

Institute for Constitutional Studies Seminar Schedule  
Native Peoples, American Colonialism, and the U.S. Constitution

Professors Greg Ablavsky, Maggie Blackhawk, and Ned Blackhawk

June 19-24, 2022

New Haven, Connecticut

Sunday, June 19, 2022

Time	Event	Location
15:00	Check-in	The Study at Yale, 1157 Chapel St, New Haven, CT
17:30	Welcome Dinner	Atelier Florian, 1166 Chapel St, New Haven, CT

Monday, June 20, 2022

Time	Event	Location
8:00-8:45	Breakfast	Humanities Quadrangle (HQ) Courtyard, 320 York St, New Haven, CT
9:00 – 12:00	Morning Session	HQ 276
12:00-13:00	Lunch	HQ Courtyard
13:30-15:00	Supplemental Presentation: <i>Constituting Ho-Chunk Nation Governance: An Evaluation of its Constitution</i> by Amanda White Eagle	Native American Cultural Center (NACC) Conference Room, 26 High St, New Haven, CT
15:00-17:00	Afternoon Session	NACC Conference Room
	Evening meal of one's choosing	

Tuesday, June 21, 2022

Time	Event	Location
8:00-8:45	Breakfast	HQ Courtyard
9:00 – 12:00	Morning Session	HQ 276
12:00-13:00	Lunch	HQ Courtyard
13:30-15:00	Supplemental Presentation: <i>Supporting the Sovereignty of Native Nations in Academia</i> by Rebecca Plumage and Helen Malley	NACC Conference Room
15:00-17:00	Afternoon Session	NACC Conference Room
	Evening meal of one's choosing	

Wednesday, June 22, 2022

Time	Event	Location
8:00-8:45	Breakfast	HQ Courtyard
9:00 – 11:30	Morning Session	HQ 401, <i>please note the room change</i>
11:45-13:15	Lunch	Weather-permitting Harvest Wine Bar & Restaurant, 1104 Chapel St, New Haven, CT; otherwise, lunch of your choosing
13:30-15:00	Supplemental Presentation: <i>American Indian Legal History Resources</i> by Ned Blackhawk	Beinecke Rare Book & Manuscript Library, 121 Wall St, New Haven, CT
15:00-16:30	Afternoon Session	Beinecke Rare Book & Manuscript Library
17:30	Professional and Graduate Student Dinner	Olea, 39 High St, New Haven, CT
	Evening meal of one's choosing for all other participants	

Thursday, June 23, 2022

Time	Event	Location
8:00-8:45	Breakfast	HQ Courtyard
9:00 – 12:00	Morning Session	HQ 276
12:00-13:00	Lunch	HQ Courtyard
15:00-17:00	Afternoon Session	NACC Conference Room
17:30	Group Celebration Dinner	High George at The Blake Hotel, 9 High St, New Haven, CT

Friday, June 24, 2022

Time	Event	Location
12:00	Check-out	The Study at Yale

# Native Peoples, American Colonialism, and the U.S. Constitution

Professors Greg Ablavsky, Maggie Blackhawk, and Ned Blackhawk

Interdisciplinary Summer Workshop in Constitutional Studies

June 20-24, 2022

New Haven, Connecticut

Seminar sessions will run each day from 9 am until 12 pm and then from 3 pm until 5 pm.

## Mon. June 20

### Introduction

#### United States Constitutional History and the Erasure of Native America:

Ned Blackhawk, *The Iron Cage of Erasure: American Indian Sovereignty in Jill Lepore's These Truths*, 125 *Am. Hist. Rev.* 1752-1763 (2020);

Maggie Blackhawk, *On Power & Indian Country*, 1 *Women & Law* 39-56 (2020);

Angela R. Riley, "Native Nations and the Constitution: An Inquiry into Extra-Constitutionality," *Harv. L. Rev. F.* 130 (2017): 178-97.

#### Native Peoples, American Colonialism, and the Founding:

Ned Blackhawk, *The Rediscovery of America: American Indians and the Unmaking of U.S. History* (2023) (Chapter 5, "Settler Uprising: The Indigenous Origins of the American Revolution");

Gregory Ablavsky, "Two Federalist Constitutions of Empire," *Fordham L. Rev.* 89 (2021): 1677-1706;

Colin Calloway, *The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation* 1-15 (2018);

Jeffrey Ostler, "Locating Settler Colonialism in Early American History," *The William and Mary Quarterly* 76, no. 3 (2019): 443-50.

In our morning session, we will begin our discussion of the Constitution, Native peoples, and American colonialism with a reflection on the current literature in legal history, history, and law and, particularly, the notable erasure of Native peoples and American colonialism. *Questions for reflection and discussion:* What are the scope and contours of the erasure of Native peoples and American colonialism from studies of the United States Constitution? What does this tell us about the

dynamic of erasure itself? What are the possible implications of this erasure for the fields of history/law, our constitutional culture, and our understanding of American democracy?

In our afternoon session, after examining the problem of erasure, we will then turn to the burgeoning literature within the fields of history and legal history that aim to combat these erasures and bring about a new American history that centers Native peoples and American colonialism. Our foray into the literature is chronological and we begin with the revolutionary era and the Founding. *Questions for reflection and discussion:* At base, what are the historiographical implications of centering Native peoples and American colonialism within the American Revolution and the Founding? Does the inclusion of these histories shift the interpretation of the causes and character of these eras? Are there other reasons to center these histories?

## **Tues. June 21**

### Native Peoples, American Colonialism, and the Development of United States Constitutional Law:

Gregory Ablavsky, "Sovereign Metaphors in Indian Law," *Montana Law Review* 80 (2019): 11-40 [feel free to skim/skip sections titled "Today"];

Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, Mass: Harvard University Press, 2010). [Ch. 6];

Mark Peterson, The Long Crisis of the Constitution 132-180 (double-spaced manuscript pages);

Ned Blackhawk, *The Rediscovery of America: American Indians and the Unmaking of U.S. History* (2023) (Chapter 11, "Indigenous Twilight at the Dawn of the Century: Native Activists and the Myth of Indian Disappearance");

Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1806-38 (2019);

Patrick Wolfe, *Against the Intentional Fallacy: Legocentrism and Continuity in the Rhetoric of Indian Dispossession*, 36 *American Indian Culture and Research Journal* 1-7 (intro), 25-34 (2012).

Over the course of a full seminar day, we will continue our survey of the current literature offering a new history of the United States—one that places Native peoples and American colonialism at its center—from the antebellum era to the twentieth century. *Questions for reflection and discussion:* What are the historiographical implications of centering Native peoples and American colonialism within the long nineteenth and twentieth centuries? Does the inclusion of these histories shift the interpretation of the causes and character of these eras? Are there other reasons to center these histories?

**Wed. June 22**

How Does Centering Native Peoples and American Colonialism Allow For a New Constitutional History?:

A. Rethinking the Origins and Logics of Particular Doctrines:  
Treaty Power as Case Study

Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 Fordham L. Rev. 1707, 1707-53 (2021);

Cherokee Removal Petition & Zitkala-Sa Petition;

Selections from Charles Wilkinson, *Blood Struggle: the Rise of Modern Indian Nations* ix-xvi, 166-178, 198-205 (2005);

Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1809-15 (2019) (skim);

IGRA and compacting: Randall K. Q. Akee, et. al, “The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development,” *Journal of Economic Perspectives* (2015): 185-199;

B. Expanding and Reshaping the Scope of Constitutional History

Reshaping the scope:

Sam Erman, “Truer U.S. History: Race, Borders, and Status Manipulation Review,” *Yale Law Journal* 130, no. 5 (2021): 1233-49.

Decentering the courts:

Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1872-76 (2019);

*United States v. Lara*.

How Does Centering Native Peoples and American Colonialism Allow for the Rethinking of Constitutional Theory (One Rooted in Constitutional History)?:

A. The Histories That Made Us: Constitutional Theory & US History

Bruce Ackerman, *We The People: Foundations* 3-6 (1991);

Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1789-1806 (2019).

B. Case Study: Originalism

Gregory Ablavsky and Tanner Allread, *We the (Native) People?* (forthcoming 2023), Intro + Parts II & IV.

In our morning session, we will begin with a discussion of whether and how a new history of the United States, inclusive of Native peoples and American colonialism, could shift broader approaches to constitutional history and legal history. *Questions for reflection and discussion:* How would the inclusion of Native peoples impact the subject-specific practice of constitutional history? Drawing upon the history of the treaty power specifically, how does the inclusion of Native peoples and American colonialism shift the scope and contours of the history and constitutional law within this area?

The afternoon session will continue our discussion of how the inclusion of Native peoples and American colonialism could result in a deeper understanding of continuities and discontinuities of United States constitutional history across the long nineteenth and twentieth centuries. We will also discuss its potential to expand the archive of constitutional history beyond the courts—and explore the possibilities and limitations of that expansion. Finally, we will close our afternoon session with an exploration of how the field of originalism could be transformed by the inclusion of Native peoples. *Questions for reflection and discussion:* How are the prevailing constitutional theories rooted in presumptions about United States history? Would these theories shift upon changes in the underlying histories upon which they rely? Finally, how would inclusion of the histories of Native people and American colonialism impact the study and theorization of “originalism”?

**Thurs. June 23**

**How Does Centering Native Peoples and American Colonialism Allow for the Rethinking of Constitutional Theory (One Rooted in Constitutional History) (cont.)?:**

B. Case Study: Structure/Rights

Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1845-72 (2019).

**Conclusion: *McGirt v. Oklahoma* & *Brackeen v. Haaland* in comparison**

Maggie Blackhawk, *On Power and the Law: McGirt v. Oklahoma*, 2020 Sup. Ct. Rev. 367, 367-91, 395-422 (2021);

Matthew L. M. Fletcher, “Muskrat Textualism,” *Northwestern University Law Review* 116 (2021): 963, 999-1011;

Brief for Amicus Curiae Professor Gregory Ablavsky in Support of Defendants-Appellants and Intervenor Defendants-Appellants and Reversal, *Brackeen v. Zinke* (2019) (5th Cir. No. 4:17-CV-00868-O), Part I.

Fletcher and Singel, *Lawyering the ICWA*, Parts II & V and Conclusion].

In our morning session, we will continue to explore the impact of a broader United States history on constitutional law and theory with a second case study: the dichotomy in constitutional theory between structure and rights and the presumption that protections against oppression exist largely on the side of rights. *Questions for reflection and discussion:* How does the presumed divide between structure and rights reflect a model of United States history and government? Does a broader and more inclusive history shift this presumed divide? If so, what does that shift tell us about the origins and implications of the divide?

In our afternoon session, we will close the workshop with a discussion of two cases, one recently decided and one currently pending before the Supreme Court. Drawing upon our exploration during the morning session, *Brackeen* is a case seen as central to the field of constitutional law, given that the challenges to the ICWA are couched in the constitutional parlance of rights. *McGirt* is a case that is often overlooked for its constitutional implications. *Questions for reflection and discussion:* What are the implications for the fields of constitutional law and history that cases like *Brackeen* are seen as central, while cases like *McGirt* are often overlooked? What do these distinctions convey about the divide between structure and rights? What do these distinctions teach us about the limits of constitutional histories, the history of social movements, and theories of constitutional change?

**Fri. June 24**

[Travel Day]