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## American Colonialism and Constitutional Redemption

Seth Davis

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# American Colonialism and Constitutional Redemption

Seth Davis\*

*Americans are debating what it would take to redeem the Constitution's promise of a "more Perfect Union" in a time of deep and stark disagreements about the nation's future. Despite the partisan rancor, most Americans share a faith in the Constitution's redemptive potential. Constitutional faith is the civic religion that shapes our constitutional law, theory, and politics and binds Americans as one nation, indivisible.*

*This Essay is about something our faith forgets: The promise of a "more Perfect Union" of "We the People" is not redemptive for colonized peoples who did not consent to the Constitution but are subject to American plenary power. This Essay makes three contributions to constitutional law and theory by focusing upon the United States' colonial relationships with American Indians and Alaska Natives. First, this Essay makes the case that American colonialism poses a fundamental challenge to our constitutional faith. It traces the convergence of American constitutionalism and American colonialism in the conception of government power as a public trust, which is the foundation of federal plenary power over*

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*American Indians and Alaska Natives. Second, this Essay argues that the trust conception of constitutional law cannot solve the problem of redeeming American colonialism. Instead, the constitutional trust has reinforced the very power relations and ideology that Indian Nations challenge when they claim a right to national self-determination. Third, this Essay offers a viable alternative for redressing the wrongs of American colonialism by revisiting the problem of redemption from a relational perspective, one that does not focus on the trust that “We the People” place in the Constitution. In comparing trust with contract to develop this relational perspective, this Essay contributes to the emerging literature that reimagines constitutional law by reference to rules and norms from the common law.*

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## INTRODUCTION

What would it take to redeem the U.S. Constitution? To pose the question is to suggest the Constitution needs redeeming. A heresy? Perhaps, but one that’s increasingly embraced on both the left and the right. On the left, for instance, prominent legal scholars and grassroots organizations have called for a constitutional amendment to reform the United States’ broken campaign finance regulations, and thus, it’s hoped, to begin to repair a dysfunctional

political system.<sup>1</sup> On the right, conservative constitutionalists and their representatives in Washington, D.C., have called for amendments to curtail federal power and thus to “remember the sovereignty of the states.”<sup>2</sup>

This Essay is about what has been forgotten in the debate about constitutional redemption. Among several others, the American constitutional tradition holds this truth to be self-evident: America’s colonial history is not important to American constitutionalism. At some level, of course, many Americans are aware that we are a colonial nation, one founded on the taking of the lands of American Indians, Alaska Natives, and Native Hawaiians and refusals to recognize Indigenous sovereignty. But Americans tend to think of colonialism as an event in our distant past, regrettable, even tragic, but not a wrong that matters for how we measure the U.S. Constitution today. Though our courts continue to decide cases concerning colonial rule,<sup>3</sup> the law of American colonialism is not part of the constitutional canon taught to first-year law students or discussed by constitutional scholars. And the call for constitutional redemption from both left and right has not remembered American colonialism.<sup>4</sup>

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1. See, e.g., Lawrence Lessig, *The Only Realistic Way to Fix Campaign Finance*, N.Y. TIMES (July 21, 2015), <http://www.nytimes.com/2015/07/21/opinion/the-only-realistic-way-to-fix-campaign-finance.html> [<https://perma.cc/FS4X-7QZE>].

2. Jim Acosta & Bonney Kapp, *Does Tea Party Want to Defend or Change the Constitution?*, CNN (Sept. 7, 2010), <http://www.cnn.com/2010/POLITICS/09/07/acosta.tea.party.constitution> [<https://perma.cc/HL2P-SGL4>].

3. In the October 2015 term, for example, the U.S. Supreme Court decided six cases arising from colonialism. Four of these cases concerned American Indian Nations. See *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016) (holding that an Indian Nation could not invoke equitable tolling to preserve contract claims against federal government); *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159, 2159 (2016) (affirming, by an equally divided Court, *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 177 (5th Cir. 2014), which recognized that an Indian Nation’s courts had jurisdiction over tort action against a non-Indian corporation); *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (holding that Congress had not diminished boundaries of an Indian Nation’s reservation); *United States v. Bryant*, 136 S. Ct. 1954, 1965–66 (2016) (holding that U.S. prosecutors may use uncounseled Tribal court convictions to establish prior predicate crimes for felony habitual offender statute). The other two concerned Puerto Rico. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1875–76 (2016) (holding that Puerto Rico is not a separate sovereign from the United States for purposes of the Double Jeopardy Clause of Fifth Amendment); *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) (holding that the federal Bankruptcy Code preempts Puerto Rico’s Recovery Act).

4. See Mark A. Graber, *Redeeming and Living with Evil*, 71 MD. L. REV. 1073, 1074 (2012) (noting that leading works on constitutional redemption have focused upon the “constitutional evil” of slavery). This Essay is situated within the literature on constitutional redemption, which explores constitutional law and discourse as a kind of faith. It mines different veins than previous scholarship, which has not explored the law of American colonialism. See generally JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) (arguing that constitutional redemption requires a leap of faith and shared narratives of constitutional possibility); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006) (arguing that living with constitutional evil is unavoidable problem); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (rev. ed. 2011) (1988) (considering how constitutional faith is possible in face of injustices in constitutional order).

This Essay argues that American colonialism poses a problem of constitutional redemption that cannot be solved by the trust the American people place in the Constitution. It makes three contributions to constitutional law and theory by focusing upon the United States' colonial relationships with American Indians and Alaska Natives.<sup>5</sup> First, this Essay argues that American colonialism poses a fundamental challenge to our faith in the Constitution's promises of justice. Second, this Essay considers—and then rejects—the most apparent way of meeting this challenge. It argues that the conception of

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While most of the literature on constitutional faith and redemption has not addressed American colonialism, there are a few exceptions that I have relied upon in developing this Essay's arguments. These works include Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015 (2012), which focuses on the Civil War and early Reconstruction to argue that “narratives of tragedy,” rather than of redemption, “are better contemporary tools for confronting injustice” and fostering “a truly emancipatory and anti-colonial politics.” *Id.* at 1020; *see also* AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 3 (2010) (“I argue that most of the American experience is best understood as a constitutional and political experiment in what I term *settler empire*. . .”). Though indebted to Rana's important work, this Essay proceeds along a different path, one focusing on the convergence between federal Indian law and constitutional theory, and has a different aim—to offer an alternative framework of common law constitutionalism that emphasizes mutual consent, equal respect, and negotiation among peoples rather than colonial dominance. I am also indebted to Milner Ball's work on constitutional law and federal Indian law, particularly his discussion of constitutional origins in Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2306 (1989) (arguing that “[c]onstitutional supremacy is a great achievement of Americans but a threat to Native American tribes”), and his review of Sanford Levinson's *Constitutional Faith*. *See* Milner S. Ball, *Onward Constitutional Soldiers*, 87 MICH. L. REV. 1438, 1448 (1989) (reviewing SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988)) (“If nothing else, the presence of Native Americans is a continuing reminder that there are on this continent other political realities older than the constitutional one.”).

Finally, I am deeply indebted to the work of Indigenous scholars who have explored the relationship between constitutionalism and colonialism, including VINE DELORIA JR. & DAVID E. WILKINS, *TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS* 161 (1999) (arguing, based upon survey of U.S. constitutional law, that “it is long overdue that the federal government” restore treaty-based relationships with Indian Nations); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 54 (2012) (arguing that “tribal consent theory should be explored and integrated in federal Indian law”); Angela R. Riley, *Tribal Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 800 (2007) (arguing that “the United States' own theory of Indian sovereignty supports the perpetuation of Indian nations' autonomous existence”); and Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CALIF. L. REV. 981, 996 (1994) (“explor[ing] the commensurability of [a] North American indigenous vision of law and peace between different peoples with contemporary understandings of the problem of achieving human solidarity and accommodation”).

5. The United States' colonial relationships with Native Hawaiians and with overseas territories present unique questions that this Essay does not address, leaving them to future work. *See generally* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996) (discussing unique status of Native Hawaiians in constitutional law and federal Indian law); Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005) (describing how a series of Supreme Court decisions known as the *Insular Cases* shaped the legal status of colonial territories in the United States).

government as a “sacred trust,”<sup>6</sup> which is reflected in the Indian trust doctrine of federal Indian law,<sup>7</sup> cannot redeem the republic from the wrongs of colonial rule. Third, this Essay offers an alternative way of thinking about constitutional redemption in a colonial republic. It reimagines redemption in relational terms by looking to Indigenous theories of diplomacy and treaty making,<sup>8</sup> critical social contract theory,<sup>9</sup> critical race theory,<sup>10</sup> and relational theories of rights<sup>11</sup> and contract law.<sup>12</sup> Relational redemption, it argues, is a process in which different communities of faith treat with one another based upon principles of equal respect and non-domination.

These arguments proceed in three parts. Part I makes the *prima facie* case that American colonialism is a fundamental challenge to constitutional faith.

6. See, e.g., Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 404, 405 (Andrew S. Gold & Paul B. Miller, eds., 2014).

7. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (explaining that United States “has charged itself” with trust obligations to Indians).

8. See, e.g., COLIN G. CALLOWAY, *PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY* (2013); ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800* (1999) (analyzing indigenous treaty making in North America as a form of multicultural diplomacy).

9. See, e.g., CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997) (arguing that Western social contract was predicated on racial contract supporting white domination); CAROLE PATEMAN & CHARLES MILLS, *CONTRACT AND DOMINATION* (2007) (exploring intersections between racial and sexual contracts that lead to domination); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988) (arguing that original contract includes sexual contract through which men assert authority over women).

10. See, e.g., Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363, 373–74 (1992) (discussing ways in which “racial patterns adapt . . . [to] maintain white dominance”); Nicholas J. Johnson, *Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory, and the Second, Ninth, and Tenth Amendments*, 57 *OHIO ST. L.J.* 1555, 1590 (1996) (arguing that “American minorities might view plenary power constitutionalism as close to the worst of circumstances”); Dorothy E. Roberts, *The Meaning of Blacks’ Fidelity to the Constitution*, 65 *FORDHAM L. REV.* 1761, 1761 (1997) (arguing that “[w]hat fidelity to the Constitution does to us depends on our experience of constitutional evil”).

11. This Essay draws inspiration from relational theories of rights within feminist legal theory. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 9 (1990) (arguing that “[b]ecause of its preoccupation with boundaries, law has neglected ongoing relationships between people”); JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 19 (2012) (offering a “relational approach” in which “human subjects of law and government are not best thought of as freestanding individuals who need protection from one another”); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 *BERKELEY WOMEN’S L.J.* 39, 40 (1985) (discussing psychological and sociological research that “postulated that women grow up in the world with a more relational and affiliational concept of self than do men” and noting some criticisms of this research).

12. There is an extensive literature on relational contract theory, including Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 *VA. L. REV.* 1089 (1981); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 *NW. U. L. REV.* 854 (1978). For more recent discussions, see Michele Goodwin, *Relational Markets in Intimate Goods*, 44 *TULSA L. REV.* 803, 823 (2009); Ethan J. Leib, *Contracts and Friendships*, 59 *EMORY L.J.* 649, 713 (2010).

Many Americans share a faith in the Constitution's promises of justice and, when faced with injustice, hope for constitutional redemption.<sup>13</sup> Not only political elites, but also social movement and community leaders speak of our constitutional tradition in religious terms.<sup>14</sup> A basic tenet of our civic religion holds that the legitimacy of constitutional government "proceeds directly from the people" and "is, emphatically, and truly, a government of the people."<sup>15</sup> This story of popular consent that our Constitution is based upon cannot be told about American Indians and Alaska Natives, who did not consent as peoples to the Constitution. The Constitution looks to join us as one people, yet assimilation is hardly redemptive for Indigenous Peoples who assert their rights as preconstitutional sovereigns. Conquest is also a feature of our constitutional tradition, which proclaims the Constitution "the supreme law of the land."<sup>16</sup> The problem is the possibility that faith in the Constitution's supremacy may stand in the way of remedying the wrongs of conquest and American colonialism.

Part II considers whether the law of colonial rule contains the tools necessary for its own redemption. It traces the convergence of American constitutionalism and American colonialism in the concept of government power as a public trust. A growing group of scholars has revived the idea that the government is a trustee for those subject to state power,<sup>17</sup> and the U.S. Supreme Court has shown interest in the constitutional trust.<sup>18</sup> No less an authority than *The Federalist Papers* suggested the Constitution is a trust that empowers public officials to act as trustees on behalf of the people.<sup>19</sup> And no less an authority than Chief Justice John Marshall reasoned that the United

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13. See BALKIN, *supra* note 4, at 6–7 (arguing that "constitutional traditions have much in common with religious traditions," including faith in the possibility of redemption); LEVINSON, *supra* note 4, at 14 ("Some of our most eloquent American political rhetoric specifically evokes an imagery of constitutional faith.").

14. See BALKIN, *supra* note 4, at 61–72 (discussing constitutional change and social movements).

15. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–05 (1819).

16. U.S. CONST. art. VI, § 1, cl. 2.

17. See *infra* note 22.

18. See *Ariz. State Legislature v. Ariz. Ind. Redistricting Comm'n*, 135 S. Ct. 2652, 2675 (2015) (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 149, at 385 (Peter Laslett ed. 1964) in upholding the constitutionality of Arizona's independent redistricting commission, and opining that constitutional democracies treat government's power to make laws as "being only a Fiduciary Power to act for certain ends," one limited by "[t]he people's ultimate sovereignty"); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013) (holding that proponents of ballot amendment to state constitution banning same-sex marriage lacked standing in federal court because they were not fiduciaries of state).

19. See THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961). With a few important exceptions, American constitutional doctrine has not expressly incorporated trust law. Instead, the trust conception of the Constitution was part of the Framers' understanding of the political duties of public officials and is enforced by political remedies such as impeachment. See Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1172–74 (2014).

States is a trustee with the responsibility to protect American Indian Nations.<sup>20</sup> In a nutshell, the trust conception of constitutional law holds that the government and government officials are trustees and the people are beneficiaries of a fiduciary relationship. Similarly, the Indian trust doctrine holds that the United States “has charged itself with moral obligations of the highest responsibility and trust” towards Indians.<sup>21</sup> In light of the Indian trust doctrine, colonialism and constitutionalism converge for those who would understand government power in terms of fiduciary law.<sup>22</sup> The Indian trust doctrine has been a source of remedies for Indian rights, and in this way seems to redeem the wrongs of colonial rule.<sup>23</sup> This Essay argues, however, that the constitutional trust cannot redeem the republic. Though the Indian trust doctrine has supported meaningful remedies, the trust conception of government reinforces the power relations and ideologies of colonial

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20. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing relationship between American Indian Nations and United States as one that “resembles that of a ward to his guardian”).

21. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). Federal courts have enforced the United States’ duties through specific relief and damages, particularly in cases involving federal management of Indian resources. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 227–28 (1983) (holding that a Tribe was entitled to monetary damages for the federal government’s mismanagement of timber resources).

22. *See, e.g., EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 16 (2016) (drawing upon fiduciary concepts from colonial rule while arguing that “wrongfulness of colonialism arguably did not lie in the trust-like structure of colonial rule per se, but in colonialism itself”); Criddle, *supra* note 6, at 405 (“Although the historical record suggests that imperial powers abused fiduciary rhetoric as a pretext for subjugating, exploiting, and even destroying indigenous communities, over time the continuing penetration and diffusion of fiduciary concepts has subtly redefined sovereignty itself as a form of legal authority that is entrusted to states for the benefit of humanity.”); EVAN J. CRIDDLE, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 169 (2006) (“For agency activities that affect Indian tribes, for example, the Supreme Court has proclaimed this trustee-beneficiary relationship explicitly. . . .”); EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* 85 (2011) (“Because the Crown exercises the same kinds of powers over all its subjects, the Crown-Native case supplies a rich precedent from which to extend the idea of the state as fiduciary to every person subject to state power.”); Ethan J. Leib, David L. Ponet & Michael Serota, *Mapping Public Fiduciary Relationships*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra* note 6, at 388 (“Fiduciary principles once seemed to connect with only environmental and Indian law specialists, where the legal doctrine is most explicitly fiduciary.”); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 711 (2013) (“Although other areas of law besides environmental law and federal Indian law have analyzed public institutions in fiduciary terms, what makes public lands doctrine and Indian law helpful is that they show how the fiduciary foundation of public authority is not just theory, but can be relevant to legal design, too.”); Brian Slattery, *First Nations and the Constitution: A Question of Trust*, 71 CANADIAN B. REV. 261, 267 (1992) (arguing, based in part on law concerning First Nations, “that the Canadian Constitution is animated by a distinctive doctrine of *constitutional trust*”). I do not mean to suggest that the Indian trust is the only foundation for contemporary theories of fiduciary government. *See, e.g., Robert G. Natelson, The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1097–1108 (2004) (arguing that the Founders’ legal canon included classical, biblical, and puritanical sources that supported fiduciary government).

23. *See infra* Part II.B (discussing Indian trust doctrine).



domination that Indian Nations challenge when they claim their right to national self-determination.<sup>24</sup>

Told as a tale of redemption, the story of the trust conception of constitutional law begins with European colonial expansion in the New World. Troubled by colonial governors' worst abuses of Indigenous Peoples, European theologians and legal philosophers developed a doctrine that justified colonization by enjoining colonial powers to treat Indigenous Peoples beneficently, as a "guardian" must treat a "ward."<sup>25</sup> Known in the United States as the Indian trust doctrine, this colonial guardianship could be racist and "at times invited oppression."<sup>26</sup> But planted within the trust doctrine of colonial rule, the story goes, were the seeds of a legal principle that would grow to protect Indigenous Peoples from colonial domination, much as a comedy may be snatched from the jaws of tragedy in a play's final act. The Indian trust doctrine reconciles conquest with constitutionalism by requiring colonial governments to treat Indigenous Peoples with the care and faithfulness of a fiduciary.<sup>27</sup> For public fiduciary theorists who want to revive the constitutional trust, the common law trust idea provides a fiduciary foundation for protecting all subjects from a sovereign's abuse of administrative power.<sup>28</sup> Interpreting the Constitution along fiduciary lines will, some theorists argue, redeem us from the "corruption, cronyism, factionalism, capriciousness, and waste" of modern politics.<sup>29</sup>

Part II also tells another much more complicated story about constitutionalism that similarly begins with the colonial encounter,<sup>30</sup> but

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24. This Essay focuses on American constitutional law, the Indian trust doctrine, and those elements of the trust conception of government that lend themselves to ideologies of domination and plenary power. It does not aim to disprove public fiduciary theory generally. In other work I have critiqued the borrowing of fiduciary law concepts for public law in more general terms. See Davis, *supra* note 19, at 1149–50 (sketching problems of fit, intent, and function with fiduciary government). This Essay, by contrast, is focused on the fiduciary conception of government that has surfaced in the Indian trust doctrine of U.S. law.

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

26. See Criddle, *supra* note 6, at 412. For discussion of the racist elements of colonial law in the New World, see Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Right of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51, 52 (1991).

27. See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

28. See, e.g., FOX-DECENT, SOVEREIGNTY'S PROMISE, *supra* note 22, at 85 ("[T]he Crown-Native case supplies a rich precedent from which to extend the idea of the state as fiduciary[.]"); Criddle, *supra* note 6, at 405 ("[O]ver time the continuing penetration and diffusion of fiduciary concepts has subtly redefined sovereignty itself as a form of legal authority that is entrusted to states for the benefit of humanity."); Slattery, *supra* note 22, at 265 (arguing that "[t]he idea that political power is essentially a matter of trust . . . provides a link between traditional First Nations philosophies and certain strands of European political thought").

29. See Criddle, *Foundations*, *supra* note 22, at 147.

30. See Wendy Nelson Espeland, *Bureaucrats and Indians in a Contemporary Colonial Encounter*, 26 LAW & SOC. INQUIRY 403, 407 (2001) (defining encounters as "a protracted set of interactions by . . . groups who were forced to confront one another, make sense [of] each other's motives and differences, and were transformed in the process of doing so").

suggests that the trust conception of government is not so neatly redemptive. In this story, Indigenous Peoples were not simply wards of their colonial guardians, but pushed, pulled, tugged, fought, and negotiated with colonial officials over the terms under which they would “treat one another.”<sup>31</sup> As separate peoples, Indian Nations were not asked to ratify the U.S. Constitution, nor did they collectively consent to be ruled by the government established by the “We the People of the United States.”<sup>32</sup> Even so, when the United States, flush with military victories and manifest destiny, sought to direct the Indians’ fate, its courts found in the Indian trust doctrine a plenary power authorizing the federal government to regulate the lives of Indigenous Peoples.<sup>33</sup> From fiduciary duty came a doctrine legalizing the seizure of aboriginal lands, the violation of sacred treaty promises, and, where the United States found it expedient, the termination of the trust relationship. Plenary power is not the Indian trust’s only legacy, but neither is it a mere doctrinal curiosity of a less enlightened age. As the United States Supreme Court described it in 2011—not in 1811 or in 1911—the United States has “established the trust relationship in order to impose its own policy on Indian lands.”<sup>34</sup> Thus, the Indian trust has perpetuated colonial power by fiduciary means.

In this way, Part III argues, the trust conception is a kind of “cheap grace.”<sup>35</sup> Constitutional faith does not simply unite Americans; it may also divide those who have suffered an injustice from those who have not but yearn for redemption from it.<sup>36</sup> And those who seek only their own redemption may settle on a form of cheap grace, the kind of “grace we confer on ourselves” without transforming the unjust relationships we have with others.<sup>37</sup>

Part III, therefore, tells a third story of relationship between Indian Nations and the United States. For all its tragic moments, the story of American colonialism is not a tragedy. Indian Nations did not disappear.<sup>38</sup> These Nations

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31. See Robert A. Williams, Jr., “*The People of the States Where They Are Found Are Often Their Deadliest Enemies*”: *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 994 (1996) (quoting 2 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1606–1789, Pennsylvania Treaties, 1737–1756, at 335–36 (Alden T. Vaughn & W. Stitt Robinson eds., 1984)).

32. See U.S. CONST. pmbl. (“We the People of the United States.”).

33. See *United States v. Kagama*, 118 U.S. 375, 384–85 (1886) (concluding that Congress’s power over Indians “is necessary to their protection” and arises from the United States’ “duty of protection”).

34. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2326 (2011).

35. See MIGUEL A. DE LA TORRE, *THE POLITICS OF JESÚS: A HISPANIC POLITICAL THEOLOGY* 114 (2015) (discussing Reverend Adam Clayton Powell Sr.’s conception of “cheap grace,” which Reverend Powell illustrated by “white Christian America’s tolerance of Jim Crow, lynching, and racism”).

36. See, e.g., Roberts, *supra* note 10, at 1761 (explaining that “[w]hat fidelity to the Constitution does to us depends on our experience of constitutional evil”).

37. See Cheryl A. Kirk-Duggan & Travis T. Judkins, *African American Liberative Theologies*, in *INTRODUCING LIBERATIVE THEOLOGIES* 112, 124 (Miguel A. De La Torre ed., 2015).

38. See *infra* note 71 and accompanying text (discussing federally-recognized and non-federally recognized Indian Nations).

make and enforce their own laws. They negotiate agreements to provide government services,<sup>39</sup> develop their economies,<sup>40</sup> and resolve jurisdictional disputes with other governments.<sup>41</sup> They own land, sometimes in fee simple, and manage their lands, imposing conditions when someone wants to enter their territories.<sup>42</sup> And they invoke their rights in court when wronged.<sup>43</sup>

This story is one of a multicultural constitutional tradition between peoples.<sup>44</sup> In the United States, for example, the “themes of protection and trust” between the federal government and Indian Nations were part of the “language of Indian diplomacy.”<sup>45</sup> Reflected in the Two Row Wampum of the Haudenosaunee Confederacy, these themes linked peoples steering separate boats down the same river.<sup>46</sup> Consent and negotiation are central to this story; much like relational contracts in the common law, treaties between Indian Nations and the United States embody ongoing relationships of mutual respect.

This Essay does not argue that the Indian trust doctrine has failed to provide meaningful legal protections for Indian Nations. Nor does it argue that those legal protections should be abandoned. Rather, it explores how the trust conception of government is fraught with a tension between rule-of-law values and plenary power. Having retained plenary power’s logic of conquest, the United States has not transformed the trust relationship into one that would redeem the wrongs of American colonialism. The solution to that problem is not to jettison the rule-of-law requirements that the Indian trust doctrine provides.

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39. See Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 21 (2015) (providing an overview of tribal contracts under the Indian Self-Determination and Educational Assistance Act).

40. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 21.02[6] (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK] (discussing some of the legal issues that arise in Tribal contracting for economic development).

41. See, e.g., Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 84 (2007) (“In the case of modern intergovernmental agreements, Indian tribes are . . . settling questions of jurisdictional dispute with the states by creating certainty through agreement where federal Indian law offers nothing more than gray areas.”).

42. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (“Nonmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation.”).

43. See, e.g., Seth Davis, *Tribal Rights of Action*, 45 COLUM. HUM. RTS. L. REV. 499, 501–02 (2014) (arguing that Indian Nations may rightly claim an implied right of action to sue under federal law in some circumstances).

44. See Williams, *supra* note 4, at 981.

45. Williams, *supra* note 31, at 994; see also CALLOWAY, *supra* note 8, at 24–25 (explaining that “[l]anguage” of “[w]ampum belts and calumet pipes” was “essential” to Indian diplomacy and “turned treaties into sacred commitments”).

46. Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 291 (1986).

Thus, Part III's story does not focus upon the trust that "We the People" place in the Constitution, but instead upon relationships among peoples.<sup>47</sup> Redressing the wrongs of American colonialism calls for a relational approach to redemption, one that asks what constitutional faith means not only for those who hold it, but also for those who hold other faiths. Part III sketches one possibility for this relational redemption, a possibility rooted in the recognition that faith may be too costly for some when it is too cheap for others. Relational redemption in a multicultural democracy does not begin with washing "We the People" of the wrongs committed in their name. Instead, it begins by asking what is necessary to transform relationships of domination. It begins, in short, with a story of "We the Peoples."<sup>48</sup>

### I.

#### THE PROBLEM OF CONSTITUTIONAL REDEMPTION IN A COLONIAL REPUBLIC

The U.S. Constitution promises to "establish Justice" and creates a framework for self-government of "We the People."<sup>49</sup> These constitutional purposes seem to work hand in glove, and indeed they have at times in American history. But the relationship between the two commitments is more complex than that. In America's history, safeguarding the self-determination of "We the People" has included limiting the self-determination of the many Indigenous Peoples whose lands European and American settlers colonized. Though one of the "exiled narratives" of American history, the law of American colonialism is a "great dilemma of the American constitutional order."<sup>50</sup>

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47. In comparing contract and trust law to develop this relational perspective, this Essay contributes to the emerging literature that reimagines constitutional law by reference to rules and norms from the common law. *See, e.g.*, William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1836 (2016) (proposing a "positive law" model of the Fourth Amendment that would look to positive law, including common law, to "trigger Fourth Amendment protection"); Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 956 (2016) (arguing for a Fourth Amendment approach to personal property that would look to "existing rules and understandings from property law"); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1598 (2014) (developing an approach to separation of powers based upon "kinship of ordinary property and constitutional entitlements").

48. *See* Paul Oldham & Miriam Anne Frank, "We the Peoples": *The United Nations Declaration on the Rights of Indigenous Peoples*, 25 ANTHROPOLOGY TODAY 5, 5 (2008) (quoting Victoria Tauli-Corpuz, then-Chair of the U.N. Permanent Forum on Indigenous Issues, now U.N. Special Rapporteur on the Right of Indigenous Peoples, as saying that the United Nations Declaration on the Rights of Indigenous Peoples "makes the opening phrase of the UN Charter, 'We the Peoples . . .,' meaningful for the more than 370 million indigenous persons all over the world"). I am indebted to Joe Singer for suggesting the phrase.

49. U.S. CONST. pmbl.

50. *Cf.* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 19 (1983) (discussing idea of "exiled narratives" within American constitutional tradition).

### A. *Constitutional Faith*

Constitutionalism,<sup>51</sup> it is commonly observed, is America's civic religion. Having separated church and state, Americans have made a church out of their state and a sacred scripture out of their Constitution.<sup>52</sup> Americans look to the Constitution for words to argue about justice, believing in the document's "essential goodness."<sup>53</sup> We share, in other words, what Sanford Levinson has called "constitutional faith."<sup>54</sup>

Our judges, constitutional law scholars, and congressional representatives "have long employed religious terms in speaking of the Constitution."<sup>55</sup> This faith, we might think, binds us together and with the Constitution. In recent years, constitutional theorists have looked to our shared constitutional faith as a source of constitutional legitimacy. Jack Balkin, building upon Levinson's *Constitutional Faith*, has argued that the Constitution's legitimacy depends upon our faith that its promises of justice will ultimately be fulfilled. Our faith in the Constitution is, in other words, faith in the possibility of "constitutional redemption."<sup>56</sup>

The injustices committed in the Constitution's name test this faith. The Framers recognized and protected slavery in the Constitution,<sup>57</sup> perhaps the "quintessential" constitutional evil.<sup>58</sup> After slavery came Jim Crow,<sup>59</sup> and after

51. "Constitutionalism" is a term of more than one meaning. See Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671, 678 (2009) (stating that "constitutionalism" is "a term whose meaning is as elusive as the unitary system of constitutional legitimacy it means to underlie"). Here I mean to invoke the idea that the U.S. Constitution "reflects the will of the sovereign people" and brings government under the rule of law. See Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 RUTGERS L.J. 1327, 1327 (2004); cf. Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1434 (2008) (defining "[c]onstitutionalism" as the "'determination to bring . . . government under control and to place limits on the exercise of its power'" (quoting M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 2 (Liberty Fund, Inc., 2d ed. 1998) (1967))).

52. See Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); see also Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 79 (2009) (discussing Americans' reverence towards the Constitution).

53. See Aziz Rana, *Book Review, The Many American Constitutions*, 93 TEX. L. REV. 1163, 1163 (2015) (reviewing ROBERT L. TSAI, *AMERICA'S FORGOTTEN CONSTITUTIONS* (2014)).

54. LEVINSON, *supra* note 4, at 4.

55. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 172–73 (1985).

56. See BALKIN, *supra* note 4.

57. See Derrick Bell, *Learning the Three "I's" of America's Slave Heritage*, 68 CHI.-KENT L. REV. 1037, 1040 (1993).

58. GRABER, *supra* note 4, at 12.

59. See Dennis J. Hutchinson, *Introduction: Brown in the Supreme Court*, 6 J. APP. PRAC. & PROCESS 11, 14 (2004).

that, the “new Jim Crow” of mass incarceration.<sup>60</sup> Constitutional faith in the face of constitutional evil may be foolish, even unjust.<sup>61</sup>

To have faith in the Constitution despite the injustices committed in its name requires us to believe in a story of constitutional redemption. Balkin has argued that the constitutional order is legitimate to the extent that we have faith that the Constitution and “its associated institutions” are enough “to justify the benefits of political union (and the use of force to compel obedience to the law), and that the system of constitutional government can and will become still better over time.”<sup>62</sup> The Reconstruction Amendments outlawed slavery,<sup>63</sup> *Brown v. Board of Education* redeemed us from Jim Crow,<sup>64</sup> and one day, perhaps, we’ll find in the Constitution the means to end the “New Jim Crow”<sup>65</sup> of mass incarceration. In the face of constitutional evil, perhaps what we need is constitutional faith.<sup>66</sup>

### B. Conquest as a Constitutional Evil

Or perhaps the problem is faith itself. The United States’ colonial history is not part of the constitutional law canon. As Aziz Rana has powerfully pointed out, this erasure of American colonialism is tightly bound up with our belief in the “Constitution’s writing and ratification [as] . . . the constituent acts of American exceptionalism and civic founding.”<sup>67</sup> Leaving American colonialism out of the constitutional canon makes it easier to keep our faith in “[t]he U.S. Constitution [as] an important conduit for American assimilation: the dominant domestic narrative, part of the legacy of *Brown v. Board of Education*, remains that separate is inherently unequal.”<sup>68</sup> Yet a “measured

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60. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

61. See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1706 (1997).

62. JACK M. BALKIN, *LIVING ORIGINALISM* 78 (2014).

63. See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 *COLUM. L. REV.* 1992, 2001 (2003) (arguing “[t]he Reconstruction Amendments are . . . ripe for interpretation as countermonuments—monuments against the axioms that justified slavery”).

64. See Roy L. Brooks, *Toward a Post-Atonement America: The Supreme Court’s Atonement for Slavery and Jim Crow*, 57 *U. KAN. L. REV.* 739, 739 (2009) (posing the question, “is the Court’s post-*Brown v. Board of Education*, post-Jim Crow judicial philosophy sufficient to atone for slavery and Jim Crow?”).

65. See generally ALEXANDER, *supra* note 60, at 119 (chronicling the disproportionate mass incarceration of African Americans as the so-called new Jim Crow).

66. BALKIN, *supra* note 4, at 6 (“We need a narrative of redemption because all constitutions are agreements with hell, flawed, imperfect compromises with the political constellation of the moment.”).

67. See Aziz Rana, *Colonialism and Constitutional Memory*, 5 *U.C. IRVINE L. REV.* 263, 267 (2015).

68. See Greene, *supra* note 52, at 77.

separatism”<sup>69</sup>—including the power “to make their own laws and be ruled by them”<sup>70</sup>—is what Indian Nations claim when they demand the right of national self-determination that the American colonies relied upon in declaring their independence.

American Indians are the first possessors of territory that the United States now claims as American soil, as are Alaska Natives and Native Hawaiians. At last count, there were 567 federally recognized Indian Nations, and there are many nonfederally recognized and state recognized Indian Nations as well.<sup>71</sup> As preconstitutional sovereigns, Indian Nations have lawmaking authority that does not depend upon the U.S. Constitution nor is constrained by it. That much federal Indian law has always recognized.<sup>72</sup> At the same time, the United States has exercised a plenary power “to limit, modify or eliminate the powers of [Indian] self-government” over Indian lands.<sup>73</sup> Within the real estate that the United States now claims, federal constitutional government reigns supreme.

The United States’ assertion of constitutional supremacy over Indian Nations strikes at the heart of a familiar and in many ways compelling story of the Constitution’s legitimacy. That story, in a nutshell, is one of consent, not conquest.

As Chief Justice John Marshall put it, constitutional “government proceeds directly from the people” and “is, emphatically, and truly, a government of the people.”<sup>74</sup> Popular sovereignty is “what distinguished the new American republic from every other nation which preceded it in human history,” or so our founding story goes.<sup>75</sup> The American people are sovereign,

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69. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14–16 (1987).

70. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

71. On federally-recognized Indian Nations, see *Indian Affairs: Mission Statement*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/bia> [<https://perma.cc/4RCZ-WGGC>]. And on nonfederally recognized Indian Nations, see U.S. GOV’T ACCOUNTABILITY OFFICE, INDIAN ISSUES: FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES 7–9 (2012), <http://www.gao.gov/products/GAO-12-348> [<https://perma.cc/466N-XRMZ>].

72. See, e.g., *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (“It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment.”); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

73. *Santa Clara*, 436 U.S. at 56–57.

74. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–05 (1819).

75. Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 292 (2010); see also Michael Sant’Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1879 (2015) (“The Framers of the Constitution fundamentally transformed the idea of sovereignty as it was understood in eighteenth-century European political theory.”). *But cf.* Huhn, *supra*, at 295 (noting English “antecedents” of the popular sovereignty principle); RANA, *supra* note 4, at 141 (arguing that

and the government they constituted is legitimate because they consented to it.<sup>76</sup>

This story of popular sovereignty, upon which the Declaration of Independence and U.S. Constitution are based, cannot be told about American colonialism. The Framers did not ask the Indian Nations to ratify the Constitution. Instead, until 1871 when Congress ceased the practice, Indian Nations and the United States constituted their relationships through treaties.<sup>77</sup> Many Indian Nations entered into treaties with the United States, and the United States covenanted to respect Indians' property rights to their aboriginal territories and their national sovereignty. These treaties are "actual contracts"<sup>78</sup> between the United States and Indian Nations, in which the United States consistently pledged to respect the "measured separatism"<sup>79</sup> of Indian Nations. The Constitution has not held the United States to these promises, but instead has permitted the United States to break Indian treaties and to assert plenary power over Indian Nations.<sup>80</sup>

If not consent, then what is the source of federal power to break treaties, take Indian property, and deny recognition of Indian Nations' right to self-determination? The logic of conquest.<sup>81</sup> The United States has not always treated with Indian Nations through the logic of conquest, nor did it occupy all Indian lands by violence. Consent through treaties and other agreements is a central part of the government-to-government relationship between Indian Nations and the United States, as Part III will argue. But where the United States has broken treaties, taken Indian property without compensation, and denied recognition of Indian self-determination, it has not pointed to Indian consent, but rather asserted power by virtue of conquest.

The roots of federal power over Indian lands lie in the Marshall trilogy, which incorporated the doctrine of discovery into American law. In *Johnson v. M'Intosh*, the first of the trilogy, Chief Justice Marshall stated the doctrine thus: "discovery gave title to the government by whose subjects, or by whose

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"ratification radically compromised the future of popular sovereignty" as conceived by laborers and frontier settlers).

76. See James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192 (1990) ("[T]he legitimacy of the United States government—that is, its rule by right rather than by force—rests on the consent of the governed.").

77. See, e.g., DELORIA & WILKINS, *supra* note 4, at 61–62 (discussing end of treaty making period).

78. Davis, *Tribal Rights*, *supra* note 43, at 506.

79. WILKINSON, *supra* note 69, at 15.

80. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

81. By "conquest," I mean not only war and other forms of state violence, but also the "drawing of lines on a map, the definition and allocation of ownership . . . and the evolution of land from matter to property," not to mention "struggle[s] over languages, cultures and religions," all against the backdrop of violence perpetrated, supported, or permitted by the state. See PATRICIA NELSON LIMERICK, *LEGACY OF CONQUEST: THE UNBROKEN PART OF THE AMERICAN WEST* 26–27 (1987).



authority, it was made, against all other European governments.”<sup>82</sup> What Marshall meant was: Because of discovery, Indian Nations held title to their lands subject to a restraint on alienation; they could transfer their property rights only with the consent of the United States.<sup>83</sup> The doctrine of discovery did not abolish Indian Nations’ rights to occupy their lands, but it did limit Indian Nations’ self-determination over Indian lands.<sup>84</sup>

*Johnson* adopted the doctrine of discovery notwithstanding Chief Justice Marshall’s awareness of the problem of claiming constitutional authority based upon conquest. Describing Indian Nations in racist terms, the Chief Justice explained that the doctrine of discovery might find “some excuse, if not justification, in [their] character and habits.”<sup>85</sup> At the same time, he called the doctrine an “extravagant . . . pretension” and suggested it was “opposed to natural right, and to the usages of civilized nations.”<sup>86</sup> As Marshall framed it, however, the problem before the Court was not one of justice: “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”<sup>87</sup> The doctrine of discovery, being “indispensable to that system under which the country has been settled . . . certainly [could not] be rejected by Courts of justice.”<sup>88</sup> The demands of justice could not be reconciled with the territorial demands of the Union.

The doctrine of discovery was a bargain reached among European nations without Indian Nations’ consent. In *Johnson*, Chief Justice Marshall explained that Europeans agreed to the doctrine to avoid war with one another. By vesting “the sole right of acquiring the soil” in the first European nation to “discover” it, the doctrine helped European nations “avoid conflicting settlements, and consequent war.”<sup>89</sup> In turn, by adopting the doctrine into U.S. law, the Supreme Court vested “ultimate title” in the United States alone, thus minimizing (in

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82. 21 U.S. (8 Wheat.) 543, 573 (1823).

83. See Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALBANY GOV’T L. REV. 1, 24 (2017).

84. See Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 493 (1994) (explaining that discovery doctrine did not “grant the colonizing nation carte blanche” but that “Indian rights were considerably diminished in both sovereignty and property because the discovery principle denied Indian nations the power to choose whether to come within the sphere of influence (or sovereignty broadly conceived) of the European power which claimed such a colonial relationship”). In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277 (1955), the Supreme Court held that the Fifth Amendment’s Taking Clause does not protect Indian Nations’ aboriginal title, a holding that *Johnson* neither portended nor supported. See *infra* Part III.C.2 (discussing *Tee-Hit-Ton*).

85. *Johnson*, 21 U.S. at 589–90 (describing Indian Nations as “fierce savages . . . with whom it was impossible to mix”).

86. *Id.* at 591.

87. *Id.* at 590.

88. *Id.* at 591.

89. *Id.* at 573.

theory, though not always in practice) conflicting property claims to Indian lands.<sup>90</sup> To borrow from Mark Graber, this agreement was a “really rotten compromise[.]”<sup>91</sup>: without Indian Nations’ consent, Europeans (and later, Americans) struck bargains about Indian property rights even though, as *Johnson* made clear, some of them were well aware of the deal’s injustice and illegality.

This really rotten compromise is a foundation of U.S. property rights and claims to territorial sovereignty. To this day, the doctrine of discovery remains part of U.S. law. As interpreted by the Supreme Court, the Constitution has permitted the United States to break Indian treaties, to take Indian lands, and to “virtually destroy[.] the . . . Indians’ ability to practice their religion” on federal lands that the United States took from Indian Nations.<sup>92</sup> More fundamentally, the Constitution has failed to prevent the United States from invoking “conquest, violence, [and] force [as] . . . sources of the power exercised by the federal government over Indian tribes.”<sup>93</sup> In this way, U.S. law legitimates colonial claims and denies rights of property and sovereignty to Indian Nations. As *Johnson* portended, “Justice” has been part of the price of a “more perfect Union” of “We the People.”

American colonialism is thus a constitutional evil. If the United States is a constitutional democracy committed to popular consent, then it cannot legitimately assert authority over Indian Nations based upon conquest. The problem of constitutional redemption in our colonial republic, then, begins with this: the right of self-determination that the Declaration of Independence claims for all nations is the very right the Constitution has failed to protect for Indian Nations.

### C. *Constitutional Supremacy and the Problem of Redemption*

While the problem of constitutional redemption begins with consent, it does not end there. The Constitution proclaims itself “the supreme law of the land,”<sup>94</sup> and some among the faithful may think that constitutional supremacy requires denying Indian Nations’ right to self-determination.<sup>95</sup>

90. *See id.* at 591.

91. GRABER, *supra* note 4, at 1081 (defining “[r]eally rotten compromises” as those “in which the crucial parties to the constitutional bargain agree that the price of union will be the sacrifice of what at least some parties recognize to be the fundamental rights of non-participants in the negotiating process”).

92. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988) (internal quotation marks omitted).

93. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 696 (1989). As Milner Ball writes, “constitutional supremacy is a great achievement of Americans but a threat to Native American tribes.” Ball, *supra* note 4, at 2306.

94. U.S. CONST. art. VI, § 1, cl. 2.

95. *Native Vill. of Venetie I.R.A. Council v. State of Alaska*, 687 F. Supp. 1380, 1389 (D. Alaska 1988), *rev’d*, 918 F.2d 797 (9th Cir. 1990) (arguing that “tribal sovereignty” is a “weapon [that is] dangerous to Indians, because it deprives Indians subject to tribal governments of the

As a framework for “We the People” to achieve self-government, the Constitution’s text unsurprisingly says little about Indian Nations. What it does say, however, recognizes them as separate peoples. Indians “not taxed” are excluded from the population count for apportionment of congressional representatives.<sup>96</sup> Indeed, prior to 1924, when Congress’s Citizenship Act declared all Indians to be American citizens, Indians “not taxed” were not incorporated within the American polity.<sup>97</sup> The Indian Commerce Clause, which empowers Congress to regulate “Commerce” with “Indian Tribes,” also recognizes them as separate peoples.<sup>98</sup> And the Executive’s power to enter into treaties with the advice and consent of the Senate provides a mechanism for the United States to treat with Indian Nations as separate peoples.

Thus, if anything, the Constitution’s text points toward a consensual, treaty-based relationship between the United States and Indian Nations. Vine Deloria and David Wilkins have argued that treaty making is the constitutionally-authorized “traditional manner of dealing with Indian tribes.”<sup>99</sup> Basic assumptions of American constitutionalism support this traditional manner of U.S.-Tribal relations. If the “constitutional value of consent of the governed” is a “fundamental premise” of constitutional government,<sup>100</sup> then the United States acted contrary to its own constitutional traditions when it stopped treaty making. On this reading of constitutional text and tradition, “the federal government has no legitimate claim to legal supremacy over Indian tribes” unless Indian Nations consent.<sup>101</sup> The problem of constitutional redemption is thus the problem of restoring a consent-based relationship between Indian Nations and the United States.

The problem cannot be so simply stated, however, for the constitutional faithful who believe that Indian consent and constitutional supremacy may conflict. As Mark Graber has forcefully argued, the Constitution’s commitment to “establish Justice” is one of many constitutional commitments: the Constitution’s Preamble also contains commitments to a “more perfect Union,”

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protection of the United States Constitution”). *But see* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115–16 (2002) (“[U]nlike the legal primacy the federal government enjoys over states by virtue of the Supremacy Clause of the United States, the federal government has no legitimate claim to legal supremacy over Indian tribes.”).

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

97. *See, e.g.*, *Elk v. Wilkins*, 112 U.S. 94, 95, 109 (1884) (holding that an American Indian plaintiff born within the United States was not a U.S. citizen under the Fourteenth Amendment and therefore had no rights under the Fifteenth Amendment); *Iron Crow v. Ogallala Sioux Tribe of Pine Ridge Reservation*, 129 F. Supp. 15, 21 (D.S.D. 1955) (discussing Indian Citizenship Act of 1924).

98. U.S. CONST. art. I, § 8, cl. 3; *see Resnik, supra* note 93, at 691.

99. DELORIA & WILKINS, *supra* note 4, at 161.

100. Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 386 (1989); *see also* Clinton, *supra* note 118 (“[A]ny federal legislative activity that might affect Indian tribes or their lands requires their formal consent, through treaty or analogous procedure.”); Fletcher, *supra* note 4, at 54 (describing “incorporation of Indian tribes into the American polity, largely without the consent of Indian tribes and Indian people,” and arguing for “a theory of tribal consent”).

101. Clinton, *supra* note 95, at 116.

the “common defence,” “domestic Tranquility,” and so on.<sup>102</sup> The many adherents and sects practicing America’s civic religion do not always agree, and in any given historical moment, Americans will disagree about constitutional evil and which constitutional commitments matter most. As a result, “[s]ome political and constitutional evil is a necessary consequence of a pluralistic society.”<sup>103</sup> For the faithful, in other words, the question may be what they’re willing to sacrifice where constitutional commitments conflict.

A fundamental constitutional commitment is constitutional supremacy itself. *Marbury v. Madison*,<sup>104</sup> for some the urtext of constitutional review, stands for the principle that the “Constitution is the central referent” of government power and the rule of law.<sup>105</sup> Constitutional faith treats constitutional supremacy as a good, not an unqualified good, to be sure, given the existence of constitutional evil, but a good nonetheless. From the “canonical place of the Constitution” springs the sense “that all exercises of governmental power must somehow be subject to it.”<sup>106</sup>

Government officials, in particular, take oaths to uphold the Constitution and the commitments it embodies. It is not their charge to question the Constitution’s goodness. At the Founding, the “courts of the conqueror” could not be expected to question whether the United States’ constitutional order was unjust because it was based upon conquest. Nor, perhaps, can we expect today’s courts to upset the “peace of society” with “disruptive remed[ies]” for colonial wrongs.<sup>107</sup> Constitutional supremacy is, in this sense, an institutional reality.

Constitutional supremacy is also part of the story of American exceptionalism in which many Americans place political faith. As President Barack Obama said on Constitution Day in 2015, with the signing of the Constitution the “[c]olonists came together in bold pursuit of a roadmap for citizenship and a framework for our democracy—exemplifying the statesmanship and character that would forever set our Nation apart.”<sup>108</sup> Or, as a leading constitutional law scholar has celebrated, the Constitution is “a kind

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102. U.S. CONST. pmbl.

103. GRABER, *supra* note 4, at 185.

104. 5 U.S. (1 Cranch) 137 (1803).

105. See Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 79–80 (2004).

106. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 468 (2005).

107. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217 (2005).

108. President Barack Obama, Presidential Proclamation—Constitution Day and Citizenship Day, Constitution Week, 2015 (Sept. 16, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/17/presidential-proclamation-constitution-day-and-citizenship-day> [<https://perma.cc/23CZ-UGZS>].

of Ark of the Covenant of . . . America.”<sup>109</sup> By setting up a supreme, binding law based upon popular sovereignty, Americans began one of the great experiments in political and legal theory, or so our faith may hold.

For many Americans, Indian Nations’ preconstitutional sovereignty appears anomalous. To put the point most sharply, Americans’ faith in the Constitution may lead some to conclude that denying Indian self-determination is the greater constitutional good. In this sense, “[c]onstitutional supremacy is a great achievement of Americans but a threat to Native American tribes.”<sup>110</sup> At times, federal lawmakers have been explicit about this point. Under blackletter law, the Bill of Rights does not directly bind Indian Nations because their sovereignty predates the Constitution.<sup>111</sup> In one view, this “tribal sovereignty” doctrine is so dangerous that it necessitates a “chary” attitude toward Indian sovereignty.<sup>112</sup> With the Indian Civil Rights Act of 1968 (ICRA),<sup>113</sup> Congress imposed many of the Bill of Rights’ protections on Tribal governments based on the theory, familiar from typical stories of constitutional faith, that constitutional rights must be extended to ensure equal citizenship.<sup>114</sup> To ICRA’s proponents, any limits on Indian self-government were a necessary sacrifice in pursuit of the greater good of protecting constitutional rights.<sup>115</sup>

The problem of constitutional redemption in our colonial republic is not simply that the United States preaches consent while practicing conquest. Instead, the problem is the possibility that constitutional supremacy, in which Americans have placed so much of our political faith, stands in the way of redemption from the constitutional evil of conquest.

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109. Steven G. Calabresi, “*A Shining City on A Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1398 (2006).

110. Ball, *supra* note 4, at 2306.

111. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896).

112. *Native Vill. of Venetie I.R.A. Council v. Alaska*, 687 F. Supp. 1380, 1389 (D. Alaska 1988), *rev’d*, 918 F.2d 797 (9th Cir. 1990).

113. *See* 25 U.S.C. §§ 1301–1303 (2012). The Indian Civil Rights Act extends some, but not all, of the Bill of Rights’ protections to individual Tribal members vis-à-vis Tribal governments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978). For example, the Act provides that “[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws.” 25 U.S.C. § 1302(8); *see Santa Clara*, 436 U.S. at 72 (acknowledging, in a case involving an equal protection claim, that “efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe’s ability to maintain itself as a culturally and politically distinct entity”).

114. *See Riley*, *supra* note 4, at 809–10 (explaining that when sponsor of ICRA “learned that the U.S. Bill of Rights did not apply to individual Indians subject to the control of tribal governments, he commented that such a notion was ‘alien to popular concepts of American jurisprudence’”).

115. *See id.* at 809 n.61 (explaining that sponsor of ICRA did not consider that “Indians did not necessarily want to be like other citizens”). ICRA is not coextensive with the Bill of Rights, but the Court has seconded Congress’s determination that “[p]roceedings in compliance with ICRA . . . sufficiently ensure the reliability of tribal-court convictions.” *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016).

## II.

## A PROMISE OF CONSTITUTIONAL REDEMPTION

Is it possible to redeem a constitutional order based in no small measure upon conquest, not consent, while preserving constitutional supremacy? This Part addresses—and rejects—the possibility that the conquest itself planted the seeds of redemption. According to the U.S. Supreme Court, the wages of conquest include an obligation of trust “incumbent upon the Government in its dealings with [a] dependent and sometimes exploited people.”<sup>116</sup> Under this “Indian trust doctrine,” the United States must treat Indians with the care and faithfulness of a fiduciary.

This conception of government as a trustee links American colonialism with American constitutionalism. The Constitution refers to public office as a “Public Trust,”<sup>117</sup> influential members of the Founding generation discussed the Constitution as a trust,<sup>118</sup> and, quite apart from the Indian trust doctrine, trust concepts have surfaced in constitutional law. The Indian trust doctrine promises that our constitutional tradition “contains the resources for its own redemption”<sup>119</sup> from the constitutional evil of conquest. Taking this promise of redemption seriously requires us to consider how the trust doctrine had justified certain choices and affected Indigenous Peoples subject to it.<sup>120</sup> The historical and doctrinal details are sometimes complicated and may be unfamiliar, but this Part’s argument can be simply stated. At its inception, the government used the trust conception to justify the conquest of Indigenous lands. This colonial legacy persists into the present day.

The trust conception promises redemption from the wrongs of conquest by shifting the focus away from Indian Nations’ consent (or lack thereof) toward the United States’ faithfulness as a trustee. After all, while the settlor creates the trust, a trust does not require the beneficiary’s consent. Instead, the measure of the trustee’s legitimacy is how she exercises whatever power she holds under the trust. The price of redemption under the Indian trust doctrine has included federal plenary power over Indian affairs. Though the Constitution does not constrain Indian Nations of its own force, “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”<sup>121</sup> Therefore, Congress can by

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116. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

117. U.S. CONST. art. VI; *see id.* art. I, §§ 3, 9; *id.* art. II, § 1.

118. *See* THE FEDERALIST NO. 46, *supra* note 19, at 294.

119. BALKIN, *supra* note 4, at 5.

120. Here I borrow from Martha Minow and Joseph Singer’s pragmatic pluralism: “Moral theorizing fundamentally addresses right and wrong in human relations. Thus, it should not be a surprising test of moral theorizing to assess its effect on those who use it and on those who are affected by its use. Another test is its capacity to generate results that lead to or justify action. . . .” Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism As Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 909 (2010).

121. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

statute impose limits on Indian self-government. The costs of this plenary power doctrine do not fall evenly on every American.

#### A. *The Constitutional Trust*

Recently, a growing group of constitutional theorists has revived the trust conception as a theory of constitutional government. Their story shifts the focus away from consent to trust: “[F]iduciary political theories are grounded in inherent features of authority, rather than the consent of the governed.”<sup>122</sup>

Perhaps no one meaningfully consents to government authority; after all, there are powerful objections to consent theories of government.<sup>123</sup> Fiduciary relationships can exist without a beneficiary’s consent, as in trust law. If we think the law itself entrusts constitutional government with authority, then consent is not required for state power to have some measure of legal legitimacy.<sup>124</sup> Instead, “[i]n identifying what makes an exercise of power legitimate, the fiduciary political theorist focuses on how that power is actually used, rather than solely on the etiology of the institutions that purport to exercise it.”<sup>125</sup> This power is legitimate, it might be argued, as long as the

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122. Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1826 (2016).

123. One objection is that the story of popular consent to constitutional government is a bit of “make believe” we feel the need to tell ourselves but which we know to be a fiction. See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 13–14 (1988). Americans in the first thirteen states ratified the Constitution, to be sure, but ratification “was shot through with political shenanigans, systematic suppression of the views of the Constitution’s opponents, misrepresentation, and outright coercion.” LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 6 (2012). Ratification excluded not only Indian Nations, but also African American men and women, white women, and white men who did not own land, not to mention Mexicans whose lands would be conquered during the United States’ westward expansion. *Id.* at 6–7; see LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 4 (2007) (discussing how “colonialism was central to the origin of Mexican Americans”). Moreover, as Judge Richard Posner has put it, “[e]veryone who voted for the Constitution is long dead, and to be ruled by the dead hand of the past is not self-government in any clear sense.” Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 615 (2008) (quoting RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 137–38 (1990)). There are, in short, many reasons to doubt the fiction of popular consent to the Constitution. Moreover, there is no terribly convincing reason to infer individual consent from an individual remaining a citizen of a state or even participating in its politics. See, e.g., FOX-DECENT, *SOVEREIGNTY’S PROMISE*, *supra* note 22, at 117–19 (summarizing objections to the theory of tacit consent and the theory of hypothetical consent). Perhaps consent “is either such an exacting standard that there is very little of it in the world, and so very few legitimate exercises of political power; or such a weak standard that it is implausibly everywhere, and constrains states almost not at all.” Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329, 357 (2008).

124. See, e.g., CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 22, at 50 (“International law entrusts states with authority based upon their assumption of public powers held for the benefit of their people.”); FOX-DECENT, *SOVEREIGNTY’S PROMISE*, *supra* note 22, at 106 (“[T]he fiduciary principle entrusts the state to establish legal order on behalf of the people.”).

125. Leib & Galoob, *supra* note 122, at 1826. Some fiduciary scholars argue that consent continues to “exert a powerful pull” on questions of state legitimacy. Andrew S. Gold, *Reflections on the State as Fiduciary*, 63 U. TORONTO L.J. 655, 665 (2013); cf. Leib & Galoob, *supra* note 122, at

constitutional trust holds the public officials who wield it to act with the care and faithfulness of a fiduciary.

The story of the constitutional trust begins with the observation that our relationships with other people can make us vulnerable. Sometimes the law aims to protect us when we are vulnerable to another's discretion. Trust law, for example, tries to protect beneficiaries from trustees' disloyalty or incompetence. Take a straightforward private trust. A person who owns property puts it into trust for someone else's benefit by transferring title to a trustee. Trust law requires the trustee to manage the property on behalf of the beneficiary with undivided loyalty and the utmost care.<sup>126</sup> It does so in order to protect the beneficiary who does not have control of the trust property and thus is vulnerable to the trustee, who does.

It turns out that many relationships in private law and public law can be described in similar terms. Consider the power that federal government officials have under the U.S. Constitution. Congress can pass a law making something we might do a federal crime. If we commit that crime, the Executive Branch may arrest and prosecute us, at which point we will almost certainly take a plea deal.<sup>127</sup> But even if we do not, an Article III court and jury may convict us of the crime, at which point we will be sentenced, perhaps to a term in federal prison. At each stage in the process—legislative, executive, and judicial—government officials have discretion to make decisions that affect our liberty, which makes us vulnerable to them. We entrust government with this power and expect officials to wield it in the public trust.

Put more formally, the U.S. Constitution can be understood as a trust that empowers government officials while entrusting them to act with the loyalty and care of a trustee on behalf of “We the People” as beneficiaries. John Locke, whose work influenced the Framers' canon, described state power as a public trust. He wrote, “[T]he community put the legislative power into such hands as they think fit with this *trust*, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it

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1826 (arguing that public fiduciary theory avoids some of the problems of consent-based theories while noting that questions of legitimacy should not be focused “solely” on the origins of state institutions); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 712 (2013) (basing public fiduciary relationship on “delegation of power” through constitution and elections). In this Essay, I focus on the trust conception as it has surfaced in federal Indian law and the ways in which it has supported colonial domination. For further discussion of the role that consent might play in public fiduciary theory, see Seth Davis, *Pluralism and the Public Trust*, in FIDUCIARY GOVERNMENT (Evan J. Criddle et al., eds.) (forthcoming 2018).

126. See, e.g., Davis, *supra* note 24, at 1161 (evaluating trust law as an analogy for governmental authority).

127. See e.g., Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1732 (2017) (noting that “ninety to ninety-five percent of [criminal] cases are disposed of by plea”).



was in the state of nature.”<sup>128</sup> The Constitution labels public office as a public trust in Articles I, II, and VI.<sup>129</sup> Many of the Framers described officeholders as trustees; in *The Federalist No. 46*, for example, James Madison wrote, “The federal and State governments are in fact but different agents and trustees of the people.”<sup>130</sup>

Public fiduciary theorists have called for a revival and expansion of the constitutional trust to rethink rights and duties in constitutional and administrative law. These theorists argue that the Framers were right to describe public office as a public trust. Public law should hold politicians and bureaucrats to fiduciary standards of loyalty and care, just as private law imposes fiduciary duties on private trustees and other fiduciaries. By looking to principles of fiduciary law, scholars have rethought doctrines across an array of public law problems, ranging from the roles of jurors<sup>131</sup> and judges<sup>132</sup> to public spending<sup>133</sup> and public administration,<sup>134</sup> voting rights,<sup>135</sup> and the protection of “discrete and insular minorities,”<sup>136</sup> to name a few. One of the leading fiduciary theorists argues, for example, that reviving the constitutional trust will help correct the “factionalism[,] . . . corruption, cronyism, capriciousness, and waste” of American public administration.<sup>137</sup>

What does the trust conception of government have to do with the dilemma of constitutional redemption in a colonial republic? The American constitutional law canon does not include the plenary power cases or the Indian trust doctrine; these cases are not part of the constitutional law curriculum, nor do conventional debates about federal power discuss them. In reviving the constitutional trust, public fiduciary theorists have made a vital contribution to constitutional theory. Unlike most constitutional lawyers, public fiduciary

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128. Davis, *supra* note 19, at 1172 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 190 (Thomas I. Cook ed., 1947)).

129. U.S. CONST. art. I, §§ 3, 9; *id.* art. II, § 1; *id.* art. VI.

130. THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).

131. See Ethan J. Leib, Michael Serota & David L. Ponet, *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1105 (2014) (recommending jury reform through a lens of jurors as fiduciary actors).

132. See Leib et al., *Fiduciary Theory*, *supra* note 22, at 699 (advocating for a fiduciary theory of judging).

133. See Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 4 (2003) (arguing that the General Welfare Clause should be interpreted as a fiduciary trust).

134. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) (suggesting that administrative law should be reformed to promote public involvement through fiduciary representation).

135. See D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013) (arguing that elected officials have breached a fiduciary trust when they interfere with election laws).

136. See Natelson, *supra* note 22, at 1174–75 (arguing that “the Supreme Court has bestowed heightened protection on groups well-organized politically and unlikely to disappear—as it did in *Lawrence v. Texas*, 539 U.S. 558 (2003)—while denying it to groups liable to be destroyed by the very legislation the Court sustains,” such as in the “courts’ refusal to protect economic minorities”).

137. See Criddle, *Fiduciary Foundations of Administrative Law*, *supra* note 22, at 147.

theorists tell a story about constitutionalism that requires taking the law of colonial rule seriously.

Public fiduciary theorists have pointed to legal theories of colonial rule over Indigenous Peoples as a basis for the trust conception of government.<sup>138</sup> For example, drawing upon the pathbreaking work of Robert Williams,<sup>139</sup> Evan Criddle has traced the constitutional trust to the Spanish theologian and scholar of colonial law Francisco de Vitoria. As Criddle explains, Vitoria invoked trust concepts “in his 1532 lecture *On the Indians Lately Discovered* to explain the circumstances in which the law of nations would permit European states to impose colonial rule in the Americas.”<sup>140</sup> Unlike some theologians, Vitoria conceded that Indigenous Peoples had “reason and moral agency” and therefore natural rights “just like Christians.”<sup>141</sup> At the same time, Vitoria justified Spanish conquest by describing Indigenous Peoples as savages in need of Spanish guardianship. Criddle has summarized Vitoria’s view: “Spanish conquest of the Americas might be justified if first nations violated the natural rights of their Spanish visitors or engaged in ‘tyrannical and oppressive acts’ such as human sacrifice or cannibalism against their own people.”<sup>142</sup> Given Vitoria’s racist assumptions of Indigenous savagery,<sup>143</sup> the Spanish “could intervene as benevolent guardians to guarantee basic security and fundamental rights, subject to a fiduciary obligation to use the power thus conferred for the benefit of the indigenous people.”<sup>144</sup> While acknowledging this “dismal” colonial legacy, Criddle argues that fiduciary theory, properly understood, can reconcile “foreign intervention with the principle of self-determination” by holding intervening states to fiduciary duties of loyalty and care.<sup>145</sup> Thus, the

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138. See *supra* note 22 and accompanying text.

139. See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005) (chronicling the history of racist language in American law and its impact on Indian Rights); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (tracing the narrative of conquest of American Indians in Western legal thought from its medieval origins to the Marshall Trilogy); Williams, *supra* note 46, at 219 (arguing for a new Indian law jurisprudence that would acknowledge different worldviews of groups in America, rather than subordinating all non-white groups); Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 6–7 (1983) (“examin[ing] the development and origins of Western legal and political ideological thought on the nature and extent of Indian tribal sovereignty and rights”).

140. Evan J. Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 THEORETICAL INQUIRIES L. 473, 483 (2015).

141. *Id.* at 483 (quoting Francisco de Vitoria, *On the Indians Lately Discovered*, in *DE INDIS ET DE IVRE BELLI RELECTIONES* 128 (Ernest Nys ed., John Pawley Bate trans., 1917)).

142. *Id.* at 483–84.

143. See Williams, *supra* note 46, at 249 n.99 (discussing Vitoria’s treatise on Indigenous rights).

144. Criddle, *supra* note 140, at 484.

145. See *id.* at 486, 505.

trust conception of government may seem to contain the seeds for its own redemption.<sup>146</sup>

### B. *The Indian Trust Doctrine*

Against this backdrop, perhaps Chief Justice Marshall's bargain in *Johnson* does not appear so rotten after all. The discovery doctrine's limits on Indian rights, the Marshall Court explained, entailed a trust relationship. In *Cherokee Nation v. Georgia*, the Court concluded that an Indian Tribe is not a "foreign State" within the meaning of Article III of the Constitution but rather a "domestic dependent nation[.]"<sup>147</sup> Domestic, insofar as the doctrine of discovery incorporates them within U.S. territory. Dependent, insofar as "they are in a state of pupilage" and "completely under the sovereignty and dominion of the United States."<sup>148</sup> Even so, Tribes are sovereign nations that have reserved their rights to "self-government."<sup>149</sup>

By Chief Justice Marshall's logic, a trust responsibility was one of the wages of conquest. In *Cherokee Nation*, he acknowledged Indian Nations' lack of consent to colonial rule: "They occupy a territory to which we assert a title independent of their will."<sup>150</sup> But, he added, the United States' assertion of legal supremacy gave rise to a trust relationship: "[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."<sup>151</sup> Thus, Chief Justice Marshall laid the foundation of the modern Indian trust doctrine.

Building upon the Marshall framework, the United States "has charged itself with moral obligations of the highest responsibility and trust" towards Indians.<sup>152</sup> For example, in its 2001 decision in *Department of Interior v. Klamath Water Users Protective Association*, the Supreme Court acknowledged that the Indian trust "has been compared to one existing under a common law trust, with the United States as trustee [and] the Indian tribes or individuals as beneficiaries."<sup>153</sup>

As a trustee, the United States has duties of loyalty and care towards Indians. While not every aspect of the trust responsibility is judicially

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146. The remainder of this Essay focuses upon the Indian trust doctrine and the elements of the trust conception that have reinforced ideologies of colonial domination in the United States. It does not, therefore, aim to disprove public fiduciary theory in general. For a more general critique of public fiduciary theory, one not limited to the law of American colonialism, see Davis, *supra* note 24, at 1145.

147. 30 U.S. (5 Pet.) 1, 17 (1831).

148. *Id.*

149. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 547, 561 (1832).

150. *Cherokee Nation*, 30 U.S. at 17.

151. *Id.*

152. *Seminole Nation v. United States*, 316 U.S. 296 (1942).

153. 532 U.S. 1, 11 (2001); see Leib et al., *A Fiduciary Theory of Judging*, *supra* note 22, at 711 (citing *Klamath*).

enforceable,<sup>154</sup> the Indian trust doctrine has supported robust legal rights. Congress may create a full trust responsibility requiring the federal Executive to manage Indian property as a fiduciary. For example, in *United States v. Mitchell (Mitchell II)* the Court held that Indian timber management statutes imposed the “full responsibility” and “elaborate control” of a “fiduciary relationship.”<sup>155</sup> Where Congress has thus “accepted a fiduciary duty,”<sup>156</sup> federal courts will look to “elementary trust law” to discern and enforce the federal government’s fiduciary obligations.<sup>157</sup>

In particular, the full trust doctrine has protected Indian rights in proprietary cases. Where Congress has created specific trust duties, and an Indian Tribe shows that the federal executive has mismanaged Indian property and resources, federal courts may enforce the trust relationship through specific relief or damages.<sup>158</sup> The recent Report of the Secretarial Commission on Indian Trust Administration and Reform, while finding significant problems with the United States’ implementation of the trust, also reaffirmed the trust responsibility for the federal government’s management of Indian lands and resources.<sup>159</sup> Thus, while an “outmoded trust model” has “not evolved as rapidly as the movement towards self-determination” and “still influences”

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154. Under the blackletter law, there are three types of trust duties: the general trust, the limited trust, and the full trust. The *general trust* is a “moral” obligation. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011). It exhorts Congress to act on behalf of Indians but does not create legal entitlements enforceable through judicial remedies. In other cases, the doctrine recognizes merely a *limited trust* that does not entail full fiduciary duties. In *United States v. Mitchell (Mitchell I)*, the Court held that the General Allotment Act did not impose upon the United States full fiduciary duties to manage timber resources on allotted lands for the benefit of Indians. 445 U.S. 535, 542 (1980). Allotment was one of the great tragedies of federal Indian policy. In 1887 Congress ordered the breakup of Indian Tribal lands into individual allotted shares, with the aim of assimilating Indians by turning them into farmers on fee simple plots of land. General Allotment Act of 1887, ch. 119, 24 Stat. 388. The result was a massive loss of Tribal lands, which were transferred into non-Indian ownership. The Allotment Act appeared to create a trust relationship, declaring that the allotted land would be held for a time “in trust for the sole use and benefit of the” Indian owner. *See Mitchell I*, 445 U.S. at 541. *Mitchell I* held that the Act “created only a limited trust relationship,” narrowly defined to exclude liability for mismanagement of timber resources on the land. *Id.* at 542. Finally, Congress may create a *full trust* relationship enforceable through judicial remedies. *See infra* notes 155–158 and accompanying text.

155. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*).

156. *Hopi Tribe v. United States*, 2015 WL 1474727, at \*3 (Fed. Cir. Apr. 2, 2015).

157. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474–75 (2003).

158. *See Mitchell II*, 463 U.S. at 228 (holding, in case alleging mismanagement of timber lands, that “statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property”).

159. U.S. DEP’T OF INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 22 (2013), [https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform\\_FINAL\\_Approved-12-10-2013.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf) [<https://perma.cc/F9L4-5VXP>].

federal Indian law and policy,<sup>160</sup> the story of the Indian trust is partly one of righting wrongs and protecting Indian rights.

More broadly, in the last few decades, the political branches of the federal government have affirmed the trust responsibility as support for the federal policy of Tribal self-determination. President Richard Nixon's 1970 Special Message on Indian Affairs to Congress set out the basic principles of federal support for Tribal self-determination. Nixon explained that a "policy of forced termination" of the trust relationship is "wrong."<sup>161</sup> The special trust relationship, he went on, "continues to carry immense moral and legal force."<sup>162</sup> To fulfill its moral and legal responsibilities, the United States must "strengthen the Indian's sense of autonomy without threatening his sense of community" and encourage "[s]elf-determination among the Indian people."<sup>163</sup> Subsequent presidents have reaffirmed this self-determination policy.<sup>164</sup> Congress, for its part, has recognized the trust relationship and adopted self-determination policies in various statutory schemes.<sup>165</sup> Thus, the Indian trust doctrine has helped orient the political branches' federal Indian policies in ways that have fostered Indian Nations' self-determination.

Indian Nations, moreover, forcefully assert their rights under the Indian trust doctrine. As Rebecca Tsosie has summarized, "Indian nations consistently refer to the 'trust relationship' that they have with the federal government."<sup>166</sup> Because the trust doctrine has been associated with Indian rights, the threat of "termination of the trust relationship sends shock waves through Indian communities."<sup>167</sup>

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160. *Id.* at 20.

161. President Richard M. Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2573> [<https://perma.cc/FR8D-CP2Z>].

162. *Id.*

163. *Id.*

164. See, e.g., Jase Jensen, Note, *First Americans and the Federal Government: Tribal Consultation, Agriculture, and a New Government-to-Government Relationship at the Start of the Twenty-First Century*, 17 *DRAKE J. AGRIC. L.* 473, 480 (2012) ("Each President since the 1960s has supported tribal self-determination.").

165. See, e.g., The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 98-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e (2012)) (authorizing the federal government to enter into self-determination contracts with Indian Nations, under which federal funds would support Tribal provision of government services); HEARTH Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (codified at 25 U.S.C. § 415 (2012)) (creating a process for Indian Nations to enter into certain business leases without additional federal approval).

166. Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 *U. PA. J. CONST. L.* 357, 397 (2003); see also Kouslaa Tunee Kessler-Mata, *Empowerment Through Incorporation? The Trouble with Agreement Making and Tribal Sovereignty*, 47 *TULSA L. REV.* 599, 609 (2012) ("[M]any tribal leaders and federal Indian law scholars have relied on the [trust] concept for calling into question the failings of the federal government in fulfilling responsibilities to tribes.").

167. See Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 *CATH. U. L. REV.* 635, 683 (1982) ("Despite the mixed feelings of Indian tribes about the federal government, any mention of the concept of termination of the trust relationship sends shock waves through Indian communities.").

All of which is to suggest that we should see the trust doctrine in redemptive terms. The Supreme Court has described it as such, particularly when invoking racist and paternalistic conceptions of Indian Nations. In *Kagama*, for example, the Court explained that the trust duty arises from Indians' "weakness and helplessness, so largely due to the course of dealing of the federal government with them."<sup>168</sup> This "humane and self imposed policy," the Court reasoned in *Seminole Nation*, is "incumbent upon the Government in its dealings with these dependent and sometimes exploited people."<sup>169</sup> Although an Indian Nation may not, by virtue of conquest, be "free and prepared to proceed in its own behalf," it is nevertheless "entitled to rely on the United States, its guardian, for needed protection of its interests."<sup>170</sup> On that understanding, conquest, however tragic, contained the seeds of its own redemption.

As the remainder of this Essay argues, however, the trust conception does not contain all the tools necessary to redeem the wrongs of American colonialism. Trust responsibilities, like many other fiduciary duties, can exist by operation of law without the beneficiary's prior consent. Parents may be fiduciaries for their children; guardians are appointed as fiduciaries for their wards; and a settlor may create a trust without seeking the beneficiaries' prior consent.<sup>171</sup> As Part III argues, trust between Indian Nations and the United States may arise through agreements, and be maintained through mutual respect and equal concern. But if the Indian trust is merely "self imposed,"<sup>172</sup> as *Seminole Nation* put it, then the United States defines its authority under the trust.

### C. Plenary Power as the Price of Redemption

#### 1. The Plenary Power Doctrine

The story of the Indian trust is one of righting some wrongs. But it is also a story of plenary power. The U.S. government has invoked the Indian trust doctrine when denying Indian sovereignty and property rights based upon the plenary power the United States claims as a trustee for Indian peoples.

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168. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

169. *Seminole Nation v. United States* 316 U.S. 286, 296–97 (1942).

170. *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

171. Trust beneficiaries may "compel the termination" of a trust under certain circumstances. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 65 (AM. LAW INST. 2003). Indian Nations, by contrast, cannot compel termination of the Indian trust under U.S. law; in that way, their position remains that of wards subject to a permanent guardianship for their "best interest[s]." *Cf.* Cal. Rules of Court 7.1004 (2016) ("A guardianship of the person or estate of a minor may terminate by operation of law or may be terminated by court order where the court determines that it would be in the ward's best interest to terminate the guardianship.")

172. *Seminole Nation*, 316 U.S. at 296.

Though Chief Justice Marshall's foundational opinions recognized Tribal "self-government" over Tribal "affairs,"<sup>173</sup> the United States "increasingly marginalized the voice of the tribes . . . and unilaterally imposed its will on them,"<sup>174</sup> much as, one might say, a ward to his guardian. In 1885, Congress enacted the Major Crimes Act to reverse *Ex parte Crow Dog*, which denied federal criminal jurisdiction over crimes by one Indian against another on a reservation.<sup>175</sup> The Supreme Court upheld the Act in *Kagama*, concluding that the "power" to divest Tribes of self-government "arises . . . with" the United States' "duty of protection" as the Tribes' guardian.<sup>176</sup> Tribes are "the wards of the nation,"<sup>177</sup> "dependent on the United States," and "their very weakness and helplessness" give rise to plenary "political control" of Tribes by the United States.<sup>178</sup> Thus, with fiduciary duty came plenary power.

For example, in *Lone Wolf v. Hitchcock* the Court held that Congress could unilaterally take Indians' treaty-recognized property rights.<sup>179</sup> Congress enacted a statute allotting Indian lands into individual ownership and permitting non-Indian settlement.<sup>180</sup> Kiowa, Comanche, and Apache Tribes challenged allotment, arguing that it took their property rights in violation of the Constitution.<sup>181</sup> The Tribes had a property right to their lands,<sup>182</sup> and reserved rights under the 1868 Treaty of Medicine Lodge, which provided that a three-fourths vote of the adult male members of the Tribe was necessary to authorize a sale of property.<sup>183</sup> The federal government took those rights without paying "just compensation" as the Fifth Amendment to the U.S. Constitution requires when the government extinguishes property rights.<sup>184</sup>

When it came to the Indian trust relationship, in other words, the government could take property without just compensation—and the Court would not even reach the merits. Congress had "[p]lenary authority over the tribal relations of the Indians," and its "power has always been deemed a

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173. *Worcester v. Georgia*, 31 U.S. (5 Pet.) 515, 547 (1832).

174. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARKANSAS L. REV. 77, 98 (1993).

175. 109 U.S. 556 (1883).

176. *Kagama v. United States*, 118 U.S. 375, 384 (1886).

177. *Id.* at 382.

178. *Id.* at 379–80, 383–84. *Kagama* rejected the federal government's argument that the Indian Commerce Clause provided Congress with the authority to enact the Major Crimes Act. Instead, it concluded that Congress's power arose from an extraconstitutional "right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." *Id.* at 379–82, 384.

179. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

180. *Id.* at 555; *see supra* note 154 and accompanying text (discussing Allotment Act).

181. *Id.* at 560–61.

182. *See Johnson v. M'Intosh*, 21 U.S. 543 (1823).

183. Treaty with the Kiowas and Comanches, Oct. 21, 1867, 15 Stat. 581; Joseph William Singer, *Lone Wolf, or How to Take Property by Calling It a "Mere Change in the Form of Investment"*, 38 TULSA L. REV. 37, 45 (2002) (discussing the Treaty).

184. U.S. CONST. amend. V ("just compensation").

political one.”<sup>185</sup> This plenary power was a fiduciary one that arose “by reason of [the] exercise of guardianship over [Indian] interests” and could contravene the “strict letter” of an Indian treaty.<sup>186</sup>

*Lone Wolf* thus inferred from the trust relationship an unreviewable power to take Indian property and to abrogate Indian treaties. In trust terms, the Court held, Congress’s unilateral taking of Indian property was a “mere change in the form of investment of Indian tribal property, the property of those who . . . were in substantial effect the wards of the government.”<sup>187</sup> As Joseph Singer has noted, this holding “legitimated . . . what is probably the most massive uncompensated taking of property in United States history.”<sup>188</sup>

The plenary power doctrine is not simply a relic of the early twentieth-century. To this day the Supreme Court cites *Lone Wolf*’s gloss on Congress’s “plenary authority” over “the organization and management of the [Indian] trust.”<sup>189</sup> And the Court has reaffirmed that the taking in *Lone Wolf* was “a mere change in the form of investment” of the Kiowa, Comanche, and Apache lands.<sup>190</sup>

Though subsequent cases have limited *Lone Wolf*, the Indian trust doctrine continues to provide less protection for Indian Tribal property than American law affords other real property rights. In *Sioux Nation*, the Court held that the United States must compensate Indian Nations for the taking of recognized Indian title.<sup>191</sup> But so long as Congress makes a good faith effort to get “equivalent value” for Indian property, “there is no taking.”<sup>192</sup> Normally, the Takings Clause requires the government to pay the fair market value when it seizes and disposes of property.<sup>193</sup> *Sioux Nation* held,<sup>194</sup> however, that the United States has greater discretion as a trustee for Indians.

Today, as when Chief Justice Marshall penned *Johnson*, federal courts decide constitutional questions about colonial power without questioning the

185. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

186. *Id.* (“Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and . . . such authority might be implied, even though opposed to the strict letter of a treaty with the Indians.”).

187. *Id.* at 568 (“mere change in the form of investment of Indian tribal property, the property of those who . . . were in substantial effect the wards of the government.”).

188. Singer, *supra* note 183, at 39.

189. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323–24 (2011) (citing and quoting *Lone Wolf*, 187 U.S. at 565 (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”)).

190. *United States v. Sioux Nation*, 448 U.S. 371, 413 (1980) (citing *Lone Wolf*).

191. *Id.* Notwithstanding the Takings Clause, the United States may still extinguish aboriginal title—title not formally recognized by a treaty, statute, or executive order—because Indians use their aboriginal lands “at the Government’s will.” *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277 (1955).

192. *Sioux Nation*, 448 U.S. at 416 (internal quotation marks omitted).

193. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

194. See *Sioux Nation*, 448 U.S. at 409.



legitimacy of conquest. The results can be contortions of doctrine that extend the reach of plenary power to deny Indian rights under constitutional law. Consider, for example, the First Amendment, which provides that “Congress shall make no law . . . prohibiting the free exercise” of religion.<sup>195</sup> In *Lyng v. Northwestern Indian Cemetery Protection Association*, the Supreme Court held that the United States could “virtually destroy” Indian religious practice on public lands without running afoul of the First Amendment’s Free Exercise Clause.<sup>196</sup> That case concerned protection of sacred sites of the Yurok, Karok, and Tolowa Indians, which were on federal public lands.<sup>197</sup> These sites are in the “high country,” the “most sacred of lands” that the Yurok, Karok, and Tolowa must visit to help maintain the world.<sup>198</sup> The Court held that the First Amendment did not constrain what the United States could do with its “own land,”<sup>199</sup> “[e]ven if” the government’s actions “will virtually destroy the Indians’ ability to practice their religion.”<sup>200</sup> It treated the United States’ property rights as a truism: “Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land.”<sup>201</sup> On what basis did the United States’ exclusive ownership rest? The logic of conquest.<sup>202</sup> But, as in *Johnson*, it was not for the courts of the conqueror to consider the injustice of colonial rule.

Perhaps most telling is that the United States claims to control the existence of a trust relationship between the government and Indian Nations. For an Indian Nation to enjoy a government-to-government trust relationship under federal Indian law, the United States must recognize it as a “federally recognized Indian Tribe.”<sup>203</sup> Federal courts have held that recognition is a political question except to the extent that the United States has voluntarily limited its discretion by statute or by regulation.<sup>204</sup> In addition, Congress may

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195. U.S. CONST. amend. I.

196. 485 U.S. 439, 451–52 (1988).

197. *Id.* at 442.

198. *Id.* at 461 (Brennan, J., dissenting).

199. *Id.* at 454 (majority op.) (emphasis added).

200. *Id.* at 451.

201. *Id.* at 453.

202. See Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1834 (1990) (“[I]f it were the government’s land, this would be only because of conquest. . . .”); cf. Abby Abinanti, *A Letter to Justice O’Connor*, 1 INDIGENOUS PEOPLES’ J.L. CULTURE & RESISTANCE 1, 3 (2004) (responding to Justice Sandra Day O’Connor’s opinion in *Lyng* and noting “the grievances of my people against your people [concerning] . . . how that land became the land of your government”).

203. Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 209, 212 (1991) (“Federal recognition of Indian tribes is a formal political act that establishes government-to-government relationships between the tribes and the United States. Recognition acknowledges both the sovereign status of the tribes and the responsibilities of the United States toward the tribes.”).

204. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1373–74 (Fed. Cir. 2005); see also *Miami Nation of Indians of Ind., Inc. v. U.S. Dep’t of Interior*, 255 F.3d 342, 347–48 (7th Cir. 2001) (explaining that executive branch may promulgate regulations that “bring[] the tribal recognition

end the government-to-government fiduciary relationship so long as it speaks clearly.<sup>205</sup> Federal courts have never struck down an act of Congress for violating the Indian trust,<sup>206</sup> and have rejected trust-based challenges to Congress's decision to terminate the trust relationship with an Indian Nation.<sup>207</sup> Congress terminated its government-to-government relationship with more than one hundred Tribes during the Termination Era of the 1950s and early 1960s.<sup>208</sup> Though Congress has stopped terminating trust relationships with Indians, the Court continues to invoke the plenary power doctrine to explain that federal law subordinates Indian Nations' sovereignty to the United States' authority.<sup>209</sup>

As the Court recently opined, the Indian trust "is a sovereign function subject to the plenary authority of Congress," which has "altered and administered [the trust] as an instrument of federal policy."<sup>210</sup>

## 2. *Tying Together Trust, Plenary Power, and Constitutional Supremacy*

This Part set out to answer two questions: What choices has the trust conception of government justified, and how has that concept affected those subject to it? The trust conception promises redemption while preserving the "paramount power" of the United States as trustee. The trust doctrine is "a major weapon in the arsenal of Indian rights"<sup>211</sup> where Congress has created

process within the scope of the Administrative Procedure Act"); *Shinnecock Indian Nation v. Kempthorne*, 2008 WL 4455599, at \*2–3 (E.D.N.Y. Sept. 30, 2008) (reasoning that "[t]he issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not the courts," but also concluding that a court "does have authority under the [Administrative Procedure Act] to review whether [the Department of Interior] has unreasonably delayed its decision").

205. See *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986); see COHEN'S HANDBOOK, *supra* note 40, § 3.02[8][b] (citing *Catawba Indian Tribe*). Indian rights under federal treaties may, however, survive the federal government's decision to terminate its trust relationship with an Indian Nation. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 410–11 (1968) (holding that, even though Termination Act of 1954 ended "federal supervision" over the Menominee Tribe and provided that the Tribe was subject to state law, the Act did not deprive Tribal members of hunting or fishing rights afforded under a federal treaty).

206. COHEN'S HANDBOOK, *supra* note 40, § 5.04[3][b] (explaining that "trust relationship is only a prudential limit on congressional action" and that "[c]hallenges to legislative action based on the trust relationship alone, rather than on specific constitutional limitations, have been unsuccessful").

207. *Menominee Tribe v. United States*, 607 F.2d 1335, 1339 (Ct. Cl. 1979).

208. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 205 (6th ed. 2011) ("[A]pproximately 109 tribes and bands were terminated.").

209. The doctrine has become so familiar that the Court recites it even when affirming Indian sovereignty. In *Santa Clara Pueblo v. Martinez*, for example, the Court explained that "Congress has plenary authority to limit, modify or eliminate the powers of [Indian] self-government." 436 U.S. 49, 56 (1978); see also *United States v. Lara*, 541 U.S. 193, 202 (2004) ("[T]he Constitution's 'plenary' grants of power . . . authoriz[e] Congress] to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.>").

210. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175, 181 (2011).

211. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 233 (1984).

judicially-enforceable trust duties. Yet while the Indian trust doctrine constrains the United States, it also legitimates the power that the United States asserts as a trustee for Indian Nations.

There are many nonconsensual fiduciary relationships in which “one party may come to have authority over another, and as a consequence, may impose obligations on them.”<sup>212</sup> Extending this logic, “fiduciary political theories are grounded in inherent features of authority, rather than the consent of the governed.”<sup>213</sup> This focus on trust, rather than consent, may help explain why the trust concept plays such an important role in legal theories of colonialism and conquest.

Under the trust conception, for all it might suggest, American colonial rule over Indian Nations is at least partially legitimate as long as it fulfills the Indian trust responsibility. As a leading fiduciary theorist puts it, the trust conception “supplies” colonial-Indigenous “relations a measure of legitimacy that would be lacking were the [colonial state] able to set the terms of those relations at its sole discretion.”<sup>214</sup> By complying with what the Supreme Court has called “self imposed” trust duties, the United States redeems, however partially, some of the wrongs of a constitutional order whose supremacy is based partly in conquest.<sup>215</sup>

On this view, the Indian trust doctrine and federal plenary power mediate conflicts between the demands of Indian self-government and the United States’ constitutional supremacy. The Indian trust doctrine directs the United States to manage Indian resources carefully and for the Indians’ benefit. It also calls upon the United States to support Indian self-determination. By supporting Tribal governments and recognizing Tribal rights, the United States takes steps to redeem the wrongs of colonial rule.

At the same time, the trust conception promises redemption without risking constitutional supremacy. The United States has asserted a plenary power over Indian Nations based upon the trust conception. Where “Justice” demands it, the United States may exercise its plenary power to extend constitutional law into Indian Country. And where the needs of the “Union” demand it, the United States may limit Indian self-determination. “[U]nder the entrenched doctrine of federal plenary power,” Zachary Price has argued, “the

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212. FOX-DECENT, SOVEREIGNTY’S PROMISE, *supra* note 22, at 121.

213. Leib & Galoob, *supra* note 122, at 1826.

214. FOX-DECENT, SOVEREIGNTY’S PROMISE, *supra* note 22, at 69. Evan Fox-Decent and Ian Dahlman have argued that the trust conception may operate through international law to support Indigenous self-determination, thus “mitigat[ing] th[e] concern” that “trusteeship invariably leads to paternalism.” See Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 THEORETICAL INQUIRIES L. 507, 531 (2015). The plenary power doctrine of U.S. law suggests why the move to international law may be necessary for public fiduciary theory. For a response to Fox-Decent and Dahlman’s argument, which is outside the scope of this Essay’s focus on domestic U.S. law, see Davis, *supra* note 125, at 16–17.

215. See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

federal government always bears some constitutional responsibility for the actions of tribal and territorial governments, if only because Congress could have chosen to bar the jurisdiction exercised by tribal or territorial authorities.”<sup>216</sup> On that logic of conquest, Price has concluded, the United States may in its discretion “allow[] limited accommodation of tribal and territorial procedures that depart from Bill of Rights requirements in federal or state court.”<sup>217</sup> Plenary power preserves constitutional supremacy by authorizing Congress to extend federal law into Indian Country.

### III.

#### REIMAGINING THE POSSIBILITY OF REDEMPTION

The trust conception of government reconciles conquest with constitutionalism, but for whom, and at what price? This Part begins with these questions.

Constitutional supremacy and self-government do not neatly converge in a colonial republic. To address this dilemma, the trust conception promises that federal plenary power over Indian Nations, if wielded with the care and faithfulness of a fiduciary, can be reconciled with constitutional commitments to self-government. As a trustee, Congress has the plenary power to limit Tribal self-government, but it must temper its exercise of that power with the good faith of a fiduciary.

What grace the trust purchases is too cheaply bought. To be sure, as Part II discussed, the trust conception of government has supported meaningful rights for Indian Nations in U.S. courts. At the same time, every trust requires a trustee, and the United States, as the trustee, asserts a “paramount power” over the Indian trust’s beneficiaries.

This Part imagines a different approach to the problem of redemption in our colonial republic. The guiding intuition is that the Constitution’s redemption should not be measured by reference to the faith of “We the People” alone. That, I think, is a crucial lesson of including the law of American colonialism within the constitutional canon.

To reconsider the problem of constitutional redemption, this Part begins by asking, *whose* faith is at stake? It then revisits the problem of consent and redemption through the lens of relational theory. Relational redemption, it suggests, entails a process in which different communities of faith can turn towards history, rather than away from it, and together fashion a “multicultural constitutionalism.”<sup>218</sup>

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216. Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 726 (2013).

217. *Id.* at 727.

218. Williams, *supra* note 4, at 981.

A. *Whose Faith?*

As the United States' bicentennial approached, Vine Deloria reported, "Bicentennial planners [were] shocked that American Indians [were] not wildly enthusiastic about the coming anniversary of the United States."<sup>219</sup> At one time, Deloria noted, some American Indian Nations' "chiefs considered themselves such a part of America that they participated in several presidential inaugurations."<sup>220</sup> But the bicentennial appeared "to a majority of Indian people as the crowning insult in [a] vicious cycle," one that had begun four hundred years earlier with European colonialism.<sup>221</sup>

Different Americans will have different experiences of constitutional faith. In that way faith divides us. In any historical moment, of course, there will be disagreements about constitutional evil.<sup>222</sup> Many Americans, for example, would deny that mass incarceration is a perpetuation of Jim Crow.<sup>223</sup> But there is a more profound way in which faith may divide us.

While for some Americans, faith may be cheap, for others it is costly, perhaps too costly. In his sermons to the Abyssinian Baptist Church of Harlem, the Reverend Adam Clayton Powell Sr. described "white Christian America's tolerance of Jim Crow, lynching, and racism" as a form of "cheap grace."<sup>224</sup> This grace is "the grace we confer on ourselves."<sup>225</sup> While cheap grace seems to save those who adopt it, it costs others who do not share it.

To speak of a singular collective faith in the Constitution ignores, as Dorothy Roberts put it, that "[w]hat fidelity to the Constitution does to us depends on our experience of constitutional evil."<sup>226</sup> The Constitution promises a "more perfect Union" of "We the People," but not all Americans share the same faith in that promise. On the Constitution's 200th anniversary, Justice Thurgood Marshall reminded us that constitutional faith is little more than idolatry if we do not "seek . . . a sensitive understanding of the Constitution's inherent defects."<sup>227</sup> Roberts has argued that for black Americans a "naive

219. Vine Deloria, Jr., *Why Indians Aren't Celebrating the Bicentennial*, in SPIRIT & REASON: THE VINE DELORIA, JR., READER 199, 199 (Barbara Deloria et al., eds. 1999).

220. *Id.*

221. *Id.* at 204.

222. BALKIN, *supra* note 4, at 109 ("[E]xamples of constitutional evil in the present are always controversial. . .").

223. *But see* ALEXANDER, *supra* note 60 (arguing that mass incarceration is part of ongoing racial caste system that perpetuates legacies of slavery and of Jim Crow).

224. DE LA TORRE, *supra* note 35, at 114; *see also* RALPH GARLIN CLINGAN, AGAINST CHEAP GRACE IN A WORLD COME OF AGE: AN INTELLECTUAL BIOGRAPHY OF CLAYTON POWELL, 1865–1953, at ix (2002) (explaining that Reverend Powell "coin[ed]" the term "[c]heap grace"). The German theologian Dietrich Bonhoeffer, who attended services at Abyssinian Baptist while studying at Union Theological Seminary, would later draw upon Reverend Powell's concepts in DIETRICH BONHOEFFER, THE COST OF DISCIPLESHIP (1995).

225. *See* Kirk-Duggan & Judkins, *supra* note 37, at 124.

226. Roberts, *supra* note 10, at 1761.

227. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987); *see also id.* ("[T]he odds are that for many Americans the bicentennial

faith” in the Constitution is not the starting point; rather, “blacks’ instrumental fidelity to the Constitution [is] part of a social movement for equal citizenship.”<sup>228</sup> Even this instrumental fidelity is not “without psychological cost,”<sup>229</sup> because, as Derrick Bell contended, victories in the fight for equality may “slide into irrelevance as racial patterns adapt in ways that maintain white dominance.”<sup>230</sup> The costs, then, may be psychological, strategic, and material.<sup>231</sup> Faith may be too costly for some Americans when it is too cheap for others.

Not only our experiences of constitutional faith, but also our estimation of the greater constitutional good, may divide us. The Constitution’s Preamble contains not only a commitment to “establish Justice,” but also commitments to a “more perfect Union,” the “common defence,” “domestic Tranquility,” and so on.<sup>232</sup> The problem of the greater good arises where eradicating a constitutional evil would conflict with one (or more) of these constitutional commitments. Prior to the Civil War, for example, white Americans readily concluded that maintaining the Union was the greater good even if it meant perpetuating slavery.<sup>233</sup> Yet for black Americans, the conflict—and therefore the problem of the greater good—could appear a false one.<sup>234</sup>

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celebration will be little more than a blind pilgrimage to the shrine of the original document now stored in a vault in the National Archives.”)

228. Roberts, *supra* note 10, at 1771; *see also id.* at 1768 (arguing that “Blacks . . . have remained faithful to the Constitution in the struggle for citizenship by relentlessly demanding that its interpretation live up to its highest principles and follow its strictest requirements”).

229. *Id.* at 1769.

230. *Id.* at 1770 (quoting and discussing Bell, *supra* note 10, at 373).

231. *See id.* at 1770–71 (quoting and discussing Bell, *supra* note 10, at 373).

232. U.S. CONST. pmb1.

233. *See* BALKIN, *supra* note 4, at 125 (discussing Justice Joseph Story’s “wager” in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), which upheld “the right of slaveowners to regain their slaves” based upon his belief that doing so “would preserve a greater good”). *See generally Prigg*, 41 U.S. at 611 (“The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed.”).

234. *See* Roberts, *supra* note 10, at 1766–67 (quoting FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 261–62 (MacMillan Co. 1962) (1892) (“By . . . a course of thought and reading I was conducted to the conclusion that the Constitution of the United States—inaugurated to ‘form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty’—could not well have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery.”)); *cf.* BALKIN, *supra* note 4, at 112–13 (stating that “[i]t is difficult to know what to make of Douglass’s bold claim,” and that “[p]erhaps the best interpretation of Douglass’s remarks is that they are part of a tradition of oppressed groups attempting to hold the Nation responsible for its failed promises”).

Then-Senator Barack Obama echoed Douglass’s reading of the Constitution in his speech *A More Perfect Union*, which wove together the promises of Justice and of Union: “[T]he answer to the slavery question was already embedded within our Constitution—a Constitution that had at its very core the ideal of equal citizenship under the law; a Constitution that promised its people liberty, and justice, and a union that could be and should be perfected over time.” Sen. Barack Obama, *A More*

The redemption that the Indian trust doctrine promises can be understood as a form of cheap grace. The trust conception and the plenary power doctrine have been tied together, with the Court grounding federal supremacy over Indian Nations in trust concepts. The trust promises protections for Indian self-determination, while plenary power authorizes Congress to limit the same. From one perspective, plenary power and the trust mediate the conflict between constitutional supremacy and redeeming constitutionalism from the evil of conquest. From another perspective, the redemption this doctrine promises is too cheap. As Kevin Gover has argued, the trust doctrine does not disturb the “idea, which has currency in the foreign policy of the United States,” that the federal government “may arrogate the authority to administer the property and internal affairs of other nations.”<sup>235</sup>

### B. *Reimagining Redemption*

Taking the Constitution’s promises on faith can be a barrier to skepticism of constitutional supremacy. As Robin West has put it, we too often neglect to ask whether the Constitution “further[s] the ‘good life’ for the individuals, communities, and subcommunities it governs . . . .”<sup>236</sup>

Some strains of religious and political theology treat this sort of skepticism as a necessary feature of redemption. In this register, “redemption” is relational. Applied to constitutionalism, relational redemption aims to transform unjust relationships and asks what any particular constitutional faith means not only for those who hold it, but also for those who hold other faiths.

Redemptive rhetoric, George Shulman has argued, can be dangerous politics. “God’s messengers presume there is one right way to view and live in the world,” he wrote, which can lead them to treat other faiths as “false prophecy dooming the nation.”<sup>237</sup> At the same time, redemption can be relational, in which different communities of faith turn towards history and each other. When it comes to racism, for example, “we too want whites to acknowledge and overcome—why not say repent of and redeem?—a history of racial domination.”<sup>238</sup> In that sense, “faith is ubiquitous and political theology is inescapable.”<sup>239</sup> But perhaps there can be relational stories of redemption,

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Perfect Union, Nat’l Const. Ctr. (Mar. 18, 2008), <http://constitutioncenter.org/amoreperfectunion> [<https://perma.cc/56KK-7L2F>].

235. See Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 325 (2006).

236. Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 766 (1992); see also Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1154 (2006) (discussing constitutional skepticism “[i]n the context of the poor”).

237. GEORGE SHULMAN, *AMERICAN PROPHECY: RACE AND REDEMPTION IN AMERICAN POLITICAL CULTURE*, at xi (2008).

238. *Id.* at xiv.

239. *Id.* at 239.

ones in which different communities of faith “can engage rather than demonize the differences on which their identities depend.”<sup>240</sup>

For Reverend Powell, recognizing the problem of cheap grace was also a call for relational redemption. Cheap grace in the face of injustice does not disturb “the very societal structures responsible for oppression in the first place.”<sup>241</sup> Redemption, by contrast, depends upon whether “the quest for justice brings about salvation and liberation for the oppressed and their oppressors.”<sup>242</sup> On this view, redemption is relational; it begins with recognition of the injustice of a relationship and requires a transformation of that relationship.

This relational idea of redemption draws inspiration from relational theories of rights within feminist legal theory. Jennifer Nedelsky, for example, argued for an “understanding of rights as relationship and constitutionalism as a dialogue of democratic accountability.”<sup>243</sup> Rights, in this relational approach, constitute (and are constituted out of) particular relationships “of power, of responsibility, of trust, of obligation.”<sup>244</sup> Designing rights involves choices about basic values and how law structures (and is structured by) relationships, with lawmakers seeking to foster certain kinds of relationships.<sup>245</sup>

To say the state is a fiduciary is to tell a story about the relationship between political elites and those subject to the public power they wield. In Socrates’ telling, this story seemed beyond belief: “All of you in the city are brothers,” his story went, “but the most precious are the ones fit to rule, because when the god formed you at birth he mixed gold into them, silver into the auxiliaries, and iron and bronze into the farmers and the craftsmen.”<sup>246</sup> This is a sacred story of guardians bound to the terms of a public trust<sup>247</sup> and a profane tale in which some citizens dominate others.<sup>248</sup>

240. *Id.*

241. DE LA TORRE, *supra* note 35, at 114.

242. *Id.* at 115.

243. Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUDIES/REVUE D’ETUDES CONSTITUTIONELLES 1, 1 (1993).

244. *Id.* at 13.

245. *See, e.g., infra* Part III.C.2.a (discussing ways in which property law structures relationships between Indian Nations and the United States).

246. Robert L. Tsai, *Democracy’s Handmaid*, 86 B.U. L. REV. 1, 16–17 (2006) (quoting PLATO, THE REPUBLIC, Book 3, 415-d, at 84–85 (Raymond Larson ed. & trans., AHM Publ’g Corp. 1979) (381 BC)); *see* CRIDDLE & FOX-DECENT, FIDUCIARIES OF HUMANITY, *supra* note 22, at 13 (“The fiduciary conception of state authority can be traced back to the writings of Plato and Aristotle, who each characterized public officials as ‘guardians’ charged with promoting the public good.”).

247. Natelson, *supra* note 22, at 1097 (“According to Plato, the purpose of the state was to promote the interest of the entire society, and the guardian was to subordinate his interest to that purpose.”).

248. “Governmental guardianship,” Judge Jerome Frank once wrote of Socrates’ story, “is repugnant to the basic tenet of our democracy. According to our ideals, our adult citizens are self-guardians.” *United States v. Roth*, 237 F.2d 796, 801 (2d Cir. 1956) (Frank, J., concurring).



Today's public fiduciary theorists seek to work this sort of myth pure of its profaneness.<sup>249</sup> Mutual trust and the rule of law, not elitism and paternalism, are at the heart of this modern trust conception. For more than four centuries, however, the trust conception of government has been associated with relationships of European and American imperialism and colonial domination. It seems implausible to think that the association is a mere accident, that this history of fiduciary domination tells us nothing important about the fiduciary conception. And it is beside the point to say that imperialism and colonialism would have been worse without the trust conception. Perhaps it would have been. Even so, the trust conception may perpetuate or foster relationships that we should reject. Historically, the discourse of fiduciary government became "saturated" with "images" of racism and domination, particularly in settler colonial states.<sup>250</sup> The persistence of the plenary power doctrine in U.S. law should make clear it is not easy to split the sacred trust from the profane tale.

"Metaphors in law," Justice Benjamin Cardozo once mused, "are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."<sup>251</sup> Some private fiduciary relationships are patently paternalistic. The law entrusts guardians with authority over their wards' affairs based upon the (purported) incapacity of the ward. Other fiduciary relationships, such as the private trust, entail paternalism because the law directs the fiduciary to decide what's in the beneficiary's best interests. There is a strong argument that fiduciary duties "build a measure of paternalism into every fiduciary relation."<sup>252</sup> The fiduciary metaphor may keep us from focusing on the ways in which the people are not (and should not be) passive beneficiaries of public laws made and enforced by political elites.<sup>253</sup>

Where the people are defined as beneficiaries and the state as a fiduciary, perhaps we should expect political elites to assert a "paramount power"<sup>254</sup> to

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249. CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 22, at 16 (rejecting "colonialist ideology" under which "European powers framed their relationships with colonized nations as benevolent 'trusteeships' or 'wardships'").

250. See Robert W. Gordon, *Law and Ideology*, *TIKKUN*, Jan.-Feb. 1988, at 15 ("Legal discourses are saturated with categories and images that for the most part rationalize and justify in myriad subtle ways the existing social order as natural, necessary and just.").

251. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 1005 (1987) (quoting *Berkey v. Third Ave. Ry.*, 155 N.E. 58, 61 (N.Y. 1926)).

252. Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, *supra* note 6, at 209, 217. Agency might be an exception. Cf. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 *WM. & MARY L. REV.* 513, 559 (2015) ("[A]gents are also fiduciaries, and unlike trustees and directors, their powers are checked by a legal duty of obedience to their beneficiaries (that is, their principals).").

253. Cf. Martha Minow, *Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10, 44 n.165 (1987) (explaining that metaphorical thinking, while foundational to human cognition, "often obscures understanding, [in part] because it keeps us from focusing on aspects of a thing that are inconsistent with the metaphor we choose").

254. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

define the law, the right, and the just. Instead of asking why Western colonial governments dominated Indigenous Peoples “*in spite of*”<sup>255</sup> their fiduciary ideals, we might ask why the trust conception lends itself to relationships of domination.

Three features of the trust conception stand out as particularly conducive to relationships of domination.<sup>256</sup> First, consent need not be the source of public authority, as the law itself may entrust the state with fiduciary authority over a people. This idea of authority by operation of law lends itself to the law of the conqueror unilaterally declaring its own supremacy. In *Cherokee Nation v. Georgia*, Chief Justice Marshall declared it, and it was so: Indian Nations “occupy a territory to which we assert a title independent of their will . . . . Their relations to the United States resemble that of a ward to his guardian.”<sup>257</sup>

Second, under the trust conception, the state’s authority is explicable less in terms of what the people can do, but more in terms of what they are incapable of doing. Indian Nations “*are* the wards of the nation,” the Supreme Court reasoned in *Kagama*, and “their very weakness and helplessness” subjects them to the authority of the United States.<sup>258</sup> The problem, in other words, is that the trust conception lends itself to paternalistic justifications of relationships of domination.

Third, we do not expect fiduciaries to leave their beneficiaries alone. To the contrary, fiduciaries are authorized to interfere in their beneficiaries’ affairs. Private trustees, for example, manage the trust property for the beneficiaries. Transposed to the colonial context, this idea has supported policies to restrict Tribal self-government.

Nothing in what I have argued thus far “proves” that it is impossible to tell a story of constitutional law based upon trust or the trust conception of government.<sup>259</sup> But what I have argued should cast doubt on trust law (much less the law of guardianship) as a device for thinking about relationships of mutual respect among self-governing peoples. That’s not to deny the “unique obligation[s]” of the United States “toward the Indians”<sup>260</sup> or to call into question the government-to-government relationships among Indian Nations and the federal government. These government-to-government relationships are

255. CRIDDLE & FOX-DECENT, FIDUCIARIES OF HUMANITY, *supra* note 22, at 63 (“If states have been the agents of human suffering . . . it is not *because* they have justified their authority in fiduciary terms, but *in spite of* this fact.”).

256. I develop this argument in more detail in Davis, *Pluralism and the Public Trust*, *supra* note 125.

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

258. 118 U.S. 375, 383–84 (1886).

259. What would such proof look like? Elsewhere I have argued, for reasons largely orthogonal to my arguments here, that there are serious problems with fiduciary theories of government. See Davis, *supra* note 19, at 1145. But I speak only for myself and do not seek to proffer the last word on what work the trust conception might do for Indigenous Peoples resisting colonial domination. Nor do I claim to have offered the first word on the subject.

260. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977).

distinct from the relationship between an individual and the government. But, as public fiduciary theorists have shown, the relationship between state authority and anyone subject to it can be described in terms of a trust. Like private fiduciaries, public officials have discretionary power to act on the interests of others. And like the beneficiaries of private fiduciary relationships, the people depend upon public officials to exercise their discretion fairly and with care. Entrusting discretionary authority to public officials makes the people vulnerable to self-dealing, carelessness, and other abuses of power. For this reason, we might view public officials as fiduciaries who owe duties of loyalty and of care to anyone subject to their authority.<sup>261</sup> There is nothing in the formal idea of government authority as a trust that distinguishes Indigenous Peoples from others subject to government power without their consent.<sup>262</sup> Therefore, the unique government-to-government relationship between an Indian Nation and the United States does not arise from the trust form alone. Instead, we have to explain this unique relationship based on something other than trust law itself.

Such stories of relational redemption cannot be told by “We the People” alone. We the People’s veneration of the Constitution, their trust in its institutions, their confidence that constitutional government can be washed of the wrongs it has committed—ultimately, their faith in themselves<sup>263</sup>—cannot by itself transform their relationships with other peoples. Within a multinational and multicultural world, a world in which many people are excluded from “We the People” or choose not to join them, redemption should mean something that’s more demanding, more radical, and more important. It should mean sharing stories among “We the Peoples.”

### C. *The Consent of We the Peoples*

#### 1. *Stories of Relational Redemption*

Fiduciary theorists have told a story about colonial rule that focuses on how “Western nations framed their authority to govern territory in fiduciary terms.”<sup>264</sup> Other stories of the relationship between settler governments and Indigenous Peoples do not depend upon the fiduciary principles that settler governments invoked to legitimate conquest and colonial rule. Whether founded on human rights claims or Indigenous visions of diplomacy, such

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261. See FOX-DECENT, SOVEREIGNTY’S PROMISE, *supra* note 22, at 93–94; Leib et al., *Mapping Public Fiduciary Relationships*, *supra* note 22, at 388.

262. Indeed, as we have seen, the beneficiaries’ consent is not required for a trust to exist, and the trust conception focuses our attention away from the consent of the governed. See *supra* Pt. II.C.2.

263. See BALKIN, *supra* note 4, at 80 (“[F]aith in the Constitution is not simply faith in law; it is faith in the ultimate destiny and goodness of a nation, or of a people.”).

264. Criddle, *supra* note 6, at 408.

stories involve recognition of a “mutual . . . relationship”<sup>265</sup> between peoples based upon good faith and consent.

To revisit consent in this way is not to tell the same story as traditional social contract theory. Social contract theories range from quasi-anthropological descriptions of the origins of society in agreements among persons in a state of nature to the use of contract as a conceptual device for thinking about what we should demand of each other and the state.<sup>266</sup> Traditional social contract theory points to agreement among rational individuals for the foundation and content of legitimate government authority. This theory influenced—and continues to influence—Americans’ story of their constitutional government. American judges, for example, have used the idea of a social contract to justify exclusion, discrimination, and domination.<sup>267</sup>

Social contract theory, then, is susceptible to the same objection as the public trust conception of government, namely, that whatever legal legitimacy it purchases comes at the price of legitimating social injustice. Perhaps any story of constitutional government based on contract lends itself to ideologies of domination, not relational redemption.<sup>268</sup> Critical social theorists have argued that the contract conception can exclude as much as it secures freedom among individuals. Carole Pateman, for example, has argued that the original contract includes not only the social contract constituting the state, but also the “sexual contract” through which men assert the right to govern women.<sup>269</sup>

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265. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENTER. L.J. 175, 214 (2000).

266. See generally THOMAS HOBBS, *LEVIATHAN* (Michael Oakeshott ed., Touchstone 1977) (1651) (developing political theory based in part on conception that persons collectively agree to submit to sovereign authority for mutual protection); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon ed., Hafner Pub. Co. 1952) (1689) (positing that individuals surrender natural liberty and agree to constitute a community for mutual security and protection of property); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (developing theory of justice as principles that persons would agree upon if they considered them rationally and from an initial position of equality); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston, trans., Penguin Books 1968) (1762) (developing theory of social contract under which each person puts themselves under direction of general will).

267. See, e.g., *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 404–05 (1857) (reasoning that black Americans were not included within American social contract); Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 13–14 (1999) (explaining that social contract metaphor has “served the interests of injustice” in American jurisprudence); Vine Deloria, Jr., *Minorities and the Social Contract*, 20 GA. L. REV. 917, 917 (1986) (defining “[n]on-political minorities” as “permanent minorities which have always been outside the social contract and the protection of the Constitution”).

268. See, e.g., AILEEN MORETON-ROBINSON, *THE WHITE POSSESSIVE: PROPERTY, POWER, AND INDIGENOUS SOVEREIGNTY* 155 (2015) (arguing that “white patriarchy who theorized about the social contract were primarily concerned with it being a means of agreement between white men to live together”); Ann Tweedy, *The Liberal Forces Driving the Supreme Court’s Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 148, 199 (2000) (arguing that traditional social contract theory “does not adequately provide for the continuing viability of culturally distinct groups—especially those with their own claims to sovereignty”).

269. See PATEMAN, *SEXUAL CONTRACT*, *supra* note 9.

Following Pateman's account of the sexual contract, Charles Mills has argued that the social contract also includes a "racial contract" through which whites have justified the exclusion and domination of people of color.<sup>270</sup> Thus, the social contract has served as an ideology of domination, not simply a story of agreement among free and equal persons.

When it comes to American colonialism, moreover, the association between contract and domination is not simply conceptual or metaphorical. The United States acted coercively in many treaty negotiations with Indian Nations. Negotiation can lead to domination if one party does not have "the people and institutions [necessary to] hold their own as equals across the table."<sup>271</sup> Many Indigenous Peoples are renewing and developing the necessary institutions. But any number of "principal-agent difficulties" arise when we think about contracting as a tool of self-government.<sup>272</sup> Finally, in many cases colonial states refused to contract with Indigenous Peoples. Within the United States, where treaty making ended in 1871,<sup>273</sup> there are many Indian Nations without treaties.

One advantage of looking to contract rather than to trust as a metaphor for multicultural constitutionalism, however, is that it focuses us on these difficult questions, rather than on how colonial states justify the supreme power they claim over Indigenous Peoples.<sup>274</sup> Charles Mills has argued that the core of the contract metaphor is the recognition that human choices construct the law and the state.<sup>275</sup> As a doctrinal matter, a fiduciary relationship can exist by operation of law. The United States, for example, has assumed the authority of a trustee by operation of federal law even where Indian Nations have not consented to it. By contrast, as Michele Goodwin has argued, "a social compact exists only when a real social relationship exists. In this way, the party subject

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270. See MILLS, RACIAL CONTRACT, *supra* note 9.

271. See, e.g., HARVARD PROJECT ON AM. INDIAN ECON. DEV., ON IMPROVING TRIBAL-CORPORATE RELATIONS IN THE MINING SECTOR 2 (2014), <http://hpaied.org/sites/default/files/documents/miningrelations.pdf> [<https://perma.cc/ZH8V-U9QZ>].

272. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1783 n.147 (1997) (noting barriers such as "extent of authority delegated to negotiators, the quality of the information flowing from negotiators to their principals, and the difficulty of identifying and maintaining the stability of the principal itself").

273. See, e.g., DELORIA & WILKINS, *supra* note 4, at 161.

274. This focus seems especially important in light of the "emerging movement for [Indigenous] self-government," one that "is less concerned with what central governments do by way of the recognition of Indigenous peoples or their rights, legislatively or in the courts, and more concerned with what Indigenous peoples do with rights." Stephen Cornell, *Processes of Native Nationhood: The Indigenous Politics of Self-Government*, 6 INT'L INDIGENOUS POL. J. 1, 1 (2015), <http://ir.lib.uwo.ca/iipj/vol6/iss4/4> [<https://perma.cc/Q9NH-KJL9>]; see also *id.* at 2 n.2 ("[A] striking aspect of this movement is the search for political strategies that . . . bypass central governments altogether and work directly with local governments and/or corporate actors. . .").

275. Charles W. Mills, *The Domination Contract*, in CONTRACT AND DOMINATION, *supra* note 9, at 79, 104 ("Once one recognizes how protean the contract has historically been, and how politically pivotal is its insight of the human creation of society and of ourselves as social beings, one should be able to appreciate that its conservative deployment is result not of its intrinsic features. . .").

to the State's compact must be valued, their contributions respected, and their communities honored."<sup>276</sup>

Understood in this way, the social contract is a relationship. It is not a thing, like a piece of paper in a consumer contract.<sup>277</sup> The social contract is not a ritual, repeated every four years in a voting booth, nor a foundation that the Framers built centuries ago and left to posterity. Instead, the social contract is an ongoing relationship between equals in which agreement and resolution of differences in good faith is a goal.

This relational understanding of the social contract has analogues in the common law of contract. Relational theories emphasize contracts as relationships based upon "good faith, best efforts, and reasonable adjustments between parties."<sup>278</sup> One way of thinking about contracts treats them as exchanges between parties who aim to maximize value through one-off market transactions rather than as building blocks of relationships. Relational contract theorists, on the other hand, think that the way to understand contractual agreements is by focusing upon the social relationship between the contracting parties. They reject the idea that we can best understand contracts by focusing upon one-shot deals between strangers who reach agreements in impersonal markets, an idea they associate with classical contract theory. Understanding most contracts requires a thick description of relationships in which "parties expect some form of loyalty" as well as "[t]rust and social solidarity."<sup>279</sup> The difference between relational contract theory and its classical counterpart is not simply one of standards versus rules, though it encompasses that distinction. Relational contract theory, rather, focuses upon fostering ongoing relationships among contracting parties. Otherwise, relational theorists warn, "legal mechanisms are imperialistic and do not function effectively in concert" with the norms the parties have established throughout their relationship.<sup>280</sup> Thus, for relational theorists, recognizing the relational realities of most contracts opens up critiques of existing law and invites new norms of contracting.

Indigenous Peoples have asserted their rights to relationships based upon consent while resisting colonial domination. Sometimes this resistance involves demanding that colonial governments keep their treaty promises.<sup>281</sup> More broadly, as Robert Williams has put it, "[s]o long as indigenous peoples can

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276. Michele Goodwin, *Rethinking Legislative Consent Law?*, 5 DEPAUL J. HEALTH CARE L. 257, 314 (2002); see also Mills, *supra* note 275, at 105 (noting "moral egalitarianism" of contract metaphor).

277. Arthur A. Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147 (1970) (exploring "consumer contract" as a thing that "just happens to look like the result" of bargaining).

278. Leib, *supra* note 12, at 713. On relational contract theory, see also Goetz & Scott, *supra* note 12; Goodwin, *supra* note 12, at 823; Macaulay, *supra* note 12; Macneil, *supra* note 12.

279. Leib, *supra* note 12, at 654.

280. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1295 (1998).

281. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 695 (2006) ("Indians respected treaties and, to this day, seek only to enforce them.").

continue to point out the embarrassing fact that they never consented to” the authority of colonial states, “they will continue to be able to frame a compelling case for their fundamental human rights of self-determination.”<sup>282</sup> This case need not depend on a traditional Western conception of the social contract, even if it draws upon that conception for rhetorical and normative force. Before there was a U.S. Declaration of Independence, Vine Deloria remarked, “American Indians were the original proprietors of the continent, the quintessential practitioners of the original social contract.”<sup>283</sup> And before there was a story of “We the People,” there were stories of many different peoples.

When it comes to North America, one such story holds that “[t]he Trust Doctrine was not the exclusive byproduct of the Western legal tradition brought to North America from the Old World.”<sup>284</sup> In the early years of Indian and European relations in eastern North America, Indian and European sovereigns treated each other in fact “as rough political, economic, and military equals.”<sup>285</sup> As late as the 1820s, Chief Justice Marshall, the author of the foundational judicial opinions in federal Indian law, “feared the possibility that the Indians would push America into the sea.”<sup>286</sup> As equals, Indian Nations offered understandings of international diplomacy that did not depend upon the law of trusts.

For the Iroquois, for example, diplomatic relationships were extensions of kinship.<sup>287</sup> Indians might refer to their European treaty partners as fathers or brothers, with the Europeans “naturally assum[ing] that the father figure represented authority and wisdom in dealing with Indian children.”<sup>288</sup> Understood in European terms, the diplomatic relationships between Indians and colonial governments looked like a guardian-ward, or perhaps a parent-child, fiduciary relationship. But Indian kinship terms did not have the same connotations for Indians. It was not uncommon for different Indian Nations in eastern North America to treat with one another in kinship terms without surrendering sovereignty as a ward to his guardian.<sup>289</sup>

There are many such traditions of Indigenous diplomacy. Among Indian Nations of the eastern woodlands,<sup>290</sup> for example, treaties were sacred pacts

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282. Robert A. Williams, Jr., *Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System*, 2 REV. CONST. STUD. 146, 148–49 (1995).

283. Deloria, *supra* note 267, at 924.

284. Williams, *supra* note 31, at 997.

285. *Id.* at 988.

286. Fletcher, *supra* note 281, at 678.

287. See CALLOWAY, *supra* note 8, at 24. The Iroquois example is particularly important because the “Iroquois forms, conventions, and terminology pervaded the diplomacy of northeastern North American.” *Id.* at 16.

288. *Id.* at 24.

289. See *id.* at 25 (explaining, for instance, that “Cherokees also called the Delawares grandfathers but called the Iroquois elder brothers”).

290. See, e.g., Williams, *supra* note 31, at 988 (discussing European and Indian diplomacy in woodlands of Eastern North America during colonial era treaty period).

affirmed by wampum. Wampum belts, made of clamshells or glass beads, served many functions, including as gifts and records of intergovernmental agreements.<sup>291</sup> The Gus-Wen-Tah, also known as the Two Row Wampum, symbolized the Haudenosaunee understanding of the intergovernmental relationship of “peace and friendship.”<sup>292</sup> Along the wampum there “are two rows of purple” that “symbolize two paths or two vessels,” one for Indians and another for non-Indians, “travelling down the same river together,” with neither “try[ing] to steer the other’s vessel.”<sup>293</sup> The Gus-Wen-Tah signifies a relationship of mutual protection and trust, not the submission and vulnerability of a ward to a guardian under Euro-American fiduciary law.

Understood as a “mutual, ongoing trust relationship” between sovereigns,<sup>294</sup> this vision signifies legal and moral protections for Indian self-determination and separatism. Robert Williams has argued that Chief Justice Marshall’s opinion in *Worcester* incorporated Indian understandings of the trust relationship into federal law.<sup>295</sup> In *Worcester*, the Chief Justice wrote that the “relation” between the Cherokee Nation and the United States “was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting, as subjects, to the laws of a master.”<sup>296</sup> Treaties between the two nations “recognize[] the national character of the Cherokees, and their right of self-government, thus guaranteeing their lands.”<sup>297</sup> On that understanding of *Worcester*, American constitutional law and discourse has a story of mutual consent among peoples.

Recognizing the rights of Indian Nations to steer their own vessels entails respect for political communities whose ideas of good governance may not be rooted in fiduciary norms of Western law. In this way, a story of mutual consent is not a story of U.S. supremacy based upon plenary power and the Indian trust. Nor is it a story that assumes that U.S. norms and institutions are superior to Tribal institutions and norms. Such differences among legal norms and institutions are not unfamiliar from the American constitutional tradition. After all, the American federal system incorporates differences in legal norms through the varied laws of the fifty states.<sup>298</sup> The federal government may assert the supremacy of federal law, but that does not mean that federal law is superior to Tribal law.<sup>299</sup> Viewing relationships between Indigenous Peoples

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291. CALLOWAY, *supra* note 8, at 27.

292. Williams, *supra* note 46, at 291 (quoting INDIAN SELF-GOVERNMENT IN CANADA, REPORT OF THE SPECIAL COMMITTEE (backcover) (1983)).

293. *Id.*

294. Riley, *supra* note 265, at 214.

295. Williams, *supra* note 31, at 997.

296. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832).

297. *Id.* at 556.

298. See Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014).

299. See, e.g., Elizabeth Ann Kronk Warner, *Looking to the Third Sovereign: Tribal Environmental Ethics as an Alternative Paradigm*, 33 PACE ENVTL. L. REV. 397, 400 (2016) (explaining that Indian Nations, “unlike their federal counterpart,” are “actively innovating” in



and colonial governments in terms of Indigenous diplomacy and relational contracts focuses us on mutual obligations and good faith, while not assuming Indigenous and colonial governments are partners that must share the same values.

The idea of relational contracts is not simply a metaphor when it comes to Indigenous Peoples. In many cases, there are “actual contracts”<sup>300</sup> that embody ongoing relationships of mutual respect and good faith. American Indian Nations have looked to treaties as tools of self-government. Under Indian traditions of diplomacy, mutual respect, protection, and good faith are inherent to treaties. Many Indian treaties embody an ongoing relationship of mutual respect and a continuing obligation among peoples to resolve disputes through consent, not conquest. An Indian treaty is not merely a document that memorializes an agreement; rather, it invokes a relational understanding of contract and consent among peoples.

Even though the United States has ceased treaty making with Indians, contracts remain an important tool of self-determination. Indian Nations have entered into self-determination contracts with the United States to provide government services, such as education and health care, to their citizens.<sup>301</sup> Long-term contracting with private parties has allowed Indian Nations to develop their economies.<sup>302</sup> And Indian Nations have entered into agreements to resolve disputes with state and local governments over jurisdictional boundaries.<sup>303</sup>

Calls for a resumption of treaty making and government-to-government relationships based on consent are common in American Indian social movements. In November 1972, for example, American Indian activists marched the “Trail of Broken Treaties” to present “Twenty Points” to the federal government. Seven of the twenty demands concerned restoring a consensual, treaty-based relationship between Indian Nations and the United States.<sup>304</sup> More recently, international Indigenous rights movements have called for nation-states to comply fully with the duty to obtain free, prior, and

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regulatory responses to climate change and arguing that “tribal environmental ethics can be particularly helpful”); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 227 (1994) (“Tribal courts can be the possible laboratories for new beneficial concepts in law.”).

300. Davis, *supra* note 43, at 506.

301. See, e.g., COHEN’S HANDBOOK, *supra* note 40, § 22.01[1] (summarizing use of self-determination contracts to provide government services).

302. See, e.g., *id.* § 21.01 (discussing role of private nonmember enterprises in Tribal economic development and noting that this business relationship “is most commonly seen in the context of large-scale manufacturing and resource planning”).

303. See Fletcher, *supra* note 41, at 84 (“In the case of modern intergovernmental agreements, Indian tribes are . . . settling questions of jurisdictional dispute with the states by creating certainty through agreement where federal Indian law offers nothing more than gray areas.”).

304. See, e.g., VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1985).

informed consent from Indigenous Peoples, which is codified in the U.N. Declaration on the Rights of Indigenous Peoples.<sup>305</sup> Within the United States, the federal government's failure to live up to that obligation has been brought to national attention with the federal executive branch's authorization of construction of the Dakota Access Pipeline across the traditional territory of the Standing Rock Sioux Tribe,<sup>306</sup> a decision that violated the executive's obligations to take a hard look at the impacts of a pipeline spill on Tribal rights.<sup>307</sup>

Metaphors of contract and consent thus capture some of the social reality of Indian Nations' autonomy and self-determination. Indian Nations have persisted not as wards of a colonial guardian, but as nations that negotiate agreements to provide government services, to develop their economies, and to resolve disputes with other governments. The operative metaphor here is not the guardian-ward relationship, or even a relationship in which a trustee makes decisions for her beneficiary. Instead, the metaphor is one of contract. There is a significant risk of romanticizing consent and contract as an alternative to the trust conception. But if we are committed to a constitutional democracy that recognizes Indigenous self-determination, then we need a way of sharing stories that begins with mutual respect and autonomy, not with plenary power and domination.

## 2. *Doctrinal Examples*

What might the relationship between Indian Nations and the United States look like if we began with a story of consent among "We the Peoples"? This subsection sketches some of the doctrinal implications of such a story, focusing upon ways in which law could support government-to-government negotiation.

### a. *Indigenous Property Rights*

Consider first the implications of a relational model for Indigenous property rights. The law of American colonialism distinguishes "aboriginal" from "recognized" title. Indian Nations may claim aboriginal title based upon their historical occupancy of their lands.<sup>308</sup> Recognized title, by contrast, is based upon positive law. Congress may, for example, recognize Indian

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305. See, e.g., Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 191–92 (2014); Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 67–87 (2015).

306. See Sierra Crane-Murdoch, *Standing Rock: A New Moment for Native-American Rights*, NEW YORKER (Oct. 12, 2016), <http://www.newyorker.com/news/news-desk/standing-rock-a-new-moment-for-native-american-rights> [<https://perma.cc/2LVX-LABA>].

307. See *Standing Rock Sioux Tribe v. U.S. Army Corps. of Eng'rs*, No. 1601534, 2017 WL 2573994, at \*18 (D.D.C. June 14, 2017).

308. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823).

property rights by statute.<sup>309</sup> Aboriginal title does not count as “property” for purposes of the Fifth Amendment’s Takings Clause.<sup>310</sup> By contrast, the Fifth Amendment protects recognized title.<sup>311</sup> The United States may therefore have to compensate Indians for taking recognized title. Thus, the doctrine holds that Indian Nations do not have a Fifth Amendment property right against federal takings of their traditional lands unless the federal government recognizes that right in positive law. This doctrine cannot be reconciled with a relational understanding that aims at mutual respect and agreement among peoples.

The distinction between aboriginal and recognized title can be found in *Tee-Hit-Ton Indians v. United States*.<sup>312</sup> The Tee-Hit-Ton Indians sought compensation under the Fifth Amendment for the federal government’s taking of timber from their aboriginal lands. The federal government argued that they held their land “at the Government’s will” unless and until Congress recognized their property rights.<sup>313</sup> The Supreme Court agreed, holding that the federal government may take “unrecognized Indian title” without paying just compensation under the Takings Clause.<sup>314</sup> Typically, property owners’ constitutional right to just compensation does not depend upon legislative recognition. But the Court concluded that aboriginal title was different. In principle, the Court reasoned, conquest left Indian Nations with something like a revocable license to occupy their lands.<sup>315</sup> As the Court saw it, “it was not a sale but the conquerors’ will that deprived” Indian Nations of their lands.<sup>316</sup> Its holding simply gave legal recognition to that conquest.

In other takings cases, the Court has offered a very different story of the relationship between the government and non-Indigenous owners subject to its power. Consider, for example, the Court’s concern for unconstitutional conditions in its takings jurisprudence. In *Koontz v. St. John’s Water Management District*, the Court expanded the reach of its rule that a local government may not impose conditions on a development permit unless those conditions are a reasonably proportional attempt to mitigate the harms of development.<sup>317</sup> The Court’s opinion was replete with concern for what it saw as the relational realities of bargaining between government and private property owners. Coercion and extortion were the dominant themes. “Mindful of the special vulnerability” of developers, the Court held that they need “protection when the government demands money” as a condition on

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309. See, e.g., *United States v. Sioux Nation*, 448 U.S. 371, 415 (1980).

310. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

311. See *United States v. Creek Nation*, 295 U.S. 103, 109–11 (1935).

312. *Tee-Hit-Ton*, 348 U.S. at 272.

313. *Id.* at 277.

314. *Id.* at 285.

315. See *id.* at 279.

316. *Id.* at 290.

317. 133 S. Ct. 2586, 2591 (2013).

development.<sup>318</sup> Its holding was necessary, in other words, to help level the playing field of negotiation between landowners and the state.

In *Tee-Hit-Ton*, by contrast, the Court saw conquest and inequality as the relational and legal reality. Its reasoning is inconsistent with the idea that Indian Nations and the United States owe each other mutual respect and should strive to settle disputes by agreement. By assuming that federal recognition (or, more precisely, the lack thereof) controlled, the Court was continuing conquest.<sup>319</sup> As the Court noted, the chief of the Tee-Hit-Ton Tribe was “qualified as an expert [witness] on the Tlingits, a[n Indigenous] group composed of numerous interconnected tribes including the Tee-Hit-Tons.”<sup>320</sup> Under Tlingit law, the Tee-Hit-Tons had a claim of ownership based on possession and use. The Tee-Hit-Ton chief chronicled his People’s historical possession and use of their lands, explained their relationship with the Russians who came to their lands, and identified current use based upon markers of residence, burial, hunting, and fishing.<sup>321</sup> Thus, the Tee-Hit-Ton introduced evidence of their title under their own property law. But in this dispute between sovereigns, the Court treated the U.S. political branches’ policy as self-evidently supreme.

Like *Brown v. Board of Education*,<sup>322</sup> which the Court had decided the prior year, *Tee-Hit-Ton* could have been a moment to try to transform legal and relational realities of domination. Instead, the Court focused upon the justifications for federal supremacy. By recognizing aboriginal title as “property” under the Takings Clause, the Supreme Court could have pushed the political branches towards good-faith bargaining and away from taking Indian property as the first course of action. Such a rule would have been consistent with the practice of treaty making and Indigenous traditions of diplomacy.<sup>323</sup> It would have supported an ongoing relationship based upon consent rather than coercion among peoples.

The metaphor of consent and contract focuses us on the role of law in setting conditions for negotiation among peoples. The Court in *Tee-Hit-Ton* did not frame the case in terms of consent and negotiation among equal peoples. If it had, the Court might have asked what rule would have been necessary in light of the realities of colonial history to make it possible for the United States

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318. *Id.* at 2602–03.

319. See Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1234 (1980).

320. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955).

321. *See id.* at 285–86.

322. 347 U.S. 483 (1954).

323. See DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE SUPREME COURT: THE MASKING OF JUSTICE* 179 (1997); Earl M. Maltz, *Brown and Tee-Hit-Ton*, 29 AM. INDIAN L. REV. 75, 98 & n.135 (2004) (discussing *Tee-Hit-Ton* and noting Wilkins’s argument).

and the Tee-Hit-Ton Tribe to negotiate meaningfully and as equals.<sup>324</sup> A relational approach focuses on this question when the federal government threatens to take Indian lands.

*b. Consent and Implicit Divestiture*

A relational approach helps specify the fundamental problems with the Court's "implicit divestiture" doctrine. In recent years, Supreme Court Justices have raised concerns about the consent of the governed when considering whether to recognize Indian Nations' legal authority over their lands. According to the implicit divestiture doctrine, Indian Nations' sovereignty is limited by their "domestic dependent"<sup>325</sup> status. This common law doctrine holds that Indian Nations may not prosecute non-Indians who commit crimes on Tribal lands or against Tribal members. This jurisdictional rule has contributed to the disproportionately high rates of violent crimes against Native women.<sup>326</sup> The doctrine also purports to restrict Indian Nations' civil regulatory authority over non-Indians in Indian Country, particularly on fee land that is no longer held in trust for Indians.<sup>327</sup> Applying this doctrine, the Court has held that Indian Nations do not have the same authority as states to regulate land use within their territories<sup>328</sup> or to protect their members from discrimination by non-Indians.<sup>329</sup> Thus, the Court wields a "judicial plenary power"<sup>330</sup> to declare that the preconstitutional sovereignty of Indian Nations is limited by their purported dependency on the United States.

To justify some exercises of this judicial plenary power, Supreme Court Justices have invoked the idea of consent. The clearest statement comes from *Duro v. Reina*, in which the Court held that an Indian Nation did not have criminal jurisdiction over an Indian who was not a citizen of that Nation.<sup>331</sup> According to the Court, this implicit limit on Tribal jurisdiction followed from

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324. Such an approach, which sounds in relational redemption, is consistent with Philip Frickey's argument that "negotiation seems to promise to bring Indians into Indian law far better than does adjudication." Frickey, *supra* note 272, at 1783.

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

326. See generally INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 3 (2015) ("Disproportionately high rates of domestic violence, substance abuse, and related violent crime within many Native nations have called into question whether the current Federal and State predominance in criminal justice jurisdiction offers Tribal nations a realistic solution to continued social distress marked by high rates of violence and crime."), <http://www.aisc.ucla.edu/iloc/report/index.html> [<https://perma.cc/R4U4-7B4R>].

327. *Montana v. United States*, 450 U.S. 544 (1981).

328. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

329. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

330. Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 128–29 (2000).

331. 495 U.S. 676, 679 (1990).

principles of consent. Tribal governments' jurisdiction "is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members."<sup>332</sup> And because "[a] tribe's additional authority comes from the consent of its members," nonmembers who have not consented to Tribal criminal jurisdiction should not be subject to it.<sup>333</sup> Of course, the *Duro* Court's emphasis on consent was more than a little ironic, given the legacy of conquest.

There are several fundamental objections to the Court's exercises of a judicial plenary power to divest Indian Nations of sovereign authority. Perhaps the most fundamental objection is that the Court's assumption of a judicial plenary power takes U.S. supremacy for granted. Much like a guardian, the Court has intervened to save non-Indians by refusing to recognize Indian Nations' legal authority. There is a ready example of this dynamic in *Plains Commerce Bank v. Long Family Land & Cattle Company*, in which the Supreme Court held that an Indian Tribal court could not exert jurisdiction over a bank that had regularly sued *in Tribal court* and had stated in its trial papers that the Tribal Court "ha[d] jurisdiction over the subject matter" of the action.<sup>334</sup> The Supreme Court did not hesitate to consider by what authority it could decide whether a Tribal Court had jurisdiction over the bank. Had it asked that question, Tribal consent would not have been its answer.

From a relational perspective, the Court's rulings make it harder for Indian Nations and the United States to arrive at jurisdictional settlements based upon mutual respect. Objections to the legitimacy of federal authority are the sorts of objections "ruled out of court."<sup>335</sup> But such objections need not be ruled out of our political and legal theories of the colonial state. As Carole Pateman has stated, "a democratic state whose 'beginning' is the settler contract requires the creation of a new political legitimacy, the building of a new settlement with Native peoples."<sup>336</sup> To look to the courts for this new consensus may hope for too much from the judiciary. But we can at least hope that courts would refrain from exercising common law powers to make a new settlement even harder to achieve.<sup>337</sup> From a relational perspective, Indian

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332. *Id.* at 693.

333. *Id.* *Duro* was overturned by Congress, which recognized by statute Indian Nations' criminal jurisdiction over nonmember Indians. See *United States v. Lara*, 541 U.S. 193 (2004).

334. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 346 (2008) (Ginsburg, J., dissenting) (discussing the Court's holding and pointing out the bank's consent to Tribal court jurisdiction).

335. Carole Pateman, *The Settler Contract*, in *CONTRACT AND DOMINATION*, *supra* note 9, at 35, 77.

336. *Id.*

337. Courts might consider any assignment of jurisdictional authority based upon the prospect of bargaining, trying to set the assignments in such a way as to encourage a level playing field, or they might leave such questions to the political branches altogether and dismiss challenges to Tribal jurisdiction as nonjusticiable. See Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 *UCLA L. REV.* 666, 676 (2016) (arguing that Congress, not the federal courts, should have authority over questions of Tribal jurisdiction).

Nations' legal authority presents questions of jurisdiction and choice of law that should not be solved primarily in occasional, adversarial litigation in federal courts, but instead through negotiation in the context of ongoing relationships.

The relational perspective suggests a second fundamental objection to the Court's common law of divestiture. Implicit divestiture depends upon an assumption of federal supremacy that is often flatly inconsistent with the United States' actual treaty promises as well as federal Indian law's recognition of reserved rights. Under this doctrine, Indian Nations retain their preconstitutional rights of property and sovereignty unless and until they consent to transfer them.<sup>338</sup> In many cases, Indian Nations' legal authority is thus a vested right.<sup>339</sup> By contrast, non-Indians who enter Tribal lands have no vested rights or legitimate expectations to be free from Tribal jurisdiction.<sup>340</sup> After all, literal consent is usually not required for a sovereign to prosecute an individual who commits crimes within its territory.

Moreover, it is meaningful to speak of consent to jurisdiction and the possibility of exit in the context of Indian Country. The reality is that "[t]housands upon thousands" of nonmembers have consensual relationships with Indian Nations. For instance, "[m]any . . . thousands of nonmembers live in tribal housing[, a]nd all of them have signed legal documents in which they expressly consent to tribal regulation . . . ."<sup>341</sup> It may be that we cannot meaningfully speak of a citizen's consent when we think about the nation-state; after all, most of us have no realistic opportunity to move to a different country.<sup>342</sup> But it does not follow that consent theory is meaningless when we think about Indian Nations as sovereign owners of their lands who may place conditions on nonmembers who enter and remain within their territories.

### c. *Tribes Without Treaties*

A relational conception that focuses upon consent might seem to exclude Tribes without treaties. Some Indian Nations did not enter into treaties with the United States. For those who are federally recognized, their government-to-government relationships with the United States may be reflected in statutes and executive orders instead.<sup>343</sup>

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338. Joseph Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 663, 666 (2003) ("In return for giving up roughly 98% of the land in the United States, the tribes were promised the right to retain the lands they had left and *the right to govern those lands.*").

339. *See id.*

340. *See id.* at 664.

341. Fletcher, *supra* note 4, at 115.

342. *See* Carter Dillard, *The Primary Right*, 29 PACE ENVTL. L. REV. 860, 861 (2012) ("[U]nless there exists an alternative to participation in a political system—a right to walk away from all human polities—consent is meaningless if not impossible and individual autonomy is undermined.").

343. *See, e.g.,* Sioux Tribe of Indians v. United States, 316 U.S. 317, 327 (1942).

Relational redemption for colonial wrongs should not depend upon whether the United States sought an Indian Nation's actual consent. The trust conception provides one basis for treating all Indian Nations equally, regardless of the historical vagaries of conquest. Elsewhere, however, I argued that ideas of consent and contract can be a device for thinking about the rights of Indian Nations without treaties.<sup>344</sup> These ideas support, for example, an equal footing doctrine for Indian Nations that would treat Tribes without treaties as it treats those with them: sovereigns with whom the United States shares a government-to-government relationship.<sup>345</sup>

Existing Indian treaties help us think through the problem of righting the wrongs of American colonialism. They provide a positive law basis for imagining consensual relationships of mutual respect between peoples.<sup>346</sup> But some treaty negotiations were coercive. And sometimes the United States refused to enter into treaties. Therefore, to redeem the wrongs of colonial rule means that we cannot rely on the plain text of treaties alone.

How might we think about constitutional redemption if we began with treaties but did not end with them? As a non-ideal theory, Charles Mills has argued, the social contract can focus attention on what's necessary to achieve real relationships of mutual respect *given* the past and present of racism, imperialism, and colonialism.<sup>347</sup> Revising Rawls, Mills asks what sort of social order we would choose if none of our options were ideal.<sup>348</sup> If we knew we would have to live in a non-ideal society shaped by white supremacy, but we did not know whether we would enjoy white privilege, what sort of society would we choose?<sup>349</sup> Thus, contract may be a device for describing how whites have excluded and dominated people of color *and* for imagining relational redemption.

To step behind Mills's veil of ignorance is to recognize that the redemption of "We the People" can be cheap grace. We live in a world in which colonial powers have asserted for centuries—and continue to this day to assert—plenary power as trustees, claiming constitutional supremacy in the name of "We the People" over all the lands subject to their authority. In such a

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344. Davis, *supra* note 43, at 540.

345. See *id.* at 540–41; Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 671 (1994) ("Doctrines such as equal footing and rules of preemption—that have served to sustain state sovereignty—should be applied to tribes in the same manner.").

346. See Davis, *supra* note 43, at 540; cf. Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1419 (2001) ("The social contract is an ideological or rhetorical map defining the political landscape upon which to place existing and emerging social relationships.").

347. Charles W. Mills, *Contract of Breach: Repairing the Racial Contract*, in CONTRACT AND DOMINATION, *supra* note 9, 106, 119.

348. See *id.*

349. See *id.*



world, the trust that “We the People” place in their Constitution cannot redeem all the wrongs committed in their name.

#### CONCLUSION

For many Americans, the U.S. Constitution is central to a story in which the United States is an exceptional nation entrusted with a unique mission. In his first inaugural address, President George Washington reminded the Congress of his “ardent love” of country, explaining that “the preservation of the sacred fire of liberty, and the destiny of the Republican model of Government, are justly considered as deeply, perhaps as finally staked, on the experiment entrusted to the hands of the American people.”<sup>350</sup> For some, the American experiment has always been a great one; others profess faith that the right leader will make it great again. But until We the People of the United States recognize more is at stake in our constitutional story than our own redemption—that redeeming ourselves isn’t enough—we will continue to put our faith in false idols.

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350. Nat’l Archives and Records Admin., Washington’s Inaugural Address of 1789 (Apr. 30, 1789), [http://www.archives.gov/exhibits/american\\_originals/inaugtxt.html](http://www.archives.gov/exhibits/american_originals/inaugtxt.html) [https://perma.cc/KV3X-E4N9].