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# INDIAN NATIONS AND THE CONSTITUTION

*Joseph William Singer*

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## INDIAN NATIONS AND THE CONSTITUTION\*

*Joseph William Singer\*\**

*Abstract*

This Constitution Day speech focuses on how the Constitution has been interpreted both to protect and to undermine the sovereignty of Indian nations. The good news is that both the text of the Constitution and the practice of the United States have recognized Indian nations as sovereigns who pre-existed the creation of the United States and who retain their inherent original sovereignty. The bad news is that the Constitution has often been interpreted by the Supreme Court to deny Indian nations protection for their property rights and their sovereignty. Most Americans are not aware of the history of interactions between the United States and Indian nations and most lawyers and law students never study the ways the Constitution treats Indian nations and their citizens differently from non-Indians. It is important for Americans to better understand the ways that the Constitution protects Indian nations from continued conquest and to understand the ways that the Supreme Court has interpreted the Constitution so as to deny equal rights to Indians and Indian nations. Limiting tribal sovereignty or harming tribal property without tribal consent is an act of conquest. It is an act that cannot be deemed consistent with our democratic values. Conquest is an historical fact that cannot be undone, but we can recognize that conquest was incomplete and that tribal sovereignty persists alongside that of the states and the federal government. The least we can do to honor the Constitution is to recognize the reality of conquest while committing not to do it ourselves. We can do that by consulting with Indian nations over matters that concern them; we can honor our treaty commitments. We can follow the lead of Chief Justice Marshall who lamented the fact of conquest and counseled the United States not to do it anymore.

I. INTRODUCTION

Five days after taking office, President Trump cancelled President Obama's order to prepare an environmental impact statement for the Dakota Access pipeline.<sup>1</sup> It was

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\*\* Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow, Mira Singer, Bob Anderson, Seth Davis, and Kevin Washburn. This project was supported in part by funding provided through the research program at Harvard Law School. This speech was given as the Constitution Day Address at the University of Maine School of Law on September 18, 2017. I want to also thank Dean Danielle Conway and Professor Jennifer Wriggins for inviting me to give that lecture. The speech has been edited to bring it up to date and to acknowledge the proclamation issued by President Trump on October 31, 2017, acknowledging tribal sovereignty and committing to engage in government-to-government consultation with Indian nations.

<sup>1</sup> See Tom Perez, *Trump is Breaking the Federal Government's Promises to Native Americans*, L.A. TIMES, Aug. 7, 2017, <http://www.latimes.com/opinion/op-ed/la-oe-perez-native-american-indians-trump-20170807-story.html> [<https://perma.cc/6ZWF-GPCN>]; Robinson Meyer, *Oil Is Flowing Through the Dakota Access Pipeline*, THE ATLANTIC (June 9, 2017), <https://www.theatlantic.com/science/archive/2017/06/oil-is-flowing-through-the-dakota-access-pipeline/529707/> [<https://perma.cc/B96J-FFCN>].

his first official action as President concerning Indian affairs. He did this without consulting the Standing Rock Sioux Tribe or the Cheyenne River Sioux Tribe. Five months later, oil began to flow through the pipeline. It went through “unceded” lands guaranteed to the Standing Rock Sioux by the Fort Laramie Treaties of 1851 and 1868.<sup>2</sup> The 1868 treaty is still in effect and it preserves tribal property rights in the adjacent Missouri River. Any pollution of that river would violate the property rights of the Standing Rock Sioux and the treaty commitments of the United States.<sup>3</sup>

President Trump was not concerned about the possibility that the pipeline might harm the tribe’s property and treaty rights. Nor did it matter to him that the residents of Bismarck, North Dakota had lobbied to protect themselves from the very thing the Sioux are now worried about.<sup>4</sup> When the oil began to flow, President Trump was overjoyed. “The Dakota Access pipeline is now officially open for business,” he said. “It’s up, it’s running, it’s beautiful, it’s great. Everybody is happy, the sun is shining, the water’s still clean. When I approved it, I thought I’d take a lot of heat. But I took none, actually none . . . .”<sup>5</sup>

That is a puzzling statement. David Archimbault, the Chairman of the Standing Rock Sioux Tribe, had a lot to say about Trump’s pipeline approval. He said, “just because oil is flowing today doesn’t mean it won’t leak in the future . . . . There’s an uneasy feeling that at any moment, this pipeline could pose a threat to our way of life.”<sup>6</sup> His concerns are not irrational. The pipeline has already leaked—several times.<sup>7</sup> If it leaks in the river, the Chairman tells us, it threatens the Sioux way of life. The 1868 Treaty promised the tribe that its current lands were “set apart for [the tribe’s] absolute and undisturbed use and occupation. . . .”<sup>8</sup> Pollution of the waters of the Missouri River bordering the Standing Rock Sioux Reservation would infringe

<sup>2</sup> Kimberley Richards, *This Standing Rock Map That Shows Where the Pipeline Would Be Puts the Impact in Context*, ROMPER, Nov. 4, 2016, <https://www.romper.com/p/this-standing-rock-map-that-shows-where-the-pipeline-would-be-puts-the-impact-in-context-21942> [<https://perma.cc/76MU-PJRM>]; Treaty of Fort Laramie of 1868, Apr. 29, 1868, 15 Stat. 635, <http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0998.htm> (Treaty with the Sioux – Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee – and Arapaho). Treaty of Fort Laramie of 1851, Sept. 7, 1851, 11 Stat. 749, <http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0594.htm> [<https://perma.cc/EL4Z-F2V8>] (Treaty with the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandas, and Arrickaras). On why the lands are “unceded,” see Carl Sack, *Invisible Nation: Mapping Sioux Treaty Boundaries*, (Feb. 18, 2017), <https://northlandia.wordpress.com/2017/02/18/invisible-nation-mapping-sioux-treaty-boundaries/> [<https://perma.cc/8PLK-95TZ>]; Jeffrey Ostler & Nick Estes, “*The Supreme Law of the Land*”: *Standing Rock and the Dakota Access Pipeline*, INDIAN COUNTRY TODAY, (Jan. 16, 2017), <https://indiancountrymedianetwork.com/news/opinions/supreme-law-land-standing-rock-dakota-access-pipeline/> [<https://perma.cc/JJ46-3PJK>].

<sup>3</sup> See Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, — U. COLO. L. REV. at 44 (forthcoming, 2018), <https://ssrn.com/abstract=3002867>; Gabriel S. Galanda, GALANDA BROADMAN, *Standing Rock, Sacred Stone Camp, DAPL: Sacred Treaty Lands & Waters*, (Sept. 2, 2016), <http://www.galandabroadman.com/blog/2016/9/standing-rock-sacred-stone-camp-dalp-sacred-treaty-lands-waters>.

<sup>4</sup> Amy Dalrymple, *Pipeline Route Plan First Called for Crossing North of Bismarck*, BISMARCK TRIBUNE, (Aug. 18, 2016), [http://bismarcktribune.com/news/state-and-regional/pipeline-route-plan-first-called-for-crossing-north-of-bismarck/article\\_64d053e4-8a1a-5198-a1dd-498d386c933c.html](http://bismarcktribune.com/news/state-and-regional/pipeline-route-plan-first-called-for-crossing-north-of-bismarck/article_64d053e4-8a1a-5198-a1dd-498d386c933c.html).

<sup>5</sup> Meyer, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Leaks found on Dakota Access pipeline system*, CBS NEWS, (May 22, 2017), <https://www.cbsnews.com/news/more-leaks-found-along-dakota-access-pipeline/>.

<sup>8</sup> Treaty of Fort Laramie of 1868, *supra* note 2 at art. II, ¶ 1.

on the tribe's property rights and would almost certainly violate the treaty commitments of the United States. However, the pipeline has yet to leak into the river and it may never do so. Thus, the question becomes, does the mere threat of pollution violate the treaty?

The answer depends on federal law governing treaty interpretation. The Supreme Court has held that treaties with Indian nations must be interpreted as the Indians themselves would have understood them, and that any ambiguities must be interpreted liberally to preserve tribal sovereignty and property rights.<sup>9</sup> The land promised to the Standing Rock Sioux is not fungible with other land; they cannot simply move somewhere else. They are, in their minds, where God meant them to be. Chairman Archimbault has explained that his tribe's way of life is threatened by the pipeline. If we interpret the 1868 Treaty the way the Standing Rock Sioux would have interpreted it in 1868, it is also true that the United States has already violated its promise to "set aside" the reservation for the "undisturbed use" of the tribe.

## II. WHY DO INDIAN NATIONS MATTER?

Why does it matter that the United States may be, even now, violating its sacred promises to the Standing Rock Sioux Tribe? It matters because the Constitution of the United States makes treaties the supreme law of the land. It matters because, in our constitutional system, we believe in the rule of law. It matters because we believe in democracy. But it is apparent that President Trump was not interested in learning about the Fort Laramie Treaties. He was not curious about how the tribe interpreted the rights they secured in those treaties in exchange for giving up most of their territory to the United States.

There is a moral to this story and it is not simply a complaint about President Trump. The President's failure to consult the Standing Rock Sioux Tribe or to consider whether the pipeline violates reserved treaty rights is a symptom of a larger problem. Yesterday was Constitution Day and a federal regulation requires institutions that receive federal funds to provide education about the history of the U.S. Constitution.<sup>10</sup> The U.S. Constitution established the United States but that act did not, and could not, by itself disestablish the Indian nations.

The Constitution is based on the notion of "we the people" and government "of the people, by the people, [and] for the people." The Indian nations did not sign the Constitution. How did they ever come under U.S. sovereignty? If democracy and self-determination are the normative bases of our constitutional system, then the only way they could legitimately become part of the federal system was through treaties.

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<sup>9</sup> *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) (Congressional intent to diminish the boundaries of an Indian reservation "must be clear" either because of text or "unequivocal evidence" of the "contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State"); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) ("[A] congressional decision [to abrogate tribal immunity] must be clear . . . . That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." (internal citations omitted)).

<sup>10</sup> See 36 U.S.C. § 106 (2012); Consolidated Appropriations Act, 2005, div. J, § 111, Pub. L. 108-447, 118 Stat. 2809, 3344-45 (Dec. 8, 2004); Notice of Implementation of Constitution Day and Citizenship Day on September 17 of Each Year, U.S. Dept. of Educ., May 24, 2005, <https://ifap.ed.gov/registres/FR05242005.html>.

That means, as the late Professor Philip Frickey explained, that treaties are quasi-constitutional documents; they define some of the contours of a legitimate relationship between Indian nations and the United States, and they limit the legitimate powers of the federal government in Indian country.<sup>11</sup> That means that the United States cannot live up to its own democratic and constitutional values if it does not respect tribal sovereignty. We cannot comply with those constitutional values if the United States refuses to consult with Indian nations about federal laws and actions that affect reserved tribal rights and interests. As the Dakota Access pipeline teaches us, we cannot do that if neither lawmakers nor the general public are aware that Indian nations are sovereigns recognized and protected by federal law.

Does the Constitution have anything explicit to say about tribal sovereignty? Quite a lot; it turns out that the Constitution both protects and undermines tribal sovereignty and property rights. The relation between tribal governments and the United States is complex and ever-changing. The Constitution recognizes tribal sovereignty and classifies tribes as nations. On the other hand, the Supreme Court, many Presidents, and Congress have interpreted the Constitution to allow conquest. The result of this good news/bad news situation is that conquest happened, but it was incomplete.

We live in the United States, but we Americans share this land with Indian nations. In a very real sense, we—all of us—live in Indian country. In that vein, I wish now to acknowledge that we are on land originally occupied by the Native inhabitants of this state. The fact that title to these lands has been transferred under federal or colonial law does not alter the historical connection between the land and the Native nations who lived and continue to live here. I wish to convey my thanks and my greetings to the four federally-recognized Indian nations in Maine: the Aroostook Band of Micmacs, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe of Maine, and the Penobscot Indian Nation. I recognize also that there are nations here not recognized by the United States; that lack of recognition does not mean they do not exist.

There are two things every American should know about Indian nations and the Constitution. First, the good news: compared to other constitutions around the world, our Constitution is remarkably protective of the sovereignty of Indian nations. In some ways, our Constitution has created a system that is more protective of tribal sovereignty than any other nation in the world.

Second, the bad news: our Constitution has been interpreted over time in ways that betray its most fundamental democratic values. The Supreme Court has allowed the U.S. government to deny basic constitutional rights for Indians that it confers to non-Indians. It has interpreted the Constitution to enable the United States to engage in conquest. The Supreme Court has itself engaged in acts of conquest by limiting tribal sovereignty without any legislative or constitutional authority to do so. Americans need to know both the good and the bad. We must be aware of the ways the law unjustly oppresses Indians and Indian nations, but we must be equally aware of the ways the law protects and affirms their equal worth and dignity.

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<sup>11</sup> See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 406–26 (1993); see generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

## III. HOW DOES THE CONSTITUTION PROTECT INDIAN NATIONS?

Let us start with the ways the Constitution protects Indian nations. The Constitution starts with the words, "We, the People, of the United States."<sup>12</sup> Were Indians part of that people? The answer is no. The Constitution was ratified by the thirteen states, not the Indian nations. By adopting the Constitution, the United States could not, and did not, become sovereign over Indian country. That is in accord with our democratic values. What does the Constitution say about Indian nations? It mentions Indians three times. The Constitution gives Congress the power to regulate commerce "with the Indian Tribes."<sup>13</sup> Notice that the Commerce Clause does not give Congress the power to regulate Indians or Indian nations, just commerce *with* them. The Constitution twice excludes "Indians not taxed" from the population count for the House of Representatives.<sup>14</sup> That has been interpreted to mean that Indians residing in Indian country were not state citizens because they were citizens of their own nations. And finally, the President, with the advice and consent of the Senate, has the power to make treaties with other nations, and from the very beginning of the Republic, has done so with Indian nations.<sup>15</sup> All this means that the Constitution explicitly recognizes Indian nations as nations whose sovereignty is separate from that of the United States and the several states and whose sovereignty persists despite the adoption of the Constitution.

The text of the Constitution does not grant the United States sovereignty over Indian nations. The only way they became legally associated with the United States was the treaty process, and treaties, by their very nature, are between sovereigns. Between 1778 when the first treaty was made between the United States and the Delaware Tribe and 1871 when treaty making ended, the Senate ratified more than 370 treaties with Indian nations.<sup>16</sup> Because we are a democracy and we base the Constitution on the consent of the governed, treaties are the only potentially legitimate, democratic source of federal power over Indian nations. While many of these treaties were the results of coercion, they at least recognize tribal sovereignty and property rights. The least the United States can do is to honor the promises it actually made to Indian nations. After all, the Indian nations paid an awful lot for those promises. And because treaties are the supreme law of the land, the United States—including the Congress, the President, and the Supreme Court—is bound by those treaties until they are repudiated.

Chief Justice John Marshall interpreted the relationship between the United States and Indian nations in the 1823 case of *Johnson v. M'Intosh*.<sup>17</sup> That case is

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<sup>12</sup> U.S. CONST. pmb1.

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>14</sup> U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

<sup>15</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>16</sup> See Hansi Lo Wang, *Broken Promises on Display at Native American Treaties Exhibit*, NPR (Jan. 18, 2015, 4:57 PM), <http://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit>; see generally 5 INDIAN AFFAIRS: LAWS AND TREATIES, S. DOC. NO. 76-194 (3d Sess. 1941) <http://digital.library.okstate.edu/kappler/index.htm>; *Treaties Between the United States and Native Americans*, THE AVALON PROJECT: LILLIAN GOLDMAN L. LIBR., YALE L. SCH., [http://avalon.law.yale.edu/subject\\_menus/ntreaty.asp](http://avalon.law.yale.edu/subject_menus/ntreaty.asp) (last visited January 25, 2017).

<sup>17</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). For a more detailed explanation of what *Johnson v. M'Intosh* means, see Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1 (2017).

often taught in property law courses and is just as often misunderstood. What it actually holds is that the United States asserted sovereignty over Indian nations only to the extent that it would not tolerate their allying with another nation such as Great Britain or France. The case also held that Indian nations cannot transfer fee simple title to land to non-Indians without the consent of the United States, although they are perfectly free to grant property rights to non-Indians under tribal law. Beyond that, Chief Justice Marshall held that the United States could acquire tribal lands only with the free and voluntary consent of the tribes.<sup>18</sup>

His opinion contains a great deal of highly offensive racist language and it forthrightly acknowledges that the Supreme Court cannot protect the Indian nations from past acts of conquest. At the same time, the *Johnson* opinion puts a brake on future conquest: no more seizure of tribal lands without consent of the tribes and no regulation of internal tribal affairs without a treaty by which the tribe agrees to federal regulation. Writing fifty years after adoption of the Constitution, Chief Justice John Marshall drew a line in the sand. Conquest, he suggested, was an injustice that could not be undone. But that did not mean the Constitution allowed it to continue into the future.

This framework is, in many respects, the current policy of the United States toward Indian nations. Since Congress adopted the Indian Self-Determination and Education Assistance Act of 1975,<sup>19</sup> it has been the general (but not completely consistent) policy of the United States to promote and respect tribal sovereignty and self-determination. After implementation of this Act, tribal governments have revived, they have rewritten their constitutions and tribal codes, they have drafted laws to protect the environment and natural resources, they have created or revitalized tribal courts and government agencies, they have embarked on tribal business enterprises, they have established tribal colleges, they have restored and taught tribal languages, and they have reinvigorated tribal cultural and religious practices.

The Supreme Court has often held that "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."<sup>20</sup> The Court has also held that Congress's power to legislate on Indian affairs is constitutional only if it is "tied rationally to the fulfillment of Congress's unique obligations towards the Indians."<sup>21</sup> Every President since Nixon has recognized or supported a "government-to-government relationship" between Indian nations and the United States, and every President since Clinton has required consultation by the United States with Indian nations over matters that affect them.<sup>22</sup> On October 31,

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<sup>18</sup> Singer, *supra* note 17, at 32–33.

<sup>19</sup> Pub. L. 93-638, 88 Stat. 2203 (1975), 25 U.S.C. § 450 et seq.

<sup>20</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1], at 114 (Nell Newton et al. eds. 2012 ed. with 2017 Supp.)

<sup>21</sup> *Morton v. Mancari*, 417 U.S. 535, 555 (1974); COHEN, *supra* note 20, at § 5.04[2][d], at 410.

<sup>22</sup> See President Barack Obama, *Executive Order 13647—Establishing the White House Counsel on Native American Affairs*, 78 Fed. Reg. 39,539 (June 26, 2013), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=103829> ("This order establishes a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities."); President Barack Obama, *Tribal Consultation Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 57,879 (Nov. 5, 2009), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=86865> (reiterating Exec. Order No. 13,175 and ordering all



agency heads to report to OMB with detailed plans for compliance with Exec. Order No. 13,175); President George W. Bush, *Memorandum on Government-to-Government Relationship with Tribal Governments*, (Sept. 23, 2004), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=64553>; President William J. Clinton, Exec. Order 13175—*Consultation and Coordination With Indian Tribal Governments*, (Nov. 6, 2000), 65 Fed. Reg. 67249 (Nov. 6, 2000), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=61665>, <https://www.fws.gov/nativeamerican/pdf/executive-order-13175.pdf>; President William J. Clinton, *Memorandum on Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22951 (Apr. 29, 1994), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=50064> (stating that “I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments”); President William J. Clinton, *Remarks to Native American and Native Alaskan Tribal Leaders*, (Apr. 29, 1994) online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=50070>; President George H.W. Bush, *Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments*, (June 14, 1991), 1 PUB. PAPERS 662, online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=19695> (noting the “administration’s policy of fostering tribal self-government and self-determination.”); President Ronald Reagan, *Statement on Indian Policy*, 1 PUB. PAPERS 96 (1983), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=41665> (asserting that “[t]his administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to State and local governments but also to federally recognized American Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes”); President James Carter, *Confederated Tribes of the Siletz Indians of Oregon Statement on Signing S. 2055 into Law*, Sept. 5, 1980, <http://www.presidency.ucsb.edu/ws/index.php?pid=44995> (noting “this administration’s plan [that] strikes a balance among the interests of the tribe and those of the local community, the State of Oregon, and the Federal Government”); President James Carter, *The State of the Union Annual Message to the Congress*, (Jan. 25, 1979) online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=32735> (“The Federal government has a special responsibility to native Americans, and I intend to continue to exercise this responsibility fairly and sensitively. My Administration will continue to seek negotiated settlements to difficult conflicts over land, water, and other resources and will ensure that the trust relationship and self-determination principles continue to guide Indian policy. There are difficult conflicts which occasionally divide Indian and non-Indian citizens in this country. We will seek to exercise leadership to resolve these problems equitably and compassionately.”); President James Carter, *American Indian Religious Freedom Statement on Signing S.J. Res. 102 Into Law*, (Aug. 12, 1978), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=31173> (commending access of Indian nations to sacred sites); President Gerald Ford, *Memorandum and Federal Programs for American Indians*, (Aug. 26, 1976), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=6290&st=ford&st1=> (“I request that you continue to insure that when Federal actions are planned which affect Indian communities, the responsible Indian leaders are consulted in the planning process”); President Gerald Ford, *Executive Order 11899—Providing for the Protection of Certain Civil Service Employment Rights of Federal Personnel Who Leave Federal Employment to be Employed by Tribal Organizations Pursuant to the Indian Self-Determination and Education Assistance Act*, (Jan. 22, 1976), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=59198&st=ford&st1=>; President Gerald Ford, *Statement on Signing the Indian Self-Determination and Education Assistance Act*, (Jan. 4, 1975), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=47391>; President Richard M. Nixon, *Special Message to the Congress on Indian Affairs*, (July 8, 1970), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=2573> (stating that “[s]elf-determination among the Indian people can and must be encouraged”); President Lyndon Johnson, *Special Message to Congress on the Problems of the American Indian: “The Forgotten American*, (Mar. 6, 1968), online by Gerhard Peters and John T. Woolley, *The American Presidency Project*,

2017, nearly a year after being elected, President Trump finally joined his predecessors (at least in part) by issuing a brief proclamation acknowledging the existence of tribal sovereignty and the government-to-government relationship between Indian nations and the United States. President Trump recognized an obligation on the part of the United States to consult with Indian nations—something that he did not do in the Dakota Access pipeline matter.<sup>23</sup>

The Constitution, as originally drafted, as interpreted by Chief Justice Marshall, and as implemented by the first and the most recent congresses and presidents, all point toward a system of cooperation, consultation, and mutual respect between Indian nations and the United States. The United States may have interests that conflict with those of Indian nations, and may sometimes act contrary to those interests, but the Constitution, as originally shaped and as recently construed, requires respect for the property and sovereignty of Indian nations, as well as a process of consultation and negotiation on matters that can affect tribal rights and interests.

#### IV. HOW DOES THE CONSTITUTION OPPRESS INDIAN NATIONS?

All that may be a surprise to those Americans who have just lived through the Dakota Access pipeline matter. That controversy seems to suggest the exact opposite of what I have just said. It suggests that the United States has the constitutional power to do whatever it likes with Indian nations, that it can pass laws that harm them, that it can do so without their consent, and that their concerns are taken less seriously than those of non-Indians. There is unfortunately a lot to this alternate view of the Constitution's treatment of Indian nations. Here are five bits of bad news.

First, the United States often ignored Chief Justice Marshall's injunction that Indian nations could not be forced to give up their lands.<sup>24</sup> Forced removal was depressingly common.

Second, the Supreme Court has held that Congress can regulate, not only commerce *with* the Indian tribes, but the internal affairs *of* those tribes, and even their own members. This is true despite the fact that these powers are not enumerated in Article I of the Constitution.<sup>25</sup> According to the Supreme Court, Congress has plenary power over Indian nations.<sup>26</sup> That means that states have no power to regulate Indians in Indian country without federal authorization; however, it also means there are few, if any, limits on congressional power over Indian nations. While it is basic constitutional wisdom that Congress has only those powers enumerated in the text of the Constitution, that rule apparently does not apply to laws affecting Indian nations and tribal citizens. Although the interstate commerce clause gives Congress the

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<http://www.presidency.ucsb.edu/ws/?pid=28709>; *Political Party Platforms*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/platforms.php>.

<sup>23</sup> President Donald J. Trump, *Proclamation on National Native American Heritage Month*, (Oct. 31, 2017), <https://www.whitehouse.gov/the-press-office/2017/10/31/president-donald-j-trump-proclaims-november-2017-national-native> ("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 . . . [A]gressive regulatory reform, and a focus on government-to-government consultation, will help revitalize our Nation's commitment to Indian Country.").

<sup>24</sup> See Singer, *supra* note 17, at 32–33.

<sup>25</sup> U.S. CONST. art I, § 8; *United States v. Kagama*, 118 U.S. 375 (1886).

<sup>26</sup> *United States v. Lara*, 541 U.S. 193, 200 (2004).

power to regulate commerce alone but not other things, the Commerce Clause has been interpreted to give Congress general police power to pass laws on any subject it likes as long as the legislation regulates Indian nations or their citizens, even if the law has nothing whatsoever to do with commerce. When you learn about the interstate commerce clause in your constitutional law classes, you might ask your professor about this. They may or may not know about this; Indian law is not a topic usually covered at all in constitutional law classes in American law schools.

Third, in 1903, the Supreme Court held that the United States can abrogate treaties with Indian nations unilaterally.<sup>27</sup> Additionally, the United States can assert power over Indian nations without their consent. This is not the usual practice with treaties. If the United States repudiates a treaty with Mexico, we do not immediately treat Mexico as a part of the United States. Rather, we go our separate ways. Repudiating a treaty with a tribe usually is the opposite; rather than a divorce, repudiation cements U.S. control over Indian nations and their people.

Fourth, in 1955, the Supreme Court held that tribal property can be seized without compensation unless Congress has chosen to formally recognize tribal property rights.<sup>28</sup> Tribal property rights that were held by the Supreme Court in 1835 to be as "sacred as the fee simple of the whites"<sup>29</sup> were deemed in 1955 not to constitute "property" at all within the meaning of the Constitution.<sup>30</sup>

Finally, the Supreme Court has exercised its own common law powers in more recent years to limit the ability of Indian nations to apply their laws to non-Indians who enter their territory.<sup>31</sup>

In these five ways, as well as others, the Constitution has been interpreted to authorize acts of conquest. The Constitution was established by "We the People." This means the source of legitimate government power is the consent of the governed. Yet, the United States has repeatedly and systematically violated that core democratic principle in its treatment of Indian nations. At the same time, as I have explained, federal law has repeatedly intervened to protect Indian nations and to recognize their sovereignty and property rights. It has done so at moments when federal officials and lawmakers have remembered our fundamental values. It has done so when we have remembered the reasons we adopted the Constitution of the United States of America.

## V. HOW CAN WE MINIMIZE THE INJUSTICES OF CONQUEST?

Where does that leave us? Does the U.S. Constitution respect tribal sovereignty or does it authorize and justify the conquest of Indian nations? The answer was given by Chris Pratt's character Star-Lord at the end of the first Guardians of the Galaxy movie—a bit of both. The Constitution protects tribal sovereignty, but the Supreme Court has interpreted the Constitution to empower Congress to limit or even destroy tribal sovereignty. The United States has flipped one-hundred-eighty degrees several times over the course of its history, sometimes seizing tribal lands and limiting the

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<sup>27</sup> *Lone Wolf v. Hitchcock*, 1887 U.S. 553, 567–68 (1903).

<sup>28</sup> *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290–91 (1955).

<sup>29</sup> *Mitchel v. United States*, 34 U.S. 711, 745–46 (1835).

<sup>30</sup> *Tee-Hit-Ton Indians*, 348 U.S. at 290–91.

<sup>31</sup> *Montana v. United States*, 450 U.S. 544, 566 (1981); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 211–12 (1978).

powers of tribal governments, and sometimes protecting those lands and those governments.

Let us not equivocate. Limiting tribal sovereignty or harming tribal property without tribal consent is an act of conquest. It is an act that cannot be deemed consistent with our democratic values. We have a choice about how to understand and live with our Constitution and the right choice is to stop engaging in conquest. Conquest is an historical fact. We cannot undo it. But that does not mean we can do nothing. What, in fact, can we do?

First, we can recognize that conquest was incomplete. Tribal sovereignty remains alongside the sovereignty of the federal and state governments.

Second, non-Indians can learn about tribal governments and the federal laws that recognize, respect, and protect tribal sovereignty.

Third, the United States can choose to honor and respect those laws. We can recognize the reality of conquest, but we can also commit not to do it ourselves.

For those who worry that two sovereigns cannot inhabit the same territory, I would like to remind you that we live in the United *States* of America. We are currently in the state of Maine as well as the United States. Overlapping sovereignty is something we know about; indeed, it has been a major point of contention for our entire history. Yet we manage by debating the appropriate relations between the state and federal governments; we don't manage by ignoring the states or denying them any reserved powers. Indeed, those powers are enshrined in the Tenth and Eleventh Amendments. We know about divided sovereignty; we simply need to extend that knowledge to Indian nations. We respect divided sovereignty; we simply need to extend that respect to Indian nations.

We can do that, first and foremost, by consulting with Indian nations over matters that concern them. We can stop pretending that we take no heat when the United States threatens tribal lands and tribal governments. We can start treating Indian nations as partners rather than obstacles. We can honor our treaty commitments. We can be curious about what those commitments mean to the nations to whom the United States made sacred promises. We can follow the lead of Chief Justice Marshall who lamented the fact of conquest and counseled the United States not to do it anymore.

The United States Constitution is a striking achievement in the history of humankind, but it has also been used to inflict outrageous injustice. We can honor the Constitution by acknowledging the ways it has been interpreted to inflict dishonor and injustice and we can commit to promote justice, democracy, and the rule of law. Recognizing tribal sovereignty and consulting with the governments of Indian nations on issues that affect them is not just good policy; it is what the best interpretation of our Constitution asks of us.

