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Legislative Constitutionalism and Federal Indian Law

ABSTRACT. The United States has reached a moment in its constitutional history when the Supreme Court has asserted itself as not only one of, but the exclusive, audience to ask and answer questions of constitutional meaning and constitutional law. This "juricentric" or court-centered constitutionalism has relegated the other, so-called political branches to a second-class status with respect to the Constitution. Not only has the dominance of the Court dampened our constitutional culture writ large, it has also occluded the ways that Congress and the executive branch play distinctive and vital roles within constitutional lawmaking.

As we finally tamp out the last few embers of hope that the Supreme Court can alone sustain, preserve, and protect a robust constitutional culture within the United States, I offer here another world now in existence that could provide strategies and visions for a less juricentric future writ large—that is, the case study of federal Indian law and of American colonialism, and the Native advocacy that gave birth to this body of law.

The core theoretical contribution of the case study is that recognizing legislative constitutionalism as a legitimate and co-equal form of constitutionalism could support a distinctive and thus more varied constitutional culture than that offered by our current juricentric system. Scholars have long celebrated the unique form of participation in the lawmaking process offered to the public by the institutional structure of Congress and have highlighted the ways that Congress has fostered constitutional deliberation with "the people themselves." The case study of federal Indian law supports these earlier celebrations and allows us to build on them by also recognizing Congress's ability to offer distinctive constitutional reforms. As a legislature, Congress can engage with constitutional lawmaking as statecraft—an approach wholly absent from the courts. In the context of American colonialism, Congress has offered constitutional reforms in terms of "structure"—that is, the institutions of the U.S. government and their design; implementation and alteration of the structural aspects of the constitutional order; the contours of its federalist framework; and the distribution of power—including to subordinated communities—as an insufficient and imperfect, but innovative form of constitutional lawmaking.

For scholars of federal Indian law, recognizing the longstanding relationship between Congress and Native advocates as constitutionalism fosters a deeper understanding of the constitutional developments within the law over time—developments that place the philosophies and agency of Native people and Native Nations at the center of our constitutional law and history. Beyond reperiodization of our Native legal and constitutional histories, exploring legislative constitutionalism within the field of federal Indian law provides us with an illustration of Congress taking a central role in the identification and mitigation of constitutional failure—an illustration that illuminates the problems and promise of legislative constitutionalism.

For reformers hungry to push back on the monopolization of power by the Supreme Court, the case study of federal Indian law offers an example of marginalized advocates successfully reining in the Court using little more than persistence and ingenuity. Importantly, this case study demonstrates that stripping power from the Court may not dampen our constitutional culture or leave it to the whims of populist passion, even in the context of constitutional failure and even as applied to subordinated populations. Rather, Congress has and can play a more central role in our constitutional lawmaking on par with the Court, if we the people finally embrace and support its ability to do so.

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FEATURE CONTENTS

> It is impossible to conceive a doctrine more opposed to the constitution of our choice, than that a decision as to the constitutionality of all legislative acts rests solely with the Judiciary Department; it is removing the cornerstone on which our federal compact rests; it is taking from the people the ultimate sovereignty, and conferring it on agents appointed for specified purposes . . . .
>
> —*Albany Register* (1799)[1]

> Congress may not legislatively supersede our decisions interpreting and applying the Constitution.
>
> —*Dickerson v. United States*[2]

> [Our earlier cases], then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of inherent tribal authority that the United States recognizes. And that fact makes all the difference.
>
> —*United States v. Lara*[3]

INTRODUCTION

The United States has reached a moment in its constitutional history when the Supreme Court has asserted itself as not only one of, but the exclusive, audience to ask and answer questions of constitutional meaning and constitutional law. In decision after decision, the Court has declared the federal judiciary as the primary forum and itself the primary arbiter of constitutional conflict and debate.[4] The Court has asserted its methods—text, history, tradition—as the

1. *Reprinted in* INDEP. CHRON. (Boston), Feb. 25, 1799, at 2.

2. 530 U.S. 428, 437 (2000).

3. 541 U.S. 193, 207 (2004).

4. *See, e.g.*, *Dickerson*, 530 U.S. at 437; Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 1 (2003); Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1914 (2015) (describing the Supreme Court revising the political question doctrine in *Baker v. Carr* to allow it to decide the separation of powers).

preeminent modes of constitutionalism.[5] The Court has also established the superiority of its substantive vision of constitutional law and values.[6] This "juricentric" constitutionalism has relegated the other, so-called political branches to a second-class status with respect to the Constitution.[7] Not only has the dominance of the Court dampened our constitutional culture writ large, but it has also occluded the ways that Congress and the executive branch, as unique institutions, play distinctive and vital roles within constitutional lawmaking. This Feature explores what lessons public-law scholars might draw from federal Indian law in building an alternative constitutional culture to our current—and deeply flawed—juricentric system.

The United States arrived at this constitutional moment in part due to accretion. As Congress fell into dysfunction and increasingly stalled, the Supreme Court stepped into the breach.[8] But it has also arrived at this moment because of a belief that our constitutional order requires aggressive and exclusive judicial review by the Supreme Court.[9] Without the "least dangerous"[10] branch, who would enforce the limits set by the Constitution? Many of our current government leaders came of age steeped in Alexander M. Bickel, John Hart Ely, and debates over the countermajoritarian difficulty.[11] Our current Supreme Court, educated almost entirely at Harvard's and Yale's law schools, are students of these men, if not their theories.[12] The lessons of the Warren Court and the civil-rights revolution seemingly taught us that courts were the sanctuaries of subordinated

5. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

6. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317, 331-32 (1978) (holding that government actors violate the Equal Protection Clause of the Fourteenth Amendment by providing remedial preferences for historically subordinated groups), *with* Morton v. Mancari, 417 U.S. 535 (1974) (holding that Congress has the power to decide what remedial legislation is appropriate for "Indians" and that the Court will review those decisions under a rational-basis standard).

7. *See* Post & Siegel, *supra* note 4, at 2; James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155-56 (1893) ("The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent.").

8. *See, e.g.*, Nolan McCarty, *Polarization, Congressional Dysfunction, and Constitutional Change*, 50 IND. L. REV. 223, 243-44 (2016).

9. *See* Post & Siegel, *supra* note 4, at 2.

10. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

11. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Josephine Ann Bickel ed., 2d ed. 1986) (grappling with the central concern that judicial review is a countermajoritarian practice, arguing in favor of limits to decisional law and against the view of Supreme Court Justices as philosopher-kings).

12. *See FAQs—Supreme Court Justices*, SUP. CT. U.S., https://www.supremecourt.gov/about/faq_justices.aspx [https://perma.cc/4P3N-84PT].

minorities and that constitutional failures, like that of slavery and Jim Crow segregation, could be resolved by calling forth the power and empathy of the Supreme Court.[13]

So, what is to be done once scholars and the public lose the taken-for-granted belief that aggressive judicial review is necessary or even beneficial for our constitutional framework? How does one navigate a Supreme Court that is hostile to fundamental constitutional values, especially in the context of minority protection, rather than serving as the best-suited "pronouncer and guardian of such values"?[14]

This Feature offers some preliminary answers to these questions through the lens of Native people and their advocacy strategies, histories, constitutional philosophies, and the legal frameworks that govern them. The body of law that governs the relationship between Native peoples, Native Nations, and the United States—termed federal Indian law—offers a unique perspective on the distinctive roles of the other branches in making and interpreting constitutional law.[15] Of course, the success of Native advocates in shaping the United States constitutional system should not be overstated, nor should it be washed of the blood of generations of Native men, women, and children required to secure even the most tenuous constitutional change. But this Feature begins to explore the ways that the resilience of Native advocates, their innovative strategies, and the legal frameworks borne of those strategies offer lessons for our current constitutional moment.

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13. *See* Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 255, 270-71 (2008) (describing the "judicial activism" of the Warren Court, which "enhanced the power of the federal courts through, among other things, articulating expansive tests for private rights of action, narrowly reading the political question doctrine and standing limitations, and engaging the federal courts in remedying the segregation of public schools").

14. BICKEL, *supra* note 11, at 24.

15. For many years, federal Indian law was seen as too *sui generis* to offer generalized lessons for constitutional law writ large. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 440 (2005); Angela R. Riley, *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality,"* 130 HARV. L. REV. F. 173, 199 (2017). But more and more, public-law scholars are beginning to realize that the United States's treatment of Native people might not be so exceptional—rather, it might provide an overlooked wealth of experience from which to draw lessons in a range of other areas. *See, e.g.*, Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2021 SUP. CT. REV. 367 [hereinafter Blackhawk, *On Power and the Law*]; Maggie Blackhawk, *On Power & Indian Country*, 1 WOMEN & L. 39 (2020); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019) [hereinafter Blackhawk, *Federal Indian Law as Paradigm*]; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 675-80 (1989).

However imperfect, the framework of federal Indian law has fundamentally reshaped the constitutional structure of the United States, often forming the only backstop against the seemingly endless American colonial project. Most of these fundamental constitutional changes have taken place without the involvement of the federal courts. Through petitioning, lobbying, diplomacy, and even military standoffs, Native advocates have built and rebuilt the modern framework of federal Indian law—a framework that recognizes tribal sovereignty and supports self-determination and collaborative lawmaking.[16] Federal Indian law has thus reshaped the face of U.S. government from Congress to the American state, as well as its federalist and constitutional framework.

Most important for our current constitutional moment, many of these constitutional changes have taken root in the face of open hostility by the Supreme Court. In contrast to generalist scholars of public law, scholars of federal Indian law have long understood Native people to be the proverbial Indigenous "canary" in the coal mine of American democracy. As Felix Cohen famously stated, "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."[17] With respect to the Supreme Court, Native people have been the canary in an often-hostile coal mine. Most notably, Native people did not experience the legal gains before the Warren Court[18] seen by other marginalized groups during the

16. *See, e.g.*, Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1813, 1862; Blackhawk, *On Power and the Law*, *supra* note 15, at 404; CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 82 (1987) ("Indians have learned how to lobby. Highly effective legislative campaigns have been pursued by individual tribes and by national organizations."); FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 23 (2009) ("[T]he key point of political interaction in these contexts was treaty making, where diplomatic necessity displaced (at least temporarily) cultural ignorance and racial animus."); Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 77-78 (2004) ("[B]y examining Federal Indian Law one better understands that the American constitutional project includes many instances in which power is claimed by force and justified by necessity.").

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

18. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955) (holding that the federal government could seize, without compensation, Indian land whose ownership had not been authorized by Congress and noting that "[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale, but the conquerors' will that deprived them of their land").

tenure of Justice Thurgood Marshall.[19] The primary protections by the courts came during the tenure of a much earlier Marshall, Chief Justice John Marshall.[20] But these gains were over one hundred and fifty years prior and were so short-lived as to not prevent the bloodshed of removal, including the Trail of Tears only a handful of years after Chief Justice Marshall's decision in *Worcester v. Georgia*.[21] Exploring the constitutional development of federal Indian law offers insights into alternative ways of understanding the function of judicial review and of the place of Congress and the Executive in helping to interpret, make, and enforce constitutional law. As this Feature aims to show, in the context of federal Indian law, the formation of the doctrine occurred often through conflict with Congress and through the constant activism of Native peoples.

Congress has been at the heart of these constitutional reforms in three primary areas. First, Congress has restructured the federalist framework to affirm national power as central to Indian affairs and has cemented the boundaries between Native Nations and the several states. During the very first Congress, Congress passed the first of a series of Trade and Intercourse Acts that affirmed federal power over Indian Country and limited state power.[22] Congress later reinforced the separation of state jurisdiction from Indian Country within each state's enabling act.[23] Congress continues to structure the relationship between states and Native Nations today through collaborative lawmaking frameworks like the Indian Gaming Regulatory Act and by ratifying and enforcing agreements between states and Native Nations.[24]

Second, Congress has affirmed and structured the recognition of inherent tribal sovereignty and it continues to structure and facilitate the ongoing gov-

19. For Justice Thurgood Marshall's account of the U.S. Supreme Court's capacity to protect racial minorities, see Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 101 (1951).

20. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561-63 (1832) (affirming the sovereignty of Native Nations by holding that Georgia state laws have no force within the boundaries of the Cherokee Nation's territory).

21. *Id.*; *see* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1823 ("Six years after the Court issued its decision in *Worcester*, federal soldiers and state militiamen forced the Cherokee people down the Trail of Tears . . . .").

22. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137.

23. *See, e.g.*, Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894) ("That . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ."). The enabling act creating the states of North Dakota, South Dakota, Montana, and Washington used the same language as the Utah Enabling Act. Enabling Act of 1889, ch. 180, § 3, 25 Stat. 676, 677.

24. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-21).

ernment-to-government relationship between the United States and the 574 federally recognized Native Nations.[25] Today, Native Nations govern hundreds of thousands of tribal members and land masses larger than several states—all as semi-sovereign enclave states enclosed within the alleged territorial borders of the United States.[26] Through a series of self-determination statutes, beginning in the 1930s and continuing in the 1970s, Congress has also recognized the ability of Native Nations to administrate federal regulatory schemes, receive federal funds to administer federal welfare programs, contract with federal, state, and local governments, and assume control of hospitals, schools, and other infrastructure within Indian Country previously run by the national government.[27]

Finally, Congress has reshaped the structure of the federal government across all three branches and the separation of powers between these branches to facilitate better representation of Native Nations and Native people. In addition to establishing specialized committees within its own chambers,[28] Congress has also most notably reshaped the face of the American state and placed Native peoples at the helm of that state. Today, Native Nations are governed by a specialized branch of the executive, the Bureau of Indian Affairs (BIA).[29] As of 2010, because of hiring preferences established by Congress beginning in the 1930s, ninety-five percent of employees within the BIA were citizens of Native Nations.[30] Excluded from the promise of birthright citizenship in the Fourteenth Amendment, Congress created a complex form of citizenship for Native people by statute in the 1920s—a form of citizenship that allowed Native people to retain allegiance to their Native Nations and serve as the first dual-nationals recognized by the

25. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021).

26. *See, e.g.*, *Frequently Asked Questions*, CHEROKEE NATION, https://www.cherokee.org/about-the-nation/frequently-asked-questions/common-questions/?term=&page=2 [https://perma.cc/F92Z-7ZF2] ("There are more than 400,000 Cherokee nation citizens."); *Tribal Governance*, NAT'L CONG. AM. INDIANS, https://www.ncai.org/policy-issues/tribal-governance [https://perma.cc/WN4Q-3387] ("[T]ribal governments exercise jurisdiction over lands that would make Indian Country the fourth largest state in the nation.").

27. *See, e.g.*, Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934); ROBERT T. ANDERSON, BETHANY BERGER, SARAH KRAKOFF & PHILIP P. FRICKEY, AMERICAN INDIAN LAW: CASES AND COMMENTARY 152-54 (3d ed. 2015).

28. *See, e.g.*, *Senate Indian Affairs Committee*, U.S. CONG., https://www.congress.gov/committee/senate-indian-affairs/sliaoo [https://perma.cc/4ER5-2X66].

29. *Bureau of Indian Affs.*, U.S. DEP'T INTERIOR, https://www.bia.gov/bia [https://perma.cc/6WP3-YKXX].

30. *See* Indian Reorganization Act, ch. 576, § 12, 48 Stat. 984, 986 (1934) ("Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."); Livia Gershon, *Native Nations and the BIA: It's Complicated*, JSTOR DAILY (Jan. 15, 2021), https://daily.jstor.org/native-nations-and-the-bia-its-complicated [https://perma.cc/V4YH-5WLL].

United States.[31] Finally, Congress has usurped, reshaped, and translated the treaty and recognition powers, among others, to maintain fidelity to the Founding visions of inherent tribal sovereignty and to mitigate the American colonial project.[32] The lessons of Native movements, struggles, and successes in establishing these fundamental changes are myriad. But they offer guidance toward developing a constitutional culture that embraces the distinctive roles of the other branches and decenters the courts.

Centering federal Indian law within a study of constitutionalism offers a range of theoretical implications. This Feature explores two. First, Congress has a particular role in the making and interpretation of constitutional law. This lesson is not new; public-law scholars have long explored Congress's central role in constitutional lawmaking — what some scholars have termed "legislative constitutionalism"[33] and others "departmentalism."[34] But this Feature aims to build on these literatures by studying Congress's role in mitigating the constitutional failure of American colonialism. Because federal Indian law rests in the context of judicial abnegation or the absence of judicial review, this body of laws and their histories provide insights into what Congress may uniquely offer the constitutional lawmaking process — that is, what is particularly *legislative* about legislative constitutionalism.[35] When the now-dominant tide of the Court pulls back, it re-

31. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2019).

32. *See infra* Section I.C.1.

33. *See, e.g.*, SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT 3-4, 170-71, 171 n.38 (2014); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 123-24, 315 (2016); Sotirios A. Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. 267 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2005-20 (2003).

34. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 105-10, 135-36 (2004) (detailing historical roots of departmentalism); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1543 (2005) (arguing that constitutional interpretation should not be juricentric); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372-73 (1988) (same); Gary Lawson & Christopher Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270-71 (1996) (same); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987); Michael W. McConnell, *Institutions and Interpretation: A Critique of* Boerne v. Flores, 111 HARV. L. REV. 153, 156 (1997).

35. The legislative constitutionalism I describe is complementary to, but distinctive in important respects from, the idea of "politically constructed" constitutional limits to judicial review, described by Richard Fallon as the idea that "the Supreme Court is the decisive arbiter if and

veals the unique strengths and weaknesses of centering the development of constitutional meaning, values, and law within a legislature, rather than through a court, a President, or an interbranch conflict.[36]

This Feature posits that it is not coincidental that Native advocates focused their efforts on Congress. It was the lawmaking institution most open to claims and debates about American colonialism and most able to offer the structural constitutional reforms needed to mitigate it. Much of the vitality of Congress's role is rooted in the unique form of participation in the lawmaking process offered to the public by the institutional structure of Congress—more directly through the lower chamber of the House and more indirectly through the upper chamber of the Senate—through channels like the electoral process and through petitioning or lobbying.[37] Because it has facilitated and supported practices of empowered engagement and discourse since the Founding, Congress has long functioned as a central site of intersection between "the people themselves," social movements, and the formal and informal shaping of constitutional law, values, and meaning.[38] Beyond unique forms of participation, Congress also offers distinctive constitutional reforms and thus fosters deliberation in constitutional

only insofar, but only if and only insofar, as its decisions are the ones that Congress, the President, and ultimately the bulk of the American people will accept as lying within the lawful bounds of judicial authority to render." Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law*, 96 TEX. L. REV. 487, 494 (2018). In the context of federal Indian law, Congress does indeed construct "political limits" on judicial review—through "defiance" in the starkest terms of legislative override. But, beyond that, Congress also provides a constitutional culture, forum, and forms of remedy beyond that of quotidian "politics," and beyond those concerns raised by Fallon in his "informal appraisal of institutional reliability" in our current form of departmentalism. *Id.* at 535-36. It also delves into domains widely believed to be the province of the courts—most paradigmatically the protection of minorities. *Id.* at 494 (surmising that the Supreme Court's striking down of an exclusionary act by the President would bind in a way that the Court ordering the President to exercise war powers would not).

36. The analysis offered here, focused on legislatures, shares central and important similarities to the work of "administrative constitutionalism." The term seems to originate from William N. Eskridge and John Ferejohn's seminal *A Republic of Statutes*, and it has inspired a growing and increasingly sophisticated body of literature since. WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); *see, e.g.*, Sophia Lee, *Our Administered Constitution*: *Administrative Constitutionalism from the Founding to the Present*, 169 U. PA. L. REV. 1699 (2019) (surveying the symposium edition devoted entirely to administrative constitutionalism); LEE, *supra* note 33; WEINRIB, *supra* note 33; Bertrall Ross, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); Barber & Fleming, *supra* note 33.

37. *See* U.S. CONST. art. I, §§ 2-3; *id.* at amend. I.

38. *See* KRAMER, *supra* note 34, at 201 (quoting MARTIN VAN BUREN, INQUIRY INTO THE ORIGINS AND COURSE OF POLITICAL PARTIES 7 (1867)).

registers distinct from the courts. Rather than packaging claims in terms of positive or negative rights and liberties,[39] Native advocates have been able to directly address constitutional failures of representation, faulty structures of government, and the distribution of power.[40] Most central to the mitigation of American colonialism, Congress offers Native advocates the promise of constitutional reforms in terms of "structure"—that is, the institutions of the U.S. government and their design; implementation and alteration of the structural aspects of the constitutional order; the contours of its federalist framework; and the distribution of power—including to subordinated communities—as an insufficient and imperfect but innovative form of constitutional lawmaking.

A second theoretical implication arises from the fact that federal Indian law offers legislative constitutionalism a clear example of Congress interpreting the U.S. Constitution directly. In contrast to quasi-constitutionalism, federal Indian law reveals areas of constitutionalism where Congress interprets and constructs big "C" constitutional law.[41] This is not to say that a legislative constitutionalism informed by federal Indian law has no role for the courts. Rather, in these domains, courts should be seen as collaborators within the constitutional lawmaking process—a "policentric constitutionalism" among multiple constitutional lawmakers[42]—and judges should be aware of their vital but secondary role in making constitutional law in conversation with Congress. Within federal Indian law, the courts have played this role by developing a range of judicial tools to engage in the constitutional lawmaking process alongside Congress, but without recognition of the constitutional implications. These include clear-statement rules,[43] canons of construction for treaties and statutes,[44] and the rational-basis review of congressional plenary power over Indian affairs.[45] Scholars and the courts have readily debated the ambiguous status and origins of these tools. Understanding them as small "c" constitutional lawmaking in certain contexts could

39. *See, e.g.*, ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969) (distinguishing between negative liberty as the freedom to act without interference and positive liberty as the autonomy necessary for self-determination).

40. *See infra* Part I.

41. The distinction between big "C" and small "c" constitutionalism is drawn from the scholarship of Eskridge and Ferejohn, inspired by an Aristotelian vision of constitutionalism—one that reaches beyond the formal or big "C" Constitution to the broader context of fundamental constitutional values and norms against which that formal document is read or the little "c" constitution. ESKRIDGE & FEREJOHN, *supra* note 36, at 25-26 (2010); *see also* Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001) (proposing a hypothetical constitutional system with Congress interpreting the Constitution).

42. *See* Post & Siegel, *supra* note 33, at 2026-32.

43. *See infra* notes 339-358 and accompanying text.

44. *See infra* notes 359-362 and accompanying text.

45. *See infra* notes 363-365 and accompanying text.

allow legal scholars, as well as courts, to reconcile clear-statement rules, interpretive canons, and deferential review of plenary power as constitutional law—but constitutional law that defers to the authority of Congress as Congress interprets and implements the Constitution directly.

This Feature proceeds in four parts. Part I explores legislative constitutionalism in the context of a particular case: federal Indian law—the intricate, exceptional, and deeply flawed body of laws that regulate aspects of the American colonial project. In doing so, it offers a reperiodization of Native legal history through the lens of Native advocacy and Native constitutional and political thought. Parts II and III explore the theoretical implications of this case study. Part II offers ways to better center the institution of the legislature by examining the *longue durée* history of Congress and the distinctive forms of participation and redress it offers in the context of constitutional lawmaking. Part III offers ways to theorize Congress as an embedded and discursive institution—not a branch at war with the courts—by envisioning the Supreme Court's role, in particular domains, as a creator of little "c" constitutional law to support big "C" constitutional interpretation in Congress. This Part also situates federal Indian law within other areas of substantive constitutional law over which Congress wields supremacy today—either through judicial abnegation or the Court's declination of judicial review—to identify similar dynamics of policentric constitutionalism across substantive areas. Finally, Part IV closes with an exploration of the ways that our current constitutional moment could draw on these implications to craft a more dynamic and robust constitutional culture. Most importantly, this Part closes with a recommendation that reformers focus, too, on empowering Congress and defining a positive role for the courts within that dynamic system, in addition to considering restrictions and checks on the Supreme Court's current juricentric constitutional project.

I. CASE STUDY: FEDERAL INDIAN LAW AND LEGISLATIVE CONSTITUTIONALISM

Imagine for a moment that Congress could override the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* with a statute.[46] By passing a Reproductive Freedom for All Act that asserts that Congress has interpreted the Equal Protection Clause of the Constitution to mean that prohibiting the medical procedure of abortion constitutes unconstitutional sex discrimination, the nation would recognize a U.S. constitutional right to abortion. Any challenge to the Act would be met by a Supreme Court review of congressional intent and one that reviews congressional deliberation over the statute. The

46. 142 S. Ct. 2228 (2022).

Court would decline to interpret the Constitution directly, understanding that Congress's power with respect to the Constitution is "plenary" and that Congress holds more robust institutional capacity to engage with questions of constitutional meaning and values in this area. To the extent that the Court reviewed acts of Congress, it would subject those acts only to a form of review that asks if the statute has a rational relationship to constitutional values identified by Congress in the past, requires a clear statement by Congress when it intends to change the law or deviate from values it has already established, and looks to past legislative acts for context on constitutional values and meaning. Even if the Court were to hold the Reproductive Freedom for All Act unconstitutional as exceeding congressional power, Congress could deliberate anew, reenact the statute, and the nation would accept the Act as authoritative.

In the short term, this solution might seem appealing to progressive reformers hungry to protect the lives of adults and children with the capacity for pregnancy who are now under immediate threat. But, of course, questions might arise about the long-term problems that this solution might cause. Would centering Congress in the constitutional lawmaking process reduce our fundamental questions of governance and values to quotidian political questions, at the whim and will of majority passion? Would Congress render our Constitution unstable and unpredictable? Would a legislative constitutionalism leave politically disempowered groups and entrenched minorities subject to the limitless subordination of the majority? Where would it leave our constitutional law to have it centered in an institution known for dysfunction, corruption, petty partisanship, and stagnation?

These questions are challenging to answer and require deeper deliberation than one piece can offer. But what if we had evidence that Congress had the capacity to tackle questions of fundamental constitutional values and lawmaking—even had the capacity to recognize and mitigate constitutional failure? What if Congress could restructure the federal government and the lawmaking process to better empower people with the capacity for pregnancy to take part in interpreting the Constitution and discerning constitutional meaning? What if Congress then explicitly took the perspectives of affected communities and built upon it a doctrine of constitutional interpretation and values that it used to motivate lawmaking—in the face of majority apathy and even opposition? What if Congress relied on these congressional doctrines to lend stability to constitutional law and to raise those questions above its quotidian lawmaking process? What if Congress continued to legislate over these issues, as motivated by its own doctrine and institutional structure, despite dysfunction, gridlock, hyperpartisanship, and corruption? It may seem well beyond imagination, but what if Congress could reach beyond the simple remedies offered by the courts and, instead, restructure the separation of powers and the federalist system to

better protect people with the capacity for pregnancy against discrimination and threat?

The case study of federal Indian law is not without its complexities. Nor is it without failings and shortcomings. Many twists and turns of history would support the fears described above—and it is hard to take a history of subordination, dispossession, and genocide and to generalize from that case. However, this Feature posits that a case study of federal Indian law does provide the evidence we might need to expand our constitutional imagination and embrace the possibilities and promise of a legislative constitutionalism. It allows us to understand the shortcomings and strengths of centering Congress within the constitutional lawmaking process by understanding what that process has looked like within our own constitutional order and over decades. Congress has taken a definitive role with respect to the mitigation of American colonialism and has implemented innovative structural reforms to ensure that mitigation. The Supreme Court has, in the main, deferred to the ability of Congress to take the lead and even allowed congressional override of its holdings by statute. Beyond a thought experiment, these doctrines provide us with concrete examples of the successes and failures of a constitutional culture distinct from the singular juricentric culture we imagine we have. They offer not necessarily answers but the hope of answers, not necessarily resolution to our fears but an opportunity to better root those fears—and their potential resolutions—in reality.

* * *

This Part provides a study of Congress's direct role in constitutional lawmaking to mitigate American colonialism. It describes the tactics, successes, and failures of Native advocates and their allies as they have forced Congress to recognize the constitutional failures of American colonialism and to mitigate these failures by treaty, statute, and regulation. Amidst this project, the United States has fashioned the body of law that regulates the relationship between Native people and the United States—federal Indian law.[47] These laws are exceptional and offer the most robust form of recognition of tribal government sovereignty in the world. These laws and their histories also offer a seemingly rare window into the process of congressional interpretation of the Constitution, Congress's recognition of a constitutional failure at the heart of our constitutional law, and its efforts to develop innovative forms of constitutional redress and mitigation of that failure.

First, this Part details how Native people advocated to the national government, and particularly Congress and the Executive, to shape the powers and

47. *See supra* note 15 and accompanying text.

structure of the U.S. government and its Constitution. Even before the Founding, Native advocates aimed to shape and mitigate the American colonial project through the construction of little "c" constitutional law in the form of treaties with Native Nations against which the Articles of Confederation would be read.[48] At the Founding, Native advocates shaped the Constitution directly and argued from U.S. constitutional values espoused at the time to press the United States toward policies of purchase over conquest.[49] Adherence to these constitutional values and limits was short-lived, however, as the United States faced the "constitutional crisis" that preceded Indian removal during the antebellum era.[50] This Part closes by describing Native advocacy before Congress in response to the constitutional failures of American colonialism and by detailing the unique structural forms of redress offered by Congress to mitigate these failures in response to Native advocacy.[51]

Again, highlighting the agency and successes of colonized, subordinated peoples is not intended to diminish the constitutional failure of American colonialism; nor is it intended to whitewash the violence wrought upon Native people by the U.S. government and its polity.[52] Rather, these examples reveal the unique constitutional conversation that formed around questions of colonialism in the context of a constitutional democracy—a unique constitutional culture that was and continues to be fostered by the institutional structure of the political branches—and one that remains surprisingly absent from the courts. Our common constitutional parlance might try to lump these conversations into those around rights—largely positive rights, but with some negative rights as well. But a closer examination reveals constitutional discourse over American colonialism that is focused directly on failures of structure of government, separation of powers, and representation rather than crafted in terms of rights.

A. Native Agency and Making of the United States Constitution, 1783-89

Initially, Native people shaped the reach and meaning of the Constitution itself more than by advocating for more traditional constitutional claims-making. For example, Native Nations shaped the federalist framework, as well as the recognition and treaty powers, through practice, political power, military might,

48. *See infra* Section I.A.

49. *See infra* Section I.A.

50. *See infra* Section I.B.

51. *See infra* Section I.C.

52. *See* Walter Johnson, *On Agency*, 37 J. SOC. HIST. 113, 113-14 (2003) (describing the turn toward "agency" in the New Social History as a problematic effort to rehabilitate the past by crafting histories of subordinated peoples that are "giving them back their agency").

and diplomacy and then argued from those constitutional powers once established.[53] In one of the earliest treaties formed by the United States, the Cherokee Nation recognized federal, and particularly congressional, supremacy over Indian affairs. This recognition would be later echoed in the U.S. Constitution itself. Signed in 1785, Article IX of the Treaty of Hopewell[54] also anticipated the reach and structure of the Indian Commerce Clause and promised:

> For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.[55]

The 1785 Treaty of Hopewell reflected a view of Native Nations at the time, especially Native Nations located in the south, that the Confederation Congress was more supportive of tribal sovereignty, more likely to uphold treaty law, more likely to respect borders of territorial sovereignty set through treaties, and less likely to dispossess Native sovereignty and lands through violence and lawbreaking. The 1785 Treaty also included a specific enforcement provision against state or federal malfeasance or neglect that promised the "justice of the United States" once a Native Nation sent a deputy to Congress.[56] Following the ratification of the Treaty of Hopewell, Congress began to read the Articles of Confederation against the background of the treaty provision, cementing federal power and beginning to build federal infrastructure around Indian affairs—in-

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53. *See, e.g.*, Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 FORDHAM L. REV. 1707, 1707-08 (2021) ("[F]our representatives of Native nations visited Philadelphia in the summer of 1787 . . . [and] [t]heir visit ensured that the Constitution secured the general government's treaty authority with Native nations . . . ."); COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION 12 (2018) (discussing the impacts of Native leaders, and the tribes they represented, on America's founding); Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1810 ("Through practice, Indian affairs shaped the reach and meaning of the Treaty Clause from the very beginning."); *see also* Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783-1795*, 106 J. AM. HIST. 591, 597-600 (2019) (documenting Native peoples' use of European-derived international law to shape the early American legal order).

54. The "Treaty of Hopewell" is often used as a collective term for three treaties signed between the Chickasaw, Choctaw, and Cherokee Nations and members of the House of Representatives, appointed as treaty commissioners by the Confederation Congress on behalf of the United States. These treaties were all signed between November 1785 and January 1786 on the Hopewell Plantation in South Carolina.

55. Treaty with the Cherokees, Cherokee Nation–U.S., art. IX, Nov. 28, 1785, 7 Stat. 18.

56. *Id.* art. XII.

cluding crafting two federal departments to govern northern and southern geographic regions respectively and appointing a federal superintendent to oversee each region.[57]

However, the constitutional status of federal power under the Articles of Confederation and the Treaty of Hopewell was not without controversy. Southern states protested Congress's assertions of federal power—Georgia and North Carolina most fervently—calling them encroachments on the "legislative rights" of the states.[58] The ambiguity of the Articles of Confederation lent credence to Georgia's and North Carolina's protests. From the very beginning, the Articles had sowed confusion over whether the federal government or the states held ultimate power over Indian affairs.[59] The Articles included a carveout for federal power over Indian affairs for Indians who were "members of any of the States,"[60] and Georgia and North Carolina seized on this language to assert their power over the southern Native Nations—which they insisted were "members" of their states.[61] To these two states, the carveout of federal power in the Articles could not be undone by federal treaty. North Carolina claimed that Native lands were guaranteed to them by the bill of rights in their state constitution, and its legislature quickly passed a bill purporting to nullify the Treaty of Hopewell, which

57. *See* AN ORDINANCE FOR THE REGULATION OF INDIAN AFFAIRS (Aug. 7, 1786), *reprinted in* 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 490-91 (John C. Fitzpatrick ed., 1934).

58. Correspondence Between William Blount and the U.S. Commissioners at Hopewell (Nov. 28, 1785), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789: REVOLUTION AND CONFEDERATION 403, 403-04 (Alden T. Vaughan & Colin G. Calloway eds., 1994) [hereinafter EARLY AMERICAN INDIAN DOCUMENTS]; Extract from the Minutes of the Georgia General Assembly (Feb. 11, 1786), *reprinted in* 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra*, at 427-28.

59. *See* THE FEDERALIST No. 42, at 217 (James Madison) (Ian Shapiro ed., 2009) ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, *which render the provision obscure and contradictory* . . . . What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority . . . is *absolutely incomprehensible*." (emphasis added)).

60. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

61. Letter from Benjamin Hawkins to Thomas Jefferson (June 14, 1786), *in* 9 THE PAPERS OF THOMAS JEFFERSON: NOVEMBER 1785 TO JUNE 1786, at 640, 641 (Julian P. Boyd ed., 1954).

the governor signed into law.[62] Meanwhile, the State of Georgia argued that the treaty had no effect on the carveout provision in the Articles.[63]

Although the views of these two states expressed a minority view of how best to interpret the Articles, Native advocates took steps to further cement federal power over Indian affairs and ensure that the Founding documents of the United States would be interpreted against the background of the treaties with Native Nations. To this end, three Native Nations sent their deputies to the Convention in Philadelphia to seek the "justice of the United States" through codification of exclusive federal power into early drafts of the U.S. Constitution.[64] A delegation of deputies from the Cherokee, Chickasaw, and Choctaw nations traveled to Philadelphia in June 1787, during the Constitutional Convention.[65] At the Convention, these deputies argued from fundamental little "c" constitutional principles—the rule of law, consent of the governed, and the equal value of all men—to persuade drafters that conquest of Indian Country through violence was antithetical to the fledgling constitutional democracy.[66] Not only would it threaten the legitimacy of the newly established experiment of the United States, but it could also threaten its very existence—the United States was very likely to lose any wars it began with Native Nations.[67]

During that visit, the deputies successfully persuaded the drafters of the new Constitution to reject the policy of "conquest" in the context of Indian affairs and Indian land.[68] They also persuaded the drafters to secure this policy in the Constitution by affirming the superiority of treaty law in the Supremacy Clause, grounding definitely the power to make treaties with Native Nations and the

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62. *See* North Carolina Protests Against the Treaties of Hopewell (Jan. 6, 1787), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 58, at 442; FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, at 148 (1970); Letter from Governor Richard Caswell to the Delegates in Congress (Apr. 3, 1786), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 58, at 428-29.

63. *See* Letter from Benjamin Hawkins to Thomas Jefferson, *supra* note 61, at 641.

64. Bilder, *supra* note 53, at 1707-08, 1714.

65. *Id.* at 1718.

66. *See, e.g.*, *id.* at 1749 (noting how the advocacy of Native Nations for equality through treaty-making led the United States to reject conquest and instead adopt a policy of purchase with respect to Native lands).

67. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1081 (2015) (noting that "the principle of sole federal protection" of Native Nations was crafted in part to forestall war).

68. The effects of this persuasion can be seen most clearly in the Committee and Secretary Reports published following the deputies' visit. *See, e.g.*, Report of Committee on Indian Affairs, *in* 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 477, 477-80 (Roscoe R. Hill ed., 1936); Report of the Secretary at War on Indian Affairs (Oct. 27, 1787), *in* 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 124, 124-26 (Roscoe R. Hill ed., 1937).

power to "manag[e] all affairs with" Native Nations in the national government, and by blocking all potential powers of state governments over Indian affairs.[69] The ambiguous carveout of the Articles of Confederation that granted state governments power over Indian affairs would not be duplicated in the new founding document. State governments had competed with the national government for power over Indian lands under the Articles of Confederation, leading to not only confusion but bloodshed,[70] and the delegation helped codify a different future into the Constitution.[71]

Over the long nineteenth century, Native advocates framed their arguments for constitutional reform in terms of structures of government and the constitutional blueprint that guided the construction of those structures. Unlike Black advocates across the period, Native advocates did not focus primarily on organizing around rights.[72] Consequently, the changes to the text of the Constitution worked in response to their advocacy to reflect that structural orientation.[73] Native advocates saw their relationship with the United States as mediated through the government of their Native Nation and the government-to-government relationship of that nation to the United States.[74] Much of the work of the new Constitution was to cement a government-to-government relationship for Native Nations with the national government exclusively. Article I, Section 10 explicitly prohibited states from forming treaties, alliances, or confederations,[75] and Article II provided the treaty power to the President with the advice and

69. *See* Bilder, *supra* note 53, at 1714, 1752-53.

70. *See* Ablavsky, *supra* note 67, at 1034 ("By 1787, nationalist predictions that state interference would lead to expensive wars were vindicated by looming hostilities against powerful Native confederacies." (citing REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783-1812, at 4-15, 31 (1967))).

71. *See id.* at 1729-30 (contrasting the path of political friendship presented by Native Nations with the possibility of violence and war suggested by state actions).

72. *See, e.g.*, KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018).

73. *See* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1849-72.

74. *See, e.g.*, Robert Clinton, *Treaties with Native Nations: Iconic Historical Relics or Modern Necessity?*, *in* NATION TO NATION: TREATIES BETWEEN THE UNITED STATES AND AMERICAN INDIAN NATIONS 15, 17 (Suzan Shown Harjo ed., 2014) (describing treaty-making as "an organic and dynamic kinship between the treaty partners"); Heidi Kiiwetinepinesiik Stark, *Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada*, 36 AM. INDIAN Q. 119, 122 (2012) (analyzing "Anishinaabe articulations of their nationhood when they engaged in treaty making with the United States").

75. U.S. CONST. art. I, § 10.

consent of two-thirds of the Senate.[76] The Supremacy Clause of Article VI promised that treaties already made under the authority of the United States and those yet to be made in the future would be considered supreme over state constitutional and legislative law.[77] Article I, Section 2, provided much clearer terms of exclusion for Native Nations from state jurisdiction—excluding from apportionment power "Indians not taxed."[78] Rather than the ambiguous terms from the Articles that allowed state power over Natives who were "members of any of the states," excluding "Indians not taxed" from state power placed the power to decide who was within or without the jurisdiction of state governments in the hands of Native peoples themselves—individuals who could decide whether or not to comply with state taxation.[79] Finally, in another sweeping provision of national power, Article I, Section 8, promised Congress the power to regulate "commerce" with the Indian tribes.[80] Unlike the Articles, congressional power over Indian affairs contained no qualification whatever for regulating Native Nations based on membership in the states—a status that Georgia and North Carolina assumed was within their power to determine[81]—nor was congressional power limited by any concern for the legislative rights of the states. Although subtle, when read together these new constitutional terms provided a strong rebuke to the ambiguous Articles of Confederation and a clear affirmation of exclusive federal power in the context of Indian affairs.

In addition to ensuring that the relationship between Native Nations and the United States would be handled by the national government, Native advocacy also shaped the horizontal separation of power between the branches of the national government and ensured that Native Nations would turn first to Congress and the President to enforce existing treaties, craft new treaties, collaboratively regulate Indian affairs, and prevent state encroachment into sovereign Native lands. The new Constitution placed the treaty power and the power to regulate commerce with Native Nations, as well as the power to receive ambassadors—known today as the recognition power—and the power over foreign relations

76. *Id.* art. II, § 2.

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

78. *Id.* art. I, § 2.

79. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 8.01[2] (discussing the "Indians not taxed" provision and noting that "[o]nly those Indians who had severed their tribal relations and individually joined non-Indian communities were considered to be subject to ordinary laws in a manner that made it appropriate to count them in the apportionment of direct federal taxes or for representation in Congress").

80. U.S. CONST. art. I, § 8.

81. *See* Ablavsky, *supra* note 67, at 1034 ("[E]xpansionist states such as New York, North Carolina, and Georgia seized on the Articles' ambiguous language to assert sole jurisdiction over Natives and their lands and to challenge federal treaties.").

squarely within the purview of Congress and the President.[82] Further, while Article III provided the Supreme Court with jurisdiction over disputes arising from treaties, the history of the Convention reveals that the drafters of the Constitution envisioned the power to enforce treaties to rest primarily with Congress and the President,[83] branches that could call forth and control the militia, oversee departments of war and foreign affairs, and nullify state law.[84] As the success of the deputies to the Convention revealed, Congress and the President were the ideal branches to facilitate the government-to-government relationship fought for by Native advocates. These branches were open and receptive to conversations about the shape of American colonialism and were amenable, at least in small part, to constructing the constitutional structure necessary to prevent the violence and lawbreaking sought by some in the aim of acquiring Native lands.

B. Diplomatic Constitutionalism, 1789-1827,[85] as Precursor to the Era of U.S. Constitutional Failure, 1828-1934

The success of the deputies at the Convention and the constitutional structure it promised resonated into the earliest acts of the United States. The fledg-

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82. U.S. CONST. art. I, § 8; *id.* art. II, § 2; *see also* Bilder, *supra* note 53, at 1753 ("[T]he instrument appeared to have put an end to claims that the states had authority over Native Nations.").

83. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 481 n.111 (2d ed. 1996) (explaining that the phrase "enforce treaties" was struck from the Necessary and Proper Clause in the drafting of Article I because it was "superfluous"); Nicholas Quinn Rosenkranz, Bond v. United States: *Can the President Increase Congress's Legislative Power by Entering into a Treaty?*, 8 N.Y.U. J.L. & LIBERTY 255 (2013) (arguing instead that the power to "enforce treaties" was struck as "superfluous" from the Militia Clause).

84. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 167-68 (Max Farrand ed., 1911); *see also id.* at 389-90 (justifying the removal of "enforce treaties" from the legislature's enumerated list of tasks, out of concern that it would be "superfluous since treaties were to be 'laws'").

85. Legal historians of Native America generally periodize long nineteenth-century history as including a "treaty era" that spans from the Founding, 1789, or earlier, in the colonial period, until either the "removal era," beginning in 1830 with the Indian Removal Act but with significant antecedents, or until 1871, when Congress passed the appropriations rider that marked the end of formal Article V treaties between Native Nations and the United States. *See, e.g.*, COLIN G. CALLOWAY, PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY (2013); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1997). Centering instead the perspectives and strategies of Native advocates reveals more continuity than change from the long nineteenth and into the twentieth century, as Native people advocated for and helped to innovate by co-creating "treaty substitutes" and other forms of collaborative lawmaking. *See, e.g.*, WILKINSON, *supra* note 16, at 63-64 (1987); PRUCHA, *supra*; Robert Anderson, *Treaty Substitutes in the Modern*

ling first Congress, in its earliest weeks, passed legislation to establish the Department of War, including in its organic act authorization for the President to designate it with power over Indian affairs.[86] Congress also appropriated funds for treaty commissioners and the costs of treating with Native Nations and set a salary for a superintendent of Indian affairs.[87] Months later, Congress again exercised its broad authority over Indian affairs to pass the first in a series of Trade and Intercourse Acts—omnibus statutes that would affirm provisions that had earlier been established by treaty and ensure that these treaty provisions set the terms of the relationship with Native Nations generally.[88] The Washington Administration's policy of recognizing the sovereignty of Native Nations and treating them on equal terms to all other foreign nations—including by requiring the Senate to ratify treaties with Native Nations as required by the Constitution—continued past the Founding.[89] Early on, these treaties and statutes reaffirmed the power of Native Nations to exercise their own laws within their jurisdictions—including their own criminal laws even against citizens of the United States that had committed a crime within Indian Country—and reaffirmed the exclusion of state power.[90]

Era, *in* THE POWER OF PROMISES: RETHINKING INDIAN TREATIES IN THE PACIFIC NORTHWEST (Alexandra Harmon, ed., 2008); *see also* DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA (2003) (proposing a "second treaty era" in the twentieth century). The following case study offers a rethinking of the periodization of Native legal history with Native advocacy and Native perspectives on constitutionalism, rather than the perspectives of federal actors, at the center.

86. Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50 (entrusting the Secretary of War with "such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeably to the Constitution . . . relative to Indian affairs").

87. Act of Aug. 20, 1789, ch. 10, 1 Stat. 54 ("[A] sum not exceeding twenty thousand dollars . . . is hereby appropriated to defray[] the expense of negotiating and treating with the Indian tribes. . . . [E]ach of the commissioners who may be appointed for managing such negotiations and treaties, shall be entitled to an allowance . . . to be paid out of the monies so appropriated."); Act of Sept. 11, 1789, ch. 13, 1 Stat. 67, 68 ("[T]here shall be allowed to the officers hereafter mentioned, the following annual salaries . . . [the] superintendent of Indian affairs in the northern department, two thousand dollars.").

88. Act of July 22, 1790, ch. 33, 1 Stat. 137.

89. Letter from President George Washington to the U.S. Senate (Sept. 17, 1789), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 58, at 546 ("[I]t seems to be both prudent and reasonable, that [treaties'] acts should not be binding on the nation, until approved and ratified by the Government.").

90. *See, e.g.*, Treaty with the Cherokees, Cherokee Nation–U.S., art. V, Nov. 28, 1785, 7 Stat. 18, 19 ("If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands [of the Cherokee] . . . such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please."); Treaty with the Choctaws, Choctaw Nation–U.S., art. IV, Jan. 3, 1786, 7 Stat. 21, 22 (containing similar language);

Within Indian Country after the Founding, Native people also organized internally around power and government structure—meaning that Native communities debated, governed, and cared for one another internally, creating complex systems of governance and social welfare, alongside visions of equality distinctive from those fostered within the United States. To draw upon Professor Julie L. Reed's study of the Cherokee Nation's development of social welfare services over the long nineteenth century as illustration, Cherokee people "did not simply imagine a viable alternative to the social policies offered by federal officials and states; they imagined, created, debated, and reformed their own social policies."[91] These policies included the formation of a centralized Cherokee constitutional government that held all lands communally and supported a pension system, equal forms of citizenship, egalitarian property rights respecting matrilineal kinship systems, orphanages, medical associations, public education, public healthcare, and institutional care for Native people suffering from mental-health issues.[92] Cherokee visions of equality, citizenship, belonging, and community care arose from a central belief in *gadugi* or coordinated work for the social good—work that would preserve the *osdv iyunvnehi*, roughly translated to community.[93] Internal deliberation, statecraft, and power-building allowed the people of the Cherokee Nation, like other Native people now enclosed within the purported territorial borders of the United States, to debate and reject the offers of U.S. citizenship dangled in front of them by the national government as a lesser version of what their own Native Nation offered.[94] Instead, Native people organized centrally around power and community, and preserved space for this internal power-building by holding firmly to the government-to-government treaty relationship with the United States.[95]

Yet cracks began to show as the hunger for western expansion and Native lands accelerated with the promise of Manifest Destiny in the early nineteenth century. Federal treaty commissioners began to use aggressive tactics to coerce Native Nations, especially those located in the Ohio River Valley, to surrender

Treaty with the Chickasaws, Chickasaw Nation–U.S., art. IV, Jan. 10, 1786, 7 Stat. 24, 25 (containing similar language); Treaty with the Shawnees, Shawnee Nation–U.S., art. VII, Jan. 31, 1786, 7 Stat. 26, 27 (containing similar language).

91. JULIE L. REED, SERVING THE NATION: CHEROKEE SOVEREIGNTY AND SOCIAL WELFARE, 1800-1907, at 15-16 (2016).

92. *Id.* at 17-20 (describing the construction of these services and arguing that they influenced later federal policy for the provision of social services to Native communities).

93. *Id.* at 6-14.

94. *Id.*

95. *Id.* at 1 (describing the later advocacy effort of Walter Adair Duncan, Cherokee Nation citizen and father of the Cherokee social service system rejecting United States citizenship and pointing to the "binding force of the treaties of the Government which guarantee the right of self determination").

land by treaty for unfair prices.[96] Native leaders like Tecumseh of the Shawnee raised concerns over the failure of the United States to exercise its treaty power in good faith to treat with rogue Native people.[97] Dissatisfied with the ability of the United States to uphold treaty provisions and negotiate treaties in good faith, many Native Nations joined with Britain in the War of 1812.[98] Shortly after the War of 1812, in a flurry of renegotiation of treaties between Native Nations and the United States, the first exchange treaty for removal was signed and ratified.[99] Over a decade earlier, state governments had ceded their western land claims to the national government with the promise that Native people would eventually voluntarily remove.[100] Following the landslide election of Andrew Jackson into office in 1828, state impatience over removal was finally vindicated. Contrary to longstanding constitutional practice and in defiance of decades of treaty provisions, President Jackson shared in his inaugural State of the Union his view that any Native Nation that refused to remove would be subject to state jurisdiction.[101]

The constitutional crisis created by the conflict over how to interpret the Constitution in the context of federal power over Indian affairs resulted in what one historian has termed "the most serious crisis in the history of the Court."[102] President Jackson's position on state power over Indian affairs ran headlong into a Supreme Court led by Chief Justice Marshall and the Court's opinion in *Worcester v. Georgia*—the second case brought by the Cherokee Nation and its

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96. *See generally* Donna L. Akers, *Decolonizing the Master Narrative: Treaties and Other American Myths*, 29 WICAZO SA REV. 58, 67-70 (2014) (discussing the range of tactics used by treaty commissioners, including mistranslation, bribery, debt, and the withholding of annuities and rations).

97. Tecumseh Speech at Vincennes to Governor Harrison (1810).

98. ROBERT S. ALLEN, HIS MAJESTY'S INDIAN ALLIES: BRITISH INDIAN POLICY IN THE DEFENCE OF CANADA, 1774-1815, at 115-16 (1992) (describing "Indian frustration and anger at American encroachments on their lands" and Shawnee leader Tecumseh's speech to the British, stating "we are now determined to defend it [our Country] ourselves").

99. Treaty with the Creeks, Creek Nation-U.S., Aug. 9, 1814, 7 Stat. 120. For further discussion of the treaty renegotiations that followed the War of 1812, see Carole Goldberg, *Federal Policy and Treaty Making: A Federal View*, *in* TREATIES WITH AMERICAN INDIANS: AN ENCYCLOPEDIA OF RIGHTS, CONFLICTS, AND SOVEREIGNTY 13, 21 (Donald L. Fixico ed., 2007).

100. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1074 (2014) ("In 1802, Georgia became the last state to cede its lands to the national government, in return for a federal promise to extinguish Indian title as quickly as possible.").

101. Andrew Jackson, First Annual Message (Dec. 8, 1829), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 442, 457 (James D. Richardson ed., 1911).

102. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 729 (1926).

leader, John Ross, to challenge state power over their lands.[103] In that case, Marshall adopted the arguments of the Cherokee Nation that federal power over Indian affairs was exclusive and that the laws of Georgia had no force within the lands guaranteed to the Cherokee by U.S. treaty. The laws of Georgia, wrote the Chief Justice, "interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union" and thus were "repugnant to the constitution, treaties, and laws of the United States."[104] The U.S. Constitution, the Court held in *Worcester*, must be read against the background of international and domestic practice of recognition of Native Nations as sovereign and the treaties formed with these nations.[105]

In an apocryphal but illustrative anecdote, President Jackson has been mythologized to have responded to *Worcester* by saying, "John Marshall has made his decision, now let him enforce it."[106] True to history, however, Jackson did not invoke the power of the U.S. military to protect the Cherokee Nation from the encroachment of Georgia state law abolishing and criminalizing Cherokee government and seizing and parceling out Cherokee lands.[107] Historians have long declared this confrontation between the President and the Supreme Court as one of the definitive constitutional crises from the Founding until the Civil War.[108] But history also reveals that the crisis began years prior, following Congress's passage of the Indian Removal Act in 1830—a bare-bones "exchange act" that authorized funds to negotiate an exchange of Native lands near southern states for lands in the Indian Territory west of the Mississippi.[109] The Act could have been read as just another appropriation for treaty negotiations with Native Nations. But, in the hands of Andrew "Indian Killer" Jackson, the law took on new life. The Act was fuel to the state of Georgia that Congress would not invoke its enforcement powers to enforce treaties with the Southern Native Nations, and Georgia extended its laws over the Cherokee nation, provoking the crisis,

103. 31 U.S. (6 Pet.) 515 (1832).

104. *Id.* at 561-63.

105. *Id.* at 551-52.

106. JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 204 (2008).

107. *Id.* at 203-04.

108. *See, e.g.*, Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 528 (1969) ("Jackson refused to recognize the supremacy of the Constitution as interpreted by the Supreme Court.").

109. Act of May 28, 1830, ch. 148, 1 Stat. 411.

just a few short months later.[110] For the Jackson Administration, the funds of the Removal Act were the carrot, and the encroachment of state law was the stick. But the ultimate removal of the Cherokee Nation along the Trail of Tears was an act born entirely of unbridled executive power.

With respect to constitutional argument, the position of the Supreme Court and Chief Justice Marshall was clear: federal power over Indian affairs was exclusive, and state laws that interfered with the foreign affairs efforts of the United States with Native Nations—an early version of obstacle preemption—and the treaty law that was formed in that relationship were null and void.[111] Moreover, the power of the national government was governed by the Constitution—along with its values and the documents, like treaties, that informed its interpretation. Whether President Jackson had reached his position based on constitutional law or political motivations is, admittedly, less clear. Jackson often drew upon broader normative arguments around savagery and its exclusion from traditional rule-of-law principles, as well as a broad and ongoing misconception of the inevitable demise of Native people.[112] The most generous interpretation would be that Jackson envisioned a constitution read against the backdrop of natural law—a natural law inflected with racial hierarchy and myth.[113] But, more realistically, none of these arguments drew upon the Constitution. When he did draw upon more traditional constitutional arguments, he was often inconsistent. For example, as historians and political scientists have long noted, Jackson drew upon a state's rights sovereignty argument in the context of Indian affairs that would allow the states to nullify federal treaties and federal law.[114]

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110. Ga. Gen. Assemb., An Act to Add the Territory Lying Within the Limits of this State, and Occupied by the Cherokee Indians, to the Counties of Carroll, De Kalb, Gwinnett, Hall, and Habersham; and to Extend the Laws of this State over the Same; and for Other Purposes (Dec. 20, 1828), *reprinted in* A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 198 (Milledgeville, Grantland & Orme Co. 1831).

111. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

112. *See, e.g.*, Andrew Jackson, Second Annual Message (Dec. 6, 1830), *reprinted in* 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 500, 519-20 (1911) ("The consequences of a speedy removal will be important to the United States, to individual States, and to the Indians themselves. . . . [It] will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.").

113. *See* Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559, 606 (2020) (arguing that Jackson's orientation toward the Cherokee was not "lawless" but represents an unwritten constitution and "his commitment to white supremacy").

114. *See* RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS AND THE NULLIFICATION CRISIS 25-32 (1989); JILL NOGREN, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY 48 (2004).

But he also inexplicably took a nationalist tone in the context of the contemporaneous nullification crisis—arguing that state governments had no power to nullify federal law.[115] Reflecting upon these inconsistencies, few scholars have attributed Jackson's actions to good-faith interpretation of the Constitution.[116]

Instead, the constitutional crisis created by Indian removal resulted in a vision of the Constitution that allowed for executive power unbridled by constitutional limit—namely, the requirement of faithful execution of the law and by the checks and balances of the other branches. Following years of petitions submitted to President Jackson through the War Department to enforce *Worcester v. Georgia* and the treaties on which the decision rested, Principal Chief of the Cherokee Nation, John Ross, raised constitutional arguments against this vision of executive power in a petition to Congress on May 20, 1834.[117] Ross and the Cherokee Nation raised concerns over treaty guarantees of protection "guarded . . . by laws enacted by Congress"—guarantees "finally and authoritatively decided by the judiciary" that were not being faithfully executed by the President.[118] The petition raised concerns over checks and balances, raising a vision of an Executive "charged with the execution of treaties and laws,"[119] an Executive whose "duty" it was "to see carried into effect" the decrees of the judiciary.[120] Beyond simply failing to faithfully execute the laws of the United States as embodied in treaties, statutes, and court decrees, the petition went on to describe an Executive that was exerting power "on the side of their oppressors, and is co-operating with them in the work of destruction" by appointing problematic federal Indian agents and by withholding annuity payments guaranteed by treaty.[121]

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115. Letter from Andrew Jackson to Robert Y. Hayne, U.S. Sen. from S.C. (Feb. 4, 1831), *in* 4 CORRESPONDENCE OF ANDREW JACKSON 241-42 (John Spencer Bassett ed., 1926) ("That a state has the power to nullify the Legislative enactments of the General Government I never did believe, nor have I ever understood Mr. Jefferson to hold such an opinion. That ours is a Government of laws, and depends on a will of the majority, is the true reading of the Constitution . . . . [A]ssert that a state may declare acts passed by congress inoperative and void, and revolution with all its attendant evils in the end must be looked for and expected . . . .").

116. *Cf.* ELLIS, *supra* note 114, at 41-73 (reconciling Jackson's stances on states' rights and nullification using non-Constitutional metrics, including his attitude toward the tariff, his vision of nullification as antithetical to majority rule, his concern for the dissolution of the union, and his relationship with Calhoun).

117. *See* DELEGATES FROM THE CHEROKEE INDIANS, MEMORIAL OF JOHN ROSS, AND OTHERS, COMPLAINING OF INJURIES DONE TO THEM, AND PRAYING FOR REDRESS, S. DOC. NO. 23-386, at 1-3 (May 20, 1834).

118. *Id.* at 1.

119. *Id.*

120. *Id.*

121. *Id.* at 3.

Months later, President Jackson went on to strong-arm one-sided treaties for removal, abusing his power of recognition to recognize a splinter group of the Cherokee Nation separate from the elected council and Principal Chief, John Ross.[122] Jackson then used those treaties to undertake the mass deportation of 80,000 Native men, women, and children from the south before moving on to removals in states from Ohio to Alabama.[123] Some estimate that 25,000 Native people died during the removal process that lasted only a few years across the 1830s.[124] Jackson's vision of a nearly unbridled Executive was ultimately sanctioned by the Supreme Court after the death of Chief Justice Marshall and President Jackson's appointment of his replacement, Chief Justice Taney.[125] Taney went on to author not only *Dred Scott* but also *United States v. Rogers*—an 1846 case that established the so-called "plenary power doctrine" and held that the U.S. Executive could unilaterally determine who were and were not citizens of the Cherokee Nation for purposes of federal prosecution.[126] To Taney, "Indian" was not a political classification but a racial one, and Indians could never have

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122. *See, e.g.*, Mary Young, *The Cherokee Nation: Mirror of the Republic*, 33 AM. Q. 502, 502 (1981) ("The vast majority of the tribe rejected the Treaty, whose signers possessed no authority under the Cherokee constitution."). During the Senate debates on ratification before the very narrow and very contested vote, Senator Henry Clay first introduced the memorial of the Cherokee Nation protesting ratification of the treaty. *See Executive Proceedings of the Senate on the Treaty with the Cherokee Indians of December 29, 1835*, Senate Journal, 24th Congress, 1st Session 570 (1836). Senator Clay later moved to amend the treaty to note the lack of proper representation of the Cherokee Nation in its negotiations and to require President Jackson to return to negotiations with the proper Cherokee delegation. *Id.* at 574. After review of the correspondence regarding negotiation of the Treaty with the non-representative delegation and protracted debate, the Senate voted to ratify the Treaty by a single-vote margin. *Id.* at 575. Missouri Senator Thomas Hart Benton later described ratification of the Treaty as "one of the most difficult and delicate questions which we ever had to manage; and in which success seemed to be impossible up to the last moment." THOMAS HART BENTON, THIRTY YEARS VIEW 1, 626 (1854). Senator Benton also went on to note the irony that, because the Southern vote was divided on ratification, the vote required a number of northern states to support the Treaty, a decision that would extend "the area of slavery in Georgia by converting Indian soil into slave soil." *Id.*

123. CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY 72 (2020).

124. Caitlin Fitz, *The People Who Profited off the Trail of Tears*, ATLANTIC (May 2020), https://www.theatlantic.com/magazine/archive/2020/05/claudio-sant-unworthy-republic-trail-of-tears/609097 [https://perma.cc/88ER-APBB] (extrapolating from Claudio Saunt's text a total figure of 25,000 Native deaths as a result of removal policy).

125. *See* ELLIS, *supra* note 114, at 32.

126. 45 U.S. (4 How.) 567 (1846).

sovereign governments.[127] Admittedly, like *Dred Scott*, *Rogers* is also deeply inflected with theories of race and racism—envisioning again a constitutional law interpreted against a background of racial hierarchy.[128]

The constitutional crisis that led to *Rogers* turned to constitutional failure within decades. Pointing explicitly to the Supreme Court's sanction of the plenary power doctrine in *Rogers*,[129] the Executive began a policy in the 1860s of unilaterally building detention camps on lands reserved to Native Nations by treaty. Congress sanctioned these efforts through appropriations and an occasional supplemental statute, but the lion's share of detention-camp infrastructure was constructed unilaterally by the Executive.[130] Using the code of federal regulations, the Office of Indian Affairs created the Courts of Indian Offenses, courts that criminalized Native political organizations, spiritual practice, and familial structure.[131] The United States established the first federally run on-reservation boarding school within the lands of the Yakama Nation in 1860 and established the first federally run off-reservation boarding school, the infamous Carlisle Indian Industrial School, in 1879.[132] The aim of these schools was to "kill the Indian in [these children] to save the man," and to this end, the schools applied corporal punishment to stop children from practicing their religions and speaking their native tongues.[133] Children were provided with new "American" names, their hair was cut, and they were farmed out to neighboring White

127. *See id.* at 572-73.

128. *See id.* at 572.

129. *See* Bethany R. Berger, *"Power over this Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2016–18 (2004) (overviewing the Executive's use of the *Rogers* decision); *see also* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1834 ("Head of the War Relocation Authority, Dillon S. Myer, likely found the inherent and limitless federal power within reservations and the already existing infrastructure a good fit for a new form of concentration camp.").

130. Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15.

131. *See* II REPORT OF THE SECRETARY OF THE INTERIOR; BEING PART OF THE MESSAGE AND DOCUMENTS COMMUNICATED TO THE TWO HOUSES OF CONGRESS AT THE BEGINNING OF THE SECOND SESSION OF THE FIFTY-SECOND CONGRESS 28-31 (Washington, Gov't Printing Off. 1892) (providing an overview of the Courts of Indian Offenses established by the Office of Indian Affairs).

132. *See* Tary J. Tobin, *Indian Education in the Northwest*, *in* ON INDIAN GROUND: THE NORTHWEST 1, 3-4 (Michelle M. Jacob & Stephany RunningHawk Johnson eds., 2020); Frank Vitale IV, *Counting Carlisle's Casualties: Defining Student Death at the Carlisle Indian Industrial School, 1879-1918*, 44 AM. INDIAN Q. 383, 386 (2020).

133. Richard H. Pratt, *The Advantages of Mingling Indians with Whites* (June 1892), *reprinted in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE NINETEENTH ANNUAL SESSION HELD IN DENVER, COL., JUNE 23-29, 1892, at 46 (Isabel C. Barrows ed., Press of George H. Ellis 1892); CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 53-54 (2005).

homes to perform manual labor.[134] Children over the age of eight or nine were required to spend half of their days working on "upkeep" of the school itself, under conditions that the U.S. government later recognized would be "prohibited in many states by the child labor laws" were they to apply.[135] If parents refused to send their children to the boarding schools, executive agents overseeing the camps would threaten to withhold rations or forcibly remove the children.[136] Native families were even unable to avoid these conditions by abandoning their homelands—the lands promised to their governments by treaty—because many detention camps on reservations required a pass granted by the federal Indian agent supervising the camp to be able to leave. Beyond its detention camps, the Executive fought violent wars with Native people without legal limit, indefinitely detained prisoners of war and their families across generations, authorized the largest mass execution in U.S. history, and supported the slaughter of thousands of Native men, women, and children to a level that some historians have called genocide.[137]

The long nineteenth century began with the glimmer of a promise that the United States might uphold its constitutional values and treaty obligations. The method of American colonialism, conquest or diplomacy, was a path yet to be determined. The century closed with the closure of the frontier and, with it, the fruits of mass slaughter, genocide, and militarized, unbridled executive power. Following the end of the Spanish-American War in 1898 and the Spanish cession of Puerto Rico, Guam, and the Philippines to the United States, eyes began to

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134. As the seminal "Meriam Report" on the problem of Indian administration observed, "[E]ffort ha[d] been made to feed the children on a per capita of eleven cents per day," leading to serious dietary deficiencies and a greater incidence of tuberculosis and trachoma; schools were "crowded materially beyond their capacities" and didn't provide adequate toilet facilities or proper ventilation; and medical services were "not up to a reasonable standard." LEWIS MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION: REPORT OF A SURVEY MADE AT THE REQUEST OF HONORABLE HUBERT WORK, SECRETARY OF THE INTERIOR, AND SUBMITTED TO HIM, FEBRUARY 21, 1928, at 11-12 (1928). Rather than educate the children during the day, most boarding schools required all children above the fourth grade (age nine or ten) to labor for half of their day to engage in "production work for the maintenance of the school[s]." *Id.* at 13. Not only did the required labor detract from the children's education, it also put the children at risk—as the Meriam Report speculated that much of the work would be "prohibited in many states by the child labor laws," were they to apply, because the equipment on which the children were required to work was "antiquated and not properly safeguarded." *Id.*

135. *Id.* at 13.

136. *See* BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900-1940, at 13 (1998).

137. *See, e.g.*, JEFFREY OSTLER, SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS 1 (2019); NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 78-79 (2019); THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE (M. Annette Jaimes ed., 1992).

look to overseas expansion as the new frontier. Domestically, Native advocates and their allies turned again to Congress to remedy the devastation that American colonialism had left in its wake.

C. Reviving the Native Constitution, 1934-Present

The late nineteenth and early twentieth centuries saw a renaissance in Native activism, much of it directed at Congress. Native advocates focused their efforts on tactics to persuade Congress to recognize the constitutional failure of American colonialism and to implement, by statute and executive order, the framework for federal Indian law promised by the original constitutional order.[138] The mid-to-late nineteenth century witnessed a sharp deviation from the principles for which Native advocates had fought for in the Supremacy Clause, treaty power, recognition power, and Indian Commerce Clause, as well as within the federal system. The original Constitution recognized exclusive federal power over Indian affairs and centralized that power in a collaborative treaty-making process that guaranteed the recognition of Native Nations as sovereign.[139] It ensured that federal power would also be limited by the same checks and balances that the Constitution applied in other contexts to prevent government abuse. The Constitution also excluded Native Nations from state jurisdiction and apportionment—an exclusion that was reaffirmed in the Reconstruction Amendments.[140] But, by the end of the long nineteenth century, these big "C" constitutional principles had been abandoned and, along with them, the little "c" constitutional values, norms, and practices that they protected.

Because Native advocates took the position that these constitutional values were already a part of the Constitution, their advocacy did not focus on enacting constitutional amendments. Instead, advocates focused on finding ways to return the United States to its own Founding document and adherence to the values and limits delineated therein. History indicated to Native advocates that simple legislation could direct the United States toward or away from those values.

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138. *See* Daniel Carpenter, *On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 349, 365-69 (Nicholas R. Parrillo ed., 2017) (discussing administrative petitioning for treaty compliance); BEYOND RED POWER: AMERICAN INDIAN POLITICS AND ACTIVISM SINCE 1900, at 1 (Daniel M. Cobb & Loretta Fowler eds., 2007); FREDERICK E. HOXIE, THIS INDIAN COUNTRY: AMERICAN INDIAN ACTIVISTS AND THE PLACE THEY MADE 400 (2012).

139. *See* U.S. CONST. art. II, § 2 (endowing the President with treaty power); *id.* art. I, § 10 (prohibiting states from making treaties); *id.* art. VI, cl. 2 (making treaties part of "the supreme Law of the Land").

140. *See id.* art. I, § 2 (excluding "Indians not taxed" from apportionment); *id.* amend. XIV, § 2 (repeating the language of "Indians not taxed").

The national government had, for example, pointed to an appropriations rider passed in 1871 as its authority for ending the collaborative treaty-making process with Native Nations.[141] Admittedly, since that time, the United States had turned to "treaty substitutes" in the form of legislation or executive agreement to do the work previously accomplished by treaty—a practice in which it still engages today. But advocates had seen the ways that Congress could be central to redirecting U.S. policy back toward its constitutional values and, importantly, providing checks upon the executive power that had led to the most egregious abuses of the nineteenth and early-twentieth centuries. Consequently, Native advocates turned their attention to Congress to make arguments around structural constitutional violations and for remedies to those violations.[142]

A full survey of Native activism leading up to the Indian New Deal could strain the bindings of a book, perhaps several books, and is beyond the scope of a single study. Instead, the advocacy of Gertrude Simmons Bonnin (Yankton Sioux), known as Zitkala-Ša and president of the National Council of American Indians, is offered here as an illustration of the complex and multilayered tactics of Native advocates aiming to leverage the power of Congress to mitigate the failures of American colonialism during this period.[143] Zitkala-Ša was central to the passage of the Indian Citizenship Act of 1924, which extended for the first time a form of dual United States and tribal citizenship to Native people nationwide and without condition.[144] At first blush, these tactics seem similar to those of other marginalized communities—fight first for citizenship, then privileges of citizenship-like rights and the vote, then enforce those rights in a court. Zitkala-Ša herself had cut her advocacy teeth in the fight for women's suffrage.[145] But Zitkala-Ša instead drew on the tactics of these other early civil-rights movements—like citizenship and rights—as simply another means to advocate for recognition and empowerment of Native Nations and enforcement of treaties.[146] In her twenty-three-page petition to Congress, submitted on April 24, 1926,

141. *See* Act of March 3, 1871, ch. 120, 16 Stat. 544, 566 ("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . .").

142. *See generally* THOMAS C. MAROUKIS, WE ARE NOT A VANISHING PEOPLE: THE SOCIETY OF AMERICAN INDIANS, 1911-1923 (2021) (providing an overview of the federal lobbying efforts of the Society of American Indians).

143. For further discussion of Zitkala-Ša's advocacy, see TADEUSZ LEWANDOWSKI, RED BIRD, RED POWER: THE LIFE AND LEGACY OF ZITKALA-ŠA (2016).

144. *See id.* at 127-28; *see also* Cathleen D. Cahill, *"Our Democracy and the American Indian": Citizenship, Sovereignty, and the Native Vote in the 1920s*, 32 J. WOMEN'S HIST. 41, 45-47 (2020) (describing the importance of the Indian Citizenship Act for Native suffrage).

145. *See* LEWANDOWSKI, *supra* note 143, at 159.

146. *See id.*

Zitkala-Ša presented the grievances of all "Indian citizens of the United States" for the violations of "treaties and the Constitution of the United States."[147] The language of citizenship and rights seems to frame the document, but the petition's focus on the government-to-government relationship between Native Nations and the United States and the centrality of treaties to this relationship echoes the petitions of Native peoples across the long nineteenth century.[148] Notably, the constitutional violations documented in the petition sound in structure rather than rights: the failure to properly police the federalist framework and the imposition of state jurisdiction over Indian Country, the failure to check executive power in the crisis between President Jackson and the Supreme Court, violation of the Supremacy Clause by allowing Georgia to essentially nullify federal law during Indian removal, and violation of the Treaty Clause by failing to negotiate in good faith and by failing to uphold treaty provisions or provide enforcement for breach.[149]

In response to claims from Native advocates like Zitkala-Ša and her allies about the structural constitutional violations at the heart of American colonialism, the national government has built a complex and innovative legal framework through statute and regulation to mitigate American colonialism since the 1930s. These forms of redress reveal themselves as distinct from the remedies

147. ZITKALA-ŠA, "PETITION OF THE NATIONAL COUNCIL OF AMERICAN INDIANS TO THE SENATE OF THE UNITED STATES OF AMERICA ASSEMBLED, UNDER AMENDMENT I OF THE CONSTITUTION" (1926), *reprinted in*, ZITKALA-ŠA: LETTERS, SPEECHES, AND UNPUBLISHED WRITINGS, 1898-1929, at 219 (Tadeusz Lewandowski ed., 2017).

148. *See id.* at 219-25; *see also Cherokee Petition in Protest of the New Echota Treaty*, NAT'L ARCHIVES (1836) [hereinafter *Cherokee Petition*], https://www.docsteach.org/documents/document/cherokee-petition-protest-new-echota-treaty [https://perma.cc/D4DJ-5Q7W] (protesting the ratifying of the New Echota treaty by the Senate in a petition to Congress signed by 3,352 Cherokee citizens).

149. *See Cherokee Petition*, *supra* note 148. Following the hearing on Zitkala-Ša's petition, the Senate Committee on Indian Affairs appointed her husband as a principal investigator to document the conditions within Indian Country and initiated an independent investigation into the conditions of Indian Country. Susan Rose Dominguez, The Gertrude Bonnin Story: From Yankton Destiny into American History, 1804-1938 (unpublished Ph.D. dissertation) (on file with author). Historians have credited these investigations, along with Zitkala- Ša's earlier research into Oklahoma Native Nations as inspiring the seminal report *The Problem of Indian Administration*, known as the Meriam Report. *See* LEWANDOWSKI, *supra* note 143, at 171. Their investigations offered early interventions into issues later documented within the Meriam Report. Most credit the Meriam Report with motivating the drafting and passage of the Indian Reorganization Act. *See, e.g.*, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.05 (describing the Meriam Report as the "primary catalyst for change" among federal legislators that led to the passage of the Indian Reorganization Act); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 960 (1972) (noting the "recognition that Indians were living in grinding poverty, that Indian health and education were in an abominable state, and that government policies were not working" brought about by the Meriam Report).

commonly offered in response to either positive- or negative-rights claims. Here, Congress addressed these constitutional concerns by reshaping the structure of the U.S. government and the constitutional order, rather than by offering traditional remedies for rights claims.

First, in response to advocacy by Native Nations and Native people, Congress has affirmed and structured the recognition of inherent tribal sovereignty, and it continues to structure and facilitate today the ongoing government-to-government relationship between the United States and the 574 federally recognized Native Nations.[150] Second, Congress reshaped the structure of the U.S. government across all three branches, as well as the breadth and reach of national power to facilitate better representation of Native peoples in their distinctive relationship with the United States as colonized peoples. Many of these innovations repurposed government infrastructure that had been built initially to further the American colonial project.[151] Third, Congress has established measures to check unbridled executive power and to even usurp the constitutional powers of the Executive if the Executive fails to wield those constitutional powers to mitigate American colonialism. Lastly, through statute and the upholding of treaty provisions, Congress defined the relationship between Native Nations and the United States as one that excludes state power and jurisdiction unless the national government authorizes and sets the terms of that power and jurisdiction.[152] The following Sections explore each of these forms of structural redress in turn.

1. Translating Constitutional Powers

In response to claims by Native advocates that the United States has failed to adhere to the constitutional value of recognizing Native Nations as sovereign and collaborating with them on fair terms, Congress has crafted a series of statutes that ensure the recognition of Native Nations, structure that recognition, provide forms of collaborative lawmaking like "treaty substitutes," and support an

150. *See, e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301-5423); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994) (codified as amended at 25 U.S.C. §§ 5361-5377); Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7554 (Jan. 29, 2021).

151. *See infra* Section II.A.

152. For example, in *Ysleta del Sur Pueblo v. Texas*, the Court held that Congress can "exercise[] its authority to allow state law to apply on tribal lands" but not without expressly doing so. 142 S. Ct. 1929, 1934 (2022) (noting that, "[u]nder our Constitution, treaties, and laws, Congress too bears vital responsibilities in the field of tribal affairs," in addition to tribes' "inherent sovereign authority" (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991))).

ongoing government-to-government relationship between Native Nations and the United States. Congress's structural reforms reflect the tactics and strategies of Native advocates. From the Founding, rather than seek substantive outcomes from another government—like equality, freedom of speech, or economic security—Native advocates focused their efforts primarily on shifting governing power to their communities to allow their own governments to secure equality, freedom, and economic security. The paradigmatic strategy by which Native advocates have successfully shifted power to their communities has been by securing the recognition of inherent tribal sovereignty—recognition that was secured not through the courts, but through the President and Congress—and then by shaping the reach and meaning of that recognition. In the early twentieth century, Native advocates persuaded Congress to translate[153] the recognition and treaty powers into complex and innovative forms of recognition and collaborative lawmaking across the twentieth and twenty-first centuries.[154]

Congress has exercised these translated treaty and recognition powers to construct innovative statutory and institutional frameworks that aim to mitigate American colonialism by regulating relations among Native Nations, the United States, and the several states. These "super-statutes" ensure ongoing recognition of inherent tribal sovereignty and maintain a more collaborative government-to-government relationship during the lawmaking process. Faced with the abject failure of the ongoing project of American colonialism over Native people in the 1920s in the publication of the Meriam Report,[155] Congress over the twentieth and twenty-first centuries crafted intricate statutory frameworks that mitigate the realities of American colonialism by recognizing Native Nations, fostering tribal sovereignty, and mimicking through domestic legislation the collaborative lawmaking process of treaty lawmaking.[156] Much like Congress's approach to other constitutional values in the twentieth century, Congress began to create a swath of innovative forms of governance during the Progressive Era in order to better mitigate the realities of American colonialism.[157] The centerpiece of these

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

154. *See* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1812 (describing how the "collaborative model of lawmaking born of the treaty power resurfaced" during the twentieth century).

155. *The Problem of Indian Administration*, INST. FOR GOV'T RSCH. (1928), https://files.eric.ed.gov/fulltext/ED087573.pdf [https://perma.cc/6TYL-N9QU]; *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.05 (describing how the Meriam Report "brought to public attention the deplorable living conditions" of Native people).

156. *See* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1812-15.

157. *See, e.g.*, Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1538-39 (2018).

statutory frameworks—and the statute that provides the primary framework by which the relationship between the U.S. government and the 574 federally recognized Native Nations is defined—is the Indian Reorganization Act (IRA), passed in 1934.[158] Like other super-statutes,[159] the IRA was crafted after over a hundred years of experimentation in the realm of Indian affairs and was passed following deep deliberation regarding the nature of the United States as a constitutional democracy and a colonial power.[160] It also coincided with a seachange in U.S. constitutional law in the 1920s, with the growing recognition of the constitutional values of groups and pluralism in addition to the more traditional values of individualism and assimilation across a range of areas of constitutional law—labor and the economy, most notably.[161] The IRA aimed to mitigate the realities of American colonialism by providing a framework through statute that would formalize and stabilize the government-to-government relationship between the United States and the Native Nations it recognized. The IRA primarily served as a means to recognize the inherent sovereignty of Native nations and to foster self-governance of those Native Nations by offering them the ability to form constitutional governments that the United States would recognize. The IRA further fostered self-governance by providing a formal framework through which the three sovereigns within the United States—the national government, the states, and tribal governments—would interact in government-to-government relationships and engage in collaborative lawmaking.[162] The bill itself was crafted in collaboration with Native Nations and their representatives,

158. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C.A. §§ 5101-5129 (2012)).

159. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216-17, 1260 n.201 (2001) (defining "super-statutes" as "quasi-constitutional" laws that "seek[] to establish a new normative or institutional framework" that cements within law and effects broad change and noting the Indian Reorganization Act as a super-statute); *see also* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1814 (describing the Indian Reorganization Act as a super-statute).

160. 48 Stat. at 984 ("[H]ereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.").

161. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 185-250 (2022) (describing the Progressive era and the reclamation of a popular constitutionalism).

162. *See* 48 Stat. at 987.

and it required affirmative consent by each Native nation in order to take effect within that jurisdiction.[163]

Later statutes have mimicked and built upon the translated recognition power of the IRA. During the self-determination era of the late 1960s and early 1970s, Congress passed a slew of legislation similar to the IRA that recognized the power of Native Nations to contract and compact over their own educational, safety, housing, and health services;[164] to assume authority over the placement of Native children in the context of adoption and foster care — including the ability to override state law with tribal law;[165] as well as established formal means by which states and Native Nations would govern, fund, and distribute profits from gaming enterprises within a state's territorial borders.[166] Throughout these legislative histories, Congress has routinely cited the particular power it holds under the Constitution with respect to Native Nations and a quasi-constitutional doctrine, called the trust doctrine, that requires Congress to mitigate the realities of colonialism.[167]

Today, Native Nations collectively govern hundreds of thousands of tribal members and land masses larger than several states — all as semi-sovereign enclaves within the territorial borders of the United States.[168] Of the 574 federally recognized Native Nations, many have drafted, ratified, and amended their own

163. *Id.* at 988 ("This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election called by the Secretary of Interior, shall vote against its application."). *But see* ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 190 (2000) ("A serious and consequential error [by the BIA in seeking advice related to the crafting of the IRA] was the failure to seek input directly from Indians and their governments.").

164. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.07.

165. *Id.*

166. *Id.* §§ 12.02, 12.09, 16.04.

167. *See, e.g.*, Indian Child Welfare Act of 1978, 25 U.S.C. § 1902 (2018) ("[I]t is the policy of this nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."); *see also* Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1778 (2017) ("[T]he Indian trust doctrine has helped orient the political branches' federal Indian policies in ways that have fostered Indian Nations' self-determination.").

168. *See Tribal Governance*, NAT'L CONG. AM. INDIANS, https://www.ncai.org/policy-issues/tribal-governance [https://perma.cc/WN4Q-3387].

tribal constitutions.[169] These constitutions have established federated governments, judiciaries, executive branches, and legislatures.[170] Over the lands reserved to Native Nations by treaty, those nations exercise civil and criminal jurisdiction through their own governments.[171] Many Native Nations have passed complex criminal and civil codes by statute and regulation, and many have developed nuanced bodies of published common law through their court systems.[172] Some tribal governments have successfully established a social safety net unseen elsewhere within the United States for their tribal citizens—including head-start education,[173] elder care,[174] health insurance,[175] energy to heat and cool homes,[176] and universal basic income.[177] Native Nations have also assumed

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169. *Tribal Nations and the United States: An Introduction*, NAT'L CONG. OF AM. INDIANS 24 (2020), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf [https://perma.cc/2PPY-2AS3] [hereinafter *Tribal Nations: An Introduction*]; 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 4.04.

170. *Tribal Nations: An Introduction,* supra note 169, at 23-24; 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 4.04.

171. *Id.*

172. *See, e.g.*, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 4.05; *see also* Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 707 (2006) (dividing tribal common law into "intertribal common law" and "intratribal common law"); Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 823 (2014) ("Tribal courts also have generated an impressive array of tribal common law, memorialized in thousands upon thousands of written opinions.").

173. *Tribal Early Care and Education Programs: An Overview*, BIPARTISAN POL'Y CTR. 8-9 (2021), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2021/03/Funding-overview-tribal.pdf [https://perma.cc/8YPS-V3VJ].

174. Jessica Bylander, *Meeting the Needs of Aging Native Americans*, HEALTHAFFAIRS (Mar. 8, 2018), https://www.healthaffairs.org/do/10.1377/forefront.20180305.701858/full [https://perma.cc/2NZ2-FZMB].

175. *See, e.g.*, *Tribally-Sponsored Health Insurance Program*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, https://www.anthc.org/what-we-do/tribally-sponsored-health-insurance-program [https://perma.cc/SBL9-HG3N]; 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 22.04 (detailing tribally administered health-care programs and systems).

176. *See, e.g.*, *Energy Assistance Program*, OSAGE NATION (Mar. 11, 2023, 6:30pm), https://www.osagenation-nsn.gov/services/financial-assistance [https://perma.cc/KX2A-MT8V] (detailing how Native Americans on the Osage Reservation can access energy assistance); *see also Tribal Energy Program*, MUSCOGEE NATION (Mar. 11, 2023, 6:35pm), https://www.muscogeenation.com/tribal-energy-program [https://perma.cc/8PBT-JMPY] (detailing how Muscogee (Creek) Nation citizens can receive $600 in assistance for heating and cooling bills).

177. *See* Ben Winck, *The Choctaw Nation Has Begun Experimenting with Universal Basic Income*, BASIC INCOME TODAY (Aug. 24, 2021), https://basicincometoday.com/the-choctaw-nation-has-begun-experimenting-with-universal-basic-income [https://perma.cc/H5L8-G6LZ] (describing a form of universal basic income developed by the Choctaw Nation); *see also* Ioana

power within our federal framework. Through a series of self-determination statutes, beginning in the 1930s and peaking in the 1970s, Congress has recognized the ability of Native Nations to administer federal regulatory schemes, receive federal funds to administer federal welfare programs, contract with state and local governments, and to control hospitals, schools, and other infrastructure within Indian Country run previously by the national government.[178] In addition to establishing governments borne of and limited by constitutions, many tribal governments formed business organizations insulated from tribal politics to administer natural resources[179] and to run tribal businesses[180]—allowing for a level of experimentation and exploration of social democracy unheard of in neighboring jurisdictions.

Beyond translating the recognition power, Native advocates have also pressed Congress to translate the collaborative-lawmaking values of the treaty power into the context of the twentieth and twenty-first centuries. Notably, even immediately after the 1871 appropriations rider that purported to end treaty-making with Native Nations, the United States continued to collaboratively make agreements through "treaty substitutes" with Native Nations, in the form of legislation or executive order.[181] But Congress even began to translate the collaborative-lawmaking value of the treaty power into statutes that we consider to

Marinescu, *No Strings Attached: The Behavioral Effects of U.S. Unconditional Cash Transfer Programs*, ROOSEVELT INST. 15 (May 2017), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-No-Strings-Attached-201705.pdf [https://perma.cc/RQ4D-7T8M] (describing a form of universal income developed by the Eastern Band of Cherokee Indians).

178. *See, e.g.*, *Self-Determination*, U.S. DEP'T INTERIOR: INDIAN AFFS., https://www.bia.gov/regional-offices/great-plains/self-determination [https://perma.cc/HH7B-M3MQ] (discussing the Indian Self-Determination and Education Assistance Act, which "allowed for Indian tribes to have greater autonomy and to have the opportunity to assume the responsibility for programs and services administered to them on behalf of the Secretary of the Interior through contractual agreements"); *About Tribal Programs*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.acf.hhs.gov/ofa/programs/tribal/about [https://perma.cc/33K2-UVN9] (discussing tribal administration of welfare programs); *Tribal Nations: An Introduction*, *supra* note 169, at 23 (discussing tribal control of, among other things, "education, law enforcement, judicial systems, health care, environmental protection, natural resource management, and the development and maintenance of basic infrastructure such as housing, roads, bridges, sewers, public buildings, telecommunications, broadband and electrical services, and solid waste treatment and disposal").

179. *See* Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, REVENUE WATCH INST. 38–39 (2011), https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf [https://perma.cc/Y665-6HND].

180. *Tribal Nations: An Introduction*, *supra* note 169, at 31.

181. *See* WILKINSON, *supra* note 16, at 63-68 (1987) (discussing treaty substitutes—including both legislation and executive orders—in the context of reservation lands); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, §§ 1.01, 5.01.

be unilateral federal legislation.[182] Beginning with the IRA in the 1930s, Congress has conditioned much of federal Indian law on the consent of individual Native Nations in the application of those laws—meaning that Native Nations could and still can opt in or opt out of various legal frameworks that shape their sovereignty, giving them a veto power over the laws that govern their citizens and territory.[183] Congress has also empowered Native citizens to run the federal regulatory infrastructure that governs the government-to-government relationship with their nations through hiring-preference statutes.[184] Hiring preferences do not ensure a particular substantive outcome, nor do they exempt those regulations from the administrative processes that govern rulemaking and adjudication generally. But they do provide an innovative form of power-shifting to Indian Country by ensuring that "cause lawyers inside the state" will wield the power of the state, should they so choose.[185] Congress and the Executive have also ensured that lawmakers outside of the BIA will consult Native Nations in crafting regulations pertinent to Indian Country through statutes like the Native American Graves and Repatriation Act[186] and through a series of executive orders and memoranda requiring consultation.[187] More recently, federal agencies have built upon this culture of collaborative lawmaking to begin to "comanage" certain areas of regulation, like public lands that include sites sacred to Native

182. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 4.01 ("[C]ongressional recognition of tribal authority is reflected in statutes requiring that various administrative acts of the President or the Department of the Interior be carried out only with the consent of the Indian tribe, its head of government, or its council.").

183. Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 52 (2012).

184. Act of June 18, 1934, ch. 576, § 12, 48 Stat. 984, 986 (codified at 25 U.S.C. § 5116)) (instituting a hiring preference for the Bureau of Indian Affairs). For additional discussion, see Steven J. Novak, *The Real Takeover of the BIA: The Preferential Hiring of Indians*, 50 J. ECON. HIST. 639, 639-40 (1990).

185. *Cf.* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2012) (examining the impacts cause lawyers can have working inside the government to harness state power to advance social-movement goals and the limitations they face in doing so).

186. Pub. L. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. § 3001).

187. *See, e.g.*, Exec. Order No. 13,175, 3 C.F.R. § 304 (2000); Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009) (articulating President Obama's commitment to "regular and meaningful consultation and collaboration with tribal officials"); Tribal Consultation and Strengthening Nation-to-Nation Relationships: Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7491 (Jan. 26, 2021) (articulating President Biden's commitment to "regular, meaningful, and robust consultation with Tribal officials").

people, through intergovernmental cooperative agreements signed with Native Nations.[188]

2. *Checking the Executive*

Beyond translating the treaty and recognition powers, Congress has also ensured checks on the exercise of unbridled executive power that would further the American colonial project. Paradigmatically, Congress has even claimed some of the power held by the Executive when it has determined that the Executive has failed to uphold the constitutional values at stake in mitigating American colonialism. For example, Congress has taken steps across the latter half of the twentieth century to better define and articulate the process by which the United States recognizes Native Nations.[189] As the Supreme Court has noted,[190] recognition of Native Nations operates differently as a constitutional matter in the context of the recognition of Native Nations than it does in the context of the recognition of foreign nations. Traditionally, the recognition power is seen as largely the province of the Executive.[191] But, in federal Indian law, Congress has both asserted a formal role for itself and defined the process for the other branches. Much of that distinction is due to Congress taking a strong lead in regulating federal Indian law more generally and taking seriously its role in upholding the trust responsibility.

Although recognition of Native Nations has a muddled and often contradictory legal history, historically, the United States has recognized Native Nations through sovereign-to-sovereign forms of diplomacy, settlement-like treaties,

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188. *See, e.g.*, U.S. Dep't of Interior & U.S. Dep't of Agric., Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403 (Nov. 15, 2021) (directing costewardship of federal lands that are located within or adjacent to reservation land).

189. *See, e.g.*, Indian Federal Recognition Administrative Procedures Act of 1994, H.R. 4462, 103d Cong. § 2(1) (2d Sess. 1994) (proposing an act to "establish an administrative procedure to extend Federal recognition to certain Indian groups"). *See generally* Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955 (2016) (contending that Congress, more so than the Bureau of Indian Affairs (BIA), plays an enduringly prominent role in the recognition of Indian tribes); RICHARD C. EHLKE, CONG. RSCH. SERV., FEDERAL RECOGNITION OF INDIAN TRIBES (1983), ProQuest, Doc. No. CRS-1983-AML-0037 (summarizing congressional recognition of Indian tribes generally and pertaining to particular statutes).

190. *See* Zivotofsky v. Kerry, 576 U.S. 1, 22 (2015) ("[T]he recognition of Indian tribes . . . [is] a distinct issue from the recognition of foreign countries.").

191. *See id.* at 28 ("This history confirms the Court's conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone.").

and executive-legislative agreements.[192] But the United States has also recognized Native Nations through simple statute, executive order, and regulation.[193] Because Congress has declared that the federal trust responsibility is limited to those Native Nations that the United States has recognized as sovereign, Congress has taken an affirmative role in identifying those Native Nations the United States has recognized and articulating the contours of the recognition process. Along with the drafting and the passage of the IRA, Congress published a list of Native Nations eligible for inclusion under the Act.[194] The IRA list was controversial and problematic.[195] But it also created clarity for the first time as to which tribes the United States claimed to have recognized. Native Nations excluded from the IRA list by Congress then began to petition the BIA for recognition through an ad hoc process that continued until the 1970s.[196] During this same period, however, Congress continued to assert a role for itself in the recognition process. Not only did Congress claim to have unilaterally terminated federal recognition of certain Native Nations in the 1950s and 60s,[197] but it also asserted the sole power to reinstate recognition of those Native Nations.[198]

From the nineteenth century onward, there existed multiple, often overlapping and conflicting, channels of recognition available to Native Nations—including recognition through the Executive, the judiciary, as well as Congress through simple statute. The standard story within federal Indian law is that recognition is primarily the work of the executive branch through the Office of Federal Acknowledgement and through the formal recognition process established by that office.[199] But recent studies have shown that more nations in the

192. *See, e.g.*, Fletcher, *supra* note 183, at 52, 70-71 (2012).

193. *Id.*

194. *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 356 (1990).

195. *See, e.g.*, *id.* ("Immediately there were questions concerning recognition that followed inevitably in the wake of the IRA, owing primarily to the anomalous and confused legal status occupied by American Indian communities."); Carcieri v. Salazar, 555 U.S. 379, 397-98 (2009) (Breyer, J., concurring) ("We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 Tribes covered by the Act; and we also know that it wrongly left certain tribes off the list.").

196. *See* Quinn, *supra* note 194, at 359-63.

197. *See id.* at 360-61.

198. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 3.02(8)(c).

199. *See, e.g.*, Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 125 (2017) ("The federal acknowledgement process is a creature of the BIA, relying on delegated authority from Congress to the executive to 'prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs.'"); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 3.02(4); *Office of Federal*

last twenty years have received recognition by lobbying Congress than by petitioning the Executive. There is also evidence that Congress took the lead in exercising the recognition power even before that time. Recent empirical work by Professor Kirsten Matoy Carlson found that in the nearly forty years from 1975 to 2013, more Native Nations had gained recognition by congressional statute than by the formal administrative process within the BIA's Office of Federal Acknowledgment.[200] Although the majority of Native Nations advocated to both Congress and the BIA, Carlson also found that the success rate for lobbying Congress—measured by legislative activity, including bill introduction, hearings, and bill passage—to gain recognition was higher than the success rate for petitions submitted to the BIA.[201]

The pattern of recent congressional recognition is also evidence of ongoing congressional commitment to Indian affairs despite increasing gridlock, a hostile Executive, and whatever party happens to be in power. On the eve of Congress's end-of-the-year holiday recess in 2019, for example, one of the final votes cast that year resolved a nearly 130-year-long advocacy campaign by the Little Shell Chippewa nation to gain recognition from the United States.[202] Congress then sent the bill to the desk of President Trump, where it was signed without fanfare.[203] In gaining recognition by statute, the Little Shell Nation joins a burgeoning number of Native Nations that have received recognition through Congress in recent years. The Trump Administration alone signed bills that recognized seven Native Nations, all sent to the President's desk in the last two years of his administration.[204]

Acknowledgement (OFA), BUREAU OF INDIAN AFFS., https://www.bia.gov/as-ia/ofa [https://perma.cc/V227-KSUA].

200. *See* Carlson, *supra* note 189, at 971-72.

201. *Id.* at 973-78.

202. Kathleen McLaughlin, *A Big Moment Finally Comes for the Little Shell: Federal Recognition of Their Tribe*, WASH. POST (Dec. 21, 2019, 7:00 AM EST), https://www.washingtonpost.com/national/a-big-moment-finally-comes-for-the-little-shell-federal-recognition-of-their-tribe/2019/12/20/72f5ee86-204d-11ea-bed5-880264cc91a9_story.html [https://perma.cc/F9U4-DPVE].

203. *Id.*

204. *See id.* (noting the recognition of the Little Shell Nation); Jenna Portnoy, *Trump Signs Bill Recognizing Virginia Indian Tribes*, WASH. POST (Jan. 30, 2018, 11:30 AM EST), https://www.washingtonpost.com/local/virginia-politics/trump-signs-bill-recognizing-virginia-indian-tribes/2018/01/30/8a46b038-05d4-11e8-94e8-e8b8600ade23_story.html [https://perma.cc/4LEH-FMK6] (noting the recognition of six tribes in Virginia).

3. Reshaping Representation

Today, Native people have secured citizenship, the franchise, and enforcement of rights claims against the United States. Yet these aims arose largely in the twentieth century and remain secondary to the aim of recognition of Native Nations.[205] Native people vote in U.S. elections,[206] fill seats in Congress,[207] and serve on courts.[208] However, representation of Native people as Native people continues to be primarily through the government-to-government relationship between the United States and Native Nations.[209] This relationship is constructed and managed primarily by Congress.

Congress's unique representational role with respect to Native Nations and Native people has its roots in history. The distinctive relationship between Congress and Native Nations, in certain senses, reaches back beyond the early twentieth century. From the Founding, Congress kept its doors open to petitions, lobbying, and other forms of participation by Native Nations as nations. The Constitution initially promised a congressional enforcement mechanism for treaty law—allowing Native Nations to send a deputy to Congress to call forth the "justice of the United States."[210] Presidents, too, until the era of President Jackson, engaged respectfully with delegates of Native Nations as they did with other foreign diplomats.[211] For the first hundred years after this nation's birth, presidential administrations from President Washington to President Adams

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205. *See* Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)); *see also* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880, at 155-79 (2007) (describing "Indians' [multifaceted] reasons for supporting or opposing citizenship" through a case study on debates over citizenship by state legislative action).

206. *See, e.g.*, Felicia Fonseca & Angeliki Kastanis, *Native American Votes Helped Secure Biden's Win in Arizona*, AP NEWS (Nov. 19, 2020), https://apnews.com/article/election-2020-joe-biden-flagstaff-arizona-voting-rights-fa452fbd546fa00535679d78ac40b890 [https://perma.cc/7K2Z-FAG5].

207. *Indigenous Americans 117th*, U.S. HOUSE OF REPRESENTATIVES PRESS GALLERY, https://pressgallery.house.gov/indigenous-americans-117th [https://perma.cc/67MP-UV3Q].

208. *Senate Confirms First-Ever Native American Federal Judge in California*, DEF. SERVS. OFF. (May 20, 2022), https://www.fd.org/news/senate-confirms-first-ever-native-american-federal-judge-california [https://perma.cc/S7D5-CFDC].

209. *See* Seminole Nation v. Norton, 223 F. Supp. 2d 122, 140 (D.D.C. 2002) (discussing how the federal government must "ensure that the [Native] Nation's representatives, with whom it must conduct government-to-government relations, are the valid representatives of the Nation as a whole").

210. Bilder, *supra* note 53, at 1713-14.

211. *See, e.g.*, CALLOWAY, *supra* note 53, at 331 (recording the Washington Administration's acknowledgment of Native Nations as "foreign nations, not as subjects of the states").

formed more treaties with Native Nations than any other sovereign nation.[212] In contrast, the federal courts largely denied entrée to Native Nations and Native people to bring suit at all over the long nineteenth century and, even today, still adjudicate central issues of federal Indian law without the formal intervention of Native Nations.[213] But, throughout history, Congress has been open to the petitions of Native Nations and Native people for redress — even when the executive branch turned against them. In the early twentieth century, Congress took the lead in interpreting the constitutional values and issues at stake in the context of American colonialism and in crafting structural reforms like translation of the treaty and recognition powers.[214] Because Congress placed itself at the helm of mitigating the constitutional failure of American colonialism, it ensured that the constitutional departmentalism of the nineteenth century carried into the twentieth, and that it survived even the rise of judicial supremacy in the context of constitutional issues generally and particularly over the protection of minorities.[215]

The unique form of representation offered to Native people by Congress may also have its origins in the distinctive strengths and weaknesses of our national institutions. From the Founding, Congress and the Executive engaged in the practices of diplomacy with the representatives of foreign nations, deliberated over petitions from associations of individuals petitioning as a class, and structured their internal workings to better recognize the breadth and structure of the wide range of associations within and without the United States. The very design of these institutions was meant to be porous and open to engagement with

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

213. *See, e.g.*, Alegre v. United States, No. 16-cv-2442, 2021 WL 5920095, at *1-2 (S.D. Cal. Dec. 14, 2021) (adjudicating whether the BIA's decision to deny federal recognition of Plaintiffs' membership in the San Pasqual Band of Mission Indians was arbitrary and capricious, despite the Band having unanimously voted to enroll Plaintiffs and without the Band's intervention in judicial review).

214. *See, e.g.*, United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.").

215. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616-17 n.7 (2000) ("[E]ver since *Marbury* this Court has remained the ultimate expositor of the constitutional test."); Zietlow, *supra* note 13, at 269-74 (describing the "judicial activism" of the Warren Court).

the public—in whatever form that public chose to present itself.[216] In contrast, the courts struggled to give forum and voice to groups as groups—instead giving preference to values of individualism and assimilation over the long nineteenth century.[217] In the context of Indian affairs, the inability to provide a forum for Native Nations was stark. Most paradigmatically, the Supreme Court declined to adjudicate the issues present in *Worcester v. Georgia* in the version of the case presented to the Court one year earlier, *Cherokee Nation v. Georgia*, because it held that the presence of the Cherokee Nation as a party stripped the Court of original jurisdiction under Article III.[218] But the Supreme Court has long adjudicated issues of federal Indian law without the presence of a tribal government as a party, and the lower courts often denied access to Native Nations to bring suits on behalf of Native people.[219]

Today, this distinctive representative relationship continues to position Congress as the primary institution to deliberate over and address constitutional values in the context of American colonialism—but supported now by an extensive administrative apparatus, largely run by citizens of Native Nations.[220] Although the Supreme Court continues to adjudicate cases and to provide often in-depth forms of judicial review, the Court has also explicitly affirmed the authority of Congress to override the Court's decisions by statute.[221] Members of Congress have recognized this unique representational role with respect to Native Nations and Native people and continue to develop innovative structural reforms to better facilitate the representation of Native Nations—polities outside of the traditional constitutional and federalist framework, but now deeply enmeshed within it.

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216. Even prior to the Founding, petitioning was understood as a mechanism for the representation of the public—including the unenfranchised public—to participate in and engage with their legislative bodies. *See, e.g.*, Maggie Blackhawk, Daniel Carpenter, Tobias Resch & Benjamin Schneer, *Congressional Representation by Petition: Assessing the Voices of the Voteless in a Comprehensive New Database, 1789-1949*, 46 LEGIS. STUD. Q. 817, 822 (2021) ("Thomas Jefferson recognized petitioning as a mode by which the 'people out-of-doors' (or people 'without doors,' that is, outside the halls of the legislature) made their appearance within the doors of government.").

217. *See, e.g.*, Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTL. J. LEGAL PHIL. 185, 198-99 (2000); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 320-24 (1988).

218. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

219. *Id.* at 11-15.

220. *See supra* note 184 and accompanying text.

221. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799 (2014) ("Congress exercises primary authority in this area [tribal immunity] and 'remains free to alter what we have done . . . .'" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989))).

From early on, Congress shaped its internal infrastructure to focus on Indian affairs—a primary focus of the early federal government and, for many decades, its main source of federal expenditure. Both chambers of Congress developed specialized standing committees on Indian affairs and Congress designated an administrative apparatus to trade with Native Nations in the early nineteenth century.[222] These specialized committees and administrative agencies had initially focused on war, removal, detention, and other forms of subordination.[223] But they also served as a locus for expertise and deliberation over Indian affairs and Native petitions, and as a central place of engagement with Native Nations and Native people. By submitting petitions to Congress, many Native Nations successfully instigated the treaty-making process and enforced treaty-law requirements through congressional petitions.[224] The nineteenth century is replete with examples of Native resistance to federal subordination. But, beginning in the late nineteenth century, Native advocates persuaded Congress to repurpose these subordinating frameworks. By the twentieth century, they claimed certain committees and agencies to develop a unique framework of representation for Native people and Native Nations.

For example, Congress repurposed its established standing committees within each chamber to specialize in Indian affairs, and they are leveraged today to engage directly with Indian Country. Congress's specialized committees on Indian affairs were abolished briefly in the twentieth century by the Legislative Reorganization Act, but the Senate reinstated its standing committee on Indian Affairs in 1984.[225] The House also recently recreated its own standing subcommittee focused on Indigenous peoples during the 116th Congress (2019–21).[226] These committees serve as points of entry for Native advocates and often seek

222. S. Res. 127, 95th Cong., 130 CONG. REC. 15022-27 (1984) (reestablishing the Senate Committee on Indian Affairs); 165 CONG. REC. H1574 (daily ed. Feb. 13, 2019) (establishing the House Subcommittee for Indigenous Peoples of the United States); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.03.

223. *See, e.g.*, Act of July 9, 1832, ch. 174, 4 Stat. 564 (establishing the first iteration of the BIA within the Department of War); MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 5-6 (2014) (describing the BIA's responsibility to carry out federal boarding school policy).

224. *See* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1874-75.

225. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812; S. Res. 127, 95th Cong., 130 CONG. REC. 15026 (1984).

226. 165 CONG. REC. H1574 (daily ed. Feb. 13, 2019).

out the expertise and input of Native Nations in crafting legislative mitigations of American colonialism.[227]

In addition to reshaping the inner structures of the House and Senate, Congress has also reshaped the face of the American state to provide an agency that specializes in regulating Indian affairs, engaging in consultation with Indian Country and in mitigating American colonialism. Congress has also shaped parts of other agencies to better facilitate the regulation of the relationship between the United States and Indian Country.[228] Importantly, by developing this specialized infrastructure, Congress has affirmatively placed Native peoples at the helm of that state to facilitate representation and serve as an additional check on executive action. Today, the government-to-government relationship is regulated by the BIA, an agency that began as part of the Department of War in the early nineteenth century.[229] As of 2010, because of hiring preferences established by Congress beginning in the 1930s, ninety-five percent of employees within the BIA were Native American.[230] As would always be the case in the context of ongoing colonialism, the relationship between Native Nations and the BIA is complex and deeply imperfect in many ways. Scholars have also begun to recognize the ways that funding streams and other forms of institutional design have undermined the representative function of these institutions—leaving any government-to-government relationship in name only.[231] But understanding these innovative forms of representation and their creation as constitutional reforms crafted by Congress in response to the failures of American colonialism could help to clarify their purposes and to better secure their constitutional role in the future.

These innovations of representation within the national government have fostered a longstanding relationship between Congress and Native Nations.

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227. *See, e.g.*, *A Call to Action: Native Communities' Priorities in Focus for the 117th Congress: Hearing Before the Comm. on Indian Affairs*, 117th Cong. 1 (2021) ("[This hearing] is a real opportunity for members of the Committee to chart a path forward by listening to and learning from Native leaders . . . . [A]s the strongest voice for Native priorities in the Congress, this Committee will act . . . to uphold the Federal treaty and trust responsibilities to tribes and Native communities across the Country.").

228. Act of Mar. 3, 1849, ch. 108, 9 Stat. 395, 395 (1849) (establishing the Department of the Interior and authorizing the Secretary of the Interior to "exercise the supervisory and appellate powers . . . in relation to all the acts of the Commissioner of Indian Affairs"); *see, e.g.*, *Native American Affairs*, U.S. DEP'T COMMERCE, https://www.commerce.gov/bureaus-and-offices/os/olia/native-american-affairs [https://perma.cc/8YLT-E7E4].

229. Act of July 9, 1832, ch. 174, 4 Stat. 564 (authorizing the President to appoint a commissioner of Indian affairs under the Secretary of War).

230. Gershon, *supra* note 30.

231. *See* Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 137-40 (2021).

They reflect a constitutional culture within Congress that recognizes the issues of American colonialism—even those involving constitutional values derived from a document that excluded Native people—and facilitates the participation of Native Nations in determining mitigations and solutions. Congress has continued to support and strengthen these innovative forms of representation even following the success of Native advocates in pressing for state and national citizenship for Native peoples, which they achieved via the Indian Citizenship Act of 1924.[232] No doubt, these innovations fell short of ensuring the United States would fulfill all its responsibilities under treaty law—the promise of the appointment of a Native-Nation delegate to Congress in the 1835 Treaty of New Echota with the Cherokee Nation, most notably.[233] But the wealth of innovation around the representation of colonized peoples does gesture toward something more than historical accident.

4. Structuring Federalism

In addition to reshaping constitutional powers and checking the horizontal separation of power, Native advocates have persuaded Congress to also reshape the federalist framework to provide space for Native Nations to continue to govern as semi-sovereign enclave states. Under the Articles of Confederation and disputes over the Constitution, Native peoples learned quickly that state governments were often too close to their settler citizens to uphold the rule of law with respect to treaties, borders, and Native sovereignty.[234] The national government was certainly not anticolonial. But, at least in its early years, it seemed as though it would support forms of diplomacy and treaty-making not consistently upheld by the states.[235]

Native advocates pushed early on to strengthen national power over Indian affairs. Given the predominant interest in land speculation among the Founding Fathers, Congress was happy to oblige. Since the Founding, Congress has consistently restructured the federalist framework to affirm national power as central to Indian affairs and has cemented the boundaries between Native Nations and the several states. Even when Congress has authorized state jurisdiction over

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232. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

233. Treaty with the Cherokees, U.S.-Cherokees, art. 7, Dec. 29, 1835, 7 Stat. 478.

234. *See, e.g.*, sources collected *supra* notes 58-63 (discussing how Georgia's and North Carolina's interpretations of the Articles of Confederation prioritized state interests (including interests in amassing land) over respecting Native sovereignty or federal rule of law).

235. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.03[2] (detailing how certain early federal leaders, such as Secretary of War Henry Knox, "demanded respect for treaty obligations and tribal property rights").

Indian Country in narrow instances,[236] it has consistently affirmed federal power to set those boundaries and has adjusted state jurisdiction over time.[237] Although the Supreme Court has increasingly asserted an independent role for itself in determining those boundaries, it has – at least for now – continued to affirm the supremacy of congressional power in policing the federalist framework with respect to Native Nations.[238]

Since its formation, Congress has passed a series of acts that affirmed federal power over Indian Country, limited state power, and reinforced the separation of state jurisdiction from Indian Country within each state's enabling act. The very first Congress, for example, passed the Trade and Intercourse Act of 1790, a statute that defined the fundamental contours of our federal system by placing all of Indian Country under federal criminal jurisdiction and by requiring a federal license to enter Indian Country and trade with Native people.[239] Congress continued to strengthen the Trade and Intercourse Act with a series of amendments until 1834, referred to collectively as the Trade and Intercourse Acts, in which Congress strengthened federal power over Native people, trade, and lands.[240] These statutes worked hand-in-glove with the treaty process to respect the borders of Native lands set by treaty[241] and to ensure the recognition of tribal sovereignty. Although state governments recognized exclusive federal power and that the result of these statutes and treaties was the exclusion of Indian Country

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236. *See id.* § 6.04.

237. *See, e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (granting certain states criminal jurisdiction over Indians on reservations and allowing civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts); 18 U.S.C. § 3243 (2018) (giving Kansas jurisdiction over offenses committed by or against Indians on reservations in Kansas); 25 U.S.C. § 233 (2018) (conferring concurrent jurisdiction to tribal and state courts over private civil disputes between members of Indian tribes in New York).

238. *See infra* Section II.D; *see also* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) (discussing federal plenary power); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290-91 (1955) (same); Seminole Tribe v. Florida, 517 U.S. 44, 60 (1996) (same); Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . . .").

239. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137.

240. Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; *see also* William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 457 (2016) (describing the series of intercourse acts).

241. For examples of treaties that contain land negotiations, see Treaty of Peace and Friendship, U.S.-Creeks, art. IV, Aug. 7, 1790, 7 Stat. 35; and Treaty of Hopewell, U.S.-Cherokees, art. IV, Nov. 28, 1785, 7 Stat. 18.

from each state's "ordinary jurisdiction,"[242] many states continued to challenge federal power and tribal sovereignty.[243] In response, Congress continued to strengthen the Acts during the antebellum era.[244]

When it became clear that the Trade and Intercourse Acts and myriad treaties with Native Nations were insufficient to affirm exclusive federal power over Indian Country in the face of increasingly combative southern states, Congress turned to other constitutional powers to shape the federalist framework. For example, Congress began to leverage its power under the Property Clause[245] to require that new states joining the Union acquiesce in their enabling acts to federal power over Indian lands.[246] It also further strengthened federal power over Indian Country to combat complaints by state governments over Indian Country as a law-free jurisdiction.[247]

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242. *See* United States v. Cisna, 25 F. Cas. 422, 423 (C.C.D. Ohio 1835) (No. 14,795) (interpreting the Act of March 30, 1802, ch. 13, 2 Stat. 139, and noting that tribes do "not reside within the ordinary jurisdiction of any state").

243. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (ruling that only the United States, and not the individual states, had power to regulate or deal with the Indian nations despite Georgia's claims to the contrary); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (holding a Georgia statute which rescinded an earlier land grant unconstitutional under the Contract Clause). New York, in particular, openly resisted federal supremacy over Indian affairs and ignored the Trade and Intercourse Acts by engaging in dubious land transactions with Natives. *See, e.g.*, Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 664-65 (1974). *See generally* LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE 58-97 (1999) (describing the way in which "New York State continued to deal with the Indians as it pleased").

244. *See supra* note 240.

245. *See* U.S. CONST. art. IV, § 3, cl. 2 (granting Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

246. For example, when the United States began admitting additional states, Congress often included provisions within those states' enabling acts to preserve the barriers of Indian Country. *See, e.g.*, An Act for the Admission of Kansas into the Union, ch. 20, § 1, 12 Stat. 126, 127 (1861) ("[A]ll such [Indian lands reserved by treaty] shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State."); United States v. Sandoval, 231 U.S. 28, 37 (1913) (articulating one of the purposes of the Enabling Act as treating the lands of Pueblo Indians as "Indian country"); *infra* note 247 (discussing the passage of other state enabling acts in the postbellum era); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 6.01 nn.81-83.

247. *See, e.g.*, Federal Major Crimes Act of March 3, 1885, ch. 341, § 9, Stat. 362, 385 (granting federal courts jurisdiction over specific offenses if committed in Indian Country); Assimilative Crimes Act of June 25, 1948, ch. 645, 62 Stat. 686 (permitting federal courts to borrow from state criminal law if no federal-law equivalent exists for the prosecution of criminal offenses

The relationship between state and tribal governments has been one of the most contested and fraught areas of federal policy since the Founding.[248] It also became an area of constitutional crisis during the antebellum era, when the Supreme Court faced off with President Jackson on the question of the jurisdiction of the state of Georgia over the Cherokee Nation.[249] It was in the context of federal Indian law that Congress constructed the federalist framework of the United States—envisioning its role as final decisionmaker over the states on questions of American colonialism.[250] It was also in this context that Native advocates learned that the Supreme Court, even when supportive of tribal sovereignty and Native advocacy, was too powerless to police the federal framework. Following the antebellum era, Native advocates turned instead increasingly to the political branches of the national government to police these boundaries and, in the twentieth and twenty-first centuries, Native Nations have begun to advocate directly to state governments to ensure their powers of self-determination and the preservation of their borders.

Today, largely as a result of the period of constitutional failure at the end of the nineteenth century, state and tribal governments are far more enmeshed than at the Founding.[251] The Supreme Court has also begun to override hundreds of years of congressional action, as well as its own precedent, to assert itself strongly into the domain of state-tribal relationships.[252] But still, Native Nations continue to set the terms of the relationship between themselves and the states by calling on the power of Congress where necessary, as well as by exercising the economic and political capital secured by Native Nations through self-determination over time. Despite the Supreme Court's recent handiwork, Congress continues to structure the relationship between states and Native Nations through statutes like Public Law 280[253] that require the consent of Native Nations, collaborative lawmaking frameworks like the Indian Gaming Regulatory Act,[254]

committed in Indian Country); *see also* 16 CONG. REC. 934 (1885) (statement of Rep. Cutcheon) (arguing in favor of further expanding federal power because otherwise there would be "no law" governing certain offenses in Indian Country).

248. The body of literature on the relationship between state and tribal governments is particularly rich. *See, e.g.*, Resnik, *supra* note 15; Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007).

249. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

250. *See* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1815-19.

251. *See* Fletcher, *supra* note 248, at 74.

252. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2504-05 (2022).

253. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

254. 25 U.S.C. § 2710 (2018).

and the ratification and enforcement of agreements between states and Native Nations.[255]

II. IMPLICATIONS: CENTERING THE "LEGISLATIVE" IN LEGISLATIVE CONSTITUTIONALISM

Reflecting upon the history and structure of federal Indian law could help us imagine a much more central role for Congress in the interpretation and application of constitutional law—and perhaps, even, a broader vision of constitutionalism writ large—than that proposed by earlier literature. By studying an area of constitutional law outside of the core areas where the Supreme Court has asserted its juricentric constitutionalism, federal Indian law reveals a constitutional culture that is collaborative and mutually constituted with the communities it governs—and also, importantly, still practiced today within Congress.[256] Our theories of constitutionalism, and especially legislative constitutionalism, would benefit from deeper engagement with this unique case and the perspective it offers. For federal Indian law, Congress provides a particularly open forum for constitutional conversation and debate—even for disempowered minority communities and, especially, around concerns of a structural nature. The case study offers further examples of unique structural reforms to those constitutional concerns, in addition to the more traditional remedies offered by the judiciary for largely negative, but also positive, rights claims. With respect to our current constitutional moment, Indian law reveals that a healthy and dynamic constitutional culture is one that necessarily empowers Congress. The following Sections explore the theoretical implications of recognizing Congress's unique role in facilitating constitutional conversations in terms of structure and offers distinctive structural constitutional reforms in response to these conversations.

A. Constitutional Conversations in Congress

A closer examination of federal Indian law provides a deep dive into a form of legislative constitutionalism rarely seen today—that is, an area of constitutional law involving thorny constitutional values where Congress has maintained fidelity to its coequal role in interpreting and enforcing the Constitution.[257] In essence, it offers us an opportunity to put the "legislative" back in

255. For examples of tribal-state agreements, see Fletcher, *supra* note 248, at 82-83.

256. *See supra* notes 22-24 and accompanying text.

257. *See, e.g.*, United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact

legislative constitutionalism and to begin to formulate a vision of "legisprudence" informed by the workings of Congress over the last two hundred years.[258] Years ago, Professor Robin West called on scholars to imagine how constitutional law in the hands of a "conscientious legislator" might look.[259] Federal Indian law moves us from an imagination limited by speculation to an imagination expanded and empowered by the histories and workings of our own Congress and provides us with examples of the distinctive constitutional conversations fostered therein.

The legisprudence of Congress has fostered these distinctive constitutional conversations over the mitigation of American colonialism because of at least three important differences between the way Congress and the courts approach constitutional questions. First is the notable absence from Congress of the traditional structure of constitutional conversation initiated by a rights claim from a particular individual or group, followed by evidence of a violation, and then a request for a particular remedy—usually a remedy rooted in the traditional powers of a court.[260] Second is Congress's direct engagement with affected communities—even subordinated communities stripped of rights claims—and in a sustained fashion over time, coupled with its institutional powers of investigation and deliberation.[261] Finally, legislators within Congress approach interpretation of the Constitution, including its structural provisions, as guidance for its implementation through legislative action—not simply to evaluate legislative action in the past.[262] This approach allows for a distinctive form of interpretation

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legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.").

258. Julius Cohen introduced the term "legisprudence" as the study of the law as created by the legislature (as opposed to the judiciary). Julius Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163, 1163-64 (1983); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693 (1987) ("Scholarly and pedagogical attention to the nature of law should be as much 'legisprudential' as 'jurisprudential.'" (footnote omitted)).

259. Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, at 79 (Jack M. Balkin & Reva B. Siegel eds., 2009).

260. Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001*, 29 LAW & SOC. INQUIRY 127, 167 (2004) (comparing the "traditional judicial model[] of constitutional interpretation, emphasizing interstitial, rights-based, limited, and determinate decision making" with the "often flexible . . . expansive, and open-ended" model of congressional constitutional interpretation).

261. *See* Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 545-46 (2010).

262. *See* Roger H. Davidson, *The Lawmaking Congress*, 56 LAW & CONTEMP. PROBS. 99, 105 (1993) (describing how Congress devotes at least some attention to constitutional questions involving prospective legislative issues). *See generally* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (2d ed. 1996) (discussing instances in which Congress has

that inflects all aspects of the Constitution with full value, not simply the rights provisions.[263] It also captures a constitutional law that guides government action and structure rather than solely limiting it.[264]

The case study of federal Indian law demonstrates an approach to constitutionalism by legislators in Congress that rejects — or, more optimistically, transcends or predates — the juricentric model offered by the courts, a model that usually follows the traditional pattern of right-violation-remedy. In contrast to the courts, Congress has since the Founding not only offered unenfranchised and marginalized individuals, like Native peoples, as well as associations of individuals like Native Nations, a forum to take positions on and debate normative questions writ large, but also to engage with and identify those questions in a constitutional register.[265] Congress is notoriously less "insulated" from the public and need not struggle with issues of standing, causes of action, or limited jurisdiction in addressing constitutional questions.[266] Congress also need not shield its normative engagement with constitutional lawmaking under the guise of interpretive or historical practice.[267] Petitioners to Congress addressed their arguments in specifically constitutional terms and Native advocates did too, inflecting the Constitution with the normative and legal views of communities at the margins, including international law and the laws of foreign nations like tribal law.[268] The power to recognize new constitutional issues, reform earlier-

engaged in constitutional interpretation by reacting to rulings by the Supreme Court on various policy issues).

263. *See* Robin West, *Tom Paine's Constitution*, 89 VA. L. REV. 1413, 1460 (2003) (arguing that by recapturing Thomas Paine's view of "the Constitution as a law for governors that emanates directly from the will of the people rather than from the interpretive prowess of apolitical courts," we can give "legislative content" to key constitutional provisions).

264. *Id.* at 1454-55 (discussing our constitutional tradition's "neglect of the affirmative constitution" and of "positive rights" realized through legislative action).

265. *See, e.g.*, DANIEL CARPENTER, DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790-1870, at 415-26 (2021) (discussing congressional petitioning by both individual Native people and Native Nations during the nineteenth century).

266. Although this distinction has blurred quite a bit with the later development of the "administrative state" and with the dismantling of the petition process in Congress in the mid-twentieth century, in many ways Congress still offers a more expansive platform to engage with discussions of new constitutional rights and values than does the bureaucracy. *See* McKinley, *supra* note 157, at 1559, 1603, 1609.

267. *See* Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2111-13 (2020).

268. *See, e.g.*, sources collected *supra* notes 147-149 and accompanying text.

recognized constitutional values, and offer new structural solutions to those constitutional problems remains with Congress.[269] As David P. Currie's monumental work has shown, Congress was at the heart of constitutional interpretation and implementation for the first decades following the birth of the United States.[270]

Instead of structuring their grievances to the courts or in terms of rights, Native advocates were able to engage in constitutional conversations in Congress over the methodology of constitutional interpretation directly—including by initiating constitutional conversations that predated the Founding, successfully advocating that the Articles of Confederation should be read against the backdrop of treaties, and then guiding the formal shape of the Constitution itself.[271] Central to conversations about the mitigation of American colonialism originally were discussions over the constitutional values at stake—among them the equality and value of all men and rule-of-law principles but also, more vitally, the survival of the union and its polity; the relationship of these values to certain structures of U.S. government, like the federalist system and separation of powers across branches; and the interrelationship between aspects of the constitutional order.[272]

Not beginning with a specific provision of the Constitution and its violation allows Congress to examine and identify constitutional issues and particular

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269. *See* Neal Devins & Keith E. Whittington, *Introduction* to CONGRESS AND THE CONSTITUTION 1, 14 (Neal Devins & Keith E. Whittington eds., 2005) (highlighting the "the critical role that Congress can play and has played in shaping constitutional values"); *see also* Blackhawk, *supra* note 267, at 2071-77 (illustrating how "petitions for representation by individuals often came to reshape the general rule" in Congress, by exploring a case study on widows' petitions in the early nineteenth century).

270. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1997) [hereinafter CURRIE, THE FEDERALIST PERIOD]; DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (2001); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861 (2005).

271. *See, e.g.*, 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 68, at 454-60 (construing the Articles of Confederation, in resolving a dispute between Georgia and Cherokee nation over treaty lands, to suggest that Georgia cede territory to the national government to maintain sole control over "regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people" (citing ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4)).

272. For example, Secretary of War Henry Knox implored North Carolina to honor the Treaty of Hopewell as required by "the principles of good Faith [and] sound policy;" "in order to vindicate the sovereignty of the Union from reproach;" and so that "all the indian tribes should rely with security on the treaties" to avoid providing "good grounds . . . according to the impartial judgements of the civilized part of the human race for waging perpetual war against the citizens of the United States." 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 68, at 343-44.

constitutional failures that reach across constitutional provisions—treaty, recognition, and other foreign-affairs powers coupled with checks on the Executive and state governments. It also allows Congress to consider provisions that do not yet exist. The constitutional failures identified by Native advocates were not failures simply because they did not adhere to the structures of government and powers delineated in the Founding documents. Rather, they were failures because they violated the constitutional values and norms that those designs were put in place to guard against. The constitutional conversations fostered within Congress allowed the failures of structure and of values to be addressed simultaneously and without the need to identify particular rights claim to ground the value. There is, of course, no right in the U.S. Constitution to not be colonized by the government or to not be subjected to wholesale dispossession and mass slaughter.

Federal Indian law reminds us that the structural aspects of the Constitution were crafted to protect against more than violations of the rights provisions that followed—they were crafted instead to guide the construction of a government over time and toward particular democratic and constitutional values.[273] The case study of federal Indian law reveals Congress at the center of conversations about the Constitution in ways that guided its own policy through legislation and in the manner that it built out, managed, and restructured the United States government over the last two hundred years. If you couple this case study with Professor Currie's seminal work documenting the Constitution in Congress over the long nineteenth century, it shows how the constitutional culture that created modern frameworks of federal Indian law remains faithful to that practiced at the time of the Founding, rather than an invention of the twentieth century or a *sui generis* constitutional culture specific to a particular area of the law.[274]

Second, Congress engaged with the communities impacted by the constitutional failures directly and over time by including these groups within its investigations and its deliberations. Scholars have long lauded Congress for its facilities of deliberation and for fostering deliberation over constitutional issues within the public.[275] The history of federal Indian law illustrates not only that these scholars are more than justified in their celebration, but also that Congress provided for a unique means of deliberation that involved unenfranchised and disempowered communities within the investigation and lawmaking process

273. *See* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 777 (1994).

274. *Id.*

275. *See, e.g.*, J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004).

through the petition process, and that Congress made this unique means of public engagement available from even before the Founding.[276] The petition process allowed subordinated and marginalized communities to instigate the lawmaking process, to enforce treaties, and to begin deliberation and investigation into large-scale allegations of constitutional failure.[277]

Before the Founding, Native Nations were welcomed to send a deputy to Congress to call forth the "justice of the United States" in upholding treaty promises.[278] Following the Founding, Native Nations instigated the treaty process, brought attention to structural constitutional failings, and called forth the power of the United States against the encroachment of state governments.[279] This engagement was not always successful—as the story of removal and the constitutional failure of the detention camps of the so-called reservation era tells all too well.[280] But Native Nations saw some success, and those successes accelerated into the twentieth and twenty-first centuries as Congress restructured its processes of public engagement and deliberation to better engage with Native Nations enmeshed within United States territory after expansion.

The petition submitted by Zitkala-Ša on behalf of the national Council of American Indians[281] and the responses that followed are instructive. Following the submission of her petition on April 24th of 1926, the Senate initiated a process of deliberation over the issues raised in the petition—including holding a formal hearing on the petition and providing Zitkala-Ša the opportunity to testify to Congress.[282] It also began a process of further investigation into the issues

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276. McKinley, *supra* note 157, at 1547; *see also* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1144-45 (2016) (discussing pre-Founding petitioning practices as "the primary means of political engagement for the unenfranchised and for collective political activity, as petitioners formed associations and petitioned on behalf of the collectivity").

277. Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1874-75.

278. *See* Treaty with the Cherokees, Cherokee Nation-U.S., art. XII, Nov. 28, 1785, 7 Stat. 8; *see also, e.g.*, 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 68, at 454 (inviting leaders of Creek nation to a conference and informing them of Congress's "wish to hear and redress all their grievances" in a dispute between Creek nation and Georgia over the state's encroachment on Creek nation's treaty lands).

279. *See supra* Section I.A.

280. *See, e.g.*, Natsu Taylor Saito, *Interning the "Non-Alien" Other: The Illusory Protections of Citizenship*, 68 LAW & CONTEMP. PROBS. 173, 183-90 (2005) (describing the long history of internment of Native peoples).

281. *See* P. Jane Hafen, *"Help Indians Help Themselves": Gertrude Bonnin, the SAI, and the NCAI*, 37 AM. INDIAN Q. 199, 208 (2013) ("[T]his document outlines the history of injustice and current social and economic problems.").

282. 67 CONG. REC. 8152-58 (1926) (petition of Gertrude Bonnin); *Hearing Before a Subcomm. of the Comm. on Indian Affs. Pursuant to S. Res. 341: A Resolution Providing for a General Survey of the Condition of the Indians in the United States, and for Other Purposes*, 69th Cong. 85-91 (1927) (statement of Gertrude Bonnin, President, National Council of American Indians).

raised in the petition: Congress appointed Zitkala-Ša's husband as a field investigator and Senate liaison and sent them both into Indian Country with a salary.[283] This process also spurred the Executive a few weeks later to initiate the independent investigation—sponsored and overseen by the administrative branch—that resulted in the seminal report, *The Problem of Indian Administration*, commonly known as the Meriam Report.[284] Many credit the Meriam Report with the sweeping wave of legislation passed during the Indian New Deal, including the Indian Reorganization Act of 1934, a "super-statute" that translated the treaty and recognition powers into Congress for safekeeping.[285]

Lastly, legislators in Congress have approached their constitutional role to mitigate American colonialism as not simply a limit on government action, as in negative-rights claims. Nor do the complex and multivalent actions of Congress, seen in acts of engagement, participation, deliberation, and investigation fit neatly into even the most capacious theorization of positive rights. Instead, legislators in Congress approach their role with respect to the Constitution as one that they have now incorporated into every action they take formally and informally with respect to Native people.

Understanding Congress's role with respect to the mitigation of American colonialism as one of constitutional magnitude is also helpful in better understanding why Congress has taken the lead in building and preserving the government-to-government relationship between the United States and Native Nations[286]—a relationship that serves as the sole bulwark against furtherance of the American colonial project. It has taken the lead because of its commitment to the Petition Clause of the Constitution, its accessibility to the public, and its status as the branch most able to design and enforce structural solutions to large-scale problems.[287] It was the primary constitutional interpreter and lawmaker for the first decades of the Republic.[288] But it is also presumed to be a predominantly majoritarian institution responsive to electoral and political pressures through

283. Dominguez, *supra* note 149.

284. MERIAM, *supra* note 134; *see also* Donald T. Critchlow, *Lewis Meriam, Expertise, and Indian Reform*, 43 HISTORIAN 325, 325 (1981) (describing the genesis of the Meriam Report).

285. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

286. *See supra* note 150 and accompanying text.

287. *See* McKinley, *supra* note 157.

288. *See, e.g.*, Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 624 (1999) ("[A]t least [James] Madison, and likely most of his contemporaries, understood the right to petition as part of the system by which the First Amendment would guard the people's right to 'communicate their will' to their government.").

votes and parties—and not an institution that mulls over constitutional meaning.[289] So why have legislators in Congress been more faithful arbiters and protectors of constitutional values with respect to one of the most disempowered and subordinated minorities in the United States? Why have legislators strengthened Congress's ability to represent Native people as disempowered minorities, rather than forcing them to participate in the vote and fight for majority power?

The answer can be found, in part, in Congress's own reasoning and the distinctions it describes from its approach to quotidian lawmaking in other contexts. The most paradigmatic example is the development and invocation of the so-called "trust doctrine"—a quasi-constitutional doctrine to which Congress points as creating a "duty" or "responsibility" to act in ways that benefit Native people as Native people.[290] At times, it is also a source of constitutional power to act in these beneficial ways.[291] In legislative histories and the text of its Indian law bills, Congress often points explicitly to its "trust responsibility" to recognize Native Nations and foster their self-determination.[292] Scholars have parted ways on the source and substance of the trust responsibility.[293] But the national government has described the trust responsibility in essentially constitutional terms: "The Government, following 'a humane and self-imposed policy . . . , has

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289. *See, e.g.*, Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2153 (1998) (describing "our contemporary fixation on voting as the measure of political participation" as obscuring the important role of the Petition Clause).

290. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1472 ("Throughout the tumultuous 200-year history of federal-Indian affairs, the Indian trust doctrine has largely framed the legal relationship between the federal government and Indian nations. That doctrine imposes a fiduciary obligation on the federal government in its dealings with Indian tribes . . . ."). For the early development of the trust doctrine, see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

291. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 5.04[3].

292. *See, e.g.*, *Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 1 (2012) (statement of Sen. Daniel Akaka, Chairman, S. Comm. on Indian Affs.) ("All branches of the Government, the Congress, Administration and the courts acknowledge the uniqueness of the Federal trust relationship . . . . When the trust responsibility is acknowledged and upheld by the Federal Government, a true government-to-government relationship can exist and thrive.").

293. Davis, *supra* note 167, at 1776-78 (locating the origins of the modern Indian trust doctrine in the Marshall trilogy); Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 306-07 (2009) (same); Mary Christina Wood, *EPA's Protection of Tribal Harvests: Braiding the Agency's Mission*, 34 ECOLOGY L.Q. 175, 178-79 (2007) (locating the origins of the modern Indian trust doctrine in land cessions through treaty and otherwise).

charged itself with moral obligations of the highest responsibility and trust,' obligations 'to the fulfillment of which the national honor has been committed.'"[294] For a variety of reasons, most notably to avoid the encroachment of juricentric constitutionalism and to preserve Congress's role, the trust responsibility is rarely addressed in an explicit constitutional register. It is difficult, if not incorrect, to identify a single cause of the continued centrality of Congress in determining the constitutional issues at stake in the context of American colonialism. But Congress continues to affirmatively point to the trust responsibility and deliberate over the trust doctrine in quasi-constitutional terms in explaining its motivation for legislative action on behalf of Native people.[295]

B. Structural Constitutional Reforms

One of the most, if not *the* most, distinctive aspects of Congress's role with respect to the Constitution is its ability to invoke its role as builder, overseer, and reformer of the structure of the U.S. government. Congress not only fosters constitutional conversations that transcend the limits of the traditional constitutional discourse in the courts—that is, claims of violated rights and pleas for remedies. It manifests these transcendental conversations into the reforms it crafts in response. Native advocates, for example, were able to raise broad concerns of constitutional failure of American colonialism as in tension with the values and norms of the little "c" constitution, while also pointing to failures within the big "C" structural aspects of the Constitution—like the treaty and recognition power.[296] These conversations were not limited to particular constitutional provisions, nor were they framed either in terms of individual or class harms caused by a rights or structural constitutional violation.[297] Their arguments were not that the powers of the national government were exceeded or that they exceeded the promise or limits of recognized rights—rather, Native advocates ar-

294. United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) (citation omitted) (first quoting Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); and then quoting Heckman v. United States, 224 U.S. 413, 437 (1912)).

295. *See supra* note 289 and accompanying text. Rather than being *sui generis* within Congress, the trust doctrine resembles a range of common-law doctrines developed and adhered to by Congress over time—importantly also in the context of representation. *See* Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946 (2020); Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765 (2021).

296. *See, e.g.*, WILKINSON, *supra* note 16, at 82-83; *see also supra* Section I.C (describing the renaissance of Native activism after 1934).

297. *See, e.g.*, HOXIE, *supra* note 138, at 399 (describing these conversations as seeking "legal visibility and human recognition," with the understanding that such recognition would lay the groundwork for "negotiation and a common adherence to the rule of law" in the future).

gued that the powers of the national government were being exercised in violation of or without adherence to constitutional values like rule-of-law principles or consent of the governed.[298] In essence, Native advocates were arguing within a vision of constitutional law where Congress was an active participant tasked with ensuring that the day-to-day processes and structures of government comported with the Constitution.[299] Native advocates presumed a constitutionalism that required Congress to interpret the structural provisions of the Constitution, including the distribution and scope of the powers of the national government, against a backdrop of constitutional values, norms, and common law.

As Professor Currie's monumental four-volume history of Congress's interpretation, implementation, and enforcement of the Constitution in its first ninety or so years reminds us, Congress's approach to the Constitution in the context of federal Indian law was not unique: Congress approached the Constitution across all domains as "great outlines" of a government structure that it was tasked with building, overseeing, and reforming.[300] The Constitution both constituted Congress and charged it explicitly and implicitly with the construction of the U.S. government writ large.[301] As lawmakers in Congress built out the infrastructure of the U.S. government and delineated the contours of the national government's relationship with others, they had to interpret the Constitution directly and repeatedly in exercising its powers to construct a government from that constitutional blueprint.[302]

The First Congress, populated with many of the men present at the Convention, established its own lawmaking process, created the executive departments, and established the federal judiciary by statute.[303] Their interpretation of a sparse constitutional document was necessarily informed by broader guiding principles, rather than motivated by simple majoritarian, electoral, or partisan

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298. *See supra* Section I.C.

299. *See, e.g.*, WILKINSON, *supra* note 16, at 83 ("[T]ribal representatives have made repeated use of the rational basis test in advocating against bills deemed to be detrimental to Indian interests. The new cases have been argued in the legislative forum with particular vigor in defining Congress's trust duties in regard to confiscatory proposals concerning water, fishing rights, and land—none of which has been enacted."); *see also id.* at 10-11 (describing three levels of Congressional action in the field of Indian law, from broad treaties and statutes affecting the recognition of individual tribes to broad statutes on policy matters later implemented by further legislation or administrative action to highly specific, self-implementing legislation).

300. *See* CURRIE, THE FEDERALIST PERIOD, *supra* note 270, at 3 ("For the Constitution, as Chief Justice Marshall would later remind us, laid down only the 'great outlines' of governmental structure; translating the generalities of this noble instrument into concrete and functioning institutions was deliberately left to Congress." (citation omitted)).

301. *See* CURRIE, THE FEDERALIST PERIOD, *supra* note 270, at 3.

302. *Id.* at 3-5.

303. *Id.* at 4.

pressure.[304] Lawmakers were aware of the precedent likely set by these early constitutional interpretations—in his First Inaugural Address to Congress, for example, President Washington argued explicitly against congressional interpretations of the Constitution inflected by "local prejudices," "separate views," and "party animosities."[305] Instead, lawmakers in Congress were to look toward values, not party or electoral pressures in building a republican democratic government.[306] Although most visible within the early years of the Republic when Congress laid the rudimentary foundations of the United States, Congress remains today the primary builder, overseer, and reformer of the institutional structure of the national government and of many of the structural aspects of the Constitution.

Not only does Congress's distinctive role with respect to the Constitution foster more deliberative and discursive constitutional conversations; it also means that Congress offers distinctive remedies. Rather than respond to a constitutional violation or failure like a court—that is, with monetary damages or with a narrow command to halt or resume government conduct of a particular kind—Congress could restructure the government, the federalist framework, the constitutional order, and the processes of constitutional deliberation.[307] For example, at the Founding, Native people had advocated for and succeeded in obtaining codification of structural provisions of the Constitution that would provide for American colonialism through purchase and diplomacy, rather than conquest.[308] Native advocates raised these concerns in the register of structure—the problem was not failing to honor a single treaty, failing to negotiate in good

304. *Id.*

305. George Washington, First Inaugural Address in the City of New York (April 30, 1789), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES: FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989, at 1, 3 (Washington, D.C.: U.S. Gov't Printing Off. 1989).

306. CURRIE, THE FEDERALIST PERIOD, *supra* note 270, at 296.

307. Scholars have attempted to address some of the shortcomings of negative-rights remedies, arguing also for positive-rights remedies like the idea that lawbreaking by the government must also be met with measures to keep the government from engaging in unlawful conduct in the future. *See, e.g.*, Lisa Hajjar, *Universal Jurisdiction as Praxis: An Option to Pursue Legal Accountability for Superpower Torturers*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 87, 109-110 (Austin Sarat & Nasser Hussain eds., 2010) (arguing that consequences for government lawbreaking have a deterrent effect against future actions).

308. Imbuing the structural aspects of the Constitution with value was not a foreign concept and was invoked repeatedly in Founding-era debates, like in the Federalist Papers and by James Madison. *See, e.g.*, THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961) (describing the merits of a republican form of government and concluding that "[t]he federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures").

faith with one Native Nation, or refusing recognition of a particular Native polity. Instead, Native advocates argued that the exercise of national power by the United States failed to adhere to rule-of-law principles and constitutional values across a range of areas—collectively resulting in the constitutional failure of American colonialism.[309] Mass slaughter, subordination, dispossession, and what some call genocide do not fit neatly into the traditional rights-violation-remedy framework. Nor do they resolve with simple solutions.

Congress had often approached regulation of Indian affairs piecemeal in the postbellum era.[310] But advocates convinced Congress in the early twentieth century to begin wholesale structural reforms to mitigate the impacts of American colonialism—and to, hopefully, change the course of American colonialism with respect to Native peoples in the future.[311] Of course, these reforms should not be taken as exhaustive. Instead, they should serve as an illustration of the capacity of Congress to interpret and construct constitutional law, and of its concrete efforts to address some of the thorniest constitutional issues across the twentieth and twenty-first centuries. As Part I described, Congress focused its reforms within four primary areas. First, it aimed to mitigate the constitutional failure of American colonialism by ensuring that the affected community would have the powers and resources needed to self-govern even within the dramatically changed constitutional context of the twentieth century—that is, by ensuring that the United States recognized tribal sovereignty and by providing for forms of collaborative lawmaking akin to the treaty process. Second, Congress redesigned the national government to better provide checks and balances to executive power. Third, it created out of whole cloth a distinctive form of representation for colonized peoples that would allow them to be part of the polity, but not through the process of colonization. It also restructured the processes of constitutional lawmaking to better involve colonized people within the processes of constitutional deliberation and conversation. Lastly, Congress restructured the federalist framework to further safeguard Native peoples from possible future colonization of their governments, lands, cultures, and families by neighboring U.S. governments.

The case study of federal Indian law offers the tantalizing possibility that a constitutional culture that centers Congress offers far more sweeping forms of constitutional reform than one that centers the courts. Although courts have attempted to create analogs to these structural reforms, most often through exercise of equitable powers and structural injunctions, these analogs have been far

309. *See supra* Section I.A.

310. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 1.04.

311. *See supra* text accompanying notes 280-284.

less enduring and successful, and far more controversial, than their congressional counterparts.[312] Theorists have identified certain strains of court doctrine as operating within a vision of "positive rights" rather than negative rights.[313] But these doctrines have again been controversial and, perhaps because of the controversy, more unstable and short-lived.

Within the field of federal Indian law, Congress has created one of the most robust frameworks for the mitigation of colonialism in the world. It translated constitutional powers and reshaped constitutional structures to better adhere to constitutional values than they had in the past; to shore up shortcomings in government structure in order to avoid past constitutional failures and ensure ongoing adherence to constitutional law in the future; and to recognize the dramatically changed contexts within which the Constitution operated in the twentieth century. To guide these efforts, Congress read the Constitution, including its structural provisions, against the background little "c" constitutional values of democratic governance, consent of the governed, controlled state violence, and adherence to the rule of law.[314] In contrast to the simple model of judicial constitutionalism—right-violation-remedy—Congress could guide its own exercise of constitutional powers, as well as the distribution and exercise of the powers of other branches, to better aim for the constitutional values for which the Constitution stands.

A constitutional culture with Congress at the center could support, and perhaps reveal, a vision of the Constitution that is more robust than the libertarian document offered by some. Importantly, it offers a world where the *exercise* of government power is informed and guided by the Constitution—not merely guided by electoral impulse and then limited by rights or other checks and balances. The failures of American colonialism reveal the limits of the latter form of constitutionalism. When the machinery of government can be captured by the electorate to enact atrocities on those outside the polity, a Constitution that leans heavily on "rights" as limits and on courts to enforce those rights is essentially a Constitution without any meaningful limit.

Communities on the margins of American empire are, by their very nature, less empowered to bring rights claims against a government not of their own making. Courts are less likely to allow them entry and could treat them unfairly in suits brought against government actors. In contrast, the political branches have historically excelled in processes of engagement with outsiders—through

312. *See* Russell L. Weaver, *The Rise and Decline of Structural Remedies*, 41 SAN DIEGO L. REV. 1617, 1617-19 (2004).

313. *See, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 882, 887 (1986) ("[S]ome clauses are more likely to be interpreted to have 'positive' components than others.").

314. *See supra* Section I.C.

diplomacy, treaty-making, and the like.[315] Furthermore, the extreme case of American colonialism as a constitutional failure should allow us some space to question whether "rights" as limits are mere paper barriers to mass atrocities like genocide, group slaughter, family separation, and violent deportation, detention, and dispossession. Preventing further atrocities of colonialism in the United States has required a constitutionalism that is engaged, vigorous, discursive, and, most vitally, prospective — a way of constitutional thinking that guides government action rather than simply limiting it. This constitutional culture tasks *Congress* with exercising its powers in comportment with its own interpretation of the Constitution, closer to the vision of constitutionalism expressed by Chief Justice Marshall in his confrontation with President Jackson over *Worcester v. Georgia* and further from the vision of populist constitutionalism and unbridled executive power offered by President Jackson.

Finally, the case study of federal Indian law reveals a constitutional culture that not only guides the exercise of government power but also guides that power to build government institutions and structure processes of constitutional lawmaking to better deliberate over and adhere to constitutional values. The framework of federal Indian law draws this dynamic into sharp relief. Not only did Congress create policy that ensured ongoing recognition of tribal governments and better structured their government-to-government relationships, but it redrew the borders of the United States, redistributed the horizontal separation of power, provided additional checks on the exercise of national power, rebuilt the American state, placed Native people in positions of power within that government, crafted innovative forms of collaborative lawmaking, and reformed its own constitutional lawmaking process to better accommodate and mitigate the reality of its status as empire.[316] Crafting structural reforms ensured that processes of constitutional deliberation would not only include Native people and their perspectives but also would be discursive and iterative over time.

Constitutional time within Congress is unlike that of constitutional time within a court. New institutions and deliberative processes mean that Native people remain central to the investigation, review, interpretation, and implementation of the constitutional reforms they secure. By creating forums for advocates to affect constitutional reforms over time, Congress can remain connected to the social context of its constitutional values and the perspectives that informed its reforms in the first instance. Furthermore, it can better manifest those values and perspectives, and as lessons are learned and circumstances

315. *See generally* Spirling, *supra* note 212 (discussing the almost 600 treaties signed between the Revolutionary War and the beginning of twentieth century as well as how the treaty-making power moved from the President to Congress).

316. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

change, Congress can modify the implementation process and suggest further reform. By reforming processes of deliberation, Congress also can increase the quantity and location of deliberation in addition to changing its quality by including different voices. Allowing Native people and nations direct access to Congress, direct participation in the interpretation and implementation of law in the administrative state, as well as supporting their own constitutional lawmaking process increased constitutional deliberation over American colonialism by an order of magnitude—and gave it a home within the political branches.

III. IMPLICATIONS: THE ROLE OF THE COURTS IN LEGISLATIVE CONSTITUTIONALISM

Centering Congress within the constitutional lawmaking process does not mean that there would be no role left for courts with respect to the Constitution. As Robert Post and Reva Siegel persuasively describe, "The plain historical fact is that judicial and nonjudicial interpretations of the Constitution frequently coexist and contend for the allegiance of the country."[317] This policentric constitutionalism recognizes that the work of constitutional interpretation is distributed across branches often in ways that overlap. The Supreme Court's current project of asserting itself as an exclusive constitutional arbiter has further occluded the longstanding, overlapping, and dynamic relationship between the branches in constitutional lawmaking—a relationship that likely varies widely across substantive areas.

Within federal Indian law, the relationship between Congress and the courts has long taken a distinctive policentric form. In contrast to areas of constitutional law developed around rights claims, the Supreme Court has not definitely asserted its exclusivity, nor has it entirely eschewed judicial review, as it has in areas of constitutional law that relate to the internal workings of the political branches or other "political questions."[318] Instead, the Court has largely continued to review federal Indian law questions, but it frames its role as secondary to that of Congress.[319] The Supreme Court seems sincere in its deference and has asserted repeatedly that Congress may override judicial decisions through legislative

317. Post & Siegel, *supra* note 33, at 2029; *see also* Fallon, *supra* note 35, at 491 ("Our system is not, never has been, and probably never could be one of pure judicial supremacy.").

318. These areas include, for example, interpretation of the Journal, Rules, and Origination Clauses of the U.S. Constitution. U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings."); *id.* art. I, § 5, cl. 2 (authorizing each house of Congress to "determine the Rules of its Proceedings"); *id.* art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

319. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 383-84 (1886).

acts.[320] It has also developed doctrines that allow for engaged but deferential judicial review—like clear-statement rules, subject-specific interpretative canons, and distinctive forms of rational-basis review.

Given their deep roots in the long nineteenth century, it should come as no surprise that these doctrines are classically Thayerian in their form.[321] Writing in the late nineteenth century and in response to the Supreme Court's invalidation of the Civil Rights Act of 1875, James B. Thayer argued that the ideal constitutional culture is one where the task of interpreting the Constitution rests in the legislature and where judicial review is limited to the most egregious abuses of this interpretive power.[322] It also embraces a constitutional vision that is open to a range of rational interpretations—interpretations that may change with the lessons of governance, wisdom, and time. The judicial function in this context is "merely that of fixing the outside border of reasonable legislative action" through a review that strikes down only those acts that step definitively outside the range of the rational.[323] In addition to inspiring innovative legal frameworks to mitigate American colonialism, this relationship has also, seemingly, prevented "[t]he checking and cutting down of legislative power . . . making the government petty and incompetent."[324] Legislators have created doctrines out of whole cloth, like the "trust doctrine," to give shape to their deliberations and drafting,

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320. *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 195 (1984) ("Judicial deference to federal legislation affecting Indians is a theme that has persisted throughout the two-hundred-year history of American Indian law.").

321. The resemblance between the doctrines and dynamics of federal Indian law and Thayerian judicial philosophy are likely even more deeply interrelated. Although the connections have yet to be explored, over the same period that Thayer crafted his writings on the court and constitutionalism, he also served as one of the lead members of the controversial Friends of the Indian advocacy organization and was a passionate advocate for Indian law reform. *See* Valerie Sherer Mathes, *James Bradley Thayer in Defense of Indian Legal Rights*, 21 MASS. HIST. REV. 41 (2020); FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900 at 335-41 (1976); Richard B. Collins & Karla D. Miller, *A People Without Law*, 5 INDIGENOUS L.J. 83, 97-100 (2006). Thayer crafted op-eds and spoke widely on the need for legislative reform in Indian law and even drafted legislation, known as the "Thayer bill," that Senator Dawes introduced to the Senate on March 29, 1888. *See* Mathes, *supra*, at 41; James B. Thayer, *The Dawes Plan and the Indians*, ATLANTIC, Mar. 1888; James B. Thayer, *A People Without Law*, ATLANTIC, Oct.-Nov. 1891. Thayer was aware of the "plenary" power of Congress to mitigate the American colonial project through legislation—although he identified the constitutional failure not in failing to recognize and support tribal governance, but in allowing the Executive to govern Indian Country without the constitutional protections offered by the Congress and the courts. *See* AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE "FRIENDS OF THE INDIAN," 1880-1900, at 172-74 (Francis Paul Prucha ed., 1973).

322. Thayer, *supra* note 7, at 148-49.

323. *Id.* at 148.

324. *Id.* at 156.

and they have empowered marginalized communities to shape and participate in the making of their own constitutional law for the United States. These doctrines offer the possibility that "might" is not always synonymous with "right" and that lawmaking within the Congress may have a greater character than populist passion and be inflected with deeper values than blunt majority will.

Despite these deep historical and theoretical roots, the contemporary Supreme Court approaches many of these doctrines as if they rest on shaky analytical ground. The Justices have regularly struggled with the reasoning and foundations of these doctrines. The doctrines have also begun to collide ever more frequently with the Supreme Court's effort to usurp power for itself with respect to the Constitution. The following Sections describe the development of these doctrines, before turning to the ways that the Supreme Court's juricentric constitutional project is threatening its deferential relationship with Congress in the context of federal Indian law—most recently and most notably in *Oklahoma v. Castro-Huerta*,[325] decided just this last Term. Finally, the last Section closes with some suggestions as to how a deeper understanding of legislative constitutionalism and the longstanding, dynamic relationship between Congress and the courts with respect to the Constitution could bring much-needed stability to these doctrines.

A. Congressional Supremacy in Federal Indian Law

Like the thought experiment that began our case study, the doctrine of federal Indian law has long rested on the fundamental principle of congressional supremacy—meaning, in practical terms, that Congress can and has overridden the Supreme Court by statute.[326] A paradigmatic example is that of the so-called "*Duro* fix"[327]—a statute passed by Congress in 1990 to override the Supreme Court's opinion in *Duro v. Reina*[328] issued six months earlier. The fix provided congressional recognition of the inherent jurisdiction of Native Nations for crimes committed by nonmember Indians within Indian Country after *Duro v. Reina* had, by judicial fiat, taken that recognition away.[329] The Supreme Court had long asserted explicitly that Congress held plenary power within the realm of Indian affairs. Beginning in modern doctrines with the Court's decision in

325. 142 S. Ct. 2486 (2022).

326. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799 (2014) ("Congress exercises primary authority in this area [of tribal immunity] and 'remains free to alter what we have done' . . . ." (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989))).

327. 25 U.S.C. § 1301(2) (2018).

328. 495 U.S. 676, 685 (1990).

329. 25 U.S.C. § 1301(2) (2018).

Oliphant v. Suquamish Indian Tribe[330]—the infamous case where the Supreme Court held that Native Nations had no criminal jurisdiction over crimes committed by non-Indians within Indian Country—it also began closing its more aggressive Indian-law opinions with the reassertion that Congress could override the Court should it so choose.[331]

In 2004, in a surprisingly fractured opinion, given the Supreme Court's repeated assertions that congressional override power was clear, the Court held that Congress had the power to override the Court with the *Duro* fix.[332] Since *United States v. Lara*, Congress has taken steps to "fix" Supreme Court decisions by statute several times—most notably and most recently in the two partial *Oliphant* fixes passed in the reauthorizations of the Violence Against Women Acts of 2013 and 2022.[333] In both fixes, Congress recognized the power of Native Nations to exercise criminal jurisdiction over a narrow subset of non-Indian defendants charged with crimes committed within Indian Country. The 2012 *Oliphant* fix included an opt-in provision and pilot-implementation program.[334] After the success of the earlier program, the 2022 fix further expanded recognition of tribal-criminal jurisdiction over non-Indian defendants.[335] Congress is also in the process of considering fixes to other recent Supreme Court decisions. It has regularly deliberated over a fix to the Supreme Court's 2009 decision in *Carcieri v. Salazar*.[336] Congress is also now considering a fix to the Supreme Court's recent activist decision in *Oklahoma v. Castro-Huerta*.[337]

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330. 435 U.S. 191 (1978).

331. *Id.* at 212 (acknowledging that the ultimate decision of whether to authorize tribal courts to exercise jurisdiction over non-Indians rests with Congress).

332. United States v. Lara, 541 U.S. 193, 206-07 (2004).

333. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, tit. VIII, 136 Stat. 49, 895.

334. Pub. L. No. 113-4, § 904, 127 Stat. at 120.

335. Pub. L. No. 117-103, § 804, 136 Stat. at 899.

336. 555 U.S. 379, 397-98 (2009) (Breyer, J., concurring); *see, e.g.*, H.R. 4352, 117th Cong. (2021) ("[A]mend[ing] the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes."). It bears mention also that deliberations over a congressional *Carcieri* fix have stalled through certain presidential administrations because the implications of the decisions have been "fixed" by regulations promulgated by the Executive.

337. *See, e.g.*, Allison Herrera, *In Wake of Castro-Huerta Ruling, Tribes Propose Varied Paths Forward for Criminal Justice System*, PUB. RADIO TULSA (Oct. 11, 2022, 7:39 AM CDT), https://www.publicradiotulsa.org/local-regional/2022-10-11/in-wake-of-castro-huerta-ruling-tribes-propose-varied-paths-forward-for-criminal-justice-system [https://perma.cc/9YUY-WATN]; Jacob Fischler, *Tribal Law Enforcement Boosted Under Bill Proposed by Members of Congress from the West*, NEV. CURRENT (Sept. 22, 2022, 2:50 PM), https://www.nevadacurrent.com/2022/09/22/tribal-law-enforcement-boosted-under-bill-proposed-by-members-of-congress-from-the-west [https://perma.cc/M5RC-Y8TN].

Even beyond the possibility and potential of override, congressional supremacy has shaped all aspects of the Supreme Court's relationship with the doctrine. Again, this does not mean that the Court has abnegated its role entirely—this is not a doctrine to which the Court has applied the political-question doctrine or other jurisdictional barriers like standing. Rather, when approaching federal Indian law questions, the Supreme Court looks to what Congress has done in the past and the particular values espoused behind federal Indian law policies to determine the content of the law—rather than its own interpretation.[338] It has even strengthened its deference to Congress when it comes to federal Indian law by implementing clear-statement rules that limit the power of the Court to infer its own policy preferences from unclear legislative histories. Instead, the Court requires a "clear statement" by Congress when the legislature intends to change the law or deviate from its stated policy and value preferences.[339]

In many of its recent cases resolving competing treaty interpretations, the Court has reaffirmed its deference to congressional power over Indian affairs by applying and strengthening these clear-statement rules. For example, the Supreme Court has long held that Congress may unilaterally override treaty provisions through statute—including extinguishing treaty provisions and diminishing reservation borders.[340] Whether Congress ought to have the remarkable power to unilaterally abrogate a treaty—the so-called "last-in-time" treaty rule[341]—is a valid question, but in the context of Indian affairs, this power has been tempered by Congress's trust responsibility and by the checks and balances

338. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2460-68 (2020) (examining extensive treaty and statutory history to determine that the Muscogee Creek Nation has a reservation which Congress has not diminished); Morton v. Mancari, 417 U.S. 535, 552-53 (1974) (upholding BIA hiring preferences in part because Congress's legislation reflects its determination "that proper fulfillment of its trust require[s] turning over to the Indians a greater control of their own destinies").

339. These clear-statement rules are notably distinct from those identified by scholars like Dean John F. Manning in that the constitutional value to which Congress is held is identified not by the courts, but by Congress. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404-05 (2010). Despite this distinction, Dean Manning might disagree that values enforced by clear-statement rules can be constitutional values, even if identified by Congress, because the Constitution is a text born of a compromise between a range of plural values. The question remains whether, even taking as true the vision of Constitution as compromise, there are values beyond those plural reasonable values that the Constitution might have ultimately codified. These values might be easiest to identify in the extreme—most notably, that democratic governments ought not engage in genocide or mass slaughter of innocents in order to dispossess and colonize those innocents.

340. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 468 (1984) (discussing the allotment era and the ability of some surplus-land Acts to have diminished reservation borders).

341. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . [I]f the two are inconsistent, the one last in date will control the other . . . .").

of judicial review. Clear-statement rules in this context, rather than disciplining Congress, ensure that the decision to abrogate a treaty is made by Congress and not by a court interpreting ambiguous legislative evidence to support its own policy preferences—preferences not shaped by the trust doctrine as they are in Congress. A recent high-profile case underscored this dynamic.

Issued in 2020, Justice Gorsuch crafted the majority opinion in *McGirt v. Oklahoma*,[342] which further strengthened an already very strong clear-statement requirement that Congress speak very clearly when diminishing reservation borders. Although the *McGirt* decision surprised many by holding that Congress had not diminished the Muscogee Creek Nation reservation, resulting in the recognition that one-half to two-thirds of Oklahoma existed within an Indian reservation, the actual rule applied by the Court was settled doctrine. The Supreme Court's *Solem* line of cases had long held that, to find diminishment of reservation borders set by treaty, courts must identify a clear statement by Congress diminishing those borders.[343] Settlement of the lands by non-Natives or the belief of state and local governments that the reservation was diminished was not enough. The Supreme Court had reaffirmed and even strengthened the *Solem* rule unanimously in 2016, in an opinion written by Justice Thomas: *Nebraska v. Parker*.[344] In *Parker*, the Court explicitly stated that it would only hold reservation borders diminished when Congress had issued text that stated its intent clearly to diminish those borders—indirect forms of undermining tribal jurisdiction, through allotment statutes or otherwise, were insufficient.[345] The Court also held explicitly in *Parker* that the modern-day consequences of finding a predominantly non-Native city within the borders of a reservation were not dispositive to its consideration.[346] It was not for the Court to decide best policy in the context of Indian affairs.[347] These were questions for Congress—questions that Congress must answer clearly.[348] The Court's opinion in *McGirt* hewed closely

342. 140 S. Ct. 2452 (2020).

343. *Solem*, 465 U.S. at 470 ("Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found." (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977))).

344. 136 S. Ct. 1072, 1078, 1082 (2016).

345. *Id.* at 1078-79.

346. *Id*. at 1079-80.

347. *Id.* at 1081-82.

348. *Id.* at 1082 ("Petitioners' concerns about upsetting the 'justifiable expectations' of the almost exclusively non-Indian settlers who live on the land are compelling, but these expectations alone, resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation. And though petitioners wish that Congress would have 'spoken differently' in 1882, 'we cannot remake history.'" (citations omitted)).

to *Parker* and *Solem*.[349] In a decision that surprised many, the Supreme Court held firm to its deference to the authority of Congress, even when the result was the recognition that large swaths of Oklahoma, including portions of the city of Tulsa, rested within reservation borders.[350] Eighteen months later, Congress has yet to act to diminish any reservation borders within Oklahoma — essentially ratifying *McGirt*'s interpretation of congressional history and intent.

The Supreme Court has taken a similar approach in its doctrine on treaty-provision abrogation more generally: it has recently reaffirmed the rule that courts require evidence of a clear statement by Congress to hold a treaty provision abrogated. For example, in the 2019 case of *Herrera v. Wyoming*,[351] Justice Sotomayor authored an opinion making clear that *Minnesota v. Mille Lacs Band of Chippewa Indians*[352] was the applicable precedent,[353] that the case required a clear statement from Congress to extinguish treaty provisions,[354] and that *Mille Lacs* had overruled *Ward v. Race Horse*[355] — a nineteenth-century outlier opinion that did not require a clear statement from Congress.[356] The Court held that, contrary to the holding of *Race Horse*, an enabling act admitting a state to the union that included language admitting the state on "equal footing" to others was not sufficient to abrogate a treaty.[357] Ultimately, applying the clear-statement rule required by *Mille Lacs*, the Supreme Court held in *Herrera* that Congress had not made a clear statement to extinguish treaty rights.[358]

The Court has also inflected the values and preferences of Congress in the canons of interpretation that it applies to acts of Congress and the Executive and the treaties that preceded these acts. Although the courts have often blurred the canons of interpretation applied to treaties, treaty substitutes, legislation, and executive orders, there seem to be two distinctive interpretive canons in the context of federal Indian law, each resolving distinctive constitutional concerns. The first requires that the courts interpret treaties and treaty substitutes as the Native signatories would have understood them, resolving ambiguities in favor of the Native Nation. From its inception, courts have described the treaty canon in Indian law as rooted in Congress's recognition of Native Nations, its identification

349. *See id.* at 1078, 1082; Solem v. Bartlett, 465 U.S. 463 (1984).

350. McGirt v. Oklahoma, 140 S. Ct. 2452, 2479, 2482 (2020).

351. 139 S. Ct. 1686 (2019).

352. 526 U.S. 172 (1999).

353. *Herrera*, 139 S. Ct. at 1694.

354. *Id.* at 1696.

355. 163 U.S. 504 (1896).

356. *See Herrera*, 139 S. Ct. at 1694-95.

357. *Id.* at 1695.

358. *See id.* at 1700.

of the constitutional value of self-determination for Native people, and the trust responsibility born of these concerns.[359] The Supreme Court has also rooted the treaty-interpretation canon in the same source as it has the trust responsibility and the quasi-constitutional doctrine: the longstanding promise of the United States and especially Congress to provide a "general pledge of protection" to Native people[360]—the same source later identified as the origins of the trust doctrine.[361] The second interpretive canon requires courts to read statutory ambiguities in favor of Native Nations and Native people—especially when those ambiguities undermine tribal sovereignty and self-determination. The Supreme Court has generally rooted the origins of this canon in longstanding acts of Congress that demonstrate a firm federal policy of "encouraging tribal independence" and in "traditional notions of sovereignty"—sovereignty recognized and supported by congressional enactment.[362]

Even when the Court does review the substance of a particular congressional act, it is deferential to Congress's own determination of its powers and their purposes. The Court has developed a unique and distinctively Thayerian form of rational-basis review, where congressional acts withstand judicial review when the Court can tie those acts "rationally to the fulfillment of Congress' unique obligation toward the Indians."[363] In *Morton v. Mancari*, the Court established clearly the rational-relationship rule for review of Congress's exercise of the plenary-power doctrine in the context of Indian affairs. In that case, the Court again turned to Congress's own stated policy in determining the content of what the "unique obligation" required—holding that a hiring preference for Native people

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359. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 547-49, 551-56 (1832); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408-11 (1993); Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267, 268, 273-76 (2022) (naming the presumption evident in *Worcester* and described in Philip P. Frickey's article as the treaty interpretation canon and arguing that its basis lies in a theory of sovereignty).

360. *In re* Kan. Indians, 72 U.S. (5 Wall.) 737, 755 (1866).

361. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, § 5.04 (discussing the origins of the trust doctrine).

362. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980).

363. Morton v. Mancari, 417 U.S. 535, 555 (1974); *see also* United States v. Antelope, 430 U.S. 641, 646-47 (1977) ("[S]uch regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."); Fisher v. Dist. Ct., 424 U.S. 382, 390-91 (1976) ("[S]uch disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.").

into the Bureau of Indian Affairs did not violate due process because it was "rationally designed to further Indian self-government,"[364] a long-standing policy of Congress within Indian affairs. Similar to many other areas where the Court recognizes plenary power in Congress, the Court has never struck down an act of Congress under this deferential standard of review. However, it has held that certain exercises of the plenary-power doctrine have violated the Takings Clause and thus require just compensation.[365]

Furthermore, the Supreme Court recognized that the plenary power of Congress was limited by the doctrine of trust responsibility even when Congress exercised its plenary power to unilaterally abrogate treaty provisions — most notably in the context of land acquisition and disposal. In *Sioux Nation*, the Court clarified that it would construe the contours of the trust doctrine from Congress's own acts — in particular, the facts that the Sioux Nation had sought redress from Congress initially and that Congress had waived sovereign immunity and directed the claim to the courts.[366] The Court cited this latter fact explicitly in moving away from the wholly deferential standard of review established in *Kagama*[367] and in applying a "good faith" standard to review whether Congress had exercised its plenary power to abrogate a treaty.[368] It held there that Congress had not, and the Court affirmed the $17.5 million in compensation due to the Sioux Nation for the taking of the Black Hills — compensation the nation has long rejected.[369]

In all of these innovations, our current constitutional culture surrounding the regulation of Indian affairs and the mitigation of American colonialism reflects a distinctively Thayerian vision — Congress has taken the lead in identifying the constitutional failure of American colonialism and has crafted the structural solutions to mitigate that failure. Under the plenary-power doctrine as limited by the trust responsibility, courts defer to the reasonable interpretation of Congress through rational-basis review that invalidates acts of Congress only when they exceed the bounds of that reasonableness.[370]

In some ways, the current policentric interpretive distribution between Congress and the courts *exceeds* Thayer's vision. In addition to deferential review of challenges to congressional acts, the Supreme Court has also developed judicial

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364. *Mancari*, 417 U.S. at 555.

365. United States v. Sioux Nation of Indians, 448 U.S. 371, 421 (1980); Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937).

366. *Sioux Nation*, 448 U.S. at 414.

367. United States v. Kagama, 118 U.S. 375, 383-84 (1886).

368. *Sioux Nation*, 448 U.S. at 416-17.

369. *See id*. at 388, 424.

370. Morton v. Mancari, 417 U.S. 535, 555 (1974).

tools to further centralize the interpretation of Congress — including clear-statement rules and interpretive canons that rest on Congress's interpretation of constitutional values. The case study of federal Indian law provides us with additional ways to enact a Thayerian vision of policentric constitutionalism while shielding that distribution from monopolization by the courts. That said, some scholars have raised concerns that Thayer's vision still does not adequately restrain the courts, pointing to the malleability of rational-basis review and the ability of the court to manipulate even a reasonableness standard to usurp power from Congress.[371] As the next Section will show, the concern over court monopolization remains a reasonable one. But the mechanisms of that monopolization may be different than those identified previously.

B. Congressional Supremacy Amidst Juricentric Constitutionalism

Even though the Supreme Court has largely maintained consistency in affirming the ultimate authority over Indian affairs as located in the political branches — primarily Congress, but also the Executive — the last fifty years have seen a similar dynamic to that seen in other areas of constitutional law. Beginning in 1978, with *Oliphant v. Suquamish Indian Tribe*,[372] the Court has increasingly asserted its power to determine the content of federal Indian law and to police the metes and bounds of tribal sovereignty. These decisions have existed alongside and in tension with those doctrines where the Court applies its tools of congressional deference through rational review, clear-statement rules, and interpretive canons. In 2004, however, the Court began to increasingly challenge the foundations of that congressional supremacy on two grounds. First, the Court has struggled with the reasoning behind the ability of Congress to override the Supreme Court by statute, increasingly asserting a juricentric constitutionalism that envisions no other authoritative constitutional interpreter.[373] Second, certain justices, Justice Thomas most commonly, have begun to question the very foundations of congressional supremacy over Indian affairs — challenging the supremacy as inconsistent with our general principles of public law and locating the congressional plenary-power doctrine in the "Court's inadequate

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371. *Cf.* Matthew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393, 413-14 (2019) ("It is true that in recent decades . . . the 'rational basis' test has moved from being the test no government ever fails to being ever more rigorous.").

372. 435 U.S. 191 (1978).

373. *See, e.g.*, United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) ("It is a most troubling proposition to say that Congress can relax the restrictions on inherent tribal sovereignty . . . to enlarge the 'unique and limited character' of the inherent sovereignty that *Wheeler* recognized." (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

constitutional analysis."[374] Finally, this last Term, the Court took a similar approach as it has in other areas of constitutional law and more aggressively asserted itself into the metes and bounds of federal Indian law — disregarding decades of legislation and congressional interpretation.

1. *Congressional Override and Juricentric Constitutionalism*

Despite the Supreme Court's repeated assertions that Congress could override its decisions, the Court, when faced with a challenge to an override statute, approached its review with fracture and dissent. From 1978 until 2004, the Supreme Court seemed content to intervene in federal Indian law unilaterally through the intermittent exercise of the so-called dormant plenary-power doctrine — a form of judicial review that looks first to acts of Congress, finds the history inconclusive, and instead determines independently the content of federal Indian law based on its own determination of what is compatible with the inherent sovereignty of the United States.[375] But it was clear that its decisions in this area were subject to correction by Congress through statute. In 1990, the Supreme Court again exercised the dormant plenary-power doctrine to hold that the United States did not recognize tribal criminal jurisdiction over crimes committed by nonmember Indians within Indian Country.[376] The Court's decision in *Duro* did not even attempt to apply the forms of judicial review that focused on Congress.[377] Instead, the Court reasoned that tribal criminal jurisdiction over nonmember Indians was incompatible with the territorial jurisdiction of the United States.[378] The Court recognized that it had left a jurisdictional hole around those crimes — under the current congressional scheme, it was unclear if *any* government held jurisdiction.[379] But the Court remained adamant that its decision, however muddled, was still subject to the same separation-of-powers limitations as the plenary-power doctrine.[380]

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374. *Id.* at 215 (Thomas, J., concurring).

375. *See* Blackhawk, *Federal Indian Law as Paradigm*, *supra* note 15, at 1838 (describing the dormant plenary-power doctrine).

376. Duro v. Reina, 495 U.S. 676, 684-85 (1990).

377. *Id.* at 688-89 (finding that "the historical record [of tribal jurisdiction] in this case is somewhat less illuminating than in *Oliphant*," yet still limiting tribal sovereignty).

378. *Id.* at 693 ("Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States.").

379. *Id.* at 696.

380. *Id.* at 698 ("If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.").

Six months later, Congress passed the first version of the *Duro* fix—a law that had been called for by the Court in *Duro* and in many of its Indian law cases over the preceding twelve years. Given the seemingly settled nature of Congress's power to override the Court, it should come as little surprise that it took fourteen years for a challenge to the *Duro* fix. By that time, the Court had further advanced its juricentric constitutional project in other areas of constitutional law and it became increasingly less certain about the power of Congress to override the Court.

In 2004, the Supreme Court ultimately upheld the power of Congress to pass the *Duro* fix in a 7-2 opinion in *United States v. Lara*.[381] The challenge was a complex one, nestled within a broader question about double jeopardy, but the Court fractured largely over the issue of congressional power to override the Court's determinations of the boundaries of inherent tribal sovereignty.[382] Much of the fracture centered around the question of whether federal Indian law doctrine was federal common law—and thus, subject to legislative override—or constitutional law—and thus, according to the Court's narrow view of judicial supremacy,[383] not subject to legislative override.[384]

The majority took the position that Indian law was federal common law.[385] Relying especially on language in its earlier opinions, the Court observed that *Oliphant* and *Duro* made clear "that the Constitution does not dictate the metes and bounds of tribal autonomy."[386] As evidence for this observation, the Court repeatedly cited the fact that these decisions had drawn on the wisdom of Congress and the Executive in determining the content of Indian law—and that these interpretations had formed the backdrop of its analysis.[387] Because the Court looked to the other branches—their legislation, regulations, and treaties—and not to its own constitutional interpretation, the question simply could not be of

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381. 541 U.S. 193, 205-07 (2004).

382. *See id.* at 205-06.

383. The Justices had, no doubt, overlooked the central argument offered by Professor Henry Monaghan that constitutional common law is simply a species of federal common law and that Congress ought to have the power to override constitutional interpretations made by the Supreme Court. *See* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). This oversight was made more markedly in the Supreme Court's later treatment of *Miranda*, a case at the heart of Professor Monaghan's common-law constitutionalism. *Id.* at 2.

384. *Lara*, 541 U.S. at 205-07.

385. *See id.* at 205.

386. *Id.* at 205.

387. *See, e.g.*, *id.* ("In *Oliphant*, the Court rested its conclusion about inherent tribal authority to prosecute tribe members in large part upon 'the commonly shared presumption of Congress, the Executive Branch, and lower federal courts.'" (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978)).

a constitutional magnitude. Justice Souter dissented, arguing that determining the sovereign status of Native Nations raised questions of constitutional character, and thus Congress's only power to override the Court rested in its ability to recognize the independence of Native Nations entirely—akin to the power it exercised over the Philippines.[388] Justice Stevens wrote separately in concurrence to problematize the majority's reasoning that federal Indian law must not be constitutional law in order to allow for legislative override, and he raised the Dormant Commerce Clause doctrine as an example of where Congress has that override capacity.[389] By 2004, it seems, legislative constitutionalism or congressional interpretation of the Constitution was essentially illegible to the Court—that these treaties and statutes might express a congressional constitutional view was simply not possible for nearly all of the Justices.

The Court's struggle to reconcile its juricentric constitutionalism with the realities of policentric constitutional lawmaking in federal Indian law mirrors the struggles the Court has encountered in other doctrines over the same period. At least since *City of Boerne v. Flores* in 1997,[390] the Court has struggled to reconcile its juricentric constitutional project with the reality that many areas of constitutional doctrine afford coequal roles for Congress in the interpretation and making of constitutional law. Over the past two decades since *City of Boerne*, the Court has struggled in the shadow of judicial supremacy to define the role of Congress with respect to the Constitution within its own doctrine.[391] In some cases, this struggle has risen to the surface of opinions, as the Court openly puzzles over how to reconcile its full-throated judicial exclusivity in some areas of constitutional law with the realities of congressional supremacy in other strands of constitutional doctrine.[392]

One early example arose just three years after *City of Boerne*. In the year 2000, the Court decided *Dickerson v. United States*,[393] which involved a challenge to a federal statute that Congress drafted to supersede the Supreme Court's 1966 opinion in *Miranda v. Arizona*—an opinion that set the constitutional standard for admissibility of a confession while protecting a criminal defendant's Fifth Amendment rights.[394] The statute explicitly replaced *Miranda*'s requirement of warnings with a more flexible totality-of-the-circumstances approach. The constitutionality of the statute turned on whether the rule requiring warnings in

388. *Id.* at 228-29 (Souter, J., dissenting).

389. *Id.* at 210-11 (Stevens, J., concurring).

390. 521 U.S. 507 (1997).

391. *See, e.g.*, Dickerson v. United States, 530 U.S. 428 (2000); *Lara*, 541 U.S. 193.

392. *See, e.g.*, *Dickerson*, 530 U.S. at 428.

393. *Id.*

394. 384 U.S. 436 (1966).

Miranda "announced a constitutional rule or merely exercised [the Supreme Court's] supervisory authority to regulate evidence in the absence of congressional direction."[395] The Court of Appeals had held that *Miranda*'s requirement of warnings was merely "prophylactic" and "not constitutional" based on the Supreme Court's subsequent exceptions created to the *Miranda* rule and the Court's own reference to *Miranda* warnings as "prophylactic."[396] But the Court disagreed and reversed, holding that *Miranda* "announced a constitutional rule."[397]

The Court's holding rested first on the observation that it had imposed the *Miranda* requirement upon state courts, over which the Supreme Court wields no authority other than the U.S. Constitution, and second on the rejection of the Court of Appeals's characterization of later developments in the *Miranda* requirements as "exceptions."[398] As the Court clarified, these "exceptions" were merely its own corrections to a rule that it created without perfect foresight of what the constitutional rule required.[399] Yet, in part because of its own iterative approach to the rule, the Court stopped short of holding that the *Miranda* warning was the *only* solution to wholly satisfy the constitutional right—stating only that the totality-of-the-circumstances solution that Congress had enacted by statute was one that the Court had considered and rejected in *Miranda* as constitutionally inadequate. Presumably, the Court's opinion in *Dickerson* left open the possibility that Congress could again propose another solution to satisfy the Fifth Amendment in the context of confessions.

The dissent took the Court to task for its ambiguity and for failing to adhere to an even more stringent form of judicial exclusivity—arguing that the Court's *only* power to strike down legislation as unconstitutional is to hold that the statute violates the Constitution, not to hold that it violates a Court-created "constitutional rule."[400] According to the dissent, the Court's observation that the statute did not resolve the procedural concerns raised in *Miranda* was insufficient. The Court was required to declare that the *Miranda* warnings were themselves part of the Fifth Amendment and the only means of satisfying that right in order to invalidate an act of Congress.[401]

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395. *Dickerson*, 530 U.S. at 437.

396. Dickerson v. United States, 166 F.3d 667, 689 (4th Cir. 1999).

397. *Dickerson*, 530 U.S. at 444.

398. *Id.* at 438-39, 441.

399. *Id.* at 441.

400. *Id.* at 444-46, 460-65 (Scalia, J., dissenting).

401. *Id.* at 454 ("[W]hat makes a decision 'constitutional' in the only sense relevant here . . . is the determination that the Constitution *requires* the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.").

Four years later, the puzzle over how to define Congress's role with respect to the Constitution in the context of judicial exclusivity rose to the surface of the Court's reasoning—again fracturing the Court in *Lara*. Both *Dickerson* and *Lara* offer evidence of this struggle and some indication as to how the Court is attempting to reconcile this contradiction. First, the Court remains committed to its project of advancing juricentric constitutionalism—not only does the Court hold itself out as the final arbiter of constitutional meaning; it has established itself as the authority on what constitutes a "constitutional rule" and what does not. Second, in so establishing, the Court may now, without much dialogue with the other branches, determine the metes and bounds of its own power by declaring something "constitutional law" or not—and those determinations seem both malleable and open to revisionist interpretation.[402] Finally, the Court has begun to indicate that actions by the executive and legislative branches on an issue make that issue less likely to involve a constitutional question. As the Court observed in *Lara*,[403] the fact that the Court looked to treaties and legislation to craft its earlier rule —rather than Supreme Court opinions—supported the holding that the rule was crafted of federal common law and did not rise to the level of constitutional concern. One could argue that to allow constitutional questions to be resolved by treaty or by simple legislation could denigrate those questions to a subconstitutional vehicle and thereby circumvent the formal Article V amendment process. However, this argument overlooks the fact that constitutional questions are engaged in and resolved through a quotidian judicial process—the same judicial process that resolves subconstitutional questions—and without any formal amendment.

Finally, it bears mentioning that the Supreme Court's juricentric project is threatening not only federal Indian law but other domains of constitutional law where the Court has previously sanctioned Congress to take the lead in interpretating and making constitutional law, even by overriding the Court. Increasingly, like the Supreme Court's position in *Lara*, the Justices are expressing skepticism over these doctrines, and the Court is further requiring Congress to adhere to certain procedural standards of deliberation, interpretation, and lawmaking. Interestingly, similar to federal Indian law, these sister domains of legislative constitutionalism also tend to involve considerations of other sovereigns within the federal system—primarily states. However, in contrast to federal Indian law, the

402. During this last Term, for example, the Supreme Court held that the *Miranda* rule was not a "constitutional rule" to the extent that violation of it would give rise to an actionable claim under § 1983—stating that it was a "prophylactic rule" for purposes of determining whether it violates the Constitution within the meaning of § 1983. *See* Vega v. Tekoh, No. 21-499, slip op. at 14-16 (U.S. June 23, 2022), https://www.supremecourt.gov/opinions/21pdf/21-499_gfbh.pdf [https://perma.cc/JCU5-PBTR].

403. United States v. Lara, 541 U.S. 193, 196-210 (2004).

Court has replaced the values protected by its clear-statement rules with its own views on the distribution of power within the federal framework.[404] Also under threat are even those rare areas where the Court recognizes the ability of Congress to override its constitutional decisions—the Dormant Commerce Clause doctrine most notably.[405] At least to date, by exercising its powers under the Dormant Commerce Clause, Congress can explicitly override an earlier Court opinion interpreting the Clause.[406] The Court has not yet asserted its juricentric constitutional project to impose its own vision of constitutional values in this domain, nor has it imposed other kinds of restrictions on how Congress must approach the exercise of this power.[407] However, members of the Court, Justice Thomas among them, have begun to express skepticism over the overall legitimacy of the Dormant Commerce Clause doctrine— skepticism that could provide an early indication of the Court's impending restrictions.[408] The Court's skepticism about legislative constitutionalism seems to be chilling congressional interpretation and lawmaking, and although Congress may still have the power to override, it rarely does so.[409]

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404. *See* Bradford Mank, *The Supreme Court's New Public-Private Distinction Under the Dormant Commerce Clause: Avoiding the Traditional Versus Nontraditional Classification Trap*, 37 HASTINGS CONST. L.Q. 1, 8 (2009) ("[C]ritics of the DCCD [Dormant Commerce Clause doctrine] have argued the doctrine should be limited because of federalist concerns that an expansive reading of the doctrine threatens appropriate state and local autonomy."); *see also id.* at 9 (noting that the Court's interference with the appropriate distribution of state and local power has been criticized, for example, when "misusing the DCCD to unduly interfere with local laws").

405. *See id.* at 5-6.

406. *See, e.g.*, Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 66 (2003) ("Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce . . . but we will not assume that it has done so unless such an intent is clearly expressed." (citations omitted)).

407. *See, e.g.*, *id.* (recognizing congressional authority to override DCCD).

408. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Water Mgmt. Auth., 550 U.S. 330, 349-55 (2007) (Thomas, J., concurring) (arguing that the DCCD is unconstitutional because the text of the Commerce Clause grants authority to Congress to regulate commerce, and not to the federal courts).

409. *See* Mank, *supra* note 404, at 6-7 ("Because the DCCD is an implied doctrine justified upon Congress' presumptive intent to forbid economic protectionism by local governments and states, Congress can override the DCCD if it enacts *clear* legislation authorizing local governments to adopt discriminatory measures, although Congress rarely enacts legislation directly overriding the Court's DCCD decisions." (emphasis added) (citation omitted)).

2. *Juricentric Constitutional Challenges*

Although Chief Justice Marshall rested his deference to Congress in the realm of Indian law within the Constitution, much ambiguity remains over the origins of congressional "plenary power" and its relationship with the Supreme Court. The case scholars point to as giving birth to the "plenary power doctrine," authored by Chief Justice Taney, held that the plenary power of Congress over Indian affairs originated not from the Constitution but from the powers inherent in the territorial sovereignty of the United States — a form of international public law domesticated into federal law — and because this power did not arise from the Constitution, it was not properly limited by the checks and balances of the document, including judicial review.[410] Twentieth- and twenty-first-century Supreme Court doctrine has attempted to marry the plenary-power doctrine with its modern project of recognizing only a federal government of limited and enumerated powers by rooting Congress's plenary power into a range of constitutional sources from the Indian Commerce Clause to the Territories Clause to the treaty power.[411] In *Lara*, a fractured Supreme Court built an ad hoc and shaky vision of legislative constitutionalism, finding that Congress's power *does* arise from the Constitution but that "Congress, with [the Supreme Court's] approval, has interpreted the Constitution's 'plenary' grants of power" as authorizing Congress to regulate Indian affairs in particular ways.[412] The Court's interpretation of these plenary grants of power, according to the majority in *Lara*, constituted federal common law only and not constitutional analysis.[413]

Since *Lara*, Native advocates and their allies have successfully argued that Congress has the power to overturn the Supreme Court by legislation by arguing that Indian law as created by the courts is "not constitutional law" and by holding firm that the strict judicial review of federal constitutional rights does not apply to federal Indian law.[414] In so doing, Native advocates approached the Court on its own overly simplistic terms and have again recentered the locus of power back to the branch that has proved itself the best guardian of constitutional values in the context of American colonialism and its mitigation: Congress. But none of this advocacy has pushed back directly on the failures of the Court and judicial review in the context of the mitigation of American colonialism and the Constitution. Throughout, advocates have not critiqued juricentric

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

411. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 552 (1974); McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172, n.7 (1973); United States v. Lara, 541 U.S. 193, 200 (2004).

412. *Lara*, 541 U.S. at 202.

413. *Id.* at 207.

414. *See supra* notes 333-337 and accompanying text.

constitutionalism directly, instead taking solace in insulating the field of federal Indian law from its damage. Thus, questions remain as to what is lost by addressing federal Indian law in a distinctly nonconstitutional register. Moreover, what happens when concerns of a constitutional magnitude, like equal protection or states' rights, collide with federal Indian law?

The Supreme Court has not yet offered definitive answers as to how it would resolve a collision between federal Indian law and a constitutional value or issue recognized by the Court. But aggressively drafted dicta in the Court's recent cases provides some indication that federal Indian law doctrines would necessarily give way—even to the Supreme Court's loosest constitutional analysis. In this last Term in *Oklahoma v. Castro-Huerta*, Justice Kavanaugh wrote for a 5-4 Supreme Court to hold that state governments have concurrent criminal jurisdiction over crimes committed by non-Indians against Indians within Indian Country.[415] The Court's opinion in *Castro-Huerta* followed upon its 2020 decision in *McGirt v. Oklahoma*.[416] The Court explicitly declined over thirty petitions submitted by the state of Oklahoma to take up the question of whether *McGirt* should be overruled.[417] But the court did grant review of a related question: whether the state of Oklahoma had concurrent jurisdiction to federal and tribal governments over certain crimes.[418] It is difficult to describe the Court's opinion in *Castro-Huerta* as anything more than activism: the Supreme Court changed composition since its 5-4 decision in *McGirt*, a decision that shocked many. The Court was not so brazen as to overrule a months-old precedent. But it did show that it was willing to take a bite out of that earlier decision and that it would take that bite regardless of whether it had the power to do so.

The Court held in *Castro-Huerta* that no act of Congress had preempted state criminal jurisdiction over crimes committed by non-Indians against Indians within Indian Country.[419] The majority of the opinion presents a preemption analysis that is flatly literalist—reviewing two-hundred years of congressional action, including many statutes that distributed piecemeal jurisdiction to states over crimes by and against Indians.[420] The Court disclaimed those statutes as not sufficiently preemptive because they did not state explicitly in their text that

415. 142 S. Ct. 2486, 2491 (2022).

416. 140 S. Ct. 2452 (2020).

417. Amy Howe, *Justices Will Review Scope of* McGirt *Decision, but Won't Consider Whether to Overturn It*, SCOTUSBLOG (Jan. 21, 2022, 3:22 PM), https://www.scotusblog.com/2022/01/justices-will-review-scope-of-mcgirt-decision-but-wont-consider-whether-to-overturn-it [https://perma.cc/B2WJ-AFU5].

418. *Castro-Huerta*, 142 S. Ct. at 2488.

419. *Id.* at 2492-2501.

420. *Id.* at 2488-91, 2494-95.

they supplanted state authority.[421] The legal history makes clear that Congress, the Executive, and the Supreme Court, as revealed in its own precedent, all presumed that states did not have any jurisdiction within Indian Country that was not granted explicitly by Congress.[422] Thus, there was no reason to write into any law the intent to take something away that did not exist in the first instance. As described, the Constitution promised exclusive federal power over Indian affairs, and Congress set to work from the Founding regulating Indian Country as wholly separate from state jurisdiction. Recognition of Native Nations established both tribal and, to a certain extent, federal jurisdiction over certain territory. Treaty law set the boundaries of that territory — even vis-à-vis the states, who considered the boundaries of Indian Country in treaties as outside the "ordinary jurisdiction" of the state.[423]

Even during the removal crisis, when state governments challenged federal power on a range of constitutional questions, Congress reaffirmed federal power in strengthened versions of the Trade and Intercourse Act and by reaffirming federal power over Indian lands and the exclusion of state authority in each new state's enabling act.[424] One Supreme Court decision in the late nineteenth century interpreted an enabling act without a federal reservation provision to mean that the state held criminal jurisdiction over crimes committed by non-Indians against non-Indians — notably exclusive jurisdiction, rather than concurrent[425] — and the Supreme Court somewhat erroneously extended that decision to all states, regardless of the content of their enabling acts in another reservation era decision.[426] But the history and doctrine seemed entirely clear that no government, and especially Congress, recognized state governments as having concurrent jurisdiction over crimes against Indians.[427] Congress has recently even repealed a piecemeal grant of such jurisdiction to the state of Iowa, which had requested the repeal.[428] Nonetheless, the Supreme Court decided by judicial fiat that all states nationwide would have concurrent criminal jurisdiction over crimes committed by non-Indians against Indians — even if that state had never opted into jurisdiction under federal law.

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421. *Id.* at 2492, 2495-96.

422. *Id.* at 2511-13 (Gorsuch, J., dissenting).

423. *See supra* Part I.

424. *Id.*

425. United States v. McBratney, 104 U.S. 621, 623-24 (1881).

426. Draper v. United States, 164 U.S. 240, 244-47 (1896).

427. Act of June 30, 1948, ch. 759, 62 Stat. 1161, *repealed by* Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395.

428. *Id.*

One hopes that the blunders of *Castro-Huerta* will find their way into the anticanon of U.S. constitutional law[429]—at the very least on separation-of-powers grounds, but also because the decision furthers the American colonial project without reflection. In a domain of law where Congress seemingly maintains "plenary power," it is a puzzle that the Supreme Court could find any basis to overlook hundreds of years of congressional action that presumed states had no jurisdiction unless explicitly authorized by Congress—and thus would never have written legislation to preempt explicitly that nonexistent jurisdiction. Likely that puzzle can be resolved, in part, from dicta within the opinion, which begins with "the Constitution" and the Supreme Court's interpretation of that Constitution—notably almost entirely without citation except to the constitutional text directly. There, the Court indicates that the "Constitution" flips the baseline presumption held by Congress, the Executive, and the courts and instead commands that a state government have jurisdiction "over all of its territory, including Indian Country" unless preempted by Congress.[430]

Justice Kavanaugh goes on to describe an interpretation that is not originalist—he concedes that the United States held this presumption at the Founding and for decades after— but relies heavily on dicta drawn from the Supreme Court's opinions from the reservation era.[431] Note that these are the same cases where the Court considered and rejected explicitly the notion that states had jurisdiction over crimes by non-Indians, so it is a doubtful interpretation of even the Court's position. But the Court's reasoning in *Castro-Huerta* also preferences the Court's vision of federal Indian law over that of Congress—and, frankly, the Court's nonexistent power of recognition and of setting jurisdictional borders through treaty. Not only has Congress repudiated its policies during the reservation and allotment eras,[432] but it has also gone on to affirm exclusive federal authority over crimes "against Indians"[433] and to establish a comprehensive federal framework by which states could assume jurisdiction over crimes "against Indians" if the state took certain steps.[434] That comprehensive federal framework

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429. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

430. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022).

431. *Id.* at 2494 ("By the 1880s the Court no longer viewed reservations as distinct nations.") (first citing United States v. McBratney, 104 U.S. 621, 623-24 (1882); then citing Draper v. United States, 164 U.S. 240, 244-47 (1896); and then quoting Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962)).

432. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6 (1995).

433. 18 U.S.C. § 1153 (2018).

434. *See, e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (granting certain states criminal jurisdiction over Indians on reservations and allowing civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts).

still governs today—however, it now overlays a blunt, judicially created framework that designates concurrent jurisdiction whole cloth.[435]

Finally, in closing, it is helpful to reflect on the fact that the primary threats posed to a constitutional culture within federal Indian law that parallels Thayer's ideal vision of constitutionalism are not necessarily those fears that opened our thought experiment. The policentric constitutionalism of federal Indian law has provided a stable and reflective body of law, however imperfect, that has succeeded in mitigating some of the worst effects of American colonialism. Congress continues to take an affirmative role in interpreting the Constitution above party politics or majoritarian passion. The Supreme Court supports Congress through deferential forms of review. Both branches have even reached beyond the constitutional culture described by Thayer to craft innovative structural reforms that empower affected communities to take part in the constitutional-law-making process. More than avoiding legislative apathy, Thayerian legislative constitutionalism has supported and increased constitutional deliberation within the United States overall and refined its character to include perspectives of those on the margins. Congress has crafted its own internal constitutional doctrines to motivate and shape the ongoing work of statebuilding and statecraft that have long been central to that branch.[436] Faced with electoral apathy and disempowered affected communities, Congress has built and sustained one of the most robust forms of Indigenous governance in the world—even while foundering writ large. Despite the flawed nature of these laws and their foundations in subordination and racial hierarchy, all these successes are worth celebrating and should, at the very least, calm some fears. Instead, experience within federal Indian law can help us identify other possible issues that could arise, most notably the overreach of the Supreme Court, which seems to have lost a firm grasp on constitutionalism and has forgotten its own institutional limits.

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435. It bears noting that Congress's power to override the Supreme Court's opinion in *Castro-Huerta* is yet untested. Currently, certain members of Congress are considering a *Castro-Huerta* fix. One version of the fix simply preempts the state criminal jurisdiction created whole cloth by the Supreme Court's opinion. A more robust version of the fix could aim, however, to attempt to return the baseline of jurisdiction within Indian Country—that is, the presumption that state governments have no jurisdiction within Indian Country not explicitly granted by Congress—to the baseline at the Founding and for the last two hundred years. The former version of the fix would very likely survive challenge before the Court. The latter version could test the ability of the Court to defer to the plenary power of Congress even on issues it considers to be central to the Constitution.

436. *See, e.g.*, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 31, §§ 5.04[3][a]-[b] (describing the Indian trust doctrine, evolved from treaties and federal statutes, as Congress's "motivating factor for legislative initiatives, and [the] source of persuasive arguments by tribes urging passage of legislation or seeking oversight of executive agencies").

IV. "SECOND-WAVE" LEGISLATIVE CONSTITUTIONALISM

Recent months have seen an ever more fervent movement to "take the constitution away from the Courts," similar to the movement for legislative constitutionalism that began in the late 1990s in the wake of *Boerne*.[437] In particular, the Supreme Court's leaked opinion in *Dobbs* and its decisions across a range of areas of constitutional law this last Term have inspired a second wave of public discourse on the role of the Supreme Court in our constitutional order. Even before this most recent post-*Dobbs* movement, conflicts over recent nominations raised the issue of Supreme Court reform as central to the 2020 presidential election.[438] Following his election, President Biden opened a public conversation about the possibility of major court reform—including by increasing the size of the Supreme Court—and he formed a bipartisan Presidential Commission on the Supreme Court of the United States to consider and propose reforms.[439] The Commission submitted an over 280-page report in December of 2021, surveying possible Supreme Court reforms and offering arguments for and against.[440] Scholars and public intellectuals alike have offered even more reforms.[441] Long

437. *See, e.g.*, TUSHNET, *supra* note 33; George Anastaplo, *Abraham Lincoln and the American Regime: Explorations*, 35 VAL. U. L. REV. 39 (2000); Katyal, *supra* note 41; Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L. L. & FOREIGN AFFS. 250 (2005); Richard W. Bauman & Tsvi Kahana, *New Ways of Looking at Old Institutions*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 1 (Richard Bauman & Tsvi Kahana eds., 2006) (providing an overview of an edited volume focused on legislative constitutionalism); Robin West, *Toward the Study of the Legislated Constitution*, 72 OHIO ST. L.J. 1343 (2011).

438. Russell Wheeler, *Should We Restructure the Supreme Court?*, BROOKINGS INST. (Mar. 2, 2020), https://www.brookings.edu/policy2020/votervital/should-we-restructure-the-supreme-court [https://perma.cc/5YHB-P549].

439. *Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, https://www.whitehouse.gov/pcscotus [https://perma.cc/QLY8-GMT7].

440. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (Dec. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/LU8A-Z7U3].

441. *See generally, e.g.*, Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1 (2021) (suggesting Supreme Court term limits as a possible avenue for reform); Andrew K. Jennings & Athul K. Acharya, *The Supreme Court and the 117th Congress*, 11 CALIF. L. REV. ONLINE 407 (2020) (suggesting court expansion, limits on certiorari discretion, jurisdiction restriction, and jurisdiction rerouting to other courts); Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022) (suggesting limiting the Court's ability to select its own questions); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020) (suggesting jurisdiction stripping); Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609 (2022) (offering a nonpartisan

argument for Supreme Court reform); Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821 (2021) (situating Supreme Court reform within broader debates about judicial review in a democracy); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019) (offering specific reforms that are implementable by statute); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021) (offering "skinny" reforms that are more pragmatic than structural but likely to find bipartisan support); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018) (proposing the expansion of Supreme Court jurisdiction to include a number of cases selected at random from the final judgments of lower courts); David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411 (2018) (arguing for a Court that operates according to ideological balance rather than popular majorities); David Orentlicher, *Supreme Court Reform: Desirable—and Constitutionally Required*, 92 S. CAL. L. REV. POSTSCRIPT 29 (2018) (arguing that the Due Process Clause requires ideologically balanced courts); Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018) (arguing for a Court evenly balanced along partisan lines); G. Michael Parsons, *Contingent Design & the Court Reform Debate*, 23 U. PA. J. CONST. L. 795 (2021) (identifying ways for Congress to strategically structure judicial review); Jeremy N. Sheff, *I Choose, You Decide: Structural Tools for Supreme Court Legitimation*, 50 SETON HALL L. REV. 161 (2019) (arguing that cases should be selected by a different group of judicial officers than those who decide them); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747 (2020) (arguing that court-packing is nearly novel in American history); Matthew A. Seligman, *Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform*, 54 ARIZ. ST. L.J. 585 (2022) (concluding that judicial appointments reform is the winning strategy for both parties); Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71 (2022) (offering principled reasons to resist Court-packing); Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789 (2020) (arguing for a judiciary reform act with delayed implementation); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021) (arguing for disempowering reforms over personnel reforms in the advancement of progressive values); Scott Bloomberg, *Reform Through Resignation: Why Chief Justice Roberts Should Resign (in 2023)*, 106 IOWA L. REV. ONLINE 16 (2021) (presenting resignations as a way of establishing self-enforced term limits); Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93 (2019) (suggesting the Court has too broad a conception of its legal omnipotence); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018) (arguing that judicial independence is politically constructed and historically contingent); William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631 (2022) (describing the ways in which the law and structure of the commission rendered deliberations difficult); Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119 (2021) (suggesting the power to appoint two Justices for each presidential term); Ganesh Sitaraman, *How to Rein in an All-Too-Powerful Supreme Court*, ATLANTIC (Nov. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924 [https://perma.cc/6V9M-757R] (arguing for the empowerment of Congress); Jeffrey L. Fisher, *The Supreme Court Reform That Could Actually Win Bipartisan Support*, POLITICO (July 21, 2022, 4:30 AM EDT), https://www.politico.com/news/magazine/2022/07/21/supreme-court-reform-term-limits-0004 6883 [https://perma.cc/UZ5T-AVG5] (arguing for term limits); Nancy Gertner & Laurence H. Tribe, Opinion, *The Supreme Court Isn't Well. The Only Hope for a Cure Is More Justices.*,

relegated to abstract speculations in the dustiest corners of the academy, court packing and jurisdiction stripping are now, quite literally, making headlines.[442]

Not surprisingly, given the Supreme Court's recent actions, most of the calls for reform focus on institutional changes to the Supreme Court—adding justices, mandating term limits, stripping jurisdiction, supermajority requirements, and other innovative reforms.[443] The majority of these reforms focus on changes to the Court's composition—a type of reform helpfully termed "personnel reforms" by Professors Ryan D. Doerfler and Samuel Moyn in one of their recent contributions to the court-reform discussion.[444] But many proposed reforms also offer the possibility of reducing the power of the Court—reforms Doerfler and Moyn describe as "disempowering reforms"[445]—jurisdiction stripping, most paradigmatically. As Doerfler and Moyn observe, disempowering reforms could help shift the constitutional conversation away from the Court and toward more "democratic domains," while a focus on personnel reforms would, at best, result in either a spiraling degradation of tit-for-tat fights over the Supreme Court's composition or, at worst, might simply lack feasibility.[446] The former offers a more robust and broad constitutional culture, while the latter continues to lock constitutional conversation into the Supreme Court and further degrades that institution over time.

The case study described here provides support for Doerfler and Moyn's proposition that disempowering the Court could press those constitutional conversations into other domains and specifically, that disempowering the Court could press us toward legislative constitutionalism—a dynamic long seen in the context of federal Indian law, and importantly, a dynamic that continues today despite dysfunction and partisanship. Federal Indian law also provides a working example of how legislative constitutionalism and a more robust constitutional conversation beyond the courts might develop over time. In so doing, it highlights the reality that constitutional law scholars concerned over juricentric constitutionalism should heed Doerfler and Moyn's advice to focus on disempowerment of the courts. But it also suggests that these reformers should join forces with scholars of legislation and Congress, as well, to focus also on how

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WASH. POST (Dec. 9, 2021, 5:01 PM EST), https://www.washingtonpost.com/opinions/2021/12/09/expand-supreme-court-laurence-tribe-nancy-gertner [https://perma.cc/Z32X-WRR4] (arguing for court-packing).

442. *See, e.g.*, Jamelle Bouie, Opinion, *This Is How to Put the Supreme Court in Its Place*, N.Y. TIMES, Oct. 14, 2022, https://www.nytimes.com/2022/10/14/opinion/supreme-court-reform.html [https://perma.cc/6SJK-CRC4].

443. *See supra* note 441.

444. *See* Doerfler & Moyn, *supra* note 441.

445. *Id.* at 1721.

446. *Id.* at 1721-25.

best to foster these constitutional conversations elsewhere. In particular, it suggests that scholars and reformers focused on remedying juricentric constitutionalism should aim to craft a second-wave legislative constitutionalism, one that emphasizes congressional reform as on par with Supreme Court reform.

A. Reforming Congress

A nascent movement of "second-wave" legislative constitutionalism scholarship has cropped up in recent years that could help inform reform efforts in response to recent Supreme Court activism. This recent scholarship joins earlier scholars in envisioning a robust role for Congress in a constitutional culture that reaches beyond the courts. But, perhaps bolstered by a much more amenable political climate and an even more assertive Supreme Court, second-wave legislative constitutionalism is also building upon these earlier proposals by embracing much more aggressive suggestions for reform. Among these have been growing proposals to empower Congress within our constitutional system using legislative overrides like those described above, establishing formal congressional review procedures of Supreme Court decisions, and breathing new life into long-lost constitutional provisions, like the power of Congress provided by the Reconstruction Amendments to reduce representation for states that restrict the vote.[447] Recent scholarship by Professors Nikolas Bowie and Daphna Renan calls for a return to congressional and presidential control of the separation of powers, rooting the Court's asserted dominance over this domain in backlash to Reconstruction.[448]

Efforts at building a "second-wave" legislative constitutionalism scholarship could also draw on a robust and empirically driven field of legislation research on Congress, its internal operations, and its relationship with other branches and governments. The reality is that recent calls for reform are also operating within a wholly different scholarly climate.[449] Since the first scholarship was published on legislative constitutionalism near the turn of the century, the field of legislation and the study of Congress within law schools has experienced an ongoing renaissance. At the center of this scholarship has been the empirical study of

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447. *See* U.S. CONST. amend. XIV, § 2; Joshua Geltzer, *The Lost 110 Words of Our Constitution*, POLITICO (Feb. 23, 2020, 7:00 AM EST), https://www.politico.com/news/magazine/2020/02/23/the-lost-constitutional-tool-to-protect-voting-rights-116612 [https://perma.cc/EV7Q-WMRH].

448. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022).

449. *See* sources collected *supra* note 441; Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717 (2016).

Congress alongside a theorization of its institutional role in our constitutional framework. An early example of this work is found in a thoughtful survey crafted by Adrian Vermeule over twenty years ago of "the constitutional law of congressional procedure"[450] — an area of law that he recognized at the time "ha[d] rarely been analyzed as an integrated body of rules."[451] His project revealed the ways in which Congress structured its internal workings to comport with its own interpretation of the Constitution and offered suggestions to improve the constitutional structuring of internal congressional procedure.[452] Since that time, a number of scholars have since followed Vermeule's lead. Among them, Josh Chafetz and Bertrall Ross have both offered comprehensive and pathbreaking work on the constitutional role of Congress in enforcing the Constitution's checks and balances vis-à-vis the other branches.[453] Professors Abbe R. Gluck and Lisa Schultz Bressman have revealed and explored the ways that Congress institutionalizes and understands interpretive processes and methodologies,[454] and Professor Gluck has analyzed the way that state legislatures contribute to broader deliberation and experimentation with interpretive methods.[455]

Beyond clashes with the Court, the legislative constitutionalism offered by these literatures has likely provided recent reformers rich ground to envision novel reforms to the lawmaking process within Congress and how refinement of checks and balances of the vertical separation of powers could support the Constitution. These studies also offer a glimpse of the potential breadth of questions that legislative constitutionalism could raise beyond providing a short-term solution to the maladies of judicial review. A more full-throated embrace of legislative constitutionalism could broaden our understanding of constitutionalism writ large. Further, these studies begin to examine how the constitutional and institutional design of Congress as a legislature affects how it might approach and shape its own unique constitutional role — a role that includes not only the

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450. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004).

451. *Id.* at 362 & n.6 (reviewing the literature).

452. *See id.* at 436-37.

453. *See, e.g.*, JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715 (2012); Bertrall Ross, Separation of Powers and Legislative Constitutionalism (unpublished manuscript) (on file with author).

454. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

455. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

regulation of its own internal workings and in interbranch affairs, but the interpretation, making, and shaping of constitutional law for the public.

Return to the questions that opened this exploration. Once scholars and the public lose the taken-for-granted belief that aggressive judicial review is necessary or even beneficial for our constitutional framework, it could provide an opportunity for those hungry for Supreme Court reform to join in a much more robust conversation about "second-wave" legislative constitutionalism that centers Congress as much as the courts. It could allow for a broader vision of minority protection beyond judicial solicitude and for greater discussion of how Congress might be better positioned to confront its constitutional role, especially in the context of minority protection. No doubt, reforms are desperately needed to curb corruption and bolster the capacity of Congress. Still, a broad embrace and recognition of Congress as a central constitutional actor could allow the legislative constitutionalism that already exists within our constitutional system—as in the case of federal Indian law—to step out of the shadows. Moreover, a better understanding of the important and distinct role Congress offers the constitutional lawmaking process could even help reinvigorate movements to reform Congress, repair its dysfunction, bolster its capacity, and curb corruption.

B. Federal Indian Law

The particular case of federal Indian law, as a body of law that reflects both the advocacy of Native Nations and the dynamics of American colonialism, has much to contribute also to a second-wave legislative constitutionalism conversation. Most centrally, it offers legislative constitutionalism an enduring example of a broader and more publicly engaged constitutional culture, and one that protects minorities and mitigates constitutional failures while decentering the Courts. As federal Indian law illustrates, Congress has long carried the lion's share of responsibility to deliberate over, investigate, and provide solutions to mitigate American colonialism. But it also illustrates the importance and fragility of belief in the power of the legislature to engage with these issues. Congress has been able to assert a more robust role because members of Congress believe strongly in their ability to do so. Without the faith of lawmakers, advocates, and the public in the power of Congress to support constitutional conversation and lawmaking, Congress has strongly pulled back in other areas of constitutional law. As described, the seed of doubt created by juricentric constitutionalism has even given Congress some pause in the field of federal Indian law. However, as this case study also illustrates, when Congress is sufficiently empowered, it may yield a constitutionalism that is not simply more responsive to and legitimized by "the people" but could also inspire forms of constitutionalism inflected with the unique contributions of legislatures—as institutions deeply enmeshed in

statecraft and as distinctive interpreters of constitutional meaning. It could help realize a legisprudence or a legislative constitutionalism necessary for a rich and deliberative constitutional order.

A common response to the suggestion that federal Indian law has lessons to offer other areas of lawmaking is that the field is simply too *sui generis*—and perhaps additionally exceptional here, where its invisibility has empowered advocates to craft solutions legislatively that wouldn't be available to more publicly salient constitutional questions. Although it is true that federal Indian law is an area of law that rarely garners attention in national elections today, it is also exceptional in that it demonstrates congressional competence to mitigate constitutional failure and to do so over decades—even those decades where awareness of American colonialism and of Native advocacy was more foregrounded in public and electoral discourse. But the reality is that Congress is central to constitutional interpretation and lawmaking across a range of doctrines, many of them very public and highly contested,[456] and the separation of powers and substance of judicial review has long been sensitive to what "We the People" believe is acceptable.[457] A second-wave legislative constitutionalism could better catalog those areas where legislative constitutionalism already operates, including those publicly salient and contested areas, and reveal their dynamics over time. Revealing the ubiquity of legislative constitutionalism and its longstanding role within our constitutional order could help shift public opinions, and thus our imaginative horizons of what is possible for our politics, and accomplish much toward embracing legislative constitutionalism in more nationally salient areas of law.

In particular, the case study of federal Indian law has much to offer such a second-wave legislative constitutionalism and the effort to envision a constitutional culture with a more robust role for Congress. It provides a real-world example of how stripping the Supreme Court of power over certain constitutional conversations could push those conversations into other, more representative branches. It also provides an example of congressional supremacy within the U.S. constitutional framework and allows us to better envision how a polycentric or Thayerian constitutionalism might interact within the federal system and over

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456. *See* ESKRIDGE & FEREJOHN, *supra* note 36, at 26 (describing the constitutional status of "superstatutes" such as the Pregnancy Discrimination Act of 1978, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Sherman Act of 1890, and how Congress influences the constitutional landscape through their passage); FISHKIN & FORBATH, *supra* note 161, at 251-318 (describing the New Deal as a broad constitutionalism outside of the courts that recognized social and economic rights against inequality); *see also* Post & Siegel, *supra* note 33, at 2029; Fallon, *supra* note 35, at 491 ("Our system is not, has never been, and probably never could be one of pure judicial supremacy.").

457. *See* Fallon, *supra* note 35, at 493 ("[J]udicial power to interpret the Constitution authoritatively exists within politically constructed bounds.").

time. Not only does it promise precedent for legislative override of Supreme Court constitutional decision-making, but it also reveals how the power to override empowers and protects minorities against a juricentric constitutionalism that centers only "public opinion," majority views, and, often, stereotype. Importantly, federal Indian law provides an example of how Congress might identify and maintain constitutional principles and values for marginalized and politically disempowered groups—including by highlighting innovations within Congress like the trust doctrine, innovations that motivate lawmaking in the absence of electoral pressure and insulate that deliberation from the passions of the moment. It could provide a more concrete guide and some precedential basis to support the use of legislative supremacy, including overrides, in other areas of constitutional law.

Beyond simply providing an example of a relatively successful implementation of legislative constitutionalism and thereby calming fears, federal Indian law also provides insights into the unique contributions that Congress might offer to constitutional interpretation and lawmaking. As many have identified, Congress is an institution designed to engage with the public and foster investigation and deliberation. It would benefit us all to better harness these institutional strengths toward constitutional questions. But, further and importantly, federal Indian law also demonstrates that Congress has the ability to foster constitutional conversations that transcend the judicial constitutional model of rights-violation-remedy to discuss structural constitutional failures directly. It also offers the power to redress these structural issues—including problems that rise to the level of constitutional failure—directly and with forms of redress that are unlikely to ever come from a court. Beyond redressing individual harms, Congress can restructure the government and its processes of constitutional deliberation; it can create and support innovative forms of representation; it can reshape the federal framework and the horizontal separation of powers; and it can redistribute lawmaking power to affected communities. The history of congressional mitigation of American colonialism reveals the ways that Congress cannot just help us limit the overreach of the courts but can support a constitutional culture that imbues governance on a daily basis and is prospective in its orientation. Put simply, a second-wave legislative constitutionalism that better centers Congress, in addition to checking the Court, could help us envision a more robust constitutionalism writ large—and perhaps one that has been hiding in plain sight all along.

CONCLUSION

As we finally tamp out the last few embers of hope that the Supreme Court can alone sustain, preserve, and protect a robust constitutional culture within

the United States, I offer here another world now in existence that could provide alternative strategies and visions for a less juricentric future writ large—that is, the case study of federal Indian law and the Native advocacy that gave birth to this body of law. The core conclusion to arise from the case study of federal Indian law is that a full embrace of legislative constitutionalism could support a distinctive and thus more varied constitutionalism than that offered by our current juricentric system. For scholars of federal Indian law, recognizing the longstanding relationship between Congress and Native advocates as constitutionalism fosters a deeper understanding of the constitutional developments within the law over time—developments that place the constitutional philosophies and political agency of Native people and Native Nations at the center of our constitutional law and history. Beyond reperiodization of our Native legal and constitutional histories, exploring legislative constitutionalism within the field of federal Indian law provides us with an illustration of Congress taking a central role in the identification and mitigation of constitutional failure—an illustration that illuminates the problems and promise of legislative constitutionalism.

For public law scholars beyond federal Indian law, the primary theoretical contribution of this case study is that Congress offers distinctive contributions to constitutional interpretation and lawmaking—distinctive contributions that could assist us in moving away from the flawed juricentric constitutionalism embraced by the Supreme Court. Scholars have long celebrated the unique form of participation in the lawmaking process offered to the public by the institutional structure of Congress and have highlighted the ways that Congress has fostered constitutional deliberation with "the people themselves." The case study of federal Indian law supports these earlier celebrations and allows us to build on them by recognizing also Congress's ability to offer distinctive constitutional reforms. No doubt, the availability of distinctive remedies necessarily alters constitutional deliberation in Congress also, fostering a range of deliberation not seen within the judiciary.

But likely the most sweeping theoretical contribution of the case study is in highlighting the ways that Congress, as a legislature, can engage with constitutional lawmaking as statecraft—an approach wholly absent from the courts. In the context of American colonialism, Congress has offered constitutional reforms in terms of "structure"—that is, the institutions of the U.S. government and their design; implementation and alteration of the structural aspects of the constitutional order; the contours of its federalist framework; and the distribution of power—including to subordinated communities—as an insufficient and imperfect but innovative form of constitutional lawmaking.

The case study explores three particular structural mitigations to American colonialism in greater depth. First, Congress restructured our federalist structure—a structure that formally involved two separate sovereigns—to create space for a third. Second, Congress has, through comprehensive legislation, shifted power to Native Nations by ensuring recognition of constitutional governments, as well as by structuring a complex government-to-government relationship between Native Nations and the United States. Finally, Congress has reshaped the separation of powers to facilitate better representation of Native Nations and Native people. At the heart of these structural reforms has been the persistent advocacy of Native people and Native Nations, but the engine has been Congress and its ability to build a prospective, deliberative, engaged, and dynamic constitutional culture.

The second theoretical implication offered by this case study is that legislative constitutionalism involves multiple interpreters—a policentric constitutionalism—and preserves a role for the courts. In federal Indian law, Congress takes the lead in interpreting the constitution directly. However, the judiciary remains a collaborator within the constitutional lawmaking process. Through clear-statement rules, canons of construction for treaties and statutes, and the rational-basis review of congressional plenary power over Indian affairs, courts support the primary constitutional lawmaking role of Congress and hold Congress to precedent it has established over time. Unpacking the secondary role of the Court within legislative constitutionalism could clarify the status of tools like clear-statement rules and canons of construction—and it could ensure that the Supreme Court implements these tools in a supportive role only, avoiding replacing the constitutional values and interpretations identified by Congress with its own.

Finally, for reformers hungry to push back on the monopolization of power by the Supreme Court, the case study of federal Indian law offers an example of marginalized advocates successfully reining in the Court using little more than persistence and ingenuity. It also demonstrates how legislative constitutionalism could exist alongside juricentric and other forms of constitutionalism—separated by doctrines, domains, and constitutional interlocutors. Not only could the successes and failures of Native people serve as a guide for other movements, but they could also highlight the range of responses by Congress and the Court to this advocacy. Other movements need not mimic Native advocacy exactly, they could borrow certain tactics and leave others. Importantly, this case study demonstrates that stripping power from the Court may not dampen our constitutional culture or leave it to the whims of populist passion, even in the context of constitutional failure and even as applied to subordinated populations. Rather, Congress has played and can play a more central role in our constitutional

lawmaking on par with the Court, if we the people finally embrace and support its ability to do so.