"New" Directions In Indian Law Scholarship: An Afterward

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This "afterword" to the "New" Directions in Indian Law Scholarship Conference held at the University of California, Berkeley School of Law on November 17, 2006, and sponsored by the National Congress of American Indians was written at the request of Professor Philip Frickey, a leading organizer of the conference. Phil gave me no direction and provided no guidance. He said, if I recall correctly, to write whatever I wanted. So here goes...

I. The Way Forward

I wholeheartedly agree that this is a propitious time to consider the "direction" of Indian law scholarship. This is so for three reasons. First, there is a new generation of committed Indian law scholars at the front end of their scholarly careers. Second, there is a general feeling that much recent Indian law scholarship lacks focus and is unsure of its audience and intended effect. The third reason centers on the observation that the landscape of much of Indian law has changed and expanded in such a way as to require new scholarly approaches and terms of engagement.¹

The essential point I want to make is that there are, in my opinion, essentially two paths of Indian law scholarship. They are paths that explore the sovereignty of power and the sovereignty of values, the path of resistance and the path of community. If we think of law in general — and Indian law in particular — its primary ingredients are power and values. Indian law jurisprudence in the modern era, especially at the Supreme Court level, is almost wholly about power and its distribution in Indian country, particularly between competing state and tribal sovereigns.

Many of us have written about this. The notions of plenary judicial power, common law colonialism, cultural assimilation, and countless others are all out

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1. To be sure, personal scholarly interests and the pursuit of tenure are powerful, if not dispositive, variables in determining what any scholar writes about. This little essay (and the conference itself) is more about what the field of Indian law needs from its scholars, not what scholars need from Indian law. Obviously, one does not preclude the other, but the focus here is on the former, not the latter.
there, which is good. Yet the Supreme Court keeps going its own way as the


The foundation principles of Indian law demand resistance to the temptation of judicial activism. A return to foundation principles, furthermore, would spare tribes the subjective judgments of courts by requiring congressional action, with the scrutiny of the political process and the tribes’ full participation, before modifying their rights as sovereigns. Indian rights do not depend on sympathy for the plight or historical mistreatment of Native Americans. Self-determination for tribes is rooted in ancient laws and treaties, and is protected against incursions except those that Congress deliberately allows. Well-meaning judicial attempts to balance and accommodate interests of Indians and non-Indians not only are inconsistent with the limited role of courts, as sanctioned by the foundation principles of Indian law, but are inevitably culturally charged.

Getches, supra, at 1654-55. Frickey discerns a seismic self-aggrandizing shift in the role of the Supreme Court in Indian law:

In the final analysis, in federal Indian law the Court has given the Congress much more legislative power than the text of the Constitution suggests, then bootstrapped that into a judicially enforceable power to clean up those areas of Indian affairs that Congress has not yet addressed. In establishing the plenary power of Congress over Indian affairs, the Court performed the perhaps disappointing, but nonetheless unsurprising, role of the “court of the conqueror” reflected in Johnson v. McIntosh — it deferred to established patterns and practices designed to centralize the colonial power in the political branches. In aggrandizing to itself a judicially enforceable “dormant” aspect of this power, however, the Court has become an actor imposing its own set of colonial values, not merely an agent of congressional choices. This second step seems remarkable, even given the realities of a colonial society. The Court has transformed itself from the court of the conqueror into the court as the conqueror.

Frickey, supra, at 68 (footnotes omitted). Pommersheim identifies this metastasis of plenary power:

The plenary power doctrine can now be seen as coming in two distinct vintages. There is the classic doctrine of congressional plenary power as established in Lone Wolf. Yet even if Congress has not acted — where one would normally presuppose an unimpaired tribal sovereignty — the Court now recognized a judicial plenary power to parse the limits of tribal court authority based on federal common law. A federal common law that at least heretofore has not been equated
self-appointed (and ultimate) "umpire" in much of Indian law. The Court calls it the way it sees it in each case; not as a matter of doctrine (with constitutional or even statutory roots), but largely as a matter of (political) preference and policy. The Court appears wholly indifferent to scholarship pointing out these inconsistencies and doctrinal shortcomings.

The tribes, their citizens, and just about everyone who works in the field of Indian law and policy already know this. As a result, perhaps, it is time to move away from our seemingly constant focus on the Supreme Court's increasingly despotic and anti-tribal jurisprudence and look elsewhere to expend scholarly effort — a scholarly effort that shifts its penetrating gaze away from the Supreme Court to a swath of important topics largely below, behind, and outside the current holdings of the Court. While there is considerable overlap, these efforts may still be roughly categorized as federal, state, and tribal in nature. Such efforts shift the angle of vision away from (federal) power, focusing instead on tribal endeavors to vindicate certain values in dealing with their own members; their relationships with the non-Indian and state community; and even decisions of lower federal courts and administrative agencies.

While it is fruitless to deny the importance of Supreme Court jurisprudence in Indian law, I think sometimes it is overemphasized. Much, even most, of Indian law takes place beneath the Supreme Court's radar. It takes place in lower federal courts, federal agencies, state arenas (e.g. state statutes, judicial decisions, tribal-state agreements), tribal councils, and trial courts. It is possible that such a "thick description" might even assist the Supreme Court to realize that its anti-tribe preference is misplaced, that tribes do "fit" as legitimate sovereigns that act competently and responsibly in carrying out their ancient mandate within a modern, democratic society.

On some level, Supreme Court jurisprudence in Indian law is immune from doctrinal analysis and criticism, because it is not engaged in doctrinal decisionmaking in the first instance. It is engaged mostly, perhaps solely, with identifying preference and setting policy. Recall, for example, Justice Scalia's frank admission in this regard:

[O]pinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but

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3. Of course, many scholars have already begun to explore these new directions, but as the transcript of the conference indicates, there remains much uncertainty and difference of opinion.

with any notion of implied divestiture of tribal authority.
Pommersheim, Tribal Courts, supra, at 328 (citations omitted).
have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional ‘expectations’ that it reflects, down to the present day.4

Thus, it appears to me that one more article about how the Supreme Court got it wrong will certainly not affect the Court’s thinking and will only tend to prove what is already obvious to everyone else in the field — the Court is motivated by preference, not doctrine.

Yet there are certainly significant areas under these inclement skies, where the weather may be much more temperate, if not completely sunny. Supreme Court jurisprudence, on the civil side of the Indian law docket, rarely creates black letter rules, but rather broad propositions that tilt against, yet do not foreclose, tribal regulatory or adjudicatory authority. There is much play in the joints of these decisions and thus there is a very valuable opportunity to review and analyze how tribal courts and lower federal courts have interpreted this play in the joints. There may be new and budding ways to identify what lower federal courts find most persuasive in tribal court analysis and decisionmaking, and to further explore such empirical and analytical components. Indeed, there may be something that might be replicated in other tribal and federal settings.

Much of what states do in Indian law does not receive the scholarly attention it deserves. There is, therefore, much fertile research ground in examining what states (individually and regionally) are doing in Indian law and affairs. What laws are state legislatures passing, what agreements are they making with Indian tribes, and what kind of judicial decisions are state courts making? The good, the bad, the ugly. Most tribes (and individual Indians) deal much more on a day-to-day basis with states than the federal government. Federal Indian law recognizes significant, even vast, areas for tribal-state interaction. What are states doing that is positive and productive and to be emulated, and what are they doing that is negative and inimical to a progressive tribal-state agenda?

If Supreme Court Indian law jurisprudence is driven not by doctrine, but by policy preference, then the greatest likelihood in affecting that preference is by demonstrating that tribes are effective, fair-minded sovereigns when dealing

4. Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990) (Duro v. Reina, No. 88-6546), in Papers of Justice Thurgood Marshall (reproduced from the Collections of the Manuscript Division, Library of Congress) (on file with author). These remarkable papers were opened to researchers after Justice Thurgood Marshall’s death, and Justice William Brennan’s papers also have been selectively opened to serious scholars. This quotation was originally cited in Getches, supra note 2, at 1575.
with states and individual non-Indians. It is probably fair to say that the Court knows little about how tribes interact with states and non-Indians; the Court needs to be educated not doctrinally, but practically — that is, to be able to "see" the things that tribes do as legitimate and well within the canon of what contemporary sovereigns do.

A. Federal Law

1. Lower Federal Courts

   None of the leading Supreme Court cases on the civil side including Montana v. United States, South Dakota v. Bourland, Strate v. A-1 Contractors, Nevada v. Hicks, and Atkinson Trading Post v. Shirley established black letter rules. Each case — to varying degrees — contains some open space, some play in its joints that provides an opportunity for Tribes to secure (jurisdictional) authority within the zones of play and flexibility. For example, what are some analytical suggestions to assist Tribes to satisfy the now famous Montana proviso? What can tribal lawmakers do, in making legislative findings, that are relevant to the proviso’s concern with “consensual agreements” and “political integrity, economic security or the trust and welfare of the Tribe?” Indian law scholars can do much to both illuminate these possibilities and aid tribal councils and tribal courts as they seek to navigate and to parse the details.

   There is also a complementary empirical component to advance such a scholarly push. Such a component would examine how tribal courts have

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To be sure, Indian tribes retain inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. (internal citations and footnotes omitted).

11. Id.
approached the issue of the *Montana* proviso. What are the kinds of facts and tribal policies that tribal courts have found most salient? Have they focused on one prong more than another? A natural extension of this is examining what federal courts have found convincing or not so convincing in “reviewing” tribal court determinations concerning the *Montana* proviso. Do federal courts have a preference for one prong over the other? Does tribal court action fare better when there is review based on a full trial on the merits as opposed to an interlocutory review in which there usually is a rather sparse factual record? And if so, should tribes substantially restrict the potential for interlocutory review in such circumstances?

2. Federal Administrative Agencies

While administrative law matters may not seem “glamorous,” they are nevertheless quite important. While well outside the scope of much law review scholarship in Indian law, there are many significant Indian law issues that are decided within federal administrative agencies. These include, for example, the Environmental Protection Agency in matters of tribes seeking EPA certification to carry out certain environmental programs as authorized by numerous federal environmental statutes. What are the administrative ins and outs of those procedures? How successful have tribes been in their efforts in this regard? How much resistance, if any, has come from states and non-Indian groups?

There are also significant matters that take place within the administrative apparatus of the Bureau of Indian Affairs, including such things as the probate of individual Indian estates involving real property as well as efforts by tribes to put land into trust. As to the former, these proceedings have tremendous implication for both tribes and individual Indian families. Why is there such incessant delay? How many of the proceedings involve wills and how many proceed intestate? What are the results? What are the implications for this process of the new American Indian Probate Reform Act?12

As to the latter, how is the Bureau of Indian Affairs administrative land into trust process working? How much land is actually going (or not going) in trust? How much resistance or opposition, if any, comes from non-Indians and the states? If the program in the aggregate adding significantly to the tribal land estate? Are there particular approaches either for or against placing land into trust that are more likely to succeed? Is there need for reform?

B. State Law

The arena of state-tribal interaction provides a rich source for instructive and significant scholarship in a number of different ways. There are at least two broad components to this area of research endeavor. They include a close examination and reading of the many tribal-state agreements that exist and the development of state law — both as a matter of statute and caselaw — that deals with Indians and Indian tribes.

1. Tribal-State Agreements

While tribal-state agreements are often canvassed in Indian law scholarship, they have not been subject to vigorous in-depth analysis as to their details. As tribal-state agreements tend to increase in areas such as hunting, fishing, taxation, law enforcement, and gaming, fruitful scholarship might parse the details to compare and contrast with an eye for patterns of similarity or dissimilarity. Can these agreements — in the aggregate — be evaluated for elements that are more advantageous for tribes and more advantageous for states? Do tribal-state agreements in a particular state or region show similarities that do not exist in other states or regions? What would be the import of such differences? What states have the most tribal-state agreements? Why? Good will, positive pragmatism? Those with the fewest? Animus, contrary to state policy? Do more agreements mean a favorable or unfavorable pattern for tribes?

2. State Statutes and Caselaw

There is an additional vein of potential scholarly insight to be gleaned from an examination of the nature of state made law in Indian affairs. What kind of statutes have state legislatures enacted in Indian affairs relevant to such areas as child welfare, voting, taxing, and gaming? Does this legislation take a progressive or regressive view of tribal sovereignty and competence? How do the various states compare? New Mexico at the top? South Dakota at the bottom? Just as tribes are diverse and various, are the states just as diverse and various in their response to Indian affairs issues? For what reasons?

What about the response of state courts? How does state court jurisprudence in Indian law look? Ahead or behind federal courts jurisprudence? Something admirable or repugnant?

There would also be a significant value to developing an annual state by

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13. Much of this kind of work has long been championed by Sam Deloria of the American Indian Law Center.
state “report card” for each state in Indian affairs. On a day-to-day basis, tribes deal more often with states than within the federal court and this closer scholarly scrutiny makes a great deal of sense.

C. Tribal Law

While there is significant scholarly attention to tribal court decisionmaking, this is usually limited to cases involving jurisdiction over non-Indians in the myriad of Montana configurations that make their way into federal court pursuant to National Farmers Union “review.” What about the growing body of tribal court jurisprudence that deals with the relationship of the tribe to its members and is seldom, if ever, subject to federal court review? This includes, for example, such things as tribal court constitutional adjudication and principles of tribal court review; cases that deal with election disputes and the eligibility to run for tribal office; referendum and removal, civil rights and tribal sovereign immunity. The developing outline of tribes’ political and cultural relationship to their own members is bedrock self-determination. This essential and dynamic relationship is to me, in many ways, the real face of tribal sovereignty — not how self-determination looks (for better or worse) to the outside non-Indian world, but how it looks to the inside world of tribal members. Is the impact of tribal sovereignty and its jurisprudence on tribal members themselves such as to garner significant support in the context of their relationship to their own tribes?

Relative to this, is the corollary inquiry: What kinds of law, if any, are tribal councils enacting in these areas? For example, what laws, if any, are tribal councils enacting relative to such things as tribal sovereign immunity, civil rights, implementing the tribal constitutional right of referendum, running for office, and challenging elections; even the right to a jury trial in civil cases, including the potential makeup of a jury when non-member Indians and non-Indians are involved.

II. Methodology

While the traditional methodology of law review scholarship will undoubtedly continue to be the primary vehicle for these new paths of inquiry, other means involving extensive interdisciplinary empirical research and “thick description” of tribal legal landscapes and actions should come more to the fore. There is, I believe, within the Indian law community of scholars a growing perception of the need to investigate and report what is empirically happening within the tribal legal communities. This is generally understood as an important aspect of tribal sovereignty and self-governance.
How does tribal sovereignty or tribal governance look on the ground? For many, especially in the non-Indian state and federal legal communities, the question of the "reality" of tribal sovereignty is percolating more and more to the surface. For example, in the criminal law area, this might include an in-depth look at the work of tribal police in making arrests, the time and legal representation in the processing of cases, guilty pleas as compared to trials, imposition of sanctions (e.g. jail time, fine, community service), and the likelihood of appeal.

Writing about Indian law without a cultural or empirical context risks a certain dislocation or disconnection about the realization of values and the development of tribal legal institutions. Whether the intended audience is that of tribal citizens or non-Indians (or both), the potential message is not limited to doctrinal elements of sovereignty and self-governance but a more complete mapping of this emerging human and legal landscape. The void of understanding in the non-Indian legal community and the non-Indian community at large remains extensive and often continues to be filled with ignorance and negative stereotypes. A "new" Indian law scholarship can do much to address this continuing problem.

While not my favorite word, the term "transparency" comes more and more to the fore. Not so much in a strictly legal context, but more in the sense of what might be called pluralistic federalism. In this sense, the question is more and more about how tribal sovereignty is actualized — that is, what is tribal law, where can it be found and what is the nature of the tribal legal institutions that carry it out. Once it can be identified in these ways, the question or challenge becomes how those strands can be integrated and respected within the national braid of pluralism. Without such "transparency," tribal sovereignty is likely to be resisted or opposed simply because it cannot be found or identified by the larger non-Indian legal community and society.

In this new age of tribal sovereignty — realized and pursued in the every day real world like never before — there are increasing questions from the non-Indian community, and the rising expectations of tribal communities themselves. "New" Indian law scholarship — wider, deeper, more (methodologically) sophisticated — can do much to increase understanding of what is happening in Indian country and to illuminate what might yet come to be.