Can the Constitutional Sin of Colonialism be Redeemed?

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Seth Davis, *American Colonialism and Constitutional Redemption*, 105 Cal. L. Rev. 1751 (2018).

The United States Constitution—that great experiment in creating a "more perfect union," more democratic, egalitarian, and libertarian—was founded in sin. These sins include, among others, slavery and political exclusion of people of color and women of all races. They also include the erasure of sovereignty required to found a country on a continent occupied by existing indigenous sovereigns. Many before Seth Davis, including Milner Ball, Philip Frickey, Nell Newton, David Wilkins, and Robert Williams, have wrestled with this founding constitutional evil. Several things, however, distinguish Professor Davis's American Colonialism and Constitutional Redemption. The result is an important addition to the canon of federal Indian law.

First, Professor Davis engages with theorists outside federal Indian law to an unusual degree. Professor Davis specifically takes on fiduciary theorists like Evan J. Criddle and Evan Fox-Decent, but also engages with other constitutional theorists like Sanford Levinson, Aziz Rana, and Jack Balkin; political theorists like Carole Pateman, Jennifer Nedelsky, and Robin West; race theorists like Dorothy Roberts and Miguel de la Torre; and even political figures like President Barack Obama and Reverend Adam Clayton Powell Sr. While other scholars of federal Indian law have written noteworthy works in other areas, few have so deftly connected their work to debates outside the field. The result is an article that helps to bring the law of Native people into mainstream debates, and out of the niche in which it is sometimes cabined.

Second, Professor Davis, more convincingly than most, rebuts the notion that either a federal trust responsibility or a treaty relationship can redeem the constitution of its colonial sins. Although (as highlighted in the work of Kevin Washburn recently praised in Jotwell) the federal-Indian trust relationship has been transformed from a paternalistic one to serve tribal self-determination, Professor Davis notes that the fundamentals of the trust make it ill-suited to this goal. Trusts, he writes, are paradigmatically written by settlors without the consent of their beneficiaries, and depend on the control of the trustee and inability of the trust beneficiary to manage its own affairs. As such, the trust is fundamentally at odds with the principles of tribal self-determination and agency. Further, after pointing out the limited efficacy of the trust concept in restraining or punishing the federal government, he argues that, quoting Rev. Powell, it is a kind of "cheap grace," providing absolution without demanding anything meaningful from the colonizers.

Although other scholars have offered treaty relationships as a basis for a more positive relationship, Professor Davis points to their limitations as well. Treaties were drafted by U.S. negotiators, often agreed to from positions of little choice, and left out many tribes with whom matters could be settled outside of treaty relationships. Relying on written treaties is a futile effort to use the master's tools to dismantle the master's house.

Third, Professor Davis offers a new vision of the tribal-federal constitutional relationship, a model of "relational consent." Drawing on relational contract theorists, he argues that the tribal-federal relationship should be understood not through formal treaties but through relationships based on

mutual respect. This understanding finds support in history and indigenous law as well as theory. As Rob Williams and others have argued, for over a century relationships between tribal and Euro-American governments were forged through a cross-cultural diplomacy that incorporated indigenous concepts of political relationship through metaphoric kinship. It also is consistent with (some) existing constitutional precedent, which has combined historical practice and the spirit of Indian treaties to create a protected status for tribal sovereignty.

Professor Davis's vision is obviously inconsistent with another long-established constitutional principle: that the federal government has plenary power to remove the sovereign and property rights tribes retain, so long as it does it clearly enough.[1] Is there any chance of undermining this principle? The demise of constitutional precedents like Scott v. Sanford and Plessy v. Ferguson provide some hope of such a constitutional revolution. But those transformations took a Civil War on one side and the spectacle of massive resistance on the other to occur. Present politics, moreover, show how little redeemed we still are from the original sins of racial inequality. I confess I am skeptical that the plenary power doctrine will ever be overruled, no matter how many fine articles we write. But short of that constitutional revolution, Professor Professor Davis's vision provides us with a new way to understand the sometimes paradoxical constitutional position of tribal nations. I believe this article will become a touchstone in federal Indian law and critical constitutional theory, and hope its constitutional vision will be incorporated by judges and politicians who make the law of indigenous peoples.

1. It is relevant here to say that I disagree with one important claim in the article. I do not believe the plenary power doctrine depends on the trust relationship. There are several other constitutional hooks for this power, and I believe the Marshall trilogy as well as much later Indian law jurisprudence prioritize those. But Professor Davis's argument on this score is not baseless, and, more importantly, this disagreement does not undermine the core arguments or contributions of the piece.

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