⁹ See Randolph, *supra* note 274, at 309–10, 313.

²⁸⁰ *Id.* at 309.

²⁸¹ *Id.*

²⁸² Oli Charbonneau, *Logics of Immersion: Lake Mohonk and the U.S. Colonial Boarding School*, in *GLOBAL PERSPECTIVES ON BOARDING SCHOOLS IN THE NINETEENTH AND TWENTIETH CENTURIES* 213, 222–23 (Daniel Gerster & Felicity Jensz eds., 2022); Benito M. Vergara, Jr., “The Real Filipino People”: *Filipino Nationhood and Encounters with the Native Other*, in *THE “OTHER” STUDENTS: FILIPINO AMERICANS, EDUCATION, AND POWER* 19, 22–23 (Dina C. Maramba & Rick Bonus eds., 2013).

²⁸³ This assumption holds today as the federal courts continue to assert that the *Insular Cases* resolved the question of birthright citizenship for the territories without ever actually addressing the issue. Ponsa-Kraus, *supra* note 87, at 2514–16.

²⁸⁴ *Developments in the Law — The U.S. Territories*, *supra* note 244, at 1619–20. See generally Abbott Lawrence Lowell, *The Status of Our New Possessions*, 13 HARV. L. REV. 155 (1899).

²⁸⁵ Lowell, *supra* note 284, at 171.

²⁸⁶ *Id.* at 176 (concluding that “territory may be so annexed as to make it a part of the United States, and that if so all the general restrictions in the Constitution apply to it . . . ; but that possessions may also be so acquired as not to form part of the United States, and in that case constitutional limitations, such as those requiring uniformity of taxation and trial by jury, do not apply”).

²⁸⁷ 182 U.S. 244 (1901).

²⁸⁸ See generally *id.*; *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); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901).

grab”²⁸⁹ of the late nineteenth century.²⁹⁰ A firm majority later adopted the distinction in full.²⁹¹

But the received wisdom understates the overall influence of nineteenth-century liberal thinking on the development of external constitutionalism — thinking that had shifted to accommodate changes in global colonialism during the late eighteenth to early nineteenth centuries. During this period, colonialism shifted from a focus on settlement of vast, “empty” landscapes like that of North America, Australia, and New Zealand, and moved to accommodate colonial domination of densely populated urban centers in Asia and Africa.²⁹² Among those to offer theories justifying the power of colonization through domination of developed areas was liberal philosopher and employee of the East India Company, John Stuart Mill.²⁹³ Mill argued for the power and even the duty to civilize.²⁹⁴ Only civilized peoples could appreciate liberty.²⁹⁵ As for the savage, the civilized owed them a duty to govern through an unrepresentative colonial bureaucracy that would put them on a path toward “a higher stage of improvement.”²⁹⁶

The received wisdom also understates the influence of domestic colonial practice in setting the terms of the external constitution for overseas colonialism. In the *Insular Cases*, Justice Brown drew on the Louisiana Purchase in his influential opinion in *Downes v. Bidwell*.²⁹⁷ The Louisiana Purchase stood for the principle that sustained the acquisition of new lands outside the original borders of the United States and the theory that those lands would be governed by Congress as “territories” external to the United States.²⁹⁸ Justice Brown went on to

²⁸⁹ HERRING, *supra* note 240, at 319.

²⁹⁰ *Downes*, 182 U.S. at 287 (holding that Puerto Rico is a “territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution”).

²⁹¹ See, e.g., *Hawaii v. Mankichi*, 190 U.S. 197, 202 (1903); *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922).

²⁹² See Daniel R. Headrick, *The Tools of Imperialism: Technology and the Expansion of European Colonial Empires in the Nineteenth Century*, 51 J. MOD. HIST. 231, 231 (1979) (describing the various explanations for the change in focus of European colonialism to “the eastern hemisphere”).

²⁹³ Abram L. Harris, *John Stuart Mill: Servant of the East India Company*, 30 CANADIAN J. ECON. & POL. SCI. 185, 185 (1964).

²⁹⁴ See JOHN STUART MILL, *CIVILIZATION* (1836), reprinted in 18 COLLECTED WORKS OF JOHN STUART MILL 117, 127 (John M. Robson ed., 1977).

²⁹⁵ Cf. *id.* at 122 (“The savage cannot bear to sacrifice, for any purpose, the satisfaction of his individual will. His ‘social cannot even temporarily prevail over his selfish feelings, nor his impulses’ bend to his calculations.”).

²⁹⁶ John Stuart Mill, *Of the Government of Dependencies by a Free State*, in 19 COLLECTED WORKS OF JOHN STUART MILL, *supra* note 294, at 562, 567. These principles of liberalism, otherwise deemed universal, required a carve-out for colonialism based on the status of “development” for each polity. *Id.* at 562–79.

²⁹⁷ See *Downes v. Bidwell*, 182 U.S. 244, 251–55 (1901) (opinion of Brown, J.).

²⁹⁸ *Id.* at 251, 255, 279–80 (describing the history of the Louisiana Purchase as precedent, as well as the ability to acquire territory and for Congress to govern it).

describe the territory power as “general and plenary”²⁹⁹ — including the ability to impose structures of government that would normally violate the provisions of the Constitution itself and to withhold citizenship from territorial residents deemed too foreign to assimilate.³⁰⁰ Justice Brown asserted, and the Supreme Court later held, that the Constitution did not automatically extend to “foreign countries” unless the Congress formally extended it by statute.³⁰¹

Finally, the received wisdom further overstates the role of the Supreme Court relative to the Executive and Congress in setting the terms of American colonialism.³⁰² The Executive and Congress had long practiced overseas colonization according to the external constitutional principles of civilization, the Doctrine of Discovery, and the law of nations generally. In 1856, driven by the demand for guano — bird droppings used as a key ingredient in manure — Congress passed the Guano Islands Act.³⁰³ The Act and gunpowder gave U.S. citizens the power to take possession for the United States of any “island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government.”³⁰⁴

Although these earlier efforts at overseas territorial expansion focused on jurisdictions that did not have permanent residents, Congress still inflected the power to colonize overseas territories with the same nascent nineteenth-century “law of nations” doctrines that had justified colonialism generally through racialized hierarchies of “civilization” and “self-government.”³⁰⁵ Drawing upon the Act, the United States provided its citizens power to “discover” and take possession of Navassa — an island forty miles off the coast of Haiti and claimed by its government — in 1857.³⁰⁶ Secretary of State Lewis Cass directed the United

²⁹⁹ *Id.* at 268 (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890)).

³⁰⁰ *Id.*; see also *id.* at 251 (stating that the Fourteenth Amendment’s provision of citizenship is limited “to persons born or naturalized in the United States which is [therefore] not extended to persons born in any place ‘subject to their jurisdiction’”).

³⁰¹ See *id.* at 270–71.

³⁰² See generally ERMAN, *supra* note 7, at 40 (describing the legal theory that motivated executive limitation of Puerto Rican citizenship and rights as derived from the work of Elihu Root, President McKinley’s Secretary of War, who drew on precedent from “consular courts, ships on the high seas, occupied lands, the guano islands, the District of Columbia, former and current territories, Mormons, slaves, the Chinese, other immigrants, free people of color before the Civil War, and American Indians”).

³⁰³ Ch. 164, 11 Stat. 119 (1856) (codified at 48 U.S.C. §§ 1411–1412, 1414–1419).

³⁰⁴ See *id.* § 1. And thereby make that “island, rock, or key” “appertain[.]” to the United States. *Id.*

³⁰⁵ See, e.g., Ablavsky, *supra* note 131, at 1059, 1061–67 (describing how the “law of nations yielded mixed results for Natives” because it “could be a sword as well as a shield, interpreted by Anglo-Americans to limit as well as protect Native sovereignty,” *id.* at 1059).

³⁰⁶ Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2394–95 (2022).

States Navy to defend the island from Haitian forces,³⁰⁷ because the United States barely recognized Haiti as an independent nation until 1864.³⁰⁸ Haiti was, of course, a nation created by a successful revolution of enslaved Black peoples against France — which recognized the independent nation of Haiti decades earlier in 1804.³⁰⁹ The United States refused to recognize Haiti on the grounds that it was governed by peoples deemed unable to self-govern and, thus, undeserving of self-government.

In 1898, the United States relied explicitly on the external constitutional power to civilize to justify the occupation, possession, and domination of the newly autonomous nation of Puerto Rico. The United States military invaded Puerto Rico with 15,000 troops as part of the Spanish-American War.³¹⁰ Spain had colonized Puerto Rico for hundreds of years until Puerto Ricans brought a successful campaign for autonomy in the late nineteenth century.³¹¹ The colonial uprising seen across Puerto Rico, Cuba, and the Philippines “was an empire-wide revolt by Spain’s colonial subjects.”³¹² Puerto Ricans had elected their

³⁰⁷ *Id.* at 2410–11 (referencing *Jones v. United States*, 137 U.S. 202, 218 (1890) (quoting in its entirety Secretary Cass’s proclamation)).

³⁰⁸ *Id.* at 2412; *see also* Treaty of Amity, Commerce, and Navigation, And for the Extradition of Fugitive Criminals, Between the United States of America and the Republic of Hayti, Haiti-U.S., Nov. 3, 1864, 13 Stat. 711.

³⁰⁹ Deklarasyon Endependans Ayiti [Haitian Declaration of Independence] (1804) (on file with the U.K. National Archives), <https://images.nationalarchives.gov.uk/cdn/thenationalarchives/previews/58/8ba8192dce116cfa9239f3cd5f9775e2/2/c15046712e588af89b8d87e19dde7703/17179.jpg> [<https://perma.cc/BC9G-WTGG>]. *But see* Blocher & Gulati, *supra* note 306, at 2410 n.104 (noting that France imposed dependent state-like obligations on Haiti for decades after Haiti nominally achieved independence, including the repayment of a debt of 150 million francs, the “price of independence”).

³¹⁰ *See* Michael González-Cruz, *The U.S. Invasion of Puerto Rico: Occupation and Resistance to the Colonial State, 1898 to the Present*, 25 *LATIN AM. PERSPS.* 7, 9 (1998). As the United States invaded Puerto Rico, it also invaded Guam in June of 1898 — an invasion that was mistaken by Spanish soldiers as a symbolic and friendly salute of an arriving ship, because they had not been in regular communication with their Spanish colonial rulers and had not been informed of the war with the United States. *See* ROBERT F. ROGERS, *DESTINY’S LANDFALL: A HISTORY OF GUAM 102–04* (rev. ed. 2011). Spain similarly “ceded” its sovereignty over Guam to the United States pursuant to the 1898 Treaty of Paris, which included also the cession of sovereignty over Puerto Rico. *See* Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris of 1898]. The United States saw Guam as a means to take possession of broader island territory — most immediately the Philippine Islands — and, in the months following the 1898 Treaty of Paris, the United States occupied and took possession of dozens of additional islands in the Pacific. *See* GEORGE C. HERRING, *THE AMERICAN CENTURY AND BEYOND: U.S. FOREIGN RELATIONS, 1893–2015*, at 21 (2008). This “island land grab” included Samoa and the Kingdom of Hawai‘i, as well as several jurisdictions without permanent residents. *See id.*

³¹¹ *See* HARRY FRANQUI-RIVERA, *SOLDIERS OF THE NATION: MILITARY SERVICE AND MODERN PUERTO RICO, 1868–1952*, at 1, 6–9, 28 (2018).

³¹² IMMERWAHR, *supra* note 7, at 72.

own local government in 1897.³¹³ Months later, the United States invaded the island, which Spain “ceded” to the United States in the 1898 Treaty of Paris.³¹⁴ The United States paid \$20 million to Spain to acquire the Philippines — whereas Puerto Rico and Guam cost nothing.³¹⁵ The United States quickly replaced the autonomous Puerto Rican government with martial law and then a unilateral civil government.³¹⁶

The military occupation, ongoing governance, and assertion of jurisdiction over Puerto Rico as a “territory” of the United States resembled its “blueprint for empire,” as well as practices of territorial government established during western expansion. Occupation, possession, and governance of Puerto Rico was justified by a rule that presumed distinct powers of the national government with respect to “uncivilized” peoples as opposed to civilized nations.³¹⁷ Viewing the treaty with Spain ceding sovereignty over Puerto Rican lands and people as the legal vehicle that brought those lands and peoples into the territory of the United States presumes that the civilized nation of Spain could speak for the people of Puerto Rico. No doubt the occupation, possession, and efforts to civilize Puerto Rico comported with theories of liberal constitutionalism that were, at the time, inflected with self-interested justifications for colonialism, including racialized hierarchy.³¹⁸ But we should not presume the domestication and constitutionalization of these doctrines as a foregone conclusion.

One can imagine an alternative path wherein the United States governed these areas consistent with the principles and ideals of the United States Constitution. A constitutional amendment to bring Puerto Rico into the Union could have clarified the reach and power of the national government, set the terms of its relationship to the Union, and provided the people of Puerto Rico with the power to set the terms of their inclusion. Puerto Rico’s political leadership advocated immediately for

³¹³ In response to Puerto Rican resistance, Spain granted Puerto Ricans self-governing powers under the Carta Autonómica in 1897, with the first elections held in March of 1898. See FRANQUIRIVERA, *supra* note 311, at 28–29.

³¹⁴ Treaty of Paris of 1898, *supra* note 310, art. II.

³¹⁵ *Id.* art. III.

³¹⁶ See Luis Martínez-Fernández, *Puerto Rico in the Whirlwind of 1898: Conflict, Continuity, and Change*, 12 ORG. AM. HISTORIANS MAG. HIST. 24, 26 (1998) (“Between October 1898 [following the Treaty of Paris] and May 1900 three military governors ruled over Puerto Rico On 1 May 1900 a civilian colonial government was finally in place under the provisions of the Foraker Act.”); Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C.) (establishing a civil government in Puerto Rico).

³¹⁷ See sources cited *infra* notes 383–91; see also ERMAN, *supra* note 7, at 40 (describing Secretary of War Root’s position that Puerto Ricans should be denied rights and citizenship because of their racial inferiority).

³¹⁸ See, e.g., Ponsa-Kraus, *supra* note 87, at 2455 (describing the constitutional solution to the occupation of Puerto Rico as a “judicial innovation designed for the purpose of squaring the Constitution’s commitment to representative democracy with the Court’s implicit conviction that nonwhite people from unfamiliar cultures were ill-suited to participate in a majority white, Anglo-Saxon polity”).

citizenship within the United States and statehood as a form of autonomy.³¹⁹ Spain merely ceded its own power to govern the lands and peoples of Puerto Rico by treaty, and United States constitutional principles, if not constitutional text, required some measure of participation from those over whom the United States intended to govern.³²⁰ Constitutional questions over the reach and limits of national power, as well as the terms of inclusion of strangers within our constitutional order, could have been answered with deliberation and debate inclusive of the views of the peoples living in the annexed territory.

Instead, the United States invaded a number of independent and autonomous island borderlands and has governed their peoples unilaterally for decades.³²¹ Puerto Rico was offered neither the dignity of a civilized nation under the law of nations, nor the fundamental rights and privileges of civilized people. The Supreme Court held that, outside of those rights deemed “fundamental” by the courts, Congress had the power to decide piecemeal which aspects of the Constitution applied to “foreign” lands³²² as the political branches exercised unlimited power to govern those lands.³²³ The *Insular Cases* and the doctrines they codified³²⁴ continue to structure the colonial relationship between our island borderlands and the United States today.

B. The Rise of the “Plenary Power Doctrine”

It was only in the twentieth century, following World War I and definitively after World War II, that the external constitution that fostered American colonialism began to fade from view.³²⁵ Before the twentieth century, foreign affairs and external powers of constitutionalism were contained within studies and treatises of constitutional law.³²⁶ In the early twentieth century, discourses of civilization began to fade against a growing recognition of cultural pluralism and the failure of

³¹⁹ See Christina Duffy Ponsa, *When Statehood Was Autonomy*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 1, 3–6 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

³²⁰ Cf. ERMAN, *supra* note 7, at 1–2 (discussing the principles of “near-universal citizenship, expanded rights, and eventual statehood,” *id.* at 2, affirmed by the Reconstruction Amendments).

³²¹ See *infra* section II.A.1, pp. 72–77.

³²² See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922) (citing *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138, 145 (1904)); *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (opinion of Brown, J.) (“[T]he Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct.”).

³²³ See cases cited *supra* note 322. See generally T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 16 (2002) (analyzing the development of plenary power doctrines in the areas of immigration, Indian law, and the territories at the end of the nineteenth century).

³²⁴ See *infra* notes 381–87 and accompanying text.

³²⁵ See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999).

³²⁶ *Id.* at 4 n.3; Sitaraman & Wuerth, *supra* note 88, at 1900 (identifying the shift of “foreign affairs” from constitutional law to international law).

“civilization” projects — projects that reflected their own forms of barbarism.³²⁷ The formative shift from natural law to legal positivism in the twentieth century,³²⁸ challenged but not halted by this barbarism, further obscured the constitution of American colonialism. A constitution that was unwritten and drew from the language and principles of the law of nations was no longer visible to courts and lawmakers looking solely within the “four corners” of the document for fundamental law and fundamental principles. Nonetheless, the American colonial project continued, as did constitutional conversation and contestation within the borderlands.

Within the courts, the constitution of American colonialism was replaced by the plenary power doctrine and constitutional silence. The courts had developed doctrines in the nineteenth century that referenced explicitly principles and logics drawn from the law of nations to justify American colonialism.³²⁹ The Court reasoned from these principles and logics that the power to civilize others rested “plenary power” in the political branches and, thus, demanded great deference.³³⁰ In the twentieth century, the logic of the plenary power doctrine continued, while the principled reasons for the deference were abandoned. Soon, the

³²⁷ Tamás Hoffmann, *The Concept of the Standard of Civilization in International Law* 10–11 (MTA Law Working Papers, Paper No. 4, 2016), <https://jog.tk.hu/en/mtalwp/the-concept-of-the-standard-of-civilization-in-international-law> [<https://perma.cc/VQ9J-6RNA>]; David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT’L L. 137, 138 (2001); Prasenjit Duara, *The Discourse of Civilization and Decolonization*, 15 J. WORLD HIST. 1, 3 (2004); NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* 9 (Eric Dunning et al. eds., Edmund Jephcott trans., rev. ed. 2000) (offering a history of civilization of Western Europe written from the perspective between two world wars); Stephen Mennell & Johan Goudsblom, *Introduction* to NORBERT ELIAS, *ON CIVILIZATION, POWER, AND KNOWLEDGE: SELECTED WRITINGS* 1, 3 (Stephen Mennell & Johan Goudsblom eds., 1998) (“The theory of civilizing processes, far from being a celebration of the Western way of life, was developed out of Elias’s urgent need to understand how the thin veneer of what people had come to think of as ‘civilization’ came to cover and disguise the powerful forces of conflict and violence not far beneath the surface of even such a seemingly stable constitutional state as Germany had appeared to be in Elias’s school days under the Kaiser.”); see also LOUIS D. BRANDEIS, *TRUE AMERICANISM* 11–12 (1915) (“On the other hand, the aristocratic theory as applied to peoples survived generally throughout Europe. It was there assumed by the stronger countries that the full development of one people necessarily involved its domination over another, and that only by such domination would civilization advance. Strong nationalities, assuming their own superiority, came to believe that they possessed the divine right to subject other peoples to their sway; and the belief in the existence of such a right ripened into a conviction that there was also a duty to exercise it. The Russianizing of Finland, the Prussianizing of Poland and Alsace, the Magyarizing of Croatia, the persecution of the Jews in Russia and Rumania, are the fruits of this arrogant claim of superiority; and that claim is also the underlying cause of the present war. The movements of the last century have proved that whole peoples have individuality no less marked than that of the single person; that the individuality of a people is irrepressible, and that the misnamed internationalism that seeks the obliteration of nationalities or peoples is unattainable.”).

³²⁸ See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 600 (1958).

³²⁹ See *infra* notes 346–72 and accompanying text.

³³⁰ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (quoting *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)).

plenary power doctrine resembled the Court's approach to political questions — deference, rooted in presumed visions of institutional competence.³³¹ The doctrine also expanded, unsurprisingly, to a range of areas of external constitutional powers that had previously been inflected by similar civilization discourse and hierarchical forms of the law of nations.³³² In this way, the plenary power doctrine operated as a fig leaf for the judiciary to allow the constitution of American colonialism to continue without the need for justification and public reason — previously articulated external constitutional principles were no longer publicly palatable.³³³

However, American colonialism continues today, as do debates over the reach and limits of power over colonized peoples. These conversations have always been predominantly located in the political branches, where Native and other colonized peoples have long advocated to shape the reach and limits of the American colonial project. But the plenary power doctrine further isolated these conversations from the courts. Over the course of the twentieth century and into the twenty first, Native nations and other colonized peoples have generally experienced success in reshaping the constitution of American colonialism toward self-determination, even when those discourses fell out of favor within international law.³³⁴ Thus, limits to American colonialism grew, even as the United States expanded the reach of its global imperial power well into the twentieth and twenty-first centuries, all through the exercise of its seemingly unprincipled plenary powers.

I. Plenary Power as “Doctrine.” — In outlining an early version of the plenary power doctrine, Chief Justice Marshall famously described in *Cherokee Nation v. Georgia*³³⁵ that “[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.”³³⁶ Whether Chief Justice John Marshall was correct in 1831 that the relationship between Indians and the United States was “unlike any other two people in existence” is open to fair debate. But he is certainly wrong today. Instead, the relationship between Indians and the United States resembles in many ways the relationships that the United States and other empires have established with a variety of colonized peoples.

³³¹ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (reasoning that political questions are “outside the courts’ competence and therefore beyond the courts’ jurisdiction”).

³³² See *Cleveland*, *supra* note 29, at 10–11.

³³³ See *supra* note 327 and accompanying text.

³³⁴ See, e.g., ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION* 178–80 (2019).

³³⁵ 30 U.S. (5 Pet.) 1 (1831).

³³⁶ *Id.* at 16. Indians and the United States were not “foreign” to one another in the sense of two foreign nations. Instead, the relation between Indians and the United States “is marked by peculiar and cardinal distinctions which exist no where else.” *Id.*

This colonial resemblance is especially pronounced in the way that the Supreme Court constitutes the power of the United States to colonize others. The Court has taken great pains to articulate again and again the seemingly scattered, ad hoc, and incoherent nature of American colonialism³³⁷ and to replicate that incoherent nature in its reasoning — Puerto Rico is a “commonwealth” governed by the Territory Clause,³³⁸ Native nations are domestic dependent nations governed by the Indian Commerce Clause,³³⁹ and the Philippines is now wholly independent.³⁴⁰ But similarities are difficult to deny when we look closely at who governs whom in the context of colonialism.

The power that the United States claims to exercise over Indians — that is, to unilaterally govern them — is a power the United States claims over all colonized jurisdictions, and the manipulation of sovereignty is common in colonial governance. Chief Justice Marshall may have been correct that Indians have a wholly sui generis relationship with the United States in that they have formed hundreds of treaties³⁴¹ — each with a variety of terms³⁴² — and that those treaties structure the colonial relationship. But these treaties are not the source of the power of the United States to colonize. The origins and logics of the United States’s power to govern the peoples it colonizes are controversial and ambiguous.³⁴³ But the existence of this power is not. Not only have Congress and the Executive repeatedly exercised the power to colonize over the last two hundred years, but the Supreme Court also continues to place its stamp of approval upon this power so frequently and

³³⁷ Judicial amnesia to American colonialism was not limited to the nineteenth century. Justice Blackmun writing for the Supreme Court in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), similarly observed “that Puerto Rico occupies a relationship to the United States that has no parallel in our history.” *Id.* at 596. By then, Justice Blackmun was certainly mistaken. Even the most generous interpretation of Justice Blackmun’s statement founders. He could have meant that Puerto Rico was sui generis as a commonwealth. But so too was the Philippines before its independence.

³³⁸ See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022).

³³⁹ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18; Ablavsky, *supra* note 131, at 1053.

³⁴⁰ See Treaty of General Relations, Phil.-U.S., July 4, 1946, 61 Stat. 1174. Terms like “commonwealth” and “domestic dependent nation,” like “Indian,” are contested and shifting legal categories that are best defined in the context of doctrine, regulation, and practice. In that light, I do not attempt to offer a singular definition here.

³⁴¹ See Kevin Gover, *Nation to Nation: Treaties Between the United States and American Indian Nations*, AM. INDIAN, Summer/Fall 2014, at 36, 36–37 (“Approximately 368 treaties were negotiated and signed by U.S. commissioners and tribal leaders (and subsequently approved by the U.S. Senate) from 1777 to 1868.” *Id.* at 37.).

³⁴² See Stacy Leeds, *Indian Treaty Making: A Native View*, in 1 TREATIES WITH AMERICAN INDIANS: AN ENCYCLOPEDIA OF RIGHTS, CONFLICTS AND SOVEREIGNTY 5, 9 (Donald L. Fixico ed., 2008).

³⁴³ See Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 521 (2007) (“The Indian Affairs Power is far more difficult to locate in the Constitution than the War Power. Three main theories have served to provide sources for this plenary Indian Affairs Power.”); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 878 (1990).

predictably that scholars have declared it a doctrine and titled it “plenary power.”³⁴⁴

Today, the Supreme Court envisions the “plenary power” of colonization as political, culminating in federal common law and not constitutional law, and it struggles to articulate principled limits and logics to the power.³⁴⁵ But that was not always the case. From the Founding, lawmakers and other government leaders drew principles from the law of nations, Doctrine of Discovery, rights of conquest, and the power and duty of civilization to justify Native dispossession. In three cases in the early 1820s and the early 1830s, the Supreme Court legitimized these principles.³⁴⁶ These opinions, all drafted by Chief Justice Marshall, known as the “Marshall Trilogy,” were described as the foundation of federal Indian law by Felix Cohen, father of modern Indian law.³⁴⁷ The Marshall Trilogy explicitly cited Vattel’s *The Law of Nations* in *Worcester v. Georgia*³⁴⁸ and rested the status of Native nations as diminished “domestic dependent nations” in part upon Lockean descriptions of Native people as scattered hordes — too uncivilized to claim a right to self-government equal to other civilized nations and too dispersed to claim rights to the territory of North America.³⁴⁹ The Court held that the existence of the power to colonize was beyond the jurisdiction of the Court to correct.³⁵⁰ Yet, however racist and hierarchical, the law of nations still offered principles by which the Court could resolve controversies. Rather than defer entirely, the Court resolved questions

³⁴⁴ See Fletcher, *supra* note 343, at 521; David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1579 (1996); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840) (describing Congress’s power over the Territories and public lands as “without limitation”); *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 93 (1909) (“In view of the plenary power of Congress under the Constitution over the territories of the United States, . . . there can be no doubt that an act of Congress undertaking to regulate commerce in . . . the territories of the United States would necessarily supersede the territorial law regulating the same subject.”).

³⁴⁵ See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1627–29 (2023).

³⁴⁶ See *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).

³⁴⁷ See, e.g., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.03[4][a], 15.03 (Nell Jessup Newton ed., 2017) [hereinafter COHEN’S HANDBOOK]; see also David P. Weber, *United States v. Lara — Federal Power Couched in Terms of Sovereignty and a Relaxation of Prior Restraints*, 83 N.D. L. REV. 735, 738 (2007).

³⁴⁸ 31 U.S. (6 Pet.) 515, 561; see also *Cherokee Nation*, 30 U.S. (5 Pet.) at 53.

³⁴⁹ See *M’Intosh*, 21 U.S. (8 Wheat.) at 567 (“[Indians] remain in a state of nature, and have never been admitted into the general society of nations.” (footnote omitted) (citing *Penn v. Lord Baltimore* (1750) 27 Eng. Rep. 1132, 1133; 1 Ves. Sr. 444, 445; LOCKE, *supra* note 30)); see also Davis et al., *supra* note 111, at 550 (describing the detailed language used by Chief Justice Marshall in *Worcester* as derived particularly from law-of-nations discourse of the day).

³⁵⁰ See *M’Intosh*, 21 U.S. (8 Wheat.) at 588 (“Conquest gives a title which the Courts of the conqueror cannot deny . . .”).

of competing sovereignties³⁵¹ and jurisdiction³⁵² and famously intervened against the state of Georgia and a defiant President Andrew Jackson.³⁵³

The Supreme Court also continued to track evolutions in the principles and logics of the power of American colonialism over the long nineteenth century — for better or for worse. The Trilogy was a prequel to the more full-throated power to colonize articulated by Chief Justice Roger Brooke Taney in *United States v. Rogers*³⁵⁴ and fully embraced by the legislative and executive branches in the late nineteenth century.³⁵⁵ Unsurprisingly, Chief Justice Taney's opinion in *Rogers* reflected the growing racial hierarchy at the heart of the evolving constitution of American colonialism. The power to colonize derived from the "discovery" of "Indians" on lands treated by European governments as though they "had been vacant and unoccupied."³⁵⁶ Rather than depicting Indians as uncivilized, non-Protestant savages, the Court described them as an "unfortunate race" over whom the United States exercised its civilizing power benevolently.³⁵⁷ These doctrines, undeniably racist, still offered the Court principles by which it could resolve controversies. The Cherokee Nation did not see itself in racialized terms.³⁵⁸ The case involved a man who argued that his naturalization into the Cherokee Nation made him an "Indian."³⁵⁹ But the Supreme Court did — holding that "a white man" of "the white race" could never be an Indian.³⁶⁰

The Supreme Court offered its most articulate early vision of the "plenary power doctrine" in the 1886 case of *United States v. Kagama*³⁶¹ — a case that notably predated by only a few years the

³⁵¹ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18.

³⁵² See *M'Intosh*, 21 U.S. (8 Wheat.) at 588.

³⁵³ See *Worcester*, 31 U.S. (6 Pet.) at 560–61. Upon hearing of the decision, President Jackson is infamously reported to have said, "Well: John Marshall has made his decision: now let him enforce it!" Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. HIST. 519, 519 (1973).

³⁵⁴ 45 U.S. (4 How.) 567, 572 (1846).

³⁵⁵ See Bethany R. Berger, "Power Over this Unfortunate Race": *Race, Politics and Indian Law* in *United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 2016–18 (2004); Blackhawk, *supra* note 27, at 1831–33; see also *United States v. Kagama*, 118 U.S. 375, 378–80 (1886) (upholding congressional authority to pass laws of general criminal jurisdiction over Indians); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (upholding Congress's ability to abrogate its own Indian treaties).

³⁵⁶ *Rogers*, 45 U.S. (4 How.) at 572.

³⁵⁷ *Id.*

³⁵⁸ See *id.* at 571.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 573.

³⁶¹ 118 U.S. 375 (1886); *id.* at 384.

invasions of Puerto Rico,³⁶² Guam,³⁶³ and the Philippines³⁶⁴ by the United States. There, Justice Miller wrote for a unanimous Court and reasoned that Congress possessed plenary power to establish criminal laws unilaterally for Indian Country.³⁶⁵ This power, Justice Miller wrote, did not necessarily arise from a particular clause in the Constitution, but instead from the “right of exclusive sovereignty” that the national government may exercise over its possessions.³⁶⁶ The power arose from the particular relationship between the United States and “semi-independent”³⁶⁷ Indian tribes that were “wards of the nation,” “pupils,” and “local dependent communities.”³⁶⁸ Indians were “a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided,”³⁶⁹ but “[t]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, [was] necessary to their protection.”³⁷⁰ However problematic, these principles still provided some limit. *Kagama* recognized the power of Congress to colonize. But *Kagama* followed closely on the heels of a predecessor case, *Ex parte Crow Dog*,³⁷¹ where the Court held that certain powers of colonization required clear congressional authorization.³⁷²

More recently, the Supreme Court has turned to the United States Constitution and has offered a panoply of justifications for the power to colonize Native nations, locating its origins in the Indian Commerce Clause and other constitutional provisions.³⁷³ In the early twentieth

³⁶² See González-Cruz, *supra* note 310, at 8 (stating that the United States invaded Puerto Rico in 1898).

³⁶³ See Stephen Kinzer, *Cruel Realities: The American Conquest of Guam*, 23 WORLD POL’Y J. 100, 100 (2006) (stating that the United States invaded Guam in 1898).

³⁶⁴ See KEES VAN DIJK, PACIFIC STRIFE: THE GREAT POWERS AND THEIR POLITICAL AND ECONOMIC RIVALRIES IN ASIA AND THE WESTERN PACIFIC, 1870–1914, at 391 (2015) (stating that the Protocol of Peace between the United States and Spain was signed on August 12, 1898, which provided that the United States would “occupy and hold the city, bay, and harbor of Manila” and negotiations over the rest of the territory would culminate in a final peace treaty).

³⁶⁵ *Kagama*, 118 U.S. at 379–80. A much earlier case, *United States v. Rogers*, had upheld the power of the United States to prosecute crimes in Indian Country but that “plenary power” case dealt with Indian Country within a territory. See *Rogers*, 45 U.S. (4 How.) at 572.

³⁶⁶ *Kagama*, 118 U.S. at 380 (citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

³⁶⁷ *Id.* at 381.

³⁶⁸ *Id.* at 382.

³⁶⁹ *Id.* at 381–82.

³⁷⁰ *Id.* at 384.

³⁷¹ 109 U.S. 556 (1883).

³⁷² *Id.* at 572 (declining to give effect to a treaty and agreement because both conflicted with “many” statutes, treaties, and decisions of the Supreme Court).

³⁷³ See Ablavsky, *supra* note 131, at 1014. This plenary power is, at times, rooted in an amalgam of constitutional power that is inevitably greater than its component parts. See Newton, *supra* note 31, at 230–31. At other times, however, the power is derived not from the Constitution, but from an allegedly inherent power derived from territorial sovereignty. Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 680–82 (2016); see also Newton, *supra* note 31, at 230–36.

century the Supreme Court offered the Indian Commerce Clause as its preferred textual and constitutional hook for the plenary power of the political branches over Indians.³⁷⁴ But as the Rehnquist Court pulled back on the Commerce Clause power in other areas in the name of its new federalism, the Court scrambled to locate a proper constitutional basis for the power.³⁷⁵ The modern Roberts Court, including in *Brackeen* this last term, has aimed instead to identify multiple clauses and powers in the Constitution that could support, collectively, a plenary power by the political branches over Indian Country — including the Indian Commerce Clause,³⁷⁶ treaty power,³⁷⁷ territory power,³⁷⁸ and other foreign affairs powers.³⁷⁹ Despite the invocation of the Constitution, however, the general constitutional principles behind these clauses are rarely explored or invoked in the context of American colonialism.³⁸⁰ Instead, the power simply remains “plenary” no matter where it springs from the Constitution.

The Supreme Court has sanctioned a similar “plenary power” for the national government over its “territories” — Puerto Rico, the Philippines, and its other island colonies.³⁸¹ In *Downes v. Bidwell*, one of the seminal *Insular Cases*, Justice Brown wrote a singular but highly influential opinion³⁸² arguing that the national government possessed nearly limitless power to acquire Puerto Rico, set the terms of its government, and determine the status of Puerto Rican residents to the United States — including by denying Puerto Ricans citizenship and republican forms of government.³⁸³ In a fractured and muddled set of

³⁷⁴ See Ablavsky, *supra* note 131, at 1014–15.

³⁷⁵ Compare *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (distinguishing sharply between the Indian Commerce Clause and the Interstate Commerce Clause), with *United States v. Lara*, 541 U.S. 193, 200–07 (2004) (rooting Congress’s “plenary power” over Indian Affairs in no fewer than six distinctive sources after the Court decided *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000) — landmark cases where the Supreme Court recognized limits on Congress’s power under the Interstate Commerce Clause).

³⁷⁶ See, e.g., *Haaland v. Brackeen*, 143 S. Ct. 1609, 1627–28 (2023) (citing *Cotton Petrol. Corp.*, 490 U.S. at 192).

³⁷⁷ *Id.* at 1628 (quoting *Lara*, 541 U.S. at 201).

³⁷⁸ See *id.* at 1653 (Gorsuch, J., concurring) (citing the territory power as a source of “the federal government’s bundle of enumerated powers” over Indian affairs).

³⁷⁹ See, e.g., *id.* at 1628 (majority opinion) (quoting *Lara*, 541 U.S. at 201).

³⁸⁰ See, e.g., *id.* at 1627–29 (rehearsing the numerous constitutional sources of this plenary power without discussion of the different constitutional principles underlying these sources); *Lara*, 541 U.S. at 200–01 (same).

³⁸¹ See Torruella, *supra* note 31, at 70, 93 (writing about the development of the doctrine of incorporation, “pursuant to which Puerto Rico was declared ‘unincorporated territory,’ and the granting to Congress of ‘plenary powers’ over Puerto Rico and its inhabitants,” *id.* at 70 (footnotes omitted)); Natsu Taylor Saito, *Asserting Plenary Power over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427, 445 (2002) (discussing the status of the Philippines).

³⁸² See Saito, *supra* note 381, at 455–56 (“As recently as 1998 federal appellate courts relied on *Downes v. Bidwell* to deny U.S. citizenship to persons who were born in the Philippines between 1898 and 1946, while it was a U.S. territory.” (footnote omitted)).

³⁸³ *Downes v. Bidwell*, 182 U.S. 244, 279–80 (1901) (opinion of Brown, J.); see also *id.* at 287.

opinions, the Justices offered justification for the power to colonize that rested upon powers held by all sovereign nations,³⁸⁴ the long-standing power of territorial governance within the United States,³⁸⁵ and the determination that Puerto Rico had not been “incorporated” into the Union.³⁸⁶

The modern Supreme Court has similarly avoided drawing upon the language of inherent sovereign authority and extraconstitutional powers to justify plenary power over our island borderlands as it has with Indian Country. Two decades after *Downes v. Bidwell*, Chief Justice Taft wrote for the Court in *Balzac v. Porto Rico*,³⁸⁷ another of the *Insular Cases*.³⁸⁸ There the Court held that the Constitution extended to Puerto Rico, as it necessarily extends “wherever and whenever the sovereign power of that government is exerted.”³⁸⁹ However, the Court also held that the principled limits of the Constitution simply did not apply, even to Puerto Ricans then extended United States citizenship, unless they were “fundamental”³⁹⁰ or unless the United States decided to “incorporate” Puerto Rico into the Union.³⁹¹

Echoing its approach in the context of Indians, the Court has increasingly sought to root Congress’s power over Puerto Rico and other island borderlands in constitutional text — commonly the Territory Clause.³⁹² In so doing, it has essentially buried the dynamics and logics

³⁸⁴ *Id.* at 300 (White, J., concurring) (discussing sovereign power).

³⁸⁵ *Id.* at 285–86 (opinion of Brown, J.) (discussing the territorial clause and Congress’s power under it).

³⁸⁶ *Id.* at 346 (Gray, J., concurring) (discussing how Puerto Rico had not been incorporated).

³⁸⁷ 258 U.S. 298 (1922).

³⁸⁸ See Saito, *supra* note 381, at 445 n.111 (“While there is some dispute over which cases constitute the ‘Insular Cases,’ there is general agreement that they start with *Downes* and go through *Balzac* . . .”).

³⁸⁹ *Balzac*, 258 U.S. at 312.

³⁹⁰ *Id.* at 312–13.

³⁹¹ *Id.* at 305 (citing *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138, 145 (1904); *Downes*, 182 U.S. 244) (holding that there is a formal distinction between lands “incorporated into the Union” and those lands “merely belonging to it” — as lands and peoples that could become part of the United States and subject to its Constitution as opposed to lands owned by the United States and not subject to its Constitution).

³⁹² Compare *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 533, 542–43 (1828) (holding that the United States may acquire and unilaterally govern Florida outside of constitutional requirements, including by creating courts outside of Article III, because of the doctrines of conquest and treaty acquisition giving rise to the “right to acquire territory” and “right to govern” that territory drawn from the “usage of the world” — and merely gesturing to the Territory Clause in the alternative), and *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336–37 (1810) (holding that “the power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and hold territory,” *id.* at 336, and gesturing to the Territory Clause in the alternative), with *Dorr*, 195 U.S. at 140 (noting that it is “settled that the Constitution of the United States is the only source of power authorizing action by any branch of government” — although puzzlingly noting also that “[i]t is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations” — and holding that the Territory Clause has always been the sole source of power over colonized lands), and *Balzac*, 258 U.S. at 312–13 (same).

of the law of nations within the constitutional doctrine of the colonizing polity. It has also steadily held that more and more “fundamental” aspects of the Constitution extend to Puerto Rico.³⁹³ But it continues to describe the plenary power of the national government over its island borderlands as “broad” and within the power of Congress to define.³⁹⁴

Despite the Court’s frequent invocation of the Constitution in the context of American colonialism, it rarely applies any principled constitutional limits. The Constitution seems to provide fewer principled limits to American colonialism than do the racialized “law of nations” doctrines of the nineteenth century. Portions of the Constitution often do not apply to acts undertaken directly by the United States and federal agents — the Constitution does not necessarily follow the flag onto the island borderlands and, even when it does, it is applied inconsistently and primarily toward furthering the American colonial project.³⁹⁵ The Appointments Clause extends to Puerto Rico, but not to individuals governing Puerto Rico, because of a perplexing “local” exception to the Appointments Clause that the Supreme Court discovered — an exception that applies conveniently to the unilaterally appointed board members currently governing the island’s fiscal future.³⁹⁶ The equal protection component of the Fifth Amendment’s Due Process Clause seemingly extends to the island.³⁹⁷ But Congress may discriminate against Puerto Ricans, ironically because their colonized status leaves them perpetually governed by the Territory Clause, and the Court will provide only the most deferential standard of judicial review.³⁹⁸ Puerto Ricans have been United States citizens since 1917.³⁹⁹ Although contested as a matter of Supreme Court doctrine, it is widely presumed that the Birthright Citizenship Clause does not apply directly to the island.⁴⁰⁰ Puerto Rican citizenship in the United States is granted not by the

³⁹³ See, e.g., *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (acknowledging that “the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico”).

³⁹⁴ See, e.g., *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016).

³⁹⁵ See, e.g., *Downes*, 182 U.S. at 287; *Balzac*, 258 U.S. at 312–13; *Torres v. Puerto Rico*, 442 U.S. 465, 470–71 (1979) (citing *Mullaney v. Anderson*, 342 U.S. 415, 419–20 (1952); *Flores de Otero*, 426 U.S. at 590, 601).

³⁹⁶ *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

³⁹⁷ See *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (per curiam).

³⁹⁸ See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1543 (2022) (citing *Califano v. Torres*, 435 U.S. 1, 3–5, 5 n.1 (1978); *Rosario*, 446 U.S. at 651–52).

³⁹⁹ Organic Act of Puerto Rico, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917) (codified as amended at 48 U.S.C. § 733a).

⁴⁰⁰ See Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 88 (2013); cf. *Fitisemanu v. United States*, 1 F.4th 862, 864 (10th Cir. 2021), cert. denied, 143 S. Ct. 362 (2022) (holding that the Birthright Citizenship Clause does not apply to American Samoans); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (same).

Constitution, but by statute⁴⁰¹ — a status far more malleable than that requiring a constitutional amendment to withdraw.⁴⁰²

In operation, the power to colonize has remained relatively stable, far more stable than many other powers, and seems generally unaffected by shifts in Supreme Court doctrine. The power that the United States exercises over colonized peoples has been “plenary” since the Founding⁴⁰³ — that is, the national government, and particularly Congress, holds seemingly unlimited power to grant, modify, and even eliminate self-governance in the colonies. What the plenary power doctrine means in effect is that however Congress and the Executive decide to regulate colonized peoples, the courts use their power to “say what the law is”⁴⁰⁴ to recognize that act as lawful. The Supreme Court has only once struck down an act of Congress regulating “Indians” as exceeding its plenary power⁴⁰⁵ — and that was a law that abrogated the power of another sovereign, the states.⁴⁰⁶ Nor has the Court struck down an act of Congress regulating its island colonies. The Court has, at times, intervened to protect some semblance of the separation of powers, particularly to hold unlawful unilateral acts by the Executive without proper congressional approval. It also infamously intervened in *Dred Scott v. Sandford*⁴⁰⁷ to hold unconstitutional the Missouri Compromise, which prevented the national government from outlawing slavery in the territories.⁴⁰⁸ But, other than those rare instances, the Court has largely recognized every act of the national government with respect to the colonies as law and has even held the colonial relationship itself a political question, beyond the reach of judicial power entirely.⁴⁰⁹

The Supreme Court has seemingly extended the “plenary power doctrine” across a range of substantive areas during the twentieth and twenty-first centuries.⁴¹⁰ Interestingly, all of these substantive areas rest within a rough approximation of what we could call “external” constitutional law or questions of constitutionalism that decide who a stranger to the Constitution is and how our government should treat those strangers — particularly, foreign affairs, immigration, and the laws of

⁴⁰¹ Organic Act of Puerto Rico § 5, 39 Stat. at 953.

⁴⁰² Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico’s Political Process Failure*, 110 COLUM. L. REV. 797, 797–98 (2010).

⁴⁰³ See *supra* section I.B.1, pp. 55–64.

⁴⁰⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴⁰⁵ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57–73 (1996); see also Transcript of Oral Argument, *supra* note 47, at 192.

⁴⁰⁶ *Seminole Tribe*, 517 U.S. at 47.

⁴⁰⁷ 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁴⁰⁸ *Id.* at 452.

⁴⁰⁹ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 592–93 (1832); see also *Blackhawk*, *supra* note 27, at 1799, 1873.

⁴¹⁰ See *Cleveland*, *supra* note 29, at 278.

war and exigency.⁴¹¹ Scholars continue to debate rigorously the extent to which the plenary power doctrine can be called a doctrine and also whether and how the doctrine of plenary power should apply to particular areas of substantive law.⁴¹² However, these debates have yet to be brought into conversation with one another and have yet to engage fully with why the Supreme Court seems more likely to simply sanction all government conduct as lawful in these areas without providing principled reasons.

2. *Plenary Power as Constitutional Silence.* — In many ways the modern “plenary power doctrine” obscures more than it reveals. It purports to be doctrine and it certainly has greater consistency and predictability than do many other bodies of law that we call “doctrines.”⁴¹³ The Supreme Court has also transformed the plenary power doctrine over time from one grounded in racialized, hierarchical “law of nations” principles into one that purports to apply the principled constitutional law of the metropole. Today, the doctrine no longer rests primarily on inherent sovereignty. Nor does it mention the “ward”⁴¹⁴ or “uncivilized”⁴¹⁵ status of an “unfortunate race”⁴¹⁶ of colonized peoples as its foundation. Instead, the Court locates the plenary power over colonized peoples and jurisdictions in its interpretation of the Indian Commerce Clause and the Territory Clause, as well as a range of other constitutional provisions, and it has also held that the power is limited accordingly by rights and other provisions within the Constitution.⁴¹⁷

But the Supreme Court also articulates fewer and fewer actual principles in its more modern “plenary power” cases.⁴¹⁸ It instead treats these areas of constitutionalism as exceptions to general principles of constitutional law — doctrines where it has asserted heightened power of judicial review and has more aggressively articulated a range of

⁴¹¹ See NEUMAN, *supra* note 38, at 4–5.

⁴¹² See Hallie Ludsin, *Frozen in Time: The Supreme Court's Outdated, Incoherent Jurisprudence on Congressional Plenary Power over Immigration*, 47 N.C. J. INT'L L. 433, 434–35 (2022); Hillary M. Hoffmann, *Congressional Plenary Power and Indigenous Environmental Stewardship: The Limits of Environmental Federalism*, 97 OR. L. REV. 353, 357 (2019); Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 735 (2017).

⁴¹³ See Cleveland, *supra* note 29, at 7.

⁴¹⁴ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

⁴¹⁵ *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888).

⁴¹⁶ *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846).

⁴¹⁷ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1629 (2023) (quoting *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977)) (citing *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935)) (affirming that plenary power is derived from the Indian Commerce Clause, but that it is limited by constitutional restrictions and thus “not absolute” (quoting *Weeks*, 430 U.S. at 84)).

⁴¹⁸ Scholars have begun to raise questions as to whether the doctrine is one of institutional competence rather than of substance. See, e.g., Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 59–60 (1999).

constitutional principles.⁴¹⁹ Often without explanation, the Court defers to Congress to determine the reach, meaning, and values behind application of these constitutional provisions to colonized people while asserting judicial exclusivity over all other applications. The Court has even sought to recast the power to colonize others as federal common law, rather than constitutional law, to explain its exceptionalism.⁴²⁰

The reality is that the plenary power doctrine cannot alone constitute a doctrine, nor can it alone serve as a constitutional conversation about the issues raised by American colonialism. It is instead an effort by the Supreme Court to avoid having to provide principled reasons for the constitution of American colonialism. It is an effort to preserve constitutional silence in areas of thorny constitutional questions that have been raised again and again and that remain unresolved. Although the plenary power doctrine continues to protect certain structural constitutional principles, like the separation of powers, it is more often wielded as a shield to constitutionalism — rather than any sort of principled constitutional discourse.

The plenary power doctrine offers the possibility that constitutional principles, including principled limits to American colonialism, are crafted outside the courts. As I have argued elsewhere, the constitution of American colonialism is largely a creature of Congress and of the administrative state.⁴²¹ Colonialism has generated a tremendous amount of statutory and regulatory law — to govern colonies directly, but also in response to advocacy from borderlands peoples. Over hundreds of years, contestation between the metropole and the borderlands has birthed a range of principles limiting and structuring American colonialism away from the rawest forms of violence, domination, and elimination. In the context of Indians, Congress has developed a unique quasi-constitutional doctrine called the “trust doctrine” from which it derives principles that limit the American colonial project with respect to Native peoples.⁴²² Until the 1990s, there were glimmers within the

⁴¹⁹ See Susan Bibler Coutin et al., *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97, 100 (2014).

⁴²⁰ *United States v. Lara*, 541 U.S. 193, 207 (2004).

⁴²¹ Blackhawk, *supra* note 27, at 1873; Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2214; see also ERMAN, *supra* note 7, at 40.

⁴²² See Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 893–94 (2016) (“[T]he origins of the modern trust relationship [are] best encapsulated in Justice Thompson’s dissenting opinion in *Cherokee Nation v. Georgia*, an opinion that formed the theoretical basis for Chief Justice Marshall’s groundbreaking opinion recognizing tribal sovereignty in *Worcester v. Georgia* the next year. In *Worcester*, the Court held the relationship of Indian tribes to the United States is founded on ‘the settled doctrine of the law of nations’ — that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one; the weaker nation does not surrender its right to self-government. ‘Protection’ was a term of art under international law that meant that the United States agreed to a legal duty of preserving Indian and tribal property and autonomy to

federal government that it might develop a quasi-trust doctrine for the island borderlands.⁴²³

For much of our history, the Supreme Court has asserted deference to congressional and executive lawmaking, and, over time, these borderlands constitutional principles have taken root and borne fruit upon the political branches. But elite discourse within the courts and the academy continues to overlook these conversations as constitutionalism — the trust doctrine is particularly misunderstood. Without recognition of these principles as constitutional principles, there remains a risk that the Supreme Court will disregard them or perhaps even abolish them before we even begin to understand them.

II. BORDERLANDS CONSTITUTIONALISM

Given the constitution of American colonialism's expansive reach over geography and time, drawing borders around it is likely more difficult than highlighting its existence. Identifying the entirety of these laws, spread as broadly as the American empire itself, and distinguishing them from laws crafted not in furtherance of the American colonial project could be a chimera. For disciples of Frederick Jackson Turner, distinguishing American colonialism from the United States would be impossible.⁴²⁴ For Turner, it was the very act of colonization, of the creation of a "frontier" and "expansion" beyond the frontier, that provided the United States with its national character.⁴²⁵ The West — an amorphous shorthand for the "frontier" or the "meeting point between savagery and civilization" — was to Turner the birthplace of rugged American individualism and egalitarian Jacksonian democracy.⁴²⁶ These lands were the source of socialization of our "country of immigrants" into a single national community.⁴²⁷ At the frontier, European immigrants became "Americans" by confronting, battling, and ultimately devolving into primitive forms of life and advancing again

the maximum extent allowable in the national interest." (footnotes omitted); Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 247–49 (2003) ("The Indian trust doctrine has had a long love-hate relationship with Indian tribes. On one hand, it has been used to sue the executive agencies of the federal government for breach of trust. On the other, it has been used to expand the plenary power of Congress over Indian affairs. While some scholars have argued that the trust doctrine should be used to control the power of Congress, the courts do not seem to be so inclined. Nevertheless, since the landmark decision of *Morton v. Mancari*, the trust doctrine has been used to shield congressional legislation from strict scrutiny when enacting legislation for the benefit of Indians." *Id.* at 247 (footnotes omitted). "I am neither the first nor the last scholar to have suggested a constitutional lineage for the trust doctrine." *Id.* at 249.); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (finding that the United States "has charged itself with moral obligations of the highest responsibility and trust" and its "dealings with Indians" should "be judged by the most exacting fiduciary standards").

⁴²³ See Erman, *supra* note 60, at 859.

⁴²⁴ See Frederick J. Turner, *supra* note 126, at 6.

⁴²⁵ *Id.* at 200.

⁴²⁶ *Id.* at 200, 211, 221.

⁴²⁷ *Id.* at 221.

through the stages of development toward civilization.⁴²⁸ For those who believe the United States has only been and always will be rugged and individualistic “America,” born from the blood of Indigenous peoples and nursed on stolen land, there may be no distinguishing between the constitution of American colonialism and the Constitution of the United States.

But to embrace the frontier as the essential logic and character of the United States is to perpetuate the colonialism that the frontier thesis celebrated. Embracing the frontier, even as sincere critique, is to erase the borderlands.⁴²⁹ The United States Census Bureau proclaimed the frontier “closed” in 1890 — determining that there were no longer large swaths of land without white settlers and, in so doing, proclaiming that there was no longer any clear demarcation between the frontier and the United States.⁴³⁰ Taking this fusion as true and envisioning these colonized peoples and landscapes as remade by the act of conquest, however, erases the borderlands that have long shaped United States history and continue to dapple the landscape of North America — the Native homelands still set by treaty law and the overseas territories that were yet to be seized. The United States is more than white men moving westward. It is more than conquest. The United States is constituted by and is a product of its borderlands. In fact, it is more borderlands — and borderlands peoples — than center.

Understanding the United States solely as frontier also erases aspects of the United States that continue to maintain the colonial relationship and aspects of constitutional discourse that continue to exist within these

⁴²⁸ *Id.* at 221–22.

⁴²⁹ Historians have long debated the centrality of “frontier” or “borderlands” to the shaping of the United States. See Lawrence Culver, *Borderlands and Frontiers*, in 1 THE OXFORD ENCYCLOPEDIA OF AMERICAN CULTURAL AND INTELLECTUAL HISTORY 147, 147–52 (Joan Shelley Rubin & Scott E. Casper eds., 2013) (surveying the literature and hearty debate inspired by the works of Frederick Jackson Turner, who developed the “frontier,” and his student, Herbert Eugene Bolton, who studied the “borderlands,” and finding that “by the late twentieth century, borderland had largely replaced frontier as a phrase and a concept,” *id.* at 151). The “New Western History” of the late twentieth century embraced the study of “the West” or places of colonization as “place” — with peoples, distinctive histories, and ongoing existences — rather than “process” — that is, the conduct, conquest, and violence of white male settlers. *Id.* at 148–49. Embracing the study of colonized places as places with their own distinctive peoples, environments, cultures, and histories allowed scholars to better capture the ways that these places — and their incorporation into the United States — shaped United States history. *Id.* (citing PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST AND THE UNBROKEN PAST OF THE AMERICAN WEST* (1987) (arguing that “the West” endured long after the closure of the frontier and continued to shape the United States)). Put simply, “borderlands history” recognized that it was not simply the process of expansion, but the incorporation of these new and varied landscapes and peoples into the United States that made the United States; nor did the act of conquest remake these places so completely that their peoples, environments, and histories were rendered irrelevant to the making of the United States. See *id.* at 149–51. More recent studies adopt a nuanced perspective of the borderlands as places, but places that have been acted upon by the process of conquest — a perspective I adopt here. *Id.* at 151.

⁴³⁰ CENSUS BUREAU, U.S. DEP’T OF THE INTERIOR, *COMPENDIUM OF THE ELEVENTH CENSUS*: 1890, at xlviii (1892).

borderlands — geographies, jurisdictions, and communities that remain as a meeting point not between savagery and civilization, but between peoples with distinctive constitutional visions, philosophies, and values. Peoples who have long been declared “strangers” to the constitutional framework of the United States but have long been wrongfully subject to its domination. To embrace the frontier thesis as all encompassing is to erase the fact that the United States is more than white settlers; it is more than “America.” The United States remains an empire and continues to be shaped by these borderlands.

In identifying the constitution of American colonialism, I offer first the vital correction that the frontier is not closed — that is, the act of colonization is not and has never been complete. The borderlands remain. The United States has not simply sinned by operating as colonial power in the past. It has not destroyed so entirely the governments and people it has colonized that it either is washed of its sins or is, perhaps, too damned to seek forgiveness. The United States remains an empire and, although it may not be able to wholly absolve itself of the sins of its past and present, it may still choose redemption. In certain respects, because of the fierce advocacy and strategic ingenuity of peoples within the borderlands, it already has taken steps toward redemption, and these efforts, too, have shaped the constitution of American colonialism.

Despite our external constitution being less visible to scholars and the courts in the twentieth century, its existence and operation remain central to the borderlands.⁴³¹ The external constitution, its principles, and the laws created to embody these principles still govern daily life. The ongoing existence of these borderlands reflects the active resistance of colonized peoples — resistance that has reshaped external constitutional principles and leveraged those reformed principles as limits on the American colonial project. Scholars and jurists may lack the language to engage or even envision this constitution. But our borderlands peoples are fluent. Their vernacular constitutionalism has shaped American colonialism from the Founding and has developed over time to temper colonialism’s most egregious forms.⁴³² The time is long overdue to rediscover our modern borderlands⁴³³ and to explore the vital contribution of borderlands peoples in crafting constitutional principles that limit American colonialism.⁴³⁴

⁴³¹ See *supra* Part I, pp. 22–66.

⁴³² Blackhawk, *supra* note 27, at 1800; Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2237.

⁴³³ The inquiry should not end with the exploration of borderlands and legal frameworks that exist today. There are, no doubt, colonized peoples who were unable to stave off American colonialism, and there are surely more subtle forms of colonialism and imperialism than those documented here.

⁴³⁴ This Foreword suggests that scholars should incorporate borderlands histories, perspectives, methodologies, and theories into the study of constitutional history, theory, and law. In doing so, it

A. *Rediscovering Our Modern Borderlands*

Natural disasters and economic crises have raised recurring questions about the relationship between Puerto Rico and the United States. It certainly is not a state.⁴³⁵ But what is an “unincorporated territory”⁴³⁶ with “commonwealth status”⁴³⁷ that is “foreign . . . for domestic purposes”⁴³⁸? The Commonwealth of Puerto Rico is governed by its own constitution,⁴³⁹ adopted by majority vote of the Puerto Rican electorate on March 3, 1952. The Puerto Rican Constitution established a tripartite system of government that resembles the governments of the several states of the United States with executive, legislative, and judicial branches.⁴⁴⁰ A governor heads the executive branch.⁴⁴¹ The bicameral legislature includes a Senate and House⁴⁴² with representatives elected to terms of four years.⁴⁴³ The Puerto Rican judiciary consists of a three-tiered hierarchy, headed by a court of last resort in the Puerto Rican Supreme Court.⁴⁴⁴

In many respects, the government of Puerto Rico and its relationship with the United States are indistinguishable from the varied landscape of our federalism. Like it did with the several states,⁴⁴⁵ Congress set the terms of Puerto Rico’s relationship to the Union by statute — an organic act that afforded a process to establish a constitution by majority vote of jurisdiction residents and following congressional approval of that

builds upon the work of classical constitutional theorists like Professor Bruce Ackerman, who re-made constitutional theory by persuading the field successfully in a series of works in the 1980s and 1990s to “discover” the “American Constitution” in “American constitutional history” and America’s “distinctive pattern of constitutional thought and practice,” rather than looking to borrowed concepts from Europe. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3 (1991). To Ackerman’s theory, I humbly offer that it is not the “American Constitution” we must “rediscover[],” *id.* at 5, but the Constitution and history of the United States — a Constitution and history necessarily shaped by its contestation and negotiation within the borderlands. It is this contestation, negotiation, and pluralism that this Foreword offers as borderlands constitutionalism.

⁴³⁵ See *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) (noting that Puerto Rico is not “territory which had been incorporated in the Union or become a part of the United States”).

⁴³⁶ See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 340 (1901) (White, J., concurring) (describing how “the express purpose of the treaty was not only to leave the *status* of the territory [of Puerto Rico] to be determined by Congress but to prevent the treaty from operating to the contrary”); *Balzac*, 258 U.S. at 305.

⁴³⁷ See Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (approving the Constitution of the Commonwealth of Puerto Rico).

⁴³⁸ Charles R. Venator Santiago, *Race, Space, and the Puerto Rican Citizenship*, 78 DENV. U. L. REV. 907, 914 (2001).

⁴³⁹ 48 U.S.C. § 731d.

⁴⁴⁰ P.R. CONST. art. I, § 2.

⁴⁴¹ *Id.* art. IV, § 1.

⁴⁴² *Id.* art. III, § 1.

⁴⁴³ *Id.* art. VI, § 4.

⁴⁴⁴ *Id.* art. V, §§ 1, 3; Judiciary Act of the Commonwealth of Puerto Rico of 2003, P.R. LAWS ANN. tit. 4, § 24(b) (2003).

⁴⁴⁵ See, e.g., Compromise of 1850, ch. 50, 9 Stat. 452 (admitting California into the Union).

constitution.⁴⁴⁶ But, unlike the enabling acts for the states, approval of Puerto Rico's constitution was not followed by admission into the Union.⁴⁴⁷ The population of Puerto Rico, at over three million residents, rivals many of the western states.⁴⁴⁸

Puerto Rican residents have long elected their own representatives and made their own local laws.⁴⁴⁹ But the similarities end there. Puerto Rican residents cannot formally participate in federal elections.⁴⁵⁰ Puerto Rico holds no voting representatives in Congress⁴⁵¹ and participates in presidential elections only indirectly — through the nomination of candidates in the primary election only.⁴⁵² Like the other territories,⁴⁵³ Puerto Rico holds a single delegate in the House of Representatives, a resident commissioner elected by the people of Puerto Rico every four years.⁴⁵⁴ But that single House delegate is denied the ability to vote.⁴⁵⁵ Puerto Rico holds no formal representation in the Senate, nonvoting or otherwise.

Even beyond these unequal structures of government, however, the United States also continues to assert a distinctive power to intervene in and restructure the government of Puerto Rico. This power to intervene in Puerto Rican government is not restricted by the consent of Puerto Ricans — the United States may restructure the government

⁴⁴⁶ Act of July 3, 1950, Pub. L. 81-600, §§ 1-4, 64 Stat. 319, 319 (codified at 48 U.S.C. §§ 731b-731e).

⁴⁴⁷ See *id.*

⁴⁴⁸ See *Quick Facts: Puerto Rico*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/PR> [<https://perma.cc/MBV5-MAZA>]. This is comparable with the population of Nevada, at 3.1 million, *Quick Facts: Nevada*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/fact/table/NV/PST045222> [<https://perma.cc/6BPJ-2SKX>], and Utah, at 3.3 million, *Quick Facts: Utah*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/UT> [<https://perma.cc/C7PD-9XXP>].

⁴⁴⁹ See Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327; see also, e.g., Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C.); Organic Act of Puerto Rico, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified as amended in scattered sections of 48 U.S.C.).

⁴⁵⁰ *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc) (“As Puerto Rico has no electors, its citizens do not participate in the presidential voting, although they may do so if they take up residence in one of the 50 states and, of course, they elect the Governor of Puerto Rico, its legislature, and a nonvoting delegate to Congress.”).

⁴⁵¹ *Id.*

⁴⁵² CONN. ADVISORY COMM., U.S. COMM’N ON CIVIL RIGHTS, ADVISORY MEMORANDUM: VOTING RIGHTS IN U.S. TERRITORIES 4 (2021).

⁴⁵³ See, e.g., 48 U.S.C. § 1711 (“The territory of Guam and the territory of the Virgin Islands each shall be represented in the United States Congress by a nonvoting Delegate to the House of Representatives . . .”).

⁴⁵⁴ 48 U.S.C. § 891; *What Is a Resident Commissioner?*, U.S. CONGRESSWOMAN JENNIFFER GONZÁLEZ-COLÓN, <https://gonzalez-colon.house.gov/about/what-resident-commissioner> [<https://perma.cc/QJ36-CQG6>].

⁴⁵⁵ See *What Is a Resident Commissioner?*, *supra* note 454 (“The Resident Commissioner may only vote in the Committees to which she or he belongs . . . [and] has no right to vote for the final passing of Bills . . . nor for election of the Speaker or other officials.”).

unilaterally and without notice.⁴⁵⁶ Nor must the government imposed by the United States be republican or representative in nature.⁴⁵⁷

To provide one recent example that has generated a spate of litigation before the Supreme Court: following a financial crisis in 2014,⁴⁵⁸ Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act⁴⁵⁹ (PROMESA). PROMESA created a multi-member financial oversight board, appointed by the President.⁴⁶⁰ This board wields ultimate authority over the budget of Puerto Rico — over and above the democratically elected government of Puerto Rico.⁴⁶¹ Because the United States prohibits Puerto Rico from declaring bankruptcy,⁴⁶² PROMESA affords a means for Puerto Rico to enter a process akin to bankruptcy.⁴⁶³ Since 2016, the management of Puerto Rico’s finances has been overseen by a Fiscal Control Board (FCB), which has imposed a number of strict austerity measures that have burdened the people of Puerto Rico without their input or participation.⁴⁶⁴ Many

⁴⁵⁶ See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1679 (2020) (Sotomayor, J., concurring in the judgment) (asking whether “Congress [may] ever simply cede its power under the [Territory Clause] to legislate for the Territories,” because it surely seemed to do so “nearly 60 years ago with respect to Puerto Rico”); Ponsa-Kraus, *supra* note 87, at 2455. The power to colonize exists despite the fact that, in granting commonwealth status to Puerto Rico, the United States persuaded the United Nations to remove Puerto Rico from its list of “non-self-governing territories” — a euphemistically named list meant to identify colonizing governments and their colonies and require certain forms of international oversight and reporting. *Developments in the Law — The U.S. Territories*, *supra* note 244, at 1656. The United Nations lists the rest of our island borderlands, but notably does not include Native nations. *Non-Self-Governing Territories*, UNITED NATIONS, <https://www.un.org/dppa/decolonization/en/nsigt> [<https://perma.cc/Y624-KPW2>]. Recent exercises of the plenary power and declarations by the Supreme Court that Puerto Rico lacks recognized sovereignty have inspired calls to relist Puerto Rico as a non-self-governing territory. See, e.g., *Developments in the Law — The U.S. Territories*, *supra* note 244, at 1656.

⁴⁵⁷ U.S. CONST. art. IV, § 3, cl. 2.

⁴⁵⁸ Up until 1996, Puerto Rico was subject to certain exemptions from federal tax laws that supported its economic development. The Clinton Administration began to phase out these laws in the mid-1990s — a change to which some attribute Puerto Rico’s current financial struggles. See Scott Greenberg & Gavin Ekins, *Tax Policy Helped Create Puerto Rico’s Fiscal Crisis*, TAX FOUND. (June 30, 2015), <https://taxfoundation.org/tax-policy-helped-create-puerto-rico-fiscal-crisis> [<https://perma.cc/8ENG-CGXD>].

⁴⁵⁹ Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as amended at 48 U.S.C. §§ 2101–2177, 2191–2241).

⁴⁶⁰ 48 U.S.C. § 2121(e)(1)(A).

⁴⁶¹ *Id.* § 2141(c)(3).

⁴⁶² See 11 U.S.C. § 101(52) (excluding Puerto Rico’s categorization as a state for the “purpose of defining who may be a debtor under chapter 9” of the U.S. Bankruptcy Code).

⁴⁶³ 48 U.S.C. § 2170 (“The Federal Rules of Bankruptcy Procedure shall apply to a case under this subchapter and to all civil proceedings arising in or related to cases under this chapter.”).

⁴⁶⁴ In a survey of Puerto Rican voters in late 2020, seventy percent said they had a “somewhat” or “very unfavorable view” of the Fiscal Oversight and Management Board. Edoardo Ortiz & Gustavo Sánchez, *Undemocratic and Unsupported*, DATA FOR PROGRESS (Sept. 15, 2021), <https://www.dataforprogress.org/blog/2021/9/15/undemocratic-and-unsupported-americans-overwhelmingly-oppose-the-federal-governments-takeover-of-puerto-ricos-finances> [<https://perma.cc/D3T3-MVUU>]; see also NATALIA RENTA ET AL., CTR. FOR POPULAR DEMOCRACY & ACTION

Puerto Ricans believed that commonwealth status had provided true sovereignty and had stripped the Congress of plenary power over the island, but PROMESA signified a return to the United States's history of exerting control over Puerto Rico.⁴⁶⁵ Litigants have brought a number of cases challenging PROMESA before the federal courts.⁴⁶⁶

I. Our Island Borderlands. — Puerto Rico is also not alone. The United States colonizes a range of other island jurisdictions and polities. Over many years, unilateral intervention by the United States has resulted in wide variation in the colonial relationships with these island nations — ranging from complete independence,⁴⁶⁷ independence with association,⁴⁶⁸ statehood, commonwealth status, to complete colonization. The United States has also partially assimilated some island nations by extending United States citizenship and nonvoting delegate representation in the House of Representatives.⁴⁶⁹ But, despite this seeming variation, these island nations remain colonized by the United States and share the feature of a colonized polity: the United States continues to claim, and at times exert,⁴⁷⁰ unilateral power to govern these jurisdictions.⁴⁷¹

Following many years of occupation, possession, and governance by the United States, Congress has supported some of its colonies toward independence and statehood. The most notable example of this path to independence is the nation of the Philippines. Residents of the Philippine islands had already fought for and declared independence from Spain before the United States Navy invaded the islands in the spring of

CTR. ON RACE & ECON., PROMESA HAS FAILED: HOW A COLONIAL BOARD IS ENRICHING WALL STREET AND HURTING PUERTO RICANS, at iii (2021) (stating that the Fiscal Oversight and Management Board “has used its power to impose devastating austerity measures and negotiate unsustainable debt restructuring plans that enrich Wall Street and hurt Puerto Ricans”).

⁴⁶⁵ RENTA ET AL., *supra* note 464, at 9.

⁴⁶⁶ See, e.g., *id.* at 21.

⁴⁶⁷ Independence of the Philippines, 11 Fed. Reg. 7517 (July 4, 1946) (declaring that the United States “withdraws and surrenders all rights of possession, supervision, jurisdiction, control, or sovereignty now existing and exercised by the United States of America in and over the territory and people of the Philippines”).

⁴⁶⁸ Currently, there are three Freely Associated States (FAS): the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. *What's a Freely Associated State?*, P.R. REP., <https://www.puertoricoreport.com/whats-free-associated-state> [<https://perma.cc/D5VY-HBD9>].

⁴⁶⁹ See *Member FAQs*, U.S. HOUSE OF REPRESENTATIVES, <https://clerk.house.gov/Help> [<https://perma.cc/RU5E-AS7S>]. Nonvoting delegates in the House from island nations include: Delegate Aumua Amata Coleman Radewagen of American Samoa, Delegate James C. Moylan of Guam, Delegate Gregorio Kilili Camacho Sablan of the Northern Mariana Islands, and Delegate Stacey E. Plaskett of the Virgin Islands. U.S. HOUSE OF REPRESENTATIVES, 118TH CONG., OFFICIAL LIST OF MEMBERS (2023), https://clerk.house.gov/member_info/TTD-118.pdf [<https://perma.cc/93JU-NEYK>].

⁴⁷⁰ See, e.g., RENTA ET AL., *supra* note 464, at 9.

⁴⁷¹ U.S. CONST. art. IV, § 3, cl. 2.

1898.⁴⁷² The United States then allegedly “purchased” the Philippines, the prized occupation of the Spanish-American War, in December of 1898 from Spain for twenty million American dollars⁴⁷³ and declared military rule weeks later.⁴⁷⁴ President William McKinley announced at the outset of occupation: “The Philippines are ours . . . not to exploit but to develop, to civilize, to educate, to train in the science of self-government.”⁴⁷⁵ The islands of the Philippines experienced forty-eight brutal years of United States “civilization programs,” including the exportation of tools of American colonization perfected on Indian nations like family separation and boarding school reeducation, which began under military rule by the Taft Commission and then continued under the first civil governor, William Howard Taft.⁴⁷⁶ In 1934, following years of hearings and reports documenting the civilization status of the Philippines, Congress passed the Philippine Independence Act.⁴⁷⁷ The Act provided a multistage, multiyear plan toward independence that began with permitting the Philippine people to draft a constitution that the President of the United States would approve.⁴⁷⁸ In 1946, after twelve years of oversight pursuant to the congressional plan, the United States Congress formally recognized Philippine independence following the end of World War II.⁴⁷⁹ The Philippines remains today an independent nation.

Colonization by the United States has also resulted in statehood within the island borderlands. The islands comprising the Kingdom of Hawai‘i collectively became a state in the Union in 1959⁴⁸⁰ after being illegally annexed in 1898 by the United States⁴⁸¹ — notably for use as a

⁴⁷² The revolution against Spain began in 1896, and a “Filipino leader, Emilio Aguinaldo, achieved considerable success before a peace was patched up with Spain. . . . The Filipinos had . . . declared their independence and established a republic . . . [but t]heir dreams of independence were crushed when the Philippines were transferred from Spain to the United States in the Treaty of Paris (1898)” *Philippine History*, PINAS, <https://pinas.dlsu.edu.ph/history/history.html> [<https://perma.cc/8XTZ-U85C>].

⁴⁷³ WILLIAM A. JOHNSTON, *HISTORY UP TO DATE: A CONCISE ACCOUNT OF THE WAR OF 1898 BETWEEN THE UNITED STATES AND SPAIN* 242–43 (New York, A.S. Barnes & Co. 1899).

⁴⁷⁴ See IMMERWAHR, *supra* note 7, at 90.

⁴⁷⁵ Jose A. Lansang, *The Philippine-American Experiment: A Filipino View*, 25 PAC. AFFS. 226, 226 (1952).

⁴⁷⁶ See Anne Paulet, *To Change the World: The Use of American Indian Education in the Philippines*, 47 HIST. EDUC. Q. 173, 175–76, 183–84 (2007) (discussing the analogies U.S. colonizers drew between Filipino people and Native people and the ensuing need for analogous civilizing efforts).

⁴⁷⁷ Pub. L. No. 73-127, 48 Stat. 456 (1934).

⁴⁷⁸ *Id.* § 3.

⁴⁷⁹ See *Philippine History*, *supra* note 472.

⁴⁸⁰ Hawai‘i Statehood Admissions Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

⁴⁸¹ See H.R.J. Res. 259, 55th Cong., 30 Stat. 750 (1898); H.R. EXEC. DOC. NO. 53-47, at 447 (1893).

military base to invade Guam and the Philippines⁴⁸² — and following occupation by the military for over sixty years.⁴⁸³ In contrast to other islands colonized by the United States during the island land grab of the late nineteenth century, the Kingdom of Hawai‘i was first brought under the “sovereign dominion” of the United States not by treaty, but by a joint resolution of the Congress known as the Newlands Resolution.⁴⁸⁴ President McKinley had signed a treaty to annex Hawai‘i one year earlier with the rogue government of Hawai‘i — a government established following a coup led by settler elites, predominantly plantation owners with strong ties to the United States, and imposition of a “Bayonet” Constitution in 1887.⁴⁸⁵ But the President failed to find adequate support in the Senate to ratify his treaty with the rogue government in accordance with Article II.⁴⁸⁶ In debates over whether to admit Hawai‘i into the Union as a state, members of Congress reached back to quote Senator Newlands’s successful speech promoting the annexation by resolution: “The country [Hawai‘i] has already, by the peaceful process of evolution, assimilated itself with us. For years it has been practically American. American ideas, American liberty, American civilization, prevail there.”⁴⁸⁷ In 1993, Congress passed and President Clinton signed into law the Apology Resolution, recognizing that the overthrow of Hawai‘i was, in large part, due to the actions of citizens and agents of the United States and recognizing the fact that the Kingdom of Hawai‘i had never relinquished its sovereignty over the islands.⁴⁸⁸ The Apology Resolution had no legal effect, however, and Native Hawaiians or

⁴⁸² David Keanu Sai, *American Occupation of the Hawaiian State: A Century Unchecked*, 1 HAWAIIAN J.L. & POL. 46, 59 (2004).

⁴⁸³ Noelani Goodyear-Ka‘ōpua, *Hawai‘i: An Occupied Country*, 35 HARV. INT’L REV. 58, 58 (2014) (describing “[t]he onset of prolonged US occupation [of Hawai‘i] that began in 1898”).

⁴⁸⁴ TOM COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAI‘I 311 (rev. ed. 2016).

⁴⁸⁵ See NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 145–46 (2004) (discussing the historical context around this treaty and the settler Provisional Government in Hawai‘i); see also Melody Kapilialoha MacKenzie, Ke Ala Loa — *The Long Road: Native Hawaiian Sovereignty and the State of Hawai‘i*, 47 TULSA L. REV. 621, 625–28 (2012) (discussing the 1893 settler-led coup against the Hawaiian Kingdom, and the annexation of Hawai‘i). Congress annexed the Independent Republic of Texas, as well as the overthrown Kingdom of Hawai‘i, through joint resolution — or “congressional-executive agreements.” These agreements were not treaties within the meaning of the Treaty Clause, but they did satisfy the standards of treaty-making under international legal standards of the period. See Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1354–55, 1355 n.352 (2008) (describing the annexation resolutions for Texas and Hawai‘i as “congressional-executive agreements” and, thus, “treaties” under international law).

⁴⁸⁶ See SILVA, *supra* note 485, at 159; MacKenzie, *supra* note 485, at 626.

⁴⁸⁷ 31 CONG. REC. 5831 (1898) (statement of Rep. Newlands).

⁴⁸⁸ Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1512–13.

Kānaka Maoli people have had little success in decolonizing the islands⁴⁸⁹ or claiming a distinctive sovereignty.⁴⁹⁰

The United States has also allowed some of its colonies to operate within a middle ground between complete independence and colony, supporting these colonized nations toward independence while remaining in an ongoing relationship by compact. In collaboration with the United Nations, the United States administered the island nations it occupied during World War II as the United Nations Trust Territory of the Pacific Islands (TTPI) and supported three of these island nations until they gained independence — the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.⁴⁹¹ These nations then compacted with the United States as “freely associated states” or formerly colonized territories to which the United States now relates by compact.⁴⁹² The final TTPI nation, the Northern Mariana Islands, organized instead as a commonwealth of the United States, similar to Puerto Rico.⁴⁹³

Beyond separation, the United States has attempted to partially assimilate the peoples colonized on its island borderlands — including by extending United States citizenship and nonvoting representation in the House of Representatives.⁴⁹⁴ Within its island borderlands, Congress has extended United States citizenship by statute to Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands.⁴⁹⁵ In contrast, American Samoans are not United States citizens and hold only “U.S. national” status — a status that denies them the ability to vote in any

⁴⁸⁹ See, e.g., J. KEHAULANI KAUANUI, PARADOXES OF HAWAIIAN SOVEREIGNTY: LAND, SEX, AND THE COLONIAL POLITICS OF STATE NATIONALISM 18, 29 (2018) (locating Hawaiian decolonization in the examination of “Indigenous ontologies” and “prestate [Kānaka] sovereignty” that predated the establishment of the Kingdom of Hawai‘i as a nation, because decolonization requires not just fitting Indigenous peoples into the “logic of Western civilization” on equal “nationalist” terms, but rethinking this system entirely).

⁴⁹⁰ Cf. MacKenzie, *supra* note 485, at 645–48 (“Native Hawaiian endeavors to regain lands [not only] help to preserve Hawai‘i’s natural environment, [but] are also hard-fought efforts to restore to Native Hawaiians a measure of self-determination.” *Id.* at 648.)

⁴⁹¹ For the agreement between the United States and the United Nations Security Council, see U.N. SCOR, 2d Sess., 124th mtg. at 1, U.N. Doc. S/318 (Apr. 2, 1947) (Trusteeship Agreement for the Former Japanese Mandated Islands), and also Armand Hage, *The American Federal State in the Pacific Islands*, 2 NEW PAC. REV. 71, 78–87 (2003).

⁴⁹² See, e.g., Joint Resolution of Nov. 14, 1986, Pub. L. No. 99-658, 100 Stat. 3672; Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified as amended at 48 U.S.C. §§ 1901–1912, 2001–2004).

⁴⁹³ Hage, *supra* note 491, at 73.

⁴⁹⁴ See generally Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1254–64 (2019) (providing an overview of each territory’s citizenship and representation laws).

⁴⁹⁵ 8 U.S.C. § 1402 (Puerto Rico); *id.* § 1406 (Virgin Islands); *id.* § 1407 (Guam); see 48 U.S.C. § 1801 note (Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America § 303).

United States election.⁴⁹⁶ The United States also affords many of these island borderlands — American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands — a nonvoting delegate in the House.⁴⁹⁷

Currently, the United States colonizes five primary polities within our island borderlands: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. The United States continues to exercise unilateral power over these island borderlands, including by imposing, structuring, and supervising their forms of government. The forms of government imposed by the United States vary wildly from jurisdiction to jurisdiction and take a range of ad hoc forms.

Compare, for example, Guam with American Samoa. Both are relatively small islands with populations of around 160,000 and 50,000 respectively.⁴⁹⁸ The United States first exercised this unilateral power to govern both islands by imposing martial law. Both Guam and American Samoa were occupied and governed by the United States Navy from approximately 1898 to 1949 and 1900 to 1951, respectively.⁴⁹⁹ Then, in 1950, Congress passed the Organic Act of Guam,⁵⁰⁰ which conferred United States citizenship on Guamanians and established a territorial government system with resident elections.⁵⁰¹ By contrast, Congress delegated all power over the Samoan government to the President in 1929 and has never reclaimed it.⁵⁰² Guam was occupied and governed by the United States Navy until 1950 when President Truman transferred governance to the Secretary of the Interior, transforming colonization through martial law into bureaucratic colonialism.⁵⁰³ In 1960, American Samoa established its own constitutional government without explicit authorization by Congress, but with oversight and approval by the United States Secretary of Interior.⁵⁰⁴ Over the last hundred years, the Supreme Court has increasingly imposed narrow constitutional

⁴⁹⁶ See Lin, *supra* note 494, at 1259 & n.73; 8 U.S.C. § 1101(a)(29) (defining American Samoa as an “outlying possession[.]”); *id.* § 1408 (“[T]he following shall be nationals, but not citizens, of the United States at birth: . . . A person born in an outlying possession of the United States . . .”); see also *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (“[T]he Citizenship Clause does not extend birthright citizenship to those born in American Samoa.”).

⁴⁹⁷ 48 U.S.C. § 891 (Puerto Rico); *id.* § 1711 (Guam and Virgin Islands); *id.* § 1731 (American Samoa); *id.* § 1751 (Northern Mariana Islands).

⁴⁹⁸ Lin, *supra* note 494, at 1258, 1260.

⁴⁹⁹ *Developments in the Law — The U.S. Territories*, *supra* note 244, at 1707 (discussing U.S. naval occupation in Guam from 1898 to 1949); Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899–1960*, 60 AM. J. LEGAL HIST. 311, 320–21, 351 n.213 (2020) (discussing U.S. naval occupation in American Samoa (also known as Eastern Samoa) from 1900 to 1951).

⁵⁰⁰ Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421–1424b).

⁵⁰¹ See *id.* at 384, 387.

⁵⁰² Dardani, *supra* note 499, at 336.

⁵⁰³ Exec. Order No. 10,077, 3 C.F.R. 279 (1949).

⁵⁰⁴ See *Developments in the Law — The U.S. Territories*, *supra* note 244, at 1686; M.D. Olson, “Indirect Rule” and the Rule of Law in Samoa, 28 J. HIST. GEOGRAPHY 380, 387–88 (2002).

restrictions on the power of the United States to intervene unilaterally in the governments of these island borderlands, but the power of the United States over these islands remains expansive and without any meaningful judicial limit.⁵⁰⁵

2. *Our Indian Country Borderlands.* — The United States holds legally distinct, but equally complex, relationships with the original and perhaps paradigmatic case of American colonialism — “Indians.” A case so paradigmatic that recognition of the exclusion of Native peoples from the polity has been codified into the United States Constitution four times: twice to exclude Native peoples from apportionment with “Indians not taxed,”⁵⁰⁶ once to provide power to Congress to regulate commerce “with the Indian Tribes” as distinct from both states and foreign nations,⁵⁰⁷ and finally to carve out Native peoples from the Fourteenth Amendment’s promise of birthright citizenship with “subject to the jurisdiction thereof.”⁵⁰⁸ “Indians” are the only people the Constitution subordinates by name. Despite the explicit exclusion of Native peoples from aspects of the constitutional framework, including birthright citizenship,⁵⁰⁹ the United States similarly asserts unilateral power to regulate every facet of our Indian Country borderlands.⁵¹⁰

Today, the United States has leveraged this unilateral power to colonize hundreds of Native nations within the recognized territorial borders of the lower forty-eight states and the states of Alaska and Hawai‘i. These “Indians” are governed under a wholly different legal framework from the insular territories and, in the case of Alaska and Hawai‘i, from each other.⁵¹¹ In contrast to its approach to island territories, the United States recognizes a certain level of sovereignty for Native nations and has afforded them the distinctive status of “domestic dependent nations” existing within the territorial borders of the United States.⁵¹² But our

⁵⁰⁵ See generally *Developments in the Law — The U.S. Territories*, *supra* note 244, at 1617 (discussing recent developments in the legal relationship between the United States and the island territories at the Supreme Court and circuit court level).

⁵⁰⁶ U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

⁵⁰⁷ *Id.* art. I, § 8, cl. 3.

⁵⁰⁸ *Id.* amend. XIV, § 1.

⁵⁰⁹ See generally Gregory Ablavsky, “*With the Indian Tribes*: Race, Citizenship, and Original Constitutional Meanings,” 70 STAN. L. REV. 1025, 1054–58 (2018) (discussing the notion of “Indian” as Noncitizen” at the time of the Founding); Cleveland, *supra* note 29, at 56–58 (discussing the denial of birthright citizenship to Native people in the late nineteenth century).

⁵¹⁰ See Steele, *supra* note 373, at 680–82 (providing an overview of Congress’s plenary powers in Indian affairs).

⁵¹¹ Compare Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629h (creating and transferring land to twelve private, for-profit Alaska Native corporations), and HAW. REV. STAT. §§ 10-1 to -4 (1993) (establishing a public trust for Native Hawaiian self-determination through the Office of Hawaiian Affairs), with Indian Reorganization Act § 16, 25 U.S.C. § 5123 (authorizing tribal constitutional self-government in the lower forty-eight).

⁵¹² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“[I]t may well be doubted whether those tribes which reside within . . . the United States can . . . be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.”).

Indian Country borderlands, too, share the core feature found in all of our borderlands — that is, the unilateral power of the United States to govern them.⁵¹³

The United States has exercised this unilateral power over the last two hundred years through campaigns to dispossess Native nations of their lands and to assimilate, exterminate, and finally end the “Indian Problem” of Native peoples.⁵¹⁴ Similar to its treatment of the island borderlands, the United States used this power to invade and enact martial law within Indian Country in the late nineteenth century.⁵¹⁵ Yet, despite these campaigns, hundreds of Native nations continue to resist and survive within the borderlands.⁵¹⁶ Today, the United States colonizes over 570 Native nations that continue to govern as “domestic dependent” semisovereign enclave states within the territorial borders of the United States.⁵¹⁷ Some Native nations govern lands that are larger than several states.⁵¹⁸ The United States’s long-standing recognition of inherent tribal sovereignty is exceptional in offering its Indigenous peoples a robust form of self-governance since the country’s founding.⁵¹⁹ But, because of the erasure of American colonialism, this form of United States exceptionalism goes unrecognized and tribal sovereignty remains imperiled.

Following decades of military occupation and various forms of imposed, unrepresentative government, the United States began to extend forms of self-government to Indian Country in the twentieth century. Three months after Congress passed the Philippine Independence

⁵¹³ See Cleveland, *supra* note 29, at 11 (discussing how the exercises of plenary power in the late nineteenth and early twentieth centuries all “involved U.S. relations with lands outside of the jurisdiction of the states — whether Indian lands . . . or U.S. territories”).

⁵¹⁴ See, e.g., MERIAM REPORT, *supra* note 11, at 429 (“[I]n the past forty or fifty years a body of experience in both education and social work has developed that can and should be applied in order to speed up the solution of the Indian problem.”).

⁵¹⁵ See, e.g., Indian Removal Act, Pub. L. No. 21-148, §§ 1-2, 4 Stat. 411, 411-12 (1830) (authorizing the President to grant Native peoples land west of the Mississippi in exchange for their lands within state borders, resulting in forcible removal by the United States military).

⁵¹⁶ See generally James Ruppert, *Survivance in the Works of Velma Wallis*, in SURVIVANCE: NARRATIVES OF NATIVE PRESENCE 291-92 (Gerald Vizenor ed., 2008) (“[S]urvival and resistance are allied in Native narratives.”).

⁵¹⁷ See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4636 (Jan. 28, 2022).

⁵¹⁸ See, e.g., *Navajo Nation*, INDIAN HEALTH SERV., <https://www.ihs.gov/navajo/navajonation> [<https://perma.cc/4P8D-PUBZ>] (“The Navajo Nation . . . compr[is]es about 16 million acres, or about 25,000 square miles, about the size of West Virginia.”); *Tribal Governance*, NAT’L CONG. AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance> [<https://perma.cc/6QJ7-VQSB>] (“[T]ribal governments exercise jurisdiction over lands that would make Indian Country the fourth largest state in the nation.”).

⁵¹⁹ See *Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 105-06 (2011) (statement of Alan R. Parker, Secretary, United League of Indigenous Nations); cf. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 216 (2014) (comparing protections for Indigenous self-governance in the United States, Canada, Panama, and Colombia).

Act — the Act that provided for a process whereby the Philippine Islands would draft a constitution that would be recognized by the United States — the Congress passed the Indian Reorganization Act of 1934⁵²⁰ (IRA). Like the Philippine Independence Act, the IRA afforded federally recognized Native nations in the lower forty-eight the option to craft a constitutional government that the United States would recognize in a government-to-government relationship if the Secretary of the Interior approved of the constitution.⁵²¹ Over one hundred Native nations opted into the IRA framework in the late 1930s and early 1940s, making it one of the most generative constitutional moments in the history of North America.⁵²² It was notably a moment Indian Country shared with another United States colony, the Philippine Islands, which ratified its constitution in 1935 after it was certified by President Roosevelt.⁵²³ The IRA continues to serve as the primary framework regulating the relationship between Indian Country and the United States today.⁵²⁴ Federal bureaucratic officials continue to oversee the process and substance of constitutional amendments, conventions, and lawmaking within Indian Country.⁵²⁵

Despite their paradigmatic status, the category of American Indians remains complex — especially with respect to Native people who were colonized in the twentieth century. Native peoples of what are now the states of Alaska and Hawai‘i are governed under entirely different frameworks than “Indians” within the lower forty-eight United States. As mentioned, the Indigenous peoples of what is now the state of Hawai‘i, the Kānaka Maoli, struggle for basic recognition and self-

⁵²⁰ Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended in scattered sections of 25 U.S.C.).

⁵²¹ A “government-to-government” relationship takes a range of forms, but consists primarily of the recognition of the Native government by the United States as a government that collectively represents its membership, governs its lands, and lobbies the United States regarding any laws, policies, or regulations that impact the Native government or its polity. *See id.* §§ 16–17.

⁵²² *See* Blackhawk, *supra* note 27, at 1813; 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3][a][i] n.16 (Nell Jessup Newton ed., 2023); Seth Davis, *Tribalism and Democracy*, 62 WM. & MARY L. REV. 431, 451 (2020) (“[A]pproximately 161 Indian Tribes adopted constitutions under the Indian Reorganization Act of 1934 (IRA).”); *see also* Matthew L.M. Fletcher, *Textualism’s Gaze*, 25 MICH. J. RACE & L. 111, 144 (2020) (“The 1934 Indian Reorganization Act revolutionized tribal governments.”).

⁵²³ CONST. (1935) (Phil.); H.R. DOC. NO. 74-400, at 24 (1936); *see* Maximo M. Kalaw, *The New Constitution of the Philippine Commonwealth*, 13 FOREIGN AFFS. 687, 687 (1935).

⁵²⁴ Monte Mills, *Why Indian Country? An Introduction to the Indian Law Landscape*, in INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND 1, 10–11 (2017) (providing an overview of the Reorganization Era and noting that the Indian Reorganization Act “remains the foundational federal legislation in modern Indian affairs” (quoting MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 1.3 at 12 (2016))).

⁵²⁵ *See, e.g.*, 25 C.F.R. § 81.1–63 (2022) (regulating the Secretary’s involvement in tribal election procedures).

governance, and struggle even to organize toward self-governance.⁵²⁶ There are also more than two hundred federally recognized tribes that exist within Alaska⁵²⁷ and operate under a wholly distinct legal framework than the Indian Reorganization Act framework for the federally recognized tribes within the lower forty-eight.⁵²⁸ The United States “purchased” Alaska from Russia in 1867 for \$12 per square mile — a treaty negotiated by then–Secretary of State William Seward.⁵²⁹ Russia had attempted to colonize Alaska from the eighteenth century onward,⁵³⁰ but the reality was a very small actual footprint for Russian settlement. The highest estimates for Russian settlers peaked at 823 in 1839 — a figure dwarfed by the thousands of Native Alaskans who survived the devastating waves of disease wrought by Russian contact.⁵³¹ Nonetheless, the United States raised its flag in what it called the Department of Alaska in 1867 and governed the area under the varied

⁵²⁶ See *supra* notes 480–90. The meaning and desired manifestation of “self-governance” in the Hawaiian context today remains an ongoing subject of debate. See Kristen A. Carpenter, “*Aspirations*”: *The United States and Indigenous Peoples’ Human Rights*, 36 HARV. HUM. RTS. J. 41, 77 (2023) (“Some Kanaka Maoli have articulated the view that their claims to sovereignty in Hawaii are better advanced through international law’s paradigms on ‘anti-occupation’ rather than the [United Nations Declaration on the Rights of Indigenous Peoples] ‘self-determination’ model.”); Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 365–66 (2003) (“Currently, the Native Hawaiian people are exploring whether they should accept a domestic status under federal law as a ‘recognized’ Native group with partial rights to self-government, whether they should continue to press for reinstatement of their independent constitutional monarchy under international law, or whether they should try to articulate a new set of rights and relationships as ‘indigenous peoples’ under the self-determination rubric of international human rights law.”).

⁵²⁷ Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2112 (Jan. 12, 2023) (“There is a total of 347 federally recognized Indian Tribes within the contiguous 48 states and 227 federally recognized Native entities within the state of Alaska that comprise the 574 federally recognized Indian Tribes of the United States.”).

⁵²⁸ See Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, 882 (2008) (discussing how the “legal status and rights of Alaska Natives differ from those of American Indian tribes in the lower 48 states” as a result of the Alaska Native Claims Settlement Act of 1971 (ANCSA)); Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL’Y 72, 76 (1997) (“The most significant recent federal legislation establishing tribal governments is . . . ANCSA. . . [T]oday, the legal status of Alaska Native government is of an extremely complex character and may include status as a federally chartered government, a state chartered corporation, or a tradition-based village.”). But see Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, 33 ALASKA L. REV. 187, 210 (2016) (noting that, at the time of ANCSA’s passage, over seventy Alaska Native villages were organized under the IRA).

⁵²⁹ See Treaty of Cession, *supra* note 247, at 543; Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 114 (2008) (noting that the United States purchased “586,400 square miles of land . . . for \$7.2 million”).

⁵³⁰ See ALASKA DEP’T OF LAB. & WORKFORCE DEV., A HISTORY OF ALASKA POPULATION SETTLEMENT 6 (2013), <https://live.laborstats.alaska.gov/pop/estimates/pub/pophistory.pdf> [<https://perma.cc/627M-JMM6>].

⁵³¹ See *id.* at 6–7.

jurisdiction of the Army, Treasury, and Navy,⁵³² before granting the District of Alaska territorial status in 1912.⁵³³ The Alaska Statehood Act⁵³⁴ then brought Alaska into the Union as the forty-ninth state in 1959, the same year as the admission of Hawai‘i.⁵³⁵ It is unclear how much involvement Native Alaskans had in deciding whether their homelands should join the Union.⁵³⁶ However, both of the organic acts bringing Alaska and Hawai‘i into the Union reserved homelands for Native Alaskans and Hawaiians respectively,⁵³⁷ and Hawai‘i’s organic act obligated the newly established Hawaiian state government to serve as guardian of its Native population.⁵³⁸

B. American Colonialism and Borderlands Agency

Empire generates a tremendous amount of law. As Professors Lauren Benton and Lisa Ford observed in the context of the formation of the nineteenth-century British imperial constitution, law became the medium through which individuals sought to structure, formalize, and transform colonial relationships.⁵³⁹ Yet, law in the context of colonialism was not simply the formal law generated through one governmental voice. Instead, law and legal debate were constituted through a “fluid vernacular”⁵⁴⁰ generated by a cacophony of voices from highly heterogeneous groups scattered across an expansive colonial landscape. Although these voices varied, the shared aims and constraints of empire

⁵³² See Bobby Dave Lain, *North of Fifty-Three: Army, Treasury Department, and Navy Administration of Alaska, 1867–1884*, at 12–13 (1974) (Ph.D. dissertation, University of Texas at Austin) (ProQuest) (discussing the successive rule of the Army, Treasury, and Navy over Alaska beginning in 1867); *see also id.* at 30–31 (discussing the establishment of the Department of Alaska); Richard Packer, *150 Years of the Army in Alaska*, U.S. INDO-PAC. COMMAND (Nov. 1, 2017), <https://www.pacom.mil/Media/News/News-Article-View/Article/1360176/150-years-of-the-army-in-alaska> [https://perma.cc/R383-CE54].

⁵³³ Alaska Government Act, Pub. L. No. 62-334, 37 Stat. 512 (1912).

⁵³⁴ Pub. L. No. 85-508, 72 Stat. 339 (1958).

⁵³⁵ *Id.*; Hawai‘i Statehood Admissions Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

⁵³⁶ The original treaty with Russia purchasing Alaska had excepted from citizenship and rights the “uncivilized native tribes.” Treaty of Cession, *supra* note 247, at 542. Native Alaskans were later extended citizenship under the statute that extended uniform citizenship to Natives writ large. *See* Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (repealed 1952) (current version at 8 U.S.C. § 1401(b)). But Native Alaskan voter suppression was rampant — in 1925, the year following the Indian Citizenship Act, the Alaskan legislature passed bills requiring literacy tests in English to vote. *See* Singel, *supra* note 31, at 803–04 (discussing both the extension of Native citizenship in 1924 and the backlash against Alaskan Native voters in 1925). Congress then enacted this policy into law for the territory in 1927. *See* Act of Mar. 3, 1927, Pub. L. No. 69-766, § 1, 44 Stat. 1392, 1392–93.

⁵³⁷ *See, e.g.*, Alaska Statehood Act § 4 (reserving “lands or other property . . . the right or title to which may be held by any Indians, Eskimos, or Aleuts”); Hawai‘i Statehood Admissions Act § 5 (requiring that the Hawaiian Homes Commission Act — an act setting aside 200,000 acres to be held in trust for Native Hawaiians — be incorporated into the state constitution).

⁵³⁸ *See* Hawai‘i Statehood Admissions Act § 5.

⁵³⁹ *See* LAUREN BENTON & LISA FORD, *RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850*, at 2 (2016).

⁵⁴⁰ *See id.* at 3.

caused certain dominant themes to emerge.⁵⁴¹ Particularly relevant were calls for the colonizing government to safeguard legal pluralism, ensure certain standards of due process, redistribute power among colonial institutions, and leverage the professionalization and formalization of law to structure and stabilize colonial relationships.⁵⁴²

Law has served a similar ordering purpose in the context of the American colonial project. It has also taken similar forms. From the Founding, individuals have turned to law to structure the shape and reach of American empire.⁵⁴³ United States agents have turned to law to push forward the American colonial project⁵⁴⁴ and colonized peoples have turned to law to shape and mitigate its progress.⁵⁴⁵ Reflecting the heterogeneity of voices and the varied contexts within which these laws apply, the law governing these relationships is fractured and siloed — seemingly belying any logic or shared dynamics.⁵⁴⁶ The laws of American colonialism span quite the range within the laws of the United States — forming entire titles within the *United States Code*,⁵⁴⁷ encompassing hundreds of treaties,⁵⁴⁸ and structuring a range of administrative agencies,⁵⁴⁹ thousands of pages of federal regulations,⁵⁵⁰ and innumerable intergovernmental compacts and contracts.⁵⁵¹ But over time, this “fluid

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ Compare Rennard Strickland, Lecture, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 719 (1986) (arguing that “the law was both a formal and an informal instrument of genocide”), with Frickey, *Marshalling Past and Present*, *supra* note 31, at 384 (“[A]lthough the federal Indian law crafted in the early-nineteenth century by Chief Justice John Marshall assisted the implementation of colonization in a variety of ways, it did not abandon the civil religion [of limited government and democracy] entirely.”).

⁵⁴⁴ See, e.g., Strickland, *supra* note 543, at 719–21; Frickey, *Marshalling Past and Present*, *supra* note 31, at 384.

⁵⁴⁵ See Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2219–58 (describing “the tactics, successes, and failures of Native advocates and their allies as they have forced Congress to recognize the constitutional failures of American colonialism and to mitigate these failures by treaty, statute, and regulation,” *id.* at 2219); Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 271–86 (2023) (discussing the role played by Native leaders and advocates in the constitutional-creation process).

⁵⁴⁶ See BENTON & FORD, *supra* note 539, at 3.

⁵⁴⁷ See, e.g., 25 U.S.C. (entitled “Indians”); 48 U.S.C. (entitled “Territories and Insular Possessions”).

⁵⁴⁸ See Gover, *supra* note 341, at 37.

⁵⁴⁹ These include the Bureau of Indian Affairs, the Indian Health Service, and the National Indian Gaming Commission.

⁵⁵⁰ See 25 C.F.R. (entitled “Indians”).

⁵⁵¹ See, e.g., Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166–1168, 25 U.S.C. §§ 2701–2721 (requiring Tribal-State gaming compacts); 15 U.S.C. § 637(a) (permitting tribes, Alaska Native corporations, and Native Hawaiian Organizations to contract with the federal government); see also Larry Chavis et al., *Federal Contracting’s Expanding Revenue Role in Indian Country*, FED. RSRV. BANK MINNEAPOLIS (Dec. 21, 2022), <https://www.minneapolisfed.org/article/2022/federal-contractings-expanding-revenue-role-in-indian-country> [<https://perma.cc/ZZ8B-K7NQ>] (“[A]cross 40 years, 50.5 percent of tribes have been involved in federal contracting.”).

vernacular”⁵⁵² has successfully shaped the colonial center to better safeguard legal pluralism, established certain levels of procedural fairness, and leveraged law to stabilize the inherent instability in colonial relationships.

Native peoples leveraged “law talk”⁵⁵³ to shape the United States and its Constitution, as well as to force principled limits upon the American colonial project from the Founding.⁵⁵⁴ Native advocates adopted similar strategies to those of Black social movements — that is, by repurposing the languages of power of the period and arguing within those frameworks.⁵⁵⁵ For Black advocates, the discourse wielded was primarily that of internal constitutionalism and particularly that of citizenship and rights.⁵⁵⁶ Native advocates focused on the external constitution and fought to shape the constitution of American colonialism on two fronts: First, Native peoples aimed to shape the reach and meaning of the external powers granted to the national government by the United States Constitution.⁵⁵⁷ Second, Native advocates drew upon languages and logics from the law of nations and advocated to entrench those

⁵⁵² BENTON & FORD, *supra* note 539, at 3.

⁵⁵³ *See id.* at 4.

⁵⁵⁴ *See* Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2215–16; Blackhawk, *supra* note 27, at 1800.

⁵⁵⁵ *See* Roberts, *supra* note 45, at 54–62 (outlining abolitionists’ argument that the Constitution was an antislavery document); MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 4 (2018) (recounting the abolitionist William Yates’s argument that the very legal theories that had entrenched racism could be employed for racial equality); KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* 314–15 (2021) (explaining how antislavery activists couched their arguments in the existing frameworks of discrimination and civil rights law).

⁵⁵⁶ *See* Roberts, *supra* note 45, at 54–62; Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts* (Jan. 26, 1865), *in* 4 *THE FREDERICK DOUGLASS PAPERS* 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991). Extended and broad efforts at synthesis, such as this one, always run the risk of oversimplifying complex phenomena, especially in the context of comparison. To avoid the most egregious forms of oversimplification and, especially, to avoid glossing over important and nuanced questions about the nature and relationship of social movement advocacy by those subordinated by the United States, it bears noting that Black activists also embraced the language of separation, power, and independence described here as central to the strategies of colonized peoples. *See, e.g.*, ROBIN D.G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* 21–23 (2002) (discussing arguments for repatriation to Africa); STOKELY CARMICHAEL (later known as KWAME TURE) & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 45–48 (1967). Movements for Black power or Black nationalism have been ongoing since the Founding, albeit as a minority view within the broader movement for inclusion. *See* WILSON JEREMIAH MOSES, *Introduction to CLASSICAL BLACK NATIONALISM: FROM THE AMERICAN REVOLUTION TO MARCUS GARVEY I* (Wilson Jeremiah Moses ed., 1996). Recognizing the constitution of colonialism raises myriad questions regarding the relationship between strategies of internal and external constitutionalism within communities subordinated within the United States.

⁵⁵⁷ *See* Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2220; Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 *FORDHAM L. REV.* 1707, 1710 (2021).

principles within United States constitutional law to shape the exercise of those external powers.⁵⁵⁸

The nuanced and complex forms of advocacy by Native and other colonized peoples over the last two hundred years deserve deeper treatment. But I offer here a glimpse of strategies undertaken by Native peoples to better understand the development of borderlands constitutional principles over time. Scholars of social movement advocacy have long studied constitutional discourse as historically and contextually inflected with the constitutional culture of its time.⁵⁵⁹ For much of our history, constitutional meaning with respect to the external constitutional powers of the United States, including the power to colonize, was rooted in the unique vernacular of the law of nations. Thus, advocates did not frame these principles in terms of “rights,” but focused instead on concepts of sovereignty, nonintervention, collaborative lawmaking, and treaty practice as guiding and limiting the power of the United States with respect to others — especially those others whom the United States had colonized.⁵⁶⁰

Native peoples leveraged these laws and crafted legal strategies to shape colonialism within North America long before the Founding.⁵⁶¹ Native leaders argued that the law of nations recognized Native governments as nations, thereby limiting the power of European colonial governments over them. Native peoples then drew on these precedents to advocate for formation of sovereign-to-sovereign relationships with the United States.⁵⁶² Native peoples argued they would continue to be governed by law-of-nations principles — primarily, treaties and diplomacy.⁵⁶³ Leveraging this nascent body of international law and the United States’s early reliance on it helped preserve the rule of law and its stabilizing and limiting force within the American colonial project. Most importantly, these strategies placed controversial but vital limits on the reach of American colonialism into the internal governance of Native people — they preserved the recognition of the sovereignty of

⁵⁵⁸ See, e.g., Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, The United States, and International Law, 1783–1795*, 106 J. AM. HIST. 591, 598–600 (2019) (recounting how Native leaders invoked international law to illustrate the unlawfulness of the United States’s — and other nations’ — behavior); Davis et al., *supra* note 111, at 565 (explaining how Indian leaders would invoke the law-of-nations concept of “[f]ree and [i]ndependent states” to assert their sovereignty).

⁵⁵⁹ See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1325 (2006).

⁵⁶⁰ See generally Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39 (illustrating Native peoples’ developments through affirming tribal sovereignty, constitutional lawmaking, and treaty practice).

⁵⁶¹ See *id.* at 2220 (explaining that Native advocates shaped and mitigated American colonialism “[e]ven before the Founding” through treaties).

⁵⁶² Ablavsky, *supra* note 558, at 599–600.

⁵⁶³ *Id.* (discussing how this line of international law–based advocacy resulted in the Washington Administration determining that “[r]elationships with Native peoples would be governed . . . by the ‘law of nations,’” *id.* at 599).

each Native nation and its ability to govern its territory relatively free from interference and intervention.⁵⁶⁴

Following independence, Native advocates developed legal strategies that drew upon the Constitution and laws of the United States. When United States officials drew on the Doctrine of Discovery to claim sovereign power over Native peoples and Native lands,⁵⁶⁵ Native advocates fought to shape this power through treaty law, diplomacy, and other forms of advocacy.⁵⁶⁶ Native leaders sought to reshape the fundamental law of the United States indirectly, through the creation of treaties which Native people understood could influence the Articles of Confederation, and directly, through efforts to shape the United States Constitution.⁵⁶⁷ Indians may have been carved out of the core nation-building project of the United States Constitution, but Native advocates focused on shaping the powers and principles of the United States that impacted their governments and communities — powers deemed “external” by the Founding generation.⁵⁶⁸ Native peoples and concerns over Indian affairs earned specific mentions within the Constitution, and influenced the shape and distribution of a range of external constitutional powers — including diplomatic, treaty, and other powers.⁵⁶⁹

Following the Founding, Native advocates continued to shape the fundamental law of American colonialism through legal advocacy. Indian affairs generated a tremendous amount of law in the early period and Native advocates fought to shape much of this law.⁵⁷⁰ Initially, Native advocates fought successfully to limit the United States’s power over Native peoples to those external or foreign affairs powers designated by the Constitution — predominantly in terms of the recognition and treaty powers — and not through domestic legislation.⁵⁷¹ Even Native nations within the territories retained internal sovereignty and existed free of direct regulation by the United States. Instead, the colonial relationship was mediated predominantly through treaty — a form of law and lawmaking that made it easier to foster self-determination

⁵⁶⁴ *Id.* at 600.

⁵⁶⁵ Miller, *supra* note 211, at 330–31 (“[T]he American colonial, state, and federal governments all utilized the Doctrine [of Discovery] and its religious, cultural, and racial ideas of superiority over Native Americans to stake legal claims to the lands and property rights of the indigenous peoples.”).

⁵⁶⁶ See Blackhawk, *supra* note 27, at 1809–10.

⁵⁶⁷ See Bilder, *supra* note 557, at 1710; Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2220–21 (discussing how the creation of treaties influenced federal behavior under the Articles of Confederation); *id.* at 2223–24 (discussing the impacts of Native advocates at the Constitutional Convention).

⁵⁶⁸ See Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2219–58; see also Ablavsky & Allread, *supra* note 545, at 252 (discussing “the role that Native peoples played as co-creators of American constitutional law”).

⁵⁶⁹ See Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2219–20.

⁵⁷⁰ See, e.g., Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137.

⁵⁷¹ Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2223–25.

and collaborative lawmaking, and to preserve colonized communities. Treaties, in contrast to colonialism structured by domestic legislation, preserved space for Native nations to govern themselves, respected the legal and constitutional pluralism of the many Native nations, and provided a structured process for lawmaking that allowed Native people a formal role in making law.⁵⁷²

Laws passed by the United States in the early period generally sought to preserve self-government for Native nations. The majority of treaties formed by the United States with Native nations in its first one hundred years preserved sovereignty and self-governance and, from its very first session, Congress passed a series of omnibus Trade and Intercourse Acts that shielded Indian Country from intervention by the laws and peoples of the United States, excluding the jurisdiction of the several states and regulating the relationship between Indian Country and citizens of the United States.⁵⁷³ But over the long nineteenth century the language of civilization within the law of nations and within the United States, along with demand for Indian land, prevailed.⁵⁷⁴ Through the nineteenth and into the twentieth century, the United States constitutionalized the growing belief that civilized nations had the power to govern uncivilized peoples toward self-government and republicanism.⁵⁷⁵ This vision of national power, coupled with the growing power of state governments, meant that the power to civilize allowed the United States to govern Indian Country to the ground by the late nineteenth century.⁵⁷⁶

Colonialism-inflected hierarchies within the law of nations — including the language of “civilization” and the presumption that the United States holds unlimited power to civilize savages — took hold of United States constitutional and other domestic law across the

⁵⁷² Blackhawk, *supra* note 27, at 1809–10; PRUCHA, *supra* note 142, at 144 (discussing the prohibition on state and private actors entering into treaty agreements with Native nations to acquire land).

⁵⁷³ See, e.g., Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137; see also Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2212; PRUCHA, *supra* note 142, at 144; *id.* at 189–90 (discussing measures taken to regularize criminal law in early Trade and Intercourse Acts given that Indian Country was outside state jurisdiction).

⁵⁷⁴ See Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297, 314–16 (2013).

⁵⁷⁵ See *id.* (tracing the emergence of “civilizing” language and discourse over the nineteenth century); Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105, 1120–21 (arguing that the Supreme Court has had a role in advancing the notion that “because the Indian tribes were neither Christian nor civilized, they were subject to the doctrine of discovery,” *id.* at 1120, which “gave the discovering nation plenary power . . . to acquire lands of Indians and decide on the methods by which the lands were to be acquired,” *id.* at 1121 (footnote omitted)).

⁵⁷⁶ See Fort, *supra* note 574, at 316.

nineteenth century.⁵⁷⁷ This power to “civilize” is one that the United States has drawn upon to occupy militarily and dispossess the lands, resources, and even children of peoples deemed “foreign” or “uncivilized.”⁵⁷⁸ As long as federal power was exercised toward “civilization” of Native people, it could separate families, criminalize political and religious expression, and allow federal agents to incarcerate and beat Native children. Civilization was the engine of Manifest Destiny. It is a power that has been used to justify mass slaughter, lawless wars, and even genocide.⁵⁷⁹

But recognizing the egregiousness of American colonialism should not also erase the ongoing resistance mounted by Native peoples. Across this same period, Native advocates continued to leverage law of nations discourse, including the hierarchy of “civilization,” to limit the power of the United States to colonize them.⁵⁸⁰ When faced with arguments that the United States had the power to “civilize” them toward republican self-government, some Native nations began to craft forms of government that emulated “civilization,” as defined by the United States. The Five “Civilized Tribes” famously adopted constitutional government, separated powers of government into a tripartite structure, crafted laws in English, adopted pastoral practice, and even took up the institution

⁵⁷⁷ See, e.g., Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 256 (tracing how a “medievally-derived ideology — that normatively divergent ‘savage’ peoples could be denied equal rights and status accorded to the civilized nations of Europe” within international law — became “an integral part of the fabric of United States law” under the Marshall Court).

⁵⁷⁸ See Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENV'T & ENERGY L. & POL'Y J. 188, 192 (2009) (describing “the 19th century notion of the ‘vanishing redman,’ which posited that indigenous peoples would disappear in the face of civilization, thereby justifying the wholesale appropriation of Native lands, genocidal military campaigns against indigenous peoples, and paternalistic efforts to ‘save’ individual Indians by sending them to government-run boarding schools”); Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1167–68 (2012) (“In the nineteenth century, the BIA promulgated federal administrative regulations to ‘civilize’ and ‘Christianize’ the Indian people.” *Id.* at 1167. “[F]ederal policies banning Native religion or forcibly removing Indian children to federal military-style boarding schools were [considered] permissible as secular policies of ‘civilization’ applied to ‘wards’ of the federal government.” *Id.* at 1168.).

⁵⁷⁹ A full clearing of the theoretical thicket between the “power to civilize,” “doctrines of discovery,” “plenary power,” and limits like the “trust doctrine” must be left to future work that focuses on these concepts in greater detail. But, to clarify these terms preliminarily: the “Doctrine of Discovery,” “conquest,” and the “power to civilize” are distinct but related arguments to justify the power to colonize. These justifications for the power to colonize are incorporated from the “law of nations” rules of what powers are inherent for all sovereign nations — or “powers inherent in sovereignty.” The power to colonize is a power deemed “plenary” by the Supreme Court and by those who exercise it — whether the justification for that power was “discovery,” “conquest,” or “civilization.” The trust doctrine was crafted to shape and limit the power to colonize — however justified, but usually in the context of “civilization” — and provides the power to govern colonized peoples less egregiously.

⁵⁸⁰ See TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 33 (2002).

of human enslavement.⁵⁸¹ Others leveraged the pluralistic constitutional space preserved by colonialism to envision constitutional cultures that they believed to be far more equal and just than that of the United States. In this way, the power to civilize and its distinctive constitutionalism continued to shield the borderlands from assimilative visions of constitutionalism that characterized “internal” constitutionalism of this period — preserving traditional forms of government, language, culture, and worldview.⁵⁸²

Finally, lest this overly brief survey mislead, Native advocacy was far more complex and nuanced than what can be captured here. It did not draw solely from external constitutional discourse. Often, when arguments from “external” constitutional values and international law either failed or were foreclosed, colonized peoples advocated also for forms of inclusion into the polity of the United States, in order to secure the constitutional values of the center and to shape those constitutional values toward anticolonial ends. To provide just one example, citizenship was often envisioned as the entry point for constitutional protection and as an exit from the violence of American colonialism.⁵⁸³ Early in the nineteenth century, Native peoples experimented with bargaining for citizenship within treaty negotiations with the United States.⁵⁸⁴ Yet these experiments generally ended with those Native nations realizing that citizenship failed to live up to the promises of the Constitution. Later in the nineteenth century, the United States began a practice of dangling the possibility of citizenship before colonized peoples to further the American colonial project.⁵⁸⁵ By statute, as well as by treaty, the United States offered citizenship to Native people, if only they would assist in breaking up tribal treaty lands through allotment.⁵⁸⁶ Efforts to gain citizenship were controversial and always invigorated dissent based

⁵⁸¹ See, e.g., Sarah Deer & Cecilia Knapp, *Muscogee Constitutional Jurisprudence: *Vhaku Em Potaku* (the Carpet Under the Law)*, 49 TULSA L. REV. 125, 142, 149–52 (2013) (discussing the history of the Muscogee Constitution of 1867); Joseph William Singer, Comment, *The Stranger Who Resides with You: Ironies of Asian-American and American Indian Legal History*, 40 B.C. L. REV. 171, 173 (1998) (discussing the ironies of the United States’s civilization and assimilation policies, and noting that “[t]he Cherokees, for example, developed an agricultural lifestyle, a written language and a constitution” and “were so ‘civilized’ that some Cherokees even owned slaves”).

⁵⁸² Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2236–58; JULIE L. REED, *SERVING THE NATION: CHEROKEE SOVEREIGNTY AND SOCIAL WELFARE, 1800–1907*, at 15–16 (2016).

⁵⁸³ Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2237 (referencing TADEUSZ LEWANDOWSKI, *RED BIRD, RED POWER: THE LIFE AND LEGACY OF ZITKALA-ŠA* (2016) (describing Zitkala-Ša’s efforts to gain citizenship for Native people)).

⁵⁸⁴ See Porter, *supra* note 64, at 111–12.

⁵⁸⁵ *Id.* at 119–20.

⁵⁸⁶ See *id.* at 111–12 (arguing that it “could hardly be said that these grants of citizenship [via statute and treaty] were consensual,” *id.* at 111, given their contingency on allotment and dissolution of tribal status).

on concerns over assimilation.⁵⁸⁷ But the late nineteenth and early twentieth centuries saw a wealth of advocacy by colonized peoples, Indian and non-Indian, for United States citizenship.⁵⁸⁸ Native people were able to advocate for innovative forms of citizenship that preserved dual nationalism and tribal sovereignty.⁵⁸⁹ But the protections of citizenship for colonized peoples were rarely realized — the national government continued to exert the power to colonize, even over these newly fledged citizens.⁵⁹⁰

C. *The Principles of Borderlands Constitutionalism*

Over time, borderlands advocacy has fostered a range of principles that have shaped and placed vital limits on the constitution of American colonialism and have helped craft bodies of law that embodied those values. Native people have been particularly successful in shaping these values and codifying them into law. But colonized peoples within the territories, as well as within Indian Country, have fostered a range of innovative forms of collaborative lawmaking and representation within the twentieth and twenty-first centuries — from nonvoting delegates and joint commissions to hiring preferences and rules of consultation and collaboration.

Rather than drawing from the familiar language of liberal constitutionalism, borderlands constitutionalism borrowed heavily from vernacular within the law of nations⁵⁹¹ — discourses of power, disempowerment,

⁵⁸⁷ See, e.g., Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 126, 129 (2004) (“There were many Indians, however, who feared that citizenship and suffrage would accelerate the death of Indian culture. Accordingly, they resisted the drive for citizenship and suffrage.”). See generally Mae M. Ngai, *Race, Nation, and Citizenship in Late Nineteenth-Century America, 1878–1900*, in THE COLUMBIA DOCUMENTARY HISTORY OF RACE AND ETHNICITY IN AMERICA (Ronald H. Baylor ed., 2004) (describing the paths to citizenship and general views on assimilation for Black Americans, Native peoples, European immigrants, Mexicans, Chinese immigrants, Hawaiians, Filipinos, and Puerto Ricans).

⁵⁸⁸ See Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2237.

⁵⁸⁹ For example, the Pueblo Indians — deemed citizens in the wake of the Treaty of Guadalupe Hidalgo — were able to maintain their tribal membership as well. See Porter, *supra* note 64, at 112 (“[T]here was the unique case of the Pueblo Indians, who were deemed United States citizens in 1846 by virtue of their failure to elect Mexican citizenship under the Treaty of Guadalupe Hidalgo. This was the first instance in which ‘Native citizens [were] “permitted” to retain their tribal organization and culture’ and thus be considered as dual citizens.” (quoting Alexandra Witkin, *To Silence a Drum: The Imposition of United States Citizenship on Native Peoples*, in 21 HISTORICAL REFLECTIONS/RÉFLEXIONS HISTORIQUES 353, 370 (1995))).

⁵⁹⁰ See, e.g., *United States v. Nice*, 241 U.S. 591, 598 (1916) (holding that the plenary power doctrine applies regardless of citizenship status); *United States v. Sandoval*, 231 U.S. 28, 48 (1913) (same); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) (same); see also Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1213–15 (2021) (reviewing IMMERWAHR, *supra* note 7).

⁵⁹¹ See Ablavsky, *supra* note 558, at 593 (framing “the legal contests between Native leaders and U.S. representatives in the early American borderlands as interpretive struggles over the late eighteenth-century law of nations”).

sovereignty, self-determination, development, citizenship, and nationhood — and continues to reflect these distinctive origins. At base, these discourses preserved several principles — including recognition of colonized peoples as political entities, preservation of those communities, support for self-determination, respect for the borders and jurisdiction of colonized peoples, collaborative lawmaking, and principles of nonintervention that weigh against the imposition of the laws of one people upon another.⁵⁹² Borderlands peoples then began translating these principles into the liberal constitutional discourse of the center — most notably, by advocating for self-government and limits on the unilateral imposition of law without collaboration and consent, as well as respect for legal variation and constitutional pluralism. Much of the modern law passed according to this doctrine already aims to mitigate the American colonial project through innovative structures of federalism, forms of representation, collaborative lawmaking, redistribution of power, citizenship, and consent.⁵⁹³

The following sections explore a selection of the principles of borderlands constitutionalism,⁵⁹⁴ before turning to what might be realized were we to better reckon with these principles as central to our constitutional law.

I. Recognition. — The concept of recognition within international law has long been a bit amorphous and, as Professor Hans Kelsen describes, aimed at two distinctive functions: First, recognition supports a political function of providing an affirmative statement of one nation to another to engage in a particular government-to-government legal relationship — one most often, but not necessarily, delineated through treaties.⁵⁹⁵ Second, recognition performs the separate legal function of defining those political communities that are “nations” or “states” within

⁵⁹² See *id.* at 591–92 (discussing how the Founders and Native leaders grappled with not only “concepts in what scholars now call international law — sovereignty, nationhood, independence,” *id.* at 591, but also “indigenous legal concepts of kinship, [and] reciprocity,” *id.* at 592).

⁵⁹³ See Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2236–58. See generally *Developments in the Law — The U.S. Territories*, *supra* note 244 (discussing the unique legal relationships and sovereignty assertions in the territories today).

⁵⁹⁴ I offer these constitutional principles as derived from discourses of legal advocacy, struggle, and conflict within the borderlands — discourses revealed within the formal and informal documents contesting and shaping colonization and regulation of the borderlands. These principles are ones that have been embraced by the United States and have shaped law and legal reasoning therein. At times they stand at the foreground of Supreme Court and congressional reasoning — at others, they lurk in the background. These are principles that have been shaped by non-Native people, legal elites who have distorted and abused these principles. But these are, importantly, principles put forward by colonized peoples within formal and informal institutions and are shaped by the agency, philosophies, and ingenuity of those colonized peoples. This agency is limited by colonial relationships and institutions; and these principles are not always embraced fully or applied consistently by the United States. But I offer a selection here in the hope that it will inspire more borderlands constitutional principles, as well as greater discussion and debate over the contribution of borderlands peoples to constitutional discourse writ large.

⁵⁹⁵ Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT’L L. 605, 605 (1941).

international law.⁵⁹⁶ From before the Founding, Native advocates leveraged the language of recognition toward both ends — that is, to shape their relationships with European colonial powers and then the fledgling United States, as well as to position themselves on the international stage.⁵⁹⁷ Native people have been particularly successful in gaining recognition of tribal governments as sovereign and in shaping recognition of “Indian” or colonized status as a distinct class.⁵⁹⁸ But colonized peoples across the territories and Indian Country have fought for and successfully preserved recognition of colonized peoples as political communities with which the United States agrees to engage in government-to-government relationships — either through treaties,⁵⁹⁹ treaty substitutes,⁶⁰⁰ or collaborative legislation.⁶⁰¹

Although the public, legal elites, and the academy have yet to reckon fully with the constitution of American colonialism, our laws are replete with recognition of colonized peoples as distinctive political communities. Residents of the borderlands have leveraged law to preserve recognition of their political communities as governments — largely in an effort to preserve pluralism. The cacophony of voices among empire has also leveraged this recognition successfully to press the colonial center to force law and legal norms back into its colonial relationships writ large. These laws are often specific to each colonized polity and set the fundamental law of that polity. In many ways, these laws make modern American colonialism legible by providing, in essence, a legal

⁵⁹⁶ *Id.* at 606, 608–09.

⁵⁹⁷ *See, e.g.*, FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 13–28 (1984) (discussing British recognition of American Indian tribes during the eighteenth century).

⁵⁹⁸ *See* Blackhawk, *supra* note 27, at 1796 (noting that the *recognition* of inherent tribal sovereignty is “exceptional”).

⁵⁹⁹ *See, e.g., id.* at 1810 (“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”); Matthew L.M. Fletcher, *Treaties as Recognition of the Nation-to-Nation Relationship*, in *NATION TO NATION: TREATIES BETWEEN THE UNITED STATES AND AMERICAN INDIAN NATIONS* 34, 34–35 (Suzan Shown Harjo ed., 2014).

⁶⁰⁰ *See, e.g.*, Blackhawk, *supra* note 27, at 1815 (arguing that the late-1800s shift from treaty practice to executive agreements between the U.S. government and Native nations tracked similar changes in international lawmaking between sovereigns).

⁶⁰¹ *See, e.g., id.* at 1812–15 (discussing the Indian Reorganization Act and how it “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,” *id.* at 1814).

map of the polities the United States colonizes.⁶⁰² Title 25,⁶⁰³ as well as hundreds of treaties,⁶⁰⁴ governs “Indians” and the government-to-government relationship between the over 570 federally recognized Native nations within the alleged territorial borders of the “lower forty-eight” states and the United States. Every year, the Bureau of Indian Affairs publishes in the Federal Register an updated list of all “Indian” governments recognized by the United States — a list currently recognizing 574 Native nations.⁶⁰⁵ Title 48 of the United States Code governs the relationship between a range of “territories and insular possessions”⁶⁰⁶ — some, like the Philippines, granted independence⁶⁰⁷ — and the United States. Each distinctive chapter separately names and regulates each colonized political community recognized by the United States.⁶⁰⁸ Title 43 regulates the relationship between Alaska Native “corporations” and “villages,”⁶⁰⁹ and the somewhat ambiguous relations between Alaska Native governments and the United States.⁶¹⁰ These Alaska Native nations also appear within the annual list of federally recognized Native nations published every year in the Federal Register.⁶¹¹

⁶⁰² The fracturing of borderlands law has made American colonialism more legible and it has likely served to protect legal pluralism in certain ways. But it also conceals often more than it reveals — preferencing often the views of the colonizer over the colonized. A prime example is that of the illegally annexed state of Hawai‘i and the Kānaka Maoli or Native Hawaiian population who still occupy the island state. Buried in Title 42 is recognition of Native Hawaiians as a distinct and unique people and Nation, admission that the state of Hawai‘i was annexed unlawfully, and the development of a distinct healthcare system for Native Hawaiians. 42 U.S.C. §§ 11701–11702 (“In the year 1893, . . . the United States Minister and the naval representative of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian Nation in support of the overthrow of the indigenous and lawful Government of Hawai‘i . . .” *Id.* § 11701(7)–(8)). Yet, Hawai‘i is more often depicted as the fiftieth state without recognition of this unlawful annexation.

⁶⁰³ *See generally* 25 U.S.C.

⁶⁰⁴ The United States formed the majority of treaties with Native nations during its first hundred years and the vast majority of these hundreds of treaties are still very much in force today. *See* Gover, *supra* note 341, at 37. But the United States Department of State does not publish a single treaty formed between the United States and a Native nation in their annual publication of all treaties and other international agreements in force. *See* U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020 (2020). Treaties with Native nations are instead published in a separate collection and identified as “Indian” treaties, *see generally* 2 INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., 1904), as if the term “Indian” stripped the treaty of its constitutional status as being negotiated and ratified by the President with the advice and consent of a supermajority in the Senate.

⁶⁰⁵ Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4636 (Jan. 28, 2022).

⁶⁰⁶ *See generally* 48 U.S.C.

⁶⁰⁷ Treaty of General Relations, *supra* note 340, at 1174.

⁶⁰⁸ *See, e.g.*, 48 U.S.C., ch. 20, §§ 2101–2241 (covering Puerto Rico).

⁶⁰⁹ *See, e.g.*, 43 U.S.C. § 1604.

⁶¹⁰ *See generally* 43 U.S.C. §§ 79d, 123a, 270–12, 316, 687c, 737, 942–1, 942–6, 971a–971e, 1601–1656.

⁶¹¹ Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4640 (Jan. 28, 2022).

At present, an important distinction exists between the recognition of Native nations and that of other colonized peoples within the territories: for the former, the United States has both formed a government-to-government relationship and also recognizes within Native nations a sovereignty that predates the constitutional framework.⁶¹² For colonized governments outside of our Indian Country borderlands, the United States recognizes these governments as governments and has formed government-to-government relationships with them.⁶¹³ But it recognizes their power of self-government as rooted only in the delegated federal power of the United States, rather than in their own distinctive sovereignty.⁶¹⁴

Native people have also successfully advocated to translate⁶¹⁵ the recognition power in the context of colonized peoples into a structured process managed by the Department of the Interior and, particularly, the Office of Federal Acknowledgement within the Bureau of Indian Affairs.⁶¹⁶ In 1978, the Bureau of Indian Affairs established a formalized process by which colonized peoples, limited to “Indians,” could petition for recognition by the United States as an Indian government, pursuant to formalized criteria.⁶¹⁷ When this administrative process was later deemed inadequate — with times to process a single petition for recognition frequently exceeding fifteen years⁶¹⁸ — Native advocates turned to Congress and translated the recognition power into that

⁶¹² See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 544–45 (1823) (describing how at the time “of the discovery of the continent . . . by the Europeans . . . the whole of the territory . . . was held, occupied, and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory”); see also Davis et al., *supra* note 111, at 550 (“Through its treaty practice and opinions of its Supreme Court, the United States recognized Indian tribes as political communities whose pre-constitutional sovereignty persisted despite their incorporation within U.S. territory.”).

⁶¹³ See, e.g., Treaty of General Relations, *supra* note 340.

⁶¹⁴ See, e.g., *United States v. Wheeler*, 435 U.S. 313, 321 (1978) (“[A] territorial government is entirely the creation of Congress”); see also Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 664 (2013) (“While case law recognizes retained inherent sovereignty for tribes, territorial governments exercise only delegated federal power.”).

⁶¹⁵ See generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (describing the process of maintaining fidelity to original constitutional meaning by “translating” that constitutional text into the context of changed circumstances).

⁶¹⁶ For a historical account of the politics and processes Native nations endure when seeking federal recognition, see generally MARK EDWIN MILLER, *CLAIMING TRIBAL IDENTITY: THE FIVE TRIBES AND THE POLITICS OF FEDERAL ACKNOWLEDGEMENT* (2013).

⁶¹⁷ Procedures for Federal Acknowledgment of Indian Tribes, 25 C.F.R. pt. 83 (2022).

⁶¹⁸ See *Federal Recognition: Politics and Legal Relationship Between Governments: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 2 (2012) [hereinafter *Federal Recognition Hearing*] (statement of Sen. Jon Tester, Member, S. Comm. on Indian Affs.) (noting the Little Shell Tribe had been in the federal recognition process for thirty-four years); *id.* at 5 (statement of Sen. Jim Webb) (noting six Virginia tribes had been in the federal recognition process for fifteen years each); *id.* at 21 (statement of John Norwood, Co-Chair, Task Force on Fed. Acknowledgment, Nat’l Cong. of Am. Indians) (noting the process can take up to thirty-five years).

branch.⁶¹⁹ Over the past four decades, Native nations have increasingly gained recognition by lobbying directly to Congress for recognition of their tribal governments through legislation.⁶²⁰

Beyond Indian Country, colonized peoples have successfully fought not simply for recognition by the United States of a government-to-government relationship, but also for the recognition within international law toward independence. The Philippines, in particular, began a ten-year process in 1934 initiated and structured by the United States Congress toward independence and, following World War II, Congress and the President exercised their collective power to recognize the Philippines as an independent nation.⁶²¹ Similarly, the Freely Associated States, formerly of the Trust Territory of the Pacific Islands, have advocated for recognition as independent nations while maintaining an ongoing government-to-government relationship with the United States through a Compact of Free Association.⁶²² Pursuant to this Compact, the United States exchanges military-base operations within those independent island nations for economic services, federal support, and certain forms of free exchange and free trade,⁶²³ although the United States has faced heavy criticism in recent years over its failure to uphold its obligations under the Compact.⁶²⁴

Finally, Native people have successfully advocated for recognition of colonized individuals as groups whom the United States may regulate differently from others. Most paradigmatically, the Supreme Court held in 1974 in *Morton v. Mancari*⁶²⁵ that regulation of “Indians” as colonized peoples, even within the structure of the national government itself, was

⁶¹⁹ In 1994, Congress enacted the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, (codified at 25 U.S.C. §§ 5130–5131), which recognized two additional ways for an Indian government to become federally recognized: (1) by an act of Congress, or (2) by a decision of a United States court.

⁶²⁰ See *Federal Recognition Hearing*, *supra* note 618, at 21 (statement of John Norwood, Co-Chair, Task Force on Fed. Acknowledgment, Nat'l Cong. of Am. Indians) (“But for roughly the past 35 years, recognition has been either through Congress or primarily through the administrative process.”); Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955, 957 (2016) (noting that legislation has been more common than the administrative process for Native nations to achieve recognition since the 1970s). *But cf.* William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37, 44 (1992) (arguing that the question of which branch of government has the authority to recognize tribes is actually unsettled).

⁶²¹ See Philippine Independence Act, Pub. L. 73-127, 48 Stat. 456 (1934); Proclamation No. 2695, 50 FED. REG. 7517 (July 9, 1946).

⁶²² See Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (codified as amended at 48 U.S.C. §§ 1901–1912, 2001–2004).

⁶²³ For an overview of the Compact, including the contractual benefits, see generally Kevin Morris, *Navigating the Compact of Free Association: Three Decades of Supervised Self-Governance*, 41 U. HAW. L. REV. 384 (2019).

⁶²⁴ Julianne M. Walsh, *Imagining the Marshalls: Chiefs, Tradition, and the State on the Fringes of U.S. Empire 364–76* (Aug. 2003) (Ph.D. dissertation, University of Hawai‘i) (ProQuest) (discussing criticisms of the Compact).

⁶²⁵ 417 U.S. 535 (1974).

a distinctive class for purposes of equal protection.⁶²⁶ In *Mancari*, the Court faced a challenge to a hiring and promotion preference for employees of the Bureau of Indian Affairs that preferred citizens of Native nations over others.⁶²⁷ Hiring preferences of this kind, including the one challenged, had been implemented regularly since the 1934 Indian Reorganization Act.⁶²⁸ A non-Native person claimed that the preference was rooted in racial classifications in violation of the equal protection component of the Due Process Clause of the Fifth Amendment — and was repealed by the Equal Employment Opportunity Act of 1972⁶²⁹ — and was not, as the government claimed, an effort to provide colonized peoples with a measure of self-government.⁶³⁰ The Court rejected the challenge in a unanimous opinion that held “Indian” status as distinctively political, not racial.⁶³¹ It instead subjected the hiring preference to a unique form of rational basis review that asked whether the law was “tied rationally to the fulfillment of Congress’s unique obligation toward the Indians,” including “further[ing] Indian self-government.”⁶³²

2. *Preservation.* — Colonized peoples have fought against efforts to dominate their lands and peoples through forms of mass slaughter, genocide, and depopulation programs. In so doing, they have articulated and begun to codify into law the value of preserving colonized communities from violence, elimination, and assimilation. Efforts at preservation, of course, begin with recognizing these communities as distinctive political communities and shielding them from assimilation. Colonized peoples have not only secured recognition, but have also advocated for and shaped distinctive forms of United States citizenship that reflect their status as colonized peoples. Beyond recognition, however, Native people have been particularly successful in fostering a broader value in preserving Indian Country against elimination, genocide, and depopulation — including recognizing the value of preserving the ability of Native nations to survive within their territorial borders, reservations and homelands secured to them by treaty.⁶³³ Native advocates have also helped shape quasi-constitutional doctrines within the

⁶²⁶ *Id.* at 553–54, 553 n.24.

⁶²⁷ *Id.* at 537.

⁶²⁸ *See id.* at 537–38 (quoting 25 U.S.C. § 472 (1934)).

⁶²⁹ Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972) (amending 42 U.S.C. § 2000e).

⁶³⁰ *See Mancari*, 417 U.S. at 539.

⁶³¹ *Id.* at 552–54.

⁶³² *Id.* at 555.

⁶³³ *See* John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. REV. 503, 505 (1991) (arguing that “effective preservation of tribal culture demands a continuation of the reservation system and the distinctive land and jurisdictional protections afforded by the federal government against state incursions”); Robert A. Williams, Jr., “*The People of the States Where They Are Found Are Often Their Deadliest Enemies*”: *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 982 (1996) (focusing on “an ancient Indian legal tradition of a treaty as a relationship of sacred trust and protection, and on how that tradition established the core principles protective of tribalism’s cultural survival under our Federal Indian Law”).

political branches, like the “trust doctrine,” that guide plenary power toward preservation of colonized communities and support for self-determination.⁶³⁴

At base, colonized peoples have been able to foster the value of the preservation of their communities against elimination, depopulation, and genocide by ending a range of United States programs aimed at mass slaughter,⁶³⁵ forced sterilization,⁶³⁶ and the removal and resocialization of colonized children.⁶³⁷ Many of these successes were not necessarily translated into laws that remain in effect today, but instead brought elimination and assimilation programs to an end.⁶³⁸ Thus, the value of preservation is not always readily visible within United States law. The Indian Child Welfare Act of 1978, challenged in *Brackeen*, is likely one of the most visible forms of success of colonized peoples to end programs of elimination and assimilation, and to codify preservation of their communities for the future.⁶³⁹ The law aimed to end a decades-long effort by state governments to remove twenty-five to thirty-five percent of Native children from Native families and communities, and to place those children in non-Native families.⁶⁴⁰ Its

⁶³⁴ See, e.g., Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1476 (suggesting that “the trust doctrine is particularly important in the modern era of Self-Determination as a means of responding to threats to the native land base”).

⁶³⁵ See ESTES, *supra* note 17, at 83–116 (describing Native self-defense and resistance to colonial violence).

⁶³⁶ See, e.g., THEOBALD, *supra* note 3, at 160–72 (documenting the fight for reproductive control by Native women, including the Women of All Red Nations, in the 1960s through the 1980s, leading to, for example, the adoption of federal regulations in 1978 to better protect women from coercion). For more on the importance of Native women’s activism in federal law reform, see Sarah Deer & Mary Kathryn Nagle, Case Comment, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J.L. & GENDER 179, 186 n.46 (2018) (describing the activism of Native women to change federal law).

⁶³⁷ See, e.g., JACOBS, A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD, *supra* note 4, at 97–116 (describing Native activism against child removal in the 1970s); Angelique EagleWoman (Wambdi A. WasteWin) & G. William Rice, *American Indian Children and U.S. Policy*, 16 TRIBAL L.J. 1, 28–29 (2016) (discussing the recent steps taken by tribal communities to create positive childhood environments for Native children).

⁶³⁸ See, e.g., Deer & Nagle, *supra* note 636, at 189–94, 197–202.

⁶³⁹ For a nuanced discussion of the Indian Child Welfare Act, concluding that the historical record demonstrates the core of the federal-tribal trust relationship is the welfare of Indian children and their relationship to Native nations, see Fletcher & Singel, *supra* note 422, at 958–62. For more, see generally FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 (Matthew L.M. Fletcher et al. eds., 2009), wherein the importance of ICWA is discussed in a collection of works by scholars, lawyers, and social workers.

⁶⁴⁰ See, e.g., 124 CONG. REC. 38102 (1978) (statement of Rep. Robert Lagomarsino) (“The record of nearly 5 years of congressional oversight on Indian child placements and adoptions shows a disproportionately high percentage of Indian families are broken up by the removal, often unwarranted, of their children by nontribal public and private agencies. More than 62,000 of the estimated 250,000 children whose parents live on or near reservations are currently in foster care or

structure resembles, in many ways, contemporaneous laws like the Vienna Convention⁶⁴¹ that were ratified and implemented to preserve the power of foreign nations over their citizen children.⁶⁴²

Over the course of the twentieth century, Congress extended United States citizenship to the majority of colonized peoples within the borderlands. Although citizenship was seen by some as assimilative, colonized peoples were eventually successful in pressing the United States for distinctive forms of citizenship that shielded them from formal assimilation by preserving their citizenship in and allegiance to their colonized governments.⁶⁴³ Nearly one hundred years ago, Congress passed and President Calvin Coolidge signed into law the Indian Citizenship Act of 1924.⁶⁴⁴ In its two clauses, the Act first promised citizenship to all Indians born within the territorial borders of the United States and then moved quickly to preserving all rights for those Indians “to tribal or other property.”⁶⁴⁵ Over time, Native advocates fought successfully to clarify the Indian Citizenship Act as a statute codifying and protecting a status of dual nationalism for Native people in both the United States and their Native nation.⁶⁴⁶ Puerto Ricans became the first island borderlands people extended United States citizenship in 1917⁶⁴⁷ with the balance of the island borderlands peoples receiving citizenship in the

adoptive homes or institutions. Including those whose families live in urban areas or with rural nonrecognized tribes, the number is closer to 100,000 children.”). For further background on the state-run welfare programs and other foster services that resulted in the widespread removal of Native children from their homes, see Brief of Amici Curiae AHA and Organization of American Historians, *supra* note 69, at 22–25 (“By the late 1960s, it is estimated that state governments removed a startling 25–35% of all Indian children from their families and placed them into foster homes, adoptive homes, or institutions.” *Id.* at 22.).

⁶⁴¹ Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

⁶⁴² Compare *id.* art. 5, and *id.* art. 37, with 25 U.S.C. §§ 1902, 1931(a)(8) (both requiring state courts and welfare agencies to identify covered children and collaborate with representatives of those children’s nations). For more on the parallels between the Vienna Convention and ICWA, see Brief of Amici Curiae AHA and Organization of American Historians, *supra* note 69, at 29–32.

⁶⁴³ See *supra* Part II, pp. 66–115.

⁶⁴⁴ Ch. 233, 43 Stat. 253 (1924) (repealed 1952) (current version at 8 U.S.C. § 1401(b)).

⁶⁴⁵ *Id.*

⁶⁴⁶ See, e.g., Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2237–38 (describing Native activism that leveraged a language of both United States citizenship and government-to-government relationship).

⁶⁴⁷ Organic Act of Puerto Rico, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917) (codified as amended at 48 U.S.C. § 733a).

mid-twentieth century.⁶⁴⁸ American Samoans have long resisted United States citizenship as a form of assimilation.⁶⁴⁹

Beyond citizenship, colonized peoples have fought for and now receive a range of federal support that preserves their ability to maintain their governments and peoples within the borderlands. For Indian Country, these programs were born from treaty negotiations and obligations of the eighteenth and nineteenth centuries.⁶⁵⁰ But for the rest of the borderlands, including Alaska and Hawai‘i, these forms of support grew also out of the exercise of a United States power to colonize that it justified through a duty to “civilize” colonized peoples.⁶⁵¹ Civilization programs, as well as the forms of domination required to colonize these lands and peoples, required infrastructure including boarding schools and courts.⁶⁵²

Over time, colonized peoples across the borderlands successfully reclaimed and repurposed colonial infrastructure to redirect funding from domination and “civilization,” and toward preservation. For Indian Country, this reclamation seeped back into interpretation of treaty provisions. Many eighteenth- and nineteenth-century treaties with Native nations may have been formed by the United States with the aim to eliminate Native people over time. But Native advocates were still able to achieve preservation, relying on assurances from the United States

⁶⁴⁸ Citizenship for Inhabitants of Virgin Islands Act of 1927, ch. 192, §§ 1, 3, 44 Stat. 1234, 1234–35 (current version at 8 U.S.C. § 1406) (extending U.S. citizenship to the Virgin Islands); Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421–1424b) (same for Guam); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 1, 90 Stat. 263, 263–78 (1976) (codified at 48 U.S.C. § 1801 note) (establishing the Commonwealth of the Northern Mariana Islands and extending birthright citizenship).

⁶⁴⁹ See *American Samoa*, U.S. DEP’T INTERIOR, <https://www.doi.gov/oia/islands/american-samoa> [<https://perma.cc/Y2X3-XDMW>]; see also *Fitisemanu v. United States*, 1 F.4th 862, 881 (10th Cir. 2021), cert. denied, 143 S. Ct. 362 (2022) (holding that citizens of American Samoa are not United States citizens under the Fourteenth Amendment’s Citizenship Clause).

⁶⁵⁰ See *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (“In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.”).

⁶⁵¹ See Carl Schurz, *American Imperialism*, in *AMERICAN IMPERIALISM IN 1898*, at 77–84 (Theodore P. Greene ed., 1955) (arguing that the duty to civilize colonized persons is best accomplished by helping them, not just ruling them).

⁶⁵² See, e.g., Civilization Fund Act (Indian Civilization Act), ch. 85, 3 Stat. 516 (1819) (codified at 25 U.S.C. § 271) (authorizing the Executive Branch to create educational programs for Native children and appropriating ten thousand dollars for that purpose); Blackhawk, *supra* note 27, at 1831 (discussing the operation of such boarding schools to assimilate Native children); PRICE, *supra* note 14, at 5 (describing the American creation of courts to try Native people for infractions of the Code of Indian Offenses); Diane Hirshberg, “*It Was Bad or It Was Good: Alaska Natives in Past Boarding Schools*,” 47 J. AM. INDIAN EDUC. 5, 5 (2008) (describing the operation of Bureau of Indian Affairs boarding schools in Alaska, intended to Christianize and civilize); SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* 35–62 (2000) (describing the power of American missionaries and their schools, as well as the development of the courts in Hawai‘i).

that it would interpret treaties with Native nations to preserve those communities, including, for example, the Indian canon of construction⁶⁵³ and the *Winters* doctrine.⁶⁵⁴ Beyond Indian Country, colonized peoples have secured a range of federal funding programs, including the celebrated Alaska Native Health System.⁶⁵⁵

Finally, Native people have been particularly successful in translating the value of preservation of Native nations and Indian Country to law with the development of the quasi-constitutional “Indian trust doctrine.”⁶⁵⁶ The doctrine is largely a creature of Congress and the Executive, which draw on the trust doctrine to motivate and shape the regulation of Indian Country — including by codifying a series of laws⁶⁵⁷ that state, reaffirm, and embody the trust doctrine explicitly.⁶⁵⁸ The trust doctrine has also been recognized, although not applied consistently, by the Supreme Court, which has shaped an understanding of it as a legal obligation under which the United States “has charged itself with moral obligations of the highest responsibility and trust”⁶⁵⁹ to protect “tribal and individual Indian lands, assets, resources, and treaty and

⁶⁵³ The Indian canon of construction requires treaties to always be construed in favor of Native people, with language interpreted as Native people would have understood it and ambiguities being resolved in their favor. *See, e.g.*, *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942) (“It is our responsibility to see that the terms of the treaty are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the [Indian] interests . . .”); *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)) (“The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.”). For more on the Indian canon of construction, see generally Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267 (2022) (arguing that textualist jurists should use the Indian ambiguity canon, particularly given its constitutional roots).

⁶⁵⁴ *Winters v. United States*, 207 U.S. 564 (1908) (holding that Congress is required to reserve enough water for the reservations it creates). For more on the *Winters* doctrine, see generally Richard B. Collins, *Indian Allotment Water Rights*, 20 LAND & WATER L. REV. 421 (1985) (reviewing the history of the *Winters* doctrine).

⁶⁵⁵ Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 104(b), 88 Stat. 2203, 2208 (1975) (codified as amended at 25 U.S.C. § 5322(b)) (creating the funding for healthcare provided to tribal organizations and tribes).

⁶⁵⁶ *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (“[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”); *Morton v. Mancari*, 417 U.S. 535, 541–42 (1974) (noting that congressional enactments giving preference to Indians reflect Congress’s desire “to further the Government’s trust obligation toward the Indian tribes”).

⁶⁵⁷ Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2265–66 (discussing the trust doctrine).

⁶⁵⁸ *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (“Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes.”).

⁶⁵⁹ *Seminole Nation*, 316 U.S. at 297.

similarly recognized rights.”⁶⁶⁰ Again, not wholly understood or applied consistently, the Indian trust doctrine provides a cause of action for breach of trust in instances where the United States fails to uphold the value of preserving Native communities and their ability to survive within Indian Country borderlands.⁶⁶¹

3. *Self-Determination.* — In addition to recognition of colonized communities as distinctive political entities with which the United States would form government-to-government relationships, colonized peoples have also advocated heavily for a broader value of self-government and republicanism within the borderlands. Across the twentieth and into the twenty-first century, they have been largely successful at translating this value into complex statutory schemes that established a range of forms of self-government for colonized peoples. In so doing, colonized peoples also aimed to translate and shape the “external” powers of the United States government — treaty, diplomacy, and recognition — into innovative forms of self-determination amidst the American colonial project. Beginning in the late nineteenth century and continuing to the present, colonized peoples have continually fought to reshape and reclaim colonial infrastructure. Their efforts have secured many laws that support their self-determination and mitigate their colonized status — including distinctive forms of recognition, representation, and quasi self-governance.⁶⁶² No doubt, the form of these modern laws still reflects antiquated visions of civilization and civilized governance — most notably the requirement that civilized nations embrace constitutional government. But colonized peoples have been successful in moving the constitution of American colonialism away from these outdated racial hierarchies and toward self-determination.

⁶⁶⁰ Sec’y of the Interior, Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries at 1 (Aug. 20, 2014) (citing COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3] (Nell Jessup Newton ed., 2012)), <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf> [<https://perma.cc/6BFS-N65F>].

⁶⁶¹ See *Jicarilla Apache Nation*, 564 U.S. at 177 (describing how the “applicable statutes and regulations ‘establish [the] fiduciary relationship and define the contours of the United States’ fiduciary responsibilities” (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983))); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (“One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.” (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 572 (1985))). For more on the Indian trust doctrine, see Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 231–32 (2017) (“The federal trust responsibility has evolved from a paternalistic obligation to care for Indian people to a tool protecting the boundaries of tribal governmental authority to provide that care itself.”), and see generally Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U. L. REV. 635 (1982) (discussing the enforceability of trust claims); and Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 123–26 (arguing for a new iteration of the federal trust responsibility).

⁶⁶² Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2213; Blackhawk, *supra* note 27, at 1814; Blackhawk, *On Power and the Law*, *supra* note 39, at 404–05.

Today, the majority of people colonized by the United States have established their own constitutions and govern themselves under varied forms of republican government.⁶⁶³ These schemes embody the value of self-determination in that these forms of self-government provide colonized peoples with the ability to determine the form of their local governments, as well as participate in making the law that governs their everyday lives through various forms of republicanism. As a relic of the power to “civilize” colonized peoples, many of these self-determination statutory schemes require forms of constitutional government⁶⁶⁴ and federal oversight,⁶⁶⁵ and are under steady threat of unilateral intervention by the United States.⁶⁶⁶ But colonized peoples have steadily reshaped these schemes over time to move away from these relics of civilization. Most notably, even though the primary government-to-government framework regulating the relationship between Native nations and the United States, the Indian Reorganization Act, effectively requires a constitutional government for recognition,⁶⁶⁷ many Native nations — including the nation governing the largest reservation within the United States, the Navajo Nation⁶⁶⁸ — explicitly rejected the IRA framework.⁶⁶⁹ The Navajo Nation has, for example, governed instead under its long-standing forms of government without a written constitution. Other colonized peoples, like the people of American Samoa, have established constitutional governments even in the absence of a statutory scheme authorizing them to do so.⁶⁷⁰ The United States

⁶⁶³ See *Field Listing — Government Type*, CIA, <https://www.cia.gov/the-world-factbook/field/government-type> [<https://perma.cc/4HF2-22MF>] (listing American Samoa, Guam, the Northern Mariana Islands, the Philippines, and Puerto Rico as having republican governments, and also recognizing the United States, and therefore Alaska and Hawai‘i, as having a republican government); see also *infra* Part III, pp. 115–51.

⁶⁶⁴ See, e.g., Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2241; Philippine Independence Act, Pub. L. No. 73-127, 48 Stat. 456 (1934).

⁶⁶⁵ See Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, *supra* note 31, at 459.

⁶⁶⁶ See Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata at 21–22, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394) [hereinafter Brief in Opposition, *Fitisemanu*] (“[P]etitioners’ attempt to resolve the ongoing democratic debate over American Samoan citizenship by judicial fiat would contravene the will of the American Samoan people and strip them of their right to determine their own status through the democratic process, and would instead ‘impose citizenship on an unwilling people from a courthouse thousands of miles away.’” (quoting *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021))).

⁶⁶⁷ 25 U.S.C. § 5123 (reserving the ability of Native nations to organize governments outside the IRA framework, but also delineating a detailed and clear process by which the United States would recognize Native nations that drafted and ratified constitutions — constitutions that the United States would approve and oversee — and providing benefits to those Native nations that adopted IRA constitutions).

⁶⁶⁸ Theodore Wyckoff, *The Navajo Nation Tomorrow — 51st State, Commonwealth, or . . . ?*, 5 AM. INDIAN L. REV. 267, 267 (1977).

⁶⁶⁹ See Donald A. Grinde, Jr., *Navajo Opposition to the Indian New Deal*, 19 EQUITY & EXCELLENCE IN EDUC. 79, 83 (1981) (describing the reasons why the Navajo Nation chose to stand against the Indian Reorganization Act).

⁶⁷⁰ See AM. SAM. CONST. *But see* 48 U.S.C. § 1662a (stating that an amendment to the American Samoa Constitution can be made by congressional act only).

continues to recognize these governments today and continues to engage with them in a government-to-government relationship.

Beyond self-government, colonized peoples have fostered the value of self-determination toward statutory schemes that allow them to determine for themselves the relationship between their colonized communities and the United States. Relationships between colonized peoples and the United States have taken a range of forms over the last two hundred years: independence,⁶⁷¹ freely associated independence,⁶⁷² domestic dependent nation,⁶⁷³ commonwealth,⁶⁷⁴ statehood,⁶⁷⁵ Alaska Native corporation,⁶⁷⁶ Alaska Native village,⁶⁷⁷ or not-yet-organized colonized community.⁶⁷⁸ In the main, the United States has primarily determined these relationships unilaterally. But over time, colonized peoples have had some success in pressing for the ability to provide input on these determinations. Native nations had the ability to decline the Indian Reorganization Act framework,⁶⁷⁹ and can still decide whether or not to apply for federal recognition.⁶⁸⁰ Forms of referenda across the island borderlands allow residents to vote on commonwealth status, territorial government, and statehood.⁶⁸¹ An important but

⁶⁷¹ Philippine Independence Act, Pub. L. No. 73-127, 48 Stat. 456 (1934).

⁶⁷² The Marshall Islands occupy the status of a freely associated state. See Larry Wentworth, *The International Status and Personality of Micronesian Political Entities*, 16 ILSA J. INT'L L. 1, 23 (1993).

⁶⁷³ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“[Tribes] may, more correctly, perhaps, be denominated domestic dependent nations.”). But see Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1111 (2004) (examining the relationship between Supreme Court conceptions of tribal sovereignty and the Navajo Nation’s exercise of sovereign powers on the ground).

⁶⁷⁴ See, e.g., *Torres v. Puerto Rico*, 442 U.S. 465, 466 (1979) (referring to Puerto Rico as a commonwealth). But see *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (holding that Puerto Rico’s status as a “commonwealth” did not change in any meaningful respects its status as a territory); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659–65 (2020) (same); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1543 (2022) (same).

⁶⁷⁵ Justice Edward Douglass White discussed the territorial history of several states, including Louisiana, Florida, Texas, California, New Mexico, Alaska, and Hawai‘i, in his concurring opinion in *Downes v. Bidwell*. 182 U.S. 244, 304–05 (1901) (White, J., concurring).

⁶⁷⁶ Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629h (discussing the development and structure of the Native corporation).

⁶⁷⁷ See *id.* § 1602(c) (defining the term “Native village”).

⁶⁷⁸ For a discussion of the federal recognition process for Indian tribes, see generally Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487 (2006).

⁶⁷⁹ 25 U.S.C. § 5123(h)(1) (“[E]ach Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section.”).

⁶⁸⁰ Even tribal governments that do not seek federal recognition remain legally entitled to rights guaranteed by treaty. See *United States v. Washington*, 520 F.2d 676, 692–93 (9th Cir. 1975) (“Nonrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights.”).

⁶⁸¹ Plebiscite Act of 1967, 1967 P.R. Laws 89; Act of July 4, 1993, 1993 P.R. Laws 100; Act of Aug. 17, 1998, 1998 P.R. Laws 995; Act of Dec. 28, 2011, 2011 P.R. Laws 1807; Act of Mar. 28, 2012,

under-recognized aspect of the ability of colonized people to determine their relationship with the United States is the ability to organize in the first instance to express a collective will. Certain colonized peoples, most notably the Indigenous peoples of Hawai‘i or the Kānaka Maoli, have been denied the ability to organize by the Supreme Court, which claimed a conflict between the value of self-determination and the Fifteenth Amendment.⁶⁸²

4. *Territorial Sovereignty.* — Yet another irony within the constitution of American colonialism is that the United States has treated the territory of those colonized peoples whom the United States recognizes as sovereign with far less respect than those colonized peoples whom the United States declines to recognize as sovereign. Jurisdiction over Indian Country has been a long-standing battle between Native nations, the national government, and the several states — with Native nations often losing.⁶⁸³ The Trail of Tears is our most notorious example.⁶⁸⁴ In contrast, our island borderlands have had less difficulty asserting whatever jurisdiction they have over their own territories — that is, outside of U.S. military enclaves. The distinction between the islands and Indian Country is, of course, due to the distinction between the plastic nature of law as opposed to the less malleable forms of nature protecting the territorial borders of the islands. It is far more difficult to settle and,

2012 P.R. Laws 587 (amending Act of December 28, 2011); Puerto Rico Immediate Decolonization Act, 2017 P.R. Laws 179; Act of Apr. 19, 2017, 2017 P.R. Laws 499 (amending Puerto Rico Immediate Decolonization Act); Act to Define Puerto Rico’s Ultimate Political Status, 2020 P.R. Laws 635; Hawai‘i Statehood Admissions Act, Pub. L. No. 86-3, § 1, 73 Stat. 4 (describing the Hawaiian election to adopt a State constitution); Proclamation No. 3309, 24 Fed. Reg. 6868 (Aug. 21, 1959) (proclaiming the admission of the State of Hawai‘i); Act of July 3, 1950, Pub. L. No. 81-600, §§ 1-4, 64 Stat. 319, 319 (codified at 48 U.S.C. §§ 731b-731e) (providing for a referendum in Puerto Rico to accept or reject a constitutional form of government); Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (approving the constitution adopted by the people of Puerto Rico); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, 68 Stat. 497 (1954) (codified as amended at 48 U.S.C. §§ 1541-1644); Philippine Independence Act, Pub. L. No. 73-127, 48 Stat. 456 (1934); Proclamation No. 2148, 49 Stat. 3481 (Nov. 14, 1935) (proclaiming the new constitutional officers elected by the people of the Philippines); Proclamation No. 2695, 11 Fed. Reg. 7517 (July 4, 1946) (recognizing the independence of the Philippines); see Issacharoff et al., *supra* note 26, at 4-13 (discussing the constitutional identity of Puerto Rico).

⁶⁸² See *Rice v. Cayetano*, 528 U.S. 495, 523-24 (2000).

⁶⁸³ See, e.g., *United States v. McBratney*, 104 U.S. 621, 624 (1881) (holding that states may prosecute non-Indians who commit crimes against non-Indians in Indian Country); *Draper v. United States*, 164 U.S. 240, 247 (1896) (holding that states may prosecute Indians who commit crimes against non-Indians in Indian Country); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (holding that tribes cannot prosecute non-Indians who commit crimes in Indian Country); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504 (2022) (holding that states may prosecute non-Indians who commit crimes against Indians in Indian Country).

⁶⁸⁴ See Singel, *supra* note 31, at 798 (“Within six years of *Worcester v. Georgia*, the fundamental weakness of the opinion’s affirmation of tribal sovereignty was cruelly illustrated when the Cherokee Nation was forcibly removed to the Indian Territory on the Trail of Tears.”).

thus, diminish areas of the island borderlands than it is an Indian Country adjacent to and often enclosed by state borders.⁶⁸⁵

Despite the ongoing battle over the territorial sovereignty of Indian Country, Native people have had success in drawing upon treaty law, as well as principles and norms from international law, to ensure measured respect for the borders of their reservations and their jurisdiction over those lands.⁶⁸⁶ Native advocates have had notably more success protecting the borders of their territory and notably less success protecting their ability to govern those lands.⁶⁸⁷ For example, since the Court issued its opinion in *Solem v. Bartlett*,⁶⁸⁸ Native advocates have maintained recognition of a rule that requires a clear statement from Congress to diminish the borders of reservations held by colonized peoples — obviating the possibility that those borders might be diminished by implication.⁶⁸⁹ Not only does this rule prevent the courts and the Executive from presuming the diminishment of borders, but it also ensures that Native advocates are provided notice to advocate before Congress against such a diminishment. This rule was reaffirmed and applied most recently, and most publicly, by the Supreme Court in *McGirt v. Oklahoma*.⁶⁹⁰ In *McGirt*, the Court held that Congress had

⁶⁸⁵ Difficult, but not impossible. See, e.g., Sai, *supra* note 482, at 63–64 (describing the influx to Hawai'i of U.S. nationals from the continental United States during the first half of the twentieth century).

⁶⁸⁶ See Claire Charters, *The Sweet Spot Between Formalism and Fairness: Indigenous Peoples' Contribution to International Law*, 115 AJIL UNBOUND 123, 126 (2021); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 4 (2d ed. 2004) (“Over the last several years especially, in conjunction with efforts through domestic or municipal arenas of decision making, indigenous peoples have appealed to the international community and looked to international law as a means to advance their cause.”).

⁶⁸⁷ See generally Clifford M. Lytle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country*, 8 AM. INDIAN L. REV. 65 (1980) (noting how the Supreme Court's protection of Native nations from attempted state intrusions has waned over time); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000) (recounting the evolution of the implicit divestiture doctrine and how it has come to privilege state jurisdiction over tribal sovereignty); Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 31 (discussing the Supreme Court's evolving notion of tribal sovereignty and its implications for jurisdictional disputes).

⁶⁸⁸ 465 U.S. 463 (1984).

⁶⁸⁹ *Id.* at 478 (“[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish the Cheyenne River Sioux Reservation.”).

⁶⁹⁰ 140 S. Ct. 2452 (2020). For another example of the Supreme Court's use of the clear statement rule, see *Nebraska v. Parker*, 577 U.S. 481 (2016). For more on *McGirt*, see generally Robert J. Miller & Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma*, 101 B.U. L. REV. 2049 (2021) (examining the decision in depth to highlight its implications for both federal Indian law and Native nations across the country); Bethany R. Berger, *McGirt v. Oklahoma and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250 (2021) (contextualizing *McGirt* within the broader history of Muscogee Creek Nation's century-long efforts to restore its sovereign rights); Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300 (2021) (contextualizing *McGirt* within a broader shift in the Court's approach to federal Indian law).

not diminished the borders of the Muscogee Creek Nation’s reservation, because it had not done so clearly.⁶⁹¹ In reaffirming the *Solem* test, the Court rejected evidence that Congress criminalized the colonized government, seized all public goods under threat of criminalization, and forced breaking up of colonized lands, as well as evidence of unlawful settlement of colonized lands and displacement of colonized peoples, as establishing congressional intent to diminish the borders of the Muscogee Creek Nation reservation — a standard advocated by the four dissenting Justices.⁶⁹² Yet, despite holding firm to the clear statement rule in *Solem* that maintained reservation borders, the Court also cited approvingly to equitable doctrines — like laches — that might undermine tribal sovereignty over those reservation lands.⁶⁹³

5. *Collaborative Lawmaking.* — As the American colonial project has itself ebbed and flowed over the last two hundred years, so, too, has the degree to which the United States has allowed its colonized peoples the ability to collaborate in making the laws that govern them. The flow, or the tendency of the United States to dominate and govern its colonies unilaterally, has generally been driven by the desire to exploit colonized peoples or because of xenophobic, racialized, and stereotypical views of those peoples.⁶⁹⁴ The ebb is often in response to the advocacy of colonized peoples forcing the United States to face its status as empire and arguing for forms of consent and collaboration to mitigate that status.⁶⁹⁵ Forms of collaborative lawmaking began with treaties, petitioning,

⁶⁹¹ *McGirt*, 140 S. Ct. at 2462, 2468 (“If Congress wishes to break the promise of a reservation, it must say so.” *Id.* at 2462.).

⁶⁹² *Id.* at 2484–85 (Roberts, C.J., dissenting) (arguing that “[a] century of practice” confirmed that Congress had disestablished the Creek reservation established by treaty through the “dismant[ing] of tribal governments,” “aboli[tion] of tribal courts,” “hollow[ing] out of tribal lawmaking power,” and “strip[ping] of tribal tax[ation] authority”); Five Civilized Tribes Act of 1906, ch. 1876, § 11, 34 Stat. 137, 141 (criminalizing the failure to turn over public goods after abolition of the tribal government).

⁶⁹³ *McGirt*, 140 S. Ct. at 2481 (majority opinion) (“[W]e do not disregard the dissent’s concern for reliance interests. It only seems to us that concern is misplaced. Many other legal doctrines — procedural bars, res judicata, statutes of repose, and laches, to name a few — are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are ‘fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later proceedings crafted to account for them.’” (alterations and omissions in original) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1407 (2020) (plurality opinion))).

⁶⁹⁴ See generally Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989) (tracing the origins of modern discourse that opposes tribal sovereignty back to Removal Era narratives of cultural inferiority); WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 3–5 (2010); Julian Go, “Racism” and Colonialism: Meanings of Difference and Ruling Practices in America’s Pacific Empire, 27 QUALITATIVE SOCIO. 35 (2004) (identifying the impact of racial attitudes on governance during American colonization of the Pacific); Wolfe, *supra* note 76, at 387 (arguing that racialized perceptions of Native peoples are linked to perceptions of Native land ownership).

⁶⁹⁵ See Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 37 (1997).

and diplomacy — Indigenous diplomacy that shaped the face of the United States Constitution.⁶⁹⁶ Collaborative lawmaking then faced an ebb⁶⁹⁷ in the late nineteenth century as the American colonial project reached a peak — or more likely a nadir, depending on one’s perspective — and the United States abandoned the treaty-making process for Native nations, regulating them instead through statute. Beginning in the early twentieth century and into the twenty first, colonized peoples reclaimed collaborative lawmaking, including translating treaty and other powers into superstatutes that allowed colonized peoples innovative forms of participation and collaboration in making the laws of the United States that govern them.⁶⁹⁸

Initially, the weakness of the fledgling United States and the power of Native nations afforded Native people the opportunity to press for lawmaking in the form of treaties realized through the formal Article II treaty-making process — a process of lawmaking that, quite literally, afforded colonized peoples a seat at the table.⁶⁹⁹ The United States did not initially exercise the power to regulate the internal self-government of Indian Country through domestic law.⁷⁰⁰ It initially acquiesced to a version of American colonialism that limited only the power of Native nations to participate in international relations with other civilized nations, and it regulated through domestic legislation only the relationship between Native nations and the several states.⁷⁰¹

But treaty law was soon revealed as insufficient to further the American colonial project at the pace needed to stabilize it. The United States more and more readily turned to violence to destabilize Native

⁶⁹⁶ See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, Or Grass Grows upon the Earth” — How Long a Time Is That?*, 63 CALIF. L. REV. 601, 608–09 (1975) (noting how Native nations negotiated early treaties from a position of power in relation to the United States); see also Heidi Kiiwetepinesik Stark, *Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada*, 36 AM. INDIAN Q. 119, 125 (2012) (discussing how “Anishinaabe leaders often sought recognition and protection of their nationhood, and thus their sovereignty and land tenure, by engaging with the United States and Canada in treaty making that they hoped would guarantee their status as sovereigns”).

⁶⁹⁷ Wilkinson & Volkman, *supra* note 696, at 612.

⁶⁹⁸ See COHEN’S HANDBOOK, *supra* note 347, § 1.07. Examples of these policies include the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 25 and 42 U.S.C.); and the Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. II, 108 Stat. 4270 (codified at 25 U.S.C. §§ 5361–5368).

⁶⁹⁹ Wilkinson & Volkman, *supra* note 696, at 608–09; see also Stark, *supra* note 696, at 125.

⁷⁰⁰ See Ablavsky, *supra* note 131, at 1061 (noting that, at the Founding, “[t]here was widespread agreement . . . that the law of nations should govern relations between the United States and Natives”).

⁷⁰¹ See PRUCHA, *supra* note 142, at 140–41 (excluding European nations from direct diplomatic relations with Native nations); William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 457 (2016) (describing the Trade and Intercourse Acts, which were passed to regulate the relationship between Native nations and states).

political communities and dispossess Native nations of their land.⁷⁰² As this violence intensified throughout the nineteenth century, the United States abandoned collaborative lawmaking.⁷⁰³ Whereas the United States had previously engaged in collaborative treaty-making, informed by international law's norms of relative respect between polities, these forms of negotiation began to break down — treaty negotiators bargained in bad faith, earlier treaty provisions were not upheld, and United States agents imposed treaty provisions unilaterally.⁷⁰⁴

Ultimately, Congress and the Executive began to regulate Native nations and their polities directly through domestic law — specifically, statute, regulation, and executive action. The Supreme Court has identified this moment of pivotal change or “incorporation,” drawing upon doctrines developed in the context of our island borderlands, as beginning in 1871.⁷⁰⁵ The reality is likely that this process began much earlier and progressed more informally over time. But in 1871, Congress passed an appropriations rider that purported to end the treaty process with Native nations and established domestic legislation as the primary means to regulate Indian Country.⁷⁰⁶ This shift came about notably during the infamous “Reservation Era” when the United States had

⁷⁰² See, e.g., BLACKHAWK, *supra* note 127, at 293–95 (citing the U.S.-Dakota War as an example of the “increase in the state’s monopolization of violence,” *id.* at 293, in the second half of the nineteenth century in lieu of diplomacy).

⁷⁰³ The Treaty of New Echota, for example, was not endorsed by the leadership of Cherokee Nation, and was used by the United States to justify the violent removal of the Cherokee from their homelands. See Blackhawk, *supra* note 27, at 1823 (discussing the history behind the Treaty with the Cherokees (Treaty of New Echota), Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478). In fact, over three thousand Cherokee citizens, as well as the National Cherokee Council, signed a petition protesting the treaty’s ratification. See *Cherokee Petition in Protest of the New Echota Treaty (1836)*, DOCSTEACH, <https://www.docsteach.org/documents/document/ Cherokee-petition-protest-new-echota-treaty> [<https://perma.cc/4KJ2-64ZR>].

⁷⁰⁴ See, e.g., Treaty Between the United States of America and Different Tribes of Sioux Indians (Treaty of Fort Laramie), Sioux-U.S., Apr. 29, 1868, 15 Stat. 635; Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, The U.S. Broke It and Plains Indian Tribes Are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741> [<https://perma.cc/92LC-AMW6>] (describing the ongoing struggle in a land dispute arising out of the broken Fort Laramie Treaty).

⁷⁰⁵ See *United States v. Wheeler*, 435 U.S. 313, 323, 326 (1978) (“Indian tribes are, of course, no longer ‘possessed of the full attributes of sovereignty.’ Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.” *Id.* at 323 (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886))).

⁷⁰⁶ Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71) (“[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or be recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”).

already, through unilateral executive action,⁷⁰⁷ begun to build detention centers on treaty lands and govern all facets of Indian life.⁷⁰⁸

Many of the laws of the late nineteenth century passed after this shift — most notoriously those that facilitated the boarding schools, family separation, and allotment through the Dawes Act⁷⁰⁹ — were passed over the objection of Native people. But the shift from treaty to regulation of Indian Country through general legislation has been overstated.⁷¹⁰ Instead, Congress often turned to “treaty substitutes” or forms of lawmaking that involved Native nations informally, ratifying those negotiated agreements through bicameralism and presentment or through executive order, rather than through Article II’s treaty process.⁷¹¹ Even after the passage of the 1871 appropriations rider, Native nations negotiated land cessions, set reservation borders, and negotiated the terms of the American colonial project.⁷¹² The primary change between treaties and treaty substitutes was that the House of Representatives had finally involved itself with Indian affairs directly.⁷¹³

Colonized peoples also advocated for other innovative forms of representation and collaborative lawmaking. For the island borderlands,

⁷⁰⁷ Berger, *supra* note 355, at 2003–04.

⁷⁰⁸ See generally BLACKHAWK, *supra* note 127, at 329–64 (describing federal law during the “reservation era”). See also Natsu Taylor Saito, *Interning the “Non-alien” Other: The Illusory Protections of Citizenship*, LAW & CONTEMP. PROBS., Spring 2005, at 173, 183–90 (describing the long history of internment of Native peoples).

⁷⁰⁹ Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.).

⁷¹⁰ See David H. Moore & Michalyn Steele, *Revitalizing Tribal Sovereignty in Treaty-making*, 97 N.Y.U. L. REV. 137, 158 (2022) (arguing that federal Indian law “lies uncomfortably and improbably somewhere between” treaty and general legislation).

⁷¹¹ See generally FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 311–33 (1994) (discussing the use of treaty substitutes from the late nineteenth century through the twentieth century).

⁷¹² See, e.g., *id.* at 324 (discussing the use of treaty substitutes for land cessions); *id.* at 331 (discussing the use of treaty substitutes — particularly executive orders — to negotiate reservation borders); *id.* at 324–25 (discussing the use of treaty substitutes or “agreements” for other kinds of obligations, such as the commutation of annuities, the negotiation of national park land, and prohibitions against liquor).

⁷¹³ See Carole Goldberg, *Critique by Comparison in Federal Indian Law*, 6 SCHOLARLY PERSPS. 22, 22 (2010) (“[T]he House of Representatives insisted that it participate in Indian affairs, and future relations with indigenous peoples were conducted through agreements ratified by Congress as a whole and by legislation [rather than by treaty].”); cf. Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 106–07 (2017) (detailing the House’s discontentment with being left out of the treaty process in the mid-nineteenth century). Moreover, the shift from formal treaties to executive-congressional agreements paralleled a broader shift in foreign relations law away from the formal treaty process for lawmaking with foreign nations as well. Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1684–88 (2017) (explaining the shift away from treaty-making in U.S. foreign relations law in the twentieth century); see also *id.* at 1684 (discussing early critiques of the Treaty Clause); *id.* (“Even in the nineteenth century, proponents of international cooperation viewed the veto [the Treaty Clause] gave to ‘a malcontent third’ of the Senate as ‘the original mistake in the Constitution.’” (quoting Letter from John Hay to Henry Adams (Aug. 5, 1899), quoted in W. STULL HOLT, *TREATIES DEFEATED BY THE SENATE* 177 (1933))).

Congress granted a single nonvoting delegate in the House of Representatives, allowing them to participate in the federal lawmaking process.⁷¹⁴ In addition to providing each colonized nation a nonvoting delegate, the organic statutes for each island borderland developed innovative commissions and boards that would evaluate the applicability of federal laws to the islands.⁷¹⁵ Native nations repurposed congressional committees previously focused on colonization into specialized points of access for Native nations.⁷¹⁶ Today, each chamber of Congress contains a specialized committee focused on Indian Affairs that provides expertise in the values, norms, and dynamics of the constitution of American colonialism.⁷¹⁷

Native nations have also reshaped the face of the American state in reclaiming and repurposing the Bureau of Indian Affairs as a space of collaborative lawmaking.⁷¹⁸ As of 2010, for example, ninety-five percent of employees of the Bureau of Indian Affairs were American Indian or Alaska Native.⁷¹⁹ These figures are a direct result of hiring and promotion preferences instituted in the 1930s and applied across a range of areas of Indian Affairs.⁷²⁰ In 2021, Secretary Debra Haaland, citizen of the Pueblo of Laguna Nation, made history as the first citizen of a Native nation to head the entire Department of the Interior as Secretary of the Interior.⁷²¹ In addition to tribal citizens running the national government infrastructure that regulates them, many federal agencies have

⁷¹⁴ See 48 U.S.C. § 891 (granting Puerto Rico a delegate to the House of Representatives); *id.* § 1711 (same for both Guam and the Virgin Islands); *id.* § 1731 (same for American Samoa); *id.* § 1751 (same for the Northern Mariana Islands).

⁷¹⁵ See, e.g., Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, § 8(d), 68 Stat. 497, 501 (1954) (repealed 1982) (“The President of the United States shall appoint a commission of seven persons, at least three of whom shall be residents of the Virgin Islands, to survey the field of Federal statutes and to make recommendations to the Congress within twelve months after the date of approval of this Act as to which statutes of the United States not applicable to the Virgin Islands on such date should be made applicable to the Virgin Islands, and as to which statutes of the United States applicable to the Virgin Islands on such date should be declared inapplicable.”).

⁷¹⁶ Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2252–53 (discussing how Native advocates repurposed the internal infrastructures of Congress — which historically operated as subordinating frameworks — to serve as “points of entry” for advocates seeking to “craft[] legislative mitigations of American colonialism”).

⁷¹⁷ *Id.*; see also S. Res. 127, 98th Cong., 130 CONG. REC. 15022–27 (1984) (enacted) (establishing a permanent, specialized committee in the Senate); 165 CONG. REC. H1574 (daily ed. Feb. 13, 2019) (publishing the committee rules for the Subcommittee for Indigenous Peoples of the United States in the House of Representatives Committee on Natural Resources).

⁷¹⁸ See VALERIE LAMBERT, *NATIVE AGENCY: INDIANS IN THE BUREAU OF INDIAN AFFAIRS* 35–38 (2023) (discussing how Native American bureaucrats and activists have influenced the Bureau of Indian Affairs).

⁷¹⁹ *Id.* at 4.

⁷²⁰ See *id.* at 47; Indian Reorganization Act, ch. 576, § 12, 48 Stat. 984, 986 (1934) (codified at 25 U.S.C. § 5116) (“Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.”).

⁷²¹ See Coral Davenport, *Deb Haaland Becomes First Native American Cabinet Secretary*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/climate/deb-haaland-confirmation-secretary-of-interior.html> [<https://perma.cc/C4RZ-LRBC>].

implemented formal and informal forms of consultation, collaboration, and comanagement with Native nations.⁷²²

6. *Nonintervention.* — In the twentieth and twenty-first centuries, colonized peoples have seen success in advocating for self-determination to make the “local” laws that govern everyday life in the borderlands. But what good is self-determination without the companion value of nonintervention — or the principle that imperial governments should not intervene lightly, or perhaps at all, in the governments of colonized peoples? For the majority of our island borderlands, very little stands between the local laws of the borderlands and the plenary power of the United States to intervene in colonized life at any time.⁷²³ Without non-intervention, the United States could simply pass laws that displace those established by colonized peoples — as PROMESA illustrates all too clearly.⁷²⁴

Intervention by a colonizing government through law could take a variety of forms. First, and most paradigmatically, a colonizing government could pass local law directly for colonized peoples — as the United States did for Indian Country during the Reservation Era and continues to do through federal criminal law in Indian Country.⁷²⁵ Second, it could pass a law that establishes part or all of the lawmaking body for a colonized peoples — like the financial oversight board created by PROMESA.⁷²⁶ Third, a colonizing government could intervene by simply extending the laws it has passed for its own people over colonized jurisdictions. These laws could supplant or supplement the laws passed by colonized peoples, but in either instance the laws further the colonial project by both asserting the power of the colonizing government to govern another and by undermining the power of colonized peoples to self-govern.

⁷²² See, e.g., Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021) (instructing agencies to consult with Native nations on policies with tribal implications); Sec’y of the Interior & Sec’y of Agric., Order No. 3403, Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (Nov. 15, 2021) (directing costewardship of federal lands that are located within or adjacent to reservation land), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf> [<https://perma.cc/H6AZ-NC6Y>].

⁷²³ See Cleveland, *supra* note 29, at 78.

⁷²⁴ See Pub. L. No. 114-187, § 101(d), 130 Stat. 549, 553-54 (2016) (codified at 48 U.S.C. § 2121(d)) (establishing a Financial Oversight and Management Board for Puerto Rico with authority to provide “[o]versight of [t]erritorial [i]nstrumentalities”).

⁷²⁵ See ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 90 (4th ed. 2020) (noting the emergence of federal plenary power during the Reservation Era, writing: “In the Reservation Era, federal officials began to see themselves as molding Indian lives rather than administering the boundary line between Indians and whites. They wanted more legal power in order to fulfill this role”); see also, e.g., Major Crimes Act, 18 U.S.C. § 1153 (granting the federal government exclusive jurisdiction over Indian defendants with regard to certain enumerated offenses occurring on tribal land). The Act was passed during the Reservation Era, see Blackhawk, *supra* note 27, at 1832, and is still in effect today.

⁷²⁶ See PROMESA § 101(d).

Colonized peoples have resisted intervention in these forms by raising principles of self-determination and collaborative lawmaking — that is, the United States is less likely to exercise its plenary power to pass laws directly for colonized peoples or to usurp portions of colonized peoples' government, because doing so undermines self-determination and because colonized peoples have some formal or informal say in those laws and oppose them. But the final form of intervention — the application of the general law of the colonizing government — presents a distinctive case of intervention, one that often circumvents the safeguards established by colonized peoples through self-determination and collaborative lawmaking.

Intervention through general law circumvents self-determination and collaborative lawmaking largely because the extension of general law either predates grants of self-determination or because the courts extend general law over colonized peoples through “neutral” principles of interpretation. The United States extended nearly its entire body of general federal law over many of the island borderlands when it granted each colonized nation the ability to self-govern.⁷²⁷ With respect to Indian Country, Native nations have not only resisted the extension of general federal law and state law over their jurisdictions, they have also established laws like the trust doctrine that allow intervention only when it furthers Native peoples' best interest. Beyond that, Native people have argued for and established principles of interpretation that require courts to find clear statements from Congress to allow intervention.⁷²⁸ When applied consistently, these laws insulate Indian Country from laws made by the United States — both state and federal governments.

At the Founding, Native nations argued for sovereign rights of non-intervention drawn from the law of nations. Nonintervention meant that the only form of United States law to extend over Indian Country was established by treaty.⁷²⁹ Federal public law could regulate the relationship between Native nations and the United States, as well as set and maintain the borders of Indian Country from settlers and from the extraterritorial intervention of state law.⁷³⁰ But federal and state law would have no direct application within Indian Country borders.⁷³¹

As the American colonial project reached its nadir in the late nineteenth and early twentieth centuries, the centrality of treaties and the

⁷²⁷ See, e.g., Hawaiian Organic Act, ch. 339, § 5, 31 Stat. 141, 141–42 (1900) (“That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.”).

⁷²⁸ See *Blackhawk*, *supra* note 27, at 1825.

⁷²⁹ See *Newton*, *supra* note 31, at 201.

⁷³⁰ See *id.* at 201, 204–05.

⁷³¹ See *id.* at 201.

principles of nonintervention Native people had fostered broke down.⁷³² Instead, the United States turned ever more readily to the use of legislation to regulate colonized peoples directly.⁷³³ In response to the growing encroachment of federal law and federal liability, largely as a result of the lower federal courts narrowing and not applying consistently the interpretive rules against the application of general federal law, Native advocates have turned to tribal sovereign immunity and the requirement that Congress waive tribal sovereign immunity only through “express and unequivocal” language to shield against those federal laws.⁷³⁴ State governments, growing in power as they centralized, strengthened, and grew in number across the long nineteenth century, pressed again and again on the boundaries set by the federal government around Indian Country as they tried to feed their hunger for Native lands and resources. The United States also began to blur the boundaries between the laws of the Indian Country and those of the several states. In some instances, the United States even attempted to extend the general laws of the several states over Indian Country, nearly completing the colonial project through usurpation of self-government and destruction of Native communities.⁷³⁵

Native advocates fought against the intervention of federal and state law into their homelands throughout the nineteenth century.⁷³⁶ But they

⁷³² See *id.* at 205.

⁷³³ *Id.* at 206 (“The House of Representatives ushered in the new ‘Era of Allotment and Assimilation,’ when it decreed in a rider to the Appropriations Act of 1871 that henceforth ‘[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.’ . . . Thus, the treaty-making era came to an end. Indian law became more a matter of domestic law, with Indians regarded as subjects to be governed, rather than foreign nationals.” (quoting Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566)).

⁷³⁴ This dynamic has been especially apparent with respect to general federal labor and employment law — statutes that the lower federal courts have increasingly applied to tribal governments, despite the fact that those laws lack any mention of Native nations. See, e.g., 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 522, § 2.03 n.23 (collecting cases). As the standard to apply general legislation to tribal governments has lowered, the heightened “clear expression” standard to waive tribal sovereign immunity provides the lone barrier against full intervention of federal law. See, e.g., Fla. Paraplegic Ass’n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129–31 (11th Cir. 1999) (holding that Title III of the Americans with Disabilities Act applies to tribal governments, but that tribal sovereign immunity barred private Title III enforcement claims).

⁷³⁵ The General Allotment Act of 1887, for example, authorized the President to allot reservation land, with unallotted lands open to non-Native purchase. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.). The President could do this “whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes.” *Id.* § 1, 24 Stat. at 388. The Act also extended the real estate laws of Kansas to Indian lands. *Id.* § 5, 24 Stat. at 389.

⁷³⁶ See, e.g., Berger, *supra* note 146, at 8 (describing Cherokee legal advocacy to prevent the encroachment of state jurisdiction in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)).

began to gain real traction in the early twentieth century.⁷³⁷ Not only were advocates successful in arguing against further intervention of federal and state law into Indian Country, but they were also able to rekindle respect for principles of nonintervention into Native nations and to establish a range of laws and legal principles to prevent intervention or, at the very least, make it more difficult.⁷³⁸ These laws and legal principles included a range of interpretive principles that weighed against courts unilaterally interpreting general law to apply to Indian Country and requiring Congress to state clearly its intent to intervene with general federal law.⁷³⁹

The Supreme Court articulated the principle that “[g]eneral acts of Congress d[o] not apply to Indians, unless so expressed as to clearly manifest an intention to include them,” as early as 1884 in *Elk v. Wilkins*.⁷⁴⁰ In more recent years, the Supreme Court has added nuance to this interpretive principle by holding that general federal legislation, like that of the general grant to federal courts of diversity jurisdiction, would not apply to Indian Country when that legislation “makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government.”⁷⁴¹ The interpretive rule is similar and perhaps even more stringent when intervention of federal law would abrogate forms of self-determination protected by treaty.⁷⁴²

Native advocates have also entrenched principles of nonintervention into our federalist system that insulate Indian Country against the encroachment by state and local governments.⁷⁴³ The long-standing, although recently questioned,⁷⁴⁴ rule is that state laws will not intervene into Indian Country absent an express use of plenary power by Congress to extend state law.⁷⁴⁵ Laws structuring American colonialism within our federalism are more common in the context of Indian Country,

⁷³⁷ See, e.g., Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (repealed 1952) (current version at 8 U.S.C. § 1401(b)); Cathleen D. Cahill, “*Our Democracy and the American Indian*”: *Citizenship, Sovereignty, and the Native Vote in the 1920s*, 32 J. WOMEN’S HIST. 41, 41–43 (2020). See generally THOMAS CONSTANTINE MAROUKIS, WE ARE NOT A VANISHING PEOPLE: THE SOCIETY OF AMERICAN INDIANS, 1911–1923 (2021) (recording the federal lobbying efforts of the Society of American Indians).

⁷³⁸ An example of this is the “superstatute” of the Indian Reorganization Act, reaffirming, among other principles, tribal sovereignty. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended in scattered sections of 25 U.S.C.).

⁷³⁹ See Blackhawk, *supra* note 27, at 1825.

⁷⁴⁰ 112 U.S. 94, 100 (1884).

⁷⁴¹ *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987).

⁷⁴² See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.” *Id.* at 202.).

⁷⁴³ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561–63 (1832) (holding Georgia state law had no force within the Cherokee Nation’s treaty land).

⁷⁴⁴ See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

⁷⁴⁵ See *Worcester*, 31 U.S. (6 Pet.) at 561–63.

which simply has a closer and more complicated relationship with its neighbor states. This relationship became much more complicated in the twentieth century, when the national government exercised its plenary power to extend state law over Indian Country in certain instances during the allotment and termination eras.⁷⁴⁶ The United States has since repudiated these interventions and aimed to limit the intervention of state law into Native nations, Indian Country, and the lives of Native people.⁷⁴⁷

The Indian Child Welfare Act, the statute upheld by the Court in *Brackeen*,⁷⁴⁸ was passed in part to remedy some of this failed experimentation in state law intervention. ICWA amended Title 25 to standardize the regulation of Indian child welfare.⁷⁴⁹ After decades of state and federal governments facilitating the removal of Native children from their families and communities,⁷⁵⁰ ICWA set minimal state standards for Native child separation and placement.⁷⁵¹ It also reaffirmed the long-standing power of tribal governments over Native families and children living within Indian Country and established a range of funding, contracting, and jurisdictional programs to support Native nations

⁷⁴⁶ See H.R. Con. Res. 108, 83d Cong. (1953) (enacted) (forming the basis of the United States's termination policy: "[A]t the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians"); Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360) (shifting jurisdiction shared with most tribes in Indian Country from the federal government to state governments, which was mandatory for five states and optional for all others); see also Klamath Termination Act, ch. 732, 68 Stat. 718 (1954) (terminating federal supervision over Klamath Tribe property).

⁷⁴⁷ See Act of Aug. 15, 1953, Pub. L. No. 90-284, §§ 401-402, 82 Stat. 73, 78-79 (codified as amended at 25 U.S.C. §§ 1321-1322) (amending Public Law 280 to require tribal consent for states to exercise jurisdiction in Indian Country); 116 CONG. REC. 23131-36 (1970) (statement of President Richard Nixon) (rejecting the termination policy and announcing a shift towards a policy of Indian self-determination); Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 25 and 42 U.S.C.).

⁷⁴⁸ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1623 (2023).

⁷⁴⁹ Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1902) (providing for "the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs").

⁷⁵⁰ See *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the U.S. S. Select Comm. on Indian Affs.*, 95th Cong. 1 (1977) (statement of Sen. James Abourezk, Chairman, S. Select Comm. on Indian Affs.) ("[F]or decades[,] Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal, and private agency officials. Unwarranted removal of children from their homes is common in Indian communities.").

⁷⁵¹ See, e.g., § 110, 92 Stat. at 3075 (codified at 25 U.S.C. § 1920) (mandating that state courts return Indian children to their parents or Indian custodian in the event of an improper removal of the child by any petitioner in the proceeding); § 105(a), 92 Stat. at 3073 (codified at 25 U.S.C. § 1915(a)) (requiring that preference be given to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families" in the adoption or fostering of a Native child).

in creating and increasing the capacity of their child welfare programs.⁷⁵²

III. RECKONING

In many ways we face yet another pivotal moment in the constitution of American colonialism. The Supreme Court's decision in *Brackeen* reflects a rising tide of conflict between American colonialism and the United States Constitution. In granting certiorari in *Brackeen*, the Court certainly indicated its intention to recognize this conflict and offer forms of resolution — if not today, then soon.⁷⁵³ The possible implications of this resolution are stark. Many worried that the *Brackeen* Court would do what the *Mancari* Court declined to do fifty years ago — that is, render all of Title 25 of the *United States Code*, “Indians,” unconstitutional.⁷⁵⁴ Ultimately, a large majority in *Brackeen* held that the power to colonize is a settled question and left the conflict over limiting principles for another day.⁷⁵⁵ But the conflicts between American colonialism and the United States Constitution have been rising before the Supreme Court and are likely to continue.⁷⁵⁶

As before, we may again face the difficult decision of whether to further American colonialism, limit it, or finally begin to transition away from empire. The question we face is not if or whether, but how the United States will govern its colonies and borderlands populations. We must decide whether to resolve these questions by turning to liberal constitutional principles or by turning away from them. But now we face the reality that the muddle of the language and logics surrounding our “universal” liberal constitutional principles, like that of equal protection,

⁷⁵² § 101, 92 Stat. at 3071 (codified at 25 U.S.C. § 1911) (affirming Native governments' exclusive jurisdiction over child custody proceedings); § 108, 92 Stat. at 3074 (codified at 25 U.S.C. § 1918) (providing for the reassumption of jurisdiction over child custody for Native governments that previously became subject to state jurisdiction pursuant to past federal laws); §§ 201–203, 92 Stat. at 3075–77 (codified as amended at 25 U.S.C. §§ 1931–1933) (providing grants and funds for child welfare services provided by Native nations and organizations). In addition to setting the relationship of colonized peoples to American federalism directly, more recent laws like the Indian Gaming Regulatory Act embody principles of both nonintervention and self-determination in their turn to tribal-state compacting, as well as nationally ratified tribal-state agreements allowing Native people a greater say in the relationship between American colonialism and American federalism. See, e.g., Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 11(d)(3), 102 Stat. 2467, 2476–77 (1988) (codified at 25 U.S.C. § 2710(d)(3)) (providing for the creation of tribal-state compacts governing gaming activities).

⁷⁵³ See *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring) (describing the issues raised under the Equal Protection Clause by the case as “serious” but only properly raised “by a plaintiff with standing”).

⁷⁵⁴ See, e.g., Rachel Reed, *Supreme Court Preview: Brackeen v. Haaland*, HARV. L. TODAY (Oct. 31, 2022), <https://hls.harvard.edu/today/supreme-court-preview-brackeen-v-haaland> [https://perma.cc/U9VP-B648] (interviewing Professor Joseph Singer on his views on *Brackeen*, which he saw as potentially having “revolutionary, catastrophic consequences” including rendering Title 25 unconstitutional).

⁷⁵⁵ See *Brackeen*, 143 S. Ct. at 1631.

⁷⁵⁶ See *id.*

may not be able to deliver remedies for American colonialism. More than an awkward fit, our liberal constitutional principles, as currently envisioned by the Supreme Court, could unsettle or strip away preexisting vital limits on the American colonial project.

Furthering colonialism, I offer, is not simply a result of these principles becoming shallow and distorted. They surely have. But it is also because our understanding of and experience with liberal constitutionalism developed first to justify American colonialism through the creation of a dual system of constitutionalism and then to erase the external constitution entirely — with it, erasing the American colonial project as a problem of constitutional order. This duality and erasure have meant that our constitutional culture has never tussled with the difficult questions raised by colonialism — at least outside the borderlands. Modern efforts by scholars and advocates have focused on shoring up the constitutional values and principles of the metropole⁷⁵⁷ — constitutional principles that have never fully delivered on their promise. But all the while, constitutional theories, vocabularies, and practices have largely lost touch with the distinctive vernaculars and logics of our external constitutional framework developed, in part, to facilitate American colonialism. These disparate frameworks are coming into conflict and risk destabilization.

Despite its erasure, this external constitutional framework, and the colonialism it embodies, has lived on. Recognizing its existence could allow us to begin to acknowledge the injustice, inconsistencies, and failures of this duality. As scholars and jurists have shored up the Constitution of the center, so, too, should they engage with American colonialism and begin a conversation over what sorts of values and principles should structure our external constitutional framework. Borderlands principles provide one possible path forward — a path that has, over the twentieth century, tempered some of colonialism's most egregious forms. The following sections identify these rising conflicts before turning to implications for our courts, Congress, and the Executive to better institutionalize borderlands principles and thereby build a bridge to a different, less colonial world.

A. *Constitutional Collision*

With respect to Indian Country, our internal and external constitutional frameworks have been in conflict for decades. United States constitutional principles have been raised to further the American colonial project by challenging laws that limit American colonialism. One of the cases drawn on most heavily by the challengers to ICWA in *Brackeen*

⁷⁵⁷ See, e.g., Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1196 (2010) (arguing that policies that restore political agency to Native governments “do not violate equal protection; they further it”).

was *Rice v. Cayetano*.⁷⁵⁸ *Rice* was argued in 1999 by Theodore Olson, for the challenger, against now–Chief Justice Roberts and Deputy Solicitor General Edwin Kneedler, defending the challenged provision in the Hawaiian Constitution restricting the vote for the nine-member governing body of the Office of Hawaiian Affairs (OHA) to “Hawaiians.”⁷⁵⁹ OHA is a state-run institution established to facilitate Native Hawaiians toward self-determination — recall that the admission of Hawai‘i into the Union as a state required the state government to protect the Indigenous inhabitants of the islands.⁷⁶⁰ The Supreme Court struck down the provision as violating the Fifteenth Amendment’s promise that the right to vote would not be restricted by race.⁷⁶¹

Harold Rice, the challenger, was born in the territory that became the State of Hawai‘i and was a Hawaiian state citizen, but he was prohibited from voting in the OHA election because he was not “Hawaiian.”⁷⁶² The term “Hawaiian” had been defined twice by statute, but the more capacious definition of “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii” excluded Rice.⁷⁶³ Mr. Rice was a descendant of preannexation residents of Hawai‘i⁷⁶⁴ — that is, he was a descendant of the United States citizens who settled the Hawaiian Islands and established plantations and boarding schools among Native Hawaiians.⁷⁶⁵ These were the United States citizens and plantation

⁷⁵⁸ 528 U.S. 495 (2000); Petition for Writ of Certiorari at 19, 21–22, *Brackeen*, 143 S. Ct. 1609 (No. 21–378) (arguing that the Fifth Circuit’s decision was incompatible with *Rice*).

⁷⁵⁹ *Rice*, 528 U.S. at 497–99.

⁷⁶⁰ 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 645 (1980) (“The establishment by the Constitution of the Office of Hawaiian Affairs, with power to govern itself through a board of trustees . . . results in the creation of a separate entity independent of the executive branch of government.”).

⁷⁶¹ *Rice*, 528 U.S. at 499, 524 (“In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry.” *Id.* at 524.).

⁷⁶² *Id.* at 510 (“Petitioner Harold Rice is a citizen of Hawaii and a descendant of preannexation residents of the islands. He is not, as we have noted, a descendant of pre-1778 [N]atives, and so he is neither ‘[N]ative Hawaiian’ nor ‘Hawaiian’ as defined by the statute.”); Anna Loomis, *Oral History Interview with Harold Frederick “Freddy” Rice, Jr.*, HAW. CATTLEMEN’S COUNCIL (Nov. 30, 2000), <https://www.hicattle.org/Media/HICattle/Docs/oral-history-interview-harold-fredrick-rice-jr.pdf> [<https://perma.cc/S82R-BUXP>] (quoting Rice as stating, in an interview, that he was “[b]orn in Pu‘unene, Maui” in 1934).

⁷⁶³ *Rice*, 528 U.S. at 499, 509 (quoting HAW. REV. STAT. § 10-2 (1993)).

⁷⁶⁴ *Id.* at 510.

⁷⁶⁵ Noelani Goodyear-Ka‘ōpua, *Rebuilding the ‘Auwai: Connecting Ecology, Economy and Education in Hawaiian Schools*, 5 ALTERNATIVE 46, 52–53, 53 n.5 (2009) (identifying Harold “Freddy” Rice as a descendant of the founder of the Līhu‘e Plantation after whom the “Rice Ditch,” a novel form of plantation irrigation, was named); KAUANUI, *supra* note 489, at 100 (identifying William Harrison Rice as Harold Freddy Rice’s great-great-grandfather); CAROL WILCOX, SUGAR WATER: HAWAII’S PLANTATION DITCHES 54 (1996) (identifying William Harrison Rice as the founder of the Līhu‘e Plantation on Kaua‘i and founder of the “Rice Ditch” irrigation technology).

owners, most famously the Dole family,⁷⁶⁶ who overthrew the Kingdom of Hawai‘i before illegal annexation by the United States.⁷⁶⁷ Mr. Rice’s great-grandfather, William Hyde Rice, worked to draft the “Bayonet Constitution” and assisted in the overthrow of the Hawaiian Kingdom.⁷⁶⁸ Mr. Rice’s grandfather, Harold Waterhouse Rice, as territorial Senator for Hawai‘i in the 1920s, lobbied to remove valuable plantation lands from lands designated as Native homesteads and for the “50-percent blood quantum rule” in the Hawaiian Homes Commission Act⁷⁶⁹ — the rule later challenged by his grandson in *Rice v. Cayetano*.⁷⁷⁰ The so-called 50-percent rule was one that Rice’s grandfather and other sugar plantation owners supported so they could eventually gain greater control of Hawaiian lands as fewer and fewer Native Hawaiians would qualify for homelands.⁷⁷¹ The Supreme Court could have reflected on borderlands principles of preservation, self-determination, and recognition of colonized peoples in order to treat colonized peoples as a distinctive class. But instead, the Supreme Court neglected entirely American colonialism and resolved that the election violated the Fifteenth Amendment by discriminating against Mr. Rice on account of his “race.”⁷⁷²

Conflicts between the United States Constitution and the constitution of American colonialism have also arisen beyond principles of racial discrimination and equal protection. Last summer, the Supreme Court issued *Oklahoma v. Castro-Huerta*⁷⁷³ — an opinion that followed from the Supreme Court’s decision two years earlier holding that Congress had not diminished the borders of the Muscogee Creek Nation.⁷⁷⁴ In *Castro-Huerta*, the Court was asked whether state governments could intervene within Native nations and extend their criminal laws over crimes committed within Indian Country by non-Indians against

⁷⁶⁶ See generally JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 211–41 (2002).

⁷⁶⁷ See, e.g., MacKenzie, *supra* note 485, at 625–26 (describing the takeover of the Hawaiian economy by American plantations and the later overthrow of the Hawaiian Kingdom by the American landowners).

⁷⁶⁸ Dean Itsuji Saranillio, *Kēwaikaliko’s Benocide: Reversing the Imperial Gaze of Rice v. Cayetano and Its Legal Progeny*, 62 AM. Q. 457, 462 (2010) (“Another Rice patriarch, William Hyde Rice, helped draft the Bayonet Constitution of 1887 disenfranchising from vote all Asians and a majority of Hawaiians through income, property, and literacy requirements, thus strengthening white settler control of the government.”); KAUANUI, *supra* note 489, at 100 (noting that William Hyde Rice “served as the last governor of Kaua‘i, appointed in 1891 by Queen Lili‘uokalani, whom he later helped to overthrow and place under house arrest”).

⁷⁶⁹ Ch. 42, 42 Stat. 108 (1921).

⁷⁷⁰ See J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 7, 11, 152–58 (2008) (describing the involvement of Harold Rice in Senate Concurrent Resolution 6, which carved plantation lands out of homestead lands, and the blood quantum requirement of what became the Hawaiian Homes Act).

⁷⁷¹ See *id.* at 7.

⁷⁷² *Rice v. Cayetano*, 528 U.S. 495, 523–24 (2000).

⁷⁷³ 142 S. Ct. 2486 (2022).

⁷⁷⁴ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459–60 (2020).

Indians.⁷⁷⁵ The most dramatic outcome of *Castro-Huerta* was the Supreme Court’s seeming reversal of a two-hundred-year-old nonintervention principle that presumed state governments could not extend their laws over colonized governments unless Congress exercised its plenary power to affirmatively allow that law to intervene. The *Castro-Huerta* Court reversed this principle, indicating that *Worcester v. Georgia* had been effectively overruled.⁷⁷⁶ Writing for the Court, Justice Kavanaugh cited to the Tenth Amendment without further explication and held that state law might be presumed to intervene over colonized lands and peoples unless and until Congress explicitly preempted those laws.⁷⁷⁷ Throughout, the Justices ignored American colonialism. Many presumed that intervention into the governments, lands, and lives of colonized peoples caused no harm and that Native people would only benefit from having an additional government looking after them.⁷⁷⁸

Conflicts between the United States Constitution and American colonialism have proven even more amorphous than the gestures to the Tenth Amendment offered in *Castro-Huerta*. In a series of cases, beginning with the 1978 case of *Oliphant v. Suquamish Indian Tribe*,⁷⁷⁹ the Supreme Court raised the specter of concerns for the United States constitutional rights of non-Indians — and even for non-member Indians — to erode borderlands principles of territorial sovereignty.⁷⁸⁰ In these cases, the Supreme Court did not hold that tribal law violates the United States Constitution directly — the United States Constitution does not apply to tribal governments.⁷⁸¹ But the Court instead held that Native nations lack recognition, self-determination, and territorial

⁷⁷⁵ *Castro-Huerta*, 142 S. Ct. at 2491 (“This case presents a jurisdictional question about the prosecution of crimes committed by non-Indians against Indians in Indian Country . . .”).

⁷⁷⁶ *Id.* at 2493–94 (citing precedent after *Worcester* that showed that the opinion had been effectively overruled).

⁷⁷⁷ *Id.* at 2493–500 (discussing two federal laws — the General Crimes Act, 18 U.S.C. § 1152; and Public Law 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360) — and showing that neither explicitly “preempt state authority to prosecute crimes committed by non-Indians against Indians in Indian Country,” *Castro-Huerta*, 142 S. Ct. at 2500).

⁷⁷⁸ See, e.g., *id.* at 2501–02 (noting that state governments have a “strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims”). The Court’s opinion in *Castro-Huerta* continued the Court’s long-standing project to whittle away principles of nonintervention by replacing the bright-line presumption with a far more judicially malleable balancing test. The balancing test empowered the Court to decide on a case-by-case basis whether a state law intervened in Indian Country by balancing the interests of state governments against federal and tribal government interests — a balancing test that does not account for American colonialism, its principles or dynamics. *Id.* at 2500–02 (applying the balancing test from *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and finding no preemption because the exercise of state jurisdiction “would not infringe on tribal self-government,” would not “harm the federal interest in protecting Indian victims,” and would uphold the state’s interest “in ensuring public safety and criminal justice within its territory,” *Castro-Huerta*, 142 S. Ct. at 2501).

⁷⁷⁹ 435 U.S. 191 (1978).

⁷⁸⁰ See *id.* at 194–95; see also *Duro v. Reina*, 495 U.S. 676, 693–94 (1990).

⁷⁸¹ See, e.g., *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

sovereignty in areas that might involve the rights of non-Indians.⁷⁸² Elsewhere, I've referred to these cases as the “dormant plenary power doctrine,”⁷⁸³ a term crafted to capture the fact that the Supreme Court has usurped the plenary power of the political branches to reshape unilaterally American colonialism.⁷⁸⁴ What these cases have meant in practice is that Native nations can no longer apply their criminal and civil laws to punish and deter wrongdoing by non-Indians within Indian Country — the consequences of which are seen most heavily in the domain of sexual and domestic violence against Native women and children.⁷⁸⁵

As counterintuitive as it may seem, the modern Supreme Court has held that the United States Constitution provides the power to colonize other people and dominate them without liberal constitutional limit.⁷⁸⁶ The United States Constitution provides the several states with a constitutional right to impose their criminal law on colonized lands — to police, and subject to criminal sanctions, the loved ones, neighbors, and children of colonized peoples.⁷⁸⁷ But the Constitution also limits the United States from empowering the people it colonizes to self-govern, even simply to protect their families against crime, because United States citizens who are non-Indians could then be subject to the laws and governments of colonized peoples.⁷⁸⁸ This constitutional limit holds

⁷⁸² See *Oliphant*, 435 U.S. at 208–09 (“[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.” *Id.* at 209 (quoting *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823))); *Montana v. United States*, 450 U.S. 544, 565–67 (1981) (holding that the inherent sovereignty of a tribe is not enough to allow them to regulate non-Indian hunting and fishing on non-Indian land within the reservation); *Duro*, 495 U.S. at 691 (“[I]nherent tribal jurisdiction extends to tribe members only.”).

⁷⁸³ *Blackhawk*, *supra* note 27, at 1831–33 (generally naming and defining the plenary power doctrine).

⁷⁸⁴ *Id.* at 1835–38 (naming and defining the dormant plenary power doctrine).

⁷⁸⁵ See *Deer & Nagle*, *supra* note 636, at 220–27 (describing how, after *Oliphant*, violence against Native women and children became a crisis, with over ninety-five percent of Native women reporting that they had been victimized by a person of another race).

⁷⁸⁶ See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020) (“[T]wo provisions of the Constitution, Article I, § 8, cl. 17, and Article IV, § 3, cl. 2, give Congress the power to legislate for . . . localities in ways ‘that would exceed its powers, or at least would be very unusual’ in other contexts. Using these powers, Congress has long legislated for entities that are not States — the District of Columbia and the Territories.” (quoting *Palmore v. United States*, 411 U.S. 389, 398 (1973))). The Court has repeatedly referred to Congress’s plenary power over Native affairs. In its 2023 *Brackeen* decision, the Court stated: “Our cases leave little doubt that Congress’s power in [the field of Indian affairs] is muscular, superseding both tribal and state authority.” *Haaland v. Brackeen*, 143 S. Ct. 1609, 1627 (2023) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Quoting from an earlier decision, the Court reiterated that “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.” *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 56). It qualified, however, that “[a] power unmoored from the Constitution would lack both justification and limits. So like the rest of its legislative powers, Congress’s authority to regulate Indians must derive from the Constitution.” *Id.*

⁷⁸⁷ See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504 (2022).

⁷⁸⁸ See *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210–11 (1978); *Montana v. United States*, 450 U.S. 544, 565 (1981).

even when those citizens commit wrongdoing within colonized lands or against colonized peoples.⁷⁸⁹ Beyond that, the Fifteenth Amendment, fought and died for by countless formerly enslaved people, has been held up by a large majority of the Supreme Court as a limit on the power of the United States to recognize colonized peoples and support them in their efforts toward preservation, self-determination, and territorial sovereignty.⁷⁹⁰

With respect to our island borderlands, the conflict between the United States Constitution and American colonialism has presented a distinct, but still rising, tide. Borderlands constitutional principles had long motivated Congress to pass a range of self-determination laws for the island colonies across the nineteenth century.⁷⁹¹ But application of borderlands principles to the islands has been complicated. With respect to Puerto Rico in particular, many reasonably believed that commonwealth status had secured recognition of Puerto Rican sovereignty,⁷⁹² along with promises of nonintervention and limits on future exercise of the power to colonize.⁷⁹³ This perspective came to be known as “compact theory” and envisioned the statutes granting commonwealth status in the nature of a compact, akin to a treaty substitute (without the “plenary power” to abrogate unilaterally).⁷⁹⁴ The years following passage of those statutes in the 1950s saw glimmers of a sort of trust doctrine for the island borderlands.⁷⁹⁵ Beginning in the 1980s and 1990s, however, Congress and the Executive began to reverse these borderlands constitutional principles.⁷⁹⁶ Congress excluded Puerto Rico from the benefits of the bankruptcy laws.⁷⁹⁷ The Department of Justice

⁷⁸⁹ *Oliphant*, 435 U.S. at 210.

⁷⁹⁰ See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 524 (2000) (holding that though Hawai‘i, colonized islands turned into a state, had adopted a state law limiting voting for trustees to “Hawaiians” and “native Hawaiians,” the elections were “elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies”).

⁷⁹¹ See, e.g., *supra* note 715 and accompanying text (discussing the island borderlands’ organic statutes setting up commissions whose membership included local residents to evaluate which federal statutes should apply to the islands); *supra* notes 439, 477, 491, 500 & 504 (describing other innovative forms of self-determination).

⁷⁹² Erman, *supra* note 60, at 855.

⁷⁹³ Puerto Rico’s Partido Popular Democrático, one of the dominant political parties in Puerto Rico, “supports the island’s decolonization through an improved or ‘enhanced’ version of its current ‘commonwealth’ status.” Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101, 102 (2020); see also ALENIKOFF, *supra* note 323, at 77 (“It has been strongly argued that the establishment of commonwealth status ended Congress’s ‘plenary power’ under the territory clause. Under this reasoning, Congress lost general power to regulate the internal affairs of Puerto Rico . . .”).

⁷⁹⁴ See Erman, *supra* note 60, at 855–56.

⁷⁹⁵ See, e.g., *id.* at 857 (“For many years, the Department of Justice opined that one ‘Congress could create vested rights in the status of a territory that could not be revoked unilaterally.’” (quoting Mutual Consent Provisions in the Proposed Guam Commonwealth Act, Op. O.L.C. Supp. at 1 & n.2 (July 28, 1994), <https://www.justice.gov/file/163646/download> [<https://perma.cc/5W47-YCQN>])).

⁷⁹⁶ *Id.*

⁷⁹⁷ *Id.* at 857–58.

then took the position that a quasi trust doctrine for the islands violated the constitutional principle that one Congress may not bind another.⁷⁹⁸ In the 1990s, Congress removed certain federal tax exemptions that had supported Puerto Rico, and its economy began to spiral.⁷⁹⁹ Puerto Rico attempted to pass its own bankruptcy laws to manage a mountain of debt.⁸⁰⁰

In June of 2016, all three branches of the United States abandoned any commitment to borderlands principles for Puerto Rico.⁸⁰¹ First, the Supreme Court held that Puerto Rico was not recognized as sovereign by the United States and that its representative government operated wholly on delegated federal power.⁸⁰² Second, Congress passed, and President Obama signed into law, PROMESA — the Act that established the financial Oversight Board that now unilaterally governs Puerto Rico's finances.⁸⁰³ Lastly, the Supreme Court held that the Bankruptcy Code — the laws that prevented Puerto Rico from filing for bankruptcy — “preempt[ed]” Puerto Rico's bankruptcy laws.⁸⁰⁴

The Supreme Court's 2016 decision in *Puerto Rico v. Sanchez Valle*⁸⁰⁵ deserves particular mention because it served as a final blow to the long-held but debated theory that Puerto Rico had secured recognition, territorial sovereignty, and other borderlands principles with its commonwealth status. In *Sanchez Valle*, the Court held that the United States Constitution applied to limit the territorial sovereignty and self-government of Puerto Ricans.⁸⁰⁶ The question before the Court was whether two criminal defendants could dismiss an indictment brought against them by the Commonwealth of Puerto Rico because the United States had brought charges against them based on the same alleged criminal acts.⁸⁰⁷ The grounds for dismissal would be violation of the Double Jeopardy Clause of the United States Constitution, as the

⁷⁹⁸ Issacharoff et al., *supra* note 26, at 13 (“Over the last three decades, the Department of Justice . . . [has] taken the position that the commonwealth arrangement with Puerto Rico confers no special rights of self-governance. . . . There may be no conferral of any binding special status on Puerto Rico because of the old truism that one Congress cannot bind another.”).

⁷⁹⁹ Arthur MacEwan, THE EFFECT OF 936, at 2–3, [https://www.finance.senate.gov/imo/media/doc/Arthur%20MacEwan%20and%20J.%20Tomas%20Hexner%20\(Submission%206\).pdf](https://www.finance.senate.gov/imo/media/doc/Arthur%20MacEwan%20and%20J.%20Tomas%20Hexner%20(Submission%206).pdf) [https://perma.cc/Q64T-B5BH] (report submitted to the Congressional Task Force on Economic Growth in Puerto Rico in 2016).

⁸⁰⁰ Adam Liptak & Mary Williams Walsh, *Supreme Court Rejects Puerto Rico Law in Debt Restructuring Case*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/2016/06/14/us/politics/supreme-court-rules-against-puerto-rico-in-debt-restructuring-case.html> [https://perma.cc/N3HE-NTEE].

⁸⁰¹ See Erman, *supra* note 60, at 857.

⁸⁰² *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876–77 (2016).

⁸⁰³ See RENTA ET AL., *supra* note 464, at 19.

⁸⁰⁴ *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016).

⁸⁰⁵ 136 S. Ct. 1863.

⁸⁰⁶ See *id.* at 1876–77.

⁸⁰⁷ *Id.* at 1869.

indictments were brought by the same sovereign.⁸⁰⁸ The Court held that the defendants could dismiss the Commonwealth's indictment.⁸⁰⁹ Distinguishing Indian Country borderlands from the islands, the Court explained that Puerto Rico had never exercised independent prosecutorial authority as a matter of sovereignty.⁸¹⁰ From the moment of colonization, the Court described, the United States had unilaterally established a civil government in Puerto Rico.⁸¹¹ As a consequence, Puerto Rico was much more like the Philippines, the Court reasoned, and thus the Court drew on precedent from 1907 where it had held that Philippine courts were entirely those of the colonizing government and held no independent sovereignty aside from delegated federal power.⁸¹² Because the United States had colonized Puerto Rico, rather than recognizing its newly established autonomous government and allowing it to self-govern, the Court reasoned that Puerto Rico was unlike the sovereign governments of Indian Country that had governed independently at the Founding.⁸¹³

Subsequently, advocates have brought themselves to court and have attempted to wield and reshape United States constitutional principles as a shield against colonialism.⁸¹⁴ Efforts before the Court have thus far not been successful.⁸¹⁵ Rather, the Supreme Court has declined to apply United States constitutional principles as a limit to American colonialism.⁸¹⁶

Four years after *Sanchez Valle*, the Court heard one of many challenges to the PROMESA Oversight Board in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*.⁸¹⁷ The Court avoided any explicit discussion of American colonialism. Without reflection, the Court held that the United States Constitution applied not simply to the federal government acting within a colonized jurisdiction, but also directly to the government of colonized peoples.⁸¹⁸ However, the Court proceeded to carve a unique exception to the Constitution tailored to the context of colonialism.⁸¹⁹ The question before the Court was whether the appointment of the Oversight Board

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.* at 1876–77 (explaining that Puerto Rico's sovereignty derives from the U.S. federal government and therefore prosecution for the same crime constitutes double jeopardy).

⁸¹⁰ *Id.* at 1875.

⁸¹¹ *See id.* at 1868.

⁸¹² *Id.* at 1873 (citing *Grafton v. United States*, 206 U.S. 333, 355 (1907)).

⁸¹³ *Id.* n.5.

⁸¹⁴ *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998); *see also* *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022).

⁸¹⁵ *See, e.g., Vaello Madero*, 142 S. Ct. at 1541.

⁸¹⁶ *Id.*

⁸¹⁷ 140 S. Ct. 1649 (2020).

⁸¹⁸ *See id.* at 1658. In contrast, the Supreme Court has long held that the United States Constitution does not apply to Native nations governing within Indian Country borderlands. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896).

⁸¹⁹ *Aurelius*, 140 S. Ct. at 1661.

members by the United States President, without the advice and consent of the Senate, violated the Appointments Clause of the United States Constitution.⁸²⁰ The question at issue was not whether, or perhaps why, the United States President could unilaterally appoint the government for colonized peoples, but whether he must unilaterally govern colonized peoples with the proper separation of powers — the check of Senate advice and consent.⁸²¹ The power to colonize was not questioned — that power had “continued unabated for more than two centuries.”⁸²² Instead, the Court held that appointments of officers that exercise local territorial power need not satisfy the Appointments Clause,⁸²³ with one concurrence drawing in part on the statute for the Louisiana Purchase that provided President Jefferson with powers of the Army and Navy to “occupy” and “take possession” of the Louisiana Territory.⁸²⁴

In certain respects, borderlands constitutional principles operated in the background of the case. Had the Court applied borderlands constitutional principles of recognition, nonintervention, and self-determination explicitly, the outcome in *Aurelius* may have been the same. The Court even noted in its opinion that a general constitutional rule requiring all government officials in the island borderlands to satisfy the Appointments Clause would have wreaked havoc.⁸²⁵ The representative governments of our borderlands are now elected by the people of those borderlands, not appointed by the President and Senate of the colonizing government.⁸²⁶ But direct engagement with the borderlands principles of recognition, self-determination, and nonintervention could have also helped distinguish between the application of the United States Constitution to the recognized, sovereign government of a colonized peoples — including the Governor of Puerto Rico elected pursuant to the Puerto Rican constitution — and application of limits required by the United States Constitution to unilateral governments crafted for colonized peoples by the United States, including the PROMESA Board. The Supreme Court has long held that the United States Constitution does not limit Native nations directly,⁸²⁷ because the United States has recognized these governments as distinct sovereigns (like Canada) that are not subject to the constitution of a separate

⁸²⁰ *Id.* at 1654.

⁸²¹ *Id.*

⁸²² *Id.* at 1659.

⁸²³ *Id.* at 1665–66.

⁸²⁴ *Id.* at 1681 n.5 (Sotomayor, J., concurring in the judgment).

⁸²⁵ *See id.* at 1661 (majority opinion).

⁸²⁶ *See, e.g.*, P.R. CONST. art. III, § 1; *id.* art. IV, § 1 (providing for the direct election of the legislature and governor of Puerto Rico by the people of Puerto Rico).

⁸²⁷ *See, e.g.*, *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

sovereign.⁸²⁸ Had the Court incorporated borderlands principles into *Aurelius* explicitly, it could have focused instead on the need for limits in the particular context of unilateral, colonial governance.

The Supreme Court struggles to limit the power of the United States over the islands in other contexts also. Last Term, the United States Supreme Court issued yet another opinion resolving a confrontation between American colonialism within the island borderlands and the United States Constitution in *United States v. Vaello Madero*. In *Vaello Madero*, the Court was asked to resolve whether it violated the equal protection component of the Due Process Clause of the Fifth Amendment for the United States to extend Supplemental Security Income benefits generally, but not to residents of Puerto Rico⁸²⁹ — even those Puerto Rican residents who had simply moved back home to Puerto Rico after decades living, working, and paying into the U.S. system while living outside the borderlands.⁸³⁰ The Court held that it did not.⁸³¹ Justice Sotomayor offered the lone dissenting voice.⁸³² No doubt, the decision in *Vaello Madero* reflected the principle of recognition for Puerto Rico as a distinctive colonized community and that of nonintervention by shielding Puerto Rico from the general laws and principles of the United States.⁸³³ If Congress had to apply all federal programs to the island borderlands, the result would be a huge swath of colonial law intruding upon all of the islands — not just Puerto Rico.⁸³⁴

In certain ways, *Vaello Madero* resembles the Supreme Court’s decision in *Morton v. Mancari* — a case called into question by *Brackeen*.⁸³⁵ The Court in *Mancari* was asked to resolve whether Congress violates equal protection principles of the United States Constitution when it treats colonized peoples differently from noncolonized peoples.⁸³⁶ In *Vaello Madero*, the Supreme Court, in an opinion authored by Justice Kavanaugh, had no trouble applying a deferential rational basis test⁸³⁷ and holding that long-standing practices of treating colonized peoples differently outweigh those fundamental values of “equal justice” that

⁸²⁸ Justice Sotomayor’s concurrence in *Aurelius* raised these limits explicitly — arguing that Puerto Rico’s commonwealth status and compact with the United States should serve as a limit on any future efforts to exercise the power to colonize Puerto Rico. See *Aurelius*, 140 S. Ct. at 1683 (Sotomayor, J., concurring in the judgment).

⁸²⁹ *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022).

⁸³⁰ See *id.* at 1558–59 (Sotomayor, J., dissenting).

⁸³¹ *Id.* at 1541 (majority opinion).

⁸³² *Id.* at 1557 (Sotomayor, J., dissenting).

⁸³³ *Cf. id.* at 1543 (majority opinion) (discussing how the Court has upheld differential treatment of Puerto Rico under constitutional principles including the right to interstate travel and the equal protection component of the Fifth Amendment Due Process Clause).

⁸³⁴ *Cf. id.* (noting that the “far-reaching consequences” might also require that “federal taxes be imposed on residents of Puerto Rico and other Territories”).

⁸³⁵ See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1648 (2023) (Gorsuch, J., concurring).

⁸³⁶ *Morton v. Mancari*, 417 U.S. 535, 537 (1974).

⁸³⁷ *Vaello Madero*, 142 S. Ct. at 1543.

Justice Kavanaugh later raised in *Brackeen*.⁸³⁸ As the Court and Justice Kavanaugh recognized in *Vaello Madero*, Congress has long made distinctive policies for colonized peoples that do not comport with the constitutional values of the metropole, and to hold otherwise “would usher in potentially far-reaching consequences.”⁸³⁹ “The Constitution does not require that extreme outcome.”⁸⁴⁰

Yet the Court’s approach in *Vaello Madero* to the island borderlands differed in small, but important, ways from its approach in *Morton v. Mancari* — to the detriment of Puerto Rican people. The *Vaello Madero* Court turned first to the Territory Clause to invoke the familiar mechanics of the plenary power doctrine — for colonized peoples, Congress’s power is plenary and subject to very deferential rational basis review by the courts.⁸⁴¹ But, unlike the plenary power doctrine in the context of Indians,⁸⁴² the Court reviewed the statute for rationality not toward a particular borderlands constitutional principle — preservation, self-determination, or otherwise — but in the sense of the United States’s budgetary “rational” self-interest.⁸⁴³ To the Court, Congress’s decision to not extend Social Security benefits to residents of Puerto Rico was a matter of dollars and cents — it exempted Puerto Rico from certain federal taxes, so it could equally exempt it from the welfare programs those taxes funded.⁸⁴⁴ In contrast to a rational basis review that asked whether the legislation aimed toward a “unique obligation toward [colonized peoples]” or support of “self-government,”⁸⁴⁵ the Court carved out a space of constitutional exception that allowed budgetary concerns to govern colonization of Puerto Rico.⁸⁴⁶ This budgetary concern hardly seemed rational, as Justice Sotomayor pointed out in her dissent, because the Puerto Rican population is so poor that it would likely be exempted from federal income tax regardless of its colonized status.⁸⁴⁷

The most generous interpretation of these recent opinions is that the Supreme Court draws from borderlands constitutional principles implicitly and justifies the lesser harm of a particular case to avoid a more problematic general rule. This interpretation could be true. However, when the Court was faced with the choice to embrace the lesser harm of the particular case and craft a general rule that preserved borderlands

⁸³⁸ Transcript of Oral Argument, *supra* note 47, at 95 (discussing the roots of “equal justice” in *Palmore v. Sidoti*); *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring).

⁸³⁹ *Vaello Madero*, 142 S. Ct. at 1543.

⁸⁴⁰ *Id.*

⁸⁴¹ *Id.* at 1541, 1543.

⁸⁴² See generally *Morton v. Mancari*, 417 U.S. 535 (1974).

⁸⁴³ Cf. *Vaello Madero*, 142 S. Ct. at 1543 (holding that rational basis review allowed Congress to “take account of the general balance of benefits to and burdens on the residents of Puerto Rico”).

⁸⁴⁴ *Id.*

⁸⁴⁵ *Mancari*, 417 U.S. at 555.

⁸⁴⁶ *Vaello Madero*, 142 S. Ct. at 1543.

⁸⁴⁷ See *id.* at 1561 (Sotomayor, J., dissenting).

principles in *Sanchez Valle*, it chose the general rule that furthered the colonial project.⁸⁴⁸

The Supreme Court's decision in *Sanchez Valle* notably predated the appointment of Justice Gorsuch to the Supreme Court.⁸⁴⁹ In more recent years, Justice Gorsuch has positioned himself as a moral compass for the Court in the context of American colonialism.⁸⁵⁰ Recent cases drawing on borderlands constitutional principles could be shaped by his expertise.

But there are indications that Justice Gorsuch may be struggling with the question of how to address colonialism, doing so with limited liberal constitutional tools. In *Vaello Madero*, Justice Gorsuch concurred in the decision, writing separately to emphasize that the outcome of the case was unavoidable unless and until the Court overruled the *Insular Cases* and applied the Constitution as a limit on American colonialism.⁸⁵¹ Nowhere did Justice Gorsuch offer borderlands principles, applied by him passionately in the context of Indian Country, for the islands.⁸⁵² Further, the Supreme Court has ignored the growing conflict in the lower courts between American colonialism and the Citizenship Clause of the United States Constitution as applied to residents of the territories⁸⁵³ — including by denying a petition for certiorari that would have brought the question before the Court this last Term.⁸⁵⁴ These cases bear mention because the most recent petition coupled requests for the extension of birthright citizenship to the territories with a call to

⁸⁴⁸ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876–77 (2016).

⁸⁴⁹ See Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/3655-RFHE>].

⁸⁵⁰ See, e.g., *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (Gorsuch, J.); *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, 141 S. Ct. 2434, 2453 (2021) (Gorsuch, J., dissenting); *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring); *Denezpi v. United States*, 142 S. Ct. 1838, 1849 (2022) (Gorsuch, J., dissenting); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting); *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J., concurring); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1704 (2023) (Gorsuch, J., dissenting); *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1819 (2023) (Gorsuch, J., dissenting). See also, for example, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), where Justice Gorsuch joined the majority opinion as the swing vote.

⁸⁵¹ *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring).

⁸⁵² See *id.* at 1552–57.

⁸⁵³ See *Fitisemanu v. United States*, 1 F.4th 862, 881 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (holding that the Birthright Citizenship Clause does not apply to American Samoans); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016) (same); *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010) (holding that the Citizenship Clause does not apply to persons born in the Philippines at the time that it was a United States territory); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (same); *Valmonte v. INS*, 136 F.3d 914, 918 (2d Cir.) (same), *cert. denied*, 525 U.S. 1024 (1998); *Rabang v. INS*, 35 F.3d 1449, 1452, 1454 (9th Cir. 1994) (same), *cert. denied*, 515 U.S. 1130 (1995).

⁸⁵⁴ *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (mem.), *denying cert. to* 1 F.4th 862 (10th Cir. 2021).

overturn the *Insular Cases*,⁸⁵⁵ a call that Justice Gorsuch raised and argued for in his concurrence in *Vaello Madero*.⁸⁵⁶

Both *Tuaua v. United States*⁸⁵⁷ and *Fitisemanu v. United States*⁸⁵⁸ brought challenges to the ongoing denial of United States citizenship to residents of American Samoa — the only island borderland to which Congress did not extend citizenship through statute.⁸⁵⁹ The government of American Samoa filed briefs in both cases to argue against the extension of citizenship and against overruling the *Insular Cases*.⁸⁶⁰ The last paragraph in the brief drafted by the government of American Samoa in *Fitisemanu* encapsulates the rising conflict between American colonialism and the United States Constitution:

The *Insular Cases* are often criticized for relying on “beliefs both odious and wrong” to deprive the inhabitants of overseas territories of their rights, including their basic right to self-determination. The decision below, however, [holding the Citizenship Clause does not apply to American Samoans] does precisely the opposite: It *respects* the wishes of the American Samoan people, as expressed by the unanimous voice of their democratic government and elected representatives, by allowing the American Samoan people to decide for themselves (in consultation with Congress) whether and when to seek birthright citizenship. It would be the height of irony to use the *overruling* of the *Insular Cases* to cut off that ongoing democratic dialogue, deprive the American Samoan people of their fundamental right to self-determination, and force them to accept birthright citizenship regardless of their wishes.⁸⁶¹

The Supreme Court denied the petitions.⁸⁶² But they remain as yet another imminent and seemingly irreconcilable conflict between the realities of American colonialism and the Constitution of the United States.

To those steeped in the idealized principles of the United States Constitution, the hierarchical and exceptional external constitution

⁸⁵⁵ Petition for Writ of Certiorari, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394).

⁸⁵⁶ *Vaello Madero*, 142 S. Ct. at 1552–57 (Gorsuch, J., concurring).

⁸⁵⁷ 788 F.3d 300 (D.C. Cir. 2015).

⁸⁵⁸ 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).

⁸⁵⁹ *Compare* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263, 264–66 (1976) (codified at 48 U.S.C. § 1801 note) (establishing the Commonwealth of the Northern Mariana Islands and extending birthright citizenship), *and* Organic Act of Guam, Pub. L. No. 81-630, sec. 4(a), § 206, 64 Stat. 384, 384 (1950) (extending U.S. citizenship to Guam), *and* Citizenship for Inhabitants of Virgin Islands Act of 1927, ch. 192, §§ 1, 3, 44 Stat. 1234, 1234–35 (current version at 8 U.S.C. § 1406) (same for the Virgin Islands), *and* Organic Act of Puerto Rico, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified as amended in scattered sections of 48 U.S.C.) (same for Puerto Rico), *with* *Fitisemanu*, 1 F.4th at 864.

⁸⁶⁰ See Brief in Opposition, *Fitisemanu*, *supra* note 666, at 12–14; Brief in Opposition by Respondents American Samoa Government and the Office of Congresswoman Aumua Amata of American Samoa at 2–3, *Tuaua v. United States*, 136 S. Ct. 2461 (2016) (No. 15-981).

⁸⁶¹ Brief in Opposition, *Fitisemanu*, *supra* note 666, at 35–36 (citation omitted) (citing *Vaello Madero*, 142 S. Ct. at 1560 n.4 (Sotomayor, J., dissenting)).

⁸⁶² *Fitisemanu*, 143 S. Ct. 362; *Tuaua*, 136 S. Ct. 2461.

embodying American colonialism seems at first an abomination.⁸⁶³ Like the *Insular Cases* and the plenary power doctrine they codify, American colonialism appears as a vestige of constitutional failures past. As Justice Gorsuch argued in his concurrence in *Vaello Madero*, the failure to extend the Constitution to the territories is “shameful” segregation.⁸⁶⁴ Segregation is, no doubt, a wrong.⁸⁶⁵ But is it the wrong of colonialism?⁸⁶⁶ Alternatively, is the wrong of colonialism the fact that our Constitution empowered us to invade an autonomous country and govern its people unilaterally for over a hundred years?⁸⁶⁷ At the very least, our Constitution did not stop us.⁸⁶⁸ Perhaps Justice Gorsuch is right that one remedy to the wrong of American colonialism might be to extend our Constitution over the borderlands peoples who want it.⁸⁶⁹ But what of those who do not?⁸⁷⁰ To unilaterally extend our Constitution over them might simply further the American colonial project, finally completing the invasions that began in 1898,⁸⁷¹ 1803,⁸⁷² and 1789,⁸⁷³ as well as countless others.⁸⁷⁴

B. Our Internal and External Constitutional Frameworks

While some may not agree with the possible path of reckoning that I offer in the sections that follow, we should all recognize that American colonialism raises difficult constitutional questions — questions that deserve deeper exploration and distinctive constitutional solutions. At the

⁸⁶³ See, e.g., ECHO-HAWK, *supra* note 694, at 3–5.

⁸⁶⁴ *Vaello Madero*, 142 S. Ct. at 1554 (Gorsuch, J., concurring).

⁸⁶⁵ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (“To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494.).

⁸⁶⁶ See Monica C. Bell, *Anti-segregation Policing*, 95 N.Y.U. L. REV. 650, 678–83 (2020) (surveying the literature on segregation and exploring the important distinctions between “dignity-enhancing separation and subordinating separation,” *id.* at 680–81, in the context of Black American experiences and Native reservations).

⁸⁶⁷ See González-Cruz, *supra* note 310, at 8, 12–13.

⁸⁶⁸ *Id.* at 11–12.

⁸⁶⁹ See *Vaello Madero*, 142 S. Ct. at 1556 (Gorsuch, J., concurring) (“Cases would no longer turn on the fictions of the *Insular Cases* but on the terms of the Constitution itself [if the *Insular Cases* were overruled]. Disputes are sure to arise about exactly which of its individual provisions applies in the Territories and how. Some of these new questions may prove hard to resolve. But at least they would be the right questions. And at least courts would employ legally justified tools to answer them, including not just the Constitution’s text and its original understanding but the Nation’s historical practices (or at least those uninfected by the *Insular Cases*).” (citing *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022))).

⁸⁷⁰ See, e.g., Brief in Opposition, *Fitisemanu*, *supra* note 666, at 5.

⁸⁷¹ H.R.J. Res. 259, 55th Cong., 30 Stat. 750 (1898) (annexing the Hawaiian Islands to the United States); Treaty of Paris of 1898, *supra* note 310, at 1754 (ceding control over Puerto Rico).

⁸⁷² Louisiana Purchase, *supra* note 160, at 200.

⁸⁷³ The “operation” of the U.S. Constitution “did not commence [until] the first Wednesday in March, 1789.” *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 423 (1820).

⁸⁷⁴ See, e.g., Treaty of Cession, *supra* note 247, at 539 (acquiring the territory of Alaska from Russia).

very least, resolution of this rising conflict will require recognition of our external constitution, and the American colonial project developed within that constitutional framework. It requires placing “external” on equal footing with “internal” and confronting the injustice in the duality of these distinctive constitutional frameworks — particularly the vision of unprincipled power without meaningful constitutional limit that is presumed in the range of areas considered “foreign affairs.” But recognizing this external constitutional framework, of course, begins with the difficult admission that the United States is and always has been an empire.⁸⁷⁵ The sharp dichotomy of internal and external constitutionalism may have itself been born in the context of American colonialism. Justice Sutherland, author of *The Internal and External Powers of the National Government* and later *United States v. Curtiss-Wright Export Corp.*,⁸⁷⁶ honed his sharp dichotomy between internal and external constitutionalism during his tenure in the Utah Territory working on Indian affairs.⁸⁷⁷

Along with recognition of American colonialism comes recognition of the devastation colonialism has wrought over the past two hundred years.⁸⁷⁸ It also comes with the recognition that the United States remains an empire, governing hundreds of governments unilaterally.⁸⁷⁹ For better or more often for worse, our constitutional law was born into hierarchy — and not solely in the singular context of human enslavement and Jim Crow segregation. The United States Constitution created both a unified nation as well as a space for exceptionalism and power to dominate others beyond that of states’ rights and our fathers’ federalism.⁸⁸⁰ Within this space of external constitutionalism, it fostered the colonization of Indians and beyond. Exercise of the power to colonize continues today. Colonialism has its own unique constitutional history — one that our United States Constitution has never developed the language to describe, nor resolve.

What is to be done then in the face of the ongoing and historical injustice of American colonialism? Could we simply resolve this unjust

⁸⁷⁵ See IMMERWAHR, *supra* note 7, at 13–15.

⁸⁷⁶ 299 U.S. 304 (1936).

⁸⁷⁷ Eight years before authoring *The Internal and External Powers of the National Government*, as Congressman for Utah, George Sutherland testified before the House on the Indian Appropriations Act of 1902 that Congress need not obtain consent from the Ute Nation to allot their reservation: “His position . . . was that the Indians had no title to the reservation and Congress therefore had power to open it without their consent.” Alan Gray, *Untitled Biography of George Sutherland* 9 (1928) (unpublished manuscript) (on file with the Library of Congress), https://www.scmllaw.com/wp-content/uploads/2019/12/untitled_biography-of-George-Sutherland.pdf [<https://perma.cc/X9ZN-LYHP>]. This vision of federal “plenary power” over Indians was sanctioned by the Supreme Court a year after then-Congressman Sutherland’s testimony in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

⁸⁷⁸ See *supra* Part II, pp. 66–115.

⁸⁷⁹ See *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 87 Fed. Reg. 4636, 4636 (Jan. 28, 2022).

⁸⁸⁰ IMMERWAHR, *supra* note 7, at 13–15.

external constitution with the same constitutional tools that we have developed for constitutional failure within the metropole? Some, Justice Gorsuch among them, have suggested ridding ourselves of this external constitutional framework by ending the power to colonize and extending the United States Constitution over colonized communities.⁸⁸¹ No doubt, simply overruling the plenary power doctrine and extending the United States Constitution over these communities could provide forms of remedy for some. Those who support statehood for Puerto Rico, for example, might present stronger arguments for statehood if the United States Constitution applied to the island borderlands in full and the United States could no longer claim the power to govern Puerto Rico unilaterally. Forcing a choice between the options of statehood or independence could also focus debates over self-determination — and avoid creative solutions like that of the ambiguous commonwealth status that never delivered on its promises of sovereignty and self-determination. Rightfully so, many borderlands advocates may not trust that the United States can resolve American colonialism and its external constitutional framework. Instead, they may justifiably turn to those solutions that are faster and more dependable for their own communities — that is, our current constitutional tools of statehood or independence.

But overruling the plenary power doctrine, petitioning for statehood or pursuing independence on a jurisdiction-by-jurisdiction basis, or even somehow ending the power to colonize (however the Supreme Court can find the power to achieve that feat) does not begin to address the fundamental problems of American colonialism, nor does it resolve the duality of our external constitutional framework. Overruling the plenary power doctrine merely involves the Supreme Court more readily in the American colonial project. Once involved, what values, principles, and limits does the Supreme Court apply to American colonialism? Overruling the plenary power doctrine does not necessarily resolve the colonized status of those long colonized by the United States. It does not promise colonized communities statehood or independence. Nor does it begin to remedy the confusion and silence over our “external” constitutional framework or the American colonial project.

Overruling the plenary power doctrine might shift the politics of self-determination for certain jurisdictions like Puerto Rico — to finally press those borderlands advocates toward a singular solution. But it does not affirmatively end the power to colonize others at present and in the future. It does not begin to resolve the harms of colonialism to those we have long colonized and the harms inflicted upon the constitutional law and culture of the United States by the American colonial project. To provide just one example, the process of admission as a state is itself deeply rooted in the history of American colonialism and ripe

⁸⁸¹ See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1554–57 (2022) (Gorsuch, J., concurring).

for reform.⁸⁸² As it has developed, the admission of new lands and peoples does nothing to the Constitution of the center and it is unclear how statehood, without more, would remedy over a hundred years of colonial rule. Joining the Constitution of the center could, no doubt, better shield certain colonized peoples from the American colonial project — but they are shielded by becoming part of the colonial project, a power that the United States continues to inflict on others.

Attempting to solve the problem of American colonialism with the constitutional tools we hold today or resolving our external constitutional framework by simply extending the constitutional principles of the center over it, without deeper reflection and reform, could also harm those left behind within the colonial system. For example, overruling the plenary power doctrine could cause problems for others too fundamental to resolve — in fact, the “win” for Native nations in *Brackeen* came from the Supreme Court’s affirmation of Congress’s plenary power over colonized peoples and rejection of arguments to the contrary.⁸⁸³ For our Indian Country borderlands, at least according to Justice Thomas and aligned thinkers, the existence of Indian Country rests on the legal levees built by the plenary power of the national government to exclude the intervention of state law into Native nations and their territories.⁸⁸⁴ Were the Supreme Court to remove the power of the United States to maintain these levees, the power of the states would flood Indian Country enclaves, drowning those sovereigns and bringing the American colonial project to its long-desired end through the elimination of “Indians” and “Indian Country.”⁸⁸⁵ So, too, could unilateral extension of the United States Constitution over colonized communities cause widespread problems. As the government for American Samoa raised in *Fitisemanu*, some of our island borderlands continue to reject citizenship in the United States as a threat to their culture and forms of government.⁸⁸⁶ With respect to Indian Country, some Native nations

⁸⁸² See, e.g., Campbell, *supra* note 237, at 612–13, 625.

⁸⁸³ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1628 (2023) (“In sum, Congress’s power to legislate with respect to Indians is well established and broad. Consistent with that breadth, we have not doubted Congress’s ability to legislate across a wide range of areas . . .”).

⁸⁸⁴ See *id.* at 1675 (Thomas, J., dissenting); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 664–65 (2013) (Thomas, J., concurring); *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring in the judgment).

⁸⁸⁵ But see Frickey, (*Native*) *American Exceptionalism*, *supra* note 31, at 475 (“In short, cutting back congressional power over Indian affairs to those actions consistent with Congress’s enumerated powers would not necessarily cripple the federal capacity to develop reasonable policies for the future. The most important issue would be how the Supreme Court would implement this new understanding. Critically, if congressional power would no longer be considered ‘plenary,’ there would be no reason to think that Congress can do anything it wants when other constitutional values are at stake.”).

⁸⁸⁶ Brief in Opposition, *Fitisemanu*, *supra* note 666, at 21–22 (“[P]etitioners’ attempt to resolve the ongoing democratic debate over American Samoan citizenship by judicial fiat would contravene

and Native peoples would prefer to reject United States citizenship and decline to participate in United States elections or exercise other privileges of that citizenship.⁸⁸⁷ For better or for worse, the colonial frameworks currently in place allow for a flexibility that would not be realized with the unilateral imposition of constitutional birthright citizenship throughout our colonized communities.⁸⁸⁸

Rather, we need to begin anew to envision principles, values, and meaningful constitutional limits for our external constitution. Once we understand our hesitancy to imagine “external” constitutional principles as rooted, at least in part, in the history and realities of American colonialism, perhaps we could then begin to envision a constitutionalism that reaches beyond the presumed borders of the political community, beyond so-called “internal issues.” The vision could generate new constitutional conversations around the distinctive questions that arise when we no longer presume the existence of a static and bounded political community. It could better center a range of questions around constitutional values in the context of community formation, reformation, exclusion, and relations between communities and place these issues on the same footing as internal political equality, liberty, and democracy.⁸⁸⁹ The constitution of American colonialism has constructed its borderlands residents as permanent “strangers” to the Constitution.⁸⁹⁰ In many ways, how a government treats “strangers” is the ultimate test of a constitutional order, especially a political community with borders — literal and figurative — that have been shaped and reshaped so fundamentally as ours have been since the Founding.

Once we recognize this external constitution and the American colonial project embodied within it, the application of internal constitutional principles seems, at best, an odd distraction from reality. The Indian Child Welfare Act was not passed to end the vestiges of human enslavement, including ubiquitous forms of racism; it was passed to end yet another program to destroy colonized peoples by removing their children and resocializing them into the national values, languages, and visions of the colonizing government.⁸⁹¹ Puerto Rico has not been wronged because the President did not consult the Senate before governing its citizens unilaterally; it has been wronged because it was invaded and governed unilaterally. American Samoans have not been wronged because they have been denied birthright citizenship; they have

the will of the American Samoan people and strip them of their right to determine their own status through the democratic process, and would instead ‘impose citizenship on an unwilling people from a courthouse thousands of miles away.’” (quoting *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021)).

⁸⁸⁷ See generally Porter, *supra* note 64, at 141; Porter, *supra* note 528, at 91–92.

⁸⁸⁸ See Brief in Opposition, *Fitisemanu*, *supra* note 666, at 20–22.

⁸⁸⁹ See NEUMAN, *supra* note 38, at 68–85.

⁸⁹⁰ See, e.g., *supra* section I.A, pp. 26–53.

⁸⁹¹ See H.R. REP. NO. 95-1386, at 8–9 (1978).

been wronged because the United States invaded their country and continues to establish its structure of, admittedly now republican, government unilaterally. Applying internal constitutional principles as our sole limits on American colonialism offers mostly awkward, unprincipled limits and could possibly extend constitutional pathologies around “race” to further the American colonial project.

Returning us to original meaning and first constitutional principles is no solution either. This approach could limit power over colonized peoples, but not with principles that we can accept today. The original meaning of the United States Constitution — even a meaning inflected with excluded voices — will at best return us to a world where the national government may colonize Indians with more limited legal tools.⁸⁹² Original meaning will not provide resolution to the empire that we have become; nor will it repair the ways that American colonialism has, quite literally, shaped the United States since the Founding. Beyond that, original meaning could silence the rich constitutional dialogue that has been ongoing in the borderlands for the past two hundred years. To resolve American colonialism, we must offer more than “an enduring place”⁸⁹³ for Indians or “a promise[]”⁸⁹⁴ of sovereignty — if the original Constitution offered even that.⁸⁹⁵

In the context of American colonialism, this external constitutional framework provided power to the national government to dominate and dispossess certain peoples and lands — peoples deemed too “foreign” and “uncivilized” to incorporate into republican government.⁸⁹⁶ It is this power that generations of colonized men, women, and children have fought to contain — to bend toward better principles. Their voices excluded from shaping the Constitution of the center, these borderlands peoples have fought for their very survival, often limiting through blood the constitution of American colonialism. I offer these voices and their principles as one possible path of resolution in crafting meaningful principles and limits for our external constitution — especially as applied to colonized peoples in the past, present, and future. The main aim of this Foreword, however, is to begin a conversation over these external constitutional principles — within the context of American colonialism and beyond. For the borderlands, these conversations have been ongoing for

⁸⁹² Cf. Ablavsky, *The Savage Constitution*, *supra* note 31, at 1087 (describing potentially fundamental flaws in originalist understandings of Indian affairs); Ablavsky, *supra* note 131, at 1039 (describing several possible interpretations of the original meaning of the Indian Commerce Clause and recounting alternate ways the federal government has asserted authority over the Native peoples’ internal affairs).

⁸⁹³ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1661 (2023) (Gorsuch, J., concurring) (“Our Constitution reserves for the Tribes a place — an enduring place — in the structure of American life. It promises them sovereignty for as long as they wish to keep it.”).

⁸⁹⁴ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (“On the far end of the Trail of Tears was a promise.”).

⁸⁹⁵ *Brackeen*, 143 S. Ct. at 1664–66, 1670–71 (Thomas, J., dissenting).

⁸⁹⁶ *See, e.g., id.*

decades, if not hundreds of years. It is time that the courts, the academy, and the legal profession writ large join them in that conversation.

C. The Promise of Borderlands Constitutionalism

Our deliberation over external constitutional principles could begin by engaging directly with the borderlands and borderlands voices. During oral argument in *Brackeen*, the Justices of the Supreme Court struggled to find limits on the plenary power of Congress over colonized peoples.⁸⁹⁷ If not the equal protection principles of the United States Constitution, then what would possibly limit this power? What would prevent Congress and the Executive from reinstating the boarding school and family separation policies of the late nineteenth and early twentieth centuries? Borderlands constitutionalism offers such limits through its principles of recognition, self-determination, preservation, collaborative lawmaking, territorial sovereignty, and nonintervention.⁸⁹⁸ These principles have arisen from contestation and debate over American colonialism for hundreds of years.⁸⁹⁹

Once we recognize our external constitution, we can in turn recognize borderlands principles as constitutional discourse — discourse on par with weighty discussions of liberty, equality, federalism, and the separation of state power. Just as we have benefitted immeasurably from the lessons of enslaved Black people on the meaning of equality, freedom, and citizenship,⁹⁰⁰ so, too, can we learn from those we have colonized.

Yet resolution of American colonialism, not simply mitigation, must begin with the impossible task of the colonizing government — and especially its legal elites — recognizing the communities they have colonized, learning their languages, and understanding their values. Like the real meaning of equality, freedom, and citizenship offered to the United States by Black Americans — people whom the United States helped hold in enslavement — the views of colonized peoples could be seen as a resource. The principles of borderlands constitutionalism offer a brilliant and already tested path toward the mitigation of American colonialism. Colonized peoples have fought for decades, if not hundreds of years, to limit the American colonial project.⁹⁰¹ These principles might also provide the space of stability and calm necessary for colonized communities to stop fighting against progression of American colonialism and finally turn their sights toward imagining real self-determination.

⁸⁹⁷ See, e.g., Transcript of Oral Argument, *supra* note 47, at 13–17.

⁸⁹⁸ Ablavsky, *supra* note 558, at 591.

⁸⁹⁹ *Id.* at 613.

⁹⁰⁰ See, e.g., JONES, *supra* note 555, at 4; MASUR, *supra* note 555, at 314; Roberts, *supra* note 45, at 109; Douglass, *supra* note 556, at 68.

⁹⁰¹ See generally Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2217–54.

Congress and the Executive have largely embraced borderlands principles for Indian Country. Within these branches, borderlands principles operate to mediate interpretation of the Constitution, similar to constitutional interpretation in the courts.⁹⁰² When deciding whether and how they may exercise their powers to make law that impacts colonized peoples, Congress and the Executive often turn to the trust doctrine to determine whether they have the constitutional power⁹⁰³ and how that power ought to be used with respect to colonized peoples.⁹⁰⁴ For Congress, the trust doctrine requires exercise of Article I power to reflect the best interests of colonized governments and foster self-determination.⁹⁰⁵ For the Executive, as well as Congress, the trust doctrine mandates the broad interpretation of treaties (and treaty substitutes) in favor of colonized peoples and fulfillment of legal obligations to colonized peoples established by treaties, statutes, executive orders, and regulations.⁹⁰⁶ Congress often describes the trust doctrine as creating a “duty” to legislate and execute the laws in the best interest of tribal governments⁹⁰⁷ — toward borderlands constitutional principles like self-determination and collaborative lawmaking.⁹⁰⁸

Designating these principles as fundamental constitutional principles for all colonized peoples could further stabilize and structure their application. With respect to Indian Country, Congress and the Executive might be more likely to consistently adhere to the trust doctrine if they understood the principles underlying the doctrine as constitutionally required. All three branches can better understand the trust doctrine as one inflected with borderlands constitutional principles and can develop it, as well as other interpretive and legal tools developed to embody borderlands principles, in greater detail. With respect to the island borderlands, Congress and the Executive can make available all of our borderlands principles, including the trust doctrine, to these colonized peoples as well.⁹⁰⁹ The recognition of sovereignty, and other statutes

⁹⁰² Cf. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 107 (1976).

⁹⁰³ Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2265.

⁹⁰⁴ *Id.*

⁹⁰⁵ See *id.* at 2225–26, 2265–66.

⁹⁰⁶ Cf. *id.* at 2278–79.

⁹⁰⁷ See *id.* at 2265.

⁹⁰⁸ *Id.* at 2265–66.

⁹⁰⁹ Somewhat ironically, some island borderlands have been placed into a trusteeship system established by the United Nations that triggers a duty of guardianship by the trustee country and oversight by the United Nations. See Judith L. Andress & James E. Falkowski, *Self-Determination: Indians and the United Nations — The Anomalous Status of America’s “Domestic Dependent Nations,”* 8 AM. INDIAN L. REV. 97, 109–10 (1980). The United Nations international trustee system was based on the domestic “trusteeship” concept found in the federal Indian law trust doctrine, but the international version has never been applied to Native nations. *Id.* at 109 n.99 (citing YASSIN EL-AYOUTY, *THE UNITED NATIONS AND DECOLONIZATION: THE ROLE OF AFRO-*

embodying these principles, should not be undone lightly — and they certainly should not be destabilized by an alleged constitutional rule that one Congress cannot bind a subsequent Congress.⁹¹⁰

Where these principles would find the most benefit, however, is in the courts. Borderlands principles have operated throughout the doctrines of American colonialism, but largely in the background. Rarely have the broader normative, historical, or constitutional contexts of cases involving American colonialism been taken seriously by the Justices. The last fifty years of litigation before the Supreme Court has been a challenging space for Indian Country and has similarly brought no relief to our island borderlands.⁹¹¹ Indian Country cases were initially treated with immense disrespect by even the most liberal Justices.⁹¹²

When advocates argued borderlands principles to the Supreme Court, rarely did the Justices understand the fundamental nature of these principles, as well as their dynamics and application. When advocates codified borderlands principles into law, the Supreme Court often overturned those laws.⁹¹³ Even when treatment improved, the

ASIA 47 (1971) (describing the development of the trust doctrine within the United States as an outgrowth of the power to civilize in the law of nations)). Interestingly, the United States may have developed a range of versions of the trust doctrine and applied them more broadly to its borderlands beyond Indian Country in the late nineteenth century, including to formerly enslaved Black Americans in Liberia and “for the people of under-developed areas temporarily under its control.” EL-AYOUTY, *supra*, at 49 (quoting THE UNITED STATES AND THE UNITED NATIONS 46 (Franz B. Gross ed., 1964)).

⁹¹⁰ The relationship between the constitutional rule that one Congress cannot diminish the sovereignty of a later Congress and development of federal Indian law deserves deeper exploration than that offered here. Apparently, the principle itself was brought from English constitutional law into the laws of the United States through cases like *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), a case resolving the status of stolen Native lands that were “sold” by the Georgia legislature who was well compensated through bribes from the land speculation companies. See Charles F. Hobson, *The Yazoo Lands Sale Case: Fletcher v. Peck (1810)*, 42 J. SUP. CT. HIST. 239, 239–40 (2017).

⁹¹¹ See, e.g., DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 186–87 (1997) (noting the judicial backlash following legal and political wins for Native activists in the late 1960s and early 1970s); Alex Tallchief Skibine, *Teaching Indian Law in an Anti-tribal Era*, 82 N.D. L. REV. 777, 781–83 (2006) (discussing losses of Indian tribes before the Supreme Court between 1988 and 2005); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (holding that because Puerto Rico’s “authority to enact and enforce criminal law ultimately comes from Congress, then it cannot follow a federal prosecution with its own”).

⁹¹² See Frickey, *Marshalling Past and Present*, *supra* note 31, at 382–83 (“For most of those who follow the Court, these cases were almost certainly viewed as ‘crud,’ even if ‘kind of fascinating,’ ‘peeewee’ cases, perhaps even ‘chickenshit cases’ — all epithets reportedly directed at federal Indian law cases by the Justices themselves when they considered petitions for certiorari or, worse yet, when they were assigned the unenviable task of drafting majority opinions for those cases.” (footnotes omitted) (quoting H.W. PERRY, JR., DECIDING TO DECIDE 262 (1991); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 58 (1979))).

⁹¹³ See, e.g., *United States v. McBratney*, 104 U.S. 621, 624 (1882) (holding the principles of territorial sovereignty, recognition, self-determination, and nonintervention embodied by the Treaty of

outcomes of cases resolving questions relevant to American colonialism were difficult to predict and rarely tracked the judicial philosophies or ideologies of the Justices⁹¹⁴ — even more rarely did they track the law.⁹¹⁵ Justices Stevens and Ginsburg cast the decisive votes and drafted opinions stripping Native people of territorial sovereignty, self-determination, and protections from intervention.⁹¹⁶ Over time, Native advocates learned that education on Indian Country could move certain Justices to begin to see American colonialism and to understand this external constitutional framework and its borderlands constitutional principles.⁹¹⁷ Justices Stevens and Ginsburg shifted their votes.⁹¹⁸ Eventually, Justice Ginsburg pointed to *City of Sherrill v. Oneida Indian Nation*⁹¹⁹ as the opinion she regretted most.⁹²⁰ With the appointment of Justices Sotomayor and Gorsuch to the Supreme Court, it appeared as though borderlands principles might gain wide recognition and acceptance before the Court.⁹²¹

March 2, 1868 between the Ute Nation and the United States were overwritten by the admission of Colorado to the Union); *Draper v. United States*, 164 U.S. 240, 247 (1896) (holding the same as applied to the Crow Indian Reservation and the admission of Montana to the Union); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding the principles of territorial sovereignty, self-determination, recognition, and preservation embodied in treaties, federal law, and tribal law were overwritten by nascent constitutional concerns over non-Indian criminal defendants); *Montana v. United States*, 450 U.S. 544, 566–67 (1981) (holding the same as applied to non-Indian civil defendants).

⁹¹⁴ See, e.g., 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, 267–69 (2012) (arguing that federal Indian law cases are “notable exceptions” to the ability of the Median-Justice Theory — which posits that Justices choose outcomes to comport with their ideologies — to explain outcomes in the Supreme Court); John Dossett, *Justice Gorsuch and Federal Indian Law*, 43 HUM. RTS. 7, 10 (2017) (expressing uncertainty regarding what Justice Gorsuch’s approach will be toward federal Indian law, given his past experiences and decisions); Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003, 1003–04 (2009) (describing the evolution of Justice Ginsburg’s approach toward federal Indian law during her time on the Court).

⁹¹⁵ See Goldberg, *supra* note 914, at 1029 (discussing shortcomings of Justice Ginsburg’s opinion in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)).

⁹¹⁶ See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (Ginsburg, J.) (denying tribal adjudicative jurisdiction over non-Indians in Indian Country).

⁹¹⁷ Richard Guest, *Tribal Supreme Court Project: Ten Year Report*, 1 AM. INDIAN L.J. 28, 29–30 (2017).

⁹¹⁸ See *Skibine*, *supra* note 911, at 785 (“[F]rom one of the most anti-tribal Justices in 1985, Justice Stevens had somehow become, twenty years later, the least anti-tribal Justice.”); Goldberg, *supra* note 914, at 1032 (“Less than a year after *City of Sherrill*, Justice Ginsburg dissented in *Wagon v. Prairie Band Potawatomi Nation*, offering a starkly contrasting approach to Indian law.”).

⁹¹⁹ 544 U.S. 197.

⁹²⁰ See *Ruth Bader Ginsburg Wants Trump to Appoint a Native American Woman to the Supreme Court*, BUFF. CHRON. (May 5, 2020), <https://buffalochronicle.com/2020/05/05/ruth-bader-ginsburg-wants-trump-to-appoint-a-native-american-woman-to-the-supreme-court> [https://perma.cc/LW4M-7B5K].

⁹²¹ Dossett, *supra* note 914, at 8 (describing Justice Gorsuch’s relatively significant experience in Indian law); Memorandum from Richard Guest, Staff Att’y, Native Am. Rts. Fund, to Tribal

The day the Supreme Court issued *Brackeen* could have been the day to celebrate this recognition. The Court issued an opinion, supported by seven of nine Justices, upholding the Indian Child Welfare Act.⁹²² Justice Gorsuch wrote separately to offer a careful, respectful, and eloquent history of American colonialism with respect to Indians, as well as an originalist vision of the Constitution that might curb some of the excesses of the plenary power doctrine.⁹²³ But the day the Court issued *Brackeen* was not a day solely for celebration. It was also a day to reflect on how far the Court has yet to go before it might understand American colonialism.

In *Brackeen*, the Court declined to reach the question of whether ICWA violated United States constitutional principles of equal protection by mandating placement preferences for the child's own colonized extended family, the child's colonized community, or another family belonging to a community colonized by the United States.⁹²⁴ Beyond not addressing the equal protection issue directly, the Court also declined to provide support in dicta for the long-standing principle articulated in *Morton v. Mancari*, issued unanimously and upheld since 1974, that colonized peoples should be recognized as a class of people who could be regulated distinctively.⁹²⁵ The opinion opened instead with concern for children made vulnerable within the welfare system.⁹²⁶ The opinion did not express concern for children whose communities had been colonized by the United States for hundreds of years — hundreds of years that have seen innumerable campaigns to separate Indian families and eliminate Indian communities, years that have filled institutional graves with the bodies of thousands of Indian children.⁹²⁷ Justice Kavanaugh wrote separately to tout, yet again, the United States's "bedrock equal protection principles," with no mention of colonialism or self-determination on the other side.⁹²⁸ By all apparent measure, the Court is likely to strike down ICWA, or any other part of Title 25 "Indians," if presented with a challenge brought by a proper plaintiff.

Leaders and Tribal Attorneys (May 29, 2009), https://sct.narf.org/articles/indian_law_jurisprudence/nom_of_sonia_sotomayor-an_indian_law_perspective_2009.pdf [<https://perma.cc/2KFL-4CJ5>] (stating that, despite her low direct experience with Indian law, nominee Judge Sotomayor had extensive experience as a Puerto Rican woman in the law and had the potential to be an avid supporter of Native peoples).

⁹²² *Haaland v. Brackeen*, 143 S. Ct. 1609, 1623 (2023).

⁹²³ *See id.* at 1641–48 (Gorsuch, J., concurring).

⁹²⁴ *See id.* at 1638 (majority opinion) (instead resolving the equal protection question on standing grounds).

⁹²⁵ *See Morton v. Mancari*, 417 U.S. 535, 542, 553–54 (1974) (upholding preferential hiring practices in the Bureau of Indian Affairs in an equal protection challenge on the grounds that the policy was intended to promote Indian self-governance rather than to impose a racial classification).

⁹²⁶ *Brackeen*, 143 S. Ct. at 1622 ("This case is about children who are among the most vulnerable: those in the child welfare system.")

⁹²⁷ *See id.* at 1622–23.

⁹²⁸ *See id.* at 1661 (Kavanaugh, J., concurring).

Further, on the same day the Court issued *Brackeen*, it also issued its opinion in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*.⁹²⁹ In *Lac du Flambeau*, the Court held, for the first time, that a general public law of the United States could waive sovereign immunity held by Native nations without mention of tribal governments.⁹³⁰ Justice Jackson wrote for a nearly unanimous Supreme Court that the United States Bankruptcy Code had waived the sovereign immunity of a government colonized by the United States, because the statute purported to abrogate sovereign immunity for “governmental unit[s].”⁹³¹ The Bankruptcy Code provided a definition for “governmental unit” — a long list that nowhere mentioned tribal governments.⁹³² Nonetheless, a nearly unanimous Supreme Court held that this language constituted an abrogation of sovereign immunity made “unmistakably clear in the language of the statute.”⁹³³ There was no “plausible interpretation of the [Bankruptcy Code]’ that preserve[d] sovereign immunity.”⁹³⁴ Justice Jackson’s majority opinion sounded in terms of inclusion and antisubordination: the Bankruptcy Code essentially waived sovereign immunity for all governments and Native nations are, of course, governments — to hold otherwise is to place these communities at a lower caste than other governments.⁹³⁵ Justice Gorsuch’s lone dissent attempted to take the Court’s simple efforts at inclusion to task: Native nations are exceptional, special, and neither foreign nor domestic.⁹³⁶ But those arguments were unpersuasive to the balance of the Court.

A broader, and explicit, recognition of borderlands constitutional principles could begin to stabilize laws passed to embody borderlands principles, as well as help resolve the growing conflict between the United States Constitution and these laws. For challenges of equal protection like those brought in *Brackeen* and *Vaello Madero*, borderlands constitutionalism provides the Supreme Court with principles to resolve these cases. Borderlands constitutional principles are on par with and

⁹²⁹ 143 S. Ct. 1689 (2023).

⁹³⁰ Compare *id.* at 1694 (“Under our precedents, we will not find an abrogation of tribal sovereign immunity unless Congress has conveyed its intent to abrogate in unequivocal terms. That is a high bar. But for the reasons explained below, we find it has been satisfied here.”), with *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1186 (2023) (holding that the Puerto Rico Oversight, Management, and Economic Stability Act does not categorically abrogate the Financial Oversight and Management Board’s sovereign immunity).

⁹³¹ *Lac du Flambeau*, 143 S. Ct. at 1694.

⁹³² *Id.* at 1696.

⁹³³ See *id.* at 1695–96 (quoting *Centro De Periodismo*, 143 S. Ct. at 1183).

⁹³⁴ See *id.* at 1695 (quoting *FAA v. Cooper*, 566 U.S. 284, 290 (2012)).

⁹³⁵ See *id.* at 1700–01.

⁹³⁶ *Id.* at 1704 (Gorsuch, J., dissenting) (“The phrase ‘other foreign or domestic government’ . . . could also mean what it says: every ‘other foreign . . . government’; every ‘other . . . domestic government.’ And properly understood, Tribes are neither of those things. Instead, the Constitution’s text — and two centuries of history and precedent — establish that Tribes enjoy a unique status in our law.”).

far more applicable than those United States constitutional principles often brought to the Court — including challenges of equal protection and separation of powers.

With respect to *Brackeen*, the Indian Child Welfare Act codifies the borderlands principle of recognition of Native nations as colonized communities, and recognizes their citizens and their potential descendant citizens as a distinctive class worthy of protection.⁹³⁷ The Act aims to honor the principle of recognition, as well as preserve colonized communities against long-standing efforts to eliminate them through depopulation, family separation, mass slaughter, and genocide.⁹³⁸ These are constitutional values that should be on par with other constitutional values, like equality and liberty, and perhaps weighed more heavily in the context of American colonialism.

With respect to *Vaello Madero*, colonial power exercised over the territories should serve to support the principles of self-determination and preservation. The question of whether to apply the Social Security Act to Puerto Rico should turn on these principles and should not turn solely on principles of equal protection. Does offering Social Security benefits to Puerto Ricans who have returned home to retire support self-determination and preserve colonized communities? Some would argue that it does, because it allows the diaspora to return home. These answers are open to debate. But debate would, at the very least, focus on relevant questions.⁹³⁹

⁹³⁷ See H.R. REP. NO. 95-1386, at 8–9 (1978).

⁹³⁸ See, e.g., *id.* (“The purpose of the [Indian Child Welfare Act] bill . . . is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.” *Id.* at 8. “It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.” *Id.* at 9.)

⁹³⁹ Applying borderlands principles in cases like *Brackeen* and *Vaello Madero* could also allow us to see the limits of equal protection principles — even with the full-throated antisubordination understanding as opposed to the neutered antidiscrimination principles recently codified by the Supreme Court. See generally *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023). No doubt the relationship between equal protection principles and borderlands principles deserves separate treatment. But one can begin to distinguish these principles in the context of American colonialism. Equal protection, even as antisubordination, aims to make subordinated groups “equal” within an already existing constitutional culture and framework — it often takes for granted an existing constitutional baseline for equality. Borderlands constitutional principles do not presume the constitutional baseline of a single nation but instead aim for constitutional pluralism. There are lessons in the fact that the antisubordination principle is referred to in other contexts as the “equal citizenship principle.” Jack M. Balkin & Reva Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003). Rather than “equality” with the constitution of the center, borderlands principles could empower colonized peoples above and beyond the constitutional baseline of the United States. Borderlands principles could even shift the constitutional baseline of the center to better accommodate diverse borderlands constitutional cultures. Borderlands constitutional principles share many features with abolition constitutionalism, as described by Professor Dorothy Roberts, in that abolition constitutionalism aims to end a particular ongoing problem with constitutional limits — the

What application of borderlands principles looks like in practice for courts faced with a constitutional challenge to the laws of American colonialism is likely a form of rational basis review. This form of rational basis review might not be all that different from the forms of review already applied in the context of the plenary power doctrine. Yet this form of rationality review would be inflected by borderlands constitutional principles as developed in conversation with Congress, the Executive, and borderlands peoples. It is likely more than a mere coincidence that rational basis review is already the judicial tool of choice in the context of the plenary power doctrine.

James Bradley Thayer, father of rational basis review⁹⁴⁰ — and an advocate for the United States to wield its power to civilize in the context of Indians and non-Indians alike⁹⁴¹ — saw the external constitution clearly. He also understood that this constitution was a creature largely of Congress and the Executive — a creature that may not survive the “petty judicial interpretations” of the Constitution.⁹⁴² To protect this constitution, in part, Professor Thayer crafted rational basis review as a tool of deferential judicial involvement.

What Thayer overlooked in crafting rational basis, however, were the visions, voices, and laws of colonized peoples — including Native peoples, whom Thayer believed lacked law entirely.⁹⁴³ Colonized peoples have shaped constitutional principles within Congress and the Executive that could better inform the Court’s rationality review. As I have argued elsewhere, rational basis review in the context of colonized peoples should consider and apply the constitutional principles developed outside the courts — that is, our borderlands constitutional principles.⁹⁴⁴ This form of rational basis review is one that the Supreme Court applied in less nuanced terms in *Morton v. Mancari* — where it determined that a statute’s “special treatment” of Native peoples was “reasonable and rationally designed to further Indian self government,” and therefore Congress’s “legislative judgment[] [would] not be disturbed.”⁹⁴⁵

vestiges of human enslavement and Jim Crow segregation — and does not aim for a homogenous form of “equality” sought through antidiscrimination or antisubordination principles. Roberts, *supra* note 45, at 105. These similarities are almost too tempting to not explore in greater depth. But, given constraints, I must leave that exploration for another day — or another author. All of this to say that there is much to be learned from broadening our constitutional principles and putting them in conversation with one another.

⁹⁴⁰ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (“[The courts] can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question.”).

⁹⁴¹ See Thayer, *supra* note 255, at 475.

⁹⁴² *Id.* at 469.

⁹⁴³ James Bradley Thayer, *A People Without Law*, ATL. MONTHLY, Oct. 1891, at 540.

⁹⁴⁴ Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2279–81.

⁹⁴⁵ *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

In future cases similar to *Brackeen*, courts could resolve equal protection challenges with an application of rational basis review inflected explicitly and intentionally with borderlands principles — principles that can better inform what is “rational” for Congress than an ad hoc determination. Such an approach would provide vital and principled limits to the power of the United States to colonize. The courts could also provide an approach inflected with and shaped by borderlands voices, deferential to the branches most likely to hear and capture those voices — Congress and the Executive.

Of course, equal protection challenges like *Brackeen* are often argued as a conflict between principles — that is, the principles of equal protection that shield white parents from being treated unequally by the law because of their “race” as conflicting with the principles of preservation and self-determination for Native nations.⁹⁴⁶ Conflicts between constitutional principles are difficult to resolve.⁹⁴⁷ What rational basis review recognizes, however, is that the conflicts between constitutional principles should be resolved outside the courts and in the branches most aware of and in touch with the external constitutional framework that governs American colonialism.

For Congress and the Executive, rational basis review places a great burden on their shoulders to properly consider the full breadth of constitutional considerations at hand when passing legislation and promulgating regulations that address American colonialism. The legislative history of the Indian Child Welfare Act, for example, reveals the ways in which these branches have at times shouldered this burden with great care. Congress drafted and passed ICWA to limit some of the most egregious aspects of the American colonial project.⁹⁴⁸ In drawing distinctions between colonized and noncolonized peoples — Indians and non-Indians⁹⁴⁹ — Congress placed ICWA in the particular context of American colonialism. Much of ICWA focused on bolstering the ability of Native nations to develop child welfare systems.⁹⁵⁰ Congress considered constitutional concerns over racial discrimination and instead crafted ICWA to regulate only children who were citizens of Native

⁹⁴⁶ See, e.g., *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013).

⁹⁴⁷ See generally Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018) (offering a path forward through the prevailing vision of rights as trumps and describing a range of ways in which conflicts between rights claims might be better resolved).

⁹⁴⁸ See, e.g., 124 CONG. REC. 38102 (1978) (statement of Rep. Udall) (“The record shows that, in all too many cases, Indian parents have their children forcibly taken from them not because they are unfit parents or because they cannot adequately provide for those children as measured by the norms prevailing in the Indian community, but because they are Indians. . . . [B]ecause of the . . . responsibility owed to the Indian tribes by the United States to protect their resources and future, we have an obligation to act to remedy this serious problem.”).

⁹⁴⁹ See 25 U.S.C. § 1901(4).

⁹⁵⁰ See *id.* §§ 1931–1933.

nations or those who were eligible but not yet enrolled as citizens.⁹⁵¹ No doubt the United States, including its Supreme Court,⁹⁵² has used racism to justify the colonization of Native and other colonized peoples in the past — ICWA’s legislative history shows that Congress recognized these realities when crafting ICWA.⁹⁵³ But Congress drew the distinction in ICWA between colonized peoples, “Indians,” and non-colonized peoples, “non-Indians”⁹⁵⁴ — not between racialized peoples or even racialized and nonracialized (or “white”) people. These nuanced determinations are difficult and, no doubt, Congress is not an ideal institution. But it is currently the branch best positioned to make these determinations.⁹⁵⁵

Beyond *Brackeen* and *Vaello Madero*, borderlands constitutionalism could provide the logics, values, and principles that might help stabilize the doctrine in areas outside of constitutional challenge. The decision in *Lac du Flambeau* could have addressed borderlands principles directly and, in so doing, enabled argument to center on the problems raised by allowing the general law of a colonizing government to apply to colonized peoples.⁹⁵⁶ The Justices might have better understood that sovereign immunity has come to serve as a stopgap against intervention of colonizing laws.⁹⁵⁷ They might have understood the canons of interpretation in the context of colonialism as substantive and rooted in these borderlands constitutional principles.⁹⁵⁸ Rather than have the case turn on principles of inclusion or antisubordination (Native nations are governments like other governments) versus exceptionalism (Native nations are *sui generis*), the case could have been argued with the reality of American colonialism at the fore: it undermines principles of recognition, self-determination, collaborative lawmaking, and nonintervention to allow the United States to waive sovereign immunity by simply saying “governmental unit[s]” without referencing colonized governments directly.⁹⁵⁹ How are Native nations able to identify or help craft laws

⁹⁵¹ *Id.* § 1903(4). For better or for worse, our Reconstruction Amendment equality values have evolved over time to aim at ending forms of discrimination based on the “gender” or “race” of an individual — antidiscrimination principles — or ending the subordination of groups to positions lower than that of the general polity — antisubordination principles. *See, e.g.,* Crenshaw, *supra* note 40, at 1376–78.

⁹⁵² *See, e.g.,* *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846) (describing how the United States federal government “has exercised its power over th[e] unfortunate [Native] race in the spirit of humanity and justice”).

⁹⁵³ *See generally* Fletcher, *supra* note 95.

⁹⁵⁴ 25 U.S.C. § 1903(3) (defining “Indian” as “any person who is a member of an Indian tribe, or who is an Alaska Native”).

⁹⁵⁵ *See* Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 39, at 2288; *see also* Blackhawk, *supra* note 27, at 1874–76.

⁹⁵⁶ *See* cases cited *supra* notes 930–36 and accompanying text.

⁹⁵⁷ *See supra* note 734 and accompanying text.

⁹⁵⁸ *See* Skibine, *supra* note 653, at 300.

⁹⁵⁹ *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1695 (2023); *see supra* notes 929–36 and accompanying text.

collaboratively if they cannot even identify those laws until the Supreme Court tells them they apply? How are colonized peoples able to self-govern when the United States unilaterally imposes its general laws and waives sovereign immunity for Native governments? At the very least, let us require Congress to colonize other governments by stating so explicitly.

The extension of borderlands constitutional principles could not only stabilize the doctrine, but it might also begin a process of self-determination that could better position many colonized communities toward resolution. At present, many borderlands constitutional principles are unstable and not openly recognized,⁹⁶⁰ nor are they applied consistently.⁹⁶¹ Beyond that, many borderlands constitutional principles have been limited to the context of “Indians” and have been withheld from other governments colonized by the United States.⁹⁶² Recognition of borderlands constitutional principles as central to American colonialism writ large, not as cabined to “federal Indian law” or “the law of the territories,” could provide the opportunity for colonized communities to draw on these principles, arguments, and laws should they so wish.

Recognition of American colonialism as a capacious field that covers all peoples colonized by the United States could help to both broaden and narrow application of borderlands principles. On one hand, these principles could be made available to all colonized peoples — beyond “Indians” — allowing advocates from the island borderlands the option to advocate for these principles directly, rather than forcing them to try to bend the United States Constitution toward limits on colonial power.

To date, certain colonized communities have been denied borderlands constitutional principles like recognition of inherent sovereignty, the trust doctrine, and interpretive principles that shield colonized communities against further progression of the American colonial project.⁹⁶³ Perhaps some might presume this distinction because Native nations have formed treaties with the United States, while our island borderlands have not. But the reality is that not all of the 574 federally recognized Native nations⁹⁶⁴ have formed treaties with the United States — some scholars have drawn upon this discrepancy to argue that Native

⁹⁶⁰ See *supra* notes 36–39 and accompanying text.

⁹⁶¹ See, e.g., *supra* note 422 and accompanying text. Compare *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (finding that the United States “has charged itself with moral obligations of the highest responsibility and trust” and its “dealings with the Indians” should “be judged by the most exacting fiduciary standards”), with *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1816 (2023) (holding that the trust doctrine offers a cause of action only when a specific term of a treaty is breached and declining to offer a cause of action for *Winters* rights).

⁹⁶² See *supra* notes 791–834 and accompanying text.

⁹⁶³ See *supra* section III.A, pp. 116–29.

⁹⁶⁴ *Federally Recognized American Indian Tribes and Alaska Native Entities*, USAGOV (July 14, 2023), <https://usa.gov/indian-tribes-alaska-native> [<https://perma.cc/6HF4-55SF>].

nations should themselves be treated differently from each other.⁹⁶⁵ What this argument overlooks, however, is that the constitution of American colonialism and its principles of borderlands constitutionalism were born not from treaties — they were born from the power created by the United States Constitution to colonize other people. This is a power applied across our borderlands — Indian Country and island borderlands alike — and applied regardless of whether the colonial relationship began through treaties, legislation, invasion, or mass slaughter. Applying principled limits on that power, wherever it occurs and regardless of whether those limits have been drawn in the past, seems reasonable — that is, there is nothing stopping us from invoking the norms of the treaty relationship for colonized peoples with whom we have formed no treaties in the past.

On the other hand, recognizing American colonialism should also narrow borderlands constitutional principles to better tailor the application of these principles to those colonized peoples who choose them. At present, the fields of federal Indian law and territorial law treat all Native nations alike and all territories alike, and they treat Native nations and territories as necessarily distinct from each other. If the United States did not recognize Puerto Rico as sovereign, all of the islands would presume they have no recognized sovereignty either. But Native nations would remain sovereign. If the United States held that the State of Oklahoma had criminal jurisdiction over crimes committed by non-Indians against Indians within Muscogee Creek Nation lands, all Native nations and all state governments would presume they similarly held such criminal jurisdiction. No one would presume that Oklahoma may now police Puerto Rico. Wedding together the territories and Native nations has had benefits and burdens — and the island borderlands and Native nations do have meaningful distinctions from each other. But the legal and constitutional bases for these categories do not necessarily hold. Instead, relationships between colonized peoples should be reconsidered and potentially reconfigured based on whether those relationships best limit American colonialism and serve borderlands principles.

Finally, borderlands constitutionalism should be recognized as a form of constitutionalism born and raised within the confines of colonialism. These principles offer, at best, a mitigation of the harms caused by colonialism, not its resolution. Principles of borderlands constitutionalism should be seen as ways to support colonized peoples while transitioning their communities away from American colonialism in forms that work best for them — be it statehood, independence, commonwealth status, domestic-dependent-nation status, freely associated statehood, or a status yet to be described. But these principles could

⁹⁶⁵ See, e.g., Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1108–10 (2004).

foster the conditions where borderlands peoples begin to dream of a world without colonial horizons — a world of real self-determination.⁹⁶⁶

D. Imagining the Transition from American Colonialism

Communities colonized by the United States have been fighting for so long to shape or, with luck, limit the American colonial project that they have often lost sight of a world without American colonialism. The relationships between the United States and its colonies are entrenched, extending for decades, if not hundreds of years, and drenched in blood, tears, and the sweat of legal, diplomatic, and other forms of advocacy. Much of Indian Country is now wholly enclosed by the recognized territorial borders of the United States, positioning Native nations as siloed enclave states enmeshed within local governments and economies.⁹⁶⁷ Native people today have been assimilated into a world created by a government that has slaughtered their ancestors and has taken their children to early, tiny, unmarked graves.⁹⁶⁸ Mitigating American colonialism has demanded that colonized peoples learn the languages, values, visions, and laws of the United States — that we might build a shared world where colonized peoples continue to exist.

What a transition away from American colonialism looks like for communities colonized by the United States will likely vary as widely as the communities themselves began. There are hundreds of Native nations, vast expanses of island borderlands, each of them shaped by their own histories, their experiences of colonialism, and their demographics today.

Colonized communities have already advocated for and won forms of self-determination through separation: independence, free association, as well as other forms of recognized sovereignty and self-government.⁹⁶⁹ There are lessons in each of these case studies that should be explored and surveyed. All of these forms of self-determination should be made available to our colonized communities, as well as the means to organize to choose the path of separation over time.

But separation alone does not wholly transition the United States away from the American colonial project. Even if the United States

⁹⁶⁶ This is not to say that Native nations and peoples do not aim for real forms of self-determination within the American colonial framework. *See, e.g.*, Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, CALIF. L. REV. (forthcoming) (manuscript at 27–37), <https://ssrn.com/abstract=4375140> [<https://perma.cc/3ARM-Y5ZR>] (documenting and theorizing the ways that modern tribal governments have “regenerated” tribal court jurisdiction through innovative forms of self-determination); *see also* GLEN SEAN COULTHARD, *RED SKINS, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION* 14–15 (2014) (describing decolonization as a rejection of colonial frameworks and a focus on forms of community development toward self-determination).

⁹⁶⁷ *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4636 (Jan. 28, 2022).

⁹⁶⁸ *See supra* notes 4–13 and accompanying text.

⁹⁶⁹ *See supra* section II.B, pp. 81–89.

were able to transition hundreds of colonized governments toward forms of independence, would that wholly resolve the damage wrought by American colonialism to those who have experienced colonization? Would that repair the constitutional culture of the United States? Would ridding the United States of its colonized peoples finally end the power to colonize? Further, what is to be done with the many colonized communities who are, because of the American colonial project, enmeshed within the United States's legal, cultural, and economic frameworks? Are those colonized communities who do not or cannot achieve independence left solely with the option of statehood or colony? Must colonized communities and individuals be incorporated into the existing, colonial constitutional framework?

In imagining a true transition away from colonization, we must return to where this Foreword began, with a perspective captured by Walter Adair Duncan, citizen of the Cherokee Nation and father of the Cherokee social welfare system.⁹⁷⁰ No doubt, colonized peoples were wrongfully subjected to the power and constitutional culture of the United States and ending subjection to that power through independence is one form of remedy. But American colonialism has harmed also by establishing a constitutional framework that refused to yield to the inclusion of "others."⁹⁷¹ The United States rejected "savages," but these "savages" rejected the United States also.⁹⁷² They did not reject the United States because they lacked law or because they lacked their own constitutional vision.⁹⁷³ Like Walter Adair Duncan, colonized peoples rejected the terms of citizenship and inclusion within the United States because they disagreed fundamentally with the constitutional culture it offered — a constitutional culture that refused to reflect on their perspectives, their visions of equality, justice, and fairness; a

⁹⁷⁰ See *supra* note 1 and accompanying text.

⁹⁷¹ See *supra* Part I, pp. 22–66.

⁹⁷² This perspective adopts the method suggested by Professor Tommie Shelby to understand excluded "others" as "rational and moral agents" with "sound reasons" for declining to join, participate in, and uphold the dominant legal, cultural, and constitutional community. TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 8–14 (2016) (describing his approach in studying segregation of Black American communities in the United States as one that recognizes the "political morality of dissent," *id.* at 14). It is also informed by anthropological and political science studies of Native people (and by Native scholars) envisioning decolonization as resistance, refusal, and rejection in order to both retain Native worlds and to remake the worlds in which they live. See generally AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* (2014); COULTHARD, *supra* note 966. The relationship between the methods and conclusions of Professors Shelby, Simpson, and Coulthard raises important questions that deserve greater attention than I can offer here.

⁹⁷³ See, e.g., Thayer, *supra* note 943, at 541–42 ("As time went by it was perceived that the Indian self-government amounted to little, and we occasionally stepped in with laws to fill the gap. But it is only occasionally and in scraps that we have done this; for the most part, we still stand by and see them languishing under the decay of their own government, and give them nothing in its place" *Id.* at 542.).

constitutional culture that gave birth to, justified, and then erased American colonialism.⁹⁷⁴

The fight for independence was inflected with colonialism. The drafting of the Constitution was inflected with colonialism. The making of the United States we recognize today — the nation from sea to shining sea — was inflected with colonialism. The American colonial project excluded “others” from altering the constitutional character of the United States. It established a Constitution that excluded explicitly certain colonized peoples, “Indians,” and it set a near-insurmountable bar to altering that Constitution. It facilitated the settlement of individuals deemed assimilable — generally based on their “white” race — into territories before admitting those territories as states.⁹⁷⁵ Even when those new states joined the Union, admission of these new, “settled” states — especially those deemed “foreign” like New Mexico, Oklahoma, and Arizona — was not treated as a moment of constitutional deliberation.⁹⁷⁶ New states were instead admitted by petition and legislation into a constitutional framework established by the center and with a process of amendment that would rarely be met.⁹⁷⁷

Beyond different forms of independence, transitioning away from American colonialism will also require allowing some or many of these colonized communities to join the Constitution governing the center.⁹⁷⁸

⁹⁷⁴ Rejection of the United States by colonized peoples, especially in its modern instantiation, no doubt shares important sociological and phenomenological similarities to the concept of “legal estrangement” developed by Professor Monica Bell. See generally Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (arguing that legal estrangement, rather than illegitimacy, is the appropriate concept by which to understand the distrust that poor and African American communities have for the police). Bell draws on Émile Durkheim to describe “the central project of modern society” as the maintenance of “organic solidarity” — defined as “social cohesion” — and “legal estrangement” as a form of anomie from that solidarity whereby individuals “believ[e] that the legal system and law enforcement, as the individual’s group experiences these institutions, are fundamentally flawed and chaotic, and therefore send negative messages about the group’s societal belonging.” *Id.* at 2083–86. Given the world- and polity-making function of constitutional law within the United States, it raises important and central questions as to how “legal estrangement” might extend into spaces of constitutional law and exception — and to the context of American colonialism specifically.

⁹⁷⁵ See, e.g., Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 103 (1993) (discussing the example of the Indian Territory, which, in 1898, “Congress opened . . . to non-Indian settlement and ultimately statehood, thereby permanently relegating the Indians to a politically subordinate position in the lands formerly promised to them as their exclusive domains”).

⁹⁷⁶ See, e.g., Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 523 (2020) (citing *United States v. Sandoval*, 231 U.S. 28, 38 (1913)) (noting that the admission of new states into the Union was not subject to judicial review by courts).

⁹⁷⁷ For example, New Mexico and Arizona were admitted via joint resolution in 1911. See S.J. Res. 57, 62d Cong. (1911) (enacted).

⁹⁷⁸ For example, American Samoans still do not hold U.S. citizenship. See *supra* note 649 and accompanying text; cf. *Developments in the Law — The U.S. Territories*, *supra* note 244, at 1683–85 (discussing the considerations at play in determining whether to extend U.S. citizenship to American Samoans and noting that the constitutional debate reveals “a fundamental conflict between our commitments to local self-determination and to individual rights,” *id.* at 1685).

At minimum, the United States should rethink its process of admitting new states and of acquiring “foreign” nations and lands. But it should also begin a process to admit colonized communities into the United States — as states, Native nations, or a status within our federalism that has yet to be envisioned. In many ways, the United States already has a creative and nimble form of federalism that incorporates association in many varied forms. But, importantly, we should recognize and theorize this diverse federalism as a fundamental constitutional change — a change that brings pride, rather than erasure and shame.

We should finally allow the United States Constitution to be reshaped by the inclusion of these communities. Held to be unassimilable in the past because of dominant views that the United States needed to be a nation of a certain kind — often described in shorthand through racialized terms⁹⁷⁹ — these communities could broaden United States constitutionalism and nationhood, as well as expand liberal constitutionalism writ large. Inclusion of these communities could begin a process of re-envisioning the United States as truly pluralist and inclusive — with a form of constitutionalism that embraces differences in language, culture, values, religions, and government.⁹⁸⁰ In many ways, the United States has already embraced this pluralistic and inclusive constitutional culture. The United States has long afforded Native nations more robust recognition of tribal sovereignty and forms of self-governance than any other constitutional democracy in the world.⁹⁸¹ Formal inclusion of these communities within the constitutional culture of the United States could also begin a process of introspection whereby the ways that the Constitution has been inflected by American colonialism could be excavated, interrogated, and reformed.⁹⁸² Colonization has taken hundreds

⁹⁷⁹ Cf. Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 609 (2019) (discussing the racialized underpinnings of nineteenth-century assimilation policies in the United States, noting that “[w]hile clothed in the rhetoric of racial equality, . . . [assimilation] policies equally relied on Anglo-Saxon racial superiority”).

⁹⁸⁰ Remaking the constitutional order of the United States as a form of decolonization shares important features with the form of decolonization described by Professor Adom Getachew as “worldmaking” — or an effort to leverage discourses of self-determination and nation building as forms of decolonization not to achieve separateness for the sake of separateness, but to remake the world order into a “domination-free and egalitarian national order.” GETACHEW, *supra* note 334, at 2; see also SHELBY, *supra* note 972, at 10–14.

⁹⁸¹ Carpenter & Riley, *supra* note 519, at 216.

⁹⁸² The American colonial project built our nation from a gaggle of thirteen states, clinging to the eastern seaboard, to an empire of fifty states and hundreds of colonies stretching beyond “sea to shining sea.” See KATHARINE LEE BATES, *AMERICA THE BEAUTIFUL AND OTHER POEMS* 3 (1911). Given that they comprise most of the land mass of the modern United States, it should come as no surprise that our borderlands, constructed and preserved by the constitution of American colonialism, have proved to be central to American political development and United States constitutional law. As Lucius Q.C. Lamar, then Secretary of the Interior, later Supreme Court Justice, remarked in 1887: “In 1789 the States were the creators of the Federal Government; in 1861 the Federal Government was the creator of a large majority of the States.” J.L.M. CURRY,

of years, and it might take hundreds of years to lead us out of this mud-
dle. But let us at least press forward in the right direction.

CONCLUSION

This Foreword offers a long overdue reckoning with American colonialism. The horizons of our constitutional law and theory have been limited in many ways by the American colonial project. Liberal constitutionalism was born in the context of colonialism and continues to reflect those theoretical limitations by failing to offer principles, values, and limits on our relationship to “others,” especially others whom we have colonized.⁹⁸³ Most notably, colonialism has left its imprint on constitutional law in the often stark and false dichotomy between “internal” constitutional law — a domain where the rules of liberal constitutionalism apply to civilized insiders — and “external” or “foreign affairs” — where liberal constitutionalism is allegedly suspended. A proper reckoning with colonialism will require recognition of this external constitutional framework and the American colonial project it embodies. It will require recognition of the lack of principles and theories for our “external” constitution and will require deep deliberation over the proper principles, limits, and values that operate within that constitutional framework — principles that, I offer, should begin with borderlands voices and borderlands constitutionalism.

In many ways, reckoning with American colonialism will offer more questions than answers. Once we place the constitution of American colonialism at the center, for example, what then do we make of a constitutional theory that presumes constitutional uniformity and presumes “We the People” as a static category? Beyond already thorny questions of how best to constitute a domestic government and to ensure political equality, liberty, and democracy within that polity, whom do we include in that constitutional community and on what terms? How do we define the reach and limit of our power over others? How do we rectify the

THE SOUTHERN STATES OF THE AMERICAN UNION 187 (1894) (quoting Lucius Q.C. Lamar, U.S. Sec’y of the Interior, John C. Calhoun — His Life, Character, and Public Services, Oration Delivered Before the Ladies’ Calhoun Monument Association and the Public (Apr. 26, 1887), in LUCIUS Q.C. LAMAR: HIS LIFE, TIMES, AND SPEECHES, 1825–1893, at 779, 783 (Nashville, Publishing House of the Methodist Episcopal Church, South, 1896)). The ways in which the Constitution of the center was shaped by American colonialism — and the ways that American colonialism was itself shaped by the hierarchies of the center — are questions that I plan to address in forthcoming work. See generally MAGGIE BLACKHAWK, THE ANTI-COLONIAL CONSTITUTION (forthcoming); Blackhawk, *supra* note 27 (laying out a new paradigm for research that centers federal Indian law within American public law more broadly).

⁹⁸³ See generally Bhikhu Parekh, *Liberalism and Colonialism: A Critique of Locke and Mill*, in THE DECOLONIZATION OF IMAGINATION: CULTURE, KNOWLEDGE AND POWER 81 (Jan Nederveen Pieterse & Bhikhu Parekh eds., 1995); D.G. Brown, *Millian Liberalism and Colonial Oppression*, 25 CANADIAN J. PHIL. 79 (1999); Barbara Arneil, *Liberal Colonialism, Domestic Colonies and Citizenship*, 33 HIST. POL. THOUGHT 491 (2012); Tim Rowse, *The Indigenous Redemption of Liberal Universalism*, 12 MOD. INTELL. HIST. 579 (2015).

exercise of power over colonized peoples? How do we rectify the constitutional exceptionalism and hierarchy of constitutionalism applied to racialized, gendered, and other subordinated peoples, deemed unable to self-govern? The United States has been shaped fundamentally by community after community fighting for inclusion in the polity after being wrongfully declared “uncivilized”⁹⁸⁴ and “unassimilable.”⁹⁸⁵ Distinct from the question of reparations, how do we incorporate and give voice as a constitutional matter to those members subjected to a distinctive and exceptional constitutionalism — subject to its power without any of its protections? That is, how do we affirmatively engage with the constitutional questions that we may have lost to the erasure of American colonialism? These questions may not have easy answers. But let us ask them.

⁹⁸⁴ See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (“The situation of [enslaved Black peoples] was altogether unlike that of the Indian race 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.”).

⁹⁸⁵ See, e.g., Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521, 2527 (2007) (“Chinese and other Asians were excluded from naturalized citizenship as racial unassimilables.”).