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Tribes, Treaties, and Constitutional Tribulations

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VINE DELORIA JR. & DAVID E. WILKINS

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INTRODUCTION

Almost every known human society bases its beliefs and institutions upon historical precedents, seeking to remain within the boundaries originally established by its founding ancestral line. Nevertheless, in the course of national existence human memory fades and mythological interpretations of the beginnings of human society take hold in the popular imagination. Eventually the past, in spite of all efforts to the contrary, becomes idealized in our view of national origins, and the hard facts of history, in particular those incidents and activities of which a nation is not proud, become deeply buried in the national psyche. Present views of reality are believed to have always prevailed, and bringing a corrective viewpoint to prominence is seen as disruptive and often heretical, as if the past existed only to reflect current prejudices.

So it is with American Indian nations and the U.S. Constitution. Today, when the idea and ideal of equality and the vision of homogeneity is popular and acceptable, many people assume that the Constitution provides ample direction for the solution of all social problems. Indian tribes in this view are simply another racial/ethnic minority—the original proprietors of the continent, but not qualitatively, legally, or politically any different than other racial/ethnic groups who have suffered various and continuing measures of discrimination in their effort to gain full citizenship status.

When confronted with the constitutional clauses that seem to distinguish tribal nations from other identifiable racial/ethnic groups, many people remark politely, if naively, that while the Constitution does indeed mention Indian tribes¹ and Indians generally,² the passage of time and the ratification of assorted treaty provisions, as well as the enactment of specific laws that enfranchised individual Indians or targeted particular classes of Indians or specific tribes as American citizens,³ have negated or at least significantly diminished whatever distinctive status or rights Indians were

thought to have retained. The best thing for tribal members to do, for those who support this logic, is to accept their present status as American citizens and work to make American society a better place in which to live.

These same people would not, under any circumstances, suggest that the progress in human rights and economic benefits that the majority has made over the past two centuries, due primarily to an expansive interpretation of the same constitutional clauses, be reduced, negated, or eliminated. Indeed, their tempers rise whenever someone suggests the unconstitutional basis for social security, federal insurance of home mortgages, or any of the benefits that have been made available through the liberal and contemporary interpretation of obscure constitutional wordings.

American Indians, therefore, face the worst of all possible situations when they attempt to clarify their status and rights. People who would grant great flexibility in determining the meaning of the commerce clause when applied to their own welfare find it incomprehensible when Indians expect the same pattern of interpretation of the same words when applied to their lands, their treaties, and their rights to self-government and the separate national existence this clause suggests. Even the most sympathetic non-Indians cringe at the thought of a coherent and consistent interpretation of Indian rights. They know, of course, that American history is replete with instances in which the Constitution and laws of the United States—and the three branches of the federal government that are charged with upholding the Constitution and drafting, implementing, and interpreting laws—have utterly failed to do justice to American Indian nations.

When we examine the relationship of American Indians as individuals and as tribal nations in their collective capacity to the Constitution, and subsequently to the U.S. government, we discover two basic avenues for discussion. We can pore over the constitutional debates, examine the correspondence of the founding fathers, review the arguments of *The Federalist Papers*, and investigate the activities of the first few congresses to determine what the Constitution originally meant when applied to American Indians. What, we ask ourselves, did the founding fathers intend the relationship with American Indian tribes to be? And how far toward or from that desired result has American history taken us? Such studies are useful in providing a context within which the constitutional relationship with Indian tribes can be examined and understood, but to be able to infer from what we gather, it is unrealistic to assume foresight on

the part of the founding fathers that can provide us with answers to today's problems. To reach intelligible conclusions, we would have to vest Washington, Jefferson, and others with prophetic powers that would do Nostradamus proud. We may uncover some principles of congressional intent of constitutional interpretation, but we cannot use these ideas to make sense of what consequently happened or to clarify the status and rights of Indians today.

The other avenue of approach is to study the ways in which the Constitution has been applied — or not applied — to American Indians as individuals and to the lands, treaties, and rights of Indian tribes as separate sovereign nations. This method combines legal and political theories with the events and incidents of our history. Its basic value is that it can be used not only to demonstrate the unfolding of constitutional ideas over a long period of time, identifying the process of erosion of the status of the tribes within the constitutional framework, but also clarify the shorter periods of time within which the necessities of history forced novel applications of constitutional principles as the only immediate solution to pressing intergovernmental problems involving tribes, states, and the federal government.

This book will concentrate on the manner and circumstances under which the Constitution of the United States was applied to American Indians — in both their individual and collective capacities — and to their lands, treaties, and rights; it will concentrate on the ways in which Indian peoples were often excluded from the just application of constitutional principles, particularly when they were excluded from the protections offered by the Constitution. In directing our attention to the specific incidents that mark this avenue of discussion, we will come to see that a massive corrective effort is needed to bring forward the misapplications and omissions of American history so that we can create a coherent and consistent interpretation of the relationship of tribal nations to the U.S. government (and the constituent states) and to the Constitution. Existing federal Indian law — that congeries of treaties, agreements, statutes, court cases, administrative regulations, etcetera — although assumed to be a logical unity, will more accurately be seen as a terribly fragile edifice, held together more by the historical and geographical circumstances of American Indians in their relation and proximity to western peoples, institutions, and rules than by any consistent or logical principles of jurisprudence that all Anglo-Saxon law is presumed to possess.

In order to give adequate expression to the many facets of this avenue of approach, we will first examine the status of the Indian tribes when they initially encountered Europeans, the ideas and legal/political doctrines that were used to explain their relationship to the “civilized world,” and the intellectual, emotional, and normative inheritance from this era of world history that provided the context within which the founders of the American republic derived their confederate and constitutional references to Indians. We will then examine the original basis for dealing with Indian tribes as articulated in the Articles of Confederation so that we can understand the shift in emphasis that occurred with the adoption of the Constitution as the organic document of the United States.

An examination of the various constitutional phrases that mention Indians or Indian tribes will give us some basis for seeing how Indians came to mind when the constitutional fathers dealt with the question of the smaller, culturally and politically distinct indigenous nations on their western frontier. We will see the dangers the tribes posed when they had sufficient independence and military capability and could choose to ally themselves with any of the European nations who had imperial designs on parts of the North American continent. These explicit constitutional clauses, however, only give us one-third of the context within which the relationship of American Indians and the United States began. In order to carry out its constitutional responsibilities, the government of the United States had to exercise a wide variety of political powers in comprehensive but changing geographical and historical settings. It was inevitable that in unexpected ways the expansion of the United States and its solutions to its own domestic problems would involve its relationship with Indian tribes. Consequently, there are numerous constitutional clauses and phrases that, over the course of American history, have come into importance and affected the status and rights of American Indians. Finally, and perhaps historically most important, is the relationship of the three branches of the federal government to Indian tribes. To what degree and in what measure has each branch dealt with Indian tribes, and to what degree has the Constitution provided each with authority to do so?

After examining these constitutional issues so that we have a proper bearing on the Constitution as a document authorizing the exercise of political power, we will trace the manner in which both explicit and implicit constitutional clauses have been interpreted when confronting the reality

of American Indian existence and rights. This investigation will be sufficient to provide a context within which an examination of the application of the constitutional amendments can be scrutinized. Did the amendments, which provide all American citizens with certain inalienable rights and privileges, include or exclude American Indians? What effect, if any, did the various Indian naturalization measures—especially the 1924 Indian Citizenship Act,⁴ which unilaterally bestowed U.S. citizenship to Indians—have on the status of tribes and their members? To what degree and with what effects did Indian inclusion or exclusion in the American social contract contribute to the development of a clear and reliable definition of the place of American Indians within the American political system? Or, on the contrary, has Indian inclusion or exclusion simply fostered a continual confusion and uncertainty about the status of indigenous peoples in the American political and constitutional matrix?

Finally, although many states are playing a far more active (though constitutionally debatable) role in tribal affairs, Indian tribes are the clear focus of federal concern and action, whether malevolent or benign. How has the status of Indian tribes changed as both explicit and implicit constitutional principles have been applied to them? Which changes can be justified within the scope of constitutional powers and which reflect only the political expediency of the day and have no legitimate authority apart from the application of irresistible force that has been available to and often wielded by the federal government? Determining the contemporary status of Indian tribes is one major test that can be invoked when examining the application of the Constitution to those tribes. Absent an informed consent by a tribe to be included within the constitutional framework, any action of the United States, no matter what the intentions, violates the basic premise of the social contract—that government depends upon the consent of the governed. The degree to which American Indian nations and Indian persons have or have not received recognition and protection from the U.S. Constitution is, in large measure, an accurate gauge of the capability of the Constitution to meet the needs of American society.