Not So Schizophrenic: The Founders' Understanding of Indian Affairs and the Constitution

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Tagged as : Native Peoples Law

Date : May 26, 2015

Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 **Yale L.J.** 1012 (2015).

Federal Indian law fits awkwardly in American constitutional doctrine, so much so that Justice Clarence Thomas has declared it "to say the least, schizophrenic." Tribal nations are sovereign to some degree—they are not bound by the U.S. Constitution, possess substantial sovereign immunity, have police departments, courts, and broad regulatory powers, and hundreds of U.S.—tribal treaties still influence federal law. Yet the federal government has tremendous power over tribes and their members, states have significant jurisdiction in their territories, and tribal jurisdiction over non-tribal citizens is limited. Only a few words in the Constitution directly reference Indians or tribes at all. Obsolete phrases in the Apportionment Clause and Fourteenth Amendment exclude "Indians not taxed" from the population for legislative apportionment. More importantly, the Indian Commerce Clause grants Congress the power to "regulate commerce . . . with the Indian tribes." Modern Supreme Court decisions locate Congress' broad authority in Indian affairs in the Clause; more recently, Justice Thomas and some scholars have argued that this power is narrowly limited to trade; while other scholars argue that the Clause provides a constitutional basis for both state exclusion from Indian affairs and tribal sovereignty.

In a groundbreaking new article, *Beyond the Indian Commerce Clause*, Gregory Ablavsky rejects all sides of this debate. Ablavsky convincingly argues that although a narrow construction of commerce is not consistent with original understanding, the broader implications of the Indian Commerce Clause are deliberately ambiguous. Following an emerging approach to constitutional history, Ablavsky looks beyond the words of the Clause and its limited history to a greater range of constitutional actors and a longer temporal context. Canvassing statements and correspondence by the Washington administration, state officials, and others, Ablavsky argues that the founders located the Indian affairs power in the general constitutional status of the United States, and particularly the interplay of the nation's military, territorial, commercial, and diplomatic affairs powers. (For the ways that concerns about Indian affairs affected the formulation of these constitutional powers, see Ablavsky's The Savage Constitution, 63 **Duke L.J.** 999 (2014).)

The founders' more holistic understanding of the constitutional source of the Indian affairs power helps explain some perplexing aspects of modern federal Indian law, and provides reasons to challenge some others. First, the historical evidence reveals a general agreement that federal Indian affairs power was exclusive of state authority, similar to the foreign relations power. This helps normalize some cases regarding state jurisdiction in Indian country, which appear to draw from ordinary preemption analysis, but whose results bear more resemblance to the field preemption applied in matters affecting foreign relations.

Second, the evidence provides a constitutional basis for the status of Indian tribes as at once sovereign and subordinate, or, as Justice Marshall declared in *Cherokee Nation v. Georgia*, "domestic dependent nations." The federal government recognized tribal nations as sovereigns, drawing on its diplomatic

relations and military power to deal with them, and recognizing their independence from ordinary domestic legislation. At the same time, the government asserted that its own status as a sovereign with control over territory limited tribal sovereignty, making tribes less than foreign nations. As a result, tribes could not enter into diplomatic relations with other nations, and the U.S. had ultimate authority over transfers of land by the Indian tribes. Thus both tribal inherent sovereignty and congressional plenary power—the inspiration for Justice Thomas' diagnosis of schizophrenia—originate in the law of nations and its incorporation in constitutional practice. The original understanding of tribal sovereignty, moreover, suggests that modern Supreme Court decisions err in claiming that that the dependent status of Indian tribes is inconsistent with their exercise of jurisdiction over non-Indians in their territory.

Others have made similar arguments regarding the constitutional basis for federal Indian law (and if there is one flaw in the article it its failure to sufficiently acknowledge the extent to which this is true) but Ablavsky's historical grounding of these arguments is unprecedented. This may be the most important article on the Constitution and federal Indian law since Philip Frickey's Marshalling Past and Present: Colonialism, Constitutionalism, And Interpretation in Federal Indian Law, 107 **Harv. L. Rev.** 381 (1993). It is relevant to many of the debates and doctrines in federal Indian law, and may well help generate new ones. It is worth reading for all interested in federal Indian law or constitutional history.

Cite as: Bethany Berger, *Not So Schizophrenic: The Founders' Understanding of Indian Affairs and the Constitution*, JOTWELL (May 26, 2015) (reviewing Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 **Yale L.J.** 1012 (2015)), https://lex.jotwell.com/not-so-schizophrenic-the-founders-understanding-of-indian-affairs-and-the-constitution/.