

THE CONSTITUTION OF DIFFERENCE

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The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.

— Justice White, concurring in *Downes v. Bidwell* (1901)¹

Liberty and Slavery — opposite as heaven and hell — are both in the Constitution.

— Frederick Douglass, in his editorial Oath to Support the Constitution (1850)²

I think we should keep it. . . . We stole it fair and square.

— S.I. Hayakawa, then–U.S. Senate candidate for California discussing the Panama Canal Zone (1993)³

INTRODUCTION

In the past twenty years or so, scholars have begun to raise profound and difficult questions about the Constitution’s relationship with American colonialism and imperialism.⁴ These inquiries have given rise

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¹ *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring).

² DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 215 (2018) (quoting Frederick Douglass, Editorial, *Oath to Support the Constitution*, NORTH STAR (Rochester), Apr. 5, 1850), at 2.

³ Martin Smith, *Hayakawa . . . He Drives for Center Ground in Race for Senator*, SACRAMENTO BEE, Sept. 19, 1976, at A4 (quoting then–U.S. Senate candidate for California S.I. Hayakawa in reference to the Panama Canal Zone), cited in JONATHAN M. KATZ, GANGSTERS OF CAPITALISM: SMEDLEY BUTLER, THE MARINES, AND THE MAKING AND BREAKING OF AMERICA’S EMPIRE 171 (2022).

⁴ See, e.g., Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1761 (2017); Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 267 (2015); Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO [REV. JUR. U. P.R.] 1, 3

to a growing literature that attempts to reconcile America's history of conquest and racial subordination — including the original sins of slavery and Native American erasure — with what must be regarded as a credal vision of the American constitutional enterprise as inevitably liberatory and equality enhancing. Among many important questions, this literature has surfaced an arresting inquiry with respect to the nature of the American constitutional project of self-government and whether it can be understood as anything other than a colonial adventure. Put differently, if not provocatively, in view of the sordid and desolate landmarks that characterize the American experience, such as genocide, imperialism, colonialism, and enslavement, why haven't we — participants in the American constitutional experiment — conceptualized the constitutional project primarily, if not exclusively, in imperialist and colonialist terms? Is it even normatively defensible to think of the constitutional project otherwise?

Scholars have offered many answers to these questions. Professor Seth Davis notes that to many, “America's colonial history is not important to American constitutionalism.”⁵ The American liberatory creed, our positive self-image as a freedom-loving and equality-producing people, Professor Aziz Rana explains, is too powerful to enable us to face up to the reality of our past, present, and future.⁶ Professor Gregory Ablavsky underscores that colonized peoples were never “peripheral” to the Constitution, and that misunderstanding must be reversed to understand our constitutional future.⁷ Similarly, Judge Torruella notes that the march to empire in the late nineteenth century clashed with how Americans viewed themselves and their history. Their answer “had to be cloaked in an American constitutional mantle of facial respectability.”⁸ Because the United States is a “colonial settler state,” Professor Natsu Taylor Saito notes, its “legal system must shore up the ideological justifications of settler society, framed in terms of extending the ‘American values’ of freedom, democracy, and human rights to the world at large.”⁹

(2008); Gregory Ablavsky, *Two Federalist Constitutions of Empire*, 89 *FORDHAM L. REV.* 1677, 1705–06 (2021); Gregory Ablavsky, *The Savage Constitution*, 63 *DUKE L.J.* 999, 1005–06 (2014); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 *YALE L.J.* 1062, 1067 (2022).

⁵ Davis, *supra* note 4, at 1753 (explaining how the metropole often ignores and overlooks the history of American colonialism).

⁶ See Rana, *supra* note 4, at 288.

⁷ Ablavsky, *The Savage Constitution*, *supra* note 4, at 1005–06.

⁸ See Torruella, *supra* note 4, at 6–7.

⁹ Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 *FLA. A&M U. L. REV.* 1, 65 (2014) [hereinafter Taylor Saito, *Tales of Color*]; see NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* 154 (2020). Professor Taylor Saito argues that by the late 1960s, “powerful movements emerged in African American, American Indian, Chicano, Puerto Rican, and Asian American

Professor Maggie Blackhawk's remarkable Foreword, *The Constitution of American Colonialism*¹⁰ ("*American Colonialism*"), joins this important literature. She argues that Americans have failed to sufficiently grapple with the reality that colonialism and imperialism have shaped our constitutional experience.¹¹ We have ignored the fact that our constitutional jurisprudence is entangled with empire and colonialism. More importantly, she contends, we are wrong to view our constitutional tradition and the history of conquest and empire as inconsistent enterprises.¹² "The distinctions between the United States Constitution and colonialism have been overstated."¹³ Our Constitution, she declares, is a constitution of colonialism.¹⁴

To be more precise, our *primary* constitution is one of empire. The United States, *American Colonialism* explains, has not one but two constitutional traditions.¹⁵ One constitution, the liberal constitutional tradition, applies "a range of predominantly liberal values surrounding representation, democracy, limited government, liberty, equality, inclusion, and justice."¹⁶ Professor Blackhawk describes the liberal constitutional order as internal and "essentially inward-looking."¹⁷ Its "primary function" is to support the self-governing aspirations, initially, of "propertied, white men . . . that deliberated over and consented to its adoption."¹⁸ To these beneficiaries — whom Professor Blackhawk sometimes refers to as those in the center, or alternatively, those in the metropole¹⁹ — the liberal constitutional order "promised a nation that would be republican in nature and subject uniformly to the law and values of the national government."²⁰ As evidence of its potential and promise, it is the liberal constitutional tradition that has allowed us "to reckon with other constitutional failures — especially the institution of human enslavement and Jim Crow segregation."²¹

communities that identified themselves, to some degree or another, as internally colonized peoples, and it was not uncommon for scholars of color to also articulate this perspective." Taylor Saito, *Tales of Color*, *supra*, at 11; *see also id.* n.45 (quoting KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 5 (1967) ("[B]lack people in this country form a colony, and it is not in the interest of the colonial power to liberate them."); HAROLD CRUSE, *REBELLION OR REVOLUTION* 74 (2009) ("The Negro has a relationship to the dominant culture of the United States similar to that of colonies and semi-dependents to their particular foreign overseers.")).

¹⁰ Maggie Blackhawk, *The Supreme Court, 2022 Term — Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023).

¹¹ *Id.* at 5–8.

¹² *Id.* at 10.

¹³ *Id.*

¹⁴ *See id.* at 20.

¹⁵ *Id.* at 24.

¹⁶ *Id.* at 22.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See, e.g., id.* at 116.

²⁰ *Id.* at 22.

²¹ *Id.* at 13.

But, according to Professor Blackhawk, there is another constitution, an “external” constitutional order.²² This is the constitution of colonialism. The constitution of colonialism “is, in many ways,” the “opposite” of the liberal constitution.²³ Whereas liberal constitutionalism promises equality, the constitution of colonialism “rejects equality for hierarchy.”²⁴ It is “dedicated to building and maintaining an empire,” to expanding borders, and to “govern[ing] fragmented jurisdictions.”²⁵ Its subjects, whom Professor Blackhawk refers to as those on the periphery and alternatively as those in the borderlands, are defined and identified by the historical fact that they once constituted a separate sovereign people.²⁶ Through the constitution of colonialism, the United States exerts its power “unilaterally, often unlawfully and violently,” over the people in the borderlands.²⁷ It does so “on the grounds that the peoples within those borderlands require civilization before they achieve self-government.”²⁸

Though it has been deployed to manage hierarchy and facilitate empire, the constitution of colonialism is not all downsides. “Paradoxically,” Professor Blackhawk argues, “borderlands are spaces of both subordination and empowerment.”²⁹ On the plus side, colonized people in the borderlands have exercised “some powers to govern and innovate.”³⁰ Working in the “shadows” of the constitutional system, the people of the borderlands developed a “distinctive” set of constitutional “practices, norms, and institutions . . . around power, self-determination, sovereignty, jurisdiction, and community as a distinctive form of constitutional discourse.”³¹ Borderlands constitutionalism has not only empowered the people in the borderlands; it has also served to contain the negative effects of liberal constitutionalism: subjugation, colonialism, empire, hierarchy.

Like borderland constitutionalism, liberal constitutionalism is also liberatory. The liberal constitutional order, Professor Blackhawk concedes, has been deployed in the service of racial equality, in particular, equality for Black people.³² It is through the liberal constitutional order that we have abated the worst excesses of racial subordination, specifically slavery and Jim Crow.³³ This argument could arguably be

²² See *id.* at 10–11.

²³ *Id.* at 23.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *id.* at 2–5.

²⁷ *Id.* at 11.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 12–13.

³² See *id.* at 13.

³³ See *id.*

extended to Chinese exclusion, Japanese internment, and racially discriminatory rules and practices more broadly.

However, she argues, liberal constitutionalism has also been deployed to maintain and sustain colonialism, particularly when it comes to Native peoples.³⁴ Liberal constitutionalism poses an existential threat to the sovereignty of Native peoples and to the people of Territories.³⁵ As a consequence, Professor Blackhawk maintains, borderland constitutionalism's liberatory aspirations are in tension with liberal constitutionalism. In order to constrain the imperial impulses of liberal constitutionalism, borderlands constitutionalism must be brought out of the shadows. Notwithstanding its title, we understand *American Colonialism* to make the case for borderland constitutionalism or, put differently, to explain and defend the generative potential of the colonial constitution.

This is a sweeping and formidable Foreword. Professor Blackhawk's focus on the relationship among constitutionalism, consent, and obligation, especially in the context of the Territories, raises critically important questions and resonates with our own work.³⁶ *American Colonialism* shines a spotlight on an important and growing literature that attempts to reconcile a constitutional order staged to showcase its commitment to equality — the idea that all men are created equal — with the reality of colonialism and empire. The conception of two constitutions, one for insiders and one for outsiders, provides constitutional scholars with a different framework for exploring how a constitutional project conceived in liberty can accommodate subordination and colonialism. It provides an answer that revolves around the concepts of self-determination and sovereignty. Additionally, it sets as its foil the “plenary power” doctrine.³⁷ The Supreme Court has interpreted Article I, Section 8, Clause 3 of the Constitution to grant Congress, and by extension the Executive, broad, plenary power to govern the affairs of Native peoples.³⁸ From the vantage point of *American Colonialism*, the plenary power doctrine symbolizes the doctrinal subordination of Native peoples.³⁹

³⁴ See *id.* at 13–14.

³⁵ See *id.*

³⁶ See Guy-Uriel Charles & Luis Fuentes-Rohwer, *No Voice, No Exit, But Loyalty? Puerto Rico and Constitutional Obligation*, 26 MICH. J. RACE & L. 133, 144 (2021); LUIS FUENTES-ROHWER & GUY-URIEL CHARLES, THE U.S. CONSTITUTION MEETS DEMOCRATIC THEORY: THE PUZZLING CASES OF PUERTO RICO AND D.C. 2 (2020), https://www.acslaw.org/issue_brief/briefs-landing/the-u-s-constitution-meets-democratic-theory-the-puzzling-cases-of-puerto-rico-and-d-c [<https://perma.cc/D5T3-AGHU>]; Luis Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1542 (2008); Guy-Uriel Charles & Luis Fuentes-Rohwer, *The Shame of Empire 1* (Dec. 8, 2023) (unpublished manuscript) (on file with the Harvard Law School Library).

³⁷ See Blackhawk, *supra* note 10, at 8.

³⁸ See *id.*

³⁹ See *id.* at 18.

In what follows, we build on Professor Blackhawk's tremendous foundation to make legible and explicit what is often implicit and less legible in *American Colonialism's* discussion of a constitution that operates against a backdrop of subordination. We sketch — and given the context in which we are writing, we can only sketch — alternative ways of thinking about some of these issues to foreground them for students of constitutional law, race and law, and the law of democracy.

A departing premise, which we will assert and will not do much to defend, is that the American constitutionalism enterprise has not yet appreciated the fact that the modern constitutional project is very different from constitutional projects of the past. For the first time in our history as a polity, we are attempting to create a multiracial, multicultural, multireligious, and multiethnic society. To borrow from the political scientist Yascha Mounk, we are embarking on a “great experiment.”⁴⁰ Unlike the past, when subjugated and formerly subjugated groups were not intended to shape the content and direction of our constitutional democracy, that is no longer the case today. Moreover, we are attempting to undertake this unprecedented experiment as a fractured society. And, to raise the degree of difficulty, we are attempting to collectively pursue this enterprise of mutual self-government against the backdrop of our sordid constitutional history, which is pockmarked by colonialism, erasure, imperialism, and racial subordination.

Put differently, we are as diverse as we have ever been as a polity in our history.⁴¹ Collectively, though not specifically, we also have the most political autonomy that we have ever had as a people. Additionally, we are a people divided across many dimensions — race, ethnicity, place of origin, religion, class, gender, and so forth.⁴² And we carry with us the intergenerational burdens and histories of the past, which mark and tie us to our respective group identities. Because of these histories and burdens, we are advantaged and disadvantaged differently by our constitutional system.

These observations leave us with three broad but interconnected queries. First, we ask whether a people with our history of subordination, oppression, and erasure can come together as a political community in an exercise of self-government. In other words, whether it is possible for us to sustain our constitutional polity and maintain this great

⁴⁰ YASCHA MOUNK, *THE GREAT EXPERIMENT: WHY DIVERSE DEMOCRACIES FALL APART AND HOW THEY CAN ENDURE* 1 (2022).

⁴¹ See Sabrina Tavernise & Robert Gebeloff, *Census Shows Sharply Growing Numbers of Hispanic, Asian and Multiracial Americans*, N.Y. TIMES (Aug. 21, 2021), <https://www.nytimes.com/2021/08/12/us/us-census-population-growth-diversity.html> [https://perma.cc/5XKM-3PNZ]; *The United States Is More Diverse than Ever, In More Places than Ever*, AM. IMMIGR. COUNCIL (Sept. 23, 2021), <https://data.americanimmigrationcouncil.org/en/census2020> [https://perma.cc/3WM9-3AJS].

⁴² Tavernise & Gebeloff, *supra* note 41.

experiment in multiracial democracy in a manner that will allow us all to thrive collectively.

Second, we ask whether historically subordinated groups share in the same liberatory project. The inquiry asks if the peoples who can plausibly claim to have been subject to subordination or discrimination by the American political and constitutional system because of their race, ethnicity, religion, nationality, and/or place of origin were harmed in the same way.⁴³ That is, whether different groups were subordinated by similar or discordant systems of oppression.

And third, we ask if American constitutionalism needs to address past historical wrongs more directly; whether it can ignore past historical wrongs; and whether it must ignore past historical wrongs. The inquiry here is an attempt to wrestle with the feasibility, futility, and balefulness of the exercise of group-based repair premised on past harm. Perhaps the exercise is fundamentally doomed because our constitutional system will never agree on a constitutional approach for addressing past historical wrongs. If so, our constitutional system would likely apply one constitutional order to everyone, regardless of past historical wrongs. Alternatively, our constitutional system could view the work of group-based repair as a key *telos* of constitutionalism. In that case, it would attempt to provide bespoke remedies to each group to satisfy their liberatory projects, since historical wrongs differ for each group.

Our contribution is divided into five Parts. Part I reviews, in broad strokes, Professor Blackhawk's tremendous contribution in *American Colonialism*. Part II, influenced by scholars like Professor Rana, sketches a different and more fluid conception of the American constitutional order as a contrast to the categorical conception narrated by *American Colonialism*. We suggest that an alternative, and our preferred, way of thinking about the constitutional order is to see it as one constitutional system that contains a multiplicity of inconsistent and agonistic principles, as opposed to dual and separate constitutional systems governing "insiders" and "outsiders" differently.

Part III complicates the stories that *American Colonialism* tells about slavery, Jim Crow, Puerto Rico, and the Territories. This Part offers a brief survey of the history of U.S. expansion to emphasize the central role that slavery plays in the story. More importantly, and in line with many scholars of race and of the Black experience, this Part recasts the collective responses to racial subordination, slavery, and Jim Crow as

⁴³ See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715 (1993) ("Although the systems of oppression of Blacks and Native Americans differed in form — the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land — undergirding both was a racialized conception of property implemented by force and ratified by law.").

anticolonial movements.⁴⁴ The purpose here is to demonstrate the fluidity of insider-outsider rhetoric. Additionally, we also want to show how some involved in the movement for Black equality and liberation saw themselves. Few understood themselves as “insiders,” and they would never understand their quest as operating within a conceptual metropole. Indeed, some even framed their liberation project in anti-colonial terms. They would be surprised by the inclusion of their project as an “internal” enterprise. Importantly, this discussion reframes Puerto Rico and the Territories as being both inside and outside the United States. Our point here is not that the history of Native Americans should be decentered. To the contrary. Rather, we seek to point out how centering of Native peoples is compatible with a full appreciation of the Black experience.

Part IV uses the Supreme Court’s recent decision in *Students for Fair Admissions v. President & Fellows of Harvard College*⁴⁵ (*SFFA*) to press three suggestions. First, we deploy *SFFA* as a concrete and contemporary example to reaffirm the point articulated in Part III that the insider-outsider dichotomy — where Black people are inside and Native peoples and the peoples of the Territories are outside — does not fully capture the Black experience or the experience of the people of the Territories. Fundamentally, we are all insiders and outsiders. Second, we employ *SFFA* to reinforce the point of Part II that the constitutional order contains within it multiple and contradictory ideals. Our Constitution is equally the constitution of *Plessy v. Ferguson*,⁴⁶ *Brown v. Board of Education*,⁴⁷ *Grutter v. Bollinger*,⁴⁸ and *SFFA*.

Third, we present the Court’s approach in *SFFA* as the greatest obstacle to the liberatory projects of subordinated groups, including, but perhaps particularly, the liberatory project of Native peoples. For the first time in its history, a majority of the Court is purporting to embrace both a unitary and colorblind approach to equality. We call this approach the superordinate conception of equality. This Part recognizes that the Supreme Court may soon treat Native Americans as a race, rather than as a political group, and subject them to this superordinate conception of equality.

Finally, Part V reframes the age-old tension between liberty and subordination to fit the question within the borders of our contemporary

⁴⁴ We do not say anything in this Response about people who are both Black and Native American. For a discussion of the experience of individuals who are both Black and Native American, see generally Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61 (2005). We do recognize that people who fall into both categories might complicate the story that *American Colonialism* tells.

⁴⁵ 143 S. Ct. 2141 (2023).

⁴⁶ 163 U.S. 537 (1896).

⁴⁷ 347 U.S. 483 (1954).

⁴⁸ 539 U.S. 306 (2003).

multiracial and diverse democracy. It asks, skeptically, whether a singular constitutional order can govern our historically fractured polity. We are an amalgamation of people with different and arguably mutually inconsistent projects of self-government and liberation. The proper goal for a constitution of difference is to manage the excesses of difference while preserving the space for the liberty, equality, dignity, and group identity that is inherent to difference among a self-governing peoples.

I. CONSTITUTIONALIZING COLONIALISM

In *American Colonialism*, Professor Blackhawk compels us to grapple with some of the most difficult questions raised by colonialism's entanglement with the Constitution. Or to be more precise, how America's history of colonialism creates a space for some groups to exercise power and develop their autonomy away from the prying eyes of the metropole. One of the most distinctive aspects of *American Colonialism* is not just the argument that there are two constitutions, but the provocative implication that the liberatory projects of subordinated groups are subject to different constitutional orders and are rivalrous, if not antagonistic. In particular, a central contention of *American Colonialism*, sometimes implied and sometimes surfaced explicitly even if not always straightforwardly, is that the same constitutional framework that liberated Black people is bad for Native peoples.⁴⁹ *American Colonialism* draws a distinction, again sometimes explicit and often implicit, between the liberatory project of Native peoples and the legal framework that subordinated them against the liberatory project of Black people and the legal framework that subordinated them. The liberatory project of Native peoples flies under the banner of sovereignty and self-determination; for Black people, presumably, the project is in the camp of equality and belonging.

Relatedly, Professor Blackhawk conceptualizes the legal system that addressed the harm of Native erasure as not just different from the legal system that addressed slavery and Jim Crow but incompatible with it.⁵⁰ In *American Colonialism*, the national government, specifically Congress and the executive branch, are the villains of the story; the national government is the institution that generally bears the current responsibility — because of the plenary powers doctrine — for the colonial subordination of Native peoples and the people of the borderlands.⁵¹

By contrast, many racial justice scholars, particularly scholars of the Black experience, view the national government as the institution

⁴⁹ See, e.g., Blackhawk, *supra* note 10, at 13–14 (examining the role of equal protection doctrine in *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023), and how the application of the constitutional doctrine posed an existential threat to the Indian Child Welfare Act).

⁵⁰ *Id.*

⁵¹ See *id.* at 63.

that has most contributed to the liberation of Black people.⁵² Broad congressional power, for example under section 5 of the Fourteenth Amendment, is often regarded as indispensable to the quest for racial justice.⁵³ The racial justice project is often conceived in federalism terms, where the states are the problem and the federal government, Congress specifically, is the solution.⁵⁴

In *American Colonialism*, the states are relative nonentities. The problem is the failure of one sovereign, the federal government, to acknowledge its ostensible duty to engage with Native nations as fellow co-sovereigns and not as wards.⁵⁵ The attempt is to shift the relationship between the national government and Native peoples from a vertical one — Congress as guardian — to a horizontal one — Native nations as co-equals to the American nation.⁵⁶ Native peoples are therefore cast as outsiders to the American constitutional project and subjects of the colonial constitution.

Given these different constitutional aims of Native peoples and Black people, one can understand why *American Colonialism* categorizes Native peoples as “external” to the liberal constitutional framework and residents of the borderlands.⁵⁷ One can also see why *American Colonialism* places Black people within the jurisdiction of liberal constitutionalism and immanent or “internal” to the constitutional order as residents of the center and the metropole.⁵⁸ Notably, Native peoples are not the only residents of the borderlands.⁵⁹ The borderlands also include territories “outside” of the United States that were acquired through conquest — thus, *American Colonialism* extends its remit to the U.S. territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.⁶⁰

Notwithstanding these other occupants of the borderlands, it is Native peoples who are, justifiably, the primary concern of *American Colonialism*. In most relevant respects, the history of Native peoples in the United States supplies the content of the Foreword. This is the history, and the set of concerns, that fit the theory best. Professor Blackhawk endeavors to turn the central attention of constitutionalism

⁵² Cf. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2028–30 (1990).

⁵³ See, e.g., Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 637 (2005).

⁵⁴ See, e.g., Burt Neuborne, *Federalism and the “Second Founding:” Constitutional Structure as a “Double Security” for “Discrete and Insular” Minorities*, 77 N.Y.U. ANN. SURV. AM. L. 59, 75–76 (2022).

⁵⁵ See Blackhawk, *supra* note 10, at 65.

⁵⁶ See *id.* at 65–66 (explaining the previous “glimmers,” *id.* at 65, of evidence that Congress might establish and follow certain principles to limit the colonial project with respect to Native peoples).

⁵⁷ *Id.* at 68.

⁵⁸ *Id.* at 83.

⁵⁹ See *id.* at 11–12.

⁶⁰ *Id.* at 44.

from the center to the periphery, from the metropole to the borderlands.⁶¹

Though we will take issue with the placement of Black people within the metropole, given the premises of *American Colonialism*, the classification follows from the departing postulates: there is an internal constitution that applies to citizens and essentially an international relations constitution that applies to — or has external effects on — those who are outside of the polity.⁶² And by conceptual construction as well as implication, *American Colonialism* aims to reorient constitutionalism to focus on Native peoples and their liberatory project.⁶³ This in turn orients focus away from Black people and their liberatory project. Recall that in *American Colonialism*, sovereignty and self-determination are the ends of constitutionalism for Native peoples.⁶⁴ And for Black people, it seems, the exercise of constitutionalism is directed toward guaranteeing equal citizenship within the polity,⁶⁵ or what is presumed to be their polity, though admittedly, *American Colonialism* does not always make this point fully explicit.

In practical terms, this reorientation would commit scholars and jurists to press on the constitutional principles developed in, and particular to, the borderlands by the people of the borderlands. These principles include “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,

⁶¹ See *id.* at 68 n.443.

⁶² See *id.* at 68. Admittedly, though one can logically see, based upon *American Colonialism*'s classification, why Black people are placed on the inside — the internal constitution applies to citizens — it is less clear why Native peoples and some residents of the Territories are outsiders. They too are American citizens. One could argue that the Territories are outside of the political and constitutional boundaries of the United States. But that simply begs the question whether the political and constitutional boundaries of the United States include the Territories. Moreover, though geography could plausibly serve as a basis for treating the Territories differently, it would not serve as a basis for distinguishing between Native peoples and Black people. One could argue that Native peoples and Territorial residents were conquered people. Again, that would be a thin way to distinguish people who were conquered and subdued in the Americas and the Caribbean from those who were conquered, subdued, chained, and transported from Africa, to the Caribbean, to the Americas. We do not interpret *American Colonialism* to be relying upon that distinction. One could argue that Native peoples deserve sovereignty on existential grounds. Those arguments have been made in the context of Black people as well. Black people have been encouraged to return to Africa — specifically Liberia — the Caribbean, or to emigrate to Europe for the sake of self-preservation. See generally Fodei Batty, *How to Understand the Complicated History of “Go Back to Africa,”* WASH. POST (Apr. 26, 2016, 2:00 PM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/26/is-go-back-to-africa-always-an-insult-heres-a-brief-history-of-american-back-to-africa-movements> [<https://perma.cc/8H6V-7BBW>].

⁶³ Blackhawk, *supra* note 10, at 135.

⁶⁴ See *id.*

⁶⁵ For a brief overview of this work, see Ta-Nehisi Coates, *The First White President*, THE ATLANTIC, Oct. 2017, at 75. See also *Reconstructing Citizenship*, NAT'L MUSEUM AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/explore/exhibitions/reconstruction/citizenship> [<https://perma.cc/MQ67-NR2X>] (“Black people have been fighting for basic citizenship rights since the inception of the country.”).

and principles of nonintervention that weigh against the imposition of the laws of one people upon another.”⁶⁶ The legal and political principles that they appeal to are not limited in any way to the Constitution of the United States, which may arguably be irrelevant to them; the laws that they appeal to include the law of nations, international law, foreign relations law, and immigration law.

This is an arresting enterprise, not least because of what it does not say. It is honest in describing — or creating, depending upon your perspective — a tension between the liberatory aspirations of Native peoples and those of Black people. It is audacious in borrowing from an existing literature — the borderlands literature that arose to articulate the plight of those outside of the physical boundaries of a country but who seek entry into the polity — to effectively frame Native peoples as noncitizens and unwilling subjects of the American enterprise.⁶⁷ It uses that literature to describe the political and constitutional aspirations of a people, Native people, who were forcibly made part of a polity to which they did not wish to belong.

II. A CONSTITUTION OF CONTRADICTION AND DIFFERENCE

In this Part, we present a different way for thinking about the American constitutional project. The American constitutional project, embodied in the Constitution of the United States, is characterized by its contradictions and incompatible commitments. Moreover, it has negotiated differences and inconsistencies from its inception. Liberty and slavery. Self-determination and colonialism. Equality and subordination. Imperialism and sovereignty. The Constitution of the United States is both a refuge for the oppressed and a haven for oppressors. Indeed, one might argue that our Constitution and constitutional system were designed to contain and balance contradictions and differences.⁶⁸ It is always mediating between its liberatory commitments and its subordinating impulses.

This is the history of our country. This ability to accommodate divergent commitments is true about some of the most basic events and historical understandings. The American Constitution is rightly regarded as establishing a liberal democratic order based upon the consent of the governed.⁶⁹ This was a break with past justifications for political

⁶⁶ Blackhawk, *supra* note 10, at 20.

⁶⁷ See *id.* at 9 n.31 (acknowledging and citing to the work of numerous scholars in the borderlands space); *id.* at 67 n.429 (“Historians have long debated the centrality of ‘frontier’ or ‘borderlands’ to the shaping of the United States.”).

⁶⁸ See Richard Albert, *America’s Amoral Constitution*, 70 AM. U. L. REV. 773, 777–78 (2021). See generally Kimberlé W. Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683 (1998) (describing the inconsistencies within constitutional theories borne in part from the Constitution’s contradictions).

⁶⁹ But see Blackhawk, *supra* note 10, at 18 n.78 (“Constitutional memory often diverges from constitutional history in ways that manufacture authority and consent.”).

authority, which were based upon aristocracy, hierarchy, feudalism, and the divine right of kings as ordained by God.⁷⁰ And yet, as Professor Garry Wills notes, slavery was a central if not a primordial factor in the constitutional development of the United States.⁷¹ On the Three-Fifths Compromise,⁷² for example, Wills explains that the compromise was central not only in deciding the election of 1800 and President Thomas Jefferson's victory in the Electoral College but also in solidifying the South's hold on national politics through the early to mid-nineteenth century.⁷³ The compromise played a crucial role in territorial expansion, from the Louisiana Purchase, to President Jefferson's early efforts to annex Florida and Cuba, to his support for slavery in Missouri and the West.⁷⁴ While political efforts to defend and expand the institution of slavery varied, Wills concludes, "almost all of them depended in some way on the three-fifths clause, since that permeated the process of representative government."⁷⁵ Thus, as historians have explained, slavery and the Three-Fifths Compromise were central to the foundation of the Republic and critical to its economic development.⁷⁶

Not all historians join in this assessment. Prominent historians — Wills calls them "Peripheralists"⁷⁷ — disagree. Professor Joyce Appleby, for example, argues that population was the proper apportioning metric irrespective of the ability to vote. This meant that women, children and disenfranchised white men counted.⁷⁸ To Appleby, this also meant, as the Southern delegates at the convention argued, that "slaves should have been counted fully as members of the population."⁷⁹ Professor Gordon Wood agrees.⁸⁰ The fact that slaves could not vote was

⁷⁰ *Id.* at 54 n.327 (citing LOUIS D. BRANDEIS, *TRUE AMERICANISM* 11–12 (1915)) (describing the perceived divine right to subject others to governance).

⁷¹ See GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 3 (Mariner Books 2005) (2003).

⁷² U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

⁷³ WILLS, *supra* note 71, at 5.

⁷⁴ See *id.* at 8.

⁷⁵ *Id.* at 11.

⁷⁶ See GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* 130 (2010); DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 102–05* (2009). See generally PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (3d ed. 2014).

⁷⁷ WILLS, *supra* note 71, at xii.

⁷⁸ Joyce Appleby, *Having It All*, WASH. POST (Nov. 16, 2003), <https://www.washingtonpost.com/archive/entertainment/books/2003/11/16/having-it-all/99abb9f6-2737-4390-a857-ce20eb09e360> [<https://perma.cc/SSU9-RUJR>] (reviewing GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER (2003)).

⁷⁹ *Id.*

⁸⁰ Gordon S. Wood, *Slaves in the Family*, N.Y. TIMES (Dec. 14, 2003), <https://www.nytimes.com/2003/12/14/books/slaves-in-the-family.html> [<https://perma.cc/6TPA-MPAB>]; see also GORDON S. WOOD, *THE PURPOSE OF THE PAST* 293–308 (2009) (insisting that recent historiography overstates the importance of slavery at the Founding).

irrelevant, since women and children could also not vote.⁸¹ Further, he argued that representation in the House was more important than equal representation in the Senate, which was unaffected by the Three-Fifths Compromise.⁸² And whereas leading abolitionists argued that the compromise made the Constitution “a pact from hell,” Wood reminds us that “others like Frederick Douglass thought that it actually penalized the Southern states.”⁸³ The “Peripheralists” also downplay the effect of the compromise on the election of 1800.⁸⁴

This was very much the debate among abolitionists over whether the U.S. Constitution was a proslavery document. Frederick Douglass’s well-known constitutional conversion on the slave question is instructive.⁸⁵ With the Garrisonians, Douglass first understood — and argued publicly — that the U.S. Constitution was a proslavery document.⁸⁶ “The Constitution I hold to be radically and essentially slave-holding,” he told a crowd in Syracuse, New York, in September 1847, “in that it gives the physical and numerical power of the nation to keep the slave in his chains.”⁸⁷ The constitutional text did all the work for him. “The language of the Constitution is you shall be a slave or die.”⁸⁸

Within the span of a few years, however, Douglass changed his mind and came to interpret the Constitution as an abolitionist document. Importantly, the very words that years before led him to understand the Constitution as a proslavery instrument took him, when read as part of the larger document, to the opposite conclusion. “This, I undertake to say, as the conclusion of the whole matter, that the constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself.”⁸⁹ His critics reached their conclusions, he continued, “by disregarding the written Constitution, and interpreting it in the light of a secret understanding.”⁹⁰ In his well-known speech commemorating the signing of the Declaration of Independence, Douglass explained that “interpreted, as it ought to be interpreted, the Constitution is a glorious liberty document. Read its

⁸¹ Wood, *Slaves in the Family*, *supra* note 80.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Sean Wilentz, *The Details of Greatness*, NEW REPUBLIC (Mar. 28, 2004), <https://newrepublic.com/article/61007/the-details-greatness> [<https://perma.cc/RWS8-6C95>] (reviewing WILLS, *supra* note 78).

⁸⁵ See Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 58–61 (2019).

⁸⁶ Frederick Douglass, American Slavery, Speech Delivered at Market Hall (Oct. 22, 1847), in 1 PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, EARLY YEARS, 1817–1849*, at 269, 274 (1950).

⁸⁷ *Id.*

⁸⁸ *Id.* at 274–75.

⁸⁹ Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?, Speech at Glasgow, U.K. (Mar. 26, 1860), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 379, 387 (Philip S. Foner & Yuval Taylor eds., 1999) (1950).

⁹⁰ *Id.* at 388.

preamble, consider its purposes. Is slavery among them? Is it at the gate way? Or is it in the temple? It is neither.”⁹¹

Importantly, according to Professor Dorothy Roberts, Douglass was not making an originalist argument but rather a novel *constitutional* argument.⁹² This was because he was no longer willing to cede the constitutional authority to slaveholders. “I am sick and tired of arguing on the slaveholders’ side of this question,” Douglass explained, “although they are doubtless right so far as the intentions of the framers of the Constitution.”⁹³ For Professor Roberts, this conversion was driven by constitutional necessity and his “political vision for an abolition constitutionalism.”⁹⁴

Whatever the reasons for Douglass’s change of mind, our point is that Douglass, like many participants in the American constitutional enterprise, could access both the Constitution’s liberatory and oppressive potential. Our Constitution is one that contains contradictions and is meant to accommodate differences. The Constitution can simultaneously contain competing, good faith understandings of its meaning.

Race scholars know this well. It was the virtue of a flexible and accommodating Constitution that accounts for what is the most important case in the history of the Equal Protection Clause, *Brown v. Board of Education*.⁹⁵ In *Plessy v. Ferguson*, the Court held that a separate-but-equal state law was a reasonable exercise of state power under the Equal Protection Clause.⁹⁶ Infamously, the Court breezily dismissed arguments that the “enforced separation of the two races” served as a “badge of inferiority.”⁹⁷ Any stigma that followed the enforcement of these laws, the Court explained, arose “solely because the colored race chooses to put that construction upon it.”⁹⁸ In dissent, Justice Harlan penned what became his most famous passage about the colorblind Constitution. “The white race deems itself to be the dominant race in this country,” the passage began.⁹⁹ “And so it is, in prestige, in achievements, in education, in wealth and in power.”¹⁰⁰ But social realities must give way to formal law. Under the Constitution, Justice Harlan continued, “there is in this country no superior, dominant, ruling

⁹¹ Frederick Douglass, The Meaning of July Fourth for the Negro, Speech at Rochester, New York 16 (July 5, 1852), https://masshumanities.org/files/programs/douglass/speech_complete.pdf [<https://perma.cc/PWF8-CDR2>].

⁹² Roberts, *supra* note 85, at 59.

⁹³ *Id.* at 60 (quoting Letter from Frederick Douglass to Gerrit Smith (Jan. 21, 1851), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850–1860, at 149, 149 (Philip S. Foner ed., 1950)).

⁹⁴ *Id.*

⁹⁵ See 347 U.S. 483, 485–89 (1954).

⁹⁶ 163 U.S. 537, 548 (1896).

⁹⁷ See *id.* at 551.

⁹⁸ *Id.*

⁹⁹ *Id.* at 559 (Harlan, J., dissenting).

¹⁰⁰ *Id.*

class of citizens. There is no caste here.”¹⁰¹ In 1896, this meant that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”¹⁰² Justice Harlan was the lone dissenter.¹⁰³ Seven of his colleagues disagreed with him.¹⁰⁴

Half a century later, in *Brown*, the Supreme Court unanimously overturned *Plessy*.¹⁰⁵ This is an important and nuanced story about the Court, judicial behavior, and the important role played by social and political contexts in making *constitutional* law. As the Justices prepared to uphold the separate-but-equal doctrine in a closely divided opinion — and took a vote in conference to that effect¹⁰⁶ — Chief Justice Vinson died.¹⁰⁷ Chief Justice Warren replaced him and, after reargument, the Court issued the unanimous and canonical *Brown* decision.¹⁰⁸ “We conclude that in the field of public education,” the Chief Justice wrote for the Court, “the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”¹⁰⁹

It is too facile, though perhaps necessary, to argue that *Plessy* was wrong the moment it was decided.¹¹⁰ Such is the status of *Brown* in our legal culture. No credible judicial nominee to the federal bench can oppose *Brown* and survive a Senate vote (though some have refused to comment on the case).¹¹¹ Yet, other than the passage of time, not much changed between *Plessy* and *Brown*. It is not as if Black people woke up in the 1950s and decided that they were no longer going to countenance their own subjugation. They fought for their liberty from the very beginning.

More important to us, however, as with the slavery debate we discussed earlier, is the elastic and contradictory capacity of the Equal Protection Clause and of the U.S. Constitution generally. The fact is that the constitutional order accommodated *Plessy* and *Brown* simultaneously. That is, the country did not wake up on May 18, 1954, to a new constitutional order. Rather, it woke up to dueling constitutional orders. For a long time — some who easily perceive the specter of white

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 552.

¹⁰⁴ *See id.*

¹⁰⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

¹⁰⁶ *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 300 (2004).

¹⁰⁷ *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 656 (1975).

¹⁰⁸ KLARMAN, *supra* note 106, at 302.

¹⁰⁹ *Brown*, 347 U.S. at 495.

¹¹⁰ *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992).

¹¹¹ *See, e.g.*, Laura Meckler & Robert Barnes, *Trump Judicial Nominees Decline to Endorse Brown v. Board Under Senate Questioning*, WASH. POST (May 16, 2019, 7:28 PM), https://www.washingtonpost.com/local/education/trump-judicial-nominees-decline-to-endorse-brown-v-board-under-senate-questioning/2019/05/16/d5409d58-7732-11e9-b7ae-390de4259661_story.html [https://perma.cc/958H-DSKV].

supremacy will say even today — *Plessy* battled *Brown*, with the stakes for the country, particularly Black and Brown people, turning on the outcome.¹¹²

We take up a final example, the controversy between the competing 1619 and 1776 Projects. To Nikole Hannah-Jones and the contributors to the 1619 Project, “the year 1619 is as important to the American story as 1776.”¹¹³ In her controversial reframing of our constitutional founding and development, “black Americans, as much as those men cast in alabaster in the nation’s capital, are this nation’s true ‘founding fathers.’”¹¹⁴ This is both a constitutional and a constitutive argument about authorship, agency, and membership. “We the People” began long before 1787 or even 1776 with the signing of the Declaration of Independence. Importantly, writes Professor Sanford Levinson, “the 1619 Project root[s] American history, including its constitutional history, in an unrelenting past (and present) of maintaining white supremacy.”¹¹⁵

In contrast, the 1776 Project, which President Trump convened, is unwilling to reach as far back in our history. Instead, it finds support in the familiar themes and ideals of 1776. “The meaning and purpose of the Constitution of 1787,” the 1776 Commission wrote in its report, “cannot be understood without recourse to the principles of the Declaration of Independence — human equality, the requirement for government by consent, and the securing of natural rights — which the Constitution is intended to embody, protect, and nurture.”¹¹⁶ The Commission explicitly disavows the portrayal of the United States “as racist and white supremacist” and writes that Stephen A. Douglas was wrong when he argued in his first debate with Abraham Lincoln “that American government ‘was made on the white basis’ ‘by white men, for the benefit of white men.’”¹¹⁷

¹¹² John A. Powell & Stephen Menendian, *Parents Involved: The Mantle of Brown, The Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631, 683–91 (2008).

¹¹³ Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False when They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [<https://perma.cc/G4CA-D53V>] (generally referred to as “The 1619 Project”).

¹¹⁴ *Id.*

¹¹⁵ Sanford Levinson, *Are (American) Secessionists Necessarily Revolutionaries?*, 81 MD. L. REV. 217, 224 (2021); see Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), <https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html> [<https://perma.cc/F272-3NEG>] (“The goal of The 1619 Project is to reframe American history by considering . . . the consequences of slavery and the contributions of black Americans at the very center of the story we tell ourselves about who we are as a country.”).

¹¹⁶ PRESIDENT’S ADVISORY 1776 COMM’N, THE 1776 REPORT 7 (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> [<https://perma.cc/MG3S-5L8Q>].

¹¹⁷ *Id.* at 29 (quoting Stephen A. Douglas, Mr. Douglas’s Opening Speech, Ottawa, Ill. (Aug. 21, 1858), in 3 THE COMPLETE WORKS OF ABRAHAM LINCOLN 200, 216 (John G. Nicolay & John Hay eds., 1905)).

The lessons of this debate are many. Above all, it is important to underscore that this is a debate about public memory, “a dispute about the American story and how America became the country it is today.”¹¹⁸ We need not take sides in the debate to recognize, like Jake Silverstein, that “a republic founded on an irresolvable contradiction — freedom *and* slavery — was always going to wind up in an irresolvable argument over how to tell its story.”¹¹⁹ It may be that this debate is at the heart of the story of American democracy, its fracture both inevitable and a sign that “we’ve finally arrived.”¹²⁰ More importantly, and crucial to the story we tell in the rest of our Response, is the fact that we can simultaneously tell irreconcilable stories. This is also true of our Constitution, a document that can support both an equality and a subordination narrative.

III. DOMESTIC IN A FOREIGN SENSE: THE BLACK EXPERIENCE AS PART OF THE STORY OF U.S. COLONIALISM

If we understand that the Constitution, from the very beginning, is one with “two faces,”¹²¹ a document that wrestled with both racial equality and subordination as questions of constitutional interpretation, we can better appreciate how the document could support both readings simultaneously and how political actors took advantage of that fact. For example, it helps us see the Constitution as both the 1619 *and* 1776 Constitution; as both a pro- and anti-slavery document; as both *Plessy* and *Brown*.

As importantly, understanding the Constitution as one with two faces helps us see that the problem with constitutionalism is not that it has not grappled with imperialism or empire;¹²² rather, it is that it has embraced them as legitimate objectives that make up the constitutional project without regard for the costs that they impose on subordinated others. It also helps us to make sense of the Black experience, which would otherwise be inexplicable, and provides a full and accurate picture of the history of territorial expansion, colonialism, and empire in the United States. Separating the Black experience from the Native American experience leaves both incomplete.¹²³ Additionally, it complicates the story of Puerto Rico and the Territories. These are

¹¹⁸ Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 322 (2022).

¹¹⁹ Jake Silverstein, *The 1619 Project and the Long Battle over U.S. History*, N.Y. TIMES MAG. (Nov. 12, 2021), <https://www.nytimes.com/2021/11/09/magazine/1619-project-us-history.html> [<https://perma.cc/X67K-MXWK>].

¹²⁰ *Id.*

¹²¹ See Blackhawk, *supra* note 10, at 10 (citing AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 9–10 (2010)).

¹²² *See id.*

¹²³ Indeed, many areas of law and history cannot be complete without understanding the intersection of Native peoples and Black people. *See, e.g.*, Park, *supra* note 4, at 1066–68 (exploring this intersection in the context of property law).

constitutional spaces that are both internal and external, inside and outside, simultaneously seeking refuge in the liberatory constitution and respite from the constitution of colonialism. Once we properly understand the problem with colonialism, in sum, we can fully grasp why almost all racial liberatory projects throughout American history have voiced their complaints in the register of colonialism and imperialism. Nonwhite people have essentially argued that the constitutional order has treated them as domestic in a foreign sense.¹²⁴

For context, consider two central premises of the new constitutional order in 1787. First is the understanding that there would be no middle status between territory and statehood. Once acquired, a territory would be automatically on the path to statehood.¹²⁵ Second is the story of race at the Founding and the political community that would form part of the new nation. “Providence has been pleased to give this one connected country to one united people,” John Jay noted in *The Federalist No. 2*, “a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs.”¹²⁶ This was a homogenous, monoracial community. Black people, whether slave or free, were not part of this community. This would be a white nation.

Though placed under grave stress, both premises held firm throughout the nineteenth century. Once the country began to expand westward, the ideal of a white nation proved difficult to uphold. The Louisiana Purchase presented few difficulties on this point; though populated by French citizens who could not be any more different from those who called themselves U.S. citizens — in language, religion, viewpoints, and culture, among others — Louisiana received statehood and its residents U.S. citizenship within a decade.¹²⁷ This was because the Louisiana citizenry met the one overarching precondition for inclusion: it was predominantly white.¹²⁸

Future territorial acquisitions required different strategies. In the face of calls to annex all the Mexican territory at the end of the Mexican-

¹²⁴ Or in the language of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), as “domestic dependent nations.” *Id.* at 17.

¹²⁵ See Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 796–99 (2022); see also Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 450 (2002) (describing the debate over whether the United States could enforce territorial status indefinitely and without an eventual promise of statehood that arose after the annexation of Puerto Rico, the Philippines, and Guam); Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2453–54 (2022).

¹²⁶ THE FEDERALIST NO. 2, at 32 (John Jay) (Clinton Rossiter ed., 2003).

¹²⁷ See Paul Frymer, *Building an American Empire: Territorial Expansion in the Antebellum Era*, 1 U.C. IRVINE L. REV. 913, 925 (2011).

¹²⁸ *Id.*

American War, the Polk Administration negotiated a careful boundary line to include within the acquired territory as few Mexican citizens as possible.¹²⁹ Statehood would then follow once enough white settlers populated the new lands.¹³⁰ This is what happened in New Mexico.¹³¹ Incidentally, this is also what happened in Hawai‘i.¹³² For places where this strategy may not have worked, such as Cuba or the Dominican Republic and their large citizenries of color, it was best not to acquire them at all.¹³³

Expansion also put great pressure on the institution of slavery and its future. This was true from the moment the Jefferson Administration agreed to a deal with Napoleon over the Louisiana Territory. That purchase, according to Professor William Freehling, “became the climactic theater of escalating sectional warfare.”¹³⁴ The sheer size of the purchase immediately raised the question of status for the territory. Would this land be carved up as new states and, if so, how many? And more importantly, would these new states enter the Union as free or slave states? These questions, according to Professors Sanford Levinson and Bartholomew Sparrow, “made slavery *the* issue of American politics.”¹³⁵ This is the reason why it is almost impossible to think about U.S. colonialism and empire without thinking about slavery. This was true of 1820 and the compromise over Missouri. Slavery helps explain the Texas Republic, the Mexican War, and the Wilmot Proviso. The same can be said for the Compromise of 1850 and the Kansas-Nebraska Act. This was *Dred Scott*. This was, of course, the Civil War. These disputes all centered on the question of whether slavery would extend into the western territories.

Norms of expansion finally gave way to new pressures and realities in the late nineteenth century. The Far East and the opening of its markets proved too tempting.¹³⁶ The Cuban-American War placed the

¹²⁹ *Id.*

¹³⁰ *Id.* at 926.

¹³¹ *Id.* at 923.

¹³² *See id.*

¹³³ *See id.*

¹³⁴ William W. Freehling, *The Louisiana Purchase and the Coming of the Civil War*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898*, at 78 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005); *see* MICHAEL F. HOLT, *THE FATE OF THEIR COUNTRY: POLITICIANS, SLAVERY EXTENSION, AND THE COMING OF THE CIVIL WAR* 92–98 (2004). *See generally* MICHAEL A. MORRISON, *SLAVERY AND THE AMERICAN WEST: THE ECLIPSE OF MANIFEST DESTINY AND THE COMING OF THE CIVIL WAR* (1997) (exploring the role of territorial expansion and the related question of slavery in newly acquired territory in leading to the Civil War).

¹³⁵ Sanford Levinson & Bartholomew H. Sparrow, *Introduction* to *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION*, *supra* note 134, at 1, 7; *see* MICHAEL F. CONLIN, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN CIVIL WAR, 1803–1898*, at xxi (2019) (“The most important issue in the sectional battle was not slavery in the South per se, it was the expansion of slavery into the western territories.”).

¹³⁶ *See* Torruella, *supra* note 4, at 6.

Philippines, Puerto Rico, and Guam under the U.S. flag.¹³⁷ But the nation faced different questions this time. Crucially, their inhabitants were, as in prior annexations, nonwhite.¹³⁸ Unlike prior territorial annexations, however, these new possessions were insular in nature, islands that would not provide the same options that territories did in the past. In the words of Judge Torruella:

Thus, for the first time in its history, the United States had acquired sovereignty over non-contiguous lands separated by thousands of miles from the political and economic epicenter of the American polity, which lands were inhabited by large numbers of subject peoples of different races, languages, cultures, religions and legal systems than those of the then-dominant Anglo-Saxon society prevalent in the United States.¹³⁹

The United States could not take parts of these islands but not others, nor could it remove their inhabitants. It was all or nothing.

The nation responded accordingly. For the first time in U.S. history, annexations need not result in the admission of territories as states. Under the newly minted incorporation doctrine, the United States could acquire territories without the promise that they would ultimately achieve statehood.¹⁴⁰ In *Downes v. Bidwell*,¹⁴¹ Justice White's concurring opinion drew a hard line between incorporated and unincorporated territories.¹⁴² This meant that annexed territories may be held in colonial status indefinitely as unincorporated territories, until Congress explicitly incorporated them.¹⁴³ They may also be deannexed.¹⁴⁴ The incorporation doctrine soon became the majority view on the Court.¹⁴⁵

The Philippines gained its independence from the United States in 1946.¹⁴⁶ Puerto Rico and Guam remain unincorporated territories,¹⁴⁷ even if their citizens are statutory U.S. citizens.¹⁴⁸ The relationship between the United States and these islands is fraught with puzzles and contradictions. For example, Congress extended U.S. citizenship to

¹³⁷ See Blackhawk, *supra* note 10, at 51–52 (explaining the history of the war and revolts that ultimately ended in the American colonization of the Philippines, Puerto Rico, and Guam).

¹³⁸ Torruella, *supra* note 4, at 6.

¹³⁹ *Id.*

¹⁴⁰ See *Downes v. Bidwell*, 182 U.S. 244, 339 (1901) (White, J., concurring).

¹⁴¹ 182 U.S. 244.

¹⁴² See *id.* at 299 (White, J., concurring).

¹⁴³ See *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

¹⁴⁴ See Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005).

¹⁴⁵ See *Dorr v. United States*, 195 U.S. 138, 142–43 (1904); EFREN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 87 (2001).

¹⁴⁶ See Philippine Independence Act (Tydings-McDuffie Act), Pub. L. No. 73-127, 48 Stat. 456 (1934). The Act provided for the independence of the Philippines, which it subsequently achieved in 1946. See Proclamation No. 2695, 11 Fed. Reg. 7517 (July 4, 1946).

¹⁴⁷ See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring).

¹⁴⁸ See 8 U.S.C. § 1402; *id.* § 1407; Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 951, 953 (1917) (codified as amended at 48 U.S.C. § 733a).

residents of the islands — a traditional marker of incorporation — yet they remain unincorporated.¹⁴⁹ Though U.S. citizens, territorial residents may not vote in national elections.¹⁵⁰ The islands are subject to the plenary powers of Congress, and discrimination against their residents is subject to barely any constitutional review at all.¹⁵¹ In a constitutional sense, the territories are sometimes considered states, but not other times.

From this brief history, it is easy to situate territorial citizens as colonial subjects, especially after 1898. As we explained above, the exigencies of the moment and the distinct geographic characteristics of the new possessions demanded a new approach. The *Insular Cases* and the incorporation doctrine responded to these new realities. We agree with *American Colonialism* that the erasure of Native American nations from historical narratives of U.S. expansion must be remedied.¹⁵² Native peoples must be at the center of these debates. Yet, as a historical matter, one must also account for the Black experience. For one, it is true that the same “nation of immigrants” myth that erases Native peoples is also inaccurate in the context of slavery.¹⁵³ Enslaved Black peoples were brought into the United States not as “immigrants” but by force.¹⁵⁴ Like Native communities and territorial inhabitants, Black people are outsiders seeking recognition and fighting for their rights. They are a significant part of the U.S. colonial story.

Toward the end of the piece, in a footnote, *American Colonialism* acknowledges that Black advocates and social movements adopted some of the strategies that Professor Blackhawk defines as anti-colonial.¹⁵⁵ But only guardedly: “[I]t bears noting that Black activists also embraced the language of separation, power, and independence described here as central to the strategies of colonized peoples.”¹⁵⁶ Conceding that Black nationalist movements “have been ongoing since the Founding,” *American Colonialism* writes that these movements have been “a minority view within the broader movement for inclusion.”¹⁵⁷

¹⁴⁹ See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 307–08 (1922).

¹⁵⁰ See, e.g., *Vaello Madero*, 142 S. Ct. at 1562 (Sotomayor, J., dissenting).

¹⁵¹ See *id.* at 1541, 1543 (majority opinion).

¹⁵² See Blackhawk, *supra* note 10, at 17; see also NED BLACKHAWK, *THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY* 5–6 (2023) (“Indigenous absence has been a long tradition of American historical analysis. Building upon a generation of recent scholarship in Indigenous history, this book joins the many scholars who are creating a different view of the past, a reorientation of U.S. history.”).

¹⁵³ See Blackhawk, *supra* note 10, at 17.

¹⁵⁴ See, e.g., ROXANNE DUNBAR-ORTIZ, *NOT “A NATION OF IMMIGRANTS”: SETTLER COLONIALISM, WHITE SUPREMACY, AND A HISTORY OF ERASURE AND EXCLUSION* 51 (2021).

¹⁵⁵ Blackhawk, *supra* note 10, at 83 n.556.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

We agree that Black liberatory struggles date to the Founding. But the dismissal of Black nationalism as simply a minority view and essentially unrelated to the fight for inclusion is not warranted and a profound mistake in an otherwise flawless project. Leading Black intellectuals noted that the Black liberation movement was shaped by a concern with imperialism, nationalism, and anticolonialism. As the Black political scientist Robert C. Smith wrote in his critical volume on Black politics, even though Black people tend to be “much more pragmatic and utilitarian than the radical leaders of the national black political convention,” “nationalism is an enduring force in Afro-American politics that is ignored by the integrationist black establishment only at its peril, invoking as it does inchoate consciousness of race oppression, race differences, solidarity and collective race responsibility.”¹⁵⁸ According to Professor Harold Cruse, for example, “the nature of economic, cultural and political exploitation common to the Negro experience in the U.S. differs from pure colonialism only in that the Negro maintains a formal kind of halfway citizenship within the nation’s geographical boundaries.”¹⁵⁹ To M Adams and Max Rameau, summarizing the views of many prominent voices and theorists of the Black experience, “that African or Black people constitute a colony inside the United States is the central tool of analysis required to understand the persistent oppression and exploitation of Black people in this country.”¹⁶⁰ The sociologist Charles Pinderhughes wrote: “So, to capture better the current situation of historically colonized peoples in the USA, particularly that of African Americans, I argue for continued use of the theory of internal (or domestic) colonialism (or semi-colonialism).”¹⁶¹ In a footnote, Pinderhughes noted that “[t]he terms internal colonialism, domestic colonialism and semi-colonialism appear to be used interchangeably in literature since 1944 interpreting the experience of African Americans as ‘colonized.’”¹⁶² He then explained that his “work delineates the importance of internal colonialism theory to a comprehensive understanding of the oppression of African Americans living in US ghettos.”¹⁶³

As Professor Aziz Rana comprehensively summarized: “Since the entrenchment of the New Deal order, the civil rights movement has embodied the most sustained effort to revive both the vision of liberty as

¹⁵⁸ ROBERT C. SMITH, *WE HAVE NO LEADERS: AFRICAN AMERICANS IN THE POST-CIVIL RIGHTS ERA* 78 (1996).

¹⁵⁹ HAROLD CRUSE, *REBELLION OR REVOLUTION?* 69 (2009); *see also id.* at 75–76.

¹⁶⁰ M Adams & Max Rameau, *Black Community Control over Police*, 2016 WIS. L. REV. 515, 521–24.

¹⁶¹ Charles Pinderhughes, *Toward a New Theory of Internal Colonialism*, 25 SOCIALISM & DEMOCRACY 235, 235–36 (2011).

¹⁶² *Id.* at 236 n.2.

¹⁶³ *Id.* at 236.

self-rule and to connect this vision with a critique of empire.”¹⁶⁴ Putting a different cast on a similar point, Professor Randall Kennedy remarked:

Within the diverse, always-changing spectrum of black American racial thought can be discerned two broad camps: the optimists and the pessimists — those who believe that blacks are (or can become) members of the American family and those who believe that blacks will always be outsiders; those who predict that we shall overcome and those who conclude that we shall not.¹⁶⁵

It is true that the legacy of the civil rights movement is largely framed as a more or less successful quest for inclusion. “Racial equality is understood as a specifically American project of integration, one that primarily consists of providing worthy elements within the black community with an equal opportunity to achieve professional and middle-class respectability.”¹⁶⁶ But that is not, and need not be, the only legacy of the civil rights movement.¹⁶⁷ Some Black leaders, such as W.E.B. Du Bois, sought to do more than “incorporat[e] black elites into the structures of American authority.”¹⁶⁸ Du Bois, in particular, “directly tied [his] project of freedom at home to confronting empire in all its manifestations.”¹⁶⁹

Given the broader aims of the civil rights movement, one could understand why many Black leaders, specifically those in the Black Nationalist movement, framed their objection to racial subordination in the language of colonialism,¹⁷⁰ not as mere analogy but as a way to describe their lived experiences. One could argue that Pinderhughes was tracking Dr. King, who argued in his “Where Do We Go from Here?” speech that “[t]he problem that we face is that the ghetto is a domestic colony that’s constantly drained without being replenished. And you are always telling us to lift ourselves by our own bootstraps, and yet we are being robbed every day.”¹⁷¹ Just a few years later, Kwame Ture and Charles Hamilton, the authors of *Black Power: The Politics of Liberation in America*, would expand on this theme. In the first chapter of their book, entitled *White Power: The Colonial Situation*, they argued that “there is no ‘American dilemma’ because black people in this country form a colony, and it is not in the interest of the colonial power to

¹⁶⁴ RANA, *supra* note 121, at 329.

¹⁶⁵ RANDALL KENNEDY, SAY IT LOUD!: ON RACE, LAW, HISTORY, AND CULTURE 3 (2021).

¹⁶⁶ RANA, *supra* note 121, at 331.

¹⁶⁷ See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512 (1976) (criticizing the integration approach in the context of school desegregation lawsuits).

¹⁶⁸ RANA, *supra* note 121, at 331.

¹⁶⁹ *Id.*

¹⁷⁰ See, e.g., Anthony D. Taibi, *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy*, 44 DUKE L.J. 928, 968–69 (1995).

¹⁷¹ Martin Luther King, Jr., *Where Do We Go from Here?*, Speech Before the 11th Annual Session of the Southern Christian Leadership Conference (Aug. 16, 1967), <https://kinginstitute.stanford.edu/where-do-we-go-here> [<https://perma.cc/27JN-RHWV>].

liberate them.”¹⁷² Though “legal citizens of the United States with, for the most part, the same *legal* rights as other citizens,” Ture and Hamilton continued, Black people “stand as colonial subjects in relation to the white society. Thus institutional racism has another name: colonialism.”¹⁷³ Ture and Hamilton used the term “colonialism” as both analogy and historical description.¹⁷⁴ In 1948, the Black American political activist Harry Haywood argued that Black people can and should form their own nation in the American South.¹⁷⁵ Haywood argued, in fact, that Black people were an “oppressed nation.”¹⁷⁶ It is not surprising that Black people in the United States have their own national anthem, *Lift Every Voice and Sing*.¹⁷⁷

IV. THE NEW CONCEPTION OF EQUALITY: ONE LAW TO RULE THEM ALL?

A fundamental question for American constitutionalism is how constitutional actors ought to address the reality and history of group differences. Specifically, some Americans are descendants of enslavers and benefit from the bondage of other humans; others benefited from slavery, directly or indirectly, but never held anyone in bondage or had relatives who did so; and others were removed from their lands, brought to distant shores, and held in bondage so that their labor could build an empire.¹⁷⁸ How should constitutional actors respond to the resultant liberatory claims made by these groups on the American constitutional and political system?

Further, some Americans were invaded, forcibly displaced from their lands, and exterminated in order to create a new nation; others lived in territories acquired through force or purchase; and once acquired, some of these territories were granted independence, some were admitted as states and therefore full members of the political community, and others remained in a liminal status.¹⁷⁹ Some Americans came to these shores voluntarily seeking and finding opportunity; others who wanted to come were denied the privilege of doing so because of their race, religion, or

¹⁷² TURE & HAMILTON, *supra* note 9, at 5.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 6 (noting that the analogy of colonialism “is not perfect,” but also stating that political, economic, and social conditions of Black people are best described by their “colonial status,” which “operates in [these] three areas”).

¹⁷⁵ HARRY HAYWOOD, *NEGRO LIBERATION* 140 (1948).

¹⁷⁶ *Id.*

¹⁷⁷ See IMANI PERRY, *MAY WE FOREVER STAND: A HISTORY OF THE BLACK NATIONAL ANTHEM* 24 (2018).

¹⁷⁸ Heather Redding, *Opinion, Southerners, Whites Benefited from Slavery, Whether They Owned Slaves or Not*, *THE HERALD-SUN* (Durham) (July 5, 2018, 12:27 PM), <https://www.heraldsun.com/opinion/article214216894.html> [<https://perma.cc/99WP-6XH6>].

¹⁷⁹ See Daniel Immerwahr, *How the US Has Hidden Its Empire*, *THE GUARDIAN* (Feb. 15, 2019, 1:00 PM), <https://www.theguardian.com/news/2019/feb/15/the-us-hidden-empire-overseas-territories-united-states-guam-puerto-rico-american-samoa> [<https://perma.cc/EM6J-TT86>].

country of origin.¹⁸⁰ Some Americans are citizens by birth as authorized by the Fourteenth Amendment of the Constitution of the United States; some are citizens by virtue of statutes passed by Congress;¹⁸¹ yet others, though fully subject to American law and even while holding U.S. passports, are “American nationals” — whatever that designation means — not U.S. citizens.¹⁸²

According to the Supreme Court’s new and recent race jurisprudence, there is a singular way to think about equality under the Constitution. There is one approach to racial equality, and it is a color-blind conception of equality. Two recent decisions, the Court’s 2013 voting rights decision in *Shelby County v. Holder*¹⁸³ and last Term’s decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* provide the relevant data points. We are calling this development the “superordinate conception of racial equality.” Though *American Colonialism* does not explicitly lay out the argument, the superordinate conception of racial equality is the looming threat that Professor Blackhawk perceives to the sovereignty of Native peoples. The superordinate conception, rooted in colorblindness, is a potential challenge to the equality projects of many subordinated groups. Before defending these points, we first explain the superordinate principle of racial equality.

A. *The Superordinate Conception of Racial Equality*

In *SFFA*, a set of plaintiffs calling themselves Students for Fair Admissions challenged the undergraduate affirmative action admissions programs administered by Harvard University and the University of North Carolina.¹⁸⁴ If *SFFA* stands for one proposition, it is that racial equality under the Constitution, specifically the Equal Protection Clause of the Fourteenth Amendment, means one and only one thing. In an opinion authored by Chief Justice Roberts and joined by the Court’s center-right Justices, the Court stated that the Equal Protection Clause encompasses “transcendent aims.”¹⁸⁵ The Court emphasized that the proponents of the Equal Protection Clause articulated “a ‘foundation[al] principle,’ — ‘the absolute equality of all citizens of the United States politically and civilly before their own laws.’”¹⁸⁶

¹⁸⁰ See, e.g., *Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP’T ST., OFF. HISTORIAN, <https://history.state.gov/milestones/1866-1898/chinese-immigration> [<https://perma.cc/Q9JQ-3YLD>].

¹⁸¹ E.g., 8 U.S.C. § 1402.

¹⁸² See Natasha Frost, *The Only U.S. Territory Without U.S. Birthright Citizenship*, N.Y. TIMES (Nov. 25, 2022), <https://www.nytimes.com/2022/11/25/world/australia/american-samoa-birthright-citizenship.html> [<https://perma.cc/PT3C-QEZ8>].

¹⁸³ 570 U.S. 529 (2013).

¹⁸⁴ *SFFA*, 143 S. Ct. 2141, 2156–57 (2023).

¹⁸⁵ *Id.* at 2159.

¹⁸⁶ *Id.* (alteration in original).

This equality command applies to all and without qualification. It brooks no exceptions. The Framers of the Fourteenth Amendment, Chief Justice Roberts stated, “were determined” to prevent “any distinctions of law based on race or color.”¹⁸⁷ The transcendental aims of the Equal Protection Clause mean that “any ‘law which operates upon one man [should] operate *equally* upon all.’”¹⁸⁸ If repetition is reflective of importance, it is clear in *SFFA* that the majority really believed the point to be fundamentally important. “[T]he Equal Protection Clause” is best understood, the Court noted elsewhere in the opinion, as applying “‘without regard to any differences of race, of color, or nationality’ — it is ‘universal in its application.’”¹⁸⁹ Quoting Justice Powell’s opinion in *Regents of the University of California v. Bakke*,¹⁹⁰ Chief Justice Roberts explained that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”¹⁹¹

No Chief Justice Roberts race opinion is complete without an aphorism intended to capture his fundamental point, and he does not disappoint in *SFFA*. “Eliminating racial discrimination means eliminating all of it.”¹⁹² Though Chief Justice Roberts does not explicitly define it, he seems to mean something close to colorblindness, a principle that applies almost without exception.

For ease of exposition, we use the phrase “superordinate conception of racial equality” to refer to the idea that the Fourteenth Amendment does not allow the government to make any distinctions among people based on race. Importantly, this command applies to all in the same way, regardless of whether they are a member of a group that has been historically oppressed, marginalized, exterminated, or subjugated in any way.

To the extent that there was any murkiness floating over the content of the superordinate racial equality principle, Justice Thomas’s concurring opinion aimed to remove any impurities and to do so from an originalist perspective. The Reconstruction Amendments, specifically the Fourteenth Amendment, Justice Thomas began, heralded a “second founding.”¹⁹³ It was a moment of reset or leveling where former outsiders — residents of the borderlands in the language of *American Colonialism* — were remade as insiders. With the new, second founding came a new and superordinate rule. Repairing to the citation *de rigueur* as evidence of the superordinate principle, Justice Thomas ironically reached for the authority of Justice Harlan’s dissent in *Plessy v. Ferguson*:

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (alteration in original).

¹⁸⁹ *Id.* at 2162 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

¹⁹⁰ 438 U.S. 265 (1978).

¹⁹¹ *SFFA*, 143 S. Ct. at 2150 (alteration in original) (quoting *Bakke*, 438 U.S. at 289–90).

¹⁹² *Id.*

¹⁹³ *Id.* at 2176.

“[O]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”¹⁹⁴ Those who promulgated the Thirteenth and Fourteenth Amendments, along with the civil rights laws that accompanied and sometimes preceded them, Justice Thomas explained, “repeatedly affirmed their view of equal citizenship and the racial equality that flows from it.”¹⁹⁵ They were motivated by a “principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.”¹⁹⁶ The story, as members of the majority tell it, is that we have this superordinate commitment, a principle of colorblindness or something close to it, that applies to all under every circumstance. Recall here the statement from Chief Justice Roberts that the equality principle is “universal in [its] application.”¹⁹⁷

The superordinate conception of racial discrimination threatens to be totalizing. It purports to govern those operating in the public sphere as well as those operating in the private sphere. The Court refused to reconsider its prior assertions that there is no doctrinal distinction between the affirmative action programs of private institutions, such as Harvard, and those of public institutions, such as the University of North Carolina. The *SFFA* majority did not even entertain the thought. In a footnote, the majority cited and quoted from its 2003 affirmative action case, *Gratz v. Bollinger*. “We have explained,” the Court said in *Gratz*, also in a footnote, “that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”¹⁹⁸

The citation in *Gratz* came in the ultimate paragraph of the majority’s decision, stating that the University of Michigan’s affirmative action program violated the Equal Protection Clause and by extension Title VI.¹⁹⁹ The precedents cited in *Gratz* to support the proposition all point to Justice Powell’s opinion in *Bakke*, where Justice Powell wrote for himself alone,²⁰⁰ as the legal authority for the proposition.²⁰¹

But the *SFFA* majority ignored Justice Powell’s firm conclusion that Congress did not articulate a colorblind conception of equality when it

¹⁹⁴ *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

¹⁹⁵ *Id.* at 2177.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2162 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

¹⁹⁸ *Id.* at 2188 n.4 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003)).

¹⁹⁹ *Gratz*, 539 U.S. at 276 n.23.

²⁰⁰ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (“In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”).

²⁰¹ See *Gratz*, 539 U.S. at 276 n.23 (citing *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Alexander v. Choate*, 469 U.S. 287, 293 (1985)); *Sandoval*, 532 U.S. at 280–81 (discussing *Bakke*’s determination of the overlap between Title VI and the Equal Protection Clause); *Fordice*, 505 U.S. at 732 n.7 (same); *Choate*, 469 U.S. at 294 n.11 (same).

promulgated Title VI.²⁰² “Examination of the voluminous legislative history of Title VI,” Justice Powell wrote, “reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution.”²⁰³ Congress, Justice Powell explained, was targeting entities that receive federal funds but also practiced racial segregation.²⁰⁴ “Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that [Title VI] enacted a purely color-blind scheme,”²⁰⁵ those statements “generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs.”²⁰⁶ Title VI targeted racial segregation; that was Congress’s preoccupation. “There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens”²⁰⁷

It is true that Justice Powell thought that Title VI employed the conception of discrimination employed by the Fourteenth Amendment.²⁰⁸ But it is also true that Justice Powell rejected the colorblind reading of both Title VI and the Equal Protection Clause.²⁰⁹ If the *SFFA* majority was going to adopt a colorblind reading of Title VI, it needed to find a different authority to support that reading.

It is remarkable how easily the Court swept aside the public/private distinction that has often been a core component of both liberalism and constitutionalism. If it was ever a principle, it is now much less so; it is more a contextual consideration. And given the expressive force that the Court’s decisions sometimes have in our society, it will not be surprising if the superordinate conception extends beyond the domains under its legal mandate but also to the private domains governed only by custom and sociability.

B. Brute Force Maneuver

The superordinate conception of racial discrimination is based upon the descriptive claim that the Court has always understood the Constitution to forbid differential treatment based upon race, which the Court in *SFFA* interpreted to mean colorblindness or as close to colorblindness as possible, and without exception.²¹⁰ But there is a fundamental problem with the descriptive claim of the superordinate concept of racial equality: the fact that there is no evidence to support it. The

²⁰² See *Bakke*, 438 U.S. at 284–85.

²⁰³ *Id.* at 284.

²⁰⁴ See *id.* at 285.

²⁰⁵ *Id.* at 284.

²⁰⁶ *Id.* at 285.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 287.

²⁰⁹ *Id.* at 284–85.

²¹⁰ See *SFFA*, 143 S. Ct. 2141, 2175 (2023).

superordinate conception is not how we have always, or ever, understood racial equality.

One can begin to perceive the problem by examining the citations that Chief Justice Roberts and Justice Thomas used as authority for evidence of the superordinate conception. Once again, Justice Powell's opinion in *Bakke* did a lot of work, though it was selective work. When it came to the diversity rationale, Chief Justice Roberts critiqued that part of Justice Powell's opinion as deeply fractured, in an attempt to weaken the diversity rationale.²¹¹ Justice Thomas's citation is even less compelling. His epistemic authority was a dissenting opinion in one of the most iconic jurisprudential cases of the anticanon,²¹² *Plessy v. Ferguson*,²¹³ the case that attempted to impose a competing superordinate idea of equality: separate but equal.²¹⁴ Neither Chief Justice Roberts nor Justice Thomas offered much more than past concurrences and dissents.

It has now been more than 150 years since the Fourteenth Amendment was ratified.²¹⁵ One would think that there would be a clear decision that members of the *SFFA* majority could cite as evidence for the superordinate racial equality principle. For Justices claiming to follow precedent and implement a vision of equality as it was originally conceived by the framers of the Reconstruction Amendments, none of the Justices in the majority can point, and none pointed to, a holding from one of the Court's past decisions, or a recognizable source of legal authority, that articulated the superordinate conception.

The question is why the Court was unable to do so. Both Chief Justice Roberts and Justice Thomas offered an implicit explanation, which is that the Supreme Court failed to enforce the Equal Protection Clause's command of equality for too long, notwithstanding the intention of the framers of the Reconstruction Amendments. "Despite our early recognition of the broad sweep of the Equal Protection Clause," Chief Justice Roberts wrote, "this Court — alongside the country — quickly failed to live up to the Clause's core commitments."²¹⁶ Though not fully owning up to the Court's responsibility, the majority nevertheless acknowledged that, starting with *Plessy*, the "Court played its own role in that ignoble history" and contributed to the "regrettable norm" of nearly a hundred years of "state-mandated segregation . . . in many parts of the Nation."²¹⁷

²¹¹ See *id.* at 2163–64.

²¹² See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412–417 (2011) (analyzing *Plessy*'s status as anticanon).

²¹³ *SFFA*, 143 S. Ct. at 2176 (Thomas, J., concurring) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)).

²¹⁴ *Plessy*, 163 U.S. at 551.

²¹⁵ U.S. CONST. amend. XIV.

²¹⁶ *SFFA*, 143 S. Ct. at 2159.

²¹⁷ *Id.*

Justice Thomas also noted the Court's failure to enforce the Reconstruction Amendments.²¹⁸ However, unlike Chief Justice Roberts, Justice Thomas assigned more responsibility and blame to the Court for "forsaking the principle [of colorblindness] for decades," for "offering a judicial imprimatur to segregation," and for "ushering in the Jim Crow era."²¹⁹ After the Civil War, Justice Thomas remarked, the country amended the Constitution to establish the principle that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."²²⁰ Yet the "Court's commitment to that equality principle has ebbed and flowed over time."²²¹

Chief Justice Roberts and Justice Thomas suggested that *Plessy*, which they viewed as inconsistent with the underlying purposes of the Reconstruction Amendments, was a regrettable detour.²²² But the Court course corrected, Justice Thomas argued, when it decided *Brown v. Board of Education*.²²³ For Chief Justice Roberts, *Brown* represented the Court's newly found commitment to fully effectuating the "aspirations of the framers of the Equal Protection Clause."²²⁴

But of course, *Brown* does not solve the Court's problem. *Brown* did not articulate a theory of colorblindness.²²⁵ Moreover and more poignantly, since the Court's decision in *Bakke*, the Court's racial equality jurisprudence has accommodated race-conscious admissions decisions by universities. The Court's affirmative action decisions in the context of university admissions since *Bakke* — *Grutter*, *Gratz*, *Fisher v. University of Texas*²²⁶ (*Fisher I*), and *Fisher v. University of Texas*²²⁷ (*Fisher II*) — have simply reaffirmed and refined its collective decision in *Bakke*.

SFFA is a radical departure. It is a pretense. It is not based upon the traditional modalities for deriving constitutional meaning. It is not textualist. It is not originalist. It does not rely on precedent. It is not historical. It is not rooted in tradition. None of those options work. It is simply a brute force maneuver.

C. *The Territories as Limits to the Superordinate Conception*

Though the statutory basis for the plaintiff's lawsuit in *SFFA* was Title VI — which applies to educational institutions that receive federal

²¹⁸ *Id.* at 2180 (Thomas, J., concurring).

²¹⁹ *Id.* at 2176 (emphasis omitted).

²²⁰ *Id.* (alteration in original) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

²²¹ *Id.*

²²² *See id.* at 2159–60 (majority opinion); *id.* at 2184–85 (Thomas, J., concurring).

²²³ *Id.* at 2176.

²²⁴ *Id.* at 2159 (majority opinion).

²²⁵ David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100 (1986) ("The prohibition against discrimination established by *Brown* is not rooted in colorblindness at all.").

²²⁶ 570 U.S. 297 (2013).

²²⁷ 136 S. Ct. 2198 (2016).

funds²²⁸ — we do not believe that the Court’s equality rule will be cabined to educational institutions and to Title VI. Indeed, in the wake of *SFFA*, conservative activists successfully forced private employers bound by Title VII, not Title VI,²²⁹ to reassess their affirmative action and diversity policies by threatening to sue them if they refused to do so.²³⁰ The legal threat was sufficiently credible that a number of private institutions abandoned their race-based policies.²³¹ The totalizing threat of the superordinate conception of racial discrimination is real.

There is no reason to believe that the colorblind — or as close to colorblind as possible — approach of *SFFA* will not migrate from the educational context to every other domain, including employment, voting, and housing, though with some important exceptions, such as policing. The superordinate conception may eventually be the one rule that governs us all. Importantly, as we discuss below, it will not migrate to the Territories. The end point of this approach is, of course, the instantiation of race-blind decisionmaking in all walks of life — public as well as private. We are already seeing the end of race-conscious considerations in the context of elementary, secondary, and higher education admissions.²³² We will soon see it in the context of employment. The disparate impact provisions of the Fair Housing Act would no longer be enforceable.

In this respect, Native peoples are similarly situated to Black people. Like Black people, they too face a threat. In addition to the Court’s interpretation of Title VI and the Equal Protection Clause in *SFFA*, one need only look at the Court’s repeated narrowing of the Voting Rights Act²³³ (VRA) to see what is around the corner for Native peoples. This is *Shelby County* and the Court’s ahistorical and sophist evisceration of the Voting Rights Act.²³⁴ This is the recent case of *Brnovich v.*

²²⁸ *SFFA*, 143 S. Ct. at 2208 (Gorsuch, J., concurring).

²²⁹ Khorri Atkinson, *Affirmative Action Ruling Sets Up Clash over Workplace Diversity*, BLOOMBERG L. (June 30, 2023, 5:45 AM), <https://news.bloomberglaw.com/daily-labor-report/affirmative-action-ruling-sets-up-clash-over-workplace-diversity> [<https://perma.cc/DMA7-D728>].

²³⁰ See Noam Scheiber, *Affirmative Action Ruling May Upend Hiring Policies, Too*, N.Y. TIMES (June 30, 2023), <https://www.nytimes.com/2023/06/30/business/economy/hiring-affirmative-action.html> [<https://perma.cc/J8UF-QDYM>] (describing legal advice given to private employers in the aftermath of *SFFA*); Sheryll Cashin, Opinion, *First Conservatives Came for Affirmative Action. Now They’re Gunning for DEI Programs.*, POLITICO (Aug. 10, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/08/10/affirmative-action-gop-culture-war-00110558> [<https://perma.cc/Z72T-Y49Q>].

²³¹ See Shaun Harper, *Why Business Leaders Are Pulling the Plug on DEI*, FORBES (July 18, 2023, 12:31 AM), <https://www.forbes.com/sites/shaunharper/2023/07/18/why-corporate-execs-are-pulling-the-plug-on-dei> [<https://perma.cc/X2GB-4JVV>].

²³² See Suzanne Eckes, *Diversifying K–12 Public Schools: A Federal Court Finds Admission Plan Unconstitutional*, 70 UCLA L. REV. DISCOURSE 302, 304–05 (2023).

²³³ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702).

²³⁴ See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 485–86 (2014).

Democratic National Committee,²³⁵ which drastically cabined prior understandings of Section 2 of the VRA.²³⁶ No one will be surprised if the Court strikes down Section 2 of the VRA under the superordinate grounds.

Professor Blackhawk is right to worry that if the Court is serious about the superordinate conception, hard-won statutory tribal rights such as the Indian Child Welfare Act²³⁷ (ICWA) will be in jeopardy. ICWA, which provides a presumption in favor of placing Indian children with Indian families in the context of adoption and foster care decisions,²³⁸ would certainly be a ghost statute, squaring up to the issue that the Court declined to address in *Haaland v. Brackeen*.²³⁹ Justice Kavanaugh's concurrence in *Brackeen* put the point succinctly if forcefully. "In my view," Justice Kavanaugh intoned gravely, "the equal protection issue is serious."²⁴⁰ Alluding to the superordinate conception, Justice Kavanaugh expressed his concern that a child may be denied an appropriate placement in a temporary foster home or permanent adoption home because of the child's race.²⁴¹ Similarly, it seemed to him inconsistent with the superordinate conception that an otherwise appropriate prospective foster or adoptive parent would be denied the opportunity to foster or adopt a child because of the parent's race.²⁴² "Those scenarios raise significant questions under bedrock equal protection principles and this Court's precedents."²⁴³ Importantly, Justice Kavanaugh seemed unaware of, or uninterested by, the fact that his musings about equal protection law were in tension with *Morton v. Mancari*,²⁴⁴ a long-standing precedent. The Court's doctrine has long deemed "Native American" a political and not a racial category.²⁴⁵ But just as the Court easily swept away its prior precedents in *SFFA*, there is nothing stopping it from doing the same to *Mancari*. Such is the force of the superordinate conception of racial equality.

Territorial residents are not similarly situated to Native and Black peoples.²⁴⁶ One would have to ask whether this Court would prevent Congress from discriminating against residents of the Territories in the

²³⁵ 141 S. Ct. 2321 (2021).

²³⁶ *Id.* at 2372–73 (Kagan, J., dissenting).

²³⁷ Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963).

²³⁸ 25 U.S.C. § 1915(a)–(b).

²³⁹ 143 S. Ct. 1609 (2023).

²⁴⁰ *Id.* at 1661 (Kavanaugh, J., concurring).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ 417 U.S. 535 (1974).

²⁴⁵ See Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 963 (2011).

²⁴⁶ We are grateful to Professor Christina Ponsa-Kraus for helping us to see this point and for the language to articulate it.

provision of federal benefits.²⁴⁷ Similarly, one would have to ask whether this Court would reverse its precedents and conclude that the full Constitution, *tout court*, applies to the residents of the Territories. Moreover, how would the Court address the problem that Territorial residents do not have a right to vote in federal elections? Would the Court simply reaffirm and once again ratify the reality that Territorial residents are at best second-class citizens?

Fundamentally, the Territories present a bulwark against a totalizing vision of the U.S. Constitution. So while Native scholars and activists rightly worry that Native nations are threatened by a totalizing vision that would completely assimilate them, the Territories do not share that worry. Understanding that the Territories are not similarly situated to Native nations helps us to see that as long as there are Territories, the Court will always find ways to stop short of a truly totalizing constitutional vision.

V. WHERE DO WE GO FROM HERE?

America's history of colonialism and racial subordination poses a fundamental problem for contemporary constitutionalism. Is a singular conception of equality acceptable, or even workable, given our different histories of subordination? Put a different way, how should a nation of racial minorities, or a majority-minority country, think about the problem of racial equality? American constitutionalism has not yet confronted this question nor has it thought about the difficulties that will come with trying to impose a singular conception of equality to govern a diverse polity whose members believe themselves to be agentic and self-governing. Until this past Term's decision in *SFFA*, the American constitutional enterprise had not seriously attempted to impose a totalizing conception of racial equality upon us all.

Given *SFFA*, the question is whether the attempt to announce one rule of racial discrimination that governs over the whole polity is likely to be successful and embraced. This last Part takes on that crucial yet difficult question. How should the Constitution address the problem of difference, the history of subjugation,²⁴⁸ the growing multicultural character of the United States,²⁴⁹ and the different liberatory projects that different groups wish to pursue? We discuss three options.

²⁴⁷ See Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1646 (2021) (explaining "how the American territories inhabit a different and in many ways dilapidated corner of the American welfare state").

²⁴⁸ See Román & Simmons, *supra* note 125, at 470–74.

²⁴⁹ See William H. Frey, *The Nation Is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS INST. (July 1, 2020), <https://www.brookings.edu/articles/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted> [https://perma.cc/B3ZZ-6AVU].

A. Colorblindness All the Way Down

One option, following from *SFFA*, is to ignore group differences, historical grievances, and differential group positions. Instead of accounting for structural inequality, law and society could impose a colorblindness rule that would guide both public and private action. This idea, following in the footsteps of the Court's decision in *Shelby County*,²⁵⁰ essentially pretends that one is writing on a blank slate, re-starts, and presumes that we live in a society where everyone is on an equal footing. Recall here the late Justice Antonin Scalia's concurrence in *Adarand Constructors, Inc. v. Peña*.²⁵¹ In that case, the plaintiff, Adarand Constructors, Inc., challenged a federal program that used race as a proxy to identify socially and economically disadvantaged individuals.²⁵² The federal government gave general contractors who were awarded government projects a financial incentive to use as subcontractors individuals from "socially and economically disadvantaged" backgrounds.²⁵³ The law required general contractors to presume that a subcontractor was socially or economically disadvantaged if that contractor was a member of a racial minority group — Black, Latine, Asian, or Native American.²⁵⁴ Adarand Constructors successfully argued that the federal program violated the equal protection component of the Fifth Amendment's Due Process Clause.²⁵⁵

In a very brief opinion concurring in the judgment, Justice Scalia offered a conception of repair that anticipated the direction of the current Court. Justice Scalia conceded that "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole."²⁵⁶ However, when it comes to group repair — that is, providing a remedy for historical and structural wrongs — he argued that "under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual."²⁵⁷ Purporting to make a descriptive claim, Justice Scalia thundered: "In the eyes of government, we are just one race here. It is American."²⁵⁸

²⁵⁰ 570 U.S. 529, 556 (2013) ("There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula.").

²⁵¹ 515 U.S. 200, 239 (1995).

²⁵² *Id.* at 204–07.

²⁵³ *Id.* at 204.

²⁵⁴ *Id.* at 205–06.

²⁵⁵ *Id.* at 204.

²⁵⁶ *Id.* at 239 (Scalia, J., concurring in part).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

Justice Scalia's statement has received its due criticism, particularly by race scholars.²⁵⁹ That is not our aim here. We must point out, however, that this account elevates U.S. citizenship above all other considerations and erases differences irrespective of geography. If so, how can we possibly treat residents of Puerto Rico and the Territories of the United States as second-class citizens, and in the case of American Samoa, not even citizens at all? Ironically, to the extent that constitutional law can confront the problem of the differential status of the Territories, it might be the unitary approach that has the best chance of doing so. This also reflects the fact that the line one might draw between insiders and outsiders is contingent and tenuous.

The Court's decision in *SFFA* intimates that the Court is in the process of articulating a conception of racial equality that will no longer make concessions to the past.²⁶⁰ We are skeptical that this approach will work for a multicultural polity. In our view, the critical challenge for twenty-first-century constitutionalism is whether a superordinate conception of constitutional equality is capable of capturing the allegiance and binding together of a People — the capital "P" people of the preamble. This is not the monocultural People of the eighteenth century but the multicultural and multiracial People of the twenty-first — a people with separate histories of racism, subordination, and colonialism; distinct origins; and often mutually incompatible constitutional aims. Notwithstanding the American myth of rugged individualism and pulling oneself up by one's bootstraps, this history of group oppression continues to structure opportunity and life chances; group identity continues to matter.²⁶¹

The superordinate approach threatens to completely reconfigure the American legal, political, and cultural landscape in a manner that we have not yet fully imagined. That's a fundamental reality that constitutional theory cannot ignore. We are skeptical that an agentic people would accede to a legal framework that contributes to their subordination.

²⁵⁹ See, e.g., Mario L. Barnes et al., Essay, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 997–1002 (2010); Devon W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLA L. REV. 2, 39–40 (2022); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1982–83 (2000); Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1355 (2008); Kenneth B. Nunn, *Illegal Aliens: Extraterrestrials and White Fear*, 48 FLA. L. REV. 397, 414 n.61 (1996).

²⁶⁰ See *SFFA*, 143 S. Ct. 2141, 2160 (2023) ("The time for making distinctions based on race had passed. . . . So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated *all* manner of race-based state action." (emphasis added)).

²⁶¹ See, e.g., AVIDIT ACHARYA, MATTHEW BLACKWELL, & MAYA SEN, *DEEP ROOTS: HOW SLAVERY STILL SHAPES SOUTHERN POLITICS* 22 (2018).

B. Native Peoples Are Special

A second option would build on Justice Gorsuch's concurring opinion in *Brackeen*.²⁶² Notably, though Justices Sotomayor and Jackson joined Parts I and III of Justice Gorsuch's opinion, they did not agree to join Part II, the heart of his approach.²⁶³ In that Part, Justice Gorsuch argued that the Constitution envisioned a relationship among the Indian Tribes, the States, and the federal government by which "Indian Tribes remain independent sovereigns with the exclusive power to manage their internal matters."²⁶⁴ Sovereignty in this context means that the "Tribes enjoy a power to rule themselves that no other governmental body — state or federal — may usurp."²⁶⁵ Pointedly, "States have virtually no role to play when it comes to Indian affairs."²⁶⁶ With regard to the federal government, Justice Gorsuch argued that the plenary power construct is "atextual and ahistorical."²⁶⁷ The Court's plenary power doctrine "baked in the prejudices of the day" and "rested on nothing more than judicial claims about putative constitutional purposes that aligned with contemporary policy preferences."²⁶⁸

Quoting approvingly from language in *United States v. Kagama*,²⁶⁹ though not from its result and holding, Justice Gorsuch stated that even when the Court reached the wrong result, it still recognized "that Tribes are 'a separate people, with the power of regulating their internal and social relations.'"²⁷⁰ Tribes have the right to "define their own membership" and "handle their own family-law matters," including resolving "domestic disputes."²⁷¹ For Justice Gorsuch, ICWA is constitutional, notwithstanding its preference, because Congress is facilitating the right of Tribes and "Indian parents to raise their families as they please . . . and the right of Indian communities to resist fading into the twilight of history. All of that is in keeping with the Constitution's original design."²⁷²

It is instructive that no other Justice joined Justice Gorsuch's originalist analysis of the status accorded to Tribes under the Constitution and the limitations that the Constitution imposes upon the States and the federal government. If Justice Gorsuch's approach were to persuade a majority of his colleagues, it might resolve the pressing question of the liberatory aims of Native peoples, but it would also raise a series of

²⁶² *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J., concurring).

²⁶³ *Id.*

²⁶⁴ *Id.* at 1647–60.

²⁶⁵ *Id.* at 1648.

²⁶⁶ *Id.* at 1647.

²⁶⁷ *Id.* at 1658.

²⁶⁸ *Id.*

²⁶⁹ 118 U.S. 375 (1886).

²⁷⁰ *Brackeen*, 143 S. Ct. at 1659 (Gorsuch, J., concurring) (quoting *Kagama*, 118 U.S. at 381–82).

²⁷¹ *Id.*

²⁷² *Id.* at 1661.

fundamental questions that the Court may not be prepared to address. We are not convinced that the Court could restructure its doctrine to try to reach the “correct” originalist view while ignoring all others.

How would an originalist resolve the question of the Territories? The originalist position must be that the Territory Clause²⁷³ does not authorize the federal government to acquire new territories and hold them in perpetuity. The Constitution does not authorize the United States to be a colonial empire. Additionally, are not Black people special as well under the Reconstruction Amendments²⁷⁴? How does Justice Gorsuch reconcile his originalist approach in *Brackeen*²⁷⁵ with the Court’s nonoriginalist approach in *SFFA*,²⁷⁶ which he joined?²⁷⁷ As between the originalist analyses of Justices Thomas²⁷⁸ and Jackson,²⁷⁹ the professional historians are on the side of Justice Jackson, not Justice Thomas.²⁸⁰ The Second Founding,²⁸¹ the Reconstruction Amendments, seems to have accorded pride of place to the victims of America’s original sin, Black Americans — and if one wants to be more precise, Black Americans who are descendants of enslaved Americans. But this is obviously far from where the Court’s jurisprudence is today. Would we see a wholesale rethinking of the Court’s approach to historical wrongs? We are deeply skeptical.

C. Accommodation

A third option looks for a way to accommodate differences — and in the case of the Territories, territorial cultural practices — under standard constitutional doctrine. One version of this approach repurposes the *Insular Cases* as a way to accommodate the different cultures and traditions of the Territories.²⁸² Professor Christina D. Ponsa-Kraus rejects this option. She argues that repurposivism and seeing the Territories as constitutionally exceptional has produced “a jurisprudence riddled with confusion and error that ever more deeply entrenches a

²⁷³ See U.S. CONST. art. IV, § 3, cl. 2.

²⁷⁴ See U.S. CONST. amends. XIII–XV.

²⁷⁵ See *Brackeen*, 143 S. Ct. at 1641–61 (Gorsuch, J., concurring).

²⁷⁶ See, e.g., CASS SUNSTEIN, *RADICALS IN ROBES* 138 (2005) (concluding that an originalist analysis would “strongly suggest that affirmative action policies were originally regarded as legitimate”).

²⁷⁷ See *SFFA*, 143 S. Ct. 2141, 2141–53 (2023).

²⁷⁸ See *id.* at 2176 (Thomas, J., concurring).

²⁷⁹ See *id.* at 2263 (Jackson, J., dissenting).

²⁸⁰ See generally Brief of Professors of History and Law as Amici Curiae in Support of Respondents, *SFFA*, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707).

²⁸¹ For a discussion of the Second Founding and its impacts on constitutional interpretation in the modern era, see generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

²⁸² See, e.g., *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616, 1632–33 (2017) (proposing a model that allows citizens of the Territories to enjoy at least some of the benefits of federalism and sovereignty); Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea — And Constitutional*, 27 U. HAW. L. REV. 331, 348 (2005).

doctrine that gives constitutional sanction to permanent colonialism.”²⁸³ Instead, she offers a case from the High Court of American Samoa, *Craddick v. Territorial Registrar of American Samoa*,²⁸⁴ to show that courts can use traditional constitutional tools — in this case, a strict scrutiny analysis — to “give[] voice to territorial culture.”²⁸⁵

The *Craddick* court examined what can only be described as a statutory racial restriction by American Samoa in the alienation of land.²⁸⁶ Specifically, the statute banned the alienation of “any lands except freehold lands to any person who has less than one half native blood, and if a person has any nonnative blood whatever.”²⁸⁷ The statute further prohibited the alienation of “any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan, lived in American Samoa for more than five years[,] and has officially declared his intention of making American Samoa his home for life.”²⁸⁸ This is a clear racial classification, which equal protection doctrine traditionally subjects to strict scrutiny review.²⁸⁹ The *Craddick* court could have shied away from the strict scrutiny test — and its “strict in theory, fatal in fact” reputation — and repurposed the *Insular Cases* to carve an extraconstitutional space for American Samoa to protect its land. Instead, it embraced the strict scrutiny analysis and upheld the territorial restrictions.²⁹⁰ The court found that American Samoa had a compelling state interest in protecting land ownership for American Samoans and that the restrictions were narrowly tailored to achieve that compelling end.²⁹¹

The *Craddick* case shows that traditional constitutional norms offer a way to accommodate territorial cultural practices. On this point, we agree with Ponsa-Kraus that we should turn away from the *Insular Cases*, full stop.²⁹² They must be overruled once and for all. We are less optimistic about the promise of traditional constitutional tools to accommodate the Territories. The totalizing approach is uncompromising. For this reason, we think that the Court’s old voting rights jurisprudence offers a better model. This is the doctrine that arose in the wake of the Voting Rights Act of 1965.

The VRA was a forceful approach to an old and persistent problem. In the face of great reticence by some states to enforce the Fifteenth

²⁸³ Ponsa-Kraus, *supra* note 125, at 2510.

²⁸⁴ 1 Am. Samoa 2d 10 (1980).

²⁸⁵ Ponsa-Kraus, *supra* note 125, at 2510.

²⁸⁶ *Craddick*, 1 Am. Samoa 2d at 11–12.

²⁸⁷ *Id.* (quoting AM. SAMOA CODE ANN. § 37.0204(b) (2018)).

²⁸⁸ *Id.*

²⁸⁹ See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (2007).

²⁹⁰ *Craddick*, 1 Am. Samoa 2d at 14.

²⁹¹ *Id.*

²⁹² See Ponsa-Kraus, *supra* note 125, at 2510.

Amendment, Congress forced their hand.²⁹³ Essentially, any law enacted by these states was deemed unconstitutional until they submitted it to the federal government for approval.²⁹⁴ This approach stretched constitutional norms to their limits. Rather than enforce its particular vision of race and state power, the Court chose to police state actors at the margins.²⁹⁵ This was a deferential posture. This was *South Carolina v. Katzenbach*,²⁹⁶ which deferred to Congress and its use of the Reconstruction Power.²⁹⁷ This was *Shaw v. Reno*,²⁹⁸ whose “expressive harms” test cabined only the most egregious uses of race in redistricting.²⁹⁹ This was *Miller v. Johnson*,³⁰⁰ which struck down only those districting plans where race predominated.³⁰¹ This was a time when the political branches were in charge; the Court only intervened at the margins.³⁰²

The Court should follow a similar posture for the Territories. It is true that the people of the Territories are, in many ways, the epitome of discrete and insular minorities,³⁰³ and the Court should recognize and respond to that fact. But it won’t. Our point is, instead, that the Court should police the boundaries of territorial laws at the margins, in broad strokes. By way of an example, we think of *Rice v. Cayetano*,³⁰⁴ a case out of Hawai‘i. *Cayetano* considered a statutory qualification that limited voters in a race for trustees for the Office of Hawaiian Affairs to persons whose ancestry was defined by the statute as “Hawaiian” or

²⁹³ Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 HOW. L.J. 809, 843–44 (2019).

²⁹⁴ 52 U.S.C. § 10304; see also *About Section 5 of the Voting Rights Act*, U.S. DEP’T JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> [https://perma.cc/SGQ9-VJ55] (describing the process of preclearance under Section 5 both before and after *Shelby County v. Holder*, 570 U.S. 529 (2013)).

²⁹⁵ For more on the Court’s decreasing deference to congressional action, see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 112–14 (2001).

²⁹⁶ 383 U.S. 301 (1966).

²⁹⁷ *Id.* at 326; see Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1811 & n.39 (2010).

²⁹⁸ 509 U.S. 630 (1993).

²⁹⁹ *Id.* at 658; see also Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 484–85 (1993).

³⁰⁰ 515 U.S. 900 (1995).

³⁰¹ *Id.* at 924.

³⁰² See Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212> [https://perma.cc/L8M5-J7UL] (exploring the growing power and influence of the Court in past decades against historical precedent).

³⁰³ See 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, 833–34 (2010) (exploring Puerto Rico’s unique history as a Territory and how its citizens should be considered discrete and insular minorities for the purposes of equal protection analyses).

³⁰⁴ 528 U.S. 495 (2000).

“native Hawaiian.”³⁰⁵ The Court struck the limitation as a race-based voting qualification.³⁰⁶ Instead, and similar to Justice Gorsuch’s approach in *Brackeen*,³⁰⁷ the Court should have recognized the special history, culture, and traditions of Hawai‘i and deferred to the state. The Court should approach legal questions from the Territories similarly.

CONCLUSION

American Colonialism is a tremendous achievement. Most importantly, it continues a fundamental conversation about the future of our nation. The contemporary challenge for constitutionalism is whether one constitutional approach can address the various needs and demands of this diverse and multicultural people, some of whom consider themselves separate people and even separate nations. The group of people that we often refer to as “Americans” are differentially advantaged or disadvantaged because of their racial or ethnic group status and histories. Additionally, because these differentiated people have different histories of group subordination, they may have different, or competing, or inconsistent, liberatory aims. They may want different things from the constitutional order. While at the same time, current distribution of opportunities as determined by law, economics, politics, custom, culture, and the like will further advantage some and further disadvantage others (or will reduce both advantage and disadvantage) and will make some liberatory projects more possible than others.

Additionally, but at least as importantly, these Americans — specifically those who were the subject of systematic discrimination and oppression — are as agentic as they have ever been. They are no longer the people to whom things are done, but they are among the people who do the doing (or at least a people who must be consulted before any doing gets done because their views matter). To think about this differently, for almost all of American history, American elites in the metropole — to borrow the language from *American Colonialism*, though not its classification — could simply impose ideas about constitutional equality on those on the borderlands. Constitutional elites could do so with the expectation that they need not take into account the views of those in the borderlands, notwithstanding how vociferously the residents of the borderlands objected to their subjugation. But now, into the third decade of the twenty-first century, residents of the borderlands are no longer the mendicants of the constitutional order. Indeed, they flit between the metropole and the borderlands almost seamlessly. They have more of a say on the construction of the constitutional system and how it impacts them than ever before. Constitutional elites cannot

³⁰⁵ *Id.* at 498–99.

³⁰⁶ *Id.* at 524.

³⁰⁷ See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J., concurring).

simply assume that they will be able to impose their understanding of constitutional equality upon all without having to account for a reaction from those who will be most impacted by the rules imposed upon them.