In Plain View

Author : Christina Duffy Ponsa

Date : July 4, 2014

Gregory Ablavsky, *The Savage Constitution*, 63 **Duke L.J.** 999 (2014).

In this tightly argued and thoroughly engaging article, Gregory Ablavsky makes the case for a revisionist history of the U.S. Constitution that places Native American Indians at its center. While it isn't hard to show that conventional constitutional histories largely neglect Indians, it isn't easy to prove that such neglect is not benign. That is, it's one thing to argue that standard accounts should include a discussion of Indians, but it's another thing entirely to make a convincing case that core constitutional understandings would be fundamentally altered if historians fully and prominently integrated the history of relations with Indians into their narratives of the Constitution. Ablavsky aims for the latter, arguing that the history of the creation, drafting, and ratification of the Constitution should be rewritten with Indians in a leading role—and he does not miss the mark.

Ablavsky shows how concern over the problem of persistently hostile relations with Indians during the founding era informed James Madison's and Alexander Hamilton's competing Federalist arguments for a stronger central government. This isn't a modest proposal that we pause for a moment to consider how events on the periphery might shed some light on constitutional debates at the center. Rather, Ablavsky tells us that there is nothing at all peripheral about the frontier when it comes to founding-era debates about constitutional design. The problem of Indian relations, he argues, was central not only for settlers, but for the likes of Madison and Hamilton, and for their fellow delegates and the ratifying public, as they debated the best form of government for the nation they were building. Contesting views on how to solve that problem substantially contributed to shaping the visions they articulated for a more perfect Union, in ways constitutional historians have yet to recognize.

On the Madisonian account, which Ablavsky labels the "paternalist" view, "[o]nly scrupulous adherence to treaties [with Indians] and their rigorous enforcement against states and squatters… could avoid costly wars that had resulted from national weakness under the Articles" of Confederation. (P. 1037.) Such adherence and enforcement could only be accomplished with a stronger central government. On the Hamiltonian or "militarist" approach, in turn, "[o]verwhelming force alone seemed the solution to the problems of Indian affairs" (P. 1038), yet the force in question was to be aimed not at states and squatters, but at tribes—the "natural enemies" of the United States, in Hamilton's words (quoted at id.). According to Ablavsky, these competing understandings of the problem, and of what to do about it—paternalist on the one hand, militarist on the other—informed arguments at the convention not only concerning what became the Indian Commerce Clause, but also a range of related constitutional provisions. The Madisonian understanding comes into view in provisions directly involving treaties, including the Treaty Clause itself, the Supremacy Clause (with its inclusion of treaties), and the prohibition on states entering into "any Treaty, Alliance, or Confederation" (where the elimination of the words "with any King, Prince or State," which had appeared in the analogous provisions in the Articles, meant that the language now "prohibited the sort of state treatymaking that had been so problematic under the Articles." (P. 1043.) It is also apparent in the Property Clause (a.k.a. the Territory Clause), which gave Congress "explicit authority for the legally dubious Northwest Ordinance" (P. 1044), a document containing a provision on relations with Indians that "strongly reflected the Madisonian vision for the West" (P. 1045). Ultimately, however, it was the Hamiltonian or "militarist" approach to the problem of Indian relations that prevailed, according to Ablavsky, who makes the argument based not

only on other textual evidence (for example, the removal of the qualifier "foreign" from the Guarantee Clause now "required federal military intercession if Indians attacked" (P. 1047), and the provisions concerning military affairs "remedied weaknesses that had plagued the United States in its earlier dealings with Natives" (P. 1050)**)**, but also on structure (the states' retention of considerable power within their borders had important and recognized implications with respect to Indian affairs) and on what one might call "spirit," meaning of the expansionist sort (the federal state that emerged out of the founding moment was one committed to "empowering, not restraining, the inexorable westward tide" (P. 1050)).

Ablavsky's overall argument for the centrality of Indian affairs to founding-era constitutional debates relies even more heavily on ratification: as he explains, "discussions of the Constitution's likely effect on Indian affairs figured prominently in ratification, appearing in newspaper articles, pamphlets, letters, speeches, and even public toasts." (P. 1051.) Ablavsky delivers on this claim with quotations from contemporary sources such as one alluding to the need for a central government with the power to confront "murdering savages." (P. 1058.) But he also takes up the more challenging task of interpreting these debates in light of Indian relations even where the sources don't contain explicit references to Indians. The discussion here focuses again primarily on the treaty power, with Ablavsky arguing persuasively that relations with Indians informed ratification debates on the nature and implications of the federal government's power to make treaties at least as much as, if not more than, relations with Europeans (though he does take care at the same time to acknowledge that these two diplomatic fronts were substantially entangled).

In the closing pages of his article, Ablavsky turns to some of the broader legacies and implications of his argument for our understandings of constitutional history. The writing here is especially thoughtful and sharp, and the insights compelling. In a particularly elegant passage, he explains that federal financial and military support were crucial to Native dispossession, but that they were no more important than the militarist paradigm that cast settlers as victims and Natives as savages: "The specter of the 'sword of the Republic' undergirded all laws and treaties regulating Native interactions with the United States, often obviating actual bloodshed. Through this alchemy, 'lawless' violence was refined into the purer stuff of constitutional liberty and order." (P. 1079.) Another passage makes the somewhat more concrete point that the article's contributions are relevant to current debates about the domestic legislative effects of treaties, pointing out that Indian treaties, "perhaps the paradigmatic instance of treaties having domestic legislative effects,… were considered self-executing." (P. 1081.)

In short, "The Savage Constitution" accomplishes the considerable feat of offering a revisionist interpretation of founding-era debates about the Constitution, with the potential to transform received understandings of some of the most important topics in our constitutional history. It makes for a truly rewarding read.

Cite as: Christina Duffy Ponsa, *In Plain View*, JOTWELL (July 4, 2014) (reviewing Gregory Ablavsky, *The Savage Constitution*, 63 **Duke L.J.** 999 (2014)), https://legalhist.jotwell.com/in-plain-view/.