

Law & Constitution

Reviews of Select Recent Articles in Legal History

Maggie Blackhawk, “Legislative Constitutionalism and Federal Indian Law,”
Yale Law Journal 132 (2023): 2205–2303

As a Native political scientist who has long studied the complicated historical, political, economic, and legal relationships between Indigenous nations, the federal government, and the states, I was delighted when I was asked to read and comment on Professor Maggie Blackhawk’s well-crafted ruminations on the ongoing constitutional fog that continues to surround two of the three branches of the federal government—Congress and the Supreme Court—tasked with overseeing the United States’ political and legal relationship with Native nations.

One would think this question had long been answered, since the federal Constitution explicitly declares that Congress is the sole branch authorized to regulate commerce not only with foreign nations and the states but also “with the Indian Tribes.” Notwithstanding this clear statement, tension has long persisted between the two houses of Congress, the Supreme Court, and the executive branch at the national level, and between the comparable three branch systems that all 50 states have.

Thus, it should come as no surprise that Vine Deloria, Jr., a major chronicler of Native-non-Native politics and law would state unabashedly that “the very structure of the constitutional framework of government has created immense difficulties for Indian nations. No single branch of either state or federal government can be said to represent the whole functioning of that political entity unless the two remaining branches refuse to become involved in the issue under consideration. *Therefore, the Constitution itself is the greatest barrier Indians have faced in attempting to deal with the United States.*”¹ (emphasis mine) Blackhawk’s entry into this hugely complex political and legal arena adds a much-needed perspective, and I applaud the intellectual vigor and precision of her analysis.

¹ Vine Deloria, Jr., “The Application of the Constitution to American Indians,” in Oren Lyons and John Mohawk, eds. *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution* (Santa Fe, NM: Clear Light Publishers, 1992): 284.

With the U.S. Constitution's commerce clause, the drafters of that important and imperfect document recognized that, as the lawmaking and most democratically representative body, Congress was ideally suited to manage the nation's domestic and commercial affairs, including commerce with the Indigenous peoples contained within its ever-expanding boundaries. Although these domestic questions were to be addressed through legislation, the larger dealings with Native nations were considered foreign affairs, thus falling within the purview of executive branch duties. The president was empowered to wield the many diplomatic tools, including treaties, at the executive branch's disposal to engage with these nations just as any other. This was the case until 1871, when formal treaty-making with Native nations was frozen via a congressional appropriation rider.²

As Blackhawk notes, prior to the late 1970s, the Supreme Court was generally deferential to the political branches in the field of Native affairs, largely because of the language of the commerce, treaty, and supremacy clauses in the U.S. Constitution (2281). But since that time, beginning with *Oliphant v. Suquamish Indian Tribe* (1978),³ "the Court has increasingly asserted its power to determine the content of federal Indian law and to police the metes and bounds of tribal sovereignty" (2281).

Blackhawk terms this "juricentric constitutionalism," and she, like many others, including this writer, is deeply concerned about this profound shift in interpretive power. First, it is contrary to the express language of the Constitution's commerce, supremacy, and treaty clauses, which vest authority over Indigenous matters in the political branches. It also denies the critical and inherent sovereign agency of Native nations lacking representation on the Supreme Court. And finally, as Blackhawk observes, the Court's juricentric project threatens other areas of domestic law as vividly evidenced in the most recent term (2022–2023) when the justices handed down adverse rulings on affirmative action, LGBTQ rights, student loan debt, and Native water rights.⁴

Blackhawk urges that in order for the listing U.S. constitutional ship to be righted the present "juricentric" approach must be forcefully challenged in two

² 16 Stat. 544, 566.

³ 435 U.S. 191.

⁴ *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, 600 U.S. ____ (2023); *303 Creative LLC v. Elenis*, 600 U.S. ____ (2023); *Biden v. Nebraska*, 600 U.S. ____ (2023); and *Arizona v. Navajo Nation*, 599 U.S. ____ (2023).

ways. To start, “legisprudence,” a term coined by Julius Cohen to describe “the study of law as created by the legislature,” must supplant the current juricentric approach to constitutional matters (2259). This would simply mean a restoration of the authority—frequently ignored by the current Court—that Congress has traditionally wielded.

Blackhawk then persuasively argues that there is a desperate need for judicial reform and identifies two types: “personnel reform” and “disempowering reform,” both named by Ryan D. Doerfler and Samuel Moyn as critical. She contends that disempowering reforms, such as withdrawal of some jurisdictional authority previously delegated to the Court by congressional decree, would be more effective than increasing the number of justices or adding term limits. In addition to curbing the Court’s jurisdiction, other reforms call for Congress to use legislative overrides, create congressional review procedures, and secure constitutional provisions such as reducing representation for states that interfere with citizens’ voting rights (2295–96). The absence of judicial ethics standards for the Supreme Court justices was not included among the reforms discussed. This is understandable given that many of the assertions of ethical violations by Clarence Thomas, Samuel Alito, and John Roberts have only recently come to light.

In short, Blackhawk has identified a fundamental problem that tears at the constitutional heart of the United States—an increasing degree of judicial supremacy that effectively blunts the lawmaking authority of the other co-equal political branches. Thus, the abilities of congressional members and the president to fulfill their constitutional duties are hampered, making it difficult to engage in all areas of statecraft, that is politics, including the effective management of relations with Native people and, by extension, all others within the United States and its territories.

Blackhawk has done a fine job of identifying and critiquing the problems associated with a juricentric approach. Yet, I have some reservations about her overall assessment of the situation and the premises upon which her arguments are based. I was not entirely persuaded that federal Indian law provides the kind of instructive lessons she attributes to it. I am also not convinced that congressional plenary power, as it is currently articulated, can be sufficiently corralled by federal practitioners of any branch of government so that it neither negates nor diminishes inherent Native sovereignty. Finally, I expected substantive discussion of “the philosophies and agency of Native people and Native Nations at the center of our constitutional law and history,” since it is those very distinctive Indigenous

cultural and philosophical traditions that mark Native peoples as “sui generis” and, therefore, entitled to be dealt with separately by federal policymakers and the U.S. legal and political systems. I will now speak briefly about these three points.

Blackhawk’s assertion that federal Indian law has reshaped the federalist structure.

This claim assumes a coherency and potency in the area of law popularly known as federal Indian law, sometimes referred to as a “field” of law. As I have argued elsewhere,⁵ the brutal facts of history speak otherwise. How can federal Indian law be a “field” when it lacks central or consistently enforced doctrines? In essence, the only constant doctrine is the judicially concocted and constitutionally problematic concept of plenary power. Defined here as virtually unlimited federal authority,⁶ it is invariably used to justify diminishment of Native peoples’ rights. As noted in *South Dakota v. Yankton* (1998), “Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.”⁷

As Deloria noted in a critique of Felix Cohen’s classic work, *Handbook of Federal Indian Law*, first published in 1942 by the federal government, “with this publication, and in large measure because of this publication, federal treatment of Indians became a ‘field’ of law with its own structure and, unfortunately, with a set of doctrines,” most of which he noted were “cruel fictions designed more to improve the image of the federal government than to actually protect the remaining rights of indigenous peoples.” What was missing, Deloria insisted, in the way law was understood and practiced in relation to Native peoples, was a recognition of the roles that history, morality, justice, and humanity should be contributing, but were not.⁸

While admitting that Native “success” in shaping the U.S. constitutional system “should not be overstated,” Blackhawk, nevertheless, avers that “the framework of federal Indian law has fundamentally reshaped the constitutional structure of the U.S., often forming the only backstop against the seemingly endless American colonial project” (2211). Although I would like to share her optimism, my reading

⁵ David E. Wilkins, *Hollow Justice: A History of Indigenous Claims in the U.S.* (New Haven: Yale University Press, 2013).

⁶ “Plenary” has other meanings, too, including exclusive authority and preemptive power, and these meanings are historically constitutionally appropriate. See David E. Wilkins and Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman, OK: University of Oklahoma Press, 2001). See chapter 3.

⁷ 522 U.S. 329, 343.

⁸ Vine Deloria, Jr., “Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law,” *Arizona Law Review* 31, no. 2 (1989): 206.

of treaty law, statutory law, administrative law, and history has not convinced me that Native nations, as dynamically resistant as they have been to elimination and denigration, have in any significant way “reshaped” the U.S. Constitution.

Blackhawk’s description of the role that federal plenary power plays is problematic.

As discussed above, and as history, ample federal statutes, and case law attest, so long as Congress, with Supreme Court endorsement, wields what is virtually unchecked authority over Native peoples, their trust lands, and remaining resources, these nations can never rest assured that their political, legal, or cultural existence will not be curtailed or even eliminated by their treaty and trust partners—the federal government. Native Nations, since the diminishment of their military capacity and the stoppage of formal treaties in 1871 have been without an effective countervailing force to the doctrine of plenary power. Instead, they must rely on the federal courts to protect their extant treaty provisions, the spottily enforced and ill-defined trust doctrine, and the moral suasion they vigorously muster to remind the federal government of its shared treaty and trust obligations.⁹

Blackhawk posits that the federalist framework “has cemented the boundaries between Native Nations and the several states” (2212). Again, history does not, in my view, support that assertion. Almost immediately after Chief Justice John Marshall drafted what many consider the Supreme Court’s most robust opinion aimed at protecting the rights of Native Nations from states—*Worcester v. Georgia* (1832)—state intrusions into Indian Country escalated and have never relented. The profound jurisdictional problems caused by Congress’s enactment of P.L. 280 in 1953 are a prime example of how a number of states, home to a majority of Native Nations and individuals, continues to wield significant clout inside the borders of Native reservations and trust lands.¹⁰

Blackhawk’s description of tribal strategies, histories, and constitutional philosophies.

While rightly emphasizing the advocacy strategies, diplomacy, and governing and

⁹ The trust doctrine, also known as the trust relationship, broadly entails the unique legal and moral duty of the federal government to assist Native nations in the protection of their lands, resources, and cultural heritage. The federal government, many courts have maintained, is to be held to the highest standards of good faith and honesty in its dealings with Native peoples and their rights and resources. Nevertheless, since the trust doctrine is not explicitly constitutionally based, it is not enforceable against Congress, although it has occasionally proven a potent force against the executive branch.

¹⁰ See Carole Goldberg’s impressive body of work on this important topic, most notably *Planting Tail Feathers: Tribal Survival and Public Law 280* (Los Angeles, CA: American Indian Studies Center, 1997) and *Captured Justice: Native Nations and Public Law 280* (with Duane Champagne) (Durham, NC: Carolina Academic Press, 2012).

legal systems of Native peoples, as well as the profound impacts of these structures and procedures, Blackhawk goes on to contend these actions have influenced the U.S. constitutional system. I would have welcomed more attention to this intriguing assertion but was left to ponder how Native governance has made any fundamental difference in the crafting or exercise of federal or state law or policy.

Notwithstanding these criticisms, Blackhawk has mustered an impressive body of data that affirms how Native Nations have effectively retained and wielded their inherent powers of sovereignty and self-determination in the face of weltering attempts by both federal and state policymakers to destroy, diminish, or deny Indigenous agency. Moreover, she makes a convincing case that Indigenous ecological knowledge systems, governing and legal structures and principles, and cultural values and traditions, could provide valuable guidance to non-Native lawmakers as they struggle to address self-inflicted environmental catastrophes, political polarization, and profound economic inequality and disparities.

Blackhawk notes that in recent years various federal and state agencies have come to realize the benefits of what she terms “collaborative lawmaking.” These agencies work with Tribal nations to forge intergovernmental cooperative agreements and compacts that outline co-management plans for certain parcels of land, bodies of water, and animal species deemed vital to all parties (2245). This is a great example of rare moments when the federal and state governments rightly concede that the United States is not only a constitutional monopoly—with the federal and state governments bound together in the U.S. Constitution—but is, in reality, a constitutional multiplicity—with nearly 600 Native governments operating alongside and sometimes in concert with their federal and state partners. As Sidney Haring noted, “we have always paid lip service to a pluralist legal tradition in U.S. law, but we have failed to allow it to sink very deeply into the consciousness of judges, lawyer, and the people of the U.S.”¹¹

Blackhawk, like Haring, urges us to “expand our constitutional imagination and embrace the possibilities and promise of a legislative constitutionalism” as a reminder that statecraft, diplomacy, enforcement of treaties, fulfillment of trust obligations, and consistent recognition of the sovereignty of Native Nations could help the respective treaty and trust partners forge a more perfect, multiplicitous union. This strong work is not only an important addition to Native legal and

¹¹ Sidney L. Haring, *Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and U.S. Law in the Nineteenth Century* (New York: Cambridge University Press, 1994): 282.

political scholarship, it should also strengthen hope that, Native knowledges and shared principles of federal Indian law could guide effective, life-sustaining collaboration so desperately needed in these difficult times (2219).

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Gerald S. Dickinson, “The Fourth Amendment’s Constitutional Home,”
William & Mary Bill of Rights Journal 31(4): 1063-1134 (2023)

Professor Gerald S. Dickinson’s recent scholarship explores the constitutional protections of the home and the puzzling discrepancy between the special treatment afforded to one’s home under most of the Bill of Rights versus the undifferentiated treatment of domiciles under the takings clause.¹ Why is it that the home receives no special status in the exercise of eminent domain? To unravel the mystery, Dickinson’s “The Fourth Amendment’s Constitutional Home” (2023) explores “another obscure schism” that he argues has been overlooked by scholars: “the retrenchment or regression of protections to the home under the Court’s Fourth Amendment search and seizure doctrines” (1065).

Dickinson begins by providing a comprehensive review of the “homebound Bill of Rights”—the textual and doctrinal protections given to the home under the First, Second, Third, and Fourth Amendments, as well as the criminal procedure clauses of the Fifth Amendment—what he terms the Supreme Court’s “speech, smut, gods, guns, soldiers, sex, and self-incrimination jurisprudence” (1066). Dickinson details both text-bound and doctrinally developed (or atextual) treatment of the home as a sanctuary, or a zone of special protection. This recognition of homebound rights, he argues, stands in stark contrast to the Fifth Amendment’s takings clause under which the Court has refused to distinguish the taking of one’s “hearth and home” from the seizure of other real property.

Dickinson searches for clues to this discrepancy in the proliferation of exceptions

¹ See also, Gerald S. Dickinson, “The Puzzle of the Constitutional Home,” *Ohio State Law Journal* 80(6): 1099–1148 (2019), and Gerald S. Dickinson, “Intratextual and Intradoctrinal Dimensions of the Constitutional Home,” *Duke Journal of Constitutional Law and Public Policy* 15(1): 292–321 (2020). The takings clause of the Fifth Amendment of the United States Constitution places a due process restriction on the government’s exercise of the power of eminent domain, defined as the authority of a government to seize private property and convert it to public use. The clause provides that private property shall not “be taken for public use without just compensation.” In simple terms, the government must demonstrate that the noncriminal seizure of private property serves the public interest and must compensate the owner with the fair market value of the property taken.

to the general rule that a governmental search or seizure of one's home requires a warrant: plain view (or plain sight), protective sweeps, open fields, third-party consent, knock-and-talk, no-knock entries, and mobile-homes under the automobile exception. He also reviews the warrant requirement exceptions for administrative inspections, probation searches, and welfare checks. To his list might be added close pursuit—an exception that grants police the authority to warrantlessly enter and fully search *any* private dwelling into which a fleeing suspect entered or passed.

Dickinson offers several potential explanations for the Court's weakening of home protections under the Fourth Amendment, starting with the recognition that no right is absolute. Homebound rights, in other words, may be balanced against other competing, societal interests. Dickinson considers arguments that the "persistence" of property concepts and protections against trespass is the origin of several of the warrantless search exceptions. "If police activity does not invade an owner's right to exclude, then surveillance typically will not run afoul of reasonable expectations of privacy" (1118). Alternatively, recognition of a "right to security," inherent to home protection under the Fourth Amendment, might explain why, in some cases, police have warrantless authority to conduct limited searches, such as protective sweeps, or to dispense with the requirement to knock and wait prior to execution of the warrant—to ensure officer safety and public welfare against violent threats when executing search or seizure in the home. "Indeed, the prospect of physical invasion of the home . . . may have a lot to do with why the Court has cultivated a patchwork of exceptions that ease law enforcement's entry into the home in comparison with the other homebound amendments" (1124).

Dickinson moves from various doctrine-based to potential political and social explanations by considering the pattern of judicial appointments that moved the Supreme Court's majority from a due-process (rights protection) orientation exemplified by the Warren Court (1953–1969) to the crime-control (policing power) orientation on criminal justice adopted by the increasingly conservative Burger (1969–1986), Rehnquist (1986–2005), and Roberts (2005–present) Courts. With the ideological shift, the Court became increasingly sympathetic to law enforcement and less sympathetic to criminal rights. Most intriguingly, Dickinson considers the role that antipoverty bias and racial discrimination may have played in softening judicial protections against governmental intrusion in the administration of criminal justice. "While the baseline special home protections to 'houses' were meant to cabin overzealous modern police officers and tyrannical governments, the Court has, over time, come to carve out special principles and

frameworks, such as protective sweeps and plain view doctrines, to address a devalued group: criminals” (1130).

Dickinson offers no definitive answer as to which of the several theories he considers is correct or most persuasive. Rather his inquiry seeks to “initiate a conversation” that “invites further research” (1134). His discussion of the warrant exceptions seems certain to generate further questions or invite additional theories, particularly from criminal justice scholars who may discern finer nuances in the extensive case law impacting homebound rights. Dickinson’s speculation that the Fourth Amendment regression may be related to the occupation of the homestead by “welfare recipients, probationers, motor home dwellers, or subsidized [public housing] tenants” could be more carefully explored by turning to an analog of the takings clause in the criminal justice realm—the practice of civil forfeiture that allows the government to seize and sell any property (including homes) that is alleged to have been involved in, or is the proceed of, criminal activity. Such a review of civil forfeiture in practice may lend further credence to the thesis that socioeconomic characteristics of criminal defendants is a driver of the retrenchment of constitutional protections. Expanding the inquiry to include civil forfeiture may also challenge Dickinson’s central premise of homebound rights as specially deriving from the concept of the homestead as a domicile. Civil forfeiture is an *in rem* rather than an *in personam* action—an action against property (which lacks rights) rather than against persons (who possess them). In this view, there is nothing special about a home and nothing constitutionally abhorrent about taking property (even a house) absent some other violation of, or unwarranted intrusion against, a person’s constitutional rights. As the Court declared in *Katz v. United States* (1967), the Constitution “protects people, not places” (389 U.S. 352).

While Dickinson’s central focus is on understanding the divergent trajectories of homebound rights as venerated in some contexts while eroded or even curiously absent in others, his article provides a rich, embedded discussion of interest for scholars on the various theories of constitutional interpretation. Dickinson’s discussion of houses in the Court’s text and doctrine, deftly accounts for the “interpretive pluralism” of the justices and demonstrates that both textualism and doctrinalism “prove crucial to uncovering and exploring coherence and instances of disharmony across the homebound Bill of Rights” (1072).

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