

LEGAL BORDERLANDS AND IMPERIAL LEGACIES:
A RESPONSE TO MAGGIE BLACKHAWK'S
THE CONSTITUTION OF AMERICAN COLONIALISM

Jennifer M. Chacón*

What are the borderlands? In her brilliant and sweeping exploration of the “constitution of American colonialism,”¹ Professor Maggie Blackhawk references the borderlands dozens of times.² She ultimately looks to the borderlands for constitutional salvation, extracting six “principles of borderlands constitutionalism” that she urges us to reckon with as “central to our constitutional law.”³ These include principles of recognition, preservation, self-determination, territorial sovereignty, collaborative lawmaking, and nonintervention — concepts that she elaborates upon in significant detail.⁴

But borderlands are notoriously elusive. The borderlands of the United States are both everywhere (or, at least, in many places) and nowhere at once.⁵ So, when I read Blackhawk’s generative Foreword, I thought that the most useful contribution I might make by way of response would be to try to flesh out other dimensions of the borderlands, and to contemplate what might be gained from expanding on her notion of the borderlands.

In this Response, I will embark on a brief journey in search of the borderlands. In so doing, I highlight some tensions among the principles of borderlands constitutionalism, and suggest some additional

* Bruce Tyson Mitchell Professor of Law, Stanford Law School. This Response is dedicated to my students, past and present. I have learned so much from you. You help me see the world in new ways.

¹ Maggie Blackhawk, *The Supreme Court, 2022 Term — Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 12 (2023).

² See, e.g., *id.* at 66–115 (discussing “Borderlands Constitutionalism,” *id.* at 66).

³ *Id.* at 90.

⁴ See *id.* at 90–115.

⁵ On the ubiquity of borders, see, for example, Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J.C.R. & C.L. 165, 166 (2007) (observing that “legal boundaries of inclusion and exclusion” do not align neatly with “cartographic” borders); Mary L. Dudziak & Leti Volpp, *Introduction*, 57 AM. Q. (SPECIAL ISSUE) 1, 2–4 (2005) (explaining that borders are constructed “through formal legal controls on entry and exit,” but also through the conferral or denial of rights and privileges, and therefore can be both external and internal, *id.* at 2). The legal exceptions for the policing of borderland spaces that were purportedly created to ensure national security within national borders have also become increasingly unmoored from geographic spaces demarcating land borders between nations. See generally Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129 (2010). Bordering processes can be, and are, enacted without regard to actual physical proximity to a jurisdictional divide. But this does not mean that borders are uniform and ubiquitous. “[T]he border is not everywhere for everyone.” Mark B. Salter, *Theory of the / : The Suture and Critical Border Studies*, 17 GEOPOLITICS 734, 750 (2012); see also ANA MUÑIZ, *BORDERLAND CIRCUITRY* 7–9 (2022) (exploring how bordering technologies of surveillance and punishment are deployed against particular racialized, criminalized populations).

challenges that inhere in any effort to invigorate these principles in the framework of the United States’s colonial constitutional law. In the first Part of this Response, I summarize key elements of Blackhawk’s Foreword and explain the role that the borderlands, and borderlands constitutionalism, play in her argument. In the second Part, I expand upon this idea of the borderlands, and offer some reflections on how an engagement with other borderland spaces and realities might advance distinct aspects of the constitutional project that Blackhawk sets out. In the third Part, I offer an analysis of immigration law that both bolsters Blackhawk’s central claim concerning the colonial legacy that animates and structures U.S. constitutional law and illustrates some of the difficulties of constitutional redemption through borderlands constitutionalism. The final Part offers some brief reflections about how we know what we know about U.S. colonialism and its continuing practical and legal legacies.

I. THE CONSTITUTION OF U.S. COLONIALISM

Blackhawk opens *The Constitution of American Colonialism* with a description of U.S. colonialism, past and present.⁶ She does so as part of her broader effort to do nothing less than to reconceptualize broad swaths of U.S. constitutional law. She argues that “[c]onstitutional scholars rarely discuss the problem of American colonialism at all. . . . Instead, we call the component parts of American colonialism *sui generis*. We banish each to its silo.”⁷ Blackhawk identifies these siloes — “federal Indian law; the law of the territories; foreign relations law; treaty law; the war powers; and the laws of naturalization, immigration, and citizenship”⁸ — and observes that these bodies of law are commonly declared “beyond our constitutional theory and left . . . to the ‘plenary power’ of the political branches to solve.”⁹ In her view, however, “the national government built a constitution of empire: a vast and intricate web of relationships between the central government and those it colonized.”¹⁰ Colonial governance is not extrinsic to, nor is it exceptional within, the resulting constitutional framework. United States

⁶ Blackhawk, *supra* note 1, at 22–66.

⁷ *Id.* at 6 (footnote omitted).

⁸ *Id.* at 6–7 (footnotes omitted); *see also id.* at 19 (referencing once again the “seemingly disparate, but ultimately connected ‘external’ constitutional fields of federal Indian law, immigration, the law of the territories, foreign relations law, the treaty power, and the powers of war and exigency” (footnotes omitted)). *See generally* T. ALEXANDER ALENIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 16 (2002) (discussing the plenary power doctrine in the areas of Indian law, the territories, and immigration law in the late nineteenth century), *cited in* Blackhawk, *supra* note 1, at 53 n.323; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1, 13–15 (2002) (analyzing the plenary power doctrine across Indian, territorial, and immigration law), *cited in* Blackhawk, *supra* note 1, at 8 n.29.

⁹ Blackhawk, *supra* note 1, at 8.

¹⁰ *Id.* at 10.

constitutional law has provided the legal infrastructure of U.S. colonialism, and has been interpreted and reordered to facilitate the governance of colonized spaces from the center.

Blackhawk calls upon us to reckon with the constitution of colonialism, but urges that we must not only “recognize colonialism as a distinctive struggle of fundamental practices, norms, and institutions within our society,” but also grapple with ongoing discourse within colonized spaces “around power, self-determination, sovereignty, jurisdiction, and community as a distinctive form of constitutional discourse.”¹¹ Indeed, one of the most important insights that Blackhawk provides is in her reminder that grappling with the legal legacies of colonialism should not lead to a blanket “solution” that favors the universal imposition of homogenized U.S. liberal constitutional values and frameworks on colonized people and jurisdictions. She reminds us that in the absence of a more robust framework for understanding our Constitution’s colonialism, the unthinking extensions of even the constitutional frameworks that have emerged to respond to particular aspects of the racially violent past in the United States would have the ironic effect of further disempowering some colonized people.¹²

Using *Haaland v. Brackeen*¹³ as one example, Blackhawk admits that advocates (including herself) who had filed amicus briefs in the Supreme Court defending the Indian Child Welfare Act (ICWA) contended that they were *not* advocating on behalf of a “racial” group notwithstanding the many ways that Native communities have been racialized.¹⁴ To do otherwise would send the analysis of ICWA into the Court’s deracinated, ahistorical, colorblind equal protection analysis,¹⁵ where it might very well meet the same fate as affirmative action¹⁶ and voluntary desegregation efforts¹⁷ — a fate that may soon await the Voting Rights Act as well.¹⁸ As Blackhawk explains,¹⁹ the Constitution’s antidiscrimination principles have previously been (mis)used to upend efforts to promote the self-determination of Native Hawaiians in the case of *Rice v. Cayetano*.²⁰ In a world where the

¹¹ *Id.* at 13.

¹² *See id.*

¹³ 143 S. Ct. 1609 (2023).

¹⁴ Blackhawk, *supra* note 1, at 16–17.

¹⁵ *See id.* at 16.

¹⁶ *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023).

¹⁷ *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007).

¹⁸ *See Allen v. Milligan*, 143 S. Ct. 1487, 1519 (2023) (Thomas, J., dissenting) (criticizing the “gulf between our ‘color-blind’ Constitution and ‘the consciously segregated districting system currently being constructed in the name of the Voting Rights Act’” (citation omitted) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring in the judgment))).

¹⁹ Blackhawk, *supra* note 1, at 115–17.

²⁰ 528 U.S. 495 (2000); *see id.* at 523–24.

Fourteenth Amendment cannot be read to remediate the historical racial wrongs of slavery, the danger that decontextualized principles of anti-discrimination and equal protection may continue to be used to further the ends of colonial power remains strong.

Similarly, principles of federalism, which have at times delivered protections for individual rights, have also been used (including quite recently) to advance the cause of colonial control. Blackhawk writes of the Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*²¹ in which the Court deployed an expansive understanding of state criminal law jurisdiction in Native lands at the expense of recognizing tribal sovereignty in these places:

The United States Constitution provides the several states with a constitutional right to impose their criminal law on colonized lands — to police, and subject to criminal sanctions, the loved ones, neighbors, and children of colonized peoples. But the Constitution also limits the United States from empowering the people it colonizes to self-govern, even simply to protect their families against crime, because United States citizens who are non-Indians could then be subject to the laws and governments of colonized peoples.²²

Nor have liberal constitutional principles come to the aid of colonized people in Puerto Rico. Blackhawk makes this plain in her analysis of recent cases like *Puerto Rico v. Sanchez Valle*,²³ *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*,²⁴ and *United States v. Vaello Madero*,²⁵ for which:

The most generous interpretation of these recent opinions is that the Supreme Court draws from borderlands constitutional principles implicitly and justifies the lesser harm of a particular case to avoid a more problematic general rule. This interpretation could be true. However, when the Court was faced with the choice to embrace the lesser harm of the particular case and craft a general rule that preserved borderlands principles[,] . . . it chose the general rule that furthered the colonial project.²⁶

What is required then, is not a blind extension of the liberal constitutional principles that were forged in the fires of colonialism and then used as a tool for its extension and maintenance. Instead, Blackhawk

²¹ 142 S. Ct. 2486 (2022).

²² Blackhawk, *supra* note 1, at 120 (footnotes omitted).

²³ 136 S. Ct. 1863 (2016).

²⁴ 140 S. Ct. 1649 (2020); *see id.* at 1665 (affirming the legitimacy of the presidentially appointed Puerto Rican fiscal oversight board, in the absence of Senate approval, pursuant to the terms of the Puerto Rico Oversight, Management, and Economic Stability Act, because these were local officials whose appointment Congress could structure in this way (as distinct from requirements for federal officers) because of congressional power over the territories).

²⁵ 142 S. Ct. 1539 (2022); *see id.* at 1543–44 (denying the equal protection claim of a U.S. citizen residing in Puerto Rico who had lived and worked for decades in New York but was denied federal Supplemental Security Income benefits by virtue of the fact that he now resided in Puerto Rico, and finding that Congress lawfully excluded U.S. citizens residing in Puerto Rico from receiving these benefits).

²⁶ Blackhawk, *supra* note 1, at 126–27 (footnotes omitted).

urges, we need to make a genuine and sincere attempt to understand the “constitution of American colonialism,”²⁷ and to search out “distinctive constitutional solutions”²⁸ to the complex inequities, misappropriations, and disenfranchisements of colonialism’s historical legacy and ongoing damage. Rather than simply extending or universalizing constitutional doctrines as they have been designed to address certain problems (and to obscure others), we must grapple with historical specificities and engage the legal vocabularies and technologies adopted in the borderlands by people seeking to preserve their autonomy and self-governance in the face of U.S. colonialism.²⁹

To undertake this task, Blackhawk admits that she has, at best, a partial roadmap. She modestly styles her epic tour de force as a conversation starter — a broad introduction to questions that she posits at the end of the piece:

[H]ow do we incorporate and give voice as a constitutional matter to those members subjected to a distinctive and exceptional constitutionalism — subject to its power without any of its protections? That is, how do we affirmatively engage with the constitutional questions that we may have lost to the erasure of American colonialism?³⁰

These are great questions and hard ones, and if Blackhawk has no definitive answers, it shouldn’t be surprising to anyone that I do not have them either. But Blackhawk suggests that our search for answers must start at the borderlands, and so I will start there as well.

II. THE BORDERLANDS

As we seek to reconstruct a constitutional analysis that contends with the reality and harms of colonialism, Blackhawk’s recommendation is that we look to the law of the borderlands. Elaborating pluralistic notions of what the borderlands are and what they mean might therefore enrich and complicate Blackhawk’s constitutional project. Blackhawk defines the “borderlands” early in her article:

They are domains and peoples over which the United States has extended its jurisdiction unilaterally, often unlawfully and violently, on the grounds that the peoples within those borderlands require civilization before they achieve self-government. Paradoxically, borderlands are spaces of both subordination and empowerment. They are areas where “universal” rules of liberal constitutionalism apply selectively or not at all to “savages.” But they are also spaces of legal and constitutional pluralism that allow colonized peoples some powers to govern and innovate. Borderlands are where permanent “strangers” to the United States Constitution and their worldviews remain, denaturalizing the seemingly stable borders of empires and nations.³¹

²⁷ *Id.* at 12.

²⁸ *Id.* at 20.

²⁹ *See id.* at 20–21.

³⁰ *Id.* at 152.

³¹ *Id.* at 11–12 (footnotes omitted).

Though I was unaware of the fact during my own childhood,³² Indigenous people in the Americas have long used the notion of the borderland to understand and contest control over space and their own bodies. As Blackhawk's Foreword makes clear, Indian Country is filled with borderland spaces — sites of colonization, yes, but also of imaginative legal resistance and a resulting legal pluralism that can serve as a guide to possible reconfigurations of our constitutional understanding.³³ Native nations have their own borders, and the borderlands are therefore far more ubiquitous within U.S. territorial space than Euro-American maps allow.

Nor are these the only borderlands with which Blackhawk is concerned. The outlying U.S. territories are also borderlands³⁴ and figure prominently in her analysis. Some historical territories have been folded into the United States *as* states, in a series of processes that reified racial hierarchy and sought to entrench white supremacy.³⁵ Some spaces remain in territorial status to this day, part of a vast island-archipelago of U.S. empire.³⁶

But there are other borderlands — spaces that are not analyzed in Blackhawk's Foreword and that fall outside of her definition because not all parts of these borderlands are easily defined as spaces where “the United States has extended its jurisdiction.”³⁷ When I think of borderlands, the first image for me is the place where I was born and raised — in El Paso, Texas, which sits on the northern side of the United

³² My childhood ignorance cannot be explained by any lack of physical proximity to Native communities and cultures. I grew up around the ancestral lands of the Ysleta del Sur (Tigua) Pueblo. But like others who read from the Texas and U.S. history books assigned to students in the Ysleta Independent School District and other Texas schools in the 1970s and 1980s, I was taught from a series of incomplete histories that carried triumphal accounts of U.S. conquest in the region and suggested incorrectly that Native nations were things of the past. Studies of textbooks at the time of my childhood consistently found that “[m]ost accounts of the North American Indian remain distorted, disjointed and incomplete.” G. Patrick O’Neill, *The North American Indian in Contemporary History and Social Studies Textbooks*, J. AM. INDIAN EDUC., May 1987, at 22, 26 (summarizing ten different studies of textbooks in North America in the late 1970s).

Attempts in the intervening decades to tell more complex histories have encountered resistance, including a very recent round of conservative opposition. By late 2022, various states and localities had introduced 563 laws seeking to ban critical historical analyses and discussions about race in public schools; 241 of those laws had been enacted. TAIKHA ALEXANDER ET AL., UCLA SCH. OF L. CRITICAL RACE STUD. PROGRAM, TRACKING THE ATTACK ON CRITICAL RACE THEORY 4 (2023). About half of all public school students now learn from teachers who risk reprimand and firing if they discuss “divisive concepts” like systemic racism. *Id.* at 5–6.

³³ Blackhawk, *supra* note 1, at 12.

³⁴ *Id.* at 42–44.

³⁵ See *id.* at 26–27; see also LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 10–12 (2d ed. 2018) (describing the long and racially fraught history of New Mexican statehood); ERIC V. MEEKS, BORDER CITIZENS: THE MAKING OF INDIANS, MEXICANS, AND ANGLOS IN ARIZONA 4 (2007) (discussing the formation and reconfiguration of racial boundaries during Arizona’s move toward statehood).

³⁶ See DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 399 (2019) (noting that four million people live in U.S. island territories).

³⁷ Blackhawk, *supra* note 1, at 11.

States's most analyzed geopolitical border. Gloria Anzaldúa described the U.S.-Mexico borderlands as:

[U]na herida abierta where the Third World grates against the first and bleeds. And before a scab forms it hemorrhages again, the lifeblood of two worlds merging to form a third country — a border culture. Borders are set up to define the places that are safe and unsafe, to distinguish *us* from *them*. A border is a dividing line, a narrow strip along a steep edge. A borderland is a vague and undetermined place created by the emotional residue of an unnatural boundary. It is in a constant state of transition. The prohibited and forbidden are its inhabitants. *Los atravesados* live here: the squint-eyed, the perverse, the queer, the troublesome, the mongrel, the mulato, the half-breed, the half dead; in short, those who cross over, pass over, or go through the confines of the “normal.”³⁸

Anzaldúa's book posits that “borders are set up . . . to distinguish *us* from *them*.”³⁹ The geopolitical divisions created by these territorial borders undergird the maintenance of an unequal global order that arises out of colonial history.⁴⁰ Thus, the borderlands at the physical intersection of nations are also sites where colonial constitutionalism is enacted.

Such spaces can be violent. In recent years, the U.S.-Mexico border — long home to an extensive⁴¹ (if sometimes hapless⁴²) control apparatus — has been further militarized in a series of military-styled “operations,” from the federal Border Patrol's Hold the Line and Gatekeeper in the 1990s⁴³ to Governor Greg Abbott's Operation Lone Star in the present.⁴⁴ This borderland is the site of a significant armed presence: the FBI, the Border Patrol, the Army, the Air Force, ICE, and other DHS agents are all present, as are armed agents of the State of Texas, the various municipalities of the region, the Mexican government, and, of course, the armed free agents on both sides of the borderline

³⁸ GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* 57–58 (Ricardo F. Vivancos-Pérez & Norma Elia Cantú eds., The Critical Ed. 2021) (footnotes omitted).

³⁹ *Id.* at 57.

⁴⁰ E. Tendayi Achiume, *Migration as Decolonization*, 71 *STAN. L. REV.* 1509, 1519 (2019) (discussing the “role that territorial national borders have played and continue to play in maintaining Third World subordination”).

⁴¹ See generally RACHEL ST. JOHN, *LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.-MEXICO BORDER* (2011); KELLY LYTLE HERNÁNDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* (2010).

⁴² See S. DEBORAH KANG, *THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE US-MEXICO BORDER, 1917–1954*, at 134–36 (2017).

⁴³ JONATHAN XAVIER INDA, *TARGETING IMMIGRANTS: GOVERNMENT, TECHNOLOGY, AND ETHICS* 146 (2006).

⁴⁴ See Lomi Kriel & Perla Trevizo, *Gov. Greg Abbott Brags About His Border Initiative. The Evidence Doesn't Back Him Up.*, *TEX. TRIB.* (Mar. 21, 2022, 5:00 AM), <https://www.texastribune.org/2022/03/21/operation-lone-star-lacks-clear-metrics-measure-accomplishments> [https://perma.cc/9M9J-VBTP].

in the summer of 2023 on concertina wire and throughout the borderlands.⁴⁵

Anzaldúa’s description of her homeland as a “thin edge of barb-wire”⁴⁶ gained new resonance as children wounded themselves on barbed wire in the summer of 2023 near the deceptively cheerful-looking balloons bedecked with wire that are floating⁴⁷ — sometimes on the Mexican side of the Rio Bravo/Grande⁴⁸ — at the behest of Texas’s governor. Litigation over the floating border barrier initially resulted in a federal district court order requiring Texas to remove the barrier on the grounds that it sat in the navigable waters of the United States over which the federal government has control, and upon which states cannot create obstructions.⁴⁹ The Fifth Circuit Court of Appeals later reversed the injunction, allowing the barrier to remain in place pending further litigation, but providing no reasoning for its decision.⁵⁰

⁴⁵ For a discussion of the violence of the U.S. “prevention through deterrence” strategy along the U.S.-Mexico border, in which an ever-growing presence of armed agents take advantage of the deadly conditions of the physical space where they are situated, see, for example, JASON DE LEÓN, *THE LAND OF OPEN GRAVES* 42–61, 67–68 (2015). The saturation of armed agents in Texas, even relatively far from the physical border, was highlighted during the tragic shooting at Uvalde Elementary School in 2022. A Texas House Investigative Report recorded the fact that a total of 376 law enforcement agents, from numerous federal, state, and local agencies, responded to a shooting that involved a single perpetrator. TEX. H.R., H. INVESTIGATIVE COMM. ON THE ROBB ELEMENTARY SHOOTING, INTERIM REPORT, 88th Sess., at 64–65 (2022). Despite this massive armed response, twenty-one people, mostly children, were killed. *See id.* at 5, 66. For a discussion of the role of private militia members in exacerbating borderland violence, see, for example, Alex Horton, “George Zimmerman on Steroids:” *How Armed “Militias” Roam the Border in Legal Grey Areas*, WASH. POST (Apr. 25, 2019, 10:13 AM), <https://www.washingtonpost.com/nation/2019/04/24/border-militias-legal-gray-areas-civilians-detaining-migrants-gunpoint> [https://perma.cc/67RY-TLD6]. For a discussion of U.S. military involvement in border enforcement, see REECE JONES, *VIOLENT BORDERS: REFUGEES AND THE RIGHT TO MOVE* 41–42 (2016). For an article highlighting the presence of state and local police in the borderlands, see, for example, Gabe Gutierrez & Al Henkel, *State Troopers, Local Police Ramp Up Along Border as Federal Resources Are Stretched Thin*, NBC NEWS (May 5, 2021, 7:21 PM), <https://www.nbcnews.com/news/us-news/state-troopers-local-police-ramp-along-border-federal-resources-are-n1266449> [https://perma.cc/W7RN-H2PS].

⁴⁶ ANZALDÚA, *supra* note 38, at 55.

⁴⁷ David Martin Davies, *Up-Close Look at Gov. Greg Abbott’s Floating Wall in the Rio Grande*, TEX. PUB. RADIO (Aug. 6, 2023, 6:21 PM), <https://www.tpr.org/border-immigration/2023-08-06/up-close-look-at-gov-greg-abbotts-floating-wall-in-the-rio-grande> [https://perma.cc/C2BL-KFZE].

⁴⁸ *See* David Martin Davies, *Texas’ Anti-migrant Buoys Are Mostly on the Mexican Side of the Rio Grande, Survey Finds*, TEX. PUB. RADIO (Aug. 16, 2023, 12:06 PM), <https://www.tpr.org/border-immigration/2023-08-16/texas-anti-migrant-buoys-are-mostly-on-the-mexican-side-of-the-rio-grande-survey-finds> [https://perma.cc/RS2G-AVXT].

⁴⁹ *United States v. Abbott*, No. 23-CV-853, 2023 WL 5740596, at *2 (W.D. Tex. Sept. 6, 2023) (“Governor Abbott announced that he was not ‘asking for permission’ for Operation Lone Star, the anti-immigration program under which Texas constructed the floating barrier. Unfortunately for Texas, permission is exactly what federal law requires before installing obstructions in the nation’s navigable waters. Texas’s construction of the floating barrier has violated two of the three courses of conduct proscribed by Section 10 of the [Rivers and Harbors Appropriation Act of 1899].” (citations omitted) (citing 33 U.S.C. § 403)).

⁵⁰ Unpublished Order at 1, *United States v. Abbott*, No. 23-50632 (5th Cir. Sept. 7, 2023).

Anzaldúa's borderland exists within a particular (if fuzzy-edged) space situated at the intersection of two specific nations. But her description of the borderlands captures the reality that, like borders themselves, borderlands are not naturally occurring, but arise out of bordering processes.⁵¹ Like the borders they surround, borderlands are omnipresent and come into sharp relief wherever differences can be policed. They are metaphysical as well as physical. As Blackhawk makes clear, borderland spaces are generative.⁵² Anzaldúa reminds us that they are also sites of transgression, and therefore invite various forms of border patrolling designed to keep people in their place.⁵³

Blackhawk is attentive to the diversity of borderland spaces, and does the important service of highlighting how the solutions that might facilitate the greater political and legal autonomy of one borderland space might be a poor fit for another.⁵⁴ Her analysis focuses primarily on often-invisible borders of colonized spaces subject to the formal legal jurisdiction of the United States — Indian Country, the lands of Native nations, and island territories.⁵⁵ Though she begins by noting that the plenary power doctrine also makes its home in immigration law, the resulting immigration jurisprudence is not a focus of her work.⁵⁶ But immigration law is clearly designed to regulate borderland spaces, and has contributed to the constitution of U.S. colonialism. So in the Part that follows, I'll briefly sketch out how we might extend Blackhawk's project in the context of immigration law.

III. IMMIGRATION LAW AND U.S. COLONIALISM

The visible doctrinal thread that connects immigration law with the law of the territories and Indian law is the plenary power doctrine. Immigration law, one of the central legal domains in which the plenary power doctrine developed, often falls away in scholarly efforts to tether it to other legal manifestations of U.S. colonialism.⁵⁷ But if, as

⁵¹ See generally Nancy A. Wonders & Lynn C. Jones, *Doing and Undoing Borders: The Multiplication of Citizenship, Citizenship Performances, and Migration as Social Movement*, 23 THEORETICAL CRIMINOLOGY 136 (2019).

⁵² Blackhawk, *supra* note 1, at 11 (describing borderlands as “spaces of legal and constitutional pluralism that allow colonized peoples some powers to govern and innovate”).

⁵³ See MUÑIZ, *supra* note 5, at 2; cf. HAZEL V. CARBY, IMPERIAL INTIMACIES: A TALE OF TWO ISLANDS 11–18 (2019) (illustrating through narrative how the question “where are you from?” is designed to keep people in their place, to enforce racial category boundaries, and to keep racialized outsiders on the outside).

⁵⁴ See Blackhawk, *supra* note 1, at 20–21.

⁵⁵ See *id.* at 69–81.

⁵⁶ See *id.* at 19.

⁵⁷ For example, Professor Sam Erman's wonderful *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188 (2021), promises to put immigration “on [the] center stage” of his broader inquiry into questions of race, borders, and legal status, *id.* at 1188. Yet immigration law receives relatively brief treatment in the piece. See *id.* at 1205, 1234–36, 1244–45. Ample intellectual space remains for analyzing the operation of immigration law in the context of U.S. colonialism.

Blackhawk argues, “American colonialism” is the concept that unites the distinct legal siloes of the plenary power doctrine,⁵⁸ then understanding the development and functioning of plenary power in the domain of immigration law is a necessary part of the broader, connective conversation that Blackhawk has prompted.

Blackhawk rejects the notion that the plenary power doctrine is a doctrine — and not just because, as others (including, notably, immigration law scholars) have pointed out, other explanations can be found for the seemingly exceptional judicial tolerance of invidious discrimination in these decisions.⁵⁹ For Blackhawk, the problem is more fundamental — consigning issues to the plenary power of the political branches constitutes not a doctrine of constitutional law, “but the absence of constitutional discourse.”⁶⁰ She contends that matters grouped under the broad heading of plenary power are more accurately understood as a doctrinal “effort to fill the void left by the racialized hierarchy that many used to justify American colonialism and shield us from the difficult constitutional conversations that remain across the seemingly disparate, but ultimately connected ‘external’ constitutional fields.”⁶¹

But the development of immigration law suggests that plenary power in U.S. constitutional cases is not *just* an “absence” of constitutional discourse that avoids directly confronting racial legacies. It is also a substantial, if malleable, doctrinal vessel — one that has been forged from other sources of law, but that can be detached from the original source materials, including when that source material becomes less effective in service of the colonial project.⁶² In fact, we can see this pretty clearly in the relationship between international law and immigration law plenary power.

The Constitution does not grant immigration powers to the federal government expressly. Unlike the Territories Clause, or the Indian Commerce Clause, which govern other areas of the U.S. colonial constitution, there is no text to point to when it comes to federal power over

⁵⁸ Blackhawk, *supra* note 1, at 19–20 (arguing that scholars have long noted that the “plenary power doctrine [is] the common thread weaving together these fields but have puzzled over what we should make of the connection”).

⁵⁹ Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 257 (2000) (conceding that the Supreme Court has upheld various forms of invidious discrimination in immigration law that would be impermissible in other areas of law, but arguing that many of these decisions were handed down at a time when the Court tolerated such discrimination across contexts, including in domestic applications to citizens). *But see generally* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There A Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000) (disputing the doctrine’s demise).

⁶⁰ Blackhawk, *supra* note 1, at 19.

⁶¹ *Id.* at 19.

⁶² Cf. ANGELA NAIMOU, *SALVAGE WORK: U.S. AND CARIBBEAN LITERATURES AMID THE DEBRIS OF LEGAL PERSONHOOD* 6 (2015) (“[I]t is not the absence of law but rather its presence as a productive force that invents forms of legal injury and categories of degraded legal personhood . . .”).

immigration.⁶³ Though nineteenth-century jurists sometimes leaned on Congress's power to regulate commerce and naturalization, and its power to declare war, none of these inherently require a federally consolidated immigration power, or any power to restrict individuals' movements across borders.⁶⁴ Perhaps the absence of clear constitutional text on the subject explains why the Supreme Court cited no authority of either domestic or international law when it stated in 1889:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.⁶⁵

Many of the tenets of liberal theory that undergirded the U.S. Constitution at the Founding “become incoherent if one suspends the premise of free movement.”⁶⁶ By and large, however, international law by the late nineteenth century did support the Court's assertion, as is evident in its ruling a few short years later in *Fong Yue Ting v. United States*.⁶⁷ There, the Court drew heavily on international law to justify the conclusion that the federal government's right to expel noncitizens present in the United States was as “absolute” as its right to exclude.⁶⁸ How did international law develop in this way? With the growth of its empire and the abolition of slavery within it, British efforts to control the movement of its subjects across national borders became more challenging.⁶⁹ Legal scholars writing from the centers of colonial powers

⁶³ See STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 110 (7th ed. 2019) (“The federal government of the United States generally possesses only those powers that are either enumerated in the Constitution or ‘necessary and proper’ for executing the enumerated powers. And nowhere does the Constitution expressly authorize the federal government to regulate immigration.”).

⁶⁴ *Id.* at 110–14.

⁶⁵ *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889). The Court later continued, again citing no authority while also making clear the racial dimensions of the “security” project that the Court sought to advance:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.

Id. at 606. The Court ultimately pointed to a handful of mid to late nineteenth-century sources to support its conclusion that the federal government has the “conclusive” power to exclude noncitizens. See *id.* at 606–09.

⁶⁶ RADHIKA MONGIA, INDIAN MIGRATION AND EMPIRE: A COLONIAL GENEALOGY OF THE MODERN STATE 28 (2018).

⁶⁷ 149 U.S. 698 (1893).

⁶⁸ *Id.* at 705.

⁶⁹ For a discussion of the rise of borders and passports as a means of controlling the movement of now-“free” labor within the British Empire, see generally MONGIA, *supra* note 66, at 55.

met this, and related, challenges by legitimating the control of movement across borders in international and domestic law. Thus, by the late nineteenth century, the U.S. Supreme Court was able to draw upon the writings of the likes of Emer de Vattel and Theodore Ortolan, contemporary international legal scholars, to conceive of the federal sovereign prerogative as absolute when it came to defining and defending external borders.⁷⁰ The Court found no role for itself to “say what the law is” in this context.⁷¹ Though the Court signaled its ability to review administrative actions for compliance with congressional legislation, it also made clear in later rulings that there was no obvious space for individual constitutional claims, even when the political branches exercised their sovereign prerogative in ways that defied existing conceptions of due process or equal protection of the law.⁷²

International law has, of course, evolved since the nineteenth century. Yet numerous scholars working in the tradition of Third World Approaches to International Law⁷³ (TWAIL) have explained how contemporary legal notions of sovereignty, and accompanying conceptions of the sovereign right to exclude, remain central to the maintenance of the power structure of the colonial order in a post-colonial world.⁷⁴ The modern passport — which allows certain bearers to permeate border barriers that are closed to others — evolved as a central component of contemporary sovereignty, and “the passport not only is a technology *reflecting* certain understandings of race, nation/nationality, and state but [also] was central to *organizing* and *securing* the modern definition of these categories.”⁷⁵ The result is a global immigration law regime

⁷⁰ *Fong Yue Ting*, 149 U.S. at 707–08 (citing EMER DE VATTEL, LAW OF NATIONS bk. 1, ch. 19, §§ 230–231 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758); THÉODORE ORTOLAN, RÈGLES INTERNATIONALES ET DIPLOMATIE DE LA MER 297 (Paris, Librairie de Henri Plon 4th ed. 1864)).

⁷¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *United States ex rel. Knaff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (“[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (applying this principle to affirm the exclusion of a longtime lawful permanent resident on the basis of secret evidence).

⁷² See *Mezei*, 345 U.S. at 217 (Black, J., dissenting) (“Mezei’s continued imprisonment without a hearing violates due process of law. No society is free where government makes another person’s liberty depend upon the arbitrary will of another.”).

⁷³ For a brief background on TWAIL, see Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77, 79–88 (2003).

⁷⁴ See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 11 (2005); Achiume, *supra* note 40, at 1519; Darryl Li, *From Exception to Empire: Sovereignty, Carceral Circulation, and the “Global War on Terror,”* in ETHNOGRAPHIES OF U.S. EMPIRE 456, 457–58 (Carole McGranahan & John F. Collins eds., 2018); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELB. J. INT’L L. 392, 410, 435–36 (2013).

⁷⁵ Radhika Vyas Mongia, *Race, Nationality, Mobility: A History of the Passport*, 11 PUB. CULTURE 527, 528 (1999).

that creates racial borders around moving bodies in ways that replicate racialized, colonial patterns of subordination.⁷⁶

Given TWAIL scholars' dim view of *contemporary* international law, including its sustained justification of oppressive forms of migration control in the guise of humanitarian law,⁷⁷ it is striking to note the extent to which U.S. notions of national sovereignty are even more problematic than modern international law. When it comes to the regulation of migration, U.S. constitutional law largely remains frozen in the nineteenth century, particularly in its treatment of national sovereignty as absolutely trumping individual rights. This archaic conception of state sovereignty places the United States out of step even with other postcolonial states when it comes to recognizing the rights of migrants. State power over migrants is (at least formally) acknowledged to have some limits in international law, and in many jurisdictions around the world.⁷⁸ But under the U.S. Constitution, those limits seldom manifest. The Supreme Court has not interpreted any part of the Constitution to protect the individual rights of migrants seeking admission, independent of the grace of the political branches.⁷⁹ Nor are the Constitution's

⁷⁶ See generally E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445 (2022).

⁷⁷ See, e.g., B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 361 (1998).

⁷⁸ For a discussion of international agreements and cases that formalize limitations on the sovereign right to exclude in cases involving noncitizen residents, see, for example, David B. Thronson, *Closing the Gap: DACA, DAPA, and U.S. Compliance with International Human Rights Law*, 48 CASE W. RESV. J. INT'L L. 127, 127 (2016). For further discussion of contemporary international law limits on the sovereign power to exclude, see, for example, Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 EUR. J. INT'L L. 901, 902 (2016); JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 8–10 (2007); James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 818–22 (1983).

⁷⁹ The domestic codification of the protections of the Refugee Convention into federal law in 1980 is an obvious example of such legislative grace. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.). But the limited protections that Congress created for a narrowly defined class of bona fide refugees are under recurring threat and increasingly unenforceable. Press Release, Off. of the U.N. High Comm'r for Hum. Rts., New US Border Enforcement Actions Pose Risk to Fundamental Human Rights — Türk (Jan. 11, 2023), <https://www.ohchr.org/en/press-releases/2023/01/new-us-border-enforcement-actions-pose-risk-fundamental-human-rights-turk> [https://perma.cc/BP3R-CX8X]; HUM. RTS. FIRST, BIDEN ADMINISTRATION ASYLUM BAN: WIDELY OPPOSED MISSTEP VIOLATES LAW AND FUELS WRONGFUL DEPORTATION OF REFUGEES 1–2 (2023), https://humanrightsfirst.org/wp-content/uploads/2023/06/Asylum_Ban_Final_Rule_Factsheet_6.28.pdf [https://perma.cc/89YQ-7AAU]; Austin Kocher, *Glitches in the Digitization of Asylum: How CBP One Turns Migrants' Smartphones into Mobile Borders*, SOCIETIES, June 20, 2023, at 1, 5. When it comes to admitting noncitizens to the United States, the political branches of the federal government are formally limited only when the exclusions of those noncitizens would violate the rights of U.S. residents, including their speech and associational rights and their legal protections against racial and religious discrimination, but such legal protections almost never actually operate to invalidate federal immigration policies. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2401–02 (2018) (upholding the Trump Administration's travel ban policy notwithstanding significant evidence that the ban was motivated

structural allocations of power designed to protect the rights of legal outsiders. And this, too, is a legacy of colonialism.⁸⁰

Any glimmers of possibility that things might be improving on this front have been snuffed out by the current Court. In *Trump v. Hawaii*,⁸¹ the Court employed reasoning that bore many of the hallmarks of late-nineteenth-century immigration cases. It addressed a ban on immigration from several predominantly Muslim countries that had been enacted to effectuate a President's express campaign promise to engage in religious discrimination at the nation's borders.⁸² Though the Court purported to review the ban, and did not invoke the plenary power doctrine, it employed a standard so deferential that any display of religious animosity, once properly bureaucratized, would convert into a constitutional exercise of power by the political branches in the realm of border control.⁸³ The shadow of plenary power was also evident in the ways that the challenge to the entry ban had to be asserted by U.S. citizens, residents, and organizations rather than by noncitizens outside of the United States subjected to the ban.⁸⁴ Given the extant case law, developed in the heyday of the plenary power doctrine, excluded Muslims did

by discriminatory animus toward Muslims and disproportionately affected Muslims negatively). The federal judiciary has also acknowledged some limits on the government's ability to discriminate against noncitizen residents on the basis of their immigration status, but such limits have largely been spelled out as against states and localities. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982). The Court has given Congress broad license to discriminate against noncitizens on the basis of their immigration and citizenship status, see *Mathews v. Diaz*, 426 U.S. 67, 80 (1976), and even when domestic laws bear strong hallmarks of racial discrimination, courts have been reluctant to strike them down when they touch upon immigration enforcement matters, see, e.g., *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1138 (9th Cir. 2023) (declining to strike down a federal criminal law despite evidence that its passage was motivated by anti-Mexican racism and evidence that the law continues to be applied disproportionately as against Mexican and Central American migrants).

⁸⁰ Cf. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1609–10 (2009) (“National sovereignty, federalism, separation of powers, and plenary power are all central legal principles on which the United States was founded. Each term embeds a racialized history in which race and law were mutually constructed.” (footnotes omitted)).

⁸¹ 138 S. Ct. 2392.

⁸² *Id.* at 2417.

⁸³ *Id.* at 2420. For a discussion of the chef's kiss overruling of *Korematsu v. United States*, 323 U.S. 214 (1944), in this context, see Anil Kalhan, *Trump v. Hawaii and Chief Justice Roberts's "Korematsu Overruled" Parlor Trick*, AM. CONST. SOC'Y: EXPERT F. (June 29, 2018), <https://www.acslaw.org/expertforum/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick> [<https://perma.cc/GY84-RKH7>].

⁸⁴ See *Trump v. Hawaii*, 138 S. Ct. at 2407. Even still, the government argued that the claims of citizens and domestic organizations should be barred by the doctrine of consular nonreviewability: “because aliens have no ‘claim of right’ to enter the United States, and because exclusion of aliens is ‘a fundamental act of sovereignty’ by the political branches, review of an exclusion decision ‘is not within the province of any court, unless expressly authorized by law.’” *Id.* (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950)). The Court did not resolve this question, assuming without deciding that it had the power to review the plaintiffs' claims. *Id.*

not even have legal grounds upon which to contest their discriminatory exclusions in federal court.⁸⁵

In a very different context, but one that again shows the shadowy persistence of plenary power, the Court recently announced new limits on habeas review for immigrants in U.S. detention facilities on U.S. soil. In *Department of Homeland Security v. Thuraissigiam*,⁸⁶ the Court concluded that a noncitizen detained on U.S. soil had no ability to bring a federal habeas claim in U.S. courts to contest the procedural deficiencies of the asylum proceedings that had resulted in his detention.⁸⁷ The Court, in an opinion by Justice Alito, reasoned that “[h]abeas has traditionally been a means to secure *release* from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country.”⁸⁸ The fact that unlawful detention is the direct result of an unlawful proceeding does not render the claim cognizable to the Court.⁸⁹ The plenary power doctrine is not invoked here either, but the decision defends a muscular version of the sovereign prerogative to exclude — one that extinguishes all of Thuraissigiam’s legal rights.

Finally, U.S. courts have been unwilling to effectuate any limits on the power of the political branches to deport immigrant residents, including those with families, friends, workplaces, and church communities in the United States, no matter how long those immigrants have been in the country, no matter how long ago they engaged in any purportedly offensive conduct, and no matter how thin their connections to their countries of nationality.⁹⁰ This, too, makes the United States an outlier as compared to both its neighbors and to former colonial

⁸⁵ See *id.* at 2419; see also *Kerry v. Din*, 576 U.S. 86, 88 (2015) (plurality opinion) (rejecting a constitutional due process challenge lodged by a U.S. citizen to challenge the exclusion of her noncitizen husband without any substantive explanation); *Kleindienst v. Mandel*, 408 U.S. 753, 754, 770 (1972) (framing, and rejecting, a First Amendment challenge to the exclusion of a noncitizen in terms of the First Amendment associational rights of U.S. citizens).

⁸⁶ 140 S. Ct. 1959 (2020).

⁸⁷ *Id.* at 1963–64. The decision is both ahistorical and entirely predictable as an embodiment of the logics of colonialism. See Jennifer M. Chacón, *Birth of a Nation: Race, Regulation and the Rise of the Modern State*, 33 *CULTURAL DYNAMICS* 257, 257, 259 (2021) (reviewing MONGIA, *supra* note 66).

⁸⁸ *Thuraissigiam*, 140 S. Ct. at 1963.

⁸⁹ Once in detention, migrants in the United States have little recourse to courts. They can be detained indefinitely without access to bond hearings, even when their removability is a legally disputed fact. See Margaret H. Taylor, *The Story of Demore v. Kim: Judicial Deference to Congressional Folly*, in *IMMIGRATION STORIES* 356–57 (David A. Martin & Peter H. Schuck eds., 2005); *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (affirming the legality of mandatory, indefinite detention during the pendency of removal proceedings). In these cases, again, absolutist notions of sovereign power vis-à-vis individual migrants are a central feature of the reasoning. See *Demore v. Kim*, 538 U.S. 510, 526 (2003); *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1832 (2022).

⁹⁰ See, e.g., BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 52–54 (2006).

powers.⁹¹ In our system of deportation, which disproportionately targets Black and Latine migrants,⁹² the racial dimensions — and the racial violence — of plenary power are continuing features of the U.S. immigration landscape.

The free hand with which the political branches deal with those “outside” of the nation’s borders, and the Court’s complicity in blurring those borders to extinguish rights claims well within them, have wounded the borderlands. The absence of meaningful checks on borderlands federal power⁹³ has facilitated the heavy militarization of the southern border, and aggressive, racialized patterns of immigration enforcement throughout its interior.⁹⁴ It has generated countless fractured families,⁹⁵ a deadly detention archipelago that now reaches every corner of the nation,⁹⁶ and a web of surveillance.⁹⁷ And it is overwhelmingly Latine families, and often Black and Indigenous migrants, who pay the price for the violent efforts to keep the border selectively closed.⁹⁸ All of this suggests that borderlands constitutionalism might be less insistent

⁹¹ See Thronson, *supra* note 78, at 131.

⁹² Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 *LATINO STUD.* 271, 275, 282 (2013) (noting that “the vast majority of deportees are Black and Latino working class men,” *id.* at 275, and that “[o]verwhelming[ly] and conclusively, selective law enforcement has selected Latino and Black Caribbean working class men” for deportation, *id.* at 282); see also TANYA MARIA GOLASH-BOZA, *DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR AND GLOBAL CAPITALISM* 142, 144 (2015) (contending that “[p]roportionally speaking, Jamaicans and Dominicans were the [L]awful [P]ermanent [R]esidents most likely to be deported,” *id.* at 142, and that “[B]lack [people] and Latinos have an almost exclusive presence among detainees and deportees,” *id.* at 144); Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 *CALIF. L. REV.* 63, 65 (2021) (noting that “a significant number of the individuals now being detained [at the U.S.-Mexico border] are people of Indigenous origin, including Kekchi, Mam, Achi, Ixil, Awakatek, Jakalteq, and Qanjobal”).

⁹³ See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 537–38 (1985); *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004); *Egbert v. Boule*, 142 S. Ct. 1793, 1800 (2022).

⁹⁴ Chacón, *supra* note 5, at 145–48.

⁹⁵ BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* 153 (2019); JANE LILLY LÓPEZ, *UNAUTHORIZED LOVE: MIXED-CITIZENSHIP COUPLES NEGOTIATING INTIMACY, IMMIGRATION, AND THE STATE* 26 (2021).

⁹⁶ See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 *UCLA L. REV.* 1346, 1382–83 (2014); Eileen Sullivan & Emiliano Rodríguez Mega, *8-Year-Old Migrant Died After a Week in U.S. Detention*, *N.Y. TIMES* (May 19, 2023), <https://www.nytimes.com/2023/05/19/us/politics/8-year-old-migrant-died-border.html> [<https://perma.cc/Y933-2KDL>]; Jonathan Capriel, *Immigrant Advocates Sue ICE over Detainee Death Records*, *LAW360* (Sept. 14, 2023, 10:00 PM), <https://www.law360.com/immigration/articles/1721352/immigrant-advocates-sue-ice-over-detainee-death-records> [<https://perma.cc/5T9D-E34W>]; *Mapping U.S. Immigration Detention*, *FREEDOM FOR IMMIGRANTS*, <https://www.freedomforimmigrants.org/map> [<https://perma.cc/U8Q7-4ASZ>]; HEIDI ALTMAN & MARTA ASCHERIO, *NAT’L IMMIGRANT JUST. CTR., POLICY BRIEF: 5 REASONS TO END IMMIGRATION DETENTION I* (2020), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2020-09/September_2020-5_reasons_to_end_detention-FINAL-updated.pdf [<https://perma.cc/39BC-X6AW>]; cf. *ICE Detainees*, *TRAC IMMIGR.*, https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [<https://perma.cc/3UCC-VE4B>].

⁹⁷ See MUÑIZ, *supra* note 5, at 6; Anil Kalhan, *Immigration Surveillance*, 74 *MD. L. REV.* 1, 6 (2014).

⁹⁸ Golash-Boza & Hondagneu-Sotelo, *supra* note 92, at 285–87.

upon reflexive reinforcement of the hard legal borders of national sovereignty, and inclined toward a legal order premised upon the realities of global interdependence, or, more boldly, a global ethic of care.⁹⁹

Put differently, a more robust integration of immigration law into the discussion of the constitution of U.S. colonialism could help us to think more deeply about the many forms of colonialism and imperialism that Blackhawk lacks the space to address in her Foreword.¹⁰⁰ Communities across the globe have seen the imposition of a U.S. legal order well beyond the territorial borders of the United States. Blackhawk discusses this phenomenon in the case of the Philippines.¹⁰¹ But we might add to this a discussion of the Panama Canal Zone;¹⁰² the interventions by the United States in Central America on behalf of the United Fruit Company;¹⁰³ and a host of interventions to prop up dictatorial regimes friendly to the United States,¹⁰⁴ to displace leaders seen by U.S. elites as antagonistic to U.S. interests,¹⁰⁵ and, purportedly, to advance democracy.¹⁰⁶ Bearing heavy scars of U.S. influence, these places, too, might be productive sites of borderlands constitutionalism.

As climate change drives people — especially from marginalized and Indigenous communities — from their homes in these spaces of imperial intervention,¹⁰⁷ those individuals and communities who are fleeing will not benefit from late-breaking respect for the territorial borders of their homelands. Some of the value their territorial borders contain is being eviscerated by global climate change, cross-border contamination, and ongoing resource extraction.¹⁰⁸

Legacies of imperialism, through which power has been exercised outside of national borders without any commensurate, accompanying acknowledgement of rights or obligations, thus create the need to search

⁹⁹ Fiona Robinson, *Globalizing Care: Ethics, Feminist Theory, and International Relations*, 22 *ALTS.: GLOB. LOC. POL.* 113, 114 (1997).

¹⁰⁰ See Blackhawk, *supra* note 1, at 68 n.433.

¹⁰¹ *Id.* at 72–73.

¹⁰² See Benjamin D. Weber, *The Strange Career of the Convict Clause: US Prison Imperialism in the Panamá Canal Zone*, 96 *INT'L LAB. & WORKING-CLASS HIST.* 79, 92 (2019); MICHAEL E. DONOGHUE, *BORDERLAND ON THE ISTHMUS: RACE, CULTURE, AND THE STRUGGLE FOR THE CANAL ZONE I* (2014).

¹⁰³ See WALTER LAFEBER, *INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA* 118–20 (1984).

¹⁰⁴ See, e.g., Pascale Bonnefoy, *50 Years Ago, A Bloody Coup Ended Democracy in Chile*, *N.Y. TIMES* (Sept. 20, 2023), <https://www.nytimes.com/2023/09/11/world/americas/chile-coup-50-anniversary.html> [https://perma.cc/T2XP-RRAU].

¹⁰⁵ See, e.g., *id.*

¹⁰⁶ See Aslı Bâli & Aziz Rana, *American Overreach: Strategic Interests and Millennial Ambitions in the Middle East*, 15 *GEOPOLITICS* 210, 212 (2010) (analyzing the territorialistic dimensions of U.S. democracy work in the Middle East).

¹⁰⁷ See Riley & Carpenter, *supra* note 92, at 67.

¹⁰⁸ See *id.* at 103.

for new and creative borderland principles.¹⁰⁹ These borderland principles must acknowledge cross-border interdependence, entwinement, and obligation. They call out for more permeable borders and a global order in which individuals have much greater power to choose their homes and communities.

But how does this suggestion square with Blackhawk's call for the acknowledgment of "territorial sovereignty" as a principle of borderlands constitutionalism?¹¹⁰ Even if there is firm adherence to "nonintervention" going forward, the interconnected nature of our globe ensures continued social and climate spillover effects across borders.¹¹¹ Blackhawk advances territorial sovereignty as a means of redressing colonial pathologies,¹¹² and in the contexts in which she proposes this, it makes sense. But in figuring out how we move beyond colonial constitutionalism, we will also need to grapple with the difficult fact that territorial control is achieved at the expense of individual bodies, and that those most likely to be excluded when borders close are those who have been devalued in the intertwined global racial and economic order.

To be clear, I am not suggesting that the bid of colonized people for territorial sovereignty is the same thing as territorial appropriation and border control in the exercise of settler-colonial power. As Professors Angela Riley and Kristen Carpenter have explained, the concept of sovereignty itself means different things for different people and nations.¹¹³ It is nevertheless important to recognize that legal principles designed to protect one group of colonized people might increase the vulnerability of others, and that the instincts that one borderland community has about justice might not always mirror those of another. Here, we might see some divergences in the principles of borderlands constitutionalism that open up between the domestic borderlands and those that take us completely outside of the formal legal jurisdiction of the United States. These may not be insurmountable chasms, but they are tensions that will need to be addressed as we delve into the challenging questions that Blackhawk raises for us.

Blackhawk's Foreword also elegantly wrestles with the conundrum that simply "overruling" the plenary power of the political branches in

¹⁰⁹ For explorations of these themes in other contexts, see, for example, E. Tendayi Achiume & Asli Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 UCLA L. REV. 1386, 1396–429 (2021) (exploring the Libyan case, "where humanitarian intervention, counterterrorism, and migration control regimes in international law cannot be fully assessed absent engagement with empire and race," *id.* at 1391).

¹¹⁰ Blackhawk, *supra* note 1, at 103.

¹¹¹ See, e.g., PAUL J. ANGELO, COUNCIL ON FOREIGN RELS., CLIMATE CHANGE AND REGIONAL INSTABILITY IN CENTRAL AMERICA: PROSPECTS FOR INTERNAL DISORDER, HUMAN MOBILITY, AND INTERSTATE TENSIONS 2 (2022) ("[E]nvironmental degradation due to climate change will fuel volatility in Central America for decades to come, with disruptive spillover effects for neighboring Mexico and the United States.")

¹¹² See Blackhawk, *supra* note 1, at 103–05.

¹¹³ Riley & Carpenter, *supra* note 92, at 97.

the spheres of federal Indian law and the regulation of the nation's outlying territories would not provide the people of the borderlands the recognition and autonomy that they require, nor would it ensure that equal protection of the law would extend to these borderland residents.¹¹⁴ But what would “overruling” the plenary power doctrine do in the realm of immigration law?

In some ways, the question is hard to answer because the Court has not often invoked the doctrine in recent cases, leading some to question whether it matters, or even exists, in that legal realm.¹¹⁵ But if the notion of an exceptional sovereign prerogative — one that systematically favors the choices of the federal political branches over individual rights claims — is plenary power, then it seems still to be doing a lot of work in immigration law. Overruling it would mean subjecting the exercise of federal immigration power to ordinary standards of constitutional review.¹¹⁶ At first blush, however, this approach would seem to point toward *less* judicial deference to the political branches when compared to the status quo, even as Blackhawk's impulse in other borderlands contexts seems, at times, to be toward greater deference.¹¹⁷

On the other hand, judicial deference to the federal political branches' power over immigration matters has also made space for successful rights claims cast as preemption claims.¹¹⁸ In fact, some judicial rhetoric has suggested that the flipside of preemptive federal sovereign

¹¹⁴ Blackhawk, *supra* note 1, at 131–35.

¹¹⁵ *E.g.*, Chin, *supra* note 59, at 258; *see also* Margo Schlanger, *Symposium: Could This Be the End of Plenary Power?*, SCOTUSBLOG (July 14, 2017, 9:45 AM), <https://www.scotusblog.com/2017/07/symposium-end-plenary-power> [https://perma.cc/2FJ7-VAVK]. *But see* Johnson, *supra* note 59, at 304; Stephen H. Legomsky, *Immigration Exceptionalism: Commentary On Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307, 307 (2000).

¹¹⁶ It might also allow for the elevation of other values — such as labor protections — vis-à-vis migration control efforts. Currently, the notion of supreme federal power to regulate the nation's borders has prompted the Court to displace ordinary constitutional protections. *See, e.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985); *United States v. Flores-Montano*, 541 U.S. 149, 154–55 (2004). The Court has also cited the supreme importance of border control as a reason to refuse to apply the rights protections granted by statutes. *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) (holding that the requirements of the Immigration Reform and Control Act trumped the protections of the National Labor Relations Act, even when the two schemes were not necessarily in tension).

¹¹⁷ Blackhawk, *supra* note 1, at 143.

¹¹⁸ For example, preemption arguments have been used as a vehicle for seeking, and sometimes securing, antidiscrimination protections for certain immigrants. *See, e.g.*, HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 134–35 (2014) (exploring how “preemption maintains a commitment to nondiscrimination in immigration law by deciding who decides, rather than by directly monitoring the content of their decisions,” *id.* at 134). For a discussion of other legal principles that have created protections for the rights of immigrants notwithstanding federal plenary power over immigration, *see generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). Some have argued that plenary power is fundamentally a federalism argument, not a sovereignty claim. *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 32–38 (2015). Viewed as such, it can be understood to protect the rights of migrants vis-à-vis the states. *Id.*

power in the immigration sphere is unchecked state power to regulate migration.¹¹⁹ Here again, then, the way forward requires more than simply overruling plenary power. It might involve something like Blackhawk’s notion of a rational basis review informed by borderland constitutional principles.¹²⁰ Even so, the cross-cutting consequences of judicial deference to the federal political branches in the area of immigration law point to the complexity of redeeming the U.S. Constitution through borderlands constitutionalism principles. This also serves as a reminder that any attempt to develop such principles will require wrestling with the unique contexts of many borderlands, not to mention a variety of pathologies in U.S. law beyond plenary power.

IV. CONCLUDING THOUGHTS ON HOW WE KNOW WHAT WE KNOW

Scholars before Blackhawk have grouped the plenary power doctrine of immigration law with that of federal Indian law and the law governing the territories, as she herself acknowledges.¹²¹ When Blackhawk posits that the previously unidentified link between these (and other) doctrinal areas is “American colonialism,”¹²² she is definitely on to something. This is an important link that has been identified before by other scholars — including those working in the Critical Race Theory tradition.¹²³ It seems important to say this now.

Since the racial justice uprisings of the summer of 2020, Critical Race Theory (CRT) has been under political assault.¹²⁴ This attack on CRT

¹¹⁹ See, e.g., *Arizona v. United States*, 567 U.S. 387, 417 (2012) (Scalia, J., concurring in part and dissenting in part); Martin, *supra* note 118, at 35.

¹²⁰ Blackhawk, *supra* note 1, at 142.

¹²¹ *Id.* at 19–20.

¹²² *Id.* at 20.

¹²³ See, e.g., Natsu Taylor Saito, *Asserting Plenary Power over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427, 430 (2002); see also E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462, 1471 (2021) (exploring how “the old regimes of racial exclusion (sovereignty and citizenship) are repurposed to carry forward their subordinating work as new regimes of racial inclusion”); James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610, 1645 (2021) (using the case of Puerto Rico to illustrate the “similarities in the ways colonial empires were organized to prevent colonized peoples from holding colonial governments accountable”); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 2–3 (2000); Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1197 (2000); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1760 (2017) (noting the “logic of conquest” of plenary power).

¹²⁴ Fabiola Cineas, *What the Hysteria over Critical Race Theory Is Really All About*, VOX (June 24, 2021, 10:50 AM), <https://www.vox.com/22443822/critical-race-theory-controversy> [https://perma.cc/3H5N-W8SH]; Danielle M. Conway, *The Assault on Critical Race Theory as Pretext for Populist Backlash on Higher Education*, 66 ST. LOUIS U. L.J. 707, 717 (2022) (describing the legal

is part of a broader effort to shore up a constitutional jurisprudence framed around an exclusionary interpretation of the U.S. Constitution, and simultaneously to dismiss all discussions of structural racial inequities in U.S. laws and legal systems. Public schools across the country have been staging grounds for the resulting struggles.¹²⁵ And although it is technically true that CRT was never actually taught in almost any of these K–12 schools,¹²⁶ it is also true that CRT’s opponents were taking aim at something much broader, hoping to paint as “crazy” any critical interrogation, or depiction, of racial inequality in United States history.¹²⁷

In this Response, I briefly mentioned the incomplete and misleading history textbooks I was assigned to read in my middle school days.¹²⁸ I initially included that reference incidentally, but as I finish up the writing of this Response, it occurs to me that it relates more deeply to Blackhawk’s project, and to this Response. Despite moments of miseducation — moments that occurred at various (and, at least for me, frequent) points in time from kindergarten through law school — Blackhawk and I have had the benefit of the insights of people in our communities who have questioned the orthodoxies of exclusionary, colonial histories, and who have imagined and created more inclusive legal possibilities. Both she and I have also benefitted from the work of scholars who have modeled different ways of bringing the insights of outsiders into our legal analyses and arguments. If we are to ever have any hope of realizing Blackhawk’s deeply optimistic vision of a Constitution informed by borderland principles, then we must continue to fight for the teaching of the histories of the borderlands, and to uplift the scholars who bring those insights to bear in their legal analyses.

and political attacks on CRT); African American Policy Forum, *UCLA Law Review’s 2021 Annual Symposium (Day 1), Structural Inequality and the Law*, YOUTUBE, at 23:06 (Apr. 19, 2021), <https://www.youtube.com/watch?v=VkyYQqP2pApw> [<https://perma.cc/48BD-YUVZ>] (documenting remarks of Professor Cheryl I. Harris).

¹²⁵ Cineas, *supra* note 124; Theresa Montañó & Tricia Gallagher-Geurtsen, *Yes, Critical Race Theory Should Be Taught in Your School: Undoing Racism in K–12 Schooling and Classrooms Through CRT*, 69 UCLA L. REV. DISCOURSE 84, 86 (2022) (documenting the “protests against and bans on teaching Critical Race Theory” in K–12 schools); *see also* Linda S. Greene, *Critical Race Theory: Origins, Permutations, and Current Queries*, 2021 WIS. L. REV. 259, 267 (“[T]hese attacks on CRT are part of a movement to sustain a system in which Black, Brown, and the white poor are miseducated and undereducated in an increasingly carceral public school system and state.”).

¹²⁶ *See, e.g.*, Montañó & Gallagher-Geurtsen, *supra* note 125, at 87 (observing that “the explicit teaching of CRT is rare in K–12 schools, including in ethnic studies classrooms”).

¹²⁷ *Id.* at 86 (“Christopher Rufo gained national prominence by intentionally stoking fear and then blaming CRT: ‘The goal is to have the public read something crazy in the newspaper and immediately think of ‘critical race theory,’” he wrote on Twitter. ‘We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.’”) (quoting Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 3:17 PM), <https://twitter.com/realchrisrufo/status/1371541044592996352> [<https://perma.cc/TJSJ2-L72P>])).

¹²⁸ *See supra* note 32.

EPILOGUE

I wrote a good deal of this Response from my childhood bedroom in El Paso. On a hot summer morning, my brother took me and my two children to see some fossilized dinosaur tracks in Sunland Park, New Mexico, near the base of Mount Cristo Rey. The U.S.-Mexico border is a line in the sand a few meters to the south of where we stood, and we saw a Border Patrol vehicle bouncing across the rocky hills as we studied the dinosaur tracks, but it was far enough away from us that we could not see the faces of the agents, and they did not stop us. Soon, nothing remained of them but the tracks of their tires in the dusty road.

When we had seen the dinosaur tracks, we walked across the tire tracks and down to the banks of the Rio Grande, beckoned by a cooling breeze and the fresh bushes and grasses on the river's edge. The vibrant greens contrasted with the desert sands and low-lying, dusty scrub all around. We stood west of the river, at a place just north of where the river bends, where it no longer separates Mexico from the United States, and instead delineates the softer border dividing New Mexico from Texas on the ancestral lands of the Ysleta del Sur Pueblo. There, in the borderlands, the river runs, unfenced and free.