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Milner S. Ball

University of Georgia School of Law

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STORIES OF ORIGIN AND CONSTITUTIONAL POSSIBILITIES

*Milner S. Ball**

Robert Cover once observed how “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.”¹ Stories of origin locate law, invest it with legitimacy, and so lend it stability. As Cover went on to note, however, the narratives that legitimate a legal order also retain revolutionary force, for a return to the originating acts recounted in the narratives is always possible.² A polity begun in revolution remains subject to revolution.

There is an American story of origins. It is a good story. And a useful one.³ It legitimates the Constitution and gives it meaning. It supports the authority of the republic and helps to secure the founda-

* Caldwell Professor of Constitutional Law, University of Georgia School of Law. A.B. 1958, Princeton University; S.T.B. 1961, Harvard University; J.D. 1971, University of Georgia. — Ed. I am deeply indebted to a number of colleagues for their critical attention to an earlier version of this Article: William McFeely, Judith Resnik, Aviam Soifer, Joseph Vining, and Robert Williams. I am equally indebted to the editors, co-authors, and faculty, especially David Chambers, who participated in the *Michigan Law Review*'s singular, fruitful gathering at Ann Arbor. Another version of this piece was presented as a University of Georgia Humanities Center lecture, and the attendees' criticisms were both welcome and very helpful.

1. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (footnote omitted). The dependence of law upon narrative has at times been hidden from attention under attempts to expound law as an autonomous, rational system composed of rules or principles. The scholarship of James Boyd White has been instrumental in reintroducing the relation of law and narrative to contemporary legal studies. See, e.g., J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985). We may now get on with the business of exploring the relation without having to argue its legal-academic legitimacy. In taking up the issue here, I return to a subject that has taken on a different appearance in the meantime. See M. BALL, *THE PROMISE OF AMERICAN LAW* 16-28 (1981).

2. Cover, *supra* note 1, at 23-24. The Book of Deuteronomy provides a prime example:

When your son asks you in time to come, “What is the meaning of the testimonies and the statutes and the ordinances which the Lord our God has commanded you?” then you shall say to your son, “We were Pharaoh's slaves in Egypt and the Lord brought us out of Egypt with a mighty hand . . . that he might bring us in and give us the land which he swore to give to our fathers.

Deuteronomy 6:20-23 (Revised Standard Version).

3. It is not necessary to assume that there is an American story of origins, but for the sake of the experiment, I do count on readers suspending disbelief in the possibility that there is such a story and that it is related to constitutional law.

If heresy typically detaches some element of orthodoxy and invests it, in isolation, with exclusive importance, then insistence upon interpreting the Constitution according to its Framers' intent is a heretical offshoot of the American civil religion. It takes a part of the story of founding and inflates it. Heresy in general bears witness to orthodoxy, and this one may be some evidence of the existence and content of an orthodox story of origins.

tions. It has also proved, at times, wonderfully transformative, helping to augment the foundations and expand the legal order to embrace those who were formerly excluded.⁴ There is abundant reason to celebrate the story of the founding, to retell and employ it, and to affirm it and its regenerative as well as conservative powers.

And yet the story of origins also has a very different potential. It has proved to be sometimes incapacious, a rhetorical mode for closure and resistance to inclusiveness. While the struggle to gain equality for black people may be a prime instance of the transformative effect of the story, the continuing practice of violence against Indian tribes is a critical instance of its destructive effect.⁵ The story is a good one, but bound up with and inseparable from its goodness and success, it has also served aggression and exclusivity.

Can we both affirm the American story — employing it transformatively to include the excluded; enjoying, retelling, participating in, applauding, and shaping it — and at the same time disaffirm it, rejecting its capacity to do harm?

Hannah Arendt ventured the judgment that the authority of the American republic and its law “will be safe and intact as long as the act itself, the beginning as such, is remembered whenever constitutional questions in the narrower sense of the word come into play.”⁶ Perhaps her conjecture was incomplete. Perhaps the safety of the republic’s authority requires more than remembering the story of the founding when constitutional questions come into play.

Perhaps, as a minimum, that story requires supplementation, requires that it take a place alongside other stories of origin, requires that we acknowledge the validity of other constitutive narratives. By redirecting us away from monopolistic absolutes and certainties and toward appreciation of other human, political possibilities, multiple stories might help to alleviate and even reconfigure the dilemma of simultaneous affirmation and disaffirmation of the American story of origins.

The story’s power to legitimate and regenerate the republic is limited because it is not, finally, transcendent or transcending. It may transform, but it cannot transfigure. No story can. Essential and powerful though it is, narrative is not of itself redemptive. Perhaps, then, something more is necessary than narrative alone, something more than the American story even when told together with others.

4. I confine my comments to rhetoric but do not make the mistake of thinking that rhetoric alone is an engine of change.

5. These two examples are elaborated in later sections of this Article.

6. H. ARENDT, *ON REVOLUTION* 205 (1965).

I. THE STORY

A. *Douglass, Lincoln, and the Declaration of Independence*

Fourscore and seven years ago our fathers brought forth, on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

—Lincoln, *The Gettysburg Address*

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

—Jefferson, *The Declaration of Independence*

As a starter, the American story of origins may be said to consist in the people, documents, and acts that we bundle loosely together and designate as cause for celebration on the Fourth of July. It is typically anchored in the Declaration of Independence (understood to be as much event as text). That this is so, that we accept the telling of the American story as beginning this way, is an achievement — as much of one as the events and commitments recounted. It is the achievement of many people, including Frederick Douglass and Abraham Lincoln.

Douglass broke with the Garrisonians when he concluded that the dissolution of the Union they sought would allow slavery to continue unimpeded in the southern states.⁷ He then confronted a political-rhetorical problem. Because abolition required the Union, he would have to affirm the Constitution. To affirm the Constitution, he would have to construe it as an anti-slavery document. To do that, he would have to tell the (or an) American story as one that included black people. The transforming change of abolition would have to be tied to the foundations. He would have to find a language that would register with his audience and allow him both to affirm and disaffirm the facts.

The Declaration of Independence was a means to this end. It allowed Douglass to characterize the black freedom movement as placing no “new consideration upon the public” and as no more than an “endeavor to carry out the great fundamental principles of American government.”⁸

The American story was the specific object of attention in

7. 3 F. DOUGLASS, *THE FREDERICK DOUGLASS PAPERS* 174, 365 (J. Blassingame ed. 1985); F. DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 260-61 (1962).

My reading of Douglass shares much with that of Professor Mari Matsuda. See Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 325 (1987).

8. F. DOUGLASS, *We Ask Only for Our Rights: An Address Delivered in Troy, New York, on 4 September 1855*, in 3 *THE FREDERICK DOUGLASS PAPERS*, *supra* note 7, at 91, 91-92 (the particular object under protest was New York's \$250 property qualification for black voters).

Douglass' famous speech of 1852, *What to the Slave Is the Fourth of July?*⁹ As he noted, the times demanded irony.¹⁰ Accordingly, he applauded the Fourth of July story: "the great deeds of your fathers,"¹¹ the American work of freedom, and the Declaration, with its "saving principles."¹² But then he juxtaposed the story of slaves in the United States: next to the Declaration's words on equality he placed the fact that Americans held "in . . . bondage . . . a seventh part of the inhabitants of your country."¹³

The irony had an appeal. Douglass' conclusion that "[t]his Fourth [of] July is yours, not mine"¹⁴ was a plea to make it his as well, a plea to render the story capable of embracing him. The Declaration provided both encouragement to do so and a means for reading the Constitution as supporting the effort.¹⁵

It was not always so. Chief Justice Taney's account of our history in his *Dred Scott*¹⁶ opinion of 1857, five years after Douglass' Fourth of July address, is a reminder of the availability of competing versions better grounded in popular regard and in the facts of the day. In writing for the Court, Taney kept circling back to the Declaration of Independence. He cited it ten times. After quoting the Declaration's first two sentences, he observed that they "would seem to embrace the whole human family, and if they were used in a similar instrument at

9. F. DOUGLASS, *What to the Slave is the Fourth of July? An Address Delivered in Rochester, New York, on 5 July 1852*, in 2 THE FREDERICK DOUGLASS PAPERS, *supra* note 7, at 359 (1982) [Hereinafter F. DOUGLASS, *What to the Slave is the Fourth of July?*]. Compare Douglass' 1852 speech with his July Fourth address of 10 years later. F. DOUGLASS, *The Slaveholders' Rebellion: An Address Delivered in Himrod's, New York, on 4 July 1862*, in 3 THE FREDERICK DOUGLASS PAPERS, *supra* note 7, at 521. It was given a more modern ring, perhaps, by the fact that "[l]ocal young people supplemented the program by playing rousing band music." *Id.* In this later speech, he said the "downward career of the Republic . . . began by bartering away an eternal principle of right for present peace." *Id.* at 530.

10. F. DOUGLASS, *What to the Slave is the Fourth of July?*, *supra* note 9, at 371.

11. *Id.* at 366.

12. *Id.* at 364. The Declaration, he added, was the "RING-BOLT to the chain of your nation's destiny." *Id.* at 363.

Douglass asked:

Are the great principles of political freedom and of natural justice, embodied in the Declaration of Independence, extended to us? [A]nd am I, therefore, called upon to bring our humble offering to the national altar, and to confess the benefits and express devout gratitude for the blessings resulting from your independence to us?

Id. at 367.

13. *Id.* at 383 (emphasis in original).

14. *Id.* at 368.

15. *Id.* at 384-87. For specific use of the Declaration in interpreting the Constitution, and for Douglass' constitutional hermeneutics, see F. DOUGLASS, *The Dred Scott Decision: An Address Delivered, in Part, in New York, New York, in May 1857*, in 3 THE FREDERICK DOUGLASS PAPERS, *supra* note 7, at 163, 176-83; F. DOUGLASS, *The American Constitution and the Slave: An Address Delivered in Glasgow, Scotland, on 26 March 1860*, in 3 THE FREDERICK DOUGLASS PAPERS, *supra* note 7, at 340, 350-66.

16. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406-27 (1857).

this day would be so understood.”¹⁷ In spite of this enlarged contemporary understanding, however, neither the language nor the nation were to be enlarged with it.

Taney explained: If the language of the Declaration had been intended to embrace slaves, then “the conduct of the distinguished men who framed [it] would have been utterly and flagrantly inconsistent with the principles they asserted.”¹⁸ But “the men who framed this declaration were great men — high in literary acquirements . . . and incapable of asserting principles inconsistent with those on which they were acting.”¹⁹ It must be that “the language,” as understood in that day and as “used” by those honorable men, could not “be supposed to embrace the negro race.”²⁰ Since it would be “inadmissible in any tribunal called on to interpret it” to argue that the words of the Constitution or Declaration should be given “a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted,”²¹ black people could not be numbered among the “all men” created equal.

Notwithstanding the combined force of the readings of Taney on the right and of Douglass’ former ally Garrison on the left, Douglass clung to the need for Union and an antislavery reading of the Constitution and therefore also to his version of the American story.²² Irony, however, would have to give way to metaphor. He returned to the story of origins: “The Constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic, give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country.”²³ On that platform, the Constitution, which never employs the word “slavery,” could be interpreted as antislavery, and the continuation of slavery could be interpreted as a discrepancy between the Constitution as written and the Constitution as administered.²⁴

Lincoln’s Gettysburg Address of 1863 may have helped as much as

17. 60 U.S. (19 How.) at 410.

18. 60 U.S. (19 How.) at 410.

19. 60 U.S. (19 How.) at 410.

20. 60 U.S. (19 How.) at 410.

21. 60 U.S. (19 How.) at 426.

22. See F. DOUGLASS, *The Dred Scott Decision: An Address Delivered, in Part, in New York, New York, in May 1857*, *supra* note 15. “[N]o thanks to the slaveholding wing of the Supreme Court,” he said, “my hopes were never brighter than now.” *Id.* at 167.

23. *Id.* at 171-72.

24. *Id.* at 182; see also F. DOUGLASS, *Eulogy of William Jay: An Address Delivered in New York, New York, on 12 May 1859*, in 3 THE FREDERICK DOUGLASS PAPERS, *supra* note 7, at 249, 275-76 (Taney’s citation to the authority of the slaveholding practices of the Framers was an

anything to make the Douglass-like version of the American story canonical. Lincoln's opening, "Fourscore and seven years ago" — a type of "once upon a time" — was a reference not to 1789 and the adoption of the Constitution, but to 1776 and the Declaration of Independence.²⁵ In that beginning the nation had been dedicated to the "proposition" about equality.²⁶

If Douglass' initial method was ironic, Lincoln's was midrashic. Where Douglass drew out the story of origins by contrasting it with the story of slavery, Lincoln interpreted the story of origins through compatible narrative extension. He interpreted the story of bringing forth the nation by embroidering it with the story of the war for that nation's life. The methods of both men were means for engaging narrative in the transformation of the legal order, telling stories so that law might include and respect the black people who had been excluded.

Because the inclusive, egalitarian version of the story has gained purchase, Douglass' enterprise and Lincoln's vision do not now seem quixotic. The fourteenth amendment appears to have belonged in the Constitution all along, the Constitution appears to have grown out of the Declaration of Independence, and the Declaration appears to have emerged from a constitutive devotion to equality. Indeed, this version, drawn out of the Declaration, is the accepted, even mandatory, rhetorical starting point for attempts to achieve a legally protected place for the discrete and insular and the oppressed.

B. *Contemporary Habit*

With greater or lesser political as well as stylistic success, the Douglass-Lincoln versions of the American story of origins continue to be told in time of need when consensus must be rallied around change. In 1965, for example, Lyndon Johnson's appeal on behalf of the voting rights bill was cast as a version of the story:

attempt to make "[t]heir anti-slavery declarations . . . less potent for good than their pro-slavery examples have been made for evil.")

25. Address by Abraham Lincoln, Gettysburg, Pennsylvania (Nov. 19, 1863), *reprinted in AN AMERICAN PRIMER* 435, 436 (D. Boorstin ed. 1968).

26. Matthew Arnold's sense of style reportedly caused him to quit reading when he came to the phrase about dedication to a proposition. See Adler & Gorman, *Reflections: The Gettysburg Address*, THE NEW YORKER, Sept. 8, 1975, at 42-43. "In traditional logic, a proposition is a sentence setting forth something judged ('held') to be either true or false. In the first line of the second paragraph of the Declaration, that men are equal is held to be true and so is declared in a proposition." *Id.* at 43. Wilbur Samuel Howell traces the form of the Declaration and the term "self-evident" to Duncan's *Logick*. Howell, *New Insight into Declaration of Independence*, Princeton Alumni Weekly, Dec. 9, 1975, at 8, 10. Lincoln's logic may reflect Jefferson's logic which reflects Duncan's logic.

At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.

....

This was the first nation in the history of the world to be founded with a purpose. The great phrases of that purpose still sound in every American heart, North and South: "All men are created equal". . . . Those are not just clever words. Those are not just empty theories. In their name Americans have fought for two centuries

Those words are a promise to every citizen that he shall share in the dignity of man.²⁷

Another instance of this version is Justice Brennan's opinion concurring and dissenting in *Regents of the University of California v. Bakke*:²⁸

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgement that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. . . . [I]t is well to recount how recent the time has been, if it has yet to come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927).²⁹

27. Address on Voting Rights by Lyndon B. Johnson, Washington, D.C. (Mar. 15, 1965) reprinted in AN AMERICAN PRIMER, *supra* note 25, at 944, 946-47.

28. 438 U.S. 265 (1978).

29. 438 U.S. at 326. It has been argued that "a continuous yet vital constitutional tradition . . . has required the Supreme Court to interpret relevant constitutional text in terms of abstract background rights." Richards, *Interpretation and Historiography*, 56 S. CAL. L. REV. 490, 543 (1985). Brennan's opinion illustrates how it is the story of beginning and not abstract background rights that is the source of continuity and vitality.

City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), is illustrative of a version of the story crabbed in substance and crabbed in the telling:

To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . ." We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

109 S. Ct. at 727 (citations omitted) (O'Connor, J.). Brennan's story is about the little engine that could; O'Connor's in *Croson* is about the little engine that can't.

That the Declaration/equality version has become standard despite its initial implausibility is a remonstrance against too early or too easy concession to counter-realities, including the reality of Supreme Court majorities. What now have we earned a right to say is impossible for the American story? What transforming tale of American origins cannot be told in successful aid of legal place for the dissentient and the disestablished?

Charles Black encourages us to believe that the story is available for a judicially cognizable, constitutional right protecting the poor. Ringing a change on the classic narrative strategy, he tells a version of the story that fixes upon the Declaration's proposition about a right to the pursuit of happiness. This tale of an American right to livelihood is, he says, "talking into the political wind." But, he adds, "winds change."³⁰

He advises that "hypocrisy may commit itself beyond easy retraction."³¹ Or, hypocrisy may prove to have been commitment; nations, like persons, may not know their minds all at once. "[T]he Declaration of Independence is still here," Black concludes. "Later generations, yours and mine and others to come, have much work to do, if we, and those who follow us, choose to change *all* the assertions in the second sentence of the Declaration from hypocrisy to commitment."³²

If there is a version of the American story of origins that widens the embrace of the legal order to include blacks and the poor, then it may appear potentially omniscient, limited only by the stamina and imagination of the storytellers and their ability to shape the story of origins so that their particular stories can be aligned with it.³³ I think that the story is not omniscient. But before I address its limits and harmfulness, I must first elaborate the nature of its beneficial power.

30. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1115 (1986).

31. *Id.* at 1103.

32. *Id.*

33. There remain the problems, not discussed here, of how to relate particular stories, how to work them into the story of origins, and how to get them before the courts. For an instructive account of a success, see the story about stories and judges willing to listen to them in Wizner, *Passion in Legal Argument and Judicial Decisionmaking: A Comment on Goldberg v. Kelly*, 10 CARDOZO L. REV. 179 (1988). On some of the difficulties, see, e.g., Schneider, Dunlap, Lavery & Gregory, *Workshop: Lesbians, Gays, and Feminists at the Bar — Translating Personal Experience into Effective Legal Argument*, 10 WOMEN'S RTS. L. REP. 107 (1988).

II. NARRATIVE AND CONSTITUTIONAL COMMUNITY: POLYPHONY

A. *Polyphony*

The alliance that the story of origins offers to law is especially fit for the United States because of the sympathy between narrative and democracy. In contrast to the language of command, which is hierarchical and distancing and therefore unsuitable to democracy, narrative is inherently communal. A story is shared. It establishes a relation of mutuality between narrator and hearer. When it works, the audience becomes a participant in the performance.³⁴ So, when it is granted, does the entreaty "Tell me a story" establish a type of equality between child and adult — the equality of mutual participation in a joint enterprise. A story may also breach the barrier of time between the present audience and the past participants in the events narrated. In the Deuteronomic example,³⁵ it is "we" who are preserved alive "as at this day." In the American story, it is said that citizens exchanged promises and decided together how they should govern themselves.³⁶ To be at the beginning was to embark on a joint venture. To tell and to hear the story of it is also to engage in a joint enterprise. To this extent, the story does what it says.

In addition to this sympathy between participatory narrative medium and democratic political reality — the equality in each — there is a closer, more complex affinity — the capacity of each for multiple, independent voices, *i.e.*, polyphony. I use the term "polyphony" here in the sense given it by Mikhail Bakhtin, as a description of Dostoevsky's novels in particular, but also of narrative and of the dialogic nature of language and life in general.³⁷

34. The conclusion of Aeschylus' Oresteian trilogy gave way to the Panathenaic procession which was led by a company of aliens and which thus embodied the last play's image of Athens as a home for strangers. There was interaction between play, procession, and politics. The audience participation and effect I refer to in the text is not usually or necessarily so obvious and physical.

35. See *supra* note 2.

36. Cf. THE FEDERALIST NO. 1, at 3 (A. Hamilton) (J. Cooke ed. 1961) (establishing government from reflection and choice, not accident and force).

37. At different times, Bakhtin employed different terms in exploring the phenomenon: dialogue, heteroglossia, and carnivalization. See, e.g., Holquist, *Introduction*, in M. BAKHTIN, *THE DIALOGIC IMAGINATION* xix (M. Holquist trans. 1981); Holquist, *The Carnival of Discourse: Bakhtin and Simultaneity*, CANADIAN REV. COMP. LIT., June 1985, at 220, 221-22.

Bakhtin did not limit polyphony to Dostoevsky or to novels. He assigned "the term 'novel' to whatever form of expression within a given literary system reveals the limits of that system as inadequate, imposed, or arbitrary. Literary systems are composed of canons, and the novel is fundamentally anticanonical. It does not permit generic monologue." K. CLARK & M. HOLQUIST, *MIKHAIL BAKHTIN* 276 (1984).

In this sense, the novel may be thought of

Bakhtin believed Dostoevsky's singular achievement was his realization of narrative's capacity for a plurality of consciousnesses, voices, and languages: "A character's word about himself and his world is just as fully weighted as the author's." Each voice and language is fully independent — "it sounds, as it were, *alongside* the author's word" — but also "in a special way combines both with [the author's word] and with the full and equally valid voices of other characters."³⁸ The characters together with the author are equally independent and engaged in dialogue.³⁹ The whole is polyphonic.

As an affirmation of and engagement with others, their voices, consciousnesses, and autonomy, polyphony is an ethical-political as well as aesthetic achievement. Dostoevsky's characters must overcome their "solipsism, their disunited 'idealistic' consciousnesses" and thereby "transform the other person from a shadow into an authentic reality."⁴⁰ This action within the work of art, existing between the covers of the book and taking place among characters and author, also has affective extension externally. It engages its audience in the dialogue. There is no nonparticipating viewer of events in the narrative and no nonparticipating reader of it.⁴¹

not as some formalists would do . . . but rather as a tendency or possibility in literature What we seek is a representation, at whatever time or place and in whatever genre Only "the novel," with its supreme realization of the potentialities inherent in prose, offers the possibility of doing justice to voices other than the author's own, and only the novel invites us to do so. . . . It is . . . a matter of the technical resources of narrative in prose — the inherent capacity of narrative to incorporate languages other than the author's (or reader's) own.

Booth, *Introduction*, in M. BAKHTIN, *PROBLEMS OF DOSTOEVSKY'S POETICS* xxii (C. Emerson ed./trans. 1984).

38. M. BAKHTIN, *PROBLEMS OF DOSTOEVSKY'S POETICS*, *supra* note 37, at 7.

39. There is one set of values that I apply by myself to myself and another that I apply to all the others that are not me. They in turn make the same distinction between themselves and others. In the gap between the two value systems is the space where dialogue is pursued at its deepest level.

K. CLARK & M. HOLQUIST, *supra* note 37, at 242.

Language is dialogic by nature and from the beginning: "Only the mythical Adam, who approached a virginal and as yet verbally unqualified world with the first word, could really have escaped from start to finish [the] dialogical inter-orientation with the alien word that occurs in the object." M. BAKHTIN, *THE DIALOGIC IMAGINATION*, *supra* note 37, at 279. "Forming itself in an atmosphere of the already spoken, the word is at the same time determined by that which has not yet been said but which is needed and in fact anticipated by the answering word." *Id.* at 280.

40. M. BAKHTIN, *PROBLEMS OF DOSTOEVSKY'S POETICS*, *supra* note 37, at 10. One "may relate as a despot to others, that is, completely monologically, or . . . may relate to them democratically, that is, polyphonically or dialogically. Bakhtin's concern for how authors relate to their characters, then, is not merely a concern for the formal properties of point of view but also a way to flesh out possibilities of self/other relations." K. CLARK & M. HOLQUIST, *supra* note 37, at 242-43.

41. Indeed, to live is to be a participant in life's polyphony:

[T]o portray the inner man, as Dostoevsky understood it, was possible only by portraying

For this reason, “the work of art is never finished”⁴² but “is always a *relationship* . . . [that] acquires wholeness only when an individual assumes a concrete attitude toward it.”⁴³ Reading, as relationship, engages the thought, action, ethics — the person — of the reader, as Bakhtin himself demonstrated. Against the Soviet drive toward a total state — toward the apophantic, monologic, monophonic — Bakhtin, the reader of Dostoevsky, became an advocate of polyphony. When, at the conclusion of his book on Dostoevsky, he exhorted his own readers “to renounce their old monologic habits, his gesture [was] a commentary on a political situation which increasingly permitted only a single authoritative voice to be heard and which sent those such as Bakhtin himself, who could not be monologized, into exile.”⁴⁴

Polyphony in narrative is the representation “of human ‘languages’ or ‘voices’ that are not reduced into, or suppressed by, a single authoritative voice: a representation of the inescapably dialogical quality of human life at its best.”⁴⁵ This affective representational capacity accounts for the fundamental sympathetic relation between the aesthetics of narrative and the dynamics of the American legal order.

his communion with another. Only in communion, in the interaction of one person with another, can the “man in man” be revealed, for others as well as for oneself.

It is fully understandable that at the center of Dostoevsky’s artistic world must lie dialogue, and dialogue not as a means but as an end in itself. Dialogue here is not the threshold to action, it is the action itself. It is not a means for revealing, for bringing to the surface the already ready-made character of a person; no, in dialogue a person not only shows himself outwardly, but he becomes for the first time that which he is — and, we repeat, not only for others but for himself as well. To be means to communicate dialogically.

M. BAKHTIN, PROBLEMS OF DOSTOEVSKY’S POETICS, *supra* note 37, at 252.

42. K. CLARK & M. HOLQUIST, *supra* note 37, at 243.

43. Emerson, *Editor’s Preface* to M. BAKHTIN, PROBLEMS OF DOSTOEVSKY’S POETICS, *supra* note 37, at xxxix (emphasis in original).

44. K. CLARK & M. HOLQUIST, *supra* note 37, at 252.

What Bakhtin had written was: “We must renounce our monologic habits so that we might come to feel at home in the new artistic sphere which Dostoevsky discovered, so that we might orient ourselves in that incomparably more complex *artistic model of the world* which he created.” M. BAKHTIN, PROBLEMS OF DOSTOEVSKY’S POETICS, *supra* note 37, at 272.

The work that realizes polyphony

insists on a dialogue between texts that a given system admits as literature and those texts that are excluded from such a definition. The novel is a kind of epistemological outlaw, a Robin Hood of texts. Because the fundamental features of any culture are inscribed in its texts, not only in its literary texts but in its legal and religious ones as well, “novelness” can work to undermine the official or high culture of any society.

K. CLARK & M. HOLQUIST, *supra* note 37, at 276-77.

Serio-comic genres that were a first step in the development of the novel destroyed distance through laughter thereby demolishing

fear and piety before an object, before a world, making of it an object of familiar contact and thus clearing the ground for an absolutely free investigation of it. . . . Familiarization of the world through laughter and popular speech is an extremely important and indispensable step in making possible free, scientifically knowable and artistically realistic creativity in European civilization.

M. BAKHTIN, THE DIALOGIC IMAGINATION, *supra* note 37, at 23.

45. Booth, *supra* note 37, at xxii.

B. *The Polyphony of the American Constitutional System and the Story of Origins*

Aspirations for the American republic and its technical legal resources⁴⁶ were early framed in terms that may be understood as those of polyphony (or terms for which polyphony might serve as an alternative). One example is James Madison's great desideratum of a government preserving both minority rights and the spirit of popularity.⁴⁷ He imagined that such a government would be achieved through a "judicious modification and mixture of the federal principle"⁴⁸ generative of a "multiplicity of interests"⁴⁹ attached to one another by "that chain of connection, that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."⁵⁰

Another example of what might be taken as political polyphony is John Adams' republican notion of the passion for distinction, which he took to be a fundamental, powerful human disposition.⁵¹ This passion was to be directed away from accumulation of wealth toward "activity for the good of others" where the reward would be esteem and admiration rather than money.⁵² (Such a regime would help to alleviate the particular indignity visited upon the poor person, who "is not disapproved, censured, or reproached; *he is only not seen.*")⁵³ Adams concluded that "[i]t is a principal end of government to regulate this passion, which in turn becomes a principal means of government."⁵⁴ The American polity would depend upon and stage the passion for distinction, the drive of many, diverse citizens to be at the same time autonomous and engaged with others in public virtue.

A third example of (arguable) polyphony is Thomas Jefferson's late, repeated urging to divide counties into wards. He had in mind a structure composed of elementary republics that would protect both the autonomy of citizens and their participation in "the government of affairs."⁵⁵ Wards would fulfill the division of the republic "from the

46. On the possibility of court as a theater in which *personae juris* allow the voices of citizens to be heard, see M. BALL, *supra* note 1, at 40-94.

47. THE FEDERALIST No. 10, at 61 (J. Madison) (J. Cooke ed. 1961).

48. THE FEDERALIST No. 51, at 353 (J. Madison) (J. Cooke ed. 1961) (emphasis omitted).

49. *Id.* at 352.

50. THE FEDERALIST No. 47, at 327 (J. Madison) (J. Cooke ed. 1961) (emphasis omitted) (quoting the New Hampshire Constitution).

51. See J. ADAMS, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 221, 232 *passim* (C.F. Adams ed. 1851).

52. *Id.* at 234, 238-39, 246, 271, 397-98.

53. *Id.* at 239 (emphasis in original).

54. *Id.* at 234.

55. Letter from Thomas Jefferson to Joseph Cabell (Feb. 2, 1816), *reprinted in* THE LIFE

great national one down through all its subordinations, until it ends in the administration of every man's farm by himself.⁵⁶ The result would be a "gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government"⁵⁷ — a divided, representative, and therefore polyphonic rather than monophonic whole.

The American legal order, imaged as an inclusive federal republic, fitly subsists in narrative, which can realize polyphony "formed by the interaction of several consciousnesses, none of which entirely becomes an object for the other."⁵⁸

For this reason it is appropriate that the Declaration of Independence should be accepted as the originating written source of the story, for the rhetoric of that document⁵⁹ exhibits thoroughly polyphonic qualities. They are evident, for example, in the first sentence's "decent respect to the opinions of mankind," and, more pointedly, in the voice and stance illustrated by the second sentence, which has come to have such central importance.⁶⁰

By its nature, polyphony prohibits one voice or consciousness, including that of the author, from imposing its unobstructed intention upon another. Intention can only be mediated "through the intentions of others, beginning with the otherness of the language itself."⁶¹ Dialogue is an essential. "This does not mean that I cannot make my own point of view understood; it simply implies that my point of view will

AND SELECTED WRITINGS OF THOMAS JEFFERSON 660 (A. Koch & W. Peden eds. 1944); see also H. ARENDT, *supra* note 6, at 252 *passim*.

56. Letter from Thomas Jefferson to Joseph Cabell, *supra* note 55, at 660. Distinguish the related notion of John Rawls: "Taking part in political life does not make the individual master of himself, but rather gives him an equal voice along with others in settling how basic social conditions are to be arranged." J. RAWLS, *A THEORY OF JUSTICE* 233 (1971).

57. Letter from Thomas Jefferson to Joseph Cabell, *supra* note 55, at 661. The role of states as voices in federalism and article V's provision for amending the Constitution may also be identified as polyphonic.

58. M. BAKHTIN, *PROBLEMS OF DOSTOEVSKY'S POETICS*, *supra* note 37, at 18.

Martin Luther King, Jr., made an appeal to political polyphony: "Too long has our beloved Southland been bogged down in a tragic effort to live in monologue rather than dialogue." M.L. KING, *Letter from [the] Birmingham Jail*, in *WHY WE CAN'T WAIT* 77, 82 (1964).

59. The Declaration is not itself a story but does employ narrative to describe the grievances held against the King.

60. When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. Jefferson, *The Declaration of Independence*, in *AN AMERICAN PRIMER*, *supra* note 25, at 83, 86.

61. K. CLARK & M. HOLQUIST, *supra* note 37, at 245.

only emerge through the interaction of my own and another's words as they contend with each other in particular situations."⁶²

The Declaration's second sentence tacitly recognizes that, in a democratic society, even self-evident truth requires mediation, dialogue, consent. Had the truths recited by Jefferson been self-evident in the sense that they were politically monologic, *i.e.*, irresistibly compelling, he would simply have announced them rather than prefacing them with the formula "We hold." This introduction is a grammatical acknowledgement that truth, equality, and rights require agreement in the republic. They are matters of opinion exchanged and held. "We hold this opinion because freedom is possible only among equals, and we believe that the joys and gratifications of free company are to be preferred to the doubtful pleasures of holding dominion. Such preferences are politically of the greatest importance . . . Their validity depends upon free agreement and consent."⁶³ The polyphonic form and content of the Declaration — like the story that follows from it — is consistent with the images, structure, and aspirations for the constitutional system.

In Taney's hands the Declaration was a monologic or apophantic announcement, not a dialogic holding. He saw no discrepancy between the practices of the Framers and the words of the Declaration. Nor would he allow any discrepancy between the words so determined and the realities of the present. There was only one voice and no tension. By the Taney approach, neither the founders nor the foundation would be improved.

Taney had sought monologue, had sought to eliminate the tension of dialogue by allowing the practices of the Framers to determine both their rhetoric and the nation's present. Douglass read the Declaration polyphonically; he recognized the tensions between rhetoric and practice and between past and present. He played upon it in order to render the American story polyphonic and thereby engage the story to draw both past and present toward a better, more expansive future.

So did Lincoln. In the Gettysburg Address, he distinguished the nation begun in the Declaration and dedicated to equality ("that nation") from the presently existing one ("this nation"). There was a gap — a dialogic space — between them, realized in the field at Gettysburg, where the struggle for their meaning took place. To sustain both realities and maintain the tension between them required, in a

62. *Id.*

63. Arendt, *Reflections: Truth and Politics*, THE NEW YORKER, Feb. 25, 1967, at 49, 62; see also G. WILLS, *INVENTING AMERICA* (1978). I am especially indebted to Arendt's instructive reading of Lincoln.

word Lincoln used five times, dedication. The nation was “dedicated” to equality; he had come to “dedicate” the cemetery; the living are to be “dedicated” to the great task remaining. Dedication is the singular action of polyphony and dialogue: at the same time setting apart and committing oneself to, giving up and binding.

Legal texts and institutions take on radically different meanings with different consequences depending upon their narrative context. The American story of origins is told as though the republic originated in the Declaration of Independence and is dedicated to equality. Told in this way, it provides authority to the legal order but may also transform it and in the process undergo transformation itself. This transforming, dialogic capacity continues to be confirmed by the telling of the story beginning in an original promise of equality that requires present fulfillment.

C. *Polyphony, Conservation, and Transformation*

Cotton Mather hoped to conserve the cherished ways of his generation by preserving their story:

I shall count my country lost in the loss of the Primitive Principles, and the Primitive Practices, upon which it was first Established: But certainly one good way to save that Loss would be to do something . . . that the Story of the Circumstances attending the Foundation and Formation of this Country, and of its Preservation hitherto, may be impartially handed unto Posterity.⁶⁴

In fact, the story of origins is conservative. It exerts the gravitational pull of past generations upon those of the present.⁶⁵ When they are drawn into the story, contemporary Americans are brought under the authority of the founding fathers.

The story of origins, however, like a work of art, is never finished and is therefore empowering and transforming as well as conserving. Its content is not static, and its telling is not fixed. The story is unfinished in the sense that it is still being told; the United States and the Constitution still exist. But the story is unfinished also in the sense that it is still being written, is still open to alteration and amendment, is still subject to what present generations will make of it.

If narrative is polyphonic, then it is unprivileged. It is open to dialogue with successions of readers, and through the dialogue may be influenced by them.⁶⁶ This plasticity figures in transformation. The story includes — or is made to include — us. But when we participate

64. H. ARENDT, *supra* note 6, at 318 (citing *Magnalia*, Book II).

65. On the unifying, centripetal forces, see *infra* note 140.

66. About John F. Kennedy's death, Auden wrote:

we engage in dialogue. We become those the story would have us be, and the story becomes what we would have it be. Story and audience are mutually subject to betterment.⁶⁷

There is "a kind of necessary 'augmentation' by virtue of which all innovations and changes remain tied back to the foundation which, at the same time, they augment and increase."⁶⁸ For this reason, the American story of origins is improved as it improves the legal order.⁶⁹ That the American story of origins is still being written is one of the reasons that its effects, content, and telling are not finally settled. Its substance and meaning are still contested. The story of the circumstances attending the foundation conserves but also transforms and is transformed, as polyphonic narrative should in a democratic society.⁷⁰

What he was, he was:
 What he is fated to become
 Depends on us.
 Remembering his death,
 How we choose to live
 Will decide its meaning.

W.H. AUDEN, *Elegy for J.F.K.*, in ABOUT THE HOUSE 57-58 (1965).

67. Madison hoped that future generations would "improve and perpetuate" the Constitution. THE FEDERALIST NO. 14, at 89 (J. Madison) (J. Cooke ed. 1961).

68. H. ARENDT, *supra* note 6, at 203.

69. The corrupting of the story is taken up *infra*.

70. I do not know whether the American story of origins will be found accessible or not to the cause of women. In the Gettysburg Address, Lincoln referred to the new nation as one "brought forth" by "our fathers." Like Athena's birth, it was monogenetic; no mother played a role. The 1848 assembly at Seneca Falls — the beginning of the organized movement for women's rights — was clearly aimed at causing the American story of origins to be enlarged and read as one embracing women. Its "Declaration of Sentiments" opened:

When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident: that all men and women are created equal. . . .

The Seneca Falls Declaration of Sentiments and Resolutions, in AN AMERICAN PRIMER, *supra* note 25, at 376, 378-79. My uncertainty arises from questions both about the plasticity of the American story and legal order and about whether women will prefer to bring a different reality to bear. On the latter issue, specifically discussed in the light of the Seneca Falls Declaration, see C. GILLIGAN, IN A DIFFERENT VOICE 128-50 (1982). It may be that women will teach men that there are other stories of origin than the one dominated by white males under western European influence. For an approach different from that of Gilligan, see C. MACKINNON, FEMINISM UNMODIFIED (1987). On difference and the difference it makes, see MINOW, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

Frederick Douglass was a longtime comrade-in-arms of Elizabeth Cady Stanton, and Douglass was on hand at Seneca Falls. As a matter of pure conjecture, I have wondered whether Douglass got the idea for the constitutive rhetorical importance of the Declaration of Independence from the Seneca Falls Declaration of Sentiments, and whether Lincoln subsequently got it from Douglass.

My point is that women may now either cause a version of the story to include them fully and authentically or inspire the telling of an alternate American story of origins.

III. THE AMERICAN STORY AND NATIVE AMERICANS

A. *Tales About Indians*

The notion of polyphony provides a way to talk about narrative that helps to describe the strength, goodness, adaptability, and usefulness of the American story of origins; it also helps identify the story's limits and harmfulness.

No version of the American story gives full voice to Native Americans.⁷¹ The American legal order debars the autonomy of tribes and the possibility of dialogue with them as independent centers of sovereignty. This exclusion cannot be overcome in the received rhetorical manner by telling the story of American origins because that story simply entrenches the exclusion. In this regard, the story is internally polyphonic but externally monophonic.

The story can be told — and often is — as one in which the tribes are destroyed. The new nation was brought forth on this continent by conquering the “wilderness” and its “savages.”⁷² There is in this story no tribal voice and no polyphony.

Told in another fashion, the story may seem to include Indian voices but is no less insidiously monophonic, for the Indians are given voice only as they are assimilated or made over into acceptable caricatures — *e.g.*, Tonto and the Lone Ranger.

Or the Thanksgiving story. After they arrived, the *Mayflower* Pilgrims “[w]ith the help of a friendly Indian . . . learned how to plant and cultivate corn; Miles Standish taught them how to shoot game; fish, clams, and lobsters were plentiful. In October [of 1621] they invited friendly Wampanoag Indians to share their first Thanksgiving feast, and concluded a treaty with the sachem Massasoit.”⁷³ Happy Pilgrims. Happy Indians. We were all taught the story early. And we eat lots of turkey as a way of reenacting it every year.

Most of the Native Americans I know observe Thanksgiving as a day of fasting. What cannot be divined from the idyll is why they do so, or why the Pilgrims would soon build a fort at Plymouth out of fear for Indians. Only recently, and without popular notice, has attention been paid to such details as that game hunting was not the only subject Miles Standish taught. “Pretending to the Indians that he had

71. My conclusion is based upon the legal material reviewed in Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1. Some of the subjects addressed in the following pages are more fully discussed in that essay.

72. “Wilderness” and “savages” are ideological descriptions of the North American continent and the people whose home it was.

73. S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 56 (1965).

come to . . . trade, he enticed a few of them into his hands and then massacred them without warning.”⁷⁴ Shortly thereafter, massacre would become the policy put into effect against the Pequot.⁷⁵

Or, in the Tonto and Thanksgiving style, there is the example of my native state, Georgia, which drove out the last of the tribes along the Trail of Tears in the 1830s only to bring back in my lifetime the Atlanta Braves, with their Chief Nok-a-homa who would emerge from his tepee to do a little “Indian” dance for every Braves home run.

When Indians are made out as savages of the past whose aggressive want of civilization warrants their destruction; they are certainly allowed no voice. When they are depicted as simple, servile caricatures — as in the Tonto, Thanksgiving, and Braves genres — their only voice in the American story is that of assimilated or Disneyfied but not that of the tribal Indians.

B. *Law Tales About Indians*

Until recently, the legal academy has been largely silent about the relationships between the Constitution, the Supreme Court, and the tribes, and has left what is called “federal Indian law” to a handful of specialists. Indian cases have been among the most frequently decided by the Court for the last several years and are among the most jurisprudentially illuminating. However, although constitutional law casebooks include many materials on the struggles of racial and other minorities for rights, they almost never include cases about Indian tribes. Many do not employ the words Indian, Native American, or tribe at all.

The relation between American law and Native Americans has a complex past and present that may be summarized as follows (with the imprecisions customary of any gross simplification): Congress has worked its will upon the tribes in whatever way it has wished, even when its actions have wholly lacked a constitutional basis or have obviously violated treaties (treaties which were honored and fully performed by the tribes). The Supreme Court has never held an act of Congress against the tribes to be unconstitutional. Instead it has either decided that treatment of tribes is a nonjusticiable political question or invented grounds for upholding Congressional acts notwithstanding their transparent lack of constitutionality.

Indians have developed their lobbying skills, and not since 1968 has Congress enacted legislation over tribal opposition. However, now

74. F. JENNINGS, *THE INVASION OF AMERICA* 186 (1975); *see also id.* at 187.

75. *Id.* at 202-27.

that Congress has, at least temporarily, laid down the role of aggressor against the tribes, the Supreme Court has taken it up.

This was not the role initially performed by the Court under John Marshall. At the beginning, Marshall had the opportunity to speak several times about Indians, and what he said cannot always be reconciled. *Worcester v. Georgia*⁷⁶ was the occasion for his most complete statement on the subject and also his last. Samuel Worcester, a missionary and American citizen, was imprisoned by Georgia for entering Cherokee territory without the state's permission. The Court held Georgia's action to be extraterritorial and illegal. There had been no conquest of the natives; their rights had not been extinguished by war. "The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force."⁷⁷ Indian nations were to be accorded the protection of allies.⁷⁸

Earlier, in *Johnson v. M'Intosh*,⁷⁹ a case involving a dispute between non-Indians about ownership of land that had belonged to Indians, Marshall found that the plaintiffs' claim was defeated principally because the Indians had extinguished their title.⁸⁰ In the course of his opinion, he noted that non-Indians might be incorporated into tribes.⁸¹ The reverse, *i.e.*, Indian incorporation into non-Indian society, he found to be impossible.⁸²

At the end of John Marshall's tenure, so much was clear: the tribes had not been conquered and could not be incorporated. More than that was unclear. Whether they were to exist within or alongside the constitutional reality was not decided. Recently, however, and by its own hand, the Supreme Court has both conquered the tribes and incorporated them.

A year after *Brown v. Board of Education*,⁸³ in *Tee-Hit-Ton Indians v. United States*,⁸⁴ the Court held that aboriginal lands of the Tlinget in Alaska could be seized by the United States without payment of just compensation. To justify the rule, applicable to the property of Native Americans but not to that of Americans, the Court said: "*Every American schoolboy knows that the savage tribes of this conti-*

76. 31 U.S. (6 Pet.) 515 (1832).

77. 31 U.S. (6 Pet.) at 561; *see also* Ball, *supra* note 71, at 31-33.

78. 31 U.S. (6 Pet.) at 561-62.

79. 21 U.S. (8 Wheat.) 543 (1823).

80. 21 U.S. (8 Wheat.) at 593-97; *see also* Ball, *supra* note 71, at 23-29.

81. 21 U.S. (8 Wheat.) at 593.

82. 21 U.S. (8 Wheat.) at 590.

83. 347 U.S. 483 (1954).

84. 348 U.S. 272 (1955).

ment were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."⁸⁵ Somehow, "after conquest"⁸⁶ property of the Tlingit was not property protected by the fifth amendment.

Why ancient conquest would justify contemporary seizures of property is unexplained. Also unexplained is when and how the Tlingit were taken by force. As one American schoolwoman knows: "The only sovereign act that can be said to have conquered the Alaska natives was the *Tee-Hit-Ton* opinion itself."⁸⁷ The conquest is a recent, legal-historical fiction, but a fiction with painful bite for Indian tribes.

Having conquered the Tlingit in *Tee-Hit-Ton*, the Court then incorporated tribes into the United States in *Oliphant v. Suquamish Indian Tribe*.⁸⁸ Writing for the majority, then-Justice Rehnquist stated the motif: "Indian reservations are 'a part of the territory of the United States.' . . . Indian tribes 'hold and occupy [the reservations] with the assent of the United States, and under their authority.'"⁸⁹ He added: "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States."⁹⁰ Because the tribes had been "incorporated," their power could be diminished as Court interpretations might determine.

The phrase "upon incorporation" is a performative utterance. Like the conquest of tribes in the *Tee-Hit-Ton* opinion, the incorpora-

85. 348 U.S. at 289-90 (emphasis added).

86. 348 U.S. at 279.

87. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1244 (1980).

88. 435 U.S. 191 (1978).

89. 435 U.S. at 208-09 (citations omitted) (quoting *United States v. Rogers*, 45 U.S. (4 How.) 567, 571-72 (1846) Taney, C.J.). Departures in Supreme Court law from the Marshall views of *Worcester* began with *Rogers*. But Taney did not go so far as Rehnquist. At least Taney did not incorporate the tribes. In *Rogers*, Taney wrote that tribes had "never been acknowledged or treated as independent nations by the European governments." 45 U.S. (4 How.) at 572. The tribes were "continually held to be, and treated as, subject to their dominion and control." 45 U.S. (4 How.) at 572.

Later, Taney would speak very differently of the tribes. In the course of his *Dred Scott* opinion, he described Indians as a "free and independent people . . . governed by their own laws." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857). He went on to explain that "neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation," which he described as "Indian Governments" whose "freedom has constantly been acknowledged, from the time of the first emigration . . . to the present day." 60 U.S. (19 How.) at 404.

These two accounts by the same Chief Justice are in direct conflict. Justice Rehnquist chose the former rather than the latter. Perhaps the endorsement of Indian autonomy in *Dred Scott* had the sole purpose of comparing Indians with black people to the detriment of the latter.

90. 435 U.S. at 208.

tion of tribes in *Oliphant* happened in and with — only in and with — the Court's announcement of it. The conquest and incorporation of Indians was done by sleight of hand rather than force of arms, by the present Supreme Court rather than armies of the past.

C. *Salvaging the Story of Origins*

Tonto, Thanksgiving, and the Atlanta Braves (tales about happy Indians) and their recent Supreme Court analogue (tales about conquered and incorporated Indians) do not necessarily mean that the American story of origins cannot be cured, cannot be made to include tribes as independent voices and so be employed to expand the constitutional order to embrace them as authentic realities. The Court's tales mask its contemporaneous jurispactic⁹¹ acts by presenting them as though they belong to the past and to necessity. But then the fault may be said to lie not in the story but in the storytellers, whose versions could be countered and corrected.

When narrative is genuinely polyphonic, it remains subject to the meaning and consequence given by included present and future audiences. Douglass eventually prevailed over Taney. There is no guarantee that such dialogue will result in improvement and enlargement. The story of origins is as vulnerable to propagandistic revision as it is open to improvement. But where propaganda has taken over, it can be cured.

The monophony of the story in the instance of Indian tribes might be an example of constriction — remediable constriction — of the story by the storytellers. If so, the plasticity and goodness of the story and the regenerative power of its telling might be restored by laundering the corruptions out, renewing its inherent integrity and viability.

However, although there are instances where the story could be worked at least partially clean and so be made to include a more genuine tribal voice, they are peripheral. The American story of origins fundamentally excludes tribes and denies them voice.

I shall offer a few examples of the possibility of remediation and then a few examples of its impossibility. I want to credit the American story of origins and its polyphonic potential for the tribal voice. However, I believe that it cannot be told in such a way that the tribes speak and are heard. Even the goodness of the story — especially the goodness — is bad for Indians. I hope I am wrong.

91. The jurispactic nature of courts is discussed in Cover, *supra* note 1.

1. *The Black Hills*

The Black Hills afford an example of curable wrong. In the 1980 case of *United States v. Sioux Nation of Indians*,⁹² the Supreme Court upheld a judgment awarding compensation to the Sioux for the taking of the Black Hills. In contrast to the tales of conquest it has spun on other occasions, the Court here recognized that the 1868 Fort Laramie Treaty was "a complete victory for Red Cloud and the Sioux," the only time the United States has "gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return."⁹³ The Black Hills were acknowledged to be Indian country.⁹⁴

The Court went on to note that prospectors had been summoned to the Black Hills by George Custer's "florid descriptions" of the area's gold and silver resources.⁹⁵ The Army, originally sent to forestall intrusion by the prospectors, soon supported their cause. In the following campaign, Sitting Bull destroyed Custer and his troops at the Little Big Horn. The Sioux would lose by other means.

The Fort Laramie Treaty had specified that cessions of land to the United States would require the consent of three fourths of the adult males of the tribe. A subsequent treaty did purport to convey the Black Hills to the United States, but it showed the consent of only ten percent, not the clearly required seventy-five percent, of the nation's males. There is reason to doubt the authenticity of the consent of those few.

The Sioux have never surrendered their treaty-guaranteed right to the Black Hills. There was no legal forum in which they could seek vindication of their right until Congress passed a special jurisdictional act in 1920. A claim for the Sioux was filed and eventually dismissed in 1942. Subsequently the Indian Claims Commission was created, and the Sioux claim was submitted to that body in 1950. In 1974, the Commission found that the United States had violated the fifth amendment, and set compensation for the Black Hills at \$17.5 million (plus five percent interest), the value of the 7.3 million acres in 1877. It was this judgment that the Supreme Court upheld.⁹⁶

Most of the Sioux have refused to accept the money. To them

92. 448 U.S. 371 (1980).

93. 448 U.S. at 376 n.4.

94. See generally P. MATTHIESSEN, INDIAN COUNTRY 201-20 (1984); 1 & 2 F. PRUCHA, THE GREAT FATHER 540, 631-40 (1984); R. SLOTKIN, THE FATAL ENVIRONMENT 325-476 (1985).

95. 448 U.S. at 377.

96. 448 U.S. at 371-72.

money is no substitute for return of the land. The Sioux were subject to such legal representation as they could obtain. Their counsel, inexplicably, acceded to the proposition that the United States could legally abrogate the Fort Laramie Treaty and that the United States held title to Sioux and all Indian land. Counsel focused on money damages. Although the Sioux have refused the money, their lawyers have taken their allotted ten percent of the amount.⁹⁷

The case does encourage hope because the Supreme Court did demonstrate that it has access to stories other than those of schoolchildren. Displacement of the myths of conquest and incorporation is possible. Moreover, the constriction of the law imposed by the remedy in *United States v. Sioux Nation* can be removed. The formula for valuation may have so underpriced the land as itself to constitute a litigable violation of the fifth amendment. A more adequate formula could be introduced. Also, the courts are not confined to money damages. They and the Congress could respond with flexibility. They could return the land, certainly at least those considerable portions of it that are public and are held by the federal government.⁹⁸ Moreover the voice of the Sioux can certainly be better heard in the judicial process through a different quality of legal representation.

Of course, the Court can always revert at will to might-makes-right confections of conquest and incorporation with baneful consequences for the tribes, as it demonstrated two years later in a different case when Justice Thurgood Marshall maintained that Congress' "superior position over the tribes" allowed it to have its way with them.⁹⁹ This is nothing new and is no reason to forfeit sanguinity. If the vulnerable story of origins has been corrupted by its official tellers, then *United States v. Sioux Nation* lends credence to the possibility that soundness can be restored. The polyphony of the story — its integrity and its potential for enlarging and improving the legal order, in this case its potential for including the tribal voices — might yet be preserved and extended. *Sioux Nation*, in any event, does not foreclose the possibility that the story might prove amenable to the tribes.

97. See 448 U.S. at 411 n.27, 413 n.28; Tullberg & Coulter, *The Failure of Indian Rights Advocacy*, in NATIONAL LAWYERS GUILD, *RETHINKING INDIAN LAW* 51, 53 (1982).

98. There are 1.3 million acres of federal lands in the subject area of South Dakota in the Custer National Forest, the Black Hills National Forest, and Buffalo Gap National Grassland. For a map and description, see Harlan, *Wording of Bradley Bill a Key in Hills Debate*, *The Rapid City Journal*, Nov. 29, 1987, at A1, col. 1. Senator William Bradley introduced legislation that would have effected a return of these lands to the Sioux. S. 705, 100th Cong., 1st Sess., 133 CONG. REC. S2921 (daily ed. Mar. 10, 1987).

99. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 n.21 (1982).

2. *Lone Wolf*

*Lone Wolf v. Hitchcock*¹⁰⁰ was a 1903 case that also concerned a treaty, the 1867 Treaty of Medicine Lodge, which, like the Treaty of Fort Laramie, provided that cessions of reservation land would be valid only if they bore the signatures of three-fourths of the tribe's male members. Again the United States maneuvered a surrender of reservation lands and this time made unilateral changes in it before congressional ratification.¹⁰¹ When the tribes sought judicial relief they pointed to the numerous defects: unilateral changes, payment of a fraction of the land's worth, consignment of the Indians to remaining portions of the reservation that could not be made to support them, procurement of signatures through fraud, and the absence of the necessary number of signatures.

This time the Court held that it could not "materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians."¹⁰² Such "authority might be implied, even though opposed to the strict letter of a treaty with the Indians."¹⁰³ Congress can violate Indian treaties at will.

Lone Wolf is still law, and, in the *Sioux Nation* case, the Court asserted its continuing validity.¹⁰⁴ Even so, a cure for *Lone Wolf* is not terribly difficult to devise. The American story can easily be made to embrace the obligation of the nation to keep its word promised in a treaty, and central to the Declaration of Independence and its aftermath is a commitment to "just power" derived from "the consent of the governed." In this instance, the problem does not lie in the story but in bringing the legal order into conformity with it. That would not be quick or simple, but nothing narratively, doctrinally, or theoretically exceptional is necessary.

The immediate default at issue in both *Sioux Nation* and *Lone Wolf* was a treaty violation. The United States broke the law. The practice is at fault. The United States did not — but can and should — fulfill its treaty obligations. *Pacta sunt servanda*. This outcome, though beset with difficulty, remains within the realm of the legally, politically, and presently possible. The United States need only be convinced to abide by its own law in conformity to its own story of

100. 187 U.S. 553 (1903).

101. See 187 U.S. at 554-60.

102. 187 U.S. at 564.

103. 187 U.S. at 565.

104. See, e.g., *United States v. Sioux Nation*, 448 U.S. 371, 411 n.27 (1980).

origins whose integrity, potential, and plasticity remain intact and available to the tribes.

B. *The Irremediable*

There is a further, complex problem inherent in *Sioux Nation* and *Lone Wolf* and the cases and law they represent. If full compensation were to be paid to the tribes or their land returned to them, past accounts might then be settled, as they should be, and a start made toward a just relationship between the United States and the tribes. But what shape would that relationship take? What would recompense for past wrongs do to advance or give content to a United States-Indian tribe future? If the United States obeys its law, what result? With what story do we constitute a renewed relationship between the United States and the tribes? Eliminate the happy tales and the tales of conquest and incorporation, and what story remains? We say that our fathers brought forth on this continent a new nation dedicated to equality. What do the tribal voices say? Treatymaking with the tribes came to an end in 1871. Treaties were the prerogative of the Senate and President, and the House of Representatives tired of its reflexive role in appropriating funds for the implementation of treaties framed by others. One sentence, tacked onto an appropriations bill, discontinued recognition of tribes as treatymaking sovereigns but did reaffirm the validity of treaties already entered.¹⁰⁵

The year before this action was taken, the Supreme Court had held that subsequent legislation was controlling of earlier Indian treaties.¹⁰⁶ In domestic law, the "last expression of the sovereign will must control."¹⁰⁷ In relationships with other nations, however, absent the consent of the treaty partner, Congress cannot by legislation revoke a treaty and thereafter govern the former treaty partner by statute. On this matter, the legality of the 1871 measure has never been tested or clarified.

In any event, after that year there would be no new treaties. In 1903 *Lone Wolf* held that Congress can default on existing treaties with the tribes. Treaty relations with tribes are not necessarily a dead letter, however.

The constitutional future for the relationship between the United States and Indian nations could be found in a reintroduction of treatymaking or in the use of executive agreements (coupled with spe-

105. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566.

106. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870).

107. *Chinese Exclusion Case*, 130 U.S. 581, 600 (1889).

cial legislation sought by the tribes). Taking responsibility for relations with the tribes out of the Department of the Interior's Bureau of Indian Affairs and placing it in the State Department (or back in the Department of Defense where it began) is imaginable as is an adaptation of federalism (treaty federalism, *e.g.*, or some form of alliance of tribes with the federal and state government).

To this extent, the problem is one of will rather than legal form. The United States would be required only to acknowledge the validity of the tribal way. It is, after all, the oldest continuous form of politics practiced on this continent and is at least as permanent as the republic. But that is what the United States is unable to do, and the story of origins does not transform this failure of will. Treaty federalism is a possibility, but would it not provide place for *them* in *our* system rather than constitute the coexistence of sovereign peoples? The limitation lies in the story and not in the storyteller. There is no performance of the story that embraces tribes as tribes. Eliminating talk about the conquest and incorporation of Indian nations would not engender acceptance of them as independent centers of sovereignty, would not constitute polyphony.

The Declaration of Independence began by announcing the American people's assumption of their separate and equal station among the powers of the earth. The Gettysburg Address drew affective power from the story of a new nation brought forth on this continent. The founders believed themselves to have undertaken a *novus ordo saeculorum*. The story is one of a nation with a monogenetic birth. It is portrayed as exclusive, as though it had not been conceived in the midst of other resident, equally unique nations — in part over against them, in part with their aid and following their example.

The supremacy clause is the constitutional reflection of the story's critical — apparently inescapable — claim to singularity. Toward the end of the constitutional assembly, the supremacy clause was submitted to the Committee on Style. The draft clause read: "This Constitution . . . shall be the supreme law of the several States."¹⁰⁸ What emerged from the Committee, without explanation, was: "This [C]onstitution . . . shall be the supreme law of the land."¹⁰⁹ (Presumably "law of the land" was taken from the Magna Carta.) As originally drafted, the supremacy of the Constitution was confined to consenting sovereigns. It was juridically and geographically limited. In the revised, final version — although its Framers may have discerned no

108. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 572 (M. Farrand ed. 1966).

109. *Id.* at 603.

substantive difference — the supremacy of the Constitution had the capacity of an expansionist ideology. Given a sea-to-sea definition of “land,” the clause could be made into a claim to a continental monopoly of jurisdiction unwarranted by the contemporary political and territorial facts.

The Constitution’s supremacy over the states has had a generally beneficial effect on the nation’s life, enlarging its commitment to civil rights. But the United States’ claim to increasing jurisdictional supremacy over nonconsenting tribes is harmful to them and has no legitimate basis. In a federalism that made room for tribes, the Constitution would still, presumably, be supreme.

Constitutional supremacy is a great achievement of Americans but a threat to Native American tribes. This dilemma is carried over into the animating commitment to equality. Equal protection jurisprudence provides for equality of assimilation into the constitutional reality. As it has done so it has worked to the advantage of some, like those blacks whose appeal to justice has been an appeal to equality. To the extent that individual Indians, as American citizens, seek to be treated as citizens of the United States, they, too, are beneficiaries of equal protection. However, assimilation into the jurisdictional monopoly destroys rather than benefits tribes. The great achievement and noble aspiration of equality is, at the same time and without abandoning its goodness and nobility, destructive of tribes.

In a typically liberal-hearted gesture, Thomas Jefferson enjoined Indians to enclose lands and take up farming. Once their land became property, he added, they would then want laws for its protection. Jefferson concluded: “You will find that our laws are good for this purpose; you will wish to live under them, you will unite yourselves with us, join in our great councils and form one people with us, and we shall all be Americans; you will mix with us by marriage, your blood will run in our veins, and will spread with us over this great island.”¹¹⁰ If to be an Indian means to be a participant in a tribe, then Jefferson’s inspired admonition is unpromising.

The American story, the singular constitutional republic, and the dedication to equality that have been so notable and so good for so many, have not been so for tribes. Two examples will illustrate. One comes from the past, the other from the present.

110. S. PADOVER, *THOMAS JEFFERSON ON DEMOCRACY* 106-07 (1939). William McLoughlin several times employs the Jefferson statement in *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* xv, 33, 37 (1986). I have relied upon McLoughlin’s book in my account of the Cherokee Nation.

1. *The Cherokee Nation*

By the early nineteenth century, the Cherokee had few remaining resources for effective resistance to the enveloping alien civilization. The best available means of survival was adoption of the ideology and lifestyle of the newcomers. The Cherokee overcame their reluctance and internal divisions and set about preserving what remained of their identity and land by remaking themselves in the image of the United States. They took up farming, spinning, and writing, along with western dress and religion. In authentication of their ability to absorb everything really American, they adopted a constitution and the enslavement of blacks.

Congress passed the Removal Bill in 1830. The Cherokee had done all they could to realize Jefferson's promise that "we shall all be Americans" — with one exception: they sought to continue as the Cherokee Nation. They undertook to maintain tribal jurisdiction within a system that declared a jurisdictional monopoly. The republic left no room for tribes. The Cherokee could survive as a tribe only by becoming American; they could only become American by ceasing to be a tribe.

As the Cherokee became American in every way save in the essential circumstance of remaining Cherokee, President John Adams expressed alarm: "[W]e have unexpectedly found them forming in the midst of ourselves, communities claiming to be independent of ours and rivals of sovereignty within the territories of our Union."¹¹¹ This success, imitating the new republic, proved intolerable to non-Indians. In 1828, Andrew Jackson was elected President, and the Georgia legislature voted to extend its law over the Cherokee Nation, whose independence had been guaranteed by treaty.

The last act was played out before the Supreme Court in 1832. *Worcester v. Georgia*,¹¹² as I have noted, remains the clearest, strongest judicial statement of tribal sovereignty and independence. It led Indians to think they had won, non-Indians to think their law had proved just, and both to believe that the tribes as well as the Constitution had remained intact. Representatives of Christian missionaries enlightened the Cherokee.

If carried to enforcement, the Court's decision, so it was feared, would play into the hands of southern separationists. (There was talk of secession in South Carolina. It was speculated that, if Georgians were unduly aroused by impolitic federal moves, they might be driven

111. W. McLOUGHLIN, *supra* note 110, at 423.

112. 31 U.S. (6 Pet.) 515 (1832).

to side with their neighbors and so threaten the Union.) The Christians elected to "sacrifice the Cherokees to save the Union."¹¹³ They advised the tribe to strike a bargain and go west.¹¹⁴ The Trail of Tears followed. The Court's decision came to nothing. Its only real consequence was enhancement of the Court's role and power.¹¹⁵

Perhaps the fate of the Cherokee may be attributed to the racism or ethnocentrism or xenophobia or land hunger of European Americans, *i.e.*, attributed to the pathology of the American story and the American legal order. I think such attribution misses the complexity of the dilemma. What happened to the Cherokee is inseparable from devotion to the soundness and goodness of the story and the law.

2. ICRA and Rights

The Indian Civil Rights Act of 1968¹¹⁶ represents another form of commitment to the best the American tradition has to give. The Bill of Rights and fourteenth amendment have been held not to apply against tribal governments.¹¹⁷ The Indian Civil Rights Act arose from congressional desire to "protect individual Indians from arbitrary and unjust actions of tribal governments."¹¹⁸ It provided for the application of a selection and modification of the Bill of Rights against tribal governments. The action was endorsed by the Supreme Court as a permissible exercise of congressional authority to "eliminate the powers of local self-government which the tribes otherwise possess."¹¹⁹

Besides diminishing the power of tribal government, the insertion of the Act into the reservations threatens to remake tribal courts in the image of the federal judiciary. Such an institution with its system of rules and procedures would dislodge the "informality of Indian life that had been the repository of cultural traditions and customs" and transpose tribal society's understanding of "itself as a complex of responsibilities and duties . . . into a society based on rights against government [thereby eliminating] any sense of responsibility that the people might have felt for one another."¹²⁰

This deleterious imposition of selected rights and a formal institu-

113. W. McLOUGHLIN, *supra* note 110, at 446.

114. *Id.*

115. See Ball, *supra* note 71, at 58-59.

116. Codified as amended at 25 U.S.C. §§ 1301-41 (1982).

117. Talton v. Mayes, 163 U.S. 376 (1896).

118. S. REP. NO. 841, 90th Cong., 1st Sess. 6 (1967).

119. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

120. V. DELORIA & C. LYTLE, THE NATIONS WITHIN 213 (1984). For two accounts that take a different view of ICRA and disagree with my assessment, see Laurence, *Learning to Live With the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 413 (1988), and

tion for litigating them was evidently an insufficient approximation of American rights practice, for the Supreme Court divested tribal courts of jurisdiction to try non-Indians for crimes committed on reservations. It did so in the name of rights in *Oliphant v. Suquamish Indian Tribe*.¹²¹

The Court said that the Act had dissolved what it described as “many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago.”¹²² Too many of these “dangers” apparently remain. The idea that Native Americans cannot be allowed to try non-Native Americans “would have been obvious a century ago when most Indian tribes were characterized by a ‘want of fixed laws [and] of competent tribunals of justice.’ . . . It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.”¹²³

The Court noted that, “from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.”¹²⁴ Protection of rights and liberty requires the Supreme Court to rescue today’s Americans just as the cavalry was supposed to rescue their frontier predecessors when they fell into Native American hands. Devotion to the Bill of Rights does not require the Justices to mount their horses and charge off on swashbuckling, indiscriminate raids upon Indian villages, but, according to *Oliphant*, it does require the Court to restrict tribal sovereignty and diminish tribal dignity.

The achievement of Union under the Constitution that eventually ended the enslavement of blacks required the sacrifice of the tribes. In the instances of the Cherokee Nation, the Indian Civil Rights Act, and *Oliphant v. Suquamish Indian Tribe*, the American legal order was obeyed, upheld, and extended, and the American story of origins was affirmed — to the detriment of tribes.

IV. OTHER STORIES OF ORIGIN AND ALTERNATIVE LEGAL ORDERS

Francis Jennings observes that the early statesmen of the United

Laurence, Martinez, *Oliphant and Federal Court Review of Tribal Activity under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411 (1988).

121. 435 U.S. 191 (1978).

122. 435 U.S. at 212.

123. 435 U.S. at 210 (quoting an 1834 Congressional report).

124. 435 U.S. at 210.

States had a better “sense of reality than most imperialists” because when they “saw Euramericans filling up their own new colonies, which they called ‘territories’ in distinction from their ‘states’. . . they realized that those westerners were as independent minded as themselves.”¹²⁵ Accordingly, they provided for their colonies to enter the Union on a parity with the thirteen original states. “This was perhaps the greatest political invention of modern times, but the Indian tribes were left out of it.”¹²⁶

The American story, beginning with the Declaration of Independence, contains dialogue and respect for other voices. The legal order to which it gives authority is therefore subject to inclusive improvement. But there is only one story and only one legal order. The story provides no legitimation for unilateral assertion of United States jurisdiction over tribes, yet neither does it provide for dialogue with autonomous tribes — with their stories of origin and their legal orders. Native American tribes are a striking exception to Robert Cover’s belief that “[a]ll Americans share a national text in the first or thirteenth or fourteenth amendment.”¹²⁷

Giving the Supremacy Clause a territorial referent renders jurisdiction exclusive. There is an incapacity for acknowledging the validity of Indian sovereigns. The limitation is not one of territory. Territoriality is a way of organizing and talking about power. The problem is one of power, not space. There is plenty of the latter. A solution would require that the United States discontinue expanding “in the name of liberty” its “empire over Indian territories and peoples.”¹²⁸

The American story, however, does not empower the will to this end. The dialogue realized in the story and the legal order does not animate dialogue with excluded tribes. In this regard, telling the story cannot improve the story or the legal order. The internal polyphony is externally monophonic. The story is self-contained and, to this extent, self-contradictory.

It may also be correspondingly self-destructive. John Beeson apparently persuaded Lincoln that the Civil War was “an extension of the unneighborly, unChristian, and destructive practice which for gen-

125. F. JENNINGS, *EMPIRE OF FORTUNE* 479 (1988).

126. *Id.*

127. Cover, *supra* note 1, at 17.

128. F. JENNINGS, *supra* note 125, at 457. The supremacy clause includes the supremacy of treaties. If the United States were to acknowledge the sovereignty of tribes and the validity of treaties with them, then the constitutional monopoly could give way. If the United States acknowledges the autonomy of foreign nations, and makes with them treaties that are the supreme law of the land, why not accord tribes the same treatment? What is the bar of territoriality?

erations had been operating against the Aborigines."¹²⁹ Contemporary commentators have advanced the theory that the Vietnam War was an unconscious replay of the murder of the Indians.¹³⁰ And Barry Lopez points out how disastrous is the American narrative monopoly in the Arctic, where we "have no alternative, long-lived narrative to [that of the Eskimo], no story of human relationships with that landscape independent of Western science and any desire to control or possess. Our intimacy lacks historical depth, and is still largely innocent of what is obscure and subtle there."¹³¹ The possible consequence is that "the modern industries — oil, gas, and mineral extraction — might be embarked on a course as disastrously short-lived as was that of the whaling industry. And as naive — our natural histories of this region 150 years later are still cursory and unintegrated."¹³²

Self-determining Indian nations were the politics of this continent until fairly recently. Their voices could figure in North American politics now and in future — to the essential benefit of the non-Indian majority. Such an eventuality requires more than one story of origins.

A. *Narrative Multiplicity*

Part Four of John Steinbeck's *East of Eden* opens with the belief that "there is one story in the world, and only one."¹³³ A single American story inclusive of tribal voices might be achieved by taking a starting point earlier than the customary one(s). Douglass and Lincoln moved the beginning back from the Constitution to the Declaration of Independence so that the story could be told as one of equality embracing blacks.¹³⁴ A longer step into the past to an earlier beginning might produce an American story that comprehends the Native American voice. An opening could be drawn from Indian stories of origin, for example. Or the story could start with what is known about the coming of the first people so that human presence on the continent would compose a narrative about a continuing series of arrivals, beginning with Indians and including Africans, Europeans, and, subsequently, others.¹³⁵

129. I F. PRUCHA, *supra* note 94, at 468.

130. C. BLY, *LETTERS FROM THE COUNTRY* 9 (1981); *see also* R. SLOTKIN, *supra* note 94, at 16-18.

131. B. LOPEZ, *ARCTIC DREAMS* 11 (1987).

132. *Id.*

133. J. STEINBECK, *EAST OF EDEN* 413 (1952).

134. Daniel Boorstin began his collection of American documents with the Mayflower Compact. *AN AMERICAN PRIMER*, *supra* note 25, at 19. The arrival of Puritans and Pilgrims and The Fundamental Orders of Connecticut provide the starting point for others as well.

135. There are subsidiary stories, and there have always been variations on the story of ori-

Although the one-story option with a tribally inclusive beginning has its attractions, there are reasons for preferring multiple stories. One is that a single, grandly integrating story is unnecessary and misleading. If reality and truth are multiple,¹³⁶ then an ur-story is unlikely and will be inadequate to experience. Another reason for multiple stories is suspicion. If there is to be but one story, there is question about what it shall be, what shall count as story, and who shall be the judge. If history is written by the victors, then a single story may strive to be comprehensive but will nevertheless be suspect as a composition of the currently dominant ideology.¹³⁷

Nondominating groups have histories that run "on different tracks and with different timetables."¹³⁸ We would "do better if we attempt to set the American Revolution within the larger and longer frame of reference of the history of Indians, blacks, and women, rather than force their history into the framework of American political history and its periodization."¹³⁹ The politics of the continent as well as its historiography would do better if the story of American origins were told together with other stories of origin. The multiple voices realized in one story would then be matched by multiple stories. The contradiction of internal polyphony and external monophony would be eliminated.¹⁴⁰

gins, the dominant version of which differs from one time to the next. We live in a complex of stories of origin, so that, for example, a calendar may be composed of various years with different beginnings: a religious year, a personal year (birthdays, anniversaries), a civic year, a fiscal year, or a seasonal year. Or time may run nonannually or noncyclicly, as in the instance of geologic time.

136. In my theological tradition, for example, the fundamental reality — what is really real — is multiple: the Trinity, a society of Father, Son, and Spirit. And the biblical stories have it that humanity is a reflection of the godhead insofar as we are created male and female, *i.e.*, the fundamentally human is multiple. *Genesis* 1:27 (Revised Standard Version).

137. To argue for inclusion of tribes in a single story or for recognition of the validity of their stories is to argue for the sharing or decentralization of power. A transfiguration of power is necessary. Narrative as such is unlikely to effect transfiguration. *See infra* notes 149-55 and accompanying text.

138. Young, *Afterword* to *THE AMERICAN REVOLUTION* 449, 460 (A. Young ed. 1976).

139. *Id.* at 461.

140. Bakhtin noted that at the heart of human existence there is a centripetal force driving us toward unity and coherence and a centrifugal force driving us apart and toward many voices. M. BAKHTIN, *THE DIALOGIC IMAGINATION*, *supra* note 37, at 269-75. The centralizing forces work toward a unitary, ideologically saturated language, one that insures "a *maximum* of mutual understanding in all spheres of ideological life." *Id.* at 271. But verbal and ideological unification operates in the midst of the centrifugal forces that work toward decentralization and heteroglossia and so provide dynamic vitality and development.

The tension between the centrifugal and the centripetal is present within the legal order and its authorizing story and has allowed the nurturing of different voices. But a territorial monopoly of jurisdiction has removed the tension from sovereignty. The sovereign is monophonic. The vital tension would be reintroduced by recognizing the autonomy of Indian nations and engaging in dialogue with them.

B. *The Iroquois Example*

Imperialism is not solely a western phenomenon. Among the Iroquois, one people in one land was an early aspiration and theme.¹⁴¹ The Great Law of the League of the Five Nations, likely founded sometime between 1400 and 1600, asserts that when the League wishes to establish the Great Peace with another nation "and that nation refuses to accept the Great Peace, then by such refusal they bring a declaration of war upon themselves from the Five Nations."¹⁴² The Great Peace would be settled upon the recalcitrant through the great conquest.

To this hardly unusual or inspiring imperialist theme there was added another that became central to Iroquois public political discourse: the Covenant Chain. The Chain was a complex, shifting bicultural confederation between English colonies and Indian tribes, predominantly the League of Five Nations. A body of traditions, customs, practices, and trading relations, its identifying quality "was its combination of membership of both Indian and European polities."¹⁴³

The Chain was represented in various wampum belts. Among northeastern tribes, wampum was a medium of diplomacy as well as of exchange and mystery.¹⁴⁴ It was composed of beads worked out of shell and strung on deerskin strips that could be laced into belts. When employed in diplomacy, wampum was presented in a council accompanied by the words of an elected speaker. The larger the belt, the more emphasis it gave the spoken words. Nonacceptance of the belt was refusal of the proffered arrangement. Acceptance and the reciprocal giving of a belt constituted a sacred engagement. Unlike western treaties ("not worth the paper they are written on"), wampum belts were aesthetically controlled pieces, valuable in themselves. To give one was to make a significant gift. To accept one was to take up a thing of value and assume the obligations that go with any worthy gift. The exchange in this way enacted the proposed binding (more performatively so than does contractual "consideration").

The images on wampum belts, created by patterns of different-colored grains, are spare. They are suggestive rather than comprehen-

141. F. JENNINGS, *THE AMBIGUOUS IROQUOIS EMPIRE* 93 (1984).

142. *Id.* at 93, 162-63.

143. *Id.* at 368. I rely upon Jennings' account of the Chain and conversations with Professor Robert Williams of the University of Arizona Law School. For specific discussion about and practice of the Chain, see *Proceedings of the Colonial Congress held at Albany, 1754, DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK* 853 (O'Callaghan & Fernow eds. 1856-87).

144. I rely, again, upon conversations with Professor Williams and upon W. JACOBS, *DIPLOMACY AND INDIAN GIFTS* 19-24 (1950).

sive, visual rather than literal. Their interpretation and implementation — the meaning and obligation of the depicted engagements, the fine points — flowed from the enacted relationship and from related or accompanying stories.

As is not true of other agreements between Euramericans and Native Americans, in the instance of the Covenant Chain both text and interpretation were Indian.¹⁴⁵ The diplomatic medium was wampum belts whose exchange with accompanying ceremonies provided occasion to “solemnly renew[,] brighten[,] and strengthen the ancient covenant Chain.”¹⁴⁶

One of these belts was the Two Row Wampum, whose story, as I have heard it, runs:

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect.

These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.¹⁴⁷

Like its form (a belt) and matrix (a Native American universe), the

145. Reservation of interpretation to non-Indians is not limited to diplomacy. It has been observed that some ethnologists distinguish between doing stories and telling about stories in such a way that “the ‘telling about’ the story, including commentary and interpretation, [is left] entirely up to the ethnologist, while the proper business of the native is limited to the ‘doing of’ the story.” Tedlock, *The Spoken Word and the Work of Interpretation in American Indian Religion*, in *TRADITIONAL LITERATURES OF THE AMERICAN INDIAN* 45, 48 (K. Kroeber ed. 1981). This approach is close to that “of the French structuralists, who limit the native to a narrative . . . function and concede the exclusive rights to the analytic . . . function to themselves. In effect the collected texts are treated as if they were raw products, to which value is then added by the manufacture.” *Id.*

146. Proceedings of the Colonial Congress Held at Albany, 1754, *supra* note 143, at 862.

147. This version of the story is quoted from *Indian Self-Government in Canada: Report of the Special Committee*, House of Commons, Canada, 32d Parliament, 1st Sess., back cover (1983), which is virtually the same as one given by the belt's sacred keeper to a gathering at which I was present. The text as quoted may also be found in Williams, *The Algebra of Federal Indian Law*, 1986 WIS. L. REV. 219, 291. What constitutes a story may be culturally relative. The Two Row Wampum indicates that there are different ways to configure a narrative. Indian stories may be nonlinear. See, e.g., *THE WISHING BONE CYCLE* (H. Norman ed./trans. 1976) (note also the comments in the preface by Rothenberg at p. x). Translating nonlinear narrative into the acceptably linear story of law can pose insuperable difficulties as was indicated by the experience of the Mashpee when they were asked to demonstrate to a federal court their continuous existence since the seventeenth century. See J. CLIFFORD, *THE PREDICAMENT OF CULTURE* 7-8, 277-346 (1988).

subject of the Two Row Wampum is not familiar to the American tradition of narratively and jurisdictionally monolithic nation-states. It speaks of multiple stories and polycentric jurisdiction.¹⁴⁸

C. Further Examples

The Iroquois wampum contains multiple sovereigns. It does not describe how the coexistence is achieved. Nor has it of itself achieved coexistence. It has not generated the political truth of its rhetorical reality. An accepted wampum enacts or presupposes the requisite relations but cannot cause itself to be accepted any more than self-evident truth unilaterally gains purchase in a democratic society. Wampum cannot transform the will; neither can the stories accompanying it. There must be already willing listeners.

The river could bear more traffic than the American monopoly currently licenses. Nevertheless we cannot talk or imagine ourselves into a politic of two boats side by side. A powerful establishment does not yield to romanticism or sentimentality, and storytelling — whether of one story or several — does not transfigure the relationships of power politics. For this reason, at least some of the accepted Native American and western transformative stories are themselves transparent; they direct us beyond themselves to other sources of disestablishing, creative power.¹⁴⁹

For example: Among the Iroquois, it is said about the origin of the Five Nations confederation that the Great Upholder — Ta-ren-ya-wagon, the Upholder of Heavens, the Upholder of Sky — heard the cries

148. Polycentric jurisdiction is explored in Cover, *supra* note 1.

On the case history and present possibilities of constitutional protection for groups, including tribes, see the creative work of Aviam Soifer in Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts*, 48 MD. L. REV. 350 (1989). (Soifer concludes: "If we are to find the fragile material we need to pursue glimmerings of a better world, we must heed multi-layered stories that help us form and pass on our identities together." *Id.* at 383.)

By rethinking the notion of insiders and outsiders in the American story, Carol Weisbrod discerns multiple centers of authority, *i.e.*, competing sovereignties. Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1988). She pursues "a pluralist analysis that posits multiple authorities and then examines their interactions over time," and she persuasively demonstrates how such an analysis is "useful in dealing with the history of American family law and, moreover, with the issue of religious authority in America's constitutional structure, a structure that sees not merely 'faction,' but also multiple authorities." *Id.* at 766 (footnotes omitted).

If American constitutional law and the American story can be made to lie down together with the law and stories of Indians as well as of others, work like that of Cover, Soifer, and Weisbrod will surely be one of the reasons of success.

149. The question is one of power: what power is and how it is invoked. The powers that be and that uphold the status quo are one type of power. Martin Luther King, Jr., did not have this kind of power. However, he did exercise and invoke power of another order, one that I identify in the text as "disestablishing, creative power."

of humans in flight from monsters.¹⁵⁰ He descended to earth and led the people to a safe place where they could be content. When they had grown fat, he enabled them to spread out and become great nations by dividing them into tribes. To each he gave a different tongue. “[T]heir language changed and they could no longer understand the rest of the people.”¹⁵¹ The nations increased and prospered until fierce and pitiless strangers flooded down upon them from the north. The Great Upholder became a mortal and took the name Hiawatha. “He advised all the nations to assemble and wait his coming.”¹⁵² They gathered by the shores of Lake Onondaga. Hiawatha and his daughter appeared in a gleaming white canoe, and when they stepped ashore “[h]e greeted all he met as brothers and spoke to each in his own language.”¹⁵³ Suddenly they heard a great noise and out of the heavens came a bird to carry Hiawatha’s daughter away. For three days Hiawatha mourned in silence. Then he rose, called a council and advised the nations to “have one fire, one pipe, one war club.”¹⁵⁴ They promised to follow his advice. “Thus with the help of Hiawatha, the Great Unifier, the mighty League of the Five Nations was born, and its tribes held sway undisturbed over the land between the great river of the west and the great sea of the east.”¹⁵⁵ The Tree of Peace was planted. Under its shelter other nations might join with the League, and all people be related. Hiawatha returned to his canoe which rose into the sky and disappeared in the clouds.

According to the Book of Genesis, there was a time when “the whole earth had one language and few words,”¹⁵⁶ and men built a city and a tower to make a name for themselves. God came down to see and concluded: “[T]hey are one people, and they have all one language; and this is only the beginning of what they will do.”¹⁵⁷ And he confused their language that they might “not understand one another’s speech.”¹⁵⁸ They were scattered, and the city’s name “was called Babel, because there the Lord confused the language of all the

150. For recently accessible versions, see *Hiawatha the Unifier*, in AMERICAN INDIAN MYTHS AND LEGENDS 193, 194 (R. Erdoes & A. Ortiz eds. 1984), and Arden, *The Fire that Never Dies*, NATL. GEOGRAPHIC, Sept. 1987, at 375, 380-82.

151. *Hiawatha the Unifier*, *supra* note 150, at 194.

152. *Id.* at 196.

153. *Id.*

154. *Id.* at 197.

155. *Id.* at 198.

156. *Genesis* 11:1 (Revised Standard Version).

157. *Genesis* 11:6.

158. *Genesis* 11:7.

earth."¹⁵⁹ According to the Book of Acts, when Jesus' chosen apostles "were looking on, he was lifted up, and a cloud took him out of their sight."¹⁶⁰ Later, on the day of Pentecost, they heard a mighty wind from heaven, and "there appeared to them tongues as of fire, distributed and resting on each one of them. And they were all filled with the Holy Spirit and began to speak in other tongues."¹⁶¹ At the sound, "Jews, devout men from every nation under heaven . . . came together, and they were bewildered, because each one heard them speaking in his own language,"¹⁶² telling in their "own tongues the mighty works of God."¹⁶³

V. BEGINNING

Narrative — and this is true of the American story of origins in particular — is a richly accommodating, productive medium but can be transcending only when it is the medium of transcendence, as stories themselves reveal. Native American and western biblical traditions differ, radically, in their description of the transcendent and yet converge upon the point that many voices with common understanding — polyphony — is evidence that transcendence is present. Polyphony realized in politics — fully, authentically, externally as well as internally — bears witness not to the human imagination's aesthetic self-transformation through narrative but to the redemptive power of a beyond in the midst of our life.¹⁶⁴

In narrative as in the science of chaos, there is "sensitive dependence upon initial conditions."¹⁶⁵ Beginnings are critical, as Douglass

159. *Genesis* 11:9.

160. *Acts* 1:9 (Revised Standard Version).

161. *Acts* 2:3-4.

162. *Acts* 2:5-6.

163. *Acts* 2:11.

164. Dietrich Bonhoeffer described God as "beyond in the midst of our life." D. BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* 155 (E. Bethge 3d ed. 1967). On the theological context of Bonhoeffer's formula and its possible bearing upon law, see M. BALL, *LYING DOWN TOGETHER* 126-38, 182 n.15, 191 n.5 (1985).

Other forms besides narrative are also possible and effective media. For example, Emily Dickinson chose not to publish, but what she chose not to publish was lyric poetry rather than narrative. It can be argued that this was an act of resistance to the dominance of narrative expression. See Dickie, *Dickinson's Discontinuous Lyric Self*, 60 *AM. LIT.* 537 (1988). Other forms — like lyric — are possible and useful, but transcendence is still necessary if they are to be made media of transfiguration.

165. J. GLEICK, *CHAOS* 23 (1987) (the notion quoted in the text is also known as "the Butterfly effect": a butterfly stirring the air in Beijing today can transform storm systems in New York next month).

A distinction may be drawn between the beginning of a story and the beginning of the events narrated. A snapshot has edges (a beginning and an end), but the viewer knows that the events depicted began before and continued after the photograph was made. "Once upon a time" enjoys the uncomplicated ease of the snapshot as a way to slide into a story without straining over a

and Lincoln realized. In Greek (*archt'e*) and Latin (*principium*), the same word connotes both "principle" and "beginning." Principle belongs to theory, beginning to narrative.

The Two Row Wampum does not press the issue of beginning. In one sense it does denote a beginning. The matrix of the belt is said to have been the first contact between Indians and Europeans. And after this initial intersection, the Indians and the recent immigrants would be linked: they would travel a common river. In the belt they are separated but also joined by three beads of wampum. A new reality, two vessels side by side, is set in motion.

In another sense, however, the beginning is left open. The first and continuing contact is memorialized by two rows that never intersect and have no start or finish. The belt is a moment. It makes no foreclosing statement about the beginning (or end) of the nonconverging rows. It leaves to the occupants of each vessel their own story of their origins and appends no supremacy clause to one story or the other.

I tell and employ and participate in and try to improve and augment the American story of origins and shall continue to do so. But I also think the larger, more urgent vocation is obedience to the transcendent who frees us for others, for the stories of others, and for respect of their integrity — obedience to the *Principium* "for individual regeneration and for social reformation, the point of departure for a fresh experiment in human relationships, on the acceptance of which rests the only real hope of fulfilling the promise of secular life."¹⁶⁶

coincidence between the beginning of the story and the beginning of the events. The Book of Genesis illustrates a coincidence of beginnings ("In the beginning . . ."). But even there the attempted coincidence is incomplete: What about the beginning of God who "in the beginning" created the heavens and the earth? Then, too, what in the Hebrew Bible is the story of origins? In note 2, *supra*, I cited the exodus rather than the creation as the story of origins. The calling of Abraham might also be said to constitute the story of origins.

The Gospels of Mark, Luke, and John expressly raise and differently resolve the beginning.

Another way to handle the beginning of the American story is to locate its origin in a biblical story.

166. C. COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* 501 (1957). Cochrane's book is a thorough and imaginative account of Augustinian Christianity's argument with the Roman Empire that the latter had defective *principia*.

Because principle and beginning are coeval, Hannah Arendt argued, the act of beginning is saved from arbitrariness. As she paraphrased Plato: "For the beginning, because it contains its own principle, is also a god who, as long as he dwells among men, as long as he inspires their deeds, saves everything." H. ARENDT, *supra* note 6, at 214. In the American republic, she said, the beginning was identical with the singular appearance of mutual promise and common deliberation (or, as I would say, of equality and effective participation). *Id.* at 215.

I think the American beginning was flawed or at least incomplete. Many were excluded. Among the excluded were the tribes whose exclusion from the beginning and the story of the beginning is irremediable. Blacks, too, were excluded. But they worked their way in. I do not mean that the inclusion of blacks has been accomplished in fact at the present. I do mean that the American story can scarcely be told now without including the fourteenth amendment and *Brown v. Board of Education*. For the tribes there is no equivalent to *Brown*. Women, too, were excluded. A revision of the American story so that it can be made to include women and/or an

altogether new story from the feminist perspective is at least as fundamental, necessary, and promising as the revisions or additions called for in the instance of blacks and Native Americans.

The defect of the American beginning is, or so I presently believe, a particular instance of the general truth that beginnings generated by humans cannot save everything. To think them gods is to practice idolatry.

My reference to a *principium* in the last sentence of the text is drawn from Saint Augustine's observation that, when Jesus was asked "who He was, He answered that he was the *Principium*." AUGUSTINE, *THE CITY OF GOD* 329 (M. Dods trans. 1950). Augustine concluded "that Christ is the *Principium* by whose incarnation we are purified." *Id.* at 328. I need, sometime, to explore the notion of the biblical *Principium* as equipping us to accept the integrity of others' stories of origins. We can choose to take certain stories of origin as our own, as I choose those of the Bible. I do not understand such a choice to entail the rejection of the alternatives. Indeed, it seems to me to lead directly to respect and gratitude for them. Indian stories are not mine, but I am deeply affected by and thankful for them. Two vessels side by side sounds about right to me, the occupants of the one listening to those of the other without offering unsolicited steerage.

I should only want to make sure that two-boat thinking does not become a new version of the two-sphere rhetoric that masks the operations of established power. The distinction between supposed public and private spheres is an example of such rhetoric. Two-boat thinking is not to be confused with or to become a surrogate for something like the apartheid practiced by South Africa or that version of it formerly entrenched in the American South.

I am also mindful of the fact that two boats cannot mean an absence of interdependence. James Clifford has given us a thoughtful reminder that "[i]his ambiguous, multivocal world makes it increasingly hard to conceive of human diversity as inscribed in bounded, independent cultures. Difference is an effect of inventive syncretism." J. CLIFFORD, *THE PREDICAMENT OF CULTURE* 23 (1988).