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“Federal Indian Law as Paradigm within Public Law”

ABSTRACT: U.S. public law has long taken slavery and Jim Crow segregation as a paradigm case to understand our constitutional law. Cases adjudicating issues of slavery and segregation form the keystones of our constitutional canon. Reconstruction, or the so-called “Second Founding,” and the Civil Rights Era form integral boundaries of periodization of our constitutional histories. Beyond description, slavery and Jim Crow segregation supplies normative lessons throughout public law about the strengths and failings of our constitutional framework. As the paradigm teaches: too much power in the states and not enough limitation on state power in the form of national power or rights, and America might again reenact this or similar atrocity. Although there is much to learn from this Nation’s tragic history with slavery and Jim Crow segregation, resting our public law on a binary paradigm has led to incomplete models and theories. This Nation’s tragic history with colonialism and the violent dispossession of Native lands, resources, culture, and even children offer different, yet equally important lessons on the strengths and failings of our constitutional framework.

In this Article, I argue for a more inclusive paradigm and explore the centrality of federal Indian law and this Nation’s tragic history with colonialism within public law. Currently, to the extent that federal Indian law is discussed at all within public law, it is generally considered sui generis and consigned to a “tiny backwater.” While I concede that the colonial status of Native peoples and the recognition of inherent tribal sovereignty do render aspects of federal Indian law exceptional, federal Indian law and Native history have much to teach about reimagining the constitutional history of the United States. Like that of slavery and Jim Crow segregation, federal Indian law offers important lessons about the strengths and failings of our constitutional framework.

Moving beyond the binary paradigm to include federal Indian law would allow interventions—both normative and descriptive—across a range of debates within public law, including the roles and powers of the distinct branches, the limits of judicial review, nationalism and particularly the nationalist project of the Marshall Court, vertical and horizontal separation of powers, the reach and limits of the Bill of Rights and the Supremacy Clause, and the role of sovereignty in structuring our Constitution. It has often been said that federal Indian law is “incoherent” and in need of reform, because the doctrine does not comport with general public law principles. But perhaps it is the general principles of public law, and the incomplete binary paradigm on which those principles rest, that are in need of reform. More than simple intervention, the inclusion of federal Indian law could lead to fundamental reformulation. A full catalogue is beyond the scope of this Article, but I offer an example here in the hope that it will invite more. As I’ll show, federal Indian law leads public law to a very different set of principles in the context of minority protection. In particular, it unsettles many of the presuppositions that underlie
our public law theories of how best to distribute and limit power in order to prevent
government abuse of minorities. By contrast to slavery and Jim Crow segregation, federal
Indian law teaches that nationalism is no panacea for majority tyranny, and that rights can
wound as well as shield minorities.