

Indigenizing Legal Republicanism

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Abstract. This Article proposes and evaluates a synthesis of neorepublican legal theory and Indigenous peoples law and philosophy. Neorepublican legal theory, a critical reappraisal of legal republicanism, is a philosophy of law as a means to eliminate (or to minimize) domination and thus to secure for all of us a rich, deeply felt freedom. Domination is not simply overwhelming force or power; it is subjection to another's will, the potential for public or private interference when that potential is not democratically constrained. Shaped substantially by antislavery constitutionalism, neorepublican legal theory affords powerful critiques of oligarchy and empire. Yet there has been little neorepublican engagement with Indigenous justice and little Indigenous engagement with neorepublicanism. The dearth is understandable but warrants revisiting. In theorizing at the convergence, the Article addresses preliminary questions: If neorepublican legal theory demands each person's liberation and active government to achieve it, then what does that mean for Indigenous peoples and for Indian country? Should we use the republican idiom to achieve Indigenous justice nevertheless?

Indigenizing legal republicanism offers promise but also peril. On one hand, neorepublicanism can be useful in reframing Indigenous peoples law to uncover widespread domination, often judicially sanctioned. In addition, reinterpreting the United States' constitutional commitment to republican government could transform the federal government's relationships with Indigenous peoples. Indigenous peoples law and philosophy in turn has much to offer neorepublican theory writ large; Indigenous understandings of dependence and interdependence challenge widespread assumptions that dependence of any kind amounts to domination. On the other hand, neorepublicanism is a universalist philosophy and thus risks sustaining aspects of colonialism, despite being premised on consent and contestation. Reengaging Indigenous intellectual traditions, the Article proposes,

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could enable valuable collaboration in refining the neorepublican idiom consistent with Indigenous justice.

INTRODUCTION

Is it silly even to hope? Can anything but phantoms rise from the ashes of our expectations? Can we stir these greying coals to new life?¹

‘A‘ohe pau ka ‘ike i ka hālau ho‘okahi. All knowledge is not taught in the same school.²

As courts arrogate legislative power, enfeeble rights and regulation, and license abuse of public office,³ we could do worse than to rehabilitate the anti-oligarchic precepts of legal republicanism.⁴ Dismantling democratic constraints on public and private power goes hand in hand with privatizing lawmaking and privileging the already powerful.⁵ One light in the gloom is republican legal theory, a philosophy of law effectuating collective self-government and, in the theory’s current form, eliminating domination. In drawing on the republican idiom, however, we should foreground the legal theory of “constitutional outsiders,” not least Indigenous peoples,⁶ whose experiences both epitomize our constitutional hypocrisies and, just as crucially, illuminate subtleties in the meaning of liberation through law.⁷

1. Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1076 (1989) (citing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987)).

2. MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 66–67 (2011).

3. E.g., *Trump v. United States*, 144 S. Ct. 2312, slip op. at 6 (2024); *SEC v. Jarkesy*, 144 S. Ct. 2117, slip op. at 6–7 (2024), *aff’d* 34 F.4th 446 (5th Cir. 2022); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, slip op. at 35 (2024); *Garland v. Cargill*, 602 U.S. 406, 410 (2024), *aff’d* 57 F.4th 447 (5th Cir. 2023); *Sackett v. EPA*, 598 U.S. 651, 679 (2023); *W. Virginia v. EPA*, 597 U.S. 697, 721 (2022); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022); *Trump v. Hawaii*, 585 U.S. 667, 704–05 (2018); *King v. Burwell*, 576 U.S. 473, 485–86 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

4. See Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 673 (2014) (propounding our constitutional “need to avoid oligarchy”); CAMILA VERGARA, *SYSTEMIC CORRUPTION: CONSTITUTIONAL IDEAS FOR AN ANTI-OLIGARCHIC REPUBLIC* 39 (2020) (theorizing systemic corruption as “the gradual decay of ‘representativeness’ and the increasing oligarchization of government and society”).

5. E.g., Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1436–37 (2008); PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 306 (2012) [hereinafter PETTIT, *ON THE PEOPLE’S TERMS*]; J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 93, 208 (1975); Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1110 (2020); VERGARA, *supra* note 4, at 4–5, 15.

6. GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S–1830S*, at 60–71 (2019). By “Indigenous peoples” I mean both Indigenous nations, including federally recognized Indian tribes, and Indigenous groups whose nationhood is not recognized, is contested, or does not reflect self-understanding. See, e.g., S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 324 (1994) (explaining that the term “peoples” is not limited by Westphalian models of sovereignty); Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2665–72 (2022) (explaining conventional differences between “indigeneity, Indianness, colonization, race, and ancestry”).

7. See CLAUDIO SAUNT, *UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND*

Consider the “Republic of Hawai‘i,” established in 1894 by a predominantly American-born group of lawyers and businessmen who had overthrown the Kingdom of Hawai‘i the year before.⁸ Kānaka ‘ōiwi (Native Hawaiians) and astute observers saw the “Republic” for what it was: a sugar oligarchy, entrenching a planter class’s power in great part by disenfranchising kānaka as well as Asian and Latine immigrants.⁹ Exclusionary governance in Hawai‘i resembled other forms of American oligarchy, from chattel slavery and Jim Crow in the Southeast to exploitative agribusiness in the American West and territories.¹⁰ Oligarchs exercised a “freedom to dominate”, often on the basis of race, and passed this off as republicanism.¹¹ At the same time, colonial governance deprived kānaka ‘ōiwi and other Indigenous and colonized peoples of recognized ancestral governments through which to contest or consent to power imposed from the outside.¹² On an anti-imperial precept, too, calling it the

THE ROAD TO INDIAN TERRITORY 80 (2020) (noting age-old “tension between radical republican values and the racial hierarchy in the United States”); JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 4 (1995) (noting that “if constitutionalism is approached from the perspective of the struggles of Aboriginal peoples, unnoticed aspects of its historical formation and current limitations can be brought to light”) [hereinafter TULLY, *STRANGE MULTIPLICITY*].

8. Melody Kapilialoha MacKenzie, *Historical Background*, in *NATIVE HAWAIIAN LAW: A TREATISE* 2, 19–32 (Melody Kapilialoha MacKenzie, Susan K. Serrano, D. Kapua‘ala Sproat eds., 2015).

9. See Alfred L. Castle, *Advice for Hawaii: The Dole–Burgess Letters*, 15 *HAWAIIAN J. HIST.* 24, 29 (1981) (observing that constitution drafters for the “Republic” restricted kānaka and nonwhite political participation and could hardly have shown “[l]ess respect for democracy”); A.F. Judd, *The Constitution of the Republic of Hawaii*, 2 *YALE L.J.* 53, 60 (1894) (noting that the “Republic” could be understood as “the perpetuation of an oligarchy”); J. KĒHAULANI KAUANUI, *HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENITY* 34, 146 (2008) (observing that the “Big Five” sugar corporations operated as and were considered an oligarchy well into Hawai‘i’s territorial period); CAROL A. MACLENNAN, *SOVEREIGN SUGAR: INDUSTRY AND ENVIRONMENT IN HAWAII* 81–102 (2014) (documenting “organization of missionary family wealth into the powerful corporate system known as the Big Five” and its adverse effects on Hawai‘i’s ecosystems); CHRISTEN T. SASAKI, *PACIFIC CONFLUENCE: FIGHTING OVER THE NATION IN NINETEENTH-CENTURY HAWAII* 65 (2022) (noting that American-born oligarchy worked “to maintain the appearance of democracy while continuing to disenfranchise the majority of the population”); DEREK TAIRA, *FORWARD WITHOUT FEAR: NATIVE HAWAIIANS AND AMERICAN EDUCATION IN TERRITORIAL HAWAII, 1900–1941*, at 25–30 (2024) (describing efforts by “sugar oligarchs” encouraging annexation of Hawai‘i “to preserve [their] power and privilege”).

10. See generally, e.g., JEFFERSON COWIE, *FREEDOM’S DOMINION: A SAGA OF WHITE RESISTANCE TO FEDERAL POWER* (2022); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880* (1935); JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* (2024); HENRY KNIGHT LOZANO, *CALIFORNIA & HAWAII BOUND: U.S. SETTLER COLONIALISM AND THE PACIFIC WEST, 1848–1959* (2021); CAREY MCWILLIAMS, *FACTORIES IN THE FIELD: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA* (1939); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); ANDRÉS RESÉNDEZ, *THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA* (2016); *SOUTHERN HORRORS AND OTHER WRITINGS: THE ANTI-LYNCHING CAMPAIGN OF IDA B. WELLS, 1892–1900* (Jacqueline Jones Royster, ed. 2016).

11. COWIE, *supra* note 10, at 415; cf. CRISTINA BELTRÁN, *CRUELTY AS CITIZENSHIP: HOW MIGRANT SUFFERING SUSTAINS WHITE DEMOCRACY* 17, 42 (2020) (arguing that practitioners of *herrenvolk* democracy have sought “to replace the rule of law with their own actions and judgments and to see racial domination as a practice of freedom”).

12. See generally, e.g., NOELANI ARISTA, *THE KINGDOM AND THE REPUBLIC: SOVEREIGN HAWAII AND THE EARLY UNITED STATES* (2019); RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD

“Republic” of Hawai‘i while pursuing its annexation by the United States belied the antirepublican reality.¹³

Of course, republicanism has long been contested, its antithesis to oligarchy and empire more preached than practiced. Many of the federal constitution’s first framers believed that a republic required “reconfiguration of social relations” that would transfer political power to the people and, with it, “territorial expansion” that would secure the material wellbeing needed for citizens to participate as equals.¹⁴ But in Indian country and borderlands,¹⁵ egalitarianism among settlers made outsiders of Indigenous peoples.¹⁶ And this rationalized exclusion of ‘Āinamoana and Turtle Island from constitutional vision not only was our past but also is our present.¹⁷

Several legal scholars have evaluated “constitutional redemption” in light of Indigenous peoples’ subordination.¹⁸ They have confronted history,

HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* (1980); NED BLACKHAWK, *THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY* (2023); NED BLACKHAWK, *VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST* (2006); DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* (2019); CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* (1987) [hereinafter WILKINSON, *TIME*].

13. Cf. Rick Baldoz & César Ayala, *The Bordering of America: Colonialism and Citizenship in the Philippines and Puerto Rico*, 25 *CENTRO J.* 76, 79 (2013) (noting grave irony in United States’ colonization of the Philippines and Puerto Rico, given its own formation from anticolonial struggle and professed republican values).

14. MICHAEL WITGEN, *AN INFINITY OF NATIONS: HOW THE NATIVE NEW WORLD SHAPED EARLY NORTH AMERICA* 322–23 (2012) [hereinafter WITGEN, *INFINITY*]; accord AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 12–13 (2010).

15. Indian country, in code and case law, is “land set apart for the benefit of Indians or Indian tribes that is under federal jurisdiction,” including reservations, “dependent Indian communities,” and a few other categories of land. *RESTATEMENT OF THE LAW OF AMERICAN INDIANS* § 3 (Am. Law Inst. 2022). In this Article, I use the term this way *and*, through metonymy, to refer to land whose status is more contested, including in Alaska, Hawai‘i, and the United States’ insular territories. Cf. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 523 (1998) (holding that roughly 1.8 million acres of land owned in fee simple by the Native Village of Venetie Tribal Government is not “Indian country” as codified at 18 U.S.C. § 1151). Meanwhile, borderlands fill Indian country, surround boundaries with Mexico and Canada, and comprise outlying territories; but borderlands are also “wherever two or more cultures edge each other, where people of different races occupy the same territory, where under, lower, middle and upper classes touch, where the space between two individuals shrinks with intimacy.” GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* 19 (Norma Cantú and Aída Hurtado eds., 4th Ed. 2012); Jennifer M. Chacón, *Legal Borderlands and Imperial Legacies: A Response to Maggie Blackhawk’s The Constitution of American Colonialism*, 137 *HARV. L. REV. F.* 1, 5–9 (2023).

16. Gregory Evans Dowd, *Indigenous Peoples Without the Republic*, 104 *J. AM. HIST.* 19, 22 (2017); see also Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 *J. GENOCIDE RES.* 387, 388 (2006) (explaining that settler colonialism, a structure and not merely an event, “strives for the dissolution of native societies” and “erects a new colonial society on the expropriated land base”).

17. Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 *HARV. L. REV.* 1, 2–3 (2023) [hereinafter Blackhawk, *Foreword*]. ‘Āinamoana, literally “sea land” or “land of sea,” is a Hawaiian name for Oceania. DAVID A. CHANG, *THE WORLD AND ALL THINGS UPON IT: NATIVE HAWAIIAN GEOGRAPHIES OF EXPLORATION* 129–30 (2016). Turtle Island is a name used by many Indigenous peoples for the North American continent. ROBIN WALL KIMMERER, *BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS* 4 (2013); PATTY KRAWEC, *BECOMING KIN: AN INDIGENOUS CALL TO UNFORGETTING THE PAST AND REIMAGINING OUR FUTURE* 6 (2022).

18. Seth Davis, *American Colonialism and Constitutional Redemption*, 105 *CALIF. L. REV.* 1751, 1753 (2017) [hereinafter Davis, *Redemption*].

explaining liberty's use as an "exclusivist ideal, accessible only to Anglo-Saxons and select Europeans" and premised on "the subordination of internal and external enemies."¹⁹ They have argued that federal Indian law as it is precludes or at least undermines redemption,²⁰ and proposed reforms to the relationship between the United States and Indigenous peoples.²¹ At times, they have drawn on the 20th Century "revival" of the Atlantic republican tradition,²² with its roots in the Renaissance, the English Civil War, and other modern European revolutions.²³ That revival construed legal republicanism as an array of constitutional norms: from popular sovereignty and anti-corruption to pluralism and civic virtue to federalism and interstate noninterference.²⁴ Yet such formal norms could not speak for the

19. RANA, *supra* note 14, at 97; *accord* Blackhawk, *Foreword, supra* note 17, at 129 (citing IMMERWAHR, *supra* note 12, at 13–15). History and political science scholarship too recounts how received republicanism has been used to justify imperialism. *E.g.*, ADAM DAHL, *EMPIRE OF THE PEOPLE: SETTLER COLONIALISM AND THE FOUNDATIONS OF MODERN DEMOCRATIC THOUGHT* 17 (2018) (describing how egalitarian Northwest Ordinance of 1787 enabled "the further dispossession of indigenous communities as a necessary feature of republican expansionism"); GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* 27–30 (2019) (describing framers' reworking of republican theory to premise the fledgling nation's freedom on territorial expansion); MICHAEL JOHN WITGEN, *SEEING RED: INDIGENOUS LAND, AMERICAN EXPANSION, AND THE POLITICAL ECONOMY OF PLUNDER IN NORTH AMERICA* 61–62 (2022) [hereinafter WITGEN, *SEEING RED*] (describing how even antislavery Free Soil movement premised free labor on land expropriated from Indigenous peoples).

20. *E.g.*, Davis, *Redemption, supra* note 18, at 1757–58 (arguing that Indian trust doctrine "reinforces the power relations and ideologies of colonial domination that Indian Nations challenge when they claim their right to national self-determination"); Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015, 1020 (2012) (arguing that "commitment to constitutional continuity [following the Civil War] actually undermined—rather than facilitated—the possibility of a truly emancipatory and anti-colonial politics").

21. *E.g.*, Hope M. Babcock, *A Civic-Republican Vision of Domestic Dependent Nations in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443, 559–69 (2005) (proposing tribal nullification of federal laws imperiling tribal sovereignty); Matthew L. M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 305, 310–11 (2023) (arguing that federal government's duty of protection to Indian tribes "is law" that courts have "an obligation to enforce"); Elizabeth Hidalgo Reese, *Tribal Representation and Assimilative Colonialism*, 76 STAN. L. REV. 771, 832–35 (2024) (proposing congressional representation and statehood for tribes, among other things).

22. *E.g.*, Babcock, *supra* note 21, at 518–30; BARSH & HENDERSON, *supra* note 12, at 15–16; Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813, 823–27 (2006); Blackhawk, *Foreword, supra* note 17, at 100–03; Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 621–23 (1994).

23. *E.g.*, BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22–54 (1967); ZERA S. FINK, *THE CLASSICAL REPUBLICANS: AN ESSAY IN THE RECOVERY OF A PATTERN OF THOUGHT IN SEVENTEENTH CENTURY ENGLAND* 189 (1945); POCOCK, *supra* note 5, at 506–52; CAROLINE ROBBINS, *ABSOLUTE LIBERTY: A SELECTION FROM THE ARTICLES AND PAPERS OF CAROLINE ROBBINS* 55–58, 267–348 (Barbara Taft ed., 1982); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 32–36 (1969).

24. *E.g.*, Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507–15 (1988); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 193–97 (2020); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 145–56 (1995); Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1954–55 (2012); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1552–53 (1988); Zephyr Teachout, *The Anti-Corruption*

fundamental value of republican governance and its transformative potential for the United States' relationships with Indigenous peoples.

In the last two decades, however, philosophers, historians, political scientists, and legal scholars have reappraised our received understandings of republicanism.²⁵ This reappraisal, often styled neorepublicanism, posits freedom understood as nondomination as the *raison d'être* of a republic; constitutional principles like separation of powers and civic virtue are at most means to that end.²⁶ Nondomination is freedom not merely from actual interference but from potential interference by public and private actors when that potential is not suitably constrained.²⁷ In the republican idiom, subjection to another's will is "domination."²⁸ If someone can "restrain and coerce you without being contested," Lena Halldenius has explained, "then you are in their power regardless of whether they happen to leave you be."²⁹ Nondomination, or republican liberty, is thus a more robust freedom than noninterference, which is freedom only from actual interference and which is "not, at any rate logically, connected with democracy or self-government."³⁰

Philip Pettit has illustrated the idea by invoking one of Henrik Ibsen's most famous dramatic characters: Nora Helmer, a woman in 19th Century Norway whose husband Torvald dotes on her but who needs his permission to do most things, is "the doll in a doll's house, not a free woman."³¹ Torvald

Principle, 94 CORNELL L. REV. 341, 344 (2009).

25. Kip M. Hustace, *Education, Antidomination, and the Republican Guarantee*, 30 WM. & MARY BILL RTS. J. 91, 112–15 (2021); see, e.g. ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017); M. Victoria Costa, *Freedom as Non-Domination and Widespread Prejudice*, 50 METAPHILOSOPHY 441 (2019); Dawood, *supra* note 5; ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* (2015); GEOFFREY HINCHLIFFE, *LIBERTY AND EDUCATION: A CIVIC REPUBLICAN APPROACH* (2015); Sean Ingham & Frank Lovett, *Domination and Democratic Legislation*, 21 POL. PHIL. & ECON. 97 (2022); CÉCILE LABORDE, *CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY* (2008); FRANK LOVETT, *A GENERAL THEORY OF DOMINATION AND JUSTICE* (2010) [hereinafter LOVETT, GENERAL THEORY]; Christopher McCammon, *Domination: A Rethinking*, 125 ETHICS 1028 (2015); PETTIT, *ON THE PEOPLE'S TERMS*, *supra* note 5; PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017); Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEX. L. REV. 1301 (2016); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998); Nadia Urbinati, *Competing for Liberty: The Republican Critique of Democracy*, 106 AM. POL. SCI. REV. 607 (2012); VERGARA, *supra* note 4; DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES (Danielle Allen & Rohini Somanathan eds., 2020).

26. See Frank Lovett & Gregory Whitfield, *Republicanism, Perfectionism, and Neutrality*, 24 J. POL. PHIL. 120, 120 (2016).

27. PHILIP PETTIT, *JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD* xv (2014) [hereinafter PETTIT, JUST FREEDOM] (citing LOVETT, GENERAL THEORY, *supra* note 25, at 236–38).

28. Many use "domination" or "dominate" to refer loosely to control, destruction, or demonstration of might, as in "Team A dominated Team B!" In the republican idiom, however, "domination" is a term of art to describe experiencing a particular kind of power imbalance, i.e. without effective opportunity to contest or to consent to power's exercise. I use "domination" or "dominate" solely in the republican sense.

29. LENA HALLDENIUS, *MARY WOLLSTONECRAFT AND FEMINIST REPUBLICANISM* 15 (2015).

30. ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* 14 (Oxford Univ. Press 1958).

31. PETTIT, *JUST FREEDOM*, *supra* note 27, at xiv (citing HENRIK IBSEN, *A Doll's House* (1879)).

neither prohibits nor penalizes Nora's choices—other than to ban macaroons in the house—so she is generally free from interference.³² But Nora is subject to her husband's "reserve control," to the looming threat that he might at some point interfere, and so she experiences domination.³³ "You arranged everything to your taste," she tells Torvald, "and I acquired the same taste as you; or I only pretended to; I don't know really. . . ."³⁴

In its neorepublican sense, domination permeates federal Indian law. In 1979, the United States Supreme Court upheld a landmark ruling by district judge George Boldt that affirmed several Pacific Northwest tribes' off-reservation fishing rights under the Stevens Treaties.³⁵ Given the importance to the tribes of harvesting anadromous fish (which hatch in fresh water, mature in salt water, and return to fresh water to spawn), the Court notably agreed that the tribes may harvest as much as 50 percent of off-reservation fish.³⁶ And despite initial non-Indian backlash, the tribes and the state have increasingly cooperated in managing the fisheries.³⁷ Yet the Supreme Court had opined further that "Indian treaty rights to a natural resource . . . secure[] so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, *a moderate living*."³⁸ This suggests that courts may determine when a tribe fishes more than it needs, exercising a reserve control akin to Torvald Helmer's. Fishing for wealth, for beyond what is deemed "sufficient," risks inciting judicial interference, and so unfreedom remains. Through a neorepublican lens, we can thus peer deeper into Indigenous peoples' present subjugation, analyzing how external power operates, is experienced, and ultimately may be constrained.

Even as neorepublican theory represents an "instrumental turn" from constitutions' formal trappings to the point of pursuing republics,³⁹ it is right to ask not merely whether we can use it in Indigenous peoples law but whether we should. An essential first step in theorizing justice is, as James Tully has said, "to investigate if the language in which the enquiry proceeds is itself just: that is, capable of rendering the speakers their due."⁴⁰ The intellectual history of republicanism is rife with rationalization of empire. Moreover, bona fide neorepublican liberation might warrant noninterference, a pillar of tribal sovereignty, only insofar as it secures

32. *Id.*

33. *Id.* at 2; accord DANIELLE S. ALLEN, *JUSTICE BY MEANS OF DEMOCRACY* 37 (2023).

34. HENRIK IBSEN, *A Doll's House*, in *A DOLL'S HOUSE AND OTHER PLAYS* 105, 182 (Deborah Dawkin & Erik Skuggevik trans., Penguin Classics 2016).

35. *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662–69 (1979) (citing *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974)); see CHARLES WILKINSON, *TREATY JUSTICE: THE NORTHWEST TRIBES, THE BOLDT DECISION, AND THE RECOGNITION OF FISHING RIGHTS* 228–33 (2024) [hereinafter WILKINSON, *TREATY JUSTICE*].

36. *Id.* at 685.

37. See RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 5 (Am. Law Inst. 2022); WILKINSON, *TREATY JUSTICE*, *supra* note 35, at 202–11, 234–67.

38. See *Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. at 686 (emphasis added).

39. Lovett & Whitfield, *supra* note 26, at 120.

40. TULLY, *STRANGE MULTIPLICITY*, *supra* note 7, at 34.

nondomination.⁴¹ If neorepublican legal theory demands each person's liberation and active government to achieve it, then what does that mean for Indigenous peoples and for Indian country? Should we use the republican idiom to achieve Indigenous justice nevertheless?⁴²

In this Article, I argue that we should. And in doing so we should indigenize legal republicanism. Neorepublican theory enables us to incisively analyze Indigenous peoples' legal relationships with the United States and to evaluate laws that could effectuate Indigenous peoples' contestation of or consent to federal, state, and private authority. In turn, Indigenous philosophies conceptualize dependence in ways that complicate, and thus can clarify, neorepublican understandings of freedom and unfreedom. The first strand of my argument, that neorepublican theory can serve Indigenous peoples law, responds to critiques that conventional doctrines will not effectuate Indigenous self-determination.⁴³ I agree and offer something new: that the Article IV, Section 4 republican guarantee exemplifies a federal duty to secure freedom as nondomination for all persons in the United States, including Indigenous peoples. A duty of *antidomination*—the work to eliminate or minimize domination—could restructure federal governance in Indian country to require means to contest or consent to power that Indigenous peoples have long known is missing. Analyzing Indigenous peoples law through a neorepublican lens further enables us to perceive unfreedoms invisible to other theories. The second strand of my argument, that Indigenous peoples law and philosophy can aid neorepublican theory, reflects how Indigenous peoples as outsiders of many a prior “republic” have vital ideas for perfecting the rich freedom that republican thinkers envision.⁴⁴ In particular, Indigenous views of interdependence as natural fact and normative good counsel against conflating dependence and domination, a critique that would enrich nascent feminist and (dis)abled accounts of dependence in neorepublican theory.⁴⁵

41. See Blackhawk, *Foreword*, *supra* note 17, at 110 (“[W]hat good is self-determination without . . . the principle that imperial governments should not intervene lightly, or perhaps at all, in the governments of colonized peoples?”).

42. Cf. CARLO GINZBURG, *NEVERTHELESS: MACHIAVELLI*, PASCAL 143 (2022) (explaining that the word “nevertheless” represents a “tension between rules and exceptions” that is fundamental to understanding reality).

43. E.g., *id.* at 64–66, 120; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 245 (2002); Matthew L. M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 67 (2006); Matthew L. M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 55 n.60 (2012) [hereinafter Fletcher, *Tribal Consent*] (citing FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 44 (1995)); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 468 (2005).

44. Cf. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1797 (2019) (“[T]he paradigm of colonialism and federal Indian law could contribute to a fundamental rethinking of public law principles.”); Chantelle van Wiltenburg, *“The Center Cannot Hold”: Nation and Narration in American Indian Law*, 47 AM. INDIAN L. REV. 127, 160 (2023) (adjudging federal Indian law “a fertile site” for arguments based on ethos, or character, of the American polity) (citing Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 727 (1980)).

45. See, e.g., Sandrine Bergès & Eric Schliesser, *Introduction to SOPHIE DE GROUCHY’S LETTERS*

Because we must not presume that legal republicanism blends well with Indigenous peoples law,⁴⁶ I should clarify, and thus caveat, how *I* approach the synthesis. I am *kanaka* ‘ōiwi and thus theorize from indigeneity, not from Indian tribes’ specific but no less encompassing experience.⁴⁷ Indigeneity is the “subject position of communities who experienced or are descendants and citizens of those nations or tribes who experienced European colonization and settlement over the past five centuries.”⁴⁸ Theorizing from this position is a matter of “belonging to [a] particular context[],” Hawai‘i for me, and of seeking belonging.⁴⁹ How I think is rooted in obligations to sustain my homeland, people, and culture and to care for this planet’s other homelands, peoples, and cultures. All the same, I theorize within a tradition of ‘ōiwi inquisitiveness and adaptation, of seeking out what is new and at times making what has been foisted on us our own all the same.⁵⁰ *Kānaka* ‘ōiwi have explored and innovated, studying waves, weather, and stars to traverse oceans; electrifying 19th Century Honolulu; fusing foods and architectures; crafting *kī hō‘alu* (slack key guitar) and ‘ukulele music with Mexican and Portuguese immigrants; teaching the world how to hang ten; and resisting missionary censors by creating the cosmopolitan (and thus palatable) *hula ku‘i* as an offshoot of our sacred (and thus profane) *hula kahiko*.⁵¹ Ours is a composite indigeneity,⁵² so I theorize not “from some ‘pure’ sense of what it means to be Indigenous” but from one more compound and fascinated by

ON SYMPATHY: A CRITICAL ENGAGEMENT WITH ADAM SMITH’S *THE THEORY OF MORAL SENTIMENTS* 1, 31 (Sandrine Bergès trans. 2019); Tom O’Shea, *Disability and Domination: Lessons from Republican Political Philosophy*, 35 J. APPLIED PHIL. 133, 140 (2018); HANNAH FENICHEL PITKIN, *FORTUNE IS A WOMAN: GENDER & POLITICS IN THE THOUGHT OF NICCOLÒ MACHIAVELLI* 299–302 (1984).

46. See TULLY, *STRANGE MULTIPLICITY*, *supra* note 7, at 23 (“Approaching *The spirit of Haida Gwaii* [Bill Reid’s renowned sculpture] in the right spirit does not consist in recognizing it as something already familiar to us and in terms drawn from our own traditions and forms of thought. This imperial attitude is to be abjured.”).

47. See Rolnick, *supra* note 6, at 2672–78 (explaining indigeneity and Indianness); see also Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 364–66 (2003) [hereinafter Tsosie, *Tribalism*] (summarizing the decisional quandary facing *kānaka* ‘ōiwi over whether to pursue self-governance through domestic, international, or other novel frameworks).

48. KEVIN BRUYNEEL, *SETTLER MEMORY: THE DISAVOWAL OF INDIGENEITY AND THE POLITICS OF RACE IN THE UNITED STATES* xxiii (2021).

49. See JOHN BORROWS, *FREEDOM AND INDIGENOUS CONSTITUTIONALISM* 3 (2016).

50. See CHANG, *supra* note 17, at xi–xii (“*Kānaka* have been engaged with the future as well as the past.”); HI‘ILEI JULIA KAWEHIPUA AKAHAOPULANI HOBART, *COOLING THE TROPICS: ICE, INDIGENEITY, AND HAWAIIAN REFRESHMENT* 89–90 (2023) (citing *kānaka* “engagements with modernity and cosmopolitanism,” like early electrification and refrigeration in Honolulu and Euro-Hawaiian music performance, as consistent, if sometimes coerced, embrace of new culture and technology); cf. KAMANAMA KALANI BEAMER, *NO MĀKOU KA MANA: LIBERATING THE NATION* 13–14 (2014) (casting inquisitiveness and adaptation as redefinition of tradition).

51. See *supra* note 50; see also GARY Y. OKIHIRO, *ISLAND WORLD: A HISTORY OF HAWAII AND THE UNITED STATES* 49–60, 170–80 (2008); Amy Ku‘uleialoha Stillman, *Of the People Who Love the Land: Vernacular History in the Poetry of Modern Hawaiian Hula*, 28 AMERASIA J. 85 (2002); STEPHANIE NOHELANI TEVES, *DEFIANT INDIGENEITY: THE POLITICS OF HAWAIIAN PERFORMANCE* 28 (2018).

52. KAUANUI, *supra* note 9, at 12–16.

multiplicity.⁵³

Of course, the concept of indigeneity is problematic, as Linda Tuhiwai Smith has noted, since “it appears to collectivize many distinct populations whose experiences under imperialism have been vastly different.”⁵⁴ Therefore, I offer *an* Indigenous engagement with legal republicanism, moved by the antirepublican experiences of kānaka ‘ōiwi, hoping to illuminate possibilities, especially for the Indigenous peoples of ‘Āinamoana and Turtle Island, in whom I see “likeness,” though not sameness.⁵⁵ Exploring where neorepublican and Indigenous ideas “meet,”⁵⁶ my aim is *ho‘okolohe* (to make mischief) and to reimagine legal republicanism in Indigenous peoples law and as Indigenous peoples might change it to “multiply human freedom.”⁵⁷ Although I use intellectual history and law, I do so to explain, not to legitimize.⁵⁸ Out of a sense, as Fran Ansley put it, “that we have come to a charred and barren place, that past directions, at best, have petered out or, at worst, have led us astray, and that we are facing a crossroads,”⁵⁹ I connect “jurisprudence, the analytic science of law” to “jurisgenesis, the creation of legal meaning,” especially but not exclusively by constitutional outsiders.⁶⁰

This Article proceeds in three Parts, discussing a vision for a neorepublican federal obligation toward Indigenous peoples, the generative synthesis of neorepublican theory and Indigenous peoples law and philosophy, and the risks of synthesis. In Part I of the Article, I reinterpret the republican guarantee as it could embody a new federal relationship with Indigenous peoples. I first discard conventional “juricentric” readings of the guarantee as either nonjusticiable or protective of states at the expense of Indian tribes; the guarantee binds the entire federal government, each

53. LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 42 (3rd ed. 2021), *supra* note 54, at 42; see BRANDY NĀLANI MCDUGALL, *FINDING MEANING: KAONA AND CONTEMPORARY HAWAIIAN LITERATURE* 26 (2016) (describing “Hawaiian proclivity to ‘look for analogies and double meanings, [which is] part of the mental tendency to perceive relations, similarities of form, and so on’” (quoting JOHN CHARLOT, *CLASSICAL HAWAIIAN EDUCATION: GENERATIONS OF HAWAIIAN CULTURE* 290 (2005))); cf. Vine Deloria, Jr., *Philosophy and the Tribal Peoples*, in *AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS* 3, 5 (Anne Waters ed. 2004) (noting it crucial in American Indian philosophy to affirm that “there is something of value in any tribal tradition that transcends mere belief and ethnic pride”).

54. SMITH, *supra* note 53, at 6.

55. CHANG, *supra* note 17, at xv, 228.

56. Cf. Sarah Deer, *(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 *YALE J. LAW & FEMINISM* 1, 4 (2019).

57. See EDUARDO GALEANO, *The Blue Tiger and the Promised Land*, in *WE SAY NO: CHRONICLES 1963–1991*, 227 (Liz Hero trans., 1987) (1992) (“I am not one to believe in traditions simply because they are traditions. I believe in the legacies that multiply human freedom, and not in those that cage it.”).

58. See Blackhawk, *Foreword*, *supra* note 17, at 134 (“The original meaning of the United States Constitution—even a meaning inflected with excluded voices—will at best return us to a world where the national government may colonize Indians with more limited legal tools.”).

59. Ansley, *supra* note 1, at 998.

60. James Gray Pope, *Labor’s Constitution of Freedom*, 106 *YALE L.J.* 941, 944 (1997) (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983)).

branch in its own way.⁶¹ I then describe what the guarantee demands: each person's nondomination in this republic-to-be. The ideas are neorepublican and yet built upon antislavery constitutionalism, which saw the Reconstruction Amendments as emanating from the guarantee, a "sleeping giant" of federal power.⁶² I lastly articulate how the guarantee, while flowing to all persons in the United States, has complex implications for Indigenous peoples, many of whom are citizens of multiple polities. In doing so, I sketch how an antidomination duty would depart significantly from current doctrine and practice, restructuring federal power in Indian country in ways warranting further theory.

In Part II, I elucidate the value of indigenizing legal republicanism with examples of what neorepublican theory and Indigenous peoples law afford each other. Neorepublican theory can reframe Indian tribes' doctrinal status as "domestic dependent nations" as a gloss for domination. To show this, I parse two kinds of dependence invoked in federal Indian law: dependence acceded by Indigenous treaty-makers to shore up alliances or sovereignty; and unwanted socioeconomic "dependency" on a federal Indian affairs bureaucracy, conditioned by the United States' own colonial policy.⁶³ Courts conflated these senses of dependence, suffusing tribes' treaty-making with harmful tropes of "Indigenous deficiency" to rationalize federal plenary power in Indian country.⁶⁴ Moreover, neither kind of dependence coincides with Indigenous understandings of dependence and interdependence, thus obscuring liberatory possibilities for the federal-tribal relationship. I conclude the Part by taking stock of such Indigenous theories, both showing how they are distinct from domination and explaining how they can contribute to neorepublican theory in turn.

In Part III, I discuss two risks in uniting neorepublican theory with Indigenous peoples law, especially in my reinterpretation of the republican guarantee to promise antidomination in Indian country. On one hand, we risk institutional colonialism. Antidomination, while necessitating contestation and consent processes, would nevertheless entail robust federal

61. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003).

62. E.g., WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 214 (1972) (describing Senator Charles Sumner's argument that the republican guarantee is a "sleeping giant," as no other constitutional clause "gives to Congress such supreme power over the states").

63. See RICHARD WHITE, *THE ROOTS OF DEPENDENCY: SUBSISTENCE, ENVIRONMENT, AND SOCIAL CHANGE AMONG THE CHOCTAWS, PAWNEES, AND NAVAJOS* xv–xix (1983); cf. VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 32–33 (1969) (distinguishing dependence asserted in treaties from dependency based on alleged incompetence).

64. See DANIEL HEATH JUSTICE, *WHY INDIGENOUS LITERATURES MATTER* 2–4 (2018) (describing cultural and literary depictions of Indigenous peoples as "in a state of constant lack: in morals, laws, culture, restraint, language, ambition, hygiene, desire, love," to which we have frequently ascribed hardship caused in truth by settler colonialism, among other things); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 326 (1990) (denoting treaty violations and forced assimilation of Indigenous peoples as "practical extensions of a racist discourse of conquest that at its core regards tribal peoples as normatively deficient and culturally, politically, and morally inferior").

engagement with Indigenous peoples, and history teaches that Indigenous peoples have good reason to beware expanded federal power. On the other hand, we risk ideological colonialism. As in any liberatory project, the universalist goal of nondomination and the particularist ethics of indigeneity are in tension. Although neorepublican freedom is premised on avowing interests, granting or withholding consent, and contesting arbitrary rule, its intellectual corpus is predominantly Euro-American and could further displace Indigenous conceptions of freedom. To mitigate these risks, I recommend reengaging certain Indigenous intellectual traditions to collaborate on developing the neorepublican idiom so as not to cede “discursive space” that could otherwise be remade to advance Indigenous justice.⁶⁵

I. A NEOREPUBLICAN GUARANTEE

Article IV, Section 4 of the United States Constitution provides that “[t]he United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion.”⁶⁶ Section 4 links internal to external, embracing a Florentine and Venetian idea that a people is free only when governing collectively, dominated neither by oligarchy nor by empire.⁶⁷ The continuity is unsurprising. Like their English forebears domesticating radical Renaissance ideas for collective self-governance within imperial monarchy,⁶⁸ the Constitution’s first framers often borrowed ideas circulating in the transatlantic “republic of letters” while obscuring their revolutionary sources.⁶⁹

65. See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1998 (2003) (citing Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983); Scott A. Sandage, *A Marble House Divided: The Lincoln Memorial, the Civil Rights Movement, and the Politics of Memory, 1939–1963*, 80 J. AM. HIST. 135, 136 (1993)) (observing the need for say in “collective memory of a nation’s fundamental commitments”).

66. U.S. CONST. art. IV, § 4.

67. See, e.g., NICCOLÒ MACHIAVELLI, *Discorsi sopra la prima deca di Tito Livio* [Discourses on Livy] I.2, I.16, in NICCOLÒ MACHIAVELLI: TUTTE LE OPERE 269 (Mario Martelli ed., Bompiani 2018) (1531) (It.) (contrasting free peoples with those controlled internally by oligarchy and those controlled externally by empire); QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: VOL. I* 157 (1978); WIECEK, *supra* note 62, at 51–58 (describing Article IV, Section 4 drafters’ attention to internal and external unfreedom).

68. POCKOCK, *supra* note 5, at 334 (1975) (“Republican and Machiavellian ideas had to become domiciled in an environment dominated by monarchical, legal, and theological concepts apparently in no way disposed to require the definition of England as a polis or the Englishman as a citizen.”); accord FINK, *supra* note 23, at 189; see ARIHIRO FUKUDA, *SOVEREIGNTY AND THE SWORD: HARRINGTON, HOBBS, AND MIXED GOVERNMENT IN THE ENGLISH CIVIL WARS 12–17* (1997) (describing James Harrington’s Anglicization, and tempering, of Niccolò Machiavelli’s egalitarian constitutionalism when drawing from it for *The Commonwealth of Oceana*).

69. Compare, e.g., FEDERALIST NO. 10 (James Madison) (arguing that “the representatives must be raised to a certain number, in order to guard against the cabals of a few”), with MACHIAVELLI, *supra* note 67, at I.7 (arguing that “the judges must be many, for the few act always on behalf of the few”); and FEDERALIST NO. 51 (James Madison) (arguing that “[i]f men were angels, no government would be necessary”), with MACHIAVELLI, *supra* note 67, at I.3 (arguing that “those organizing a republic and its laws should presume humans capable of wrong and ready to act upon the malice within us at any opportunity”); see also PHILIP BOBBITT, *THE GARMENTS OF COURT AND PALACE: MACHIAVELLI AND*

The republican guarantee, however, has (in)famously been read six ways from Sunday.⁷⁰ And the guarantee, conventionally interpreted, has offered little to Indigenous peoples. In this Part, I synthesize doctrinal and cross-disciplinary scholarship to reinterpret the guarantee as a neorepublican commitment: the United States' duty to eliminate domination where it arises and thus to bring about republican governance. I first explain how the guarantee binds the federal government as a whole, as well as its branches "in their appropriate spheres."⁷¹ I then explain what the guarantee obligates the United States to achieve: freedom from domination, for which principles like separation of powers or federalism are merely instrumental. To construe the guarantee as an antidomination duty, I draw on philosophy, history, and political science literatures, and I explain how nondomination responds to concerns about empire. Lastly, I explain how such a duty flows to individuals, as functional beneficiaries of a duty to "every state," and how this has significant implications for Indigenous peoples, as members of multiple polities.

This reinterpretation is not "originalist" as that term tends to be used, but it is an extension of the "strong strand of antislavery constitutionalism" that arose in the years before the Civil War.⁷² Abolitionists, Free Soilers, and radical republicans challenged elitist glosses given to republican thought by preceding generations, and by grounding claims for enslaved persons' emancipation and citizenship in the federal constitution as it was—the republican guarantee and the Bill of Rights its main sources of civil rights—they imbued its provisions with profound new meanings, which they and their successors would articulate more fully in later amendments.⁷³ In attending to the republican guarantee, I treat it as the focal point of a federal neorepublican commitment, but not its only source. The guarantee is emblematic of, and most expressly provides, a commitment to republican freedom that is reflected elsewhere, from the Bill of Rights to the Reconstruction Amendments to the Nineteenth, Twenty-Fourth, and Twenty-Sixth. As the federal courts have increasingly constrained the Reconstruction Amendments in particular, it seems right to replenish their waters by returning to the wellspring.

THE WORLD THAT HE MADE 70 (2013).

70. Jacob M. Heller, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1713–16 (2010).

71. Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 523 (1962).

72. LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 68 (2015).

73. See generally, e.g., DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* (2018); CHRISTOPHER JAMES BONNER, *REMAKING THE REPUBLIC: BLACK POLITICS AND THE CREATION OF AMERICAN CITIZENSHIP* (2020); EDWARDS, *supra* note 72; ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970); KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT FROM THE REVOLUTION TO RECONSTRUCTION* (2021); JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); WIECEK, *supra* note 62.

A. The Federal Guarantor

Notwithstanding varied readings of the republican guarantee's substance, the lion's share of scholarship grapples with its justiciability.⁷⁴ The United States Supreme Court has on occasion purported to hold that claims under the guarantee present "political questions" that federal courts should not adjudicate.⁷⁵ Determining whether a government is sufficiently republican, the thinking went, entails deliberation committed to legislatures and executives or at least beyond judges' skills.⁷⁶ Under political question doctrine, therefore, guarantee disputes were best addressed by the "political branches."⁷⁷ But political question doctrine is "ill-defined, unsettled, and contentious,"⁷⁸ belying not only how courts do engage in governance⁷⁹ but also how the Supreme Court itself has applied the doctrine erratically.⁸⁰ Applying the doctrine to the republican guarantee is especially insincere, given the Court's own practice of deciding guarantee cases on the merits prior to foisting onto the clause "a general rule of nonjusticiability."⁸¹ Nevertheless, the doctrine has persisted as an expedient way for courts to dodge disputes that they are wary or incapable of resolving.

74. E.g., Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1072 (2019); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 852–53 (1994); Richard L. Hasen, *Leaving the Empty Vessel of "Republicanism" Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 75 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007); Martin H. Redish, *Judicial Review and the Political Question*, 79 NW. U. L. REV. 1031, 1039–43 (1985).

75. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (citation omitted); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912); *Taylor v. Beckham*, 178 U.S. 548, 578–81 (1900).

76. See *Baker v. Carr*, 369 U.S. 186, 217–26 (1962) (contending that questions are "political" where their resolution (1) is committed to another branch by constitutional text, (2) is precluded by "a lack of judicially discoverable and manageable standards," (3) would require "an initial policy determination of a kind clearly for nonjudicial discretion," (4) would require disrespecting another branch, (5) would require "unquestioning adherence" to prior policy determinations, or (6) would result in conflicting resolutions by different branches; and reasoning that republican guarantee must be nonjusticiable on such grounds).

77. Redish, *supra* note 74, at 1031.

78. Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. U. L. REV. 681, 687 (2021).

79. See Hustace, *supra* note 25, at 106–09 (citing ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 49–54 (1952); JAMES WILSON, *OF GOVERNMENT*, in 1 THE WORKS OF JAMES WILSON 293 (Robert Green McCloskey ed., 1967); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 17–21 (1981); Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 111 (2015)).

80. E.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022); *Shelby Cnty. v. Holder*, 570 U.S. 529, 550–51 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *Bush v. Gore*, 531 U.S. 98, 111 (2000); *New York v. United States*, 505 U.S. 144, 185 (1992); Laurence Claus, *A Republic, If the Courts Can Keep It?*, 2020 WIS. L. REV. 395, 409 (2020); Dodson, *supra* note 78, at 693, 704; Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1970–73 (2015); see also Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031, 1068–75 (2023) (describing stark differences between Supreme Court's and lower courts' uses of political question doctrine).

81. *New York v. United States*, 505 U.S. 144, 184–85 (1992) (citations omitted); e.g., *Coyle v. Smith*, 221 U.S. 559, 567–68 (1911); *Att'y Gen. of Mich. ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905); *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897); *In re Duncan*, 139 U.S. 449, 461 (1891); *United States v. Cruikshank*, 92 U.S. 542, 552–55 (1875); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175–76 (1874); *Texas v. White*, 74 U.S. (7 Wall.) 700, 727–28 (1869).

I think the republican guarantee justiciable,⁸² but I presume neither its judicial enforcement nor judicial supremacy in interpreting it. After all, the guarantee binds “[t]he United States,” not any one branch of government, and the obligation is in Article IV, not the articles for legislative, executive, and judicial power.⁸³ All three branches are “guarantors” of republicanism “in their appropriate spheres.”⁸⁴ Even decisions like *Luther v. Borden*, long misreported as holding the guarantee altogether not justiciable, cast the issue as how and not whether each branch could make good on the guarantee.⁸⁵ When asked in that case to strike down one state’s martial law imposed to quell a rebellion that formed a rival state government with a broader electorate, the Court said that it would defer to Congress’s determination whether a given government was “established” and sufficiently “republican.”⁸⁶ The Court would “follow” Congress, applying legislative findings to the dispute.⁸⁷ Justiciability is ultimately a diversion from ascertaining the guarantee’s meaning for the legislative and executive branches and for society writ large.⁸⁸

Moreover, turning the republican guarantee over to courts without telling them what it means could ensure that the “sleeping giant” remains asleep.⁸⁹ Some courts have construed the clause to protect principles at least consistent with nondomination, but others have misconstrued it to protect state sovereignty per se, even to Indian tribes’ detriment.⁹⁰ In *Agua Caliente Band of Cahuilla Indians v. Superior Court*, for example, the California Supreme Court held that the state’s Fair Political Practices Commission could sue federally recognized Agua Caliente Band for alleged noncompliance with a law requiring the Tribe to report its donations to state political campaigns.⁹¹ The court narrowly abrogated the Tribe’s sovereign

82. Hustace, *supra* note 25, at 100–01.

83. U.S. CONST. art. IV, § 4.

84. Bonfield, *supra* note 71, at 523; David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 699, 722 (2020); WIECEK, *supra* note 62, at 76–77.

85. 48 U.S. (7 How.) 1 (1849). It was the Supreme Court itself that misreported and thus “transformed” *Luther*. See Grove, *supra* note 80, at 1929, 1932–33 n.129; *supra* note 81 and accompanying text.

86. 48 U.S. (7 How.) at 42.

87. *Id.* at 47; see Grove, *supra* note 80, at 1928.

88. Cf. Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) (recommending that republican scholars not only “urge courts to help democratize non-judicial institutions” but also “counteract the ideology and practices of judicial exclusivity”).

89. WIECEK, *supra* note 62, at 214.

90. E.g., *Cnty. of Charles Mix v. U.S. Dep’t of Interior*, 674 F.3d 898, 902 (8th Cir. 2012); *S. Dakota v. U.S. Dep’t of Interior*, 775 F. Supp. 2d 1129, 1135–36 (D.S.D. 2011); *City of Lincoln City v. U.S. Dep’t of Interior*, 229 F. Supp. 2d 1109, 1112 (D. Or. 2002); *Agua Caliente Band of Cahuilla Indians v. Superior Ct.*, 148 P.3d 1126, 1135–39 (Cal. 2006); *State v. Foreman*, 16 Tenn. (8 Yer.) 256 (1835) *cf.* W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1562, 1594 (2023) (explaining antebellum state legislatures’ invocation of the guarantee as a putative federal duty to protect them against Indigenous insurrections).

91. *Agua Caliente Band of Cahuilla Indians*, 148 P.3d at 1138–39.

immunity,⁹² reasoning that California had an interest under the guarantee in “state autonomy,” perhaps a need “to effectively guard against political corruption,” which it may enforce through the Tenth Amendment.⁹³ Debate ensued over whether the court was right to enforce the guarantee for a discrete act rather than pervasive antirepublicanism.⁹⁴ But the real problem lay in the court’s sparse, inchoate sense of what exactly was the antirepublicanism at issue, which others could have conceptualized first. This coincides with concerns of courts’ maximalism or disdain for democracy,⁹⁵ bypassing Congress to determine what sovereignty tribes retain.⁹⁶

Notwithstanding courts’ uneven approaches to the republican guarantee, the guarantee remains operative for Congress and the administrative state.⁹⁷ This comports with federal Indian law, under which Congress holds plenary power to treat with Indian tribes and has delegated authority to executive agencies.⁹⁸ Even more to the point, structural provisions like the guarantee are meant “to guide the construction of a government over time and toward particular democratic and constitutional values.”⁹⁹ It is essential, therefore, that the legislative and executive branches be active partners in enforcing the guarantee, using the *power* granted to them by what reads at first glance as a duty.¹⁰⁰ One question raised by *Agua Caliente*: might Article IV, Section 4 in fact require tribal sovereign immunity to achieve and preserve republican government? The court avoided that question, but other government bodies could be better situated to answer it, deliberating how and in what circumstances immunity effects nondomination. “Better

92. Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1035 (2008) [hereinafter Skibine, *Interests*]; William Wood, *It Wasn’t an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1602 & n.80 (2013).

93. *Id.* at 1136–38. The Tenth Amendment reserves “to the states . . . or to the people” constitutional powers neither delegated to the United States nor denied to the states. U.S. CONST. am. X.

94. Compare, e.g., Heller, *supra* note 70, at 1729–31, with Skibine, *Interests*, *supra* note 92, at 1035.

95. See, e.g., Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1254–55 (2001) [hereinafter Krakoff, *Undoing*]; Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 65–71 (2011); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 669–72 (2016).

96. See *infra* notes 240–249 and accompanying text.

97. E.g., Cormac H. Broeg, *Waking the Giant: A Role for the Guarantee Clause Exclusion Power in the Twenty-First Century*, 105 IOWA L. REV. 1319, 1358–62 (2020) (arguing that republican guarantee enables Congress to exclude, or refuse to seat, representatives benefiting from vote suppression); Louk, *supra* note 84, at 683 (arguing that Congress is the most appropriate “guarantor” of republicanism).

98. Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2249 (2023).

99. *Id.* at 2262.

100. See BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY 133 (2009) (observing that a constitution is not only a limiting agent but also “an empowering agent, created for the very real purpose of ennobling or authorizing [government] institutions to act in the name of the sovereign”); Francesca L. Procaccini, *Reconstructing State Republics*, 89 FORDHAM L. REV. 2157, 2162, 2198 (2021) (observing that Article IV, Section 4 “bestows a power on the federal government,” especially legislative power, “to ensure republican government in the states”).

situated” because this is by no means an easy question, which the following account of neorepublican theory should make clear.

B. Domination and Nondomination

Republican theory had long focused on “what it takes for a democratic republic to preserve itself, not the duties of such a republic to its citizens.”¹⁰¹ It was this preoccupation that enabled received republicanism to justify restricting governance to White men of property, premising exclusion on “a view that certain peoples were too foreign or too primitive to engage in self-government.”¹⁰² Neorepublicanism inverts this logic, following the lead of 19th Century abolitionists and antislavery constitutionalists.¹⁰³ Neorepublicanism assumes nothing at the outset about persons’ capacities to govern, holding that we are all entitled to be free and critiquing the myriad ways that we are unfree.¹⁰⁴ The task of neorepublican legal theory is, at that point, to ascertain how to eliminate or at least to minimize that unfreedom.

The experience of domination is neorepublicanism’s core concern. In contrast to interference—actual interference, as through regulation—domination refers to “the *ability* to interfere when that ability is not suitably controlled.”¹⁰⁵ Power is not suitably controlled “to the extent that its exercise is not subject to effective and reliable constraints that are common knowledge to all persons or groups concerned.”¹⁰⁶ Republicans trace the concept of domination to Rome, where “a free person (*liber*) was someone not subject to the domination (*dominatio*) of another, and vice versa.”¹⁰⁷ The racialized chattel slavery of the antebellum South has thus epitomized domination, “approaching the limits of [the master’s] total power . . . and

101. Aditi Bagchi, *Nondomination and the Ambitions of Employment Law*, 24 THEORETICAL INQUIRIES IN LAW 1, 10 (2023).

102. See Blackhawk, *Foreword*, *supra* note 17, at 42; see generally, e.g., Chae Chan Ping v. United States, 130 U.S. 581 (1889); Elk v. Wilkins, 112 U.S. 94 (1884); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

103. See, e.g., TENBROEK, *supra* note 73, at 149 (observing how framers of the Thirteenth Amendment perceived all persons as entitled to liberty); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 418–19 (2012) (citing WIECEK, *supra* note 62, at 259, 269) (describing how antislavery lawyer Joel Tiffany had argued that “slaves were ‘citizens’ [simply] by virtue of having been born in the United States”).

104. Cf. Mark Francis, *Republicanism and Aboriginal Peoples*, 24 J. AUSTRALIAN STUD. 153, 155, 158–61 (2000) (explaining how scholars in liberal traditions, like neoliberalism and libertarianism, “find it easier to discuss citizenship as a matter of participation,” whereas republicans and neorepublicans view citizenship as “based on entitlement”).

105. Frank Lovett, *Non-Domination*, in THE OXFORD HANDBOOK OF FREEDOM 106, 109 (David Schmidt & Carmen E. Pavel eds., 2018); accord PETTIT, ON THE PEOPLE’S TERMS, *supra* note 5, at 27–28, 56–59, 296.

106. See FRANK LOVETT, A REPUBLIC OF LAW 115 (2016).

107. LOVETT, GENERAL THEORY, *supra* note 25, at 3; accord ANDREW HADFIELD, SHAKESPEARE AND REPUBLICANISM 146–47 (2005); see PETTIT, ON THE PEOPLE’S TERMS, *supra* note 5, at 5–8 (summarizing intellectual genealogy of “domination” from Rome through Renaissance Italy to the revolutions of Central and Western Europe).

[the enslaved person's] total powerlessness."¹⁰⁸ And for a theory of legal republicanism to be sound, Melvin Rogers has noted, it must "address the *conditions* of domination that attach to a phenomenon like chattel slavery, namely social death."¹⁰⁹ This is true particularly given our history, wherein White colonials of the American Revolution "failed to acknowledge that they deprived slaves of liberty far more fundamental than the liberty they themselves sought."¹¹⁰

Yet republican theorists, beginning at least with early modern realists, have understood domination as *lived* unfreedom and not simply *legal* enslavement. In his *Discourses on the First Ten Books of Livy*, Florentine diplomat and philosopher Niccolò Machiavelli considered who must be free in a bona fide republic:

If we consider the aims of elites and the people, then we see without doubt that elites desire to dominate and the people desire not to be dominated; thus the people have a greater will to live freely, being less able to exploit liberty than elites. Guardians of liberty, the people will take greater care of it, unable to keep it from others and so not allowing others to keep it from them.¹¹¹

Grounded in realism, republican freedom challenges the equation of wealth and political influence, turning on effective capacity to contest or consent to power.¹¹² While often using free–enslaved rhetoric, theorists construed unfreedom increasingly in gradations. Algernon Sidney wrote that although the "weight of Chains, number of Stripes, [or] hardness of labour" make one servitude worse than another, "he is a slave who serves the best and gentlest man in the world, as well as he who serves the worst."¹¹³ Mary Wollstonecraft condemned the Atlantic slave trade and, using the language of enslavement, women's unfreedom in 18th Century England too.¹¹⁴ Abolitionist David Walker, encountering a bootblack who "never want[ed] to live any better . . . than when [he could] get a plenty of boots and shoes to clean," denounced socioeconomic constraints that prevented the bootblack from objecting to his own exploitation.¹¹⁵ Labor

108. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 1 (1982).

109. Melvin L. Rogers, *Race, Domination, and Republicanism*, in *DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES* 59, 79 (Danielle Allen & Rohini Somanathan eds., 2020).

110. Justin Weinstein-Tull, *The Experience of Structure*, 55 ARIZ. ST. L.J. 1513, 1556 (2023).

111. NICCOLÒ MACHIAVELLI, *Discorsi sopra la prima deca di Tito Livio* [Discourses on Livy] I.5, in NICCOLÒ MACHIAVELLI: TUTTE LE OPERE 269, 324 (Mario Martelli ed., Bompiani 2018) (1531) (It.).

112. See JOHN MCCORMICK, *MACHIAVELLIAN DEMOCRACY* vii–ix, 5–6 (2011).

113. ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* III.21, at 349–50 (Thomas G. West ed., 1996) (1698).

114. SYLVANA TOMASELLI, *WOLLSTONECRAFT: PHILOSOPHY, PASSION, AND POLITICS* 69–72 (2020) (citing MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN: WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS* (1792)); accord Alan Coffee, *Mary Wollstonecraft, Public Reason, and the Virtuous Republic*, in *THE SOCIAL AND POLITICAL PHILOSOPHY OF MARY WOLLSTONECRAFT* 183, 185–87 (Sandrine Bergès & Alan Coffee eds., 2016).

115. DAVID WALKER, *APPEAL TO THE COLOURED CITIZENS OF THE WORLD* 31–32 (Peter P. Hinks

republicans likewise assailed an industrialism that deprived workers of information and time to read and thus created “an ‘aristocracy of intellect’” antithetical to republican government.¹¹⁶

At the heart of domination is arbitrary rule, as in unconstrained power, not simply unpredictable power (though unpredictability might manifest from lack of constraints).¹¹⁷ To be free, as Sandrine Bergès has explained, “is not . . . merely to be free of interference—as the subject of a benign monarch might be—but to be free of the potential interference of one who has absolute power over us and may choose to exert it at any point in time.”¹¹⁸ When a regime collapses and is succeeded by one less benign, its subjects’ unfreedom is not the harms that befall them but their inability to keep the regime answerable to them.¹¹⁹ Domination is less about imbalance of power than about the kind of power that dominating agents or structures exert over us.¹²⁰ In short, they exert “impositional power,” capable of disregarding their subjects’ interests, whether denying subjects’ desires or exposing the subject to harm, and knowing that they will still get their way.¹²¹ Neorepublicanism departed from received republicanism in articulating who is entitled to be free and what material or sociological circumstances counted as unfreedom. But concern with arbitrary rule has been a common thread, disclaiming not only internal “political slavery” but also external “political slavery,” i.e. empire, from the anticolonial Declaration of Independence to late 19th Century critiques of American empire.¹²²

Theorizing our trouble with empire, some scholars have attempted to

ed., 2000); see Melvin L. Rogers, *David Walker: Citizenship, Judgment, Freedom, and Solidarity*, in *AFRICAN AMERICAN POLITICAL THOUGHT: A COLLECTED HISTORY* 52, 74–75 (Melvin L. Rogers & Jack Turner eds., 2021) (noting that the bootblack “confuses the fact that he cleans shoes because he has no choice with the idea that he cleans shoes because he has freely chosen that profession”).

116. GOUREVITCH, *supra* note 25, at 156 (citation omitted).

117. PETTIT, ON THE PEOPLE’S TERMS, *supra* note 5, at 58–59; see LOVETT, GENERAL THEORY, *supra* note 25, at 96 (defining power as arbitrary “to the extent that its potential exercise is not externally constrained by effective rules, procedures, or goals that are common knowledge of all persons or groups concerned” and noting that arbitrariness “is not merely an excessive form of discretion”).

118. Sandrine Bergès, *Sophie de Grouchy on the Cost of Domination in the Letters on Sympathy and Two Anonymous Articles in Le Républicain*, 98 *MONIST* 102, 103 (2015).

119. See *id.*

120. See Gwilym David Blunt, *On the Source, Site and Modes of Domination*, 8 *J. POL. POWER* 3–4 (2015), <https://openaccess.city.ac.uk/id/eprint/20216/> [<https://perma.cc/J8JK-XWS7>]; McCammon, *supra* note 25, at 1032.

121. McCammon, *supra* note 25, at 1040–43.

122. See *Downes v. Bidwell*, 182 U.S. 244, 373 (1901) (Fuller, C.J., dissenting) (assailing theory that federal constitution empowers government to acquire other countries and subject those territories to varying laws, thus “substitut[ing] for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power”); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1, 272 (2002) (describing vocal minority of lawyers and lawmakers in late 19th Century that “attempted to assert a more egalitarian vision of American society” and “argued that America’s imperialist adventures were fundamentally contrary to republican governance”); Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 *CORNELL L. REV. ONLINE* 88, 101 (2019) (“The Declaration of Independence reflected a tradition of political thought in which the denial of political self-determination is a form of slavery.”).

distinguish from domination a separate phenomenon, “usurpation.”¹²³ Whereas domination describes a “problem of *control*,” in which agents do not realize their subjects’ interests, usurpation describes a “problem of *involvement*,” in which agents do not include subjects in their decision-making.¹²⁴ Usurpation stultifies, narrowing the worlds of those excluded, and it would seem to encapsulate the sometimes “benevolent” paternalism that Indigenous peoples have endured at the hands of state and settler alike.¹²⁵ However, exercising power responsive to subjects’ interests turns on involving them in deliberation, contestation, and consent to ascertain their interests in the first place. For usurpation to be an independently relevant concern, we would need to assume that paternalism could ever actually be responsive without subjects’ involvement. As Arash Abizadeh has argued, “procedures and processes that undermine autonomous opinion and will formation (on terms respecting the freedom and equality of persons) undermine the claim that a putative collective will truly is the will of the people.”¹²⁶ Given the need for inclusive democracy in *effectuating* nondomination, attempts to parse usurpation from domination at least underscore why neorepublicanism turns on contestation and consent processes.

Under a neorepublican guarantee, aimed at eliminating (or at least minimizing) domination, the federal government bears an ongoing antidomination duty. Because nondomination can be achieved in many ways, it can be helpful to think of three principles. Nondomination is freedom not *from* law but *through* law; freedom that exists only when there are the requisite resources to exercise it; and freedom to which persons in a republic-to-be are equally entitled.¹²⁷ First, neorepublican theory emphasizes that liberation is possible, and in fact only achievable, through law.¹²⁸ This is linked to our sense of domination as arbitrary, i.e. unconstrained, rule. Laws and legal relationships can of course be dominating, as Indigenous peoples law evinces.¹²⁹ But “public interference—exercised under democratic control—in fact *constitutes* freedom as distinct from *causing* it, because it secures citizens against private domination.”¹³⁰ This principle has surfaced frequently in republican

123. E.g., Patchen Markell, *The Insufficiency of Non-Domination*, 36 POL. THEORY 9, 10–13, 25 (2008).

124. *Id.* at 12.

125. See *infra* notes 305–310 and accompanying text.

126. Arash Abizadeh, *On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem*, 106 AM. POL. SCI. REV. 867, 880 n.31 (2012).

127. See Hustace, *supra* note 25, at 117–27.

128. See JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA, IN THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 1, 20 (J.G.A. Pocock ed., 1992) (distinguishing freedom *from* law and freedom *by* law); HINCHLIFFE, *supra* note 25, at 12 (“Harrington is making both an adversarial point . . . and a deeper one: that it is by the laws that we are free. Our freedom is created and maintained through the law.”).

129. See *infra* Part II.A.

130. Eoin Daly, *Freedom as Non-Domination in the Jurisprudence of Constitutional Rights*, 28

legal reasoning, though it has been heeded less so.¹³¹ It is the principle justifying an active federal government to reconstruct the South from the Civil War through the Civil Rights Movement and beyond, as partisans of the Slave Power continued through private and state action to subjugate African American freedpersons.¹³²

Second, neorepublican theory holds that there must be enough resources to effectuate freedom in order to say that freedom exists.¹³³ It does not matter whether people are designated as free when their lived experience belies that formalism, when functionally they cannot contest or consent to power.¹³⁴ Through this second principle we parse law's experience from its text. Through it we perceive people's different lived unfreedoms, which amount to domination despite the absence of formal enslavement.¹³⁵ Neorepublican theorists distinguish power differentials from unconstrained power, for example parsing dependence from domination despite these concepts' ubiquitous conflation.¹³⁶ Dependence is central to the human condition. We experience it through "[t]he immaturity of infancy and early childhood, illness and disability that render[] one nonfunctional even in the most accommodating surroundings, and the fragility of advanced old age. . . ."¹³⁷ But we also choose dependence at times, because we might value relationships that it deepens, by virtue of needing someone, being able

CANADIAN J.L. & JURIS. 289, 291 (2015) (citing Philip Pettit, *Law and Liberty*, in LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 39 (Samantha Besson & José Luis Martí eds., 2009)); accord BRESLIN, *supra* note 100, at 149.

131. E.g., WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 132 (Univ. of Chi. Press, 1979) (1765) ("[L]aws, when prudently framed, are by no means subversive but rather introductive of liberty; for . . . where there is no law, there is no freedom."); PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 70–71 (2016); HALE, *supra* note 79, at 381 ("Legislation which alters the relative economic powers of different classes in the community may often be accurately characterized as protecting the liberty, or property, or equality of some individuals against the actions of others."); John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 280–81 (1986) (describing laws that expand rather than contract freedom, like the Sherman Act and even traffic laws); Noelle N. Wyman, *Native Voting Power: Enhancing Tribal Sovereignty in Federal Elections*, 132 YALE L.J. 861, 866 (2023) ("Power, not just rights, is often necessary to combat subordination.").

132. See COWIE, *supra* note 10, at 294–95.

133. See PETTIT, JUST FREEDOM, *supra* note 27, at 103 (citing JOHN RAWLS, A THEORY OF JUSTICE 204–05 (1971)) (contrasting republicanism with Rawlsian justice, "under which people's equal freedom, as prescribed in [Rawls's] first principle, does not require them to have the resources needed to exercise and value that freedom").

134. See, e.g., DU BOIS, *supra* note 10, at 585 ("In the South universal suffrage could not function without personal freedom, land and education, and until these institutions were real and effective, only a benevolent dictatorship in the ultimate interests of labor, black and white, could establish."); Weinstein-Tull, *supra* note 110, at 1556 ("White revolutionaries experienced the lack of liberty as a lack of representation in government—political violence, a metaphor for violence. Black slaves experienced the lack of liberty as the absence of control over their bodies, families, and livelihoods—literal violence.").

135. Although the Thirteenth Amendment abolished most formal slavery, for example, the Black Codes and convict leasing systems recreated "slavery by another name." DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICAS FROM THE CIVIL WAR TO WORLD WAR II 155–232, 310–23 (2008); see James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 442–45 (2018).

136. See *infra* Part II.

137. EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 29 (1999); see *supra* 45 and accompanying text.

to rely on them, and perhaps being needed in return.¹³⁸ While received republicanism often casts dependence as inherently dominating, neorepublicans have begun to insist that “relationships of interpersonal support” can be structured to “resiliently protect us against arbitrary interference.”¹³⁹ As I discuss in Part II, neorepublican theory *and* Indigenous philosophies draw lines between such dependence and “dependency,” under which “a power over a man’s subsistence amounts to a power over his will.”¹⁴⁰ The former is not necessarily domination; when conditioned, however, it can become the latter and thus become dominating.

Third, neorepublican theory presumes that all people within a republic-to-be are entitled to be free from domination. If liberty “isn’t equal throughout,” said Cicero, “it isn’t liberty at all.”¹⁴¹ The greatest hypocrisies of received republicanism turned on failure to realize this principle.¹⁴² It took constitutional thinkers “out of doors” and beyond the founding era to contest the meaning of republicanism,¹⁴³ challenging its “absurd[]” theory and application and reconstructing its egalitarianism.¹⁴⁴ Black abolitionists like Hosea Easton, David Walker, and Maria Stewart condemned chattel slavery, nominally free hard labor, and race discrimination as debasements of the very idea of a republic, debasements through which Euro-American oligarchs could “carry out their [asserted] republicanism into the most fatal despotism.”¹⁴⁵ The premise that nondomination can be universalized evinced an understanding that freedom, as Anna Julia Cooper would later put it, is “not the cause of a race or a sect, a party or a class” but “the cause of humankind, the very birthright of humanity.”¹⁴⁶ At the heart of legal fights over citizenship and abolition was the question of whom the federal government was obligated to free from domination, whether in the slave states, borderlands, or Indian country.

138. See *infra* notes 257–277 and accompanying text.

139. O’Shea, *supra* note 45, at 141.

140. THE FEDERALIST NO. 79 (Alexander Hamilton).

141. PETTIT, ON THE PEOPLE’S TERMS, *supra* note 5, at 88 (quoting CICERO, THE REPUBLIC AND THE LAWS 21 (Niall Rudd trans., 1998)) (internal quotation marks omitted).

142. See SAUNT, *supra* note 7, at 80.

143. BENJAMIN H. IRVIN, CLOTHED IN ROBES OF SOVEREIGNTY: THE CONTINENTAL CONGRESS AND THE PEOPLE OUT OF DOORS (2011); see generally Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 FORDHAM L. REV. 1707 (2021); BONNER, *supra* note 73; MASUR, *supra* note 73.

144. WALKER, *supra* note 115, at 45.

145. HOSEA EASTON, *A Treatise on the Intellectual Character, and the Civil and Political Condition of the Colored People of the United States; and the Prejudice Exercised Towards Them*, in TO HEAL THE SCOURGE OF PREJUDICE: THE LIFE AND WRITINGS OF HOSEA EASTON 63, 92 (George R. Price & James Brewer Stewart eds., 1999) (1837); see Maria Stewart, *Lecture Delivered at the Franklin Hall*, in WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT 30, 30–33 (Beverly Guy-Sheftall ed., 2011) (challenging complacency over nominally free but nevertheless “deaden[ing]” hard labor in northern states); WALKER, *supra* note 115, at 43–45 (contesting the existence of real freedom in a nation that licenses race discrimination).

146. ANNA JULIA COOPER, A VOICE FROM THE SOUTH: BY A BLACK WOMAN OF THE SOUTH 120–21 (1892); see Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 71 (2019) (“Abolishing slavery meant guaranteeing everyone’s human right to freedom — to be free from domination by state or private masters, to be able to control one’s own life and labor.”).

C. Guarantee Constituencies

Even if the republican guarantee exemplifies the federal government's duty to eliminate domination, the question remains how Indigenous peoples benefit. At first glance, the guarantee might seem silent on the matter. Article IV, Section 4 obligates the United States to guarantee republicanism "to every *state* in this union."¹⁴⁷ There is no mention of Indian tribes, nor are tribes themselves bound by the terms of the federal constitution.¹⁴⁸ But words only ever evidence the underlying legal rules, so we are left to consider the functional meaning of an individualized antidomination duty for Indigenous peoples given their multiple, at times contested, citizenships in the United States.¹⁴⁹

One could argue that the republican guarantee extends to Indigenous peoples in several ways: (1) that an Indian tribe, or even an Indigenous people, is included formally in the guarantee as a "state"; (2) that the guarantee's use of "state" is itself functional, referring to a discernible "people or political community," such as an Indian tribe or Indigenous people; or (3) that the guarantee requires the federal government to create and to sustain a system of layered bona fide republics, under which Indigenous citizens no less than non-Indigenous citizens of "every state in this union" are entitled to freedom as nondomination. As I explain, the first is implausible, the second is plausible but problematic, and the third is the most coherent.

Indian tribes as "states." The guarantee text designates "every state" as the obligees of the United States' obligation to secure republican governance, and there is no mention of Indian tribes.¹⁵⁰ Add to this the fact that the Commerce Clause designates both states and Indian tribes,¹⁵¹ and it seems straightforward that only the fifty states count.¹⁵² Precedent and history generally support this reading. In *Cherokee Nation v. Georgia*, the Supreme Court held that tribes are not states but "domestic dependent nations," granted that the case was not about the guarantee.¹⁵³ On the guarantee itself, the first framers debated its inclusion and text in reference

147. U.S. CONST. art. IV, § 4.

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

149. Indigenous peoples have for generations debated United States citizenship, which has at times and for some been willingly assumed and at other times and for others been nonconsensually imposed. *E.g.*, John P. LaVelle, *Strengthening Tribal Sovereignty through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL'Y 533, 550–51 (2000); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 109–10 (1999). Because multiple citizenships pose an important challenge for my thesis, I presume Indigenous peoples' United States citizenship, alongside citizenship in their respective tribes or peoples. *See* Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. REV. 1692, 1705–34 (2016) (describing five distinct formulations of Indigenous citizenship).

150. U.S. CONST. art. IV, § 4.

151. U.S. CONST. art. I, § 8.

152. *See* Cleveland, *supra* note 122, at 241 (noting the guarantee's "textual limitation" to states).

153. 30 U.S. 1, 20 (1831).

to state governments as sovereigns, not as representatives of their respective sovereign polities.¹⁵⁴ Under this view, “every state” would refer not to the peoples of each ratifying state but to their governments, and thus “every state” would no more comprise the Indigenous peoples who governed within states and borderlands. All of this runs headlong into functionalism, especially as tribes and states “are arguably more similar now than in the past.”¹⁵⁵ But it is safe to say that a formalist argument that the guarantee encompasses tribes is weak.

Indigenous peoples as “states.” Taking a more functionalist approach, one could read “every state” in the guarantee to include polities not designated as states but nonetheless resembling them. On this logic, the United States could owe duties to tribes and also to territories.¹⁵⁶ Courts have in fact credited this argument.¹⁵⁷ In the wake of the Civil War, for example, the Supreme Court held that it had jurisdiction over a suit by Texas’s postwar state government to reclaim bonds sold by its wartime state government, rejecting bond purchasers’ argument that Texas was a conquered territory and not a state.¹⁵⁸ Interpreting the guarantee, Salmon P. Chase wrote for the Court that “state” referred to the people of Texas, not their government; notwithstanding their hostilities, they could not secede from the Union and thus had never actually done so.¹⁵⁹ Although “state” could mean people, territory, government, or the “combined idea” of the three, Chase reasoned, “in all these senses the primary conception is that of a people or community.”¹⁶⁰ Following this reasoning, Indian tribes could functionally be obligees of a federal antidomination duty.¹⁶¹

Broadening this to encompass yet-unrecognized Indigenous peoples might be a stretch. But the argument does not turn on federal recognition,

154. See, e.g., Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1838–39, 1842–44 (2019).

155. Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 24 (2019) [hereinafter Ablavsky, *Sovereign Metaphors*]; cf. Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 369 n.535 (2009) (observing that as tribes become more like states, federal constitutional provisions pertaining to states—like the republican guarantee—would seem more likely to apply to them).

156. See Ablavsky, *Sovereign Metaphors*, *supra* note 155, at 24; José R. Coleman Tió, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389, 1395 (2007).

157. E.g., *Texas v. White*, 74 U.S. (7 Wall.) 700, 720 (1869); *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 400 (2d Cir. 1927); *Mora v. Mejias*, 115 F. Supp. 610, 612 (D.P.R. 1953); *Uyeno v. Acheson*, 96 F. Supp. 510, 515 (W.D. Wash. 1951); *Stokes v. Harrison*, 115 So. 2d 373, 378 (La. 1959); *People v. Crane*, 108 N.E. 427, 429 (N.Y. 1915); cf. *Andres v. United States*, 333 U.S. 740, 745 (1948) (holding that the Territory of Hawai‘i counted as a state, at least in some contexts).

158. *Texas v. White*, 74 U.S. (7 Wall.), 726–32 (1869).

159. *Id.* at 721, 726. Chase’s holding was premised on the principle that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” *Id.* at 725.

160. *Id.* at 720.

161. This argument parallels several scholars’ work, whether observing that statutory references to “people,” as in the Northwest Ordinance, could encompass Indian tribes as well as states; or reckoning that tribes as domestic peoples distinct from states ought to have congressional representation. Reese, *supra* note 21, at 775–76; Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within Our Federalism: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 691 (2006) [hereinafter Skibine, *Redefining*].

and the main question in invoking the guarantee would be whether an Indigenous group is sufficiently constituted as a people or polity. That said, there is good reason to favor a formalist reading, as it does not assume tribal statehood where tribes have not pursued it. This aligns with doctrines presuming tribal sovereignty absent tribal waiver or clear congressional statement.¹⁶² The prospect of statehood, Greg Ablavsky has pointed out, “has always represented a Faustian bargain for Native peoples,” offering “clearer constitutional footing” for tribal sovereignty but risking “those aspects of Native governance that make Native nations indigenous.”¹⁶³ Tribal consent must be the basis for being bound by the federal constitution in the same manner as states, including for example by the Reconstruction Amendments.¹⁶⁴

Indigenous peoples as Article IV, Section 4 constituencies. The third argument is more functionalist, looking through “every state” to the individuals on the other side. They are to whom the federal government ultimately owes an antidomination duty.¹⁶⁵ Drawing on Montesquieu’s view of federated republics, for example, Carolyn Shapiro has argued that the republican guarantee is meant to ensure that each state becomes and remains a republic, resulting in a system of layered republicanism.¹⁶⁶ Because the United States must make each state republican, persons in one state have interests against antirepublican lawmaking in other states.¹⁶⁷ In Indigenous peoples law, Wenona Singel has advocated a functional approach to discerning Indian tribes’ powers and role under federalism, notwithstanding that they might be “outsiders to the constitutional compact.”¹⁶⁸ Under this approach, tribes have become integrated into the federal system by *operation* of law, even if not designated by constitutional text, so their sovereign presence must be contemplated when invoking federalism.¹⁶⁹ The same goes here: it is the people of “every state” who functionally experience and thus benefit under the guarantee.

This functionalism is consistent with individual-focused arguments made by 19th Century antislavery constitutionalists, who argued that the

162. See *infra* note 243 and accompanying text.

163. Ablavsky, *Sovereign Metaphors*, *supra* note 155, at 27 (citing Angela R. Riley, (*Tribal Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 835–47 (2007)); accord Reese, *supra* note 21, at 834–35).

164. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) (citing *Talton v. Mayes*, 163 U.S. 376 (1896)) (holding that Indian Civil Rights Act, which drew in part on Fourteenth Amendment principles, did not abrogate tribal sovereign immunity from equal protection challenge to Santa Clara Pueblo’s citizenship rules).

165. Cf. Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427, 1429 (2016) (arguing that under republican guarantee, federal structure must be republican, not only states’ structures).

166. Shapiro, *supra* note 24, at 194 (citing WIECEK, *supra* note 62, at 73).

167. See *id.* at 222–27 (explaining how partisan gerrymandering or vote suppression in one state, for example, have adverse “spillover” effects in other states).

168. Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 819 (2014) [hereinafter Singel, *First Federalists*].

169. See *id.* at 819–20.

guarantee “recognized an individual right” to republican government, including federal protection against state power.¹⁷⁰ Joel Tiffany argued, for example, that the guarantee “was designed to be a pledge of all the people of the Union, to each individual citizen thereof, that the relation which the state government should ever bear to him, should be that of a Republic.”¹⁷¹ Therefore, he explained, “if there be a single citizen who is, or has been [robbed] of full and ample protection in the enjoyment of his natural and inherent rights . . . this solemn guaranty has been violated.”¹⁷² Tiffany’s capacious reading of the constitution was just one in a wave of abolitionist and antislavery legal thought that sought to wrest the federal charter out of the Slave Power’s hands.¹⁷³ Under such a reading, each person within the United States is owed the republican guarantee.

A functionalist reading, however, has complex implications for Indigenous peoples. Whether United States citizenship was hard-fought or foisted,¹⁷⁴ Indigenous peoples are as entitled to freedom as nondomination as other persons in the United States. By virtue of tribal citizenship, however, many Indigenous persons can experience domination both as persons within the United States and as constituents of their respective peoples, which have a nation-to-nation relationship with the United States. Domination thus has internal and external facets, reflecting tribes’ positions as separate sovereigns. Consider, for example, the right to vote. Nondomination entails voting rights,¹⁷⁵ though of course it turns on more than electoral participation.¹⁷⁶ Denial of a tribal citizen’s right to vote in state or federal elections would be an instance of domination experienced by that individual. But denial of Indigenous persons’ voting rights “amounts to more than denying and diluting [their] rights,” diluting the sovereign power of tribes in which they are enrolled.¹⁷⁷ Antidomination therefore requires rectifying tribal citizens’ unfreedom as persons within the United States but in ways that neither expose them to unfreedom within their tribes

170. Zietlow, *supra* note 103, at 434.

171. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT 108 (1849).

172. *Id.* at 114.

173. See Roberts, *supra* note 146, at 54–62 (describing the antislavery constitutional theory of John Bingham, Lydia Child, Frederick Douglass, Lysander Spooner, Theodore Weld, and others); Zietlow, *supra* note 103, at 433, 447 (summarizing antislavery constitutionalists’ argument that slave states were plainly not republican because they “had a large number of people who could not participate in the polity, and whose fundamental human rights were violated”); see also Rebecca E. Zietlow, *James Ashley’s Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1712–23 (2012) (detailing antislavery constitutionalism of Representative James Mitchell Ashley from Ohio).

174. See generally Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185 (2016).

175. For an argument that the federal trust responsibility to Indian tribes entails voting rights protection, see Torey Dolan, *Congress’s Power to Affirm Indian Citizenship through Legislation Protecting Native American Voting Rights*, 59 IDAHO L. REV. 47, 88–90 (2023).

176. Cf. DELORIA, *supra* note 63, at 14–15 (noting that private paternalism could be just as harmful for Indian tribes as government paternalism).

177. See Wyman, *supra* note 131, at 865.

nor jeopardize tribes' nation-to-nation relationships.

Beyond tribal citizenship, indigeneity is also a basis on which antidomination means something different. The point is crucial, because not all Indigenous persons belong to federally recognized (or state-recognized) tribes. Although Indigenous peoples are not monolithic, indigeneity has been constructed through more or less the same application of United States laws and norms.¹⁷⁸ For example, the same yeomanry, nuclear family, and gender role norms were the goals of federal allotment policy as well as the models held up for Indigenous children to emulate at residential schools nationwide, notwithstanding the many distinct cultures that those children embodied.¹⁷⁹ Moreover, indigeneity has been shaped in substantial part through resistance to settler colonialism as well as, in the first instance, shared experiences of colonization.¹⁸⁰ The legal significance of indigeneity is contested, an "important category" under international law yet "not trigger[ing] any specific set of doctrinal protections" under domestic law.¹⁸¹ Thus, the import of indigeneity under a neorepublican guarantee would likewise be contested. The implication of indigeneity as a legally relevant difference is that in order to effectuate nondomination, we would almost certainly need to curb and even counter the effects of colonialism in order to make laws responsive to Indigenous peoples' interests as shaped by their experiences. For example, hunting certain animals could for Indigenous persons reflect traditional subsistence or cultural practices, while having much less bearing on the experience of freedom for non-Indigenous persons.¹⁸² Because indigeneity is a lived form of difference, law that fails to account for it will always be incomplete.

178. See, e.g., Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1557, 1571–94 (2001) (describing widely varying Indigenous property systems); BRUYNEEL, *supra* note 48, at xxiii (describing "subject position" of indigeneity while noting that term is "not meant to homogenize or subsume the specific national and tribal identifications of peoples"); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 532–42 (2017).

179. See Bobroff, *supra* note 178, at 1565; K. TSINANINA LOMAWAIMA & TERESA L. MCCARTY, "TO REMAIN AN INDIAN": LESSONS IN DEMOCRACY FROM A CENTURY OF NATIVE AMERICAN EDUCATION 1–6, 53–64 (2006); AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCES 116–18 (Margaret L. Archuleta, Brenda J. Child, & K. Tsianina Lomawaima).

180. PHILIP J. DELORIA, *PLAYING INDIAN* 152 (1998); Anne Waters, *Ontology of Identity and Interstitial Being*, in *AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS* 153, 160 (Anne Waters ed., 2004); see, e.g., *Kawananakoa v. Polyblank*, 205 U.S. 349, 352–54 (1907) (extending sovereign immunity doctrine beyond Indian tribes to cover governments brought into United States' ambit without treaties); *Montoya v. United States*, 180 U.S. 261, 266 (1901) (defining Indian tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory," notwithstanding that tribes had their own unique conceptions of tribal belonging or nationality).

181. Rolnick, *supra* note 6, at 2672.

182. See, e.g., *United States v. Nuesca*, 945 F.2d 254, 256–59 (9th Cir. 1991) (upholding convictions of two kānaka ʻōiwi for hunting animals protected under the Endangered Species Act, rejecting their claims of "aboriginal rights" to do so); Mike Baker, *Makah Tribe Wins Federal Approval to Hunt Gray Whales*, N.Y. TIMES (June 13, 2024), <https://www.nytimes.com/2024/06/13/us/makah-whales-hunting-noaa.html>.

* * *

In sum, an antidomination duty embodied in a neorepublican guarantee would entail eliminating, or at least minimizing, the domination that all persons experience. Doing so requires accounting for the tangible experiences of Indianness and indigeneity, implementation of which warrants exploration beyond this Article. One key to an antidomination duty would be federal provision of forums through which Indigenous peoples can articulate interests and contest or provide bona fide consent to federal lawmaking.¹⁸³ Antidomination in Indian country is not simply generating *assent* to federal policies. It is a duty first and foremost to ensure that bona fide *consent* could be given, to ensure that conditions for effective deliberation and contestation exist. Only then could any consent given, reflecting Indigenous peoples' actual interests, be the basis for federal governance that is not dominating. Although federal consultation procedures have been formalized since the 1990s, they nevertheless represent "box checking" more than bona fide consent processes.¹⁸⁴ Nondomination demands far more for the avowal of Indigenous interests, from recognition processes that presently deny even well-defined Indigenous communities domestic opportunities for self-determination, to equitable education in Indian country, for which the federal government's track record has been harrowing.

Ultimately, a neorepublican reinterpretation of Article IV, Section 4 responds to "the ongoing question of whether there is any recognizable and enforceable cap to federal authority in Indian affairs."¹⁸⁵ An antidomination duty, though it could redefine self-determination,¹⁸⁶ could even more modestly assist tribes' perennial reliance "on their governing institutions as a critical defense against actual tyranny."¹⁸⁷ An antidomination duty goes beyond the federal trust responsibility, and certainly exceeds that responsibility's present enforcement.¹⁸⁸ It could restructure rather than

183. Cf. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 66 (1997) (arguing that consent requirement of Indian Gaming Regulatory Act "is premised more upon coercion than the type of arms-length bargaining between equal parties that is found in the early treaty period").

184. Elizabeth Kronk Warner, *Sovereignty over Box Checking: Effective Tribal Consultation Leading to Consent*, FLA. ST. L. REV. (forthcoming); accord Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37 (2015).

185. Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 442 (1999).

186. A particularly robust view of an antidomination duty might, for example, support Indian nullification. See generally, e.g., WILLIAM APESS, *Indian Nullification of the Unconstitutional Laws of Massachusetts Relative to the Marshpee Tribe; or, The Pretended Riot Explained*, in ON OUR OWN GROUND: THE COMPLETE WRITINGS OF WILLIAM APESS, A PEQUOT 163 (Barry O'Connell ed., 1992); Babcock, *supra* note 21, at 559–69.

187. Singel, *First Federalists*, *supra* note 168, at 831.

188. See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 188–89 (2011) (Sotomayor, J., dissenting) (observing that Supreme Court's refusal to interpret federal trust responsibility according to common law trust principles risks "further dilution of the [United States'] fiduciary obligations" to Indian tribes).

reinforce “the power relations and ideologies of colonial domination that Indian Nations challenge when they claim their right to national self-determination.”¹⁸⁹ Antidomination at least represents invalidation of the kind of unilateral federal power embodied by *Lone Wolf v. Hitchcock*.¹⁹⁰ If the legacy of *Morton v. Mancari* was “to integrate the trust doctrine into the Indian Commerce Clause of the Constitution,”¹⁹¹ as Alex Skibine argued, then the future of a neorepublican guarantee could be as an internal constraint on federal power, albeit also a source of such power beyond the Indian Commerce Clause.¹⁹²

II. INTERDEPENDENCE WITHOUT DOMINATION

In the Article’s prior Part, I envisioned a federal commitment to republican freedom and sketched its potential to reshape the United States’ relationships with Indigenous peoples. In this Part, I turn to implications of synthesizing neorepublican legal theory with Indigenous peoples law and philosophy with a goal of showing that the synthesis is generative. The first section demonstrates one way that the neorepublican focus on domination can help us to better understand Indigenous peoples law, while the second section explains how Indigenous theories of dependence and interdependence can contribute to neorepublican thought.

Referring to Indian tribes as “domestic dependent nations” is ubiquitous in Indigenous peoples law. But the term comprises at least two different conceptions of dependence, one reflecting accession to a protectorate relationship between the United States and Indian tribes, the other ascribing to Indigenous peoples a helplessness that has been used to justify federal domination in Indian country.¹⁹³ Through a neorepublican lens, I parse these conceptions and explain how the former could be, but is not necessarily, dominating, while the latter is simply a gloss for domination. I then distinguish both conceptions from the Indigenous understandings that they occlude. Indigenous intellectual traditions treat dependence and interdependence as natural and even valuable, not as dominating.¹⁹⁴ Because received republican theory conflated dependence and domination,

189. Davis, *Redemption*, *supra* note 18, at 1757–58.

190. 187 U.S. 553 (1903); see T. Alexander Aleinikoff, *Securing Tribal Sovereignty: A Theory for Overturning Lone Wolf*, 38 TULSA L. REV. 57, 61–64 (2002) (summarizing arguments for tribal sovereignty as constitutionally protected).

191. *Morton v. Mancari*, 417 U.S. 535 (1974); Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 248 (2003).

192. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1043–44 (2015) [hereinafter Ablavsky, *Beyond*].

193. Compare, e.g., Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 623–26, 633 (2022) (providing account of domestic dependent nationhood as sustained sovereignty within a protectorate), with Blackhawk, *Foreword*, *supra* note 17, at 57–59 (providing account of domestic dependent nationhood as diminished sovereignty ostensibly justifying federal control).

194. See *infra* notes 278–282 and accompanying text.

and neorepublican theorists have often enough replicated that conflation, Indigenous thought can contribute a lot. It can strengthen both feminist and (dis)abled neorepublican accounts of dependence as distinct from domination, and it can offer insights to nascent questions about intergenerational and environmental domination.

A. Parsing Domestic Dependent Nationhood

Federal Indian law has for most of its existence cast Indian tribes as “domestic dependent nations,” and the concept remains widely used. In this section, I show how in this characterization lawyers and judges have written “dependent” but meant “dominated.” In doing so, we have crowded out, if not erased, Indigenous conceptions of dependence and interdependence. To explain, I uncover two senses of dependence that *are* embedded in the domestic dependent nationhood concept—acceded dependence and conditioned dependence—and I contrast them in broad strokes with Indigenous understandings, which I explicate more fully in the next section.

Acceded dependence in exchange for protectorates. The United States Supreme Court first cast Indian tribes as “domestic dependent nations” in the Marshall Trilogy, but the concept of “dependence” soon took on multiple meanings.¹⁹⁵ In the first of the three cases, *Johnson v. McIntosh*, the Court held that tribes within the United States’ ambit could convey their land in fee simple only to the federal government as successor to the “discovering” British Empire.¹⁹⁶ The Court used the language of dependence variously to describe a formal relationship that parties could enter willingly,¹⁹⁷ and to describe legal relationships in which land title would be determined by British law.¹⁹⁸ A decade later, the decision in *Cherokee Nation v. Georgia* sharpened the different meanings of dependence but did not select one to the exclusion of others.¹⁹⁹ There, the Court held that it lacked jurisdiction to hear tribes’ challenges to state regulation of Indian country, opining that tribes are not “foreign states” under Article III, Section 2 and thus could not sue directly in the Supreme

195. Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627 & n.2 (2006) (citing WILKINSON, TIME, *supra* note 12, at 24).

196. 21 U.S. 543, 573–74 (1823). Scholars have pointed out how the Marshall Court did not simply apply the so-called “doctrine of discovery” but “reconceptualized” it. *E.g.*, Babcock, *supra* note 21, at 472 (explaining how the doctrine purely applied would have vested the United States with exclusive right among Euro-American nations to “treat for title” but the doctrine ultimately applied vested the United States with title itself).

197. *E.g.*, *Johnson*, 21 U.S. at 580 (noting that revolutionaries in the Carolinas could “declare[] their dependence” on the British crown). In one muddled use, the Court referred to Indian tribes “as a dependent, and in some respects as a distinct people,” using dependence there more to describe tribes’ increasingly domestic position in the British empire. *See id.* at 596. That said, defendants had put a finer point on things, arguing that one nation “pass[ing] under the dominion of another” is no longer sovereign but persists in a “dependent condition.” *Id.* at 568.

198. *E.g.*, *id.* at 572, 579, 593, 598.

199. 30 U.S. 1 (1831).

Court.²⁰⁰ To the Court's eyes, treaties evinced a federal duty to protect Indian tribes, and the United States considered tribes to be "so completely under [its] sovereignty and dominion" that other nations' alliance with them or acquisition of their lands would constitute an act of war against the United States.²⁰¹ Tribes could thus "be denominated domestic dependent nations," their relationship to the United States "resembl[ing] that of a ward to his guardian."²⁰² By glossing "domestic dependent nations" in guardian-ward terms, the Court fueled more pernicious conceptions of the federal-tribal relationship, to which I will return. At the same time, the judges referred multiple times to Indian tribes asserting or acceding dependence on the United States during treaty negotiations.²⁰³

The Marshall Court soon drew back from domestic dependent nationhood as articulated in *Cherokee Nation*, or at least from some of its disparaging implications. In *Worcester v. Georgia*, decided the following year, the Court reached the merits of essentially the same question of whether states could regulate Indian country, holding that states could not regulate Indian country.²⁰⁴ The decision cast tribes not as "domestic dependent nations" but as "distinct political communities, having territorial boundaries, within which their authority is exclusive," yet the Court did not expunge the domestic dependent nationhood idiom or its associated explanations.²⁰⁵ When using dependence to explain the federal-tribal relationship, John Marshall wrote for the Court that Indian tribes "were willing to profess dependence" on England, France, or Spain during treaty-making, emphasizing the concept's formal sense.²⁰⁶ Indigenous peoples could accede dependence, Marshall reasoned, voluntarily entering protectorates with increasingly powerful Euro-American nations to gain supplies and security against "dangerous intruders . . . entering their country."²⁰⁷ Meanwhile, European monarchs could "purchase[] their alliance and dependence," underscoring that the obligation was jointly constructed, notwithstanding differentials in military or economic might.²⁰⁸ Because *assent* undergirded the obligation, and perhaps also *consent* (setting aside

200. *Id.* at 20.

201. *Id.* at 17–18.

202. *Id.* at 17.

203. *E.g., id.* at 17; *id.* at 40 (Baldwin, J., concurring); *id.* at 67 (Thompson, J., dissenting).

204. 31 U.S. 515, 561–63 (1832).

205. *Id.* at 557.

206. *Id.* at 547; see Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1001 (1981) (arguing that John Marshall used "domestic dependent nation" to designate "the political protectorate role which the federal government played in insulating the Indian tribes from intrusions by foreign governments, the states, and non-Indian citizens"); Skibine, *Redefining*, *supra* note 161, at 670–72 (arguing that under John Marshall's protectorate paradigm, "although the Indian tribes' territory was within the greater territory of the United States, that fact alone did not necessarily incorporate tribes within the political system of the United States").

207. *Worcester*, 31 U.S. at 547.

208. *See id.*

briefly what we know about Euro-American coercion and misrepresentation during treaty-making), the relationship was not necessarily dominating.

Although a protectorate bespeaks an imbalance of power, such imbalance is not *per se* domination.²⁰⁹ Indigenous treatymakers' assertions of dependence counsel against assuming that the formal relationship that they helped to forge is invalid. Scott Lyons has reminded us: "that Natives understood what was at stake in their treaties and argued passionately, not only with commissioners but with each other, about their implications; that not all chose to sign treaties (and often made speeches explaining why), but most did; and that doing so signified agency and consent—yes, limited on both counts."²¹⁰ This is, as Lyons emphasized, not to "idealiz[e] the moment of treaty";²¹¹ nor, from where I stand, does it discount any domination that Indigenous peoples experienced under the protectorate.²¹²

Conditioned dependence justifying federal plenary power. Within the Marshall Trilogy's articulation of dependence, however, were seeds of a more pernicious notion of dependence.²¹³ That understanding soon sprouted and overgrew what John Marshall might have thought was a balance carefully struck. In *Cherokee Nation*, recall, he had further explained "domestic dependent nation" through metaphor, writing that Indian tribes' relations to the United States "resemble that of a ward to his guardian."²¹⁴ Tribes, Marshall wrote, "look to [the United States] for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father."²¹⁵ Although *Worcester* made no use of the guardian-ward analogy, instead solidifying the duty of protection,²¹⁶ the analogy's racializing, disabling, and infantilizing potential lingered.

Eventually, wardship became more than metaphor, if "incrementally in an ad hoc fashion."²¹⁷ And with it, the meaning of dependence in domestic dependent nationhood changed. Whereas the federal-tribal relationship had been premised at least partly on tribes acceding dependence on the United States, reciting the necessary words to secure sovereignty-preserving treaties, the Supreme Court began to presume Indigenous peoples as physically and politically inferior. Doing so shifted the rationale for protection and devised an alternate basis for federal power in Indian

209. See *supra* notes 120–122 and accompanying text.

210. SCOTT RICHARD LYONS, X-MARKS: NATIVE SIGNATURES OF ASSENT 127 (2010).

211. *Id.*

212. Cf. Matthew L. M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 305, 322 (2023) (arguing that federal government has failed to meet duty of protection, likely distinct from an antidomination duty, by underfunding tribal governments, insufficiently consulting with tribes, and not complying court precedents that favor tribes).

213. See Ablavsky, *Beyond*, *supra* note 192, at 1079–80 (2015) (arguing that in *Cherokee Nation* Marshall put "a new valence" on the federal-tribal relationship, adding a notion of subordination that federal prior federal officials had not supposed).

214. *Cherokee Nation*, 30 U.S. 1, 17 (1831).

215. *Id.*

216. See generally *Worcester*, 31 U.S. 515.

217. Skibine, *Redefining*, *supra* note 161, at 672.

country.²¹⁸ In *United States v. Kagama*, the Supreme Court notoriously characterized Indian tribes not merely as *resembling* wards of a guardian but as *being* “the wards of the nation.”²¹⁹ *Kagama* upheld the Major Crimes Act, under which the federal government assumed exclusive jurisdiction to prosecute certain serious offenses committed by Indians against Indians in Indian country.²²⁰ Tribes, the Court reasoned, were “communities dependent on the United States,—dependent largely for their daily food; dependent for their political rights.”²²¹ As “remnants of a race once powerful, now weak and diminished in numbers,” Indian tribes were so “weak[] and helpless[]” that the United States owed them a duty of protection “and with it the power” to enforce that duty, the basis for the plenary power doctrine.²²² Adding a dubious remark that this plenary power had “always been recognized,” the Court thus justified imposing federal power in Indian country based on its own perceptions of Indian tribes’ capacity for self-government.²²³

The Court was unfortunately not alone in casting Indigenous peoples as deficient. Analogizing Indigenous peoples to children “had a long history, the two being paired rhetorically as natural, simple, naive, preliterate, and devoid of self-consciousness.”²²⁴ To missionaries in Hawai‘i, *kānaka ʻōiwi* were “benighted,” requiring Christian education to help us out of our “heathen” ways.²²⁵ Federal and territorial officials cast Indigenous peoples as “densely ignorant, superstitious, and subject to imposition,” as “incapable of sustaining any other relation with the whites, that that of dependence and pupilage.”²²⁶ Even assimilation policies “clothed in the rhetoric of racial equality” were premised on beliefs of “Anglo-Saxon racial superiority.”²²⁷ Subsequent court decisions replicated this trope of

218. See Raymond Cross, *Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine*, 39 TULSA L. REV. 369, 378 (2003) (“Justice Miller’s opinion in *Kagama* converted Chief Justice Marshall’s ‘Indian protectorate’ analogy into a license for Congress’s exercise of an extra-constitutional power not subject to judicial review or limitation . . .”).

219. *United States v. Kagama*, 118 U.S. 375, 383 (1886).

220. *Id.* at 385; see Sidney L. Harring, *The Distorted History that Gave Rise to the “So Called” Plenary Power Doctrine: The Story of United States v. Kagama*, in INDIAN LAW STORIES 149, 150 (Carole Goldberg, Kevin K. Washburn, & Philip P. Frickey eds., 2011).

221. *Kagama*, 118 U.S. at 383–84.

222. *Id.* at 384; see Harring, *supra* note 220, at 149–51.

223. *Kagama*, 118 U.S. at 384.

224. PHILIP J. DELORIA, *PLAYING INDIAN* 106 (1998).

225. ARISTA, *supra* note 12, at 83; see also JOHN DEMOS, *THE HEATHEN SCHOOL: A STORY OF HOPE AND BETRAYAL IN THE AGE OF THE EARLY REPUBLIC* 104 (2014) (documenting how even highly educated New Englanders opposed to missionaries’ work believed that the “heathen” was “incapable of ‘civilization’ and genuine religious understanding; hence missionary projects were misconceived from the start”).

226. E.g., KATHRYN GIN LUM, *HEATHEN: RELIGION AND RACE IN AMERICAN HISTORY* 185 (2022) (internal quotation marks omitted) (discussing views of William Howard Taft, former President and Chief Justice of the United States); WITGEN, INFINITY, *supra* note 14, at 338 (internal quotation marks omitted) (discussing views of Lewis Cass, former governor of Michigan Territory).

227. Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 609 (2019); accord Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization’s Harms*, 27 WM. & MARY BILL RTS. J. 501, 519–21 (2018) (explaining how colonizers totalize

“Indigenous deficiency.”²²⁸ Often the result diminished Indigenous sovereignty and rights, yet often enough too the result favored Indian tribes while entrenching their subjection to federal say-so. Congress could regulate Indians’ land sales to non-Indians given Indians’ “dependent character,” the Court once opined, epitomized by “their recognized inability to safely conduct business affairs” and the federal government’s duty to protect them “against the greed of others and their own improvidence.”²²⁹ Courts must construe Indian treaties liberally in favor of tribes, the Court has held, once on grounds that Indians are “weak and defenseless” wards “dependent upon [the United States’] protection and good faith.”²³⁰ State courts too have exploited wardship’s implication of incapacity, denying Indigenous citizens of the United States their voting rights on grounds that as wards, they were “not capable of handling their own affairs.”²³¹

A further aspect of *Kagama* warrants attention: the Court’s passing recognition that Indian tribes’ “helplessness” was “so largely due to the course of dealing of the federal government with them.”²³² Which is to say the Court’s having seen the United States’s hand in conditioning tribes’ susceptibility to federal power. The dependence that the Court construed, while characterized with Indigenous deficiency tropes, was itself premised on prior, often antagonistic, federal action. Drawing on economic theory on “dependency,” Richard White has explained this concept of conditioned dependence: “By dependency we mean a situation in which the economy of certain countries is conditioned by the development and expansion of another economy to which the former is subjected.”²³³ It is not about unequal power, or exchange in the economic sense, but about one party’s capacity to determine the other’s options.²³⁴ This is the idea encapsulated in *Kagama*, and dependence conditioned by the federal government’s prior exercise of power was all but concealed by the guardian–ward analogy. Whatever imbalance of power readers of the decision might perceive between the United States and Indian tribes—and use to justify plenary

Indigenous groups’ difference until those groups are characterized solely by that difference, which can then be exploited).

228. JUSTICE, *supra* note 64, at 2–4; see Ablavsky, *Sovereign Metaphors*, *supra* note 155, at 15 (observing that following the Marshall trilogy, “decisions would place considerably more emphasis on dependency than nationhood”); Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 261 (2010) (noting transformation of trust doctrine from one “geared at protecting the tribe’s right to self-government” by integrating tribes into federal relationship to one “based on the perceived racial inferiority of Indians and helplessness of tribes”).

229. *Sunderland v. United States*, 266 U.S. 226, 233–34 (1924).

230. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

231. *E.g.*, *Porter v. Hall*, 271 P. 411, 416–17 (Ariz. 1928), *overruled in part* by *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948); see Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1108–09 (2015); DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 14–16 (2007).

232. *Kagama*, 118 U.S. at 384.

233. WHITE, *supra* note 63, at xvii (citations omitted).

234. *See id.* at xvi–xvii.

power—it would be made explicable through static “Indigenous deficiency,” not by reference to a history of predatory economic exchange, environmental degradation, and wars, mission projects, and unconstrained settler colonial vigilantism.²³⁵

Conflation and occlusion. The Court’s freezing-in-amber of Indian tribes’ conditioned dependence, moreover, became a doctrinal basis at the very least for further conditioning efforts. Beginning in the late 19th Century, “the federal government treated Indian people as wards of the United States under a repressive guardianship concocted by Congress and the Executive branch.”²³⁶ The expanded bureaucracy’s paternalism created further “dependency,” habituating Indian tribes to rely on the federal government in ways that they had not desired when professing dependence to secure treaties.²³⁷ The Bureau of Indian Affairs “proliferated as a federal, bureaucratic alternative to self-governance.”²³⁸ Moreover, “[m]aintaining American Indians as wards, in circumstances that denied or destroyed economic development, served to *legitimate* US belief in its just inheritance of lands and freedom from Native peoples.”²³⁹

Over the course of the 20th Century, the federal legislature and executive pivoted in fits and starts toward supporting Indigenous self-determination. The Supreme Court persisted in its old habits, however, using the concept of conditioned dependence as its “primary tool to enforce tribal passivity and weakness.”²⁴⁰ As Matthew Fletcher and Frank Pommersheim have detailed, the increasingly self-aggrandized Court has used “implicit divestiture” doctrine to diminish Indian tribes’ sovereignty.²⁴¹

235. See RESTATEMENT OF THE LAW OF AMERICAN INDIANS, *Reporter’s Introduction* (Am. Law Inst. 2022) (citing *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7 (D.D.C. 1999) (“Indian tribes, on the verge of starvation and threatened with being overwhelmed by the non-Indian presence on their lands, had little choice but to comply with what one court referred to as a ‘state of coerced dependency.’”); Matthew L. M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 980 (2022) [hereinafter Fletcher, *Muskrat Textualism*] (“[T]hroughout the history of federal Indian law, the Supreme Court has warped the meaning of dependency by insisting that dependency was justified by the assumed racial inferiority of Indian people.”).

236. Matthew L. M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38, 42–43 (2020).

237. Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1254 (1995); see Cross, *supra* note 218, at 376 (observing how “deepened vulnerability to this growing federal power over their lives and resources during the late nineteenth century rendered them legally and practically dependent on the ‘good faith’ of the federal government to exercise that power in their best interests”).

238. Johnson & Hamilton, *supra* note 237, at 1258; see generally WHITE, *supra* note 63 (providing case studies of Euro-American settler nations’ conditioned dependence of Choctaw Nation, Pawnee Nation, and Navajo Nation).

239. K. Tsianina Lomawaima, *The Mutuality of Citizenship and Sovereignty: The Society of American Indians and the Battle to Inherit America*, 25 STUDS. AM. INDIAN LITERATURES 333, 335 (2013) (emphasis added).

240. Fletcher, *Muskrat Textualism*, *supra* note 235, at 980.

241. Fletcher, *Tribal Consent*, *supra* note 43, at 94; Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 326–29 (1997); accord Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 214 (2002); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 392–93 (2007); Gloria Valencia-Weber, *The*

Notwithstanding the problems with Congress's apparent "plenary power" to govern in Indian country,²⁴² the rule had long been to presume tribal sovereignty unless a tribe waives it or Congress expressly abrogates it.²⁴³ At least since *Oliphant v. Suquamish Indian Tribe*, however, the Court has on its own "manipulate[d] the contours of tribal sovereignty."²⁴⁴ There the Court held that tribes may not prosecute non-Indians for committing crimes in Indian country, asserting that Congress never gave tribes full criminal jurisdiction over their own lands, an inversion of the sovereignty presumption.²⁴⁵ The Court based its assumption that tribes would not have had jurisdiction on "their [dependent] status," with which exercising jurisdiction would be "inconsistent."²⁴⁶ Echoing *Oliphant*, the Court in *Montana v. United States* then divested tribes of their civil regulatory jurisdiction over noncitizens on noncitizen-owned land in Indian country.²⁴⁷ "[E]xercise of tribal power" beyond a narrow set of internal affairs, the Court opined, was again "inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."²⁴⁸ And these cases only began a trend.²⁴⁹

Although the notion of a protectorate based on acceded dependence still exists in the Marshall Trilogy's text, the concept has been conflated with conditioned dependence, i.e. "dependency." Ultimately "dependence" has come to mean domination, that Indian tribes are subject to the will of the United States without meaningful ways to check its exercise, all justified by age-old tropes of "Indigenous deficiency."²⁵⁰ But conflation had a further effect: obscuring Indigenous conceptions of dependence (the next section's focus), shutting them out of federal Indian law as a basis for the federal—

Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets, 5 U. PA. J. CONST. L. 405, 412 (2003).

242. *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–68 (1903) (holding that plenary power comprised unilaterally abrogating Indian treaties); *United States v. Sandoval*, 231 U.S. 28 (1913) (holding that plenary power comprised determining who counted as "Indians" and could thus be subject to federal regulation as such).

243. *E.g.*, *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883).

244. Fletcher, *Tribal Consent*, *supra* note 43, at 94. Some scholars have marked *Oliphant* in 1978 as the Court's turn against exclusive territorial sovereignty, while others have marked that turn as early as *Williams v. Lee*, 358 U.S. 217 (1959). Compare Krakoff, *Undoing*, *supra* note 95, at 1206–07, with Dewi Ioan Ball, *Williams v. Lee (1959)—50 Years Later: A Reassessment of One of the Most Important Cases in the Modern-Era of Federal Indian Law*, 2010 MICH. ST. L. REV. 391, 392, 403–05 (2010).

245. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206–08 (1978).

246. *Id.* at 208–09.

247. 450 U.S. 544, 563–66 (1981).

248. *Id.* at 564.

249. *E.g.*, *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327–28 (2008); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649–50 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850–53 (1985); see Pommersheim, *supra* note 241 at 326–27; Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 596 (2012) [hereinafter Singel, *Human Rights*].

250. See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 202 (2001) ("The operative idea in these cases is that the 'dependent' status of the tribes (e.g. after they lost what they had and became 'dependent' on the federal government) implicitly diminished their sovereignty.").

tribal relationship. Even functionalist, non-Indigenous understandings of dependence have surfaced only occasionally in Indigenous peoples law. Concurring in *Worcester*, for example, John McLean wrote that every nation is “more or less dependent on those which surround it,” underscoring that acceding dependence does not equate to bona fide reliance.²⁵¹ Although Cherokee Nation had traded some sovereign powers for certain protections by the United States, this could not, in McLean’s eyes, justify circumscribing tribal sovereignty.²⁵² Even this sense of dependence, which would mean something altogether different if read into domestic dependent nationhood, has been shut out by what amounts to a doctrinal gloss for domination.

B. Indigenous Values of Interdependence

Neither acceded dependence nor conditioned dependence encapsulates what Indigenous peoples tend to mean by dependence. In general, Indigenous understandings of dependence and interdependence are based on relationality, the respect for and affirmative assumption of reciprocal obligations.²⁵³ The world is made of relationships, so dependence and interdependence are natural, even valuable.²⁵⁴ By articulating the “domestic dependent nation” concept in reference to acceded or conditioned dependence, however, courts and lawyers have obscured Indigenous understandings.²⁵⁵ Even good-faith liberatory legal criticism has portrayed dependence negatively, as something to be avoided or corrected.²⁵⁶ In this section, I shed light on Indigenous conceptions of dependence, which are distinct from domination. I outline Indigenous understandings of dependence and interdependence, and I explain how they represent a “righting” of dominating relationships and can enrich neorepublican legal theory.

251. *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (McLean, J., concurring).

252. See *id.* at 581–82. By entering into treaties with Cherokee Nation, McLean mused, “have we not admitted the power of this people to bind themselves, and to impose obligations on us?” *Id.* at 582.

253. See Matthew L. M. Fletcher, *The Three Lives of Mamengwaa: Toward an Indigenous Canon of Construction*, 134 YALE L.J. 696, 772 (2025) (citing Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 355–56 (2007)) (explaining how relationships within a tribe “involve significant reciprocal obligations,” including in non-biological and ceremonial relationships); Kekek Jason Stark, *Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 MONT. L. REV. 293, 303–05 (2021) (explaining *mino-bimaadiziwin*, the Anishinaabe concept of “achieving harmony in life”).

254. See V. F. Cordova, *Ethics: The We and the I*, in AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS 173, 177 (Anne Waters ed., 2004) (“The combination of defining the human as a social being and denying any hierarchical systems, and a recognition of humans as a part of a greater whole, leads to a complete ethical system.”).

255. Cf. Leon E. Trakman, *Native Cultures in a Rights Empire Ending the Dominion*, 45 BUFF. L. REV. 189, 196–212 (1997) (describing how courts have supplanted Indigenous conceptions of legal interests with liberal conceptions of rights, like individuals’ freedoms of expression).

256. E.g., Ansley, *supra* note 1, at 1071–73 (problematizing dependence on authority); Rana, *Freedom Struggles*, *supra* note 20, at 1050 (describing hierarchies and dependencies as “forms of dependence [from which] to strive for liberation”).

In Indigenous thought, interdependence has several aspects: it is rejecting isolation, embracing need, and reinforcing connection. These meanings are not exclusive, and there are likely as many meanings as there are Indigenous peoples, but they bespeak themes in the Indigenous “republic of letters.” First, interdependence is rejection of material and epistemic isolation. In *Custer Died for Your Sins*, Vine Deloria quipped that the non-Indian “has defined the right to be oneself as the right of exclusive privacy, never realizing that to be alone is to be dead.”²⁵⁷ Indigenous thought, meanwhile, casts living as seeing and looking for shared experience. As Viola Cordova put it, “man is not an isolated and self-sufficient unit of existence” but is necessarily, simply by living, “dependent” on others.²⁵⁸ And on the world itself:

Man is not a being in opposition to nature but a part of it. Nature gives him his subsistence; the group gives him his identity. Just as man “owes” something to his fellows, he feels indebted to the Earth. Earth is the context of his being. He and the context he exists in are one—there is no existence for man outside of that context.²⁵⁹

The individual, Cordova wrote, is “always a part of something greater” and is not threatened by being part of a group, which offers belonging.²⁶⁰ Indigenous peoples have rejected intergroup isolation too. In a renowned essay, Epeli Hau‘ofa wrote that his and my ancestors, who lived in ‘Āinamoana for millennia, “viewed their world as ‘a sea of islands’ rather than as ‘islands in the sea,’” as *Oceania* rather than the *Pacific Islands*.²⁶¹ It was continental empires that “drew imaginary lines across the sea,” severing connections with “colonial boundaries that confined ocean peoples to tiny spaces for the first time.”²⁶² Also in Diné culture, autonomy encompasses individuation but should not be isolating.²⁶³ Although Diné value “autonomous behavior,” they expect it to “reflect the importance of fulfilling expected immediate family and clan roles.”²⁶⁴

Interdependence, moreover, is understanding of need, of the inevitability of hardship and help. Cordova explained that “there are no self-made persons . . . only those who cannot (or refuse to) acknowledge their debts.”²⁶⁵ As beings in this world, we derive insight and identity directly from challenges and opportunities presented by physical and social

257. DELORIA, *supra* note 63, at 224.

258. V. F. CORDOVA, HOW IT IS: THE NATIVE AMERICAN PHILOSOPHY OF V. F. CORDOVA 122 (Kathleen Dean Moore, Kurt Peters, Ted Jojola, & Amber Lacy eds., 2007).

259. *Id.*

260. *Id.* at 147.

261. Epeli Hau‘ofa, *Our Sea of Islands*, 6 CONTEMP. PAC. 147, 153 (1994).

262. *Id.*; accord CHANG, *supra* note 17, at 8–9.

263. See H. Corine Frankland, Ann P. Turnbull, Michael L. Wehmeyer, & Lavine Blackmountain, *An Exploration of the Self-Determination Construct and Disability as it Relates to the Diné (Navajo) Culture*, 39 EDUC. & TRAINING IN DEVELOPMENTAL DISABILITIES 191, 202 (2004).

264. *Id.*

265. CORDOVA, *supra* note 258, at 158.

environments.²⁶⁶ For kānaka ‘ōiwi, recognizing one’s role within the family and in the broader environment is a matter of knowing that one needs others and is needed in return.²⁶⁷ Need is not simply social but also environmental; we cannot get by without our ecosystems, and they require our care. Mojave poet Natalie Diaz has asked: “How can I translate—not in words but in belief—that a river is a body, as alive as you or I, that there can be no life without it?”²⁶⁸ Indigenous philosophies and practices recognize that need has a purpose: it motivates deepening relationships, as if a magnet drawing beings together and into better relations.²⁶⁹ Embracing need is not about letting necessities go unprovided, hurts unhealed, but about perceiving it and appreciating how it enables relationality.

Interdependence is then also deepening such relations and, when necessary, righting them. A core value shared by Indigenous peoples, Wenona Singel has noted, is “a relational understanding of rights and obligations founded on universal kinship.”²⁷⁰ In forming confederations, Indigenous peoples often “assumed a kinship relation to others,” making less than familial relationships into familial ones, with the norms and obligations that that entailed.²⁷¹ Such practice has often served fundamental social values like togetherness or unity. For Anishinaabe people, *Aabawaadiziwin* (togetherness) is a manifestation of their political philosophies and reflects how they “hope to teach their children to ‘[m]aintain[] balance and harmony through good relationships.’”²⁷² For kānaka ‘ōiwi, the concept of ‘*ohana* (family) is “a sense of unity, shared involvement and shared responsibility” and is “mutual interdependence and mutual help.”²⁷³ Kānaka ‘ōiwi have long defined families broadly, reaching

266. See *id.* at 156–58.

267. E.g., PUKUI, *supra* note 2, at 281 (“‘Ike aku, ‘ike mai, kōkua aku kōkua mai; pela iho la ka nohona ‘ohana. Recognize and be recognized, help and be helped; such is family life. Family life requires an exchange of mutual help and recognition.”); *id.* at 507–08 (“Malia paha he iki ‘unu, pa’a ka pōhaku nui ‘a’ole e ka’a. Perhaps it is the small stone that can keep the big rock from rolling down. He may not seem to be a very important person, but he may be the support needed to sustain a superior.”).

268. NATALIE DIAZ, *The First Water Is the Body*, in POSTCOLONIAL LOVE POEM 46, 48 (2020).

269. See, e.g., KRAWEC, *supra* note 17, at 55 (“From the giveaway in the East to the potlatch on the West Coast, Indigenous peoples measured wealth by what was given away. You gave away everything to celebrate a major event, knowing that in the midst of this, your needs would still be met.”)

270. Singel, *Human Rights*, *supra* note 249, at 620.

271. *Id.* at 620–21 (citing ROBERT A. WILLIAMS, LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800, at 62–66, 71 (1997)); see 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); see also Michalyn Steele, *Indigenous Resilience*, 62 ARIZ. L. REV. 305, 326–29 (2020) (explaining how Indian tribes have strengthened community resilience to addictions and suicide by healing and preserving kinship and interconnectedness).

272. Matthew L. M. Fletcher & Randall F. Khalil, *Preemption, Commandeering, and the Indian Child Welfare Act*, 2022 WISC. L. REV. 1199, 1200 (2022) (citing Susan Chiblow (Ogamauh annag qwe), *Anishinabek Women’s Nibi Giikendaaswin (Water Knowledge)*, 11 WATER 206, 214 (2019)); see also MATTHEW L. M. FLETCHER, THE GHOST ROAD: ANISHINAABE RESPONSES TO INDIAN HATING xiv–xviii (2020); Kekek Stark, *Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 MONT. L. REV. 293, 319 (2021).

273. MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, 1 NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 171 (1972).

distant relatives in the non-Hawaiian sense, so mutuality can extend in the first instance to a great community, even aside from duties to other peoples and the environment.²⁷⁴ Explaining complex Dakota kinship practices, Ella Deloria wrote that the heart of the matter was to develop a “proper mental attitude” reflecting a lack of selfishness when approaching others.²⁷⁵ Indigenous commitments like these have accordingly shaped unique environmental outlooks. In contrast to non-Indigenous notions of environmental “stewardship,” which represents a kind of mastery over the natural world, Indigenous philosophers have described Indigenous “environmentalism” as a kind of elder care.²⁷⁶ When humans mature, they realize that they must care for their surroundings so that their surroundings can even continue to support them.²⁷⁷

Unlike acceded and conditioned dependences, Indigenous modes of dependence do not coincide with domination. John Borrows has articulated an Anishinaabe conception of freedom as entailing “healthy” interdependence with other beings “much more than a product of an individual’s will.”²⁷⁸ Indigenous freedom is closely linked to “Indigenous mobility,” Borrows argues, a notion akin to resisting domination.²⁷⁹ Interdependence is presupposed, but domination is not; domination is to be outmaneuvered. Robert Warrior, meanwhile, has described the dilemma facing Indigenous peoples as a “death dance” between assimilation on one hand and, on the other, “declaring that we need nothing outside of ourselves and our cultures.”²⁸⁰ But there is extensive Indigenous intellectual history, he has urged, showing that we can “remove ourselves from this dichotomy.”²⁸¹ The struggle for sovereignty is “not a struggle to be free from the influence of anything outside ourselves, but a process of asserting the power we possess as communities and individuals to make decisions that affect our lives.”²⁸² We need not reject dependence, as Indigenous peoples understand it, but instead obtain (or reobtain), exercise, and protect our say in systems where that capacity has been put at risk. We can exercise dependence and interdependence without relinquishing effective

274. *E.g.*, MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, 2 NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 36 (1972) (explaining *hānai* rules, under which firstborn children belonged to and were raised by their grandparents). Moreover, scholars have interpreted colonization in Hawai‘i as ultimately a process of undermining ‘ōiwi kinship understandings and practices. LOZANO, *supra* note 10, at 12 (citing SETH ARCHER, SHARKS UPON THE LAND: COLONIALISM, INDIGENOUS HEALTH, AND CULTURE IN HAWAI‘I, 1778–1855 (2018); JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002)).

275. ELLA CARA DELORIA, SPEAKING OF INDIANS 19–25 (1944).

276. CORDOVA, *supra* note 258, at 116.

277. *Id.*; see WITGEN, INFINITY, *supra* note 14, at 80 (“To live a healthy life in this world people must establish proper relationships with the other animate beings that share the earth.”).

278. BORROWS, *supra* note 49, at 6.

279. *See id.* at 21.

280. ROBERT ALLEN WARRIOR, TRIBAL SECRETS: RECOVERING AMERICAN INDIAN INTELLECTUAL TRADITIONS 123–24 (1995).

281. *See id.*

282. *Id.*

constraints over power.

Moreover, Indigenous thought can contribute to neorepublican theory just as neorepublican theory can reframe Indigenous peoples law. One way is in urging realism: constraints arise from chance and from natural processes, and Indigenous thought holds that we need enough sensitivity toward natural facts to understand what we should not call dominating. Writing on Anishinaabe trickster Nanaboozhoo, Borrows underscores this. Nanaboozhoo travels far and wide, shapeshifting, bringing fire, getting into fights, and naming things.²⁸³ Even so:

Nanaboozhoo cannot do *whatever* he wants, because his actions are always constrained in some way. At the same time, he has a wide range of options for living a good life because of his ability to transform himself and those around him through their interactions. In other words, Nanaboozhoo is free, even as real-world relationships both facilitate and constrain the scope of his actions.²⁸⁴

Indigenous realism further clarifies the value of neorepublican theory compared to prior generations of republican thought. The particularism of Indigenous ethics—the resistance to, or skepticism of, universalized laws and policies—emphasizes the role of contestation and consent in antidomination. Because freedom as nondomination exists insofar as power tracks persons’ and communities’ interests,²⁸⁵ procedures for forming and voicing interests are indispensable.²⁸⁶ And procedures must themselves be diverse. Complexity among Indigenous peoples means that procedures that can adapt to channel difference and effectively harness or redirect external power will be more conducive to freedom than ones that adhere to ostensibly republican but rigid blueprints.²⁸⁷

Another way that Indigenous thought can aid neorepublican theory is through its attention to relationships, especially beyond intimate and familial ones. Several feminist and (dis)ability justice theorists have recognized the value of parsing dependence from domination to better understand the ethics of parenting, caretaking, living “independently,” and love.²⁸⁸ These issues are central also to Indigenous understandings of

283. BORROWS, *supra* note 49, at 7.

284. *Id.* (emphasis added).

285. See Dawood, *supra* note 5, at 1429–31; PETTIT, ON THE PEOPLE’S TERMS, *supra* note 5, at 58–59.

286. E.g., HINCHLIFFE, *supra* note 25, at 1, 73–87 (arguing that education is necessary component of antidomination); Hustace, *supra* note 25, at 128–39 (same).

287. See WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 200 (2015) (“For just as life itself is a complex web of relationships and organisms, so is the fabric of a community and a culture that chooses its future.”).

288. See *supra* note 45; see generally, e.g., Inga Bostad & Halvor Hanisch, *Freedom and Disability Rights: Dependence, Independence, and Interdependence*, 47 METAPHILOSOPHY 371 (2016); Jurgen De Wispelaere & David Casassas, *A Life of One’s Own: Republican Freedom and Disability*, 29 DISABILITY & SOC’Y 402 (2014); KITTAY, *supra* note 137. Martha Fineman’s vulnerability theory explores valuable, related ideas. See, e.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8–15 (2008).

kinship and relationality and are matters on which Indigenous theory has much to contribute, especially as kinship ethics can inform political representation. Moreover, Indigenous thought has focused a great deal on intergenerational and environmental relationalities.²⁸⁹ So have Indigenous lawyers and lawmakers, acting creatively to protect the legal interests of ecosystems, nonhuman species, and nonliving generations.²⁹⁰ Several neorepublican theorists have raised questions and ventured answers on nondomination owed to generations that will follow us, particularly in the context of climate change and environmental degradation.²⁹¹ These too are dialogues in which Indigenous theory will be indispensable. Synthesis in these areas will only become more important as we learn how gender, (dis)ability, Indigeneity, and environmental justice affect each other.²⁹²

* * *

By parsing dependence from domination in these ways, we can save “dependence,” often suffused with negative connotations, to refill it with Indigenous understandings. Retrieving these occluded theories can in turn change and complicate dependence to illuminate what interdependent relationships between the United States and Indigenous peoples might

289. See, e.g., Matthew L. M. Fletcher, *Sawnawgezowog: The Indian Problem and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 37 (2003) (noting Indigenous focus on “interconnection between human beings and the natural world”); JUSTICE, *supra* note 64, at 87, 96 (observing that we exist on earth among many other nonhuman beings and that we can learn from them only humbly and relationally); LADUKE, *supra* note 287, at 2 (describing Indigenous philosophies on humans’ relationships with nonhuman beings as familial ones); MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, 2 NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 293–94 (1972) (explaining concept of *piko*, embodied by the navel, as a link both to our ancestors and our descendants); D. Kapua’ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle against Climate Change Devastation*, 35 STAN. ENVTL. L.J. 157, 167–68 (2016) (describing ‘ōiwi creation chant, the *Kumulipo*, in which kānaka ‘ōiwi are younger siblings of other entities in natural world).

290. Jensen Lillquist & Elizabeth Kronk Warner, *Laboratories of the Future: Tribes and Rights of Nature*, 111 CALIF. L. REV. 325, 328, 388–92 (2023); Kekok Jason Stark, *Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of Nature and Its Jurisdictional Application for Anishinaabe Territories*, 83 MONT. L. REV. 79, 84–87, 89–91 (2022); see, e.g., Minnesota Dep’t of Nat. Res. v. White Earth Band of Ojibwe, No. 21-CV-1869 (WMW/LIB), 2021 WL 4034582, at *1 (D. Minn. Sept. 3, 2021), appeal dismissed and remanded, No. 21-3050, 2022 WL 4229028 (8th Cir. Aug. 10, 2022) (denying state’s motion to enjoin tribal court proceedings in which Manoomin (wild rice) and other parties had sued state to block its permit to corporation planning to remove ground water, exacerbating drought); Nā Iwi o nā Kūpuna o Mōkapu v. Dalton, 894 F. Supp. 1397, 1406–08 (D. Haw. 1995) (holding that human remains did not have standing to litigate their own safekeeping, although for kānaka ‘ōiwi, remains have interest in preservation).

291. See generally, e.g., James Bohman, *Children and the Rights of Citizens: Nondomination and Intergenerational Justice*, 633 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 128 (2011); Hans Morten Haugen, *Participation and Decision-making in Non-dominant Communities. A Perspective from Civic Republicanism*, 23 Int’l J. Minority & Group Rts. 306 (2016); Corey Katz, *Neorepublicanism and the Domination of Posterity*, 20 ETHICS, POL’Y & ENV’T 294 (2017); John Nolt, *Domination across Space and Time: Smallpox, Relativity, and Climate Ethics*, 22 ETHICS, POL’Y & ENV’T 172 (2019); Patrick Taylor Smith, *The Intergenerational Storm: Dilemma or Domination*, 3 PHIL. & PUB. ISSUES 207 (2013).

292. See Deer, *supra* note 56, at 24; HOBART, *supra* note 50, at 15.

mean.²⁹³ The point is not to shore up the conventions of domestic dependent nationhood but to shed light on how the idea is itself malleable and thus could be reworked to support interdependence, premised on Indigenous consent and contestation. Moreover, Indigenous legal experiences and philosophies are invaluable to strengthening liberatory theories like neorepublicanism, not least in making them responsive to the concerns and ethics of former outsiders.

III. THE LIMITS OF LIBERATION

We know well how law, including received republicanism, has been used “to justify [Indigenous peoples’] dispossession and subjugation.”²⁹⁴ When considering legal republicanism and Indigenous peoples law, we might doubt “whether the concepts of liberty and citizenship as they were in fact put to use in the ancient and medieval Roman tradition can serve without compromise the modern one.”²⁹⁵ Yet even the bona fide liberation offered by neorepublican legal theory presents risks.²⁹⁶ In this Part, I explain and respond to two such risks, each of which seems inherent in an antidomination project, notwithstanding the theory’s sensitivity to the domination that Indigenous peoples experience.

The first risk is that federal antidomination entails ongoing federal action. This is a problem of institutional colonialism, reflecting sustained, even increased, federal presence in Indian country via institutions, albeit ones whose purpose is antidomination. At the heart of this risk is the perennial concern of federal power straying from its purpose, threatening interference. The second risk is that antidomination comes cloaked in some of the same language that *has* been used to subjugate Indigenous peoples,

293. E.g., Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 134 (2004).

294. LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS ix (2005); see also Blackhawk, *Foreword*, *supra* note 17, at 86–87 (citing 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, 256) (explaining how pro-colonial aspects of the law of nations, including its “civilizing” language, profoundly shaped 19th Century United States constitutional law); Arturo Chang, *Languages of Transnational Revolution: The “Republicans of Nacogdoches” and Ideological Code-Switching in the U.S.–Mexico Borderlands*, 21 CONTEMP. POL. THEORY 373 (2022) (describing neocolonial practices in United States–Mexico borderlands aimed at “‘diversifying’ territories, peoples, and interests that ultimately reproduced powers of the colonial state”); Melody Kapilialoha MacKenzie, Ke Ala Loa - *The Long Road: Native Hawaiian Sovereignty and the State of Hawai’i*, 47 TULSA L. REV. 621, 625–26 & n.32 (2012) (summarizing how American-born planter class steadily excluded kānaka ‘ōiwi from economic and political mainstreams); WIECEK, *supra* note 62, at 63 (counting republican guarantee among federal constitution’s “nationalizing features”); see generally LORI J. DAGGAR, CULTIVATING EMPIRE: CAPITALISM, PHILANTHROPY, AND THE NEGOTIATION OF AMERICAN IMPERIALISM IN INDIAN COUNTRY (2023); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920 (Bison Books 2001).

295. Clifford Ando, “*A Dwelling Beyond Violence*”: *On the Uses and Disadvantages of History for Contemporary Republicans*, 31 HIST. POL. THOUGHT 183, 219–20 (2010).

296. Cf. WARRIOR, *supra* note 280, at 122 (1995) (“If we are to engage in intellectual work, we must critically reflect on both the limits and value of that work. . .”).

thus potentially displacing Indigenous languages of liberation. This is a problem of ideological colonialism. The problem is not that republicanism entails homogeneity in understanding what the good life is.²⁹⁷ Certainly neorepublicanism does not, even if prior accounts did, for it presumes the equal status of persons as they are, not as they “must be” to be “good republican citizens.” The ideological problem is that nondomination, as many versions of the good life as it can accommodate, represents one understanding of freedom. Indigenous peoples have other understandings of freedom, some of which might coincide with nondomination, some of which might not. Nevertheless, I argue that we should not forego shaping neorepublicanism from Indigenous perspectives; that there is for starters a good deal of consistency between nondomination and Indigenous freedoms; and that in reshaping the republican idiom, we can draw inspiration from tricksters, shapeshifting, and critical Indigenous philosophies.

A. Institutional Colonialism

A first concern with a neorepublican frame is that it could further entrench federal presence in Indian country. Establishing antidomination institutions and procedures might well constrain arbitrary exercises of federal power, but the fact of federal operations, and the risk of federal interference, would remain. The concern is neither abuse of federal power nor forced assimilation. An unconstrained federal bureaucracy has dominated Indigenous peoples, expropriating, violating rights, and diminishing self-governance.²⁹⁸ And laws on the books, not merely agency actions, have contributed to Indigenous dispossession, often by favoring settler colonists better versed in American legalisms.²⁹⁹ But neorepublican liberation is expansionist in its own way, responding to “the unboundedness of subjection,” to domination perpetually arising at and just beyond physical and cultural borderlands.³⁰⁰ The “universal emancipation” espoused by abolitionists and antislavery lawmakers is premised on active government that can eliminate domination from private and public sources.³⁰¹ Antislavery constitutionalism began in inclusive (and thus expansive) understandings of citizenship, like Frederick Douglass’s view that “an

297. *E.g.*, Babcock, *supra* note 21, at 527.

298. *See supra* notes 236–239 and accompanying text; *see also* Ablavsky, *Sovereign Metaphors*, *supra* note 155, at 24; DAGGAR, *supra* note 294, at 118, 144.

299. *See, e.g.*, SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW 35–39 (2000) (explaining role of American-born citizens of Hawai‘i overseeing transformation of legal system toward an Anglo-American one); OSORIO, *supra* note 274, at 73 (observing that American laws adopted and imitated in Hawai‘i gave American-born citizens “refuge” and an “instrument for the dispossession of [kānaka ‘ōiwi]”).

300. Abizadeh, *supra* note 126, at 877.

301. *See* BONNER, *supra* note 143, at 77; Rana, *Freedom Struggles*, *supra* note 20, at 1039–40 (discussing how U.S. Representative Thaddeus Stevens and U.S. Senator Charles Sumner anticipated that substantial federal supervision would be needed after the Civil War); *see generally* COWIE, *supra* note 10 (describing persistent need for federal power to restrain local and state-level White and settler colonist dispossession of Indian tribes and enslavement and disenfranchisement of African Americans).

essential human unity connected people across national borders.”³⁰² Contemporary iterations like neorepublicanism are likewise somewhat “globalizing,”³⁰³ demanding democratization and anticolonial checks on imperial power, both of which entail legal reforms.³⁰⁴

Importantly, the neorepublican focus on liberation does not preclude cooptation or simply straying from purpose. Since the nation’s first decades, United States officials have grounded federal Indian policy on “benevolence, poor relief, and mercy,” often seizing on Christian missionaries’ frequent characterization of Indigenous peoples as heathens, helpless, and in need of saving.³⁰⁵ Asserted benevolence translated directly into colonial policies. Most prominent perhaps, the General Allotment Act of 1887 had a “dual purpose of ‘civilizing’ Indians and of breaking up the tribal land mass,”³⁰⁶ and proponents of Indian residential schooling glossed as righteous their efforts to “[k]ill the Indian in [them], and *save* the man.”³⁰⁷ Assimilation through education has continued, “forc[ing] native children to compromise their heritage, language, and dress since the late nineteenth century, often with little or no regard to the differences among native tribes.”³⁰⁸ Federal education officials in the Philippines, Puerto Rico, and the Dominican Republic too characterized their missions as “saving the ‘backward,’ nonwhite populations of these lands from themselves.”³⁰⁹ The same “beneficence” has motivated challenges to the Indian Child Welfare Act that have called the law “barbaric,” stereotyped Indian biological parents as neglectful and drug-addicted, and cast non-Indian adoptive parents as Indian children’s nurturing saviors.³¹⁰

302. BONNER, *supra* note 143, at 40, 92.

303. Peggy Cooper Davis, *Post-Colonial Constitutionalism*, 44 N.Y.U. REV. L. & SOC. CHANGE 1, 3 (2019).

304. See, e.g., Pedro Cabán, *The Puerto Rican Colonial Matrix: The Etiology of Citizenship—An Introduction*, 25 CENTRO J. 4, 7 (2013) (“The very process of legally renouncing U.S. citizenship requires Puerto Ricans to submit to the laws of the very colonial authority whose legitimacy over Puerto Rico they do not acknowledge. . . . This is an interesting conundrum, but is so characteristic of the contradictions, absurdities, and profound ambiguities of the distinctly U.S. model of colonial rule that has been imposed on Puerto.”).

305. DAGGAR, *supra* note 294, at 182; see LUM, *supra* note 226, at 80–85 (describing how Christian missionaries characterized kānaka ‘ōiwi as “naturally indolent,” spiritually “lost,” and “neglectful” of our land).

306. Fletcher, *Tribal Consent*, *supra* note 43, at 77 (citing Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7–14 (1995)); accord Bethany R. Berger, “Power over This Unfortunate Race”: *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 2017 (2004); HOXIE, *supra* note 294, at 72–76.

307. R.H. Pratt, *The Advantages of Mingling Indians with Whites*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 45, 46 (Isabel C. Barrows ed., 1892) (emphasis added); see DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928*, at 50–55 (1995).

308. Beau Breslin & Katherine Cavanaugh, *Nomos and Native American Narratives: The Duality of Law in the Liberal State* 65 LAW, POLITICS, & SOC’Y 137, 143 (2014); cf. WITGEN, *SEEING RED*, *supra* note 19, at 88 (observing that “the civilizing mission of the United States was a totalizing ideological project”).

309. TAIRA, *supra* note 9, at 24.

310. See Sarah Deer, Elise Higgins, & Thomas White, *Editorializing ICWA: 40 Years of Colonial Commentary*, 7 INDIG. PEOPLES’ J. L. CULTURE & RESISTANCE 27, 46–55 (2022); Matthew L. M.

Moreover, a sense of doing “the right thing” has led judges to presume that state interference in Indian country is harmless and that Indigenous peoples “would only benefit from having an additional government looking after them.”³¹¹ But noninterference has been crucial for Indigenous sovereignty. “[W]hat good is self-determination,” Maggie Blackhawk has asked, without “the principle that imperial governments should not intervene lightly, or perhaps at all, in the governments of colonized peoples?”³¹² This presents a paradox for legal republicanism. Freedom from interference is not the basis for republican governance—freedom from domination is—yet in the colonial space, some degree of noninterference is useful if not necessary to eliminating, or minimizing, domination. Resolving this paradox will require further theory.

That said, proposals like Wenona Singel’s for an intertribal human rights regime in Indian country are promising.³¹³ Establishing Indigenous peoples-led forums for prospectively and retrospectively addressing the domination that sovereigns always threaten could accomplish at least two things.³¹⁴ First, it could strengthen tribes’ sovereignties by affording opportunities not only to govern (and to demonstrate good governance) but also to collaborate with each other, engaging in intergovernmental relations to more firmly establish their separate governments.³¹⁵ Second, it could dispel misbeliefs that Indian country is unfriendly toward human rights or treats non-Indigenous persons unfairly, and thus discourage interference.³¹⁶ By governing within Indian country in analogous but distinct ways than the United States would, Indigenous peoples can limit occasions for and mitigate any interference that would be called for by federal antidomination.

B. Ideological Colonialism

A second concern with a neorepublican frame is that its use would bring with it a mode of conceptualizing liberty that risks displacing Indigenous modes. This is a concern about ideology, which Barbara Fields has defined as “the descriptive vocabulary of day-to-day existence, through which people make rough sense of the social reality that they live and create from

Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755, 1794–95 (2022).

311. Blackhawk, *Foreword*, *supra* note 17, at 119 (citing *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 651 (2022)).

312. *Id.* at 110.

313. Singel, *Human Rights*, *supra* note 249, at 570; *see id.* at 611–12.

314. *See id.* at 585 (observing that “as with any other government, tribes are also capable of abusing their powers and inflicting harm on individuals”).

315. *See, e.g.*, Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1055 (2007) (critiquing “conventional notions of good governance” and theorizing principles for “good Native governance”); WILKINSON, *TIME*, *supra* note 12, at 23 (noting tribes’ obligations as sovereigns even to non-Indians).

316. *See* Stacy L. Leeds & Erin S. Shirl, *Whose Sovereignty? Tribal Citizenship, Federal Indian Law, and Globalization*, 46 ARIZ. ST. L.J. 89, 98–104 (2014) (explaining how misperception that tribal courts treat non-Indigenous litigants unfairly has harmed tribes).

day to day.”³¹⁷ A people’s ideology is their “language of consciousness,” how they understand their relations to each other and to the world, and is “as real as the social relations for which they stand.”³¹⁸ The concern is thus about supplanting Indigenous modes of communicating how to achieve freedom with a neorepublican one. The concern is not about whether neorepublicanism can achieve Indigenous liberation. Through requisite contestation and consent processes, neorepublicanism would effectuate the particularism that Indigenous peoples might exercise, respecting how we might contest and call upon federal power.

But law “plays a cultural role as well as a strictly legal role,”³¹⁹ as forms themselves, of which the language of justice is one, have functions.³²⁰ And the language of neorepublican legal theory is for now predominantly Euro-American, if increasingly international. Ngũgĩ wa Thiong’o wrote that colonialism’s main target is “the mental universe of the colonized,” for “[t]o control a people’s culture is to control their tools of self-definition in relationship to others.”³²¹ The danger thus lies in universalizing an ideology of liberation through law derived substantially from settler intellectual traditions, as reinterpreted and functionally liberatory as they might be.³²² The liberal “language of equality and rights” has often threatened tribal sovereignty, whether invoked by opponents or by allies “reasoning from race” in good faith,³²³ which nonetheless risks confusing tribes’ political status with racial ones.³²⁴ Scholars of Indigenous language revitalization note that “[t]o lose a language is to lose many things other than vocabulary.”³²⁵ Language loss is loss not simply of a tongue but also of

317. Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 110 (1990).

318. *Id.*

319. M. Alexander Pearl & Kyle Velte, *Indigenizing Equality*, 35 YALE L. & POL’Y REV. 461, 489 (2017).

320. Cf. Louis H. Sullivan, *The Tall Office Building Artistically Considered*, LIPPINCOTT’S MAG. 403, 408 (1896) (arguing that “form ever follows function”).

321. NGŪGĨ WA THIONG’O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 16 (1986).

322. See Aziz Rana, *Colonialism and Constitutional Memory*, 5 UC IRVINE L. REV. 263, 276 (2015) (noting that “emerging civic rhetoric of American universalism was above all an adaptation rather than a rejection of the settler past”); Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL’Y 17, 24 (1997) (noting that when “Anglo-American concepts displace native concepts, native culture is changed” and that using non-Indian law “perpetuates and interjects a way of thinking which should be carefully considered”).

323. Maggie Blackhawk, *On Power & Indian Country*, *Women & Law* 39, 44–45 (2020) (citing SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 1–8 (2011); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953–56 (2002)); see Lisa Kahaleole Hall, *Strategies of Erasure: U.S. Colonialism and Native Hawaiian Feminism*, 60 AM. Q. 273, 277 (2008) (“The logics of some forms of antiracist struggles paradoxically can undermine group identities by advocating for a form of social justice based on the equal treatment of individuals . . . [into which] the specificity and particular rights of indigenous people disappear . . .”).

324. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 963–65 (2011).

325. Teresa L. McCarty, Sheilah E. Nicholas, Kari A. B. Chew, Natalie G. Diaz, Wesley Y. Leonard & Louellyn White, *Hear Our Languages, Hear Our Voices: Storywork as Theory and Praxis in*

ways to perceive and to think, even while revitalization is “not about returning to an imagined ‘pure’ form of an ancestral language.”³²⁶ Supplanting Indigenous idioms with settler idioms can distort our “vocabulary of belonging,” denying us “not only a place but the past that goes with it and, with it, the clues from which to construct a present self.”³²⁷

Even if Indigenous peoples achieve bona fide liberation through a neorepublican idiom, its use could amount to relinquishing what Wallace Coffey and Rebecca Tsosie have called “cultural sovereignty.”³²⁸ Part of cultural sovereignty is Indigenous peoples’ prerogative to determine what counts as their culture and intellectual property, how that is preserved, and even how that is denied to others or destroyed entirely.³²⁹ By deciding what is in and what is out of their intellectual traditions and practices, Indigenous peoples exercise self-determination. For many Indigenous peoples, knowledge has boundaries, and insisting “that all things should be available without limit to everyone” reflects a corrosive, colonizing universalism.³³⁰ Therefore, say over how liberation gets theorized and talked about is no less important than setting out to achieve liberation. Of course, Indigenous peoples could determine that neorepublicanism speaks to us, notwithstanding its pedigree. If Indigenous peoples decide that imposing neorepublican constraints on the federal government is in fact consistent with our understandings of freedom and of using law to achieve it, then this concern would be minimal if not absent. Deciding for ourselves that neorepublican legal theory suits our goals could itself be an exertion of cultural sovereignty.

C. Transformations

The concerns raised above might well be abiding concerns, impossible to eliminate, only able to be minimized. It might therefore come down to assessing the tradeoff between these lingering colonialisms and the liberatory potential of neorepublican legal theory in Indigenous peoples law. In this section, however, I offer a few further responses, noting that we can draw inspiration in mitigating these concerns from Indigenous

Indigenous-Language Reclamation, 147 DAEDALUS 160, 163 (2018).

326. See *id.* at 161.

327. EAVAN BOLAND, OBJECT LESSONS: THE LIFE OF THE WOMAN AND THE POET IN OUR TIME 55–56 (1995); accord MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, 2 NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 303 (1972) (“Gradually Hawaiians concealed their practice or forgot their knowledge of much of their ancient culture. What was remembered would be recalled with increasing distortion. For when a specific practice was discarded or forgotten, there went with it the enduring, often wise concept from which the practice evolved.”).

328. See Coffey & Tsosie, *supra* note 250, at 196–202 (theorizing cultural sovereignty); Breann Swann Nu’uhiwa, *Government of the People, by the People, for the People: Cultural Sovereignty, Civil Rights, and Good Native Hawaiian Governance*, 14 ASIAN-PAC. L. & POL’Y J. 57, 65–79 (2013) (explaining cultural sovereignty).

329. See Trevor Reed, *Indigenous Dignity and the Right to Be Forgotten*, 46 BYU L. REV. 1119, 1137 (2021).

330. JUSTICE, *supra* note 64, at 25.

traditions of pragmatic adaptation, clear consistencies between Indigenous democracy and aspects of neorepublicanism, and legal tricksterism.

We live inevitably among ideas used and disused by those who came before, who include our colonizers. Whatever worlds have existed or might exist elsewhere or elsewhen, the world in which this Article exists is a world where words on a page can become the execution of a will, an injunction, an invasion, or a person.³³¹ To cede legal republicanism, not least in Article IV, Section 4, is to cede “discursive space” for negotiating and rectifying power in a constitution ascribed great authority throughout ‘Āinamoana, Turtle Island, and beyond.³³² I had always found interpretations of legal republicanism prior to neorepublican legal theory as partial and therefore partial, biased readings of who is entitled to be free incomplete and incoherent, if simply in failing to account for the obvious humanity that we all express. This is not to say that neorepublican legal theory has been perfected; there is work left to do. But laws are texts, and good readers must through methods like countermemory read into them what must be there.³³³ Indigenous peoples are familiar with pragmatism responsive to necessity.³³⁴ As Maggie Blackhawk has observed, “[m]itigating American colonialism has demanded that colonized peoples learn the languages, values, visions, and laws of the United States—that we might build a shared world where colonized peoples continue to exist.”³³⁵ It is vital to continue theorizing in Indigenous peoples law so that we can undo damage done by others in its discursive space.³³⁶

Moreover, there could well be enough ideological consistency between Indigenous modes of justice and antidomination, which turns on consent and contestation, that ideological colonialism is lessened. In one sense, legal republicanism is no less “Indigenous” than other ideas central to Indigenous

331. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”); WALLACE STEVENS, *The Man with the Blue Guitar*, in THE COLLECTED POEMS OF WALLACE STEVENS 165, 183 (2011) (“It must be this rhapsody or none, | The rhapsody of things as they are.”).

332. See Spaulding, *supra* note 65, at 1998 (citations omitted).

333. Cf. *id.* at 2025 (describing countermemory as “resist[ing], in the very act of commemoration, the monumentalist impulse either to forget or diminish the profound moral and constitutional failings of the Founding”).

334. See Philip J. Deloria, K. Tsianina Lomawaima, Bryan McKinley Jones Brayboy, Mark N. Trahan, Loren Ghiglione, Douglas Medin, & Ned Blackhawk, *Unfolding Futures: Indigenous Ways of Knowing for the Twenty-First Century*, 147 DAEDALUS 6, 14 (2018) (observing how Indigenous governance entails “preserving and operationalizing tribal distinctiveness and autonomy, as constituted through American law in the form of the Constitution and the treaties, and holding the nation to its obligations, embodied in the form of trust relationships”); SAUNT, *supra* note 7, at 320 (summarizing how Indigenous peoples have at times made “pragmatic and workable concessions,” like “ceding some regions but not others, accepting individual land titles, practicing Christianity (at least superficially), adopting U.S. farming practices, and even agreeing to U.S. citizenship”).

335. Blackhawk, *Foreword*, *supra* note 17, at 147; see, e.g., ARISTA, *supra* note 12, at 137 (“The ali’i [aristocracy] themselves recognized the need to adopt kānāwai, or written and published law, in the islands as the best way to control and discipline foreigners behaving badly on Hawaiian soil.”).

336. Raymond Cross, *Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine*, 39 TULSA L. REV. 369, 372–73 (2003).

peoples law, like sovereignty, self-determination, human rights, and even anticolonialism.³³⁷ A growing body of scholarship evinces Indigenous peoples' own historical roles in forming these principles, though influence on the republican guarantee in particular could be explored further.³³⁸ In another sense, Indigenous peoples can credibly claim extensive democratic traditions in which to locate neorepublican analogs.³³⁹ Even among Hawai'i's traditional social hierarchies, kānaka ʻōiwi have described arbitrary power akin to domination: “*He ʻauwai ka mana ʻo o na li ʻi, ʻa ʻohe maopopo kahi e kahe ai*. The minds of chiefs are like a ditch—no one knows whither they flow.”³⁴⁰ And in Anishinaabe tradition, “freedom is *not just the absence of coercion or constraint*, it is the ability to work in cooperation with others to choose, create, resist, reject, and change laws and policies that affect your life.”³⁴¹ There is substantial congruence between freedom for which mobility is integral, as Borrows puts it, and freedom as nondomination, in which one's actual choices remain uninhibited.³⁴² For their part, several neorepublican theorists have argued that freedom as nondomination advances relational equality, bespeaking republican capacity for collaboration and Indigenous influence.³⁴³

Where there is not yet consistency (or not enough), Indigenous theorists can emulate tricksters, making legal theory mischief. Tricksters and shapeshifters abound in ʻĀinamoana and on Turtle Island. For kānaka ʻōiwi

337. See Ablavsky, *Beyond*, *supra* note 192, at 1059; Tsosie, *Tribalism*, *supra* note 47, at 401.

338. See generally, e.g., Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243 (2023); Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133 (1993).

339. See DELORIA, *supra* note 63, at 12 (“True democracy was more prevalent among Indian tribes in pre-Columbian days than it has been since. Despotic power was abhorred by tribes that were loose combinations of hunting parties rather than political entities.”); Seth Davis, *Tribalism and Democracy*, 62 WM. & MARY L. REV. 431, 465 (2020) (observing that democracy “is made out of more than the clay of rights and votes” and includes forums for deliberation and contestation); Lane F. Fargher, Richard E. Blanton, & Verenice Y. Heredia Espinoza, *Collective Action, Good Government, and Democracy in Tlaxcallan, Mexico: An Analysis Based on Demokratia*, 4 FRONT. POL. SCI. 832440, at 13 (2022); Lane F. Fargher, Richard E. Blanton, & Verenice Y. Heredia Espinoza, *Egalitarian Ideology and Political Power in Prehispanic Central Mexico: The Case of Tlaxcallan*, 21 LATIN AM. ANTIQUITY 227 (2010); Jacob Holland-Lulewicz, Victor D. Thompson, Jennifer Birch, & Colin Grier, *Keystone Institutions of Democratic Governance Across Indigenous North America*, 4 FRONT. POL. SCI. 840049, at 10–11 (2022).

340. PUKUI, *supra* note 2, at 141.

341. BORROWS, *supra* note 49, at 12–13 (emphasis added); accord WITGEN, INFINITY, *supra* note 14, at 42.

342. See BORROWS, *supra* note 49, at 19–20.

343. E.g., Devon Cass, *What Is the Point of Nondomination?*, 25 J. ETHICS & SOC. PHIL. 80, 93 (2023); Marie Garrau & Cécile Laborde, *Relational Equality, Non-Domination, and Vulnerability, in SOCIAL EQUALITY: ON WHAT IT MEANS TO BE EQUALS* 45, 45–48 (Carina Fourie, Fabian Schuppert, & Ivo Wallimann-Helmer eds., 2015); cf. Mira Bachvarova, *Non-domination's Role in Theorizing Global Justice*, 9 J. GLOBAL ETHICS 173 (2013) (arguing that nondomination can at the very least be used to complement international human rights principles that many have adopted as their own).

there is Māui;³⁴⁴ for Anishinaabe, Nanaboozhoo;³⁴⁵ for Nez Perce, Coyote;³⁴⁶ for Haida, Raven.³⁴⁷ These rascals all looked out for possibilities to transform, whether themselves, their ideas, or others.³⁴⁸ Sometimes, often, they made mistakes and in doing so taught us about the world.³⁴⁹ We too can look for opportunity in the gap between convention and possibility. Indeed, the gap between how the word “republic” has been used and what it means reflects how through language we only gesture at underlying ideas. But to engage the republican idiom is not only to critically employ Euro-American thought “to delegitimize [its conventional justifications] and to test the claims of Indigenous peoples for and of freedom.”³⁵⁰ To do so is also to tap into the idiom’s own capacity to adapt to us. As Carlo Ginzburg wrote:

Language, a distinctive trait of the animal species we belong to, comes to us as a historically stratified legacy. Even a bold and highly imaginative writer like Machiavelli worked within definite constraints, linguistic as well as social and political. But constraints can also be transformed into opportunities.³⁵¹

Employing an idiom with such fraught roots could backfire if not done cautiously, conscientiously. Yet neorepublican legal theory can readily be indigenized, not merely adopted but fused with Indigenous conceptions of how to be free and how to become free. In doing so, we must take care not to “paint ourselves as we wish we were or as we might have been,” at least not too much.³⁵² It is important, as Paul Chaat Smith has pointed out, that we not romanticize or exoticize Indigenous peoples, lest we replicate habits that have “encompassed and permitted a range of historical responses from destruction to idealization.”³⁵³ But keeping some realism close, reaching for

344. MARTHA BECKWITH, *Maui the Trickster*, in HAWAIIAN MYTHOLOGY 226, 226–37 (1970); ISRAEL KAMAKAWIWO’OLE, *Maui Hawaiian Sup’pa Man, on FACING FUTURE* (Mountain Apple Company 1993).

345. FLETCHER, *supra* note 272, at vii–ix; BORROWS, *supra* note 49, at 7.

346. See COYOTE WAS GOING THERE: INDIAN LITERATURE OF THE OREGON COUNTRY (Jarold Ramsey ed., 1977).

347. See BILL REID & ROBERT BRINGHURST, *THE RAVEN STEALS THE LIGHT* (1996).

348. See, e.g., WITGEN, INFINITY, *supra* note 14, at 80 (explaining shapeshifting, especially in Anishinaabe culture, as “a habit of mind, mean[ing] seeing the potential for beings to transform themselves, and to be transformed by others”).

349. See Brian Yazzie Burkhart, *What Coyote and Thales Can Teach Us: An Outline of American Indian Epistemology*, in AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS 15, 15–16 (Anne Waters ed., 2004).

350. JAMES TULLY, *PUBLIC PHILOSOPHY IN A NEW KEY, VOL. I: DEMOCRACY AND CIVIC FREEDOM* 276 (2008).

351. GINZBURG, *supra* note 42, at 146.

352. See DELORIA, *supra* note 63, at 2.

353. PAUL CHAAT SMITH, *EVERYTHING YOU KNOW ABOUT INDIANS IS WRONG* 18 (2009); see *id.* at 178 (“Once considered so primitive that our status as fully human was a subject of scientific debate, some now regard us as keepers of planetary secrets and the only salvation for a world bent on destroying itself.”); see also BORROWS, *supra* note 49, at 5 (“Anishinaabe traditions, like all others in the world, are capable of diminishing or enhancing peoples’ freedom to live a good life. It all depends on how we envision and apply them.”).

ideals seems far less intimidating.

CONCLUSION

One of the main objections to neorepublican legal theory is that nondomination is “impossible to realize.”³⁵⁴ Simply by living in the world we are “inevitably subject to others’ uncontrolled ability to interfere.”³⁵⁵ Therefore, nondomination can seem a bit like Werner Heisenberg’s uncertainty principle, wherein we can determine either a particle’s position or its momentum but not both at once. Even as we eliminate one form of domination, another “will inevitably arise from changing patterns in human social relations.”³⁵⁶ The world is not static, nor would we want it to be. But the impossibility objection is utopophobia. It might be challenging to think through how to draft laws, build institutions, and resolve disputes so as to effectuate nondomination, but that challenge is not a good argument that any other theory of justice is more valuable.³⁵⁷ The difficulty only makes the need to work on eliminating domination more apparent.

In bringing together neorepublican legal theory and Indigenous peoples law and studying the confluence, I have tried in this Article to add nondomination to the Indigenous legal theory toolkit and to complicate it in turn with lessons from Indigenous peoples law. I have thus indigenized legal republicanism at least somewhat, though work remains. One of my aims has been to ameliorate failures of mutual recognition. As Dale Turner has written, “Aboriginal peoples’ ways of thinking about and understanding the world are not recognized by most non-Aboriginal people as of equal value to European philosophical traditions.”³⁵⁸ By supposing that there is insight and beauty to perceive from each of the Article’s vantage points, I have tried to show how presently distinct bodies of thought are “not just complementary” but “integral to a refined twenty-first-century sensibility.”³⁵⁹

This Article has also been one venture, though it will not be the only one, into what I think of as Indigenous legal futurisms, drawing from the broader, burgeoning humanities movement. Indigenous futurisms, as innovator and sf scholar Grace Dillon has explained, are “not the product of a victimized people’s wishful amelioration of their past, but instead a continuation of a

354. Cass, *supra* note 343, at 80.

355. *Id.* at 87.

356. SCOTT E. LEMIEUX & DAVID J. WATKINS, JUDICIAL REVIEW AND CONTEMPORARY DEMOCRATIC THEORY: POWER, DOMINATION, AND THE COURTS 106 (2018).

357. Cf. David Estlund, *Utopophobia*, 42 PHIL & PUBLIC AFFS. 113, 128–29, 134 (2014).

358. DALE TURNER, THIS IS NOT A PEACE PIPE: TOWARDS A CRITICAL INDIGENOUS PHILOSOPHY 86 (2006).

359. See Grace L. Dillon, *Imagining Indigenous Futurisms*, in WALKING THE CLOUDS: AN ANTHOLOGY OF INDIGENOUS SCIENCE FICTION 1, 3 (Grace L. Dillon ed., 2012). Indigenous futurisms has drawn inspiration from Afrofuturisms, an established, adjacent humanities-centered movement. *Id.* at 2; see also I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 6–20 (2019) (providing a primer on Afrofuturisms, its ideas, and its innovators).

spiritual and cultural path that remains unbroken by genocide and war.”³⁶⁰ In law, this can mean insisting that we do have the tools—and will make more as needed—to figure out justice for all peoples, not least Indigenous peoples. Legal futurisms might begin, as this Article does, without assuming that present legal conventions will hold, even if we suspect that they will at least for a time. Legal futurisms might suppose, as Indigenous philosophers do, that “[o]ur universe is still unfolding and human beings are active and creative participants” and that “[c]reativity is both the universe’s ordering principle and its process.”³⁶¹ The task then becomes to articulate “constitutional aspiration” through which some arguments can be torn down and others built up, drawing lines on the parchment, so to speak, saying that *this* is what liberation through law means.³⁶² And in aspiring, asking the necessary, if seemingly intractable, questions.³⁶³

360. Grace L. Dillon, *Indigenous Futurisms*, Bimaashi Biidaas Mose, Flying, and Walking towards You, 57 *EXTRAPOLATION* 1, 2 (2016).

361. Gregory Cajete, *Philosophy of Native Science*, in *AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS* 47 (Anne Waters ed., 2004).

362. BRESLIN, *supra* note 100, at 46.

363. Cf. WARRIOR, *supra* note 280, at 106 (observing that Indigenous peoples “begin [making the future a possibility] by opening ourselves up to experience and deriving from it the questions we must answer”).