Re-Centering Federal Indian Law

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

What can Federal Indian Law offer public law as a whole? Supreme Court justices have famously dismissed Indian Law cases as "chickenshit" and "pee wee" cases,[1] and scholars have worked for generations to justify the meager recognition of tribal sovereign interests within public law. Maggie Blackhawk's wonderfully generative *Federal Indian Law as Paradigm*, however, convincingly argues that Indian law, far from an idiosyncratic backwater, is central to the history of public law in the United States and can provide valuable lessons for framing its future.

First, Blackhawk masterfully synthesizes the work of many scholars (including her own work on the Petitions Clause) to show the role federal Indian affairs has played in the history of government power. Indian affairs were central for the founding generation, figuring prominently in the debates over the Constitution and the early work of Congress and the Executive Branch. Concerns about foreign interference with tribal diplomacy, for example, inspired the first understanding that the Senate's advice and consent role with respect to treaties included only approval after the fact rather than participation in negotiations.

Indian affairs also shaped many of important early contests between the federal government and the states. Fletcher v. Peck (1810) was the first case in which the Supreme Court struck down a state statute, and the state and presidential resistance to the Court's invalidation of Georgia law in Worcester v. Georgia (1832) almost upended the ship of state. Indian affairs also contributed to the modern form of federal power. The executive branch first exercised extensive administrative powers by the mid-1800s in implementing treaties and Indian affairs statutes, while cases like Johnson v. M'Intosh (1823) and United States v. Rogers (1846) provided early judicial assertions of extraconstitutional national power. For some of the examples in the paper more work is necessary to show that treatment of federal power in Indian affairs actually influenced later public law doctrines and structures. But altogether Blackhawk powerfully makes her case that colonizing tribal nations and lands was not just America's other original sin, it was and remained a constitutive governmental and judicial proving ground.

The next section of the paper is even more original. Blackhawk argues that understanding the paradigmatic status of federal Indian law can provide an important new frame for understanding and addressing injustice. As many have written, the black-white, slavery-freedom, segregation-integration paradigm of race relations has stymied understanding of racism in America. An equal rights framework, moreover, has limited legal efforts to address it and contributed to a conceptual separation between rights and structure in constitutional law.

Blackhawk argues that a federal Indian law paradigm can address these problems. First, the most egalitarian moves in federal Indian law have always been structural and have always ensured that tribal nations have distinct forms of power rather than simply equal rights. Indeed, well before claims of "reverse discrimination" were used to undermine civil rights, "[n]ational constitutional rights [served] as a tool to further the colonial project against Native peoples." (P. 1798.) Federal Indian law and policy also reveal a long history of recognition of distinct forms of power that the standard paradigm might condemn as creating unequal rights. Recentering federal Indian law as paradigmatic, Blackhawk argues, might therefore normalize and encourage legal protection for collective rights, such as union organizing, or obligations of consultation and representation, rather than individual remedies.

This is a long, incredibly rich, article, and one could quibble with some of its assertions. For example, although the modern Supreme Court often stands in the way of efforts by Congress and the Executive to recognize tribal power, this has not always been the case, and the Court long played an essential role in preventing state and executive overreach. So federal Indian law provides no more evidence that the congressional and executive branches are better "suited to protect against majority tyranny" than any other field does. (P. 1796.) Second, blanket statements such as "[b]y contrast to other 'minority' communities, rights are feared in Indian Country rather than sought," (P. 1859), elides Blackhawk's own rejection of a structure-rights dichotomy and overlooks the important role that rights have played for Native people as well. But again, these are quibbles, and do not detract from the contributions of the piece.

In short, *Federal Indian Law as Paradigm* is a wonderful accomplishment, one that can provide a new basis for understanding the public law grounding of federal Indian law, and the federal Indian law grounding of public law as a whole.

1. Bob Woodward & Scott Armstrong, **The Brethren** 359, 58 (1979) (quoting, respectively, Justices Brennan and Harlan).

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