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Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis

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AMBIGUITY AND THE ACADEMIC: THE DANGEROUS ATTRACTION OF PAN-INDIAN LEGAL ANALYSIS

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Replying to Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

INTRODUCTION

Professor Philip Frickey's insightful *(Native) American Exceptionalism in Federal Public Law*[1] eloquently calls upon the Court to reject the "siren" of seeming coherence;[2] yet his academic *tour de force* ironically rests upon the same false synthesis and simplification of the varied tribal experiences into a shared set of digestible legal categories. The underlying conceit of federal Indian law is not found principally in the arrogance of plenary power of one sovereign over another, nor even in the harmonizing inclination of the post-1975 cases. Rather, it can be seen in the choice to treat all tribes as subject to the same pan-Indian legal regime.

In this Reply, I draw out the reasons a pan-Indian legal doctrine appeals to both the Court and legal academics and then briefly sketch out what the legal landscape would look like were the Court and academics to take seriously the independent sovereignty of *each* tribe. Disallowing ourselves the comfort that can be found in the simplicity of treating all tribes interchangeably will lead positively to more ambiguity of the sort Professor Frickey seems to favor and perhaps negatively to greater freedom for the Court to engage in its ad hoc, "what feels right" decision making. However, regardless of whether the positive or negative effects dominate — and I suspect that the positive effects would control — judicial and academic work that conceptualizes and analyzes tribes independently rightly hedges against the conceit that pan-Indian jurisprudence is appropriate.

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[1] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

[2] As characterized in Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 47 (2006), http://www.harvardlawreview.org/forum/issues/119/dec05/krakoff.pdf.

In describing a post–plenary power regime, Professor Frickey uses the "sheer number of tribes"[3] — "over three hundred tribes in the continental United States and over two hundred more in Alaska"[4] — to support his contention that "unilateral judicial termination" in such a scheme would be inappropriate.[5] According to the introduction to an Indian law textbook, Native Americans are "a wildly heterogeneous group of peoples":

> The differences are many: landed and landless tribes; large and small tribes; eastern and western tribes; "federally recognized," "non-federally recognized," and terminated tribes; reservation and urban Indians; traditional and more assimilated Indians; and special situations with their own distinct legal histories, such as the tribes of Oklahoma and Natives of Alaska and Hawaii. Other such categories could be drawn, all pointing to the danger of typing all tribes and Indians together . . . .[6]

Elsewhere I have described the dangers of stereotyping Indians given the number of different tribes,[7] but legal generalizations that treat all tribes the same are arguably more dangerous.

Federal Indian law, as decided by the Court and described by scholars, forces all tribes into the singular pan-Indian superstructure, resisting a more complex version of federal Indian law that would recognize the unique situation of each tribe. This amalgamation does a disservice to tribal individuality and glosses over the different tribal needs and the particular relationship and history that each tribe has with the federal government as well as with the neighboring non-Indian population. This idea is perhaps best expressed by morphing the memorable language from Professor Krakoff's reply: the current writing on Indian law found in the opinions of the Court and in most scholarship "is grounded in the erasure of, rather than the imperfect reconciliation of, the nation's" tribal diversity.[8]

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The Supreme Court's reductive tendencies express themselves in opinions simplifying particular controversies to their place within a pan-Indian framework. Justice O'Connor began her *Nevada v. Hicks*[9]

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[3] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 7 (1987).

[4] Frickey, *supra* note 1, at 481 (citing BUREAU OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, TRIBAL LEADERS DIRECTORY § 5 (Spring/Summer 2005)).

[5] *Id.*

[6] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 9 (5th ed. 2005).

[7] Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 256–57 (2005).

[8] Krakoff, *supra* note 2, at 48.

[9] 533 U.S. 353 (2001).

concurrence by criticizing "the majority's sweeping opinion."[10] Yet Justice O'Connor's concurrence participated in the majority's larger generalization of categorizing the Fallon Paiute-Shoshone Tribes as being identical to the tribes involved in the precedent cases. For although "Indian tribes are not all alike," the Court's use of precedent minimizes tribal distinctions.[11]

This conflation is clear in the Court's overwhelming reliance on history and law involving non-Suquamish tribes when considering the powers of the Suquamish Indian Tribe over non-Indians.[12] *Oliphant v. Suquamish Indian Tribe*[13] relied upon precedent involving a long list of tribes: the Cherokees, the Choctaw, the Shawnees, the Sacs and Foxes, the Utah-Tabeguache Band, the Delawares, the Thlinget, the Navajo, the Crow, the Chickasaw, the Sioux, the Omaha, the Ottoe and Missouria, the Wea, the Miami, and the Hoopa.[14] Given the institutional constraints of the Court, there is *some* justification for placing the Suquamish in the same category as all other tribes. Yet logically it is not clear that the rules developed for regulating other tribes should determine the powers of the Suquamish.

My concern is not entirely novel. Two recent law review articles share my critique of the Court's nonrecognition of tribal difference,[15] such as occurs when the Court uses precedent regarding other tribes interchangeably with that of the tribe under appellate review. Max Minzner's *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country* describes the twin background assumptions regarding tribal courts held by the Supreme Court: "that tribal courts are different from state and federal courts in fundamental ways" and "that tribal courts are homogenous in all important respects."[16] In response to the "current jurisdictional framework, [in which] tribes are treated differently from states but not differently from each other," the article advocates — as an initial correction to the Court's pattern of ignoring tribal differences — a move toward concurrent jurisdiction for tribes whose court systems are similar to Anglo-American courts.[17]

In *Against Tribal Fungibility*, Professor Saikrishna Prakash argues that recognition of tribal differences is imperative when considering

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[10] *Id.* at 387 (O'Connor, J., concurring in part and concurring in the judgment).

[11] Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 89 (2005).

[12] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[13] 435 U.S. 191.

[14] *See, e.g.*, *id.* at 197 & n.8.

[15] *See* Minzner, *supra* note 11; Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

[16] Minzner, *supra* note 11, at 103.

[17] *Id.* at 90, 114–15.

whether Congress has plenary power over particular Indian tribes. In his introduction, Professor Prakash writes:

> The Justices of the U.S. Supreme Court are an enlightened group who generally do not lump together people of the same background. Still, they seem to have grave difficulties noting important differences among the Indian tribes. Instead of determining how individual Indian tribes are differently situated, the Court treats the Indian tribes as wholly fungible.[18]

Professor Prakash presents judicial and scholarly views on the plenary power doctrine and then considers possible constitutional grounds for power over Indian tribes, concluding by "suggest[ing] that we must stop lumping together all Indian tribes."[19] The dominant focus is on Supreme Court opinions, and the two articles are in agreement that "[t]he lineage of the Supreme Court's decision to treat tribes as homogenous is long-standing."[20] However, Professor Prakash's "we" is expansive and includes Indian law scholars.

Professor Charles Wilkinson observes that for the sake of "predictable doctrine . . . the need for uniformity is real."[21] Yet whose need is being considered? The needs of tribes sometimes support uniformity. Professor Wilkinson argues that "a reasonably well defined matrix of doctrine" facilitates bargaining outside of the courtroom between tribes and states.[22] Additionally, reducing complexity through a shared doctrine, what I refer to as pan-Indian federal Indian law, reduces "the specter of repetitious litigation sure to drain the resources" of all parties — tribes, individual Indians and non-Indians, as well as federal and state institutions.[23]

Professor Wilkinson partially foreshadows Professor Frickey. The need to have courage in our confusions resonates particularly well given Professor Wilkinson's description of the "uniquely formidable obstacles to the development of consistent and unitary legal doctrine" in federal Indian law.[24] In his push for greater acceptance of ambiguity and Indian law exceptionalism, Professor Frickey reveals the major movements of the Court's pan-Indian doctrine and the current crisis in Indian law. My critique, which builds on that of Professor Prakash, is that Professor Frickey's article does so without acknowledging "Indian tribes [as] the basic unit in Indian law."[25] My critique is a limited one: Professor Frickey's argument to respect ambiguity in Indian law implicitly includes that heightened level of ambiguity that would accom-

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[18] Prakash, *supra* note 15, at 1070.
[19] *Id.* at 1109.
[20] Minzner, *supra* note 11, at 114.
[21] WILKINSON, *supra* note 3, at 9–10.
[22] *Id.* at 9.
[23] *Id.*
[24] *Id.* at 3.
[25] *Id.* at 7.

pany greater recognition of distinct tribes as the basic unit of Indian law.

Yet for many scholars, tribes are analyzed only collectively. Academics' reductive treatment of Indian tribes within pan-Indian doctrine reflects both the desire to create a predictable legal framework within which tribes can operate and the practical needs of scholarly productivity. Indian law scholars (and perhaps law review editors) favor articles with pan-Indian pronouncements that purport to describe legal ramifications affecting all tribes.[26]

The characteristics of pan-Indian scholarship relative to scholarship focused on a particular tribe can make the former more attractive to a legal academic for a number of reasons:

(1) Applying the same legal superstructure to each new problem adds simplicity and ease to scholarly production. Countless articles contain the same basic analysis — they begin with the foundational decisions of Chief Justice John Marshall and end with the ways in which the Court has begun to deviate from the earlier predictable form of analysis[27] (sometimes coupled with Felix Cohen's description of the retained powers of tribes[28]) — adjusted *slightly* as needed to explain the case or controversy involved in the particular article.

(2) Pan-Indian legal scholarship facilitates expansive, capture-all claims that are more likely than case studies to have a large readership.

(3) Even with case studies, academics often prefer an expansive claim to a more localized claim that keeps entirely to the particular tribal case study because it interests a larger audience and can apply to more circumstances. By accepting the pan-Indian conception of Indian law, a single tribal narrative can have larger resonance, entering and perhaps altering the larger dialogue. I have framed arguments with this in mind.[29]

(4) Distance between the law review author and the Indian community being analyzed arguably pushes scholarship towards the often more readily accessible pan-Indian source material. Authors who are separated from the Indian community being discussed — for example,

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[26] Professor Frickey's article is simply representative of the general trend of painting Indian law matters with a broad brush.

[27] The disconnect between the Marshall opinions and the current practices of the Supreme Court is perhaps best described in Professor Frickey's article, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

[28] *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122–26 (1942).

[29] *See* Ezra Rosser, *The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291 (2005) (relying on federal Indian law rather than the particular histories of the tribes involved to analyze two Supreme Court cases).

because they are non-Indian or have not worked or lived on a reservation[30] — may be more prepared to present their argument through standard legal analysis even when a closer examination of the particular tribe would have been more appropriate.[31] Even for authors with some connection to a particular tribe, teaching and other jobs can separate them physically or even culturally from the article's focal tribe.[32]

Given the institutional limitations of a busy judiciary looking to apply precedent, it is easy to understand why judges would prefer the less ambiguous legal structure that pan-Indian analysis facilitates. In contrast, one might suppose that with greater creative freedom, scholars in a field in which history is so central[33] would rebel against judicial simplification of all tribes to a single pan-Indian collective. Yet for law review authors, the preceding four reasons make working within a structure that does not focus too heavily on a particular tribe very attractive. Ultimately, I am in agreement with Professor Prakash's conclusion:

> The strange bedfellows, the courts and their academic critics, need to get out of their bed. To properly gauge federal power over Indian tribes, both must stop stereotyping Indian tribes and, instead, conduct a tribe-by-tribe analysis taking into account the treaties, land ownership, and other relevant circumstances of each tribe. Only then will America's sovereign wards truly come of age.[34]

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The scholarly act of looking at disparate cases and from those cases creating categories that can be used to predict future outcomes has inherent value, but it is critical not to lose sight of the basic units of Indian law: individual tribes. Professor Joseph Singer concludes his reply by writing that it is "important to recognize that advocates of

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[30] *See* Robert B. Porter, *Cleaning Up the Colonizer's Mess: An Important Role for Legal Scholarship About the Indigenous Nations*, 50 KAN. L. REV. 431, 433 (2002) ("As a whole, there are still very few American law professors who have the personal experience of working within a tribal legal or judicial environment . . . .").

[31] The ability to do research the same way one would do research in most other areas of law can be a powerful reason for this preference, but so too can be something as simple as the limited selection of Indian law materials in most law school libraries.

[32] The potential distance between Indian communities and an ethnically Indian law professor whose work is in Indian law is illustrated by Professor Robert Porter's discussion of the criticism that as a professor working within the "Western educational establishment," he might be collaborating in the demise of Indian communities. *See* Robert B. Porter, *Two Kinds of Indians, Two Kinds of Indian Nation Sovereignty: A Surreply to Professor LaVelle*, 11 KAN. J.L. & PUB. POL'Y 629, 645–48 (2002).

[33] *See, e.g.*, GETCHES ET AL., *supra* note 6, at 39 ("If, as Oliver Wendell Holmes said, the life of the common law is experience, then the life of Indian law is history.").

[34] Prakash, *supra* note 15, at 1120.

Indian rights need to tolerate ambiguity ourselves."[35] Insisting on the primacy of particular tribes might be in line with Professor Frickey's call for courage in our confusions.

What would the legal landscape look like in a tribe-centered approach to Indian law? The abundance of ambiguity could potentially paralyze the field by not respecting the need for uniformity identified by Professor Wilkinson. At least in the short term, the law governing each tribe would be more unsettled, and tribes, states, and the federal government would bear some costs as a result of this uncertainty. From a tribal perspective, such costs might be partially offset by the possibility that a case with bad facts involving one tribe might play less of a role determining the powers of a differently situated tribe. There is a hint of such a possibility in Professor Frickey's article: "Often the Court has taken one factual situation and spun a general common law rule out of it — either not recognizing or not caring that a one-size-fits-all solution should not be imposed on communities as radically varied as those composing America's Indian country."[36] However, to tease out the implications of this idea fully, legal scholars would themselves have to stop, even indirectly, treating tribes "as if they were fungible."[37] Successfully doing so would hopefully create more space for the unique sovereign powers possessed by each tribe individually.

CONCLUSION

By lumping all tribes into the same pan-Indian legal framework, Professor Frickey's writing does the same thing he accuses the Court of doing: harmonizing a system better left ambiguous. For academics, that they must work within the boundaries drawn by a judicial system that relies upon the conceit of a pan-Indian federal Indian jurisprudence does not justify staying strictly within the pan-Indian framework. Such a defensive position does not accord with the power of academics to help, through their scholarship, shape the field of federal Indian law. Articles that focus on the individual needs of particular tribes need not be considered mere case studies, for from such case studies courts might begin the process of recognizing that a decision related to the relationship of a tribe with the federal government or with non-Indians need not be the final word for all other tribes.

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[35] Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1, 9 (2005), http://www.harvardlawreview.org/forum/issues/119/dec05/singer.pdf.

[36] Frickey, *supra* note 1, at 484.

[37] Prakash, *supra* note 15, at 1071.