Shifting the Paradigm: Power, Rights and Equality in Constitutional Law

Author : Katie Eyer

Date : June 13, 2019

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

Federal Indian law might seem an unlikely paradigm around which to center our understanding of constitutional law. But as Maggie Blackhawk lays out in her excellent new article, *Federal Indian Law as Paradigm Within Public Law*, the history of Native Nations and indigenous peoples in the United States, and their treatment as constitutional subjects, is equally central to our constitutional history as slavery and Jim Crow. And yet it is far less common for Native history to play a role in our canonical stories and in our understandings of what constitutional law does, or ought to, provide.

Reading Blackhawk's article is itself a potent reminder of just how little of the legal history of Native Americans' relationship to the U.S. government is taught in conventional constitutional law classes. Although the cases and practices she describes in many instances have deeply informed our modern constitutional understandings—of the treaty power, the war power, the plenary power doctrine, and others—most will be unfamiliar to those outside of the federal Indian law field. Unlike Dred Scott, Plessy, Brown, and others, no similar canon or anti-canon of federal Indian law cases forms a common vocabulary for our understanding of the Constitution's basic principles.

As Blackhawk's article makes clear, our neglect of the federal Indian law paradigm is not only a matter of erasing from public memory our nation's brutal history of colonialism and the subordination of Native peoples (though it is that too). Rather, as Blackhawk puts it, "Scholars, practitioners, and courts draw…on paradigm cases and model examples in the stories we tell about the Constitution and how constitutional law works. It is through these stories that we convey and discuss questions of constitutional theory and that we build our constitutional canon and anti-canon." (P. 1804.)

Placing Native history at the center of the canon, alongside slavery and Jim Crow, leads to different results. In Blackhawk's words "identifying colonialism at the heart of our constitutional law doctrines ought to open a conversation as to whether those doctrines should remain good law or should be discarded alongside *Dred Scott* and *Plessy v. Ferguson* as constitutional failures." (P. 1805.) So too, "[l]essons drawn from understanding the role of colonialism and its tension with constitutional democracy could provide descriptive and normative guidance to a range of general principles within public law—most notably, how to prevent constitutional failure and the abuse of state power." (P. 1806.)

Though Blackhawk describes a variety of contexts in which this re-centering could be important, she relies on equality law as her central example, and it is generative. As she points out, our canonical vision of minority protection, framed around the paradigm case of slavery and Jim Crow, has long revolved around federal protection and rights, not minority power—and inclusion and integration, not independence. Thus, our modern constitutional paradigm "presume[s] that minorities are best served by rights and national power." (P. 1846.)

As Blackhawk points out, the inadequacy and contingency of this centralized power-and-rights perspective becomes immediately apparent once Native peoples and Native Nations are placed at the center of our thinking. The violence and efforts at subordination targeted at Native Nations have been predominantly (though certainly not exclusively) effectuated at the hands of federal actors, acting under broadly construed federal powers. So too "rights" have, in Blackhawk's words, been "feared in Indian Country, rather than sought." (P. 1859.) Rather than a tool of empowerment, rights, to the extent they have been offered at all, have largely been used to weaken and undermine Native self-governance and self-determination.

In contrast, Blackhawk points to power as the central organizing principle of harm mitigation that emerges from a constitutional paradigm centered on Native Nations. As Blackhawk points out "[w]ithin Indian law, the federal government has used power to mitigate the colonization of Native Nations and the subordination of Native peoples." (P. 1862.) Understanding this as central, rather than peripheral, to our constitutional project leads to the conclusion that "[t]he empowerment of minorities should not only be celebrated, it should also be recognized as something foundational to American constitutional democracy." (P. 1863.)

Blackhawk's insights on this point ought to resonate deeply with those concerned with our constitutional equality law project. Power, and the autonomy and self-determination that come with it, are values that, as Blackhawk points out, are largely absent from our modern conception of constitutional equality law. (Though some, including a number of scholars who Blackhawk discusses, have urged their greater inclusion). And yet they are deeply important to many minority communities. From people of color, to people with disabilities, the working poor, and more, power and autonomy should be a key component of our thinking about how the Constitution ought to address issues of minority subordination and oppression.

Like most attempts at effectuating a fundamental paradigm shift, Blackhawk's article cannot hope to fully develop all of the nuances of her argument. Among the areas that could offer rich possibilities for future work is an elaboration of how her ideas relate to the paradigm case she seeks to supplement: the experience of African Americans in the United States. For although power and autonomy have not been the *constitutional* principles through which the harms of slavery and Jim Crow have been mitigated, they have long played a role in Black political thought and Black political movements. Indeed, even today political power and community control are among the central demands of the Movement for Black Lives. Yet modern examples of real power and autonomy being devolved to black or other minority communities are comparatively few, and often have been met with resistance and backlash.

Blackhawk's article also does not fully address the many genuine conflicts that can arise from devolving power to minorities, especially where communities are heterogeneous. Though she persuasively makes the case that a Native woman, whose community is told it must adhere to federal sex discrimination rights, has been in a meaningful and harmful way divested of power, she does not address how this might play out across other, potentially even more difficult, contexts. In an era in which many conservative Christians feel that they represent a minority perspective, and in which various Christian denominations are riven by internecine battles over doctrine and direction, this issue is surely not merely theoretical. Rather, it highlights the importance of integrating the paradigm on which Blackhawk would have us retrain our attention with the rights-protective paradigm that has emerged from the paradigm of African American exclusion.

Though Blackhawk's article does not (and could not) fully resolve these dilemmas, it offers important insights into what a path forward might look like. As Blackhawk points out, the path to constitutional harm-mitigation (i.e., power) in the context of Native Nations and Native peoples has not been exclusively, or even primarily, through the courts. Rather, it has been a project in which legislative, and sometimes executive, action has played a vital role—for better or for worse.

To the extent we are going to attempt to operationalize constitutional values of power and autonomy for other minority communities, this insight is surely of key importance. For while the courts may be an important site for developing Blackhawk's paradigm-shifting insights (and it is enticing to imagine contexts, such as state receivership of minority communities, which might provide a place to start), executive and legislative action at all levels of government will surely play a role. Not only are legislative and executive actors critical, by virtue of their ability to fundamentally obstruct or promote such a project, they are also arguably better equipped to consider the questions of how to address the inevitable conflicts between power and rights, or between different powers or different rights.

Ultimately, Blackhawk's article is a call for us to remember that "[t]he U.S. Constitution contained more than one compromise and more than one original sin at the Founding." (P. 1806.) As Blackhawk argues, colonialism, and the subordination of Native Nations and Native peoples, was central to our national project of constitution-making. As such, this history surely deserves a more prominent place in our constitutional canon—and anti-canon. And centering that

paradigm, alongside slavery and Jim Crow, can offer us new constitutional perspectives—on rights and power, federalism and sovereignty, and ultimately how our past constitutional mistakes ought to inform our constitutional present.

Cite as: Katie Eyer, *Shifting the Paradigm: Power, Rights and Equality in Constitutional Law*, JOTWELL (June 13, 2019) (reviewing Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 **Harv. L. Rev.** 1787 (2019)), https://conlaw.jotwell.com/shifting-the-paradigm-power-rights-and-equality-in-constitutional-law/.