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## The Constitution of Our Tribal Republic

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### ABSTRACT

Long before there was a U.S. Constitution for the American republic, there were treaties among Indian Nations and between Indian Nations and colonial governments reflecting ideals of consultation and negotiation among self-determining peoples. Indigenous traditions of treaty-making were based upon mutual recognition and respect. These traditions of constitutional negotiation have persisted to this day. Despite the absence of formal constitutional entrenchment for their sovereignty in current U.S. law, Indian Nations have maintained traditions of self-governance and continued to negotiate the terms of their association with other peoples. Scholars have argued that Indian treaties and agreements provide constitutional law, or something like it, for governance in Indian Country. Using negotiations between the United States and the states as a point of comparison, this Article works through precisely what it might mean to think about negotiations in Indian Country in constitutional terms. Indian treaties and agreements constitute institutional rules of the game for intergovernmental relationships and express fundamental values about those relationships. In this sense, they help constitute our Tribal republic.

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## INTRODUCTION

A constitution, we might think, is a document listing the things we'd like to take for granted about law and politics. Under the U.S. Constitution, for example, we take for granted that there will be a Congress composed of a House and a Senate, a President who is at least thirty-five years old, and one national Supreme Court. We also take for granted constitutional rights to freedom of speech, due process, and equal protection. And though we often disagree about what those rights mean, we take for granted that they specify some things that our republican government cannot do to individuals.

Thinking seriously about American Indian Nations' government-to-government relationships with the American republic requires us to examine more closely what a constitution is and does. On the one hand, the Constitution recognizes the separate sovereignty of "Indian Tribes" and assigns to Congress the power to regulate U.S. commerce with them.<sup>1</sup> The Constitution does not by its terms incorporate Indian Nations into the United States but empowers the federal government to associate with them through treaties.<sup>2</sup> Nor does the Constitution constrain Indian Nations' governments of its own force.<sup>3</sup> Thus, Indian Nations' sovereignty has existed beyond the reach of federal constitutional law not only in fact, but also in doctrine.<sup>4</sup>

On the other hand, the United States government has not always taken the sovereignty of Indian Nations for granted. According to the U.S. Supreme Court, "Congress has plenary authority to limit, modify or eliminate the powers of [Indian] self-government . . ."<sup>5</sup> The twentieth century alone

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1. U.S. CONST. art. I, § 8, cl. 3. The U.S. Constitution also refers to Indians in Article I and the Fourteenth Amendment when it excludes "Indians not taxed" from the population count in the apportionment of congressional representatives. See *id.* art. I, § 2, cl. 3; *id.* amend. XIV, § 2.
  2. U.S. CONST. art. II, § 2, cl. 2 (providing that President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties").
  3. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").
  4. See, e.g., Sarah Krakoff, *Law, Violence, and the Neurotic Structure of American Indian Law*, 49 WAKE FOREST L. REV. 743, 755 (2014) (arguing that Indian Nations have "the power to move always just beyond American Indian law itself" and thus perpetuate their extraconstitutional status); Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1596-99 (2004) (arguing "that Indigenous nations and peoples are not subject to American law as a matter of their own law").
  5. *Santa Clara*, 436 U.S. at 56.

featured several different periods of federal Indian policy, with the government supporting Tribal governments in the 1930s and '40s and then turning around and seeking to “terminate” its relationships with Indian Nations in the 1950s, only to reverse course again and support Tribal self-determination beginning in the 1970s. While the U.S. government has always taken its own authority for granted,<sup>6</sup> it has at times viewed Tribal sovereignty as up for grabs.

Uncertainty about Indian Nations’ status under the Constitution helps explain why there has been alarm about some of the Trump administration’s statements about federal Indian policy. The Secretary of the Interior recently suggested that it might be time to find an “off ramp” from the trust relationship between Indian Nations and the United States.<sup>7</sup> Such talk raises the specter of U.S. policy during the 1950s, when the United States terminated its recognition of over a hundred Indian Nations.

Yet consider what happened after the Interior Secretary’s speech. When alarm bells went off, the Department of the Interior wrote to the National Congress of American Indians to reaffirm the federal government’s support for “tribal self-determination, self-governance, and sovereignty . . . .”<sup>8</sup> Any changes to this policy would, the Department explained, “require . . . consultation with Tribes . . . .”<sup>9</sup>

Indian Nations have been remarkably resilient and, for the past four decades, remarkably successful in holding the United States to its commitments to support Tribal self-determination. Long before there was a constitution for the American nation, there were treaties among Indian Nations and between Indian Nations and colonial governments reflecting ideals of consultation and negotiation among self-determining peoples. Indigenous traditions of treaty-making were based upon mutual recognition and respect.<sup>10</sup> These traditions of constitutional negotiation have persisted.

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6. For an argument that the legitimacy of U.S. assertions of plenary authority should not be taken for granted, see Seth Davis, *Pluralism and the Public Trust*, in FIDUCIARY GOVERNMENT (Evan J. Criddle et al. eds.) (forthcoming 2018).

7. *Secretary Zinke Advocates ‘Off-Ramp’ for Taking Lands Out of Trust*, INDIANZ.COM (May 3, 2017), <http://www.indianz.com/News/2017/05/03/secretary-zinke-advocates-offramp-for-ta.asp> [<https://perma.cc/679M-5JL2>].

8. Letter From James Cason, Delegated Auth. of the Deputy Sec’y, U.S. Dep’t of the Interior, to Jacqueline Pata, Exec. Dir., Nat’l Cong. of Am. Indians (May 5, 2017), <http://turtle.talk.files.wordpress.com/2017/05/cason-to-ncai.pdf> [<https://perma.cc/63SM-6QXY>].

9. *Id.*

10. See, e.g., Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CALIF. L. REV. 981, 994 (1994) (offering thick description of “a unique set of paradigms and institutions by which one group of North American indigenous peoples, the Iroquois, sought to achieve a

Today, the constitution of contemporary Indian Tribal governance in Indian Country depends in part upon such negotiations,<sup>11</sup> and scholars of federal Indian law have argued that treaties and agreements provide “quasi-constitutional” law in Indian Country.<sup>12</sup>

There are two related objections to the claim that Indian treaties and agreements provide constitutional law for governance in Indian Country. The first is that negotiation may be a threat to sovereignty when one party views the other’s right to self-determination as up for grabs. The second is that the United States has asserted the authority to break its treaties and agreements with Indian Nations. How can negotiations lead to constitutional law for governance if they do not end in constitutional entrenchment of sovereignty? When it comes to the fifty states, for example, U.S. law takes for granted that their rights to govern are rights to bargain with: A state has a right to govern that it may assert or trade on its own terms. It is against this backdrop that we might celebrate negotiations as a form of constitutional federalism and an alternative to zero-sum battles in the courts.<sup>13</sup> By contrast, while Indian Nations have continued to exercise sovereignty beyond the reach of U.S. law, taking for granted that it neither constitutes nor defines their self-determination, the U.S. government has at times treated them as if recognition of their right to self-determination were up for grabs. As if, in other words, a Tribal government’s rights are something to bargain about, rather than something for the Tribe to bargain with, should it so choose. And against this backdrop, we might worry about the limits of negotiation to provide constitutional law for governance in Indian Country.

Taking these objections seriously requires working out precisely what we might mean when we call Indian treaties and agreements “constitutional law.” Constitutional law might mean formal entrenchment against change through normal political channels, such as congressional legislation or administrative

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relationship of interdependence, solidarity, and trust with a European-derived colonial power”).

11. See, e.g., Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 *FED. LAW.* 38, 38 (2006).
12. See, e.g., CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 104 (1987) (suggesting that Indian treaties “and treaty substitutes should be construed in the same manner as constitutional provisions”); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 *HARV. L. REV.* 381, 408–17 (1993) (arguing that Indian treaties provide “quasi-constitutional” law for intersovereign relationship between Indian Nations and United States).
13. See, e.g., Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 *COLUM. L. REV.* 1595, 1665–66 (2014); Erin Ryan, *Negotiating Federalism*, 52 *B.C. L. REV.* 1, 4–5 (2011).

lawmaking.<sup>14</sup> Under current U.S. law, the Constitution does not formally entrench the United States's commitment to Tribal self-determination, which is reflected not only in treaties and agreements, but also in federal statutes and executive policies. Yet, this Article argues, Indian treaties and agreements embody constitutional law for our Tribal republic.<sup>15</sup> They help constitute contemporary Tribal self-determination and the intergovernmental relationship between Indian Nations and the United States. These treaties and agreements constitute political institutions and express fundamental values of mutual respect among peoples. Despite the absence of formal constitutional entrenchment in U.S. law, Indian Nations have maintained traditions of self-governance and continued to negotiate the terms of their association with other peoples. Recognizing Indian Nations' fight to turn rights to bargain *about* into rights to bargain *with* can open up unexamined questions about the promise and potential problems of constitutional negotiations.<sup>16</sup>

### I. A CONSTITUTION IS AS A CONSTITUTION DOES

In the United States, we think we know what our Constitution is. Our Constitution is a written document that lists our foundational political institutions and our fundamental rights. In listing powers and rights, the

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14. See, e.g., Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 417–28 (2007) (distinguishing between multiple functions of constitutional law and contrasting “constituting the government” with “entrenching structures and rights against change”).

15. In referring to “our Tribal republic,” I mean to resist the kind of erasure that occurs when we talk about sovereignty and governance in America by describing the United States as a “federal republic” where sovereignty is divided among the federal government and the fifty states. Cf. FREDERICK E. HOXIE, *THIS INDIAN COUNTRY: AMERICAN INDIAN ACTIVISTS AND THE PLACE THEY MADE* 13–44 (2012) (discussing how Indian Nations have been “erased from the map”); Joseph William Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1, 2 (2014) (explaining that typical map of U.S. “erases the...federally recognized Indian Nations within the borders of the country”). There are 573 federally recognized Indian Nation governments whose sovereignty does not depend upon the U.S. Constitution. See *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 83 Fed. Reg. 34,863, 34,863 (July 23, 2018). This Article does not discuss the constitutional laws of these many Tribal governments, but instead focuses on the role of negotiation in constituting intergovernmental relationships within the American republic. It does not assume, or invite the reader to assume, that “American federal law [is] the definitive source of controlling legal precedent” on questions of Indian Nations' self-governance. Porter, *supra* note 4, at 1598.

16. See generally Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011) (discussing a “positive puzzle of constitutional commitment” to “constitutional rules and institutions” by “powerful social and political actors”).

Constitution removes certain questions from the negotiating table. It puts off the table whether we'll be a democratic republic or a hereditary dictatorship. It puts off the table whether we'll have the right to criticize our political representatives. It puts off the table whether the government can lock us up and throw away the key. (Or so we might hope.)<sup>17</sup>

The Constitution, in other words, is a document that lists things we would like to take for granted about politics and law. But that is not all our Constitution is or does. It not only entrenches legal rules against normal politics, but also constitutes institutions and expresses fundamental values of the republic.

### **A. Entrenchment**

The typical way of thinking about the Constitution assumes formal entrenchment to be the distinguishing feature of constitutional law. The U.S. Constitution, of course, does not take change entirely off the table. It can be amended. But amendment under Article V is an arduous process, one that has happened rarely throughout American history. What the Constitution does, in other words, is put some options off the table of ordinary politics.

We may recognize that the story of constitutional entrenchment is a complicated one. Article V is the formal way to amend the Constitution. But it may not be the only way, functionally speaking. Public mobilization and deliberation may be another way, at least on some influential accounts. Judicial deliberation may be another, if critics of the Supreme Court are to be believed. Perhaps our constitutional tradition admits of legislative amendment as well, again, functionally speaking. The creation of the modern administrative state, for example, may display all three forms of functional constitutional amendment.

### **B. Constituting Institutions**

Thinking about the administrative state invites us to see constitutional law for what it does, not just what it (formally) is. The Constitution not only entrenches legal rules against change. It also constitutes political institutions.

The Constitution's constitutive functions are easy to see. The document's first three articles constitute Congress as the national legislature, the President

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17. In 2018, however, the Supreme Court concluded that immigration statutes do not require periodic bond hearings for several classes of immigration detainees. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018).

as an executive officer, and the Supreme Court as a judicial body. Articles I through III lay out qualifications for office and limit the scope of each institution's authority, among other things. The Bill of Rights further constitutes political arrangements by specifying rights against government action.

As “rules of the game,”<sup>18</sup> governmental structure and individual rights are institutions that shape interactions among government actors and between government and private parties. Increasingly, we are aware that many of our governance institutions are constituted not by formally entrenched constitutional law, but rather through negotiation.

Consider, for example, federalism's role in our democracy. Federalism has become a partisan system, through which our political parties push, pull, and parlay over policy.<sup>19</sup> The constitution of this contemporary federalism depends in no small measure upon negotiations.<sup>20</sup> The U.S. Constitution provides some contours while negotiations between the federal and state governments provide much of the substance of federalism.

### C. Expressing Fundamental Values

Constitutional law not only constitutes institutions but also expresses some fundamental values of the American republic. (Some, but not all.) The Bill of Rights, for example, is “more than a text for exegesis”; it is also “a constitutional motif, a cadence of our rights.”<sup>21</sup> From childhood on, many Americans are taught that the rights enshrined in the Constitution are fundamental values, and we learn a constitutional grammar with which to debate about what we should—and shouldn't—take for granted in our polity.

## II. INDIAN TREATIES AND AGREEMENTS AS CONSTITUTIONAL LAW

Our common constitutional grammar usually has little to say about Indian Nations. Yet before there was a U.S. Constitution, there were treaties

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18. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990) (“Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.”).

19. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1078–79 (2014) (developing theory of partisan federalism and describing examples including legal challenge by Republican state officials to Patient Protection and Affordable Care Act).

20. See *infra* Subpart III.A (discussing negotiated governance theory and role of negotiations in constituting contemporary federalism).

21. Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 751 (1980).



among Indian Nations and between Indian Nations and colonial governments. Indigenous traditions of treaty-making are based upon mutual recognition and respect among peoples. Today, much of the contours and substance of federal recognition of Tribal sovereignty depend upon treaties and other agreements.<sup>22</sup> Though not compiled in a single “Constitution,” these treaties and agreements are indeed constitutional law: They constitute institutional rules of the game and express fundamental values about those institutions.

### A. The Constitutive Features of Treaties and Agreements

There are 573 federally recognized Indian Nations and Alaska Native governments. Their place within the federal system is not specified in the U.S. Constitution, which says little about Indian Nations beyond recognizing them as separate sovereigns. Treaties and other agreements, however, perform constitutional functions in Indian Country.

#### 1. Indian Treaties

First, as an historical matter, treaties between the United States and Indian Nations provide constitutional rules for governance in Indian Country. And while Congress ended formal treaty-making with Indian Nations in 1871, constitutional negotiations have continued in Indian Country. For example, negotiations memorialized in statutes or executive orders have become “treaty substitutes.”<sup>23</sup> And Indian Nations continue to demand a democracy based upon mutual respect and negotiations among peoples.<sup>24</sup>

Indian treaties play important constitutive functions. To take a straightforward example, Indian treaties recognize the boundaries of Indian lands and thus help to constitute Indian Country over which Tribes have federally recognized sovereign authority. But more than the settlement of

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22. Indian Nations have their own legal traditions that constitute their Tribal sovereignty. See Porter, *supra* note 4, at 1598 (referring to “the written and unwritten customary law, documents, and treaties that are the roots of the Indian Nation’s own legal traditions”). This Article addresses the constitution of intergovernmental recognition and relations in Indian Country, not the constitution of an Indian Nation’s inherent sovereignty.

23. WILKINSON, *supra* note 12, at 8, 63–64.

24. See, e.g., Sierra Crane-Murdoch, *Standing Rock: A New Moment for Native-American Rights*, NEW YORKER (Oct. 12, 2016), <http://www.newyorker.com/news/news-desk/standing-rock-a-new-moment-for-native-american-rights> [https://perma.cc/V746-DYV5] (discussing social movement objecting to construction of Dakota Access oil pipeline across lands of Standing Rock Sioux Tribe and describing Tribe’s lawsuit challenging federal government’s failure to consult adequately with Tribe about proposed pipeline).

boundaries is at stake in Indian Nations' demands for intergovernmental negotiation. Constitutional negotiations between states and the federal government take for granted constitutional recognition of the states. By contrast, "Indian people have long fought for the right to govern themselves as much as possible."<sup>25</sup> And their demands for negotiation are therefore also demands for recognition of Tribal self-determination: "Each time a state or local government agrees to negotiate with an Indian tribe and then to execute a binding agreement with an Indian tribe, that non-Indian government is recognizing the legitimacy of the tribal government."<sup>26</sup> Thus, negotiations in Indian Country may be constitutive processes of mutual recognition in their own right.

## 2. Self-Government Contracts

Second, as a contemporary matter, agreements between the United States and Indian Nations constitute frameworks for governance in Indian Country. Since the 1970s, the United States's policy towards Indian Nations has been to support Tribal self-determination.<sup>27</sup> Self-determination contracts provide another example of constitutive agreements between the United States and Indian Nations. Under the Indian Self-Determination and Education Assistance Act of 1975, there are some mandatory provisions in all self-determination contracts, but Indian Nations and the United States may negotiate other terms.<sup>28</sup> Under these contracts, the U.S. provides funding to Indian Tribal governments, which use the funding to develop Tribal institutions and to provide government services to Tribal citizens.<sup>29</sup>

## 3. Intergovernmental Agreements With States and Localities

Third, Indian Nations also enter into agreements with states and localities that constitute frameworks for resolving conflicts about governance in Indian Country. Jurisdictional questions in federal Indian law are complex and the

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25. Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 87 (2007).

26. *Id.*

27. See, e.g., Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1778 (2017) (describing contemporary Tribal self-determination policy and explaining its origins).

28. 25 U.S.C. § 5329 (Supp. IV 2016) (formerly cited as 25 U.S.C. § 450l (2012)).

29. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 98-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423 (Supp. IV 2016)).

answers can often be uncertain under the black letter law. Increasingly, Indian Nations are entering into innovative agreements with state and local governments to provide frameworks for resolving conflicting claims to jurisdiction.<sup>30</sup> These agreements might address the authority of Tribal, state, and local police or the allocation of authority to tax, to name but two examples.

#### 4. Private Contracts

Fourth, agreements between Indian Nations and private parties also help constitute governance in Indian Country. A private corporation may, for example, lease land from an Indian Nation to operate a business. The lease may contain a provision under which the corporation consents to jurisdiction in Tribal court.<sup>31</sup> And this consent may, for example, constitute the basis for federal recognition of Tribal jurisdiction.

#### B. The Expressive Function of Treaties and Agreements

Indian treaties and agreements may also express fundamental values about relationships among peoples. And in that sense, too, they may be constitutional. For example, the Gus-Wen-Tah, also known as the Two Row Wampum, symbolizes for the peoples of the Haudenosaunee confederacy values of “peace and friendship” among separate peoples.<sup>32</sup> The Wampum has “two rows of purple” that “symbolize two paths or two vessels, travelling down the same river together,” with neither treaty partner “try[ing] to steer the other’s vessel.”<sup>33</sup>

This understanding of the fundamental values expressed in treaty relationships has found its way into federal Indian law. In *Worcester v. Georgia*, for example, the Supreme Court looked to treaties between the Cherokee Nation and the United States to “recogniz[e] the national character of the Cherokees, and their right of self-government.”<sup>34</sup> Further, the Court

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30. See Fletcher, *supra* note 25, at 74.

31. See *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014), *aff’d by an equally divided court*, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (mem.); Matthew L.M. Fletcher, *Contract and (Tribal) Jurisdiction*, 126 YALE L.J. FORUM 1, 6 (2016) (discussing choice of law provision in the *Dollar General* case, which “point[ed] to tribal court jurisdiction”).

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

33. *Id.*

34. 31 U.S. 515, 519 (1832).

made clear that Indians do not “submit[] as subjects to the laws of a master” when they enter into treaties with the United States; rather, they retain their “national character” as recognized by the treaty relationship.<sup>35</sup>

Thus, treaties and other agreements are constitutional law in two senses. First, they constitute institutional rules of the game for governance in Indian Country and relationships among Indian Nations and non-Indians. Second, they express fundamental values about those institutions.

### III. ENTRENCHMENT AND CONSTITUTIONAL NEGOTIATION IN INDIAN COUNTRY

The Supreme Court has not held that these institutions and values are formally entrenched in constitutional law. To the contrary, it has held that the federal government has a plenary power when it comes to Indian affairs. In *Santa Clara Pueblo v. Martinez*, for example, Justice Thurgood Marshall, writing for the Court, stated that “Congress has plenary authority to limit, modify or eliminate the powers of [Indian] self-government.”<sup>36</sup> How have these institutions and values, the products of constitutional negotiations between Indians and non-Indians, persisted notwithstanding the plenary power doctrine? How have these negotiations succeeded in entrenching recognition of Indian self-determination as a norm within federal Indian law and policy?

The story of this political entrenchment is complex. Taking negotiations between the federal government and states as its point of comparison, this Part focuses on the ways in which Indian Nations have fought to transform rights to bargain *about* into rights to bargain *with*.

#### A. Negotiated Governance Theory

We might think of democracy as a process for negotiating differences in a divided world.<sup>37</sup> And we might, as political theorist Iris Marion Young did, envision federalism in terms of relationships among communities who “ought to negotiate the terms and effects of the relationship.”<sup>38</sup>

Something like this vision of democracy is implicit in recent discussions of federalism in the United States. Professor Cristina Rodríguez, for example,

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35. *Id.* at 555.

36. 436 U.S. 49, 56 (1978).

37. IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 110–11 (2000).

38. *Id.* at 259.

has argued that the value of federalism is “its creation of a framework for ongoing negotiation of differences large and small.”<sup>39</sup> This might mean the familiar story of states as culturally bounded and distinct communities, but that story is hard to take seriously today, whatever its historical merits. Much closer to the mark is a story of states as partisan political communities competing and negotiating over national policies.<sup>40</sup>

In this story, constitutional law does not so much set the normative structure of federalism as it assigns legal entitlements that may be up for grabs in constitutional negotiations. As Professors Erin Ryan and Aziz Huq have separately argued, institutions can and do exchange governance entitlements, just as private parties can and do exchange property rights.<sup>41</sup> Where the constitutional allocation of authority is uncertain, we can expect constitutional negotiations among the states and between the states and the federal government.<sup>42</sup> Because constitutional uncertainty is inevitable, constitutional bargaining is inevitable.

Negotiated governance theory, at least in some of its iterations, emphasizes the value of what is up for grabs in constitutional allocations of authority. The world changes, and constitutional negotiations change the allocation of authority with it.<sup>43</sup> Constitutional bargaining is often desirable, much as bargaining among private property owners is desirable. Professor Ryan has argued that “intergovernmental bargaining offer[s] a means of understanding the relationship between state and federal power that differs from the stylized model of zero-sum federalism dominating political discourse.”<sup>44</sup> In the Supreme Court, for example, litigants battle over whether a problem is “truly national” or “truly local,” with the winner (either the national government or the states) taking all.<sup>45</sup> Bargaining between the states and the federal governments can be an alternative to this zero-sum game, as

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39. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2094 (2014); cf. Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1962 (2014) (“[F]ederalism can serve as a robust, distinctively American strategy for institutionalizing opposition and ensuring our democracy thrives.”).

40. See Bulman-Pozen, *supra* note 19, at 1079 (exploring how states have “functioned as important sites of partisan conflict”).

41. See Ryan, *supra* note 13, at 4–5; Huq, *supra* note 13, at 1665–66.

42. See Ryan, *supra* note 13, at 4–5.

43. See Huq, *supra* note 13, at 1665–66 (“[N]egotiated change may stabilize the overall constitutional dispensation by staving off economic or social crisis.”). *But cf. id.* at 1626 (explaining that some governance entitlements are inalienable).

44. Ryan, *supra* note 13, at 4.

45. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

long as constitutional law allows enough to be up for grabs in constitutional negotiations.<sup>46</sup>

## B. Rights to Bargain About

A complete picture of negotiated governance in the United States cannot exclude constitutional negotiations in Indian Country. And this picture suggests that constitutional negotiation can also be a zero-sum game if too much is up for grabs.

The question I want to provoke is how much the promise of constitutional negotiations depends upon recognition that (at least some) institutional rights are not rights to bargain about. States have rights to bargain with. Perhaps most fundamentally, our constitutional tradition has always recognized states as legitimate governments with police power over their territories. This non-derogable entitlement to govern is a right that the state can bargain with in negotiations with the federal government. That is, the working assumption is that—whatever debates there may be at the margins—constitutional negotiation follows an initial allocation of rights rather than precedes that allocation.

With the plenary power doctrine lurking in the background, Indian Nations' rights to govern, by contrast, are not always taken for granted. Instead, their rights have been bargained *about* by other parties.

From the first, colonizing powers treated Indian rights as rights to bargain *about*. In *Johnson v. M'Intosh*, the Supreme Court held that “discovery [of Indigenous lands] gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments.”<sup>47</sup> The doctrine of discovery was a bargain struck among European powers about Indigenous rights, with the aim of avoiding European wars over Indigenous lands.<sup>48</sup>

When U.S. negotiators did not take for granted that Indian Nations had title to their lands, or believed that Indian Nations would and should disappear, they did not negotiate in good faith and sometimes drove a brutal

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46. As one state environmental official put it in an interview with Professor Ryan, “[T]here usually is not a clear right answer—both parties can be right [about who should do what], so we look for solutions that work for everybody.” Ryan, *supra* note 13, at 82 (internal quotations omitted).

47. 21 U.S. 543, 573 (1823).

48. Davis, *supra* note 27, at 1766–67.

bargain. When the metes and bounds of federal recognition of Tribal sovereignty seem up for grabs today, we see the same dynamic.

For example, in the *Montana* line of cases, the Supreme Court has developed common law restrictions on federal recognition of Indian Nations' sovereign authority over Indian territories.<sup>49</sup> This line of cases has held that Indian Nations may not have jurisdiction over nonmember activities on land held in fee simple within a reservation. There is a great deal of jurisdictional uncertainty as a result.

Unsurprisingly, therefore, we see a lot of bargaining about jurisdictional boundaries in Indian Country. For instance, Indian Nations may bargain with a corporation doing business in Indian Country, asking that the corporation expressly consent to jurisdiction in Tribal court. Or the bargain may be tacit: A corporation may over the years frequently sue as a plaintiff in Tribal court, thus tacitly acknowledging the court's authority.

We also see, however, zero-sum gaming. A corporation that has signed an agreement with an Indian Nation may then go into federal court seeking protection from Tribal jurisdiction.<sup>50</sup> Or a corporation that has sued Indians in Tribal court many times over the years may go into federal court challenging Tribal jurisdiction when an Indian sues it in Tribal court.<sup>51</sup> In the absence of (at least some) clear constitutional safeguards, we see non-Indians treating Indian Nations' rights to govern as rights to bargain about.<sup>52</sup> We see years spent in litigation before—and, more importantly for my point, after—negotiations about who holds the right in question.<sup>53</sup>

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49. See generally *Montana v. United States*, 450 U.S. 544 (1981).

50. See *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014), *aff'd by an equally divided court*, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (mem.); see also note 31 (discussing choice of law provision in *Dollar General* case).

51. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 323 (2008); *id.* at 346 (Ginsburg, J., dissenting) (explaining that the non-Tribal plaintiff corporation challenging Tribal jurisdiction had “regularly filed suit” in Tribal Court).

52. See Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57, 57 (2006) (arguing that “Tribal governments considering entering into cooperative agreements with federal, state, or local governments ought to maintain a healthy skepticism regarding the non-tribal governments sitting across from them at the negotiating table”).

53. In framing the problem thus, I have been influenced by Jacob T. Levy, *Self-Determination, Non-Domination, and Federalism*, 23 HYPATIA 60, 72–73 (2008).

### C. Building Rights to Bargain With

Even so, much of daily governance in Indian Country carries on without regard to the Supreme Court's assertions of federal plenary power. As Sarah Krakoff has summarized it, "[e]very day in Indian Country, non-Indians do business with tribes and tribal members and enter into relationships, commercial and otherwise, that link their fates."<sup>54</sup> Indian Nations do not see their right to self-determination as a right to bargain about.<sup>55</sup> And Indian Nations have, in their dealings with non-Indians, been remarkably successful in building rights to bargain *with*, even in the absence of formal constitutional entrenchment.

#### 1. Doctrinal Surrogates

First, in litigation, Indian Nations have relied upon general principles of common law, rules of statutory interpretation, and structural surrogates to create space for constitutional negotiations.

As government contractors, Indian Nations have framed cases in terms of general contract law as a way of holding the United States to its contractual promises. Indian Nations and the United States have entered into contracts that provide billions of dollars in federal funding to Tribal governments. Sometimes the federal government has sought to avoid its contractual obligations. In a series of cases, the U.S. Supreme Court has held that the United States is "as much bound by [its] contracts as are individuals" and must pay contract support costs to Tribal governments once Congress has appropriated enough unrestricted funds to pay those contracts.<sup>56</sup> The general applicability of common law principles creates space for interest convergence:<sup>57</sup> The Chamber of Commerce and the National Defense Industrial Association have filed amicus briefs in support of Indian Nations in these contracting cases

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54. Krakoff, *supra* note 4, at 751.

55. *See id.* at 756.

56. *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 191 (2012) (quoting *Lynch v. United States*, 292 U.S. 571, 580 (1934)); *see id.* at 201 (holding that "it is the Government—not the Tribes—that must bear the consequences of Congress' decision to mandate that the Government enter into binding contracts for which its appropriation was sufficient to pay any individual tribal contractor, but 'insufficient to pay all the contracts the agency has made.'" (quoting *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 637 (2005))).

57. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (positing principle of interest convergence under which "interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").



because they too stand to gain from recognition that the federal government is bound by its contracts.<sup>58</sup>

Rules of statutory interpretation have also played an important role in constituting federal Indian law's recognition of Tribal sovereignty. The Indian canon of construction requires federal courts to construe Indian treaties as the Indians would have understood them and to resolve ambiguities in federal statutes to avoid infringing Tribal sovereignty or abrogating Tribal property rights.<sup>59</sup> If Congress wishes to restrict Tribal sovereignty, then it must marshal the votes to pass a new law clearly stating so.

The Indian canon of construction is closely related to structural surrogates for substantive safeguards of Tribal sovereignty.<sup>60</sup> Some of these structural surrogates are statutory: Indian Nations have successfully argued, for example, that a particular federal agency lacks statutory authority to abrogate Tribal sovereignty. Other structural surrogates have a constitutional dimension. Indian Nations, most recently in *Nebraska v. Parker*, have successfully argued that federal courts—as opposed to Congress—are not competent to declare that the boundaries of Indian reservations have been diminished by non-Indian settlement.<sup>61</sup> These doctrines provide contours for constitutional negotiations. For example, the Tribe's victory in *Nebraska v. Parker* meant as a practical matter that the Tribe would be in a position to “make cooperative agreements” regarding taxation and revenue-sharing with the State, a point discussed at oral argument before the Supreme Court.<sup>62</sup>

## 2. Building and Bargaining With Governance Capacity

Second, Indian Nations have relied upon building capacity to get things done. As Former Assistant Secretary for Indian Affairs Kevin Washburn recently put it, “[o]ne of the most powerful practical justifications for tribal

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58. See Brief of the Chamber of Commerce of the United States of America & National Defense Industrial Ass'n as Amici in Support of Respondents, *Salazar*, 567 U.S. 182 (No. 11-551), 2012 WL 1132333; Brief of Amici Curiae the Chamber of Commerce of the United States of America, et al., in Support of the Cherokee Nation and Shoshone-Paiute Tribes, *Cherokee Nation of Okla. v. Thompson*, 543 U.S. 631 (2005) (No. 02-1472), 2004 WL 1386408.

59. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031–32 (2014).

60. Cf. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1756–58 (2010) (discussing procedural surrogates for substantive rights for undocumented immigrants).

61. 136 S. Ct. 1072, 1082 (2016).

62. Transcript of Oral Argument at \*33, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406), 2016 WL 524813.

self-governance is fiscal prudence. Because of the success of self-governance programs, it is widely understood that the federal taxpayer gets more value from each dollar spent when tribes are contracted to run federal programs.”<sup>63</sup>

In her novel *The Round House*, Ojibwe writer Louise Erdrich has powerfully illustrated the way that building capacity is linked to demands for recognition.<sup>64</sup> Joe Coutts, a thirteen-year-old Tribal citizen and protagonist of the novel, asks his father, Judge Bazil Coutts, why he remains on the reservation and works so hard crafting his judicial opinions. Judge Coutts explains:

Everything we do, no matter how trivial, must be crafted keenly. We are trying to build a solid base here for our sovereignty. . . . Our records will be scrutinized by Congress one day and decisions on whether to enlarge our jurisdiction will be made. . . . *We want the right to prosecute criminals of all races on all lands within our original boundaries.* Which is why I try to run a tight courtroom, Joe.<sup>65</sup>

As Native Nations have built governance capacity, they have obtained federal recognition of rights to regulate pollution within their territories, to develop their economies, and to prosecute non-Indians for some crimes in Indian Country. Tribes’ unique governance capacities provide a basis for constitutional negotiations even in the absence of formal constitutional entrenchment.

### 3. Linking Issues for Negotiation

Third, as Professor Bob Anderson has explained in a series of articles on water rights negotiations, Indian Nations have reached successful settlements when they have linked seemingly disparate issues together in negotiations with states and private parties.<sup>66</sup> Taking the Snake River Water Rights settlement as a template, Professor Anderson explains that the settlement process may be used “to achieve various goals [for all parties] that could not otherwise be

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63. Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. FORUM 200, 219 (2017).

64. LOUISE ERDRICH, *THE ROUND HOUSE* 229–30 (2012).

65. *Id.*

66. See, e.g., Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 23, 30–31 (2006) (explaining components of Snake River Water Rights settlement, including those components that “serv[ed] as the incentive for the State of Idaho and private water users to support a favorable settlement of tribal claims”).

achieved within the confines of a general stream adjudication.”<sup>67</sup> In the Snake River case, for example, the Nez Perce Tribe negotiated with the United States, the state of Idaho, and private interest groups for a settlement that addressed not only the Tribe’s water rights but also the protection of endangered species, which was of particular concern to non-Indians in the settlement.<sup>68</sup> “[T]he more issues the merrier,” as Professor Carrie Menkel-Meadow has put it.<sup>69</sup>

At the same time, linking different issues in negotiation is a fraught process in Indian Country. When it comes to negotiations about economic development under the Indian Gaming Regulatory Act (IGRA), for example, Indian Nations have fought to keep some issues off the table as inconsistent with states’ duties to negotiate in good faith under the Act.<sup>70</sup> This might seem bad strategy, or inconsistent with a commitment to mutual respect among peoples. But the issues that Indian Nations seek to put off the table in IGRA negotiations often have to do with their rights to govern as territorial sovereigns, such as their right to develop environmental regulations for their lands. Generally, the right to territorial self-governance is taken for granted in negotiations between states and the federal government. By contrast, much of the fractiousness in IGRA negotiations arises when states seek instead to treat an Indian Nation’s right to govern as up for grabs.<sup>71</sup>

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67. *Id.* at 32 (quoting S. REP. NO. 108-389, at 2–3 (2004)).

68. *See id.* at 30–31.

69. Carrie Menkel-Meadow, *Why We Can’t “Just All Get Along”: Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 J. DISP. RESOL. 5, 21 (“As any negotiation teacher and practitioner well knows, the more issues the merrier.”). Professor Menkel-Meadow’s insight builds upon psychological literature, finding that “human beings have very different preferences and interests which will often be complementary, not conflicting.” Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 32 (2000); *see also* Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 77 (1997) (“[A] successful negotiation requires an agenda broad enough to allow the parties to discover common ground from which they can fashion an agreement.”).

70. *See, e.g.*, *Big Lagoon Rancheria v. California*, 789 F.3d 947, 955 (9th Cir. 2015) (inquiring whether state’s demand for environmental and land use restrictions “necessarily constitutes bad faith” under IGRA).

71. *See id.* at 952–54 (considering and rejecting state’s argument that Indian Nation lacked sovereign authority over parcels at issue); *cf.* Tsosie, *supra* note 69, at 84–85 (raising concern that “there is little common ground between states and tribes upon which to build a meaningful negotiated agreement on Indian gaming,” and explaining this concern arises from “historical conflict between states and tribes over tribal sovereignty and cultural survival”).

#### 4. Normative Leveraging

Indian Nations, aware that non-Indians may not recognize their right to self-determination, often seek to exert normative leverage to obtain recognition. As Richard Shell defines it, “normative leveraging” consists of appeal to standards, norms, and moral principles that “the other party views as legitimate and relevant.”<sup>72</sup> Sometimes Indian Nations have leveraged shared norms and tapped into interest convergence, as in the government contract cases discussed above.

In other instances, Indian Nations have sought to connect their normative status as unique, preconstitutional sovereigns to shared constitutional norms. Consent of the governed plays a central role in the American constitutional tradition. Indian Nations continue to frame a “compelling case” for recognition of their rights to govern by “point[ing] out the embarrassing fact that they never consented to” U.S. rule.<sup>73</sup> This helps explain why treaties play such an important role in normative demands in Indian Country. As Justice Black once put it, “Great nations . . . should keep their word.”<sup>74</sup> Justice Black’s words have echoed throughout federal Indian policy since.<sup>75</sup> An Indian Declaration of Independence, as Vine Deloria explained, could point to Indian treaties as constitutive of a democratic relationship between Indian Nations and the United States.<sup>76</sup>

There is a risk of underestimating the role of principled argument when thinking about federalism in terms of exchanges of entitlements between governments. A picture of negotiated governance that emphasizes uncertainty about federalism’s values and focuses upon what is up for grabs in negotiations may miss the importance of such appeals to principle and underplay the ways

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72. G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 44 (2d ed. 2006).

73. Robert A. Williams, Jr., *Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System*, 2 *REV. CONST. STUD.* 146, 149 (1995).

74. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

75. Their most recent echo was this: “My Administration is committed to tribal sovereignty and self-determination. A great Nation keeps its word, and this Administration will continue to uphold and defend its responsibilities to American Indians and Alaska Natives.” Nat’l Native American Heritage Month, 2017, Pres. Proc. No. 9669, 82 Fed. Reg. 51,543 (Oct. 31, 2017). We will see if the President makes good on that promise of recognition when it comes time for the next constitutional negotiation.

76. VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 253–55 (1985) (developing model for restoration of treaty negotiations between Indian Nations and United States).

in which the process of negotiation itself can constitute and entrench mutual recognition.

### CONCLUSION

For many Americans, things that we have taken for granted now seem up for grabs. Ours is a world in which we cannot take for granted that the President will recognize duly-appointed federal judges as judges. Nor can we take for granted that one political party will recognize the other party's entitlement to govern. And it may be that ours is a legal system that will no longer take for granted that all persons on U.S. soil have rights the government cannot violate.

For some Americans, the hard work of building a republic based upon mutual recognition and respect did not begin in 2016. Indian Nations have long been both "within and without" the constitutional republic,<sup>77</sup> wanting to take for granted things that other Americans presume are up for grabs. Perhaps part of the way forward requires us to recognize that this, too, is America. Perhaps we have much more to learn from the constitution of our Tribal republic.

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77. Angela R. Riley, *Native Nations and the Constitution: An Inquiry Into "Extra-Constitutionality"*, 130 HARV. L. REV. FORUM 173, 177 (2017) (asking "what exactly does it mean for a sovereign to be both within and without the federal system").