The Messy Core: Federal Supremacy and Property Recognition

Author : Ezra Rosser

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Gregory Ablavsky, The Rise of Federal Title, **106 Cal. L. Rev. 631** (2018).

The issue of who should own federal public lands is often an issue that raises the temperature of politics and protest, especially in the western United States. Greg Ablavsky's recent article gives us a historical analysis that provides some important answers to these questions.

In 2014, the federal government attempted to halt illegal cattle grazing on lands controlled by the Bureau of Land Management (BLM). For two decades, Cliven Bundy, a Nevada rancher, used the land and refused to pay the BLM grazing fees. But federal enforcement was blocked by armed supporters and private militia members who agreed with Bundy that the federal public lands are unlawful infringements on the rights of states and ranchers.

Two years later, a militia group led by Ammon Bundy, Cliven Bundy's son, seized federal buildings in the Malheur National Wildlife Refuge in Oregon. The occupation, fueled by antagonism to federal land management and control, lasted 41 days.

Federal public lands are especially significant in western states where the United States owns 47 percent of all land. The belief that public land properly belongs to either the states or to people living nearby is often grounded on assertions that federal ownership is somehow unconstitutional.

According to this theory, land within each state belongs to the state and there is no legal or historical basis for federal land holdings. Gregory Ablavsky's wonderful legal history article, The Rise of Federal Title, buries such arguments. It also puts an exclamation mark on one of the most important lessons of property law: that governmental recognition of title is fundamental to property ownership.

Ablavsky's article draws upon the history of western expansion across the Appalachian mountains from the original colonies and states to the fertile land beyond (especially present day Tennessee and Ohio) to show how the federal government came to have so much power over all aspects of land ownership in the territories and states. As numerous scholars have highlighted, although military conquest dominates the country's historical imagination, non-Indians acquired land from Indian tribes largely through purchases and agreements.

What Ablavsky adds is a sense of the messiness of land claims in the frontier, in the territories, and in newly admitted states. Ablavsky describes how speculators rushed to claim western land and how fortunes were made and lost on land speculation. Adding to the chaotic mix of speculative claims were those of veterans who had been promised western land for their service and those of individuals who unilaterally asserted the right to land based on state law preemption allowances.

Though *Johnson v. M'Intosh* is typically taught as the mechanism—through elevation of federal title over title acquired by an individual directly from an Indian tribe—by which many of these conflicting claims were resolved, Ablavsky situates it as more a "belated capstone to the nearly century-long struggle over private purchases." (P. 656.)

As The Rise of Federal Title shows, the low level governance practices of the federal government—the way that people came to rely upon federal government officials to resolve the many land conflicts—was arguably more important than broad legal pronouncements in establishing the primacy of the federal government when it comes to the ownership and control of land within the growing nation.

Turning to current debates, Ablavsky convincingly shows that there is no historical basis for arguments that federal public land should be turned over to the states. Although this was the cause célèbre of the Bundy family and enjoys the support of some conservative politicians, the idea that states rightly should have been admitted without the burden of internal federal land holdings or interests (national parks, BLM land, Indian reservations, etc.) has very little historical support.

The equal footing doctrine cannot do the work that those seeking federal land cessions are asking of the doctrine. Ablavsky critiques the Court's decision in *Shelby County v. Holder*, which purported to be based on the idea of equal sovereignty, as historically unsupported "arbitrary line drawing." (P. 694.)

There is a lot to this article. It is full of historical details that will interest those interested in everything from Indian land rights to matters of federalism.

The commitment of constitutional originalists to interpreting rights based on how those rights were understood historically ensures that there will always be an appetite and practical utility to legal histories of this sort. But for those more interested in the origins of property and not constitutional originalism, *The Rise of Federal Title* offers a more rich account of the importance of state recognition of property rights than typical origin stories for property, most notably Johnson v. M'Intosh and Harold Demsetz's classic article, *Toward a Theory of Property Rights*.

As Ablavsky demonstrates beautifully, conflicting claims to property abound, especially when governance structures are in flux. Untangling these claims required the acceptance of the federal government as the final land rights and governance authority. Ablavsky highlights that this acceptance came as a matter of practical necessities recognized by the states themselves.

Ultimately, property rights themselves depend less on natural law theories of how rights emerge from the commons and more on state, or better stated here "federal," recognition of those rights. The Rise of Federal Title is well worth reading for how it sheds light on western expansion and frontier land rights, but perhaps the article's most important contribution to property theory is the work it does to highlight the fundamental role official governmental recognition plays in creating recognized and enforceable property rights.

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