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Sarah Krakoff

University of Colorado Law School

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THE RENAISSANCE OF TRIBAL SOVEREIGNTY, THE
NEGATIVE DOCTRINAL FEEDBACK LOOP, AND THE
RISE OF A NEW EXCEPTIONALISM

Sarah Krakoff*

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

In *(Native) American Exceptionalism in Federal Public Law*,¹ Professor Frickey elegantly describes recent trends in federal Indian law, and makes a convincing case for the exceptionalism of the field. Professor Frickey's searching analysis of the Justices' various opinions in *United States v. Lara*,² and the ways in which these opinions highlight the "constitutional crisis" lurking in federal Indian law, is deep and apt. I also agree with his prescription that the Court should resist the "seduction of coherence."³ Cleaning up Indian law in the ways portended by Justices Kennedy or Souter, and in at least one of the ways suggested by Justice Thomas, in their respective *Lara* opinions would do harm to a range of jurisprudential and normative commitments. Professor Frickey canvasses these commitments thoroughly, and there is no need to paraphrase his points.⁴

Instead, I want to sketch out, in an introductory fashion, an idea about why members of the current Court, who otherwise share relatively little in terms of their jurisprudential or political leanings, appear to be so readily seduced by the same siren. If we accept Professor Frickey's damning critique of the Court's behavior in federal Indian law, as I think we should, how do we explain that behavior? This short Reply to Professor Frickey's article suggests that the Court lacks an appropriate and realistic vision of American Indian tribes as sovereigns in the modern context. Presented with several fairly unexceptional instances of tribes acting as sovereign governments, the Court has created a new American Indian law exceptionalism in recent years, adopting rationales to reject exercises of tribal power on grounds that are inconsistent with doctrinal and interpretive norms in other fields of law. This suggestion is not at odds with Professor Frickey's observations that the Court is abandoning the previous form of Indian law exceptionalism in favor of apparent coherence. To the contrary, the

* Associate Professor, University of Colorado School of Law.

¹ 119 HARV. L. REV. 431 (2005).

² 124 S. Ct. 1628 (2004).

³ Frickey, *supra* note 1, at 435.

⁴ See *id.* at 472–89 (canvassing doctrinal, institutional, and normative "vectors" at stake).

Court's new exceptionalism merely highlights that the Justices are not, and cannot be, successful at integrating federal Indian law into other fields. The Court lurches towards norms that appear to smooth over American Indian law's frayed edges, only to tear holes in doctrinal and interpretive fabric elsewhere.

The Court's new exceptionalism is grounded in the erasure of, rather than the imperfect reconciliation of, the nation's colonial origins. The explanation for this lies, in significant part, in the Court's unstated skepticism that tribal sovereignty is viable in today's world. As Professor Frickey points out, there is little to no constitutional basis for the Court injecting its views into the law in this regard.⁵ Yet liberal constitutionalists, such as Justices Ginsburg and Souter, join hands with textualists/originalists, such as Justices Scalia and Thomas, to frolic in the common law of diminishing tribal sovereignty. A review of the cases suggests that the reason for this rare harmony is a shared belief that tribal sovereignty dissipated some time ago, and that what is left instead is an odd form of quasi-municipal government, and/or highly bureaucratic social club, the powers of which should be limited to clearly consenting members.

To counter this view, scholars should spend more time describing the significance and functions of modern American Indian tribal sovereignty, and less time urging the Court to resurrect formalisms that, as Professor Frickey suggests, never existed. Sovereignty, as a "platonian notion,"⁶ need not be revived. But sovereignty, as an evolving experience that is crucial to separate tribal identity, needs to be better appreciated, explained, and ultimately protected against further jurisprudential colonialism.

* * * *

If all you know about American Indian law comes from law review articles or Supreme Court decisions, you could be forgiven for thinking that American Indian nations must be on their last gasp, barely hanging on to any semblance of self-governance. Yet as Charles Wilkinson powerfully describes, American Indian nations are now exercising more sovereignty on the ground than at any point since the early nineteenth century.⁷ The most headline-catching aspect of this sovereignty renaissance is the Indian gaming industry, but gaming is not the most impressive aspect of the tribal revival. Of greater significance, Indian

⁵ *Id.* at 436 ("In recent years, the Court has injected itself into Indian affairs despite having an even more inferior constitutional pedigree than Congress has.").

⁶ See *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973).

⁷ See generally CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005).

nations have their own legal systems, are running educational institutions, are managing a variety of social and human services programs, are engaged in a range of economic development initiatives (including natural resource based industries, agriculture, tourism, and even manufacturing and telecommunications), and are reaching out to state governments as sovereigns to address problems of mutual governmental concern.⁸

While it would be an overstatement to say that American Indian nations are flourishing, there is little doubt that they are doing much better at most governmental functions than they have for many decades, and are consequently better-situated to meet the needs of residents of Indian country, whether tribal members or not. Ironically, the success of sovereignty-in-action has led to the erosion of the legal doctrine of sovereignty in the Supreme Court. There are (at least) two interrelated reasons for this. First, as tribes started acting more like modern governments after the first wave of self-determination policies, they inevitably began to have more legal conflicts with non-Indians. Second, the overlapping territorial boundaries of tribal and state governments, in combination with the allotment era's legacy of non-Indian land scattered throughout many reservations, has compounded the Court's confusion about and resistance to a modern version of tribal sovereignty. As a result, the Court has not been able to integrate an updated sense of tribal sovereignty into its case law, and therefore the "conflict with non-Indians" cases have placed enormous negative pressure on the field, in the ways described by Professor Frickey.⁹ The unfortunate outcome is that while tribes have struggled to grow into a sovereignty that comports with the challenges of their unique status, the Court has persistently fallen back on a very stunted vision of sovereignty that forces tribes backwards into a dependency that was never meant to continue indefinitely.¹⁰

⁸ See, e.g., Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004) (describing the range of exercises of tribal sovereignty in the context of a study of the effects of federal Indian law on the Navajo Nation).

⁹ See Frickey, *supra* note 1, at 452–60.

¹⁰ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (stating that Indian tribes are in a "state of pupilage," but also indicating that the "ward-guardian" relationship between the federal government and Indian tribes should not be a permanent situation). Indeed, the thrust of current self-determination era policies is to perpetuate the government-to-government relationship between the federal government and Indian tribes, but simultaneously to free tribes from the paternalistic and excessively controlling manifestations of that relationship that had characterized previous policy periods. See RICHARD NIXON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363 (1970); see also DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, CASES AND MATERIALS ON FEDERAL INDIAN LAW 221–25 (5th ed. 2004) (listing some of the many congressional statutes that promote tribal self-determination).

A review of some of the same cases that Professor Frickey canvasses in section III.B of his article, in which he describes the unraveling of the modern era model of Indian law,¹¹ supports the point that cases involving conflicts with non-Indians dominate the Court's Indian law agenda. The cases about state authority in Indian country and tribal authority over nonmembers in Indian country obviously involve questions of conflict between tribes and non-Indians.¹² Slightly less obviously, the cases about reservation diminishment also involve such conflicts. The question whether a reservation has been diminished often arises in the context of the tribe asserting regulatory authority over non-Indian conduct on lands whose reservation status is in question.¹³

A quick examination of the tribal activity at issue in some of these cases reveals the ways in which modern, and arguably run-of-the-mill, exertions of tribal sovereignty are treated with suspicion by the Court. In *South Dakota v. Yankton Sioux Tribe*,¹⁴ the state had approved a landfill on lands that the tribe considered to be within its jurisdiction and the tribe attempted to block the landfill.¹⁵ Regulating placement of landfills, and thereby safeguarding community health standards as well as enacting the community's norms about trade-offs between health and economic development, is an activity that in most modern circumstances falls to the proximate governmental actor. In *Yankton*, however, the Court used its diminishment doctrine to shrink the tribe's jurisdictional land base and deprive it of regulatory authority.

In *Washington v. Confederated Tribes of the Colville Indian Reservation*,¹⁶ the tribes had imposed their own tribal cigarette tax on sales within their reservations, and had set the tax at a rate lower than that imposed by Washington State.¹⁷ The tribal goal of attracting commerce and generating tax revenue was disparaged by the Court as marketing an exemption from state taxation.¹⁸ The Court's dismissive rejection of the tribes' interest in competitive taxing as a way to attract economic development is an example of the Court's new exceptionalism.

¹¹ See Frickey, *supra* note 1, at 452–60.

¹² See *id.* at 454–60.

¹³ See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (holding that the state, and not the tribe, had regulatory jurisdiction over landfill on land determined to be outside of reservation boundaries); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (rejecting tribe's request for declaratory judgment that the tribe, not the state, had jurisdiction over contested lands); *DeCoteau v. Dist. County Court*, 420 U.S. 425 (1975) (holding that the state, not the tribe, has civil and criminal jurisdiction over matters arising on contested lands).

¹⁴ 522 U.S. 329 (1998).

¹⁵ *Id.* at 333.

¹⁶ 447 U.S. 134, 154–55 (1980).

¹⁷ *Id.* at 141, 144.

¹⁸ *Id.* at 155.

Professor Frickey points out that the old exceptionalism drives the conclusions in *McClanahan v. Arizona State Tax Commission*¹⁹ and *Bryan v. Itasca County*²⁰ that states cannot impose their taxes on tribal members within Indian country, because “multiple tax burdens — federal, state, sometimes local — are common in America.”²¹ Yet the overlapping territorial jurisdiction of tribal and state governments creates tension with other norms of taxation. While it is true that concurrent taxation of some activities, in particular earning income, is common, the same cannot be said for other activities, such as purchasing consumer goods. There is, to date, no national sales tax, and as a result, states commonly compete with one another for customers by marketing their lower taxes.²² Yet the Court rejects similar activity by Indian nations.²³ One plausible message is that tribes should not step outside of their dependent sovereign boundaries. It is one thing to be in the business of protecting their hapless members, as in *Williams v. Lee*.²⁴ When that is the issue, the tribal interest can rise to the level of creating a barrier to state jurisdiction.²⁵ It is quite another to be impinging on the economic prerogatives of states, even when, as the *Colville* Court conceded, the state’s prerogatives have the potential to undermine the tribe’s economic development activities.²⁶

In the “implicit divestiture” line of cases, the Court has engaged in other versions of the new exceptionalism. For example, in *Strate v. A-1 Contractors*,²⁷ the Court, exercising its common law of implicit divestiture of tribal inherent powers, held not only that a state court might have concurrent jurisdiction over a matter between a non-Indian plaintiff and non-Indian defendants that arises within reservation boundaries — and on land that, until *Strate* itself, would have been considered “Indian country” for jurisdictional purposes²⁸ — but also that the tribal court lacks such jurisdiction.²⁹ As Professor

¹⁹ 411 U.S. 164 (1973).

²⁰ 426 U.S. 373 (1976).

²¹ Frickey, *supra* note 1, at 449.

²² In the tri-state area, for example, it is well-known that New Yorkers will often travel to New Jersey to shop for consumer goods in order to avoid New York sales taxes.

²³ See *Colville*, 447 U.S. at 155.

²⁴ 358 U.S. 217 (1959) (holding that states lack jurisdiction over a suit by a non-Indian plaintiff against tribal member defendants for a cause of action arising within reservation boundaries).

²⁵ See *id.* at 220.

²⁶ See *Colville*, 447 U.S. at 151 n.27 (“[T]he tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.”).

²⁷ 520 U.S. 438 (1997).

²⁸ See 18 U.S.C. § 1151 (2000) (defining Indian country as “all land within the limits of any Indian reservation . . . including rights-of-way running through” the reservation); *Strate*, 520 U.S. at 456 (finding that state right-of-way is “aligned with non-Indian fee land” for purposes of the Court’s jurisdictional analysis).

²⁹ See *Strate*, 520 U.S. at 442.

Frickey suggests, the Court was motivated by the “mainstay” norm of fairness to the “foreign” defendants.³⁰

Yet in its rush to vindicate this norm, it ran roughshod over several equally powerful norms embedded in doctrines about federal courts and civil procedure. The *Strate* Court received only a summary record of the underlying jurisdictional facts, because the defendants challenged the tribe’s jurisdiction in federal court before a full evidentiary hearing was held in the tribal court.³¹ So the Court, on an incomplete record and in derogation of principles of deference to lower courts regarding factfinding — let alone the “exhaustion doctrine” as applied to tribal courts³² — ruled in apparent furtherance of the norm Professor Frickey identifies: fairness to foreign defendants.

Had the facts been properly developed, the prominence of other norms might have emerged, and the strength of the “fairness to the defendant” norm would have receded. First, a prominent civil procedure norm is to defer to plaintiff’s choice of forum. In the absence of a due process problem, a statute granting removal, or fairly strong evidentiary and/or fairness concerns, courts defer to plaintiff’s forum choice. The plaintiff, Gisela Fredericks, was a non-Indian, but was the widow of a tribal member, had four children who were tribal members, and had lived her entire life within the United States as a resident of the Fort Berthold Indian Reservation.³³ The tribal forum was obviously her choice, for reasons that were likely born of a sense of belonging to the community, as well as convenience. Second, with regard to fairness to the defendant, federal courts regularly address this under the rubric of the Due Process Clause as applied to personal jurisdiction analysis. Applying the “minimum contacts” test to the defendants in *Strate*, it is evident that it would have been permissible — and therefore “fair,” because the minimum contacts/due process test includes a fairness analysis — to subject them to suit in tribal court.³⁴ The tribal forum was not “foreign” to the defendants, except in the sense that

³⁰ Frickey, *supra* note 1, at 458–59.

³¹ Interview with *Strate*’s attorney, Melody McCoy, Native Am. Rights Fund, in Boulder, Colo. (Nov. 12, 2005).

³² See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (applying exhaustion doctrine to a case between a tribal member and a non-Indian defendant residing in a different state); *Nat’l Farmers Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (holding that non-Indian defendants sued in tribal court must exhaust their tribal court remedies before challenging tribal jurisdiction in federal court).

³³ See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1260 (2001).

³⁴ See *id.* (suggesting that *Strate* could have turned on personal jurisdiction principles rather than categorical rules limiting tribal jurisdiction).

they were not tribal members.³⁵ This factor alone is fetishized by the Court and elevated to the status of a rule of decision.³⁶

In each of these representative cases, the tribe is asserting very un-exceptional claims to governmental powers. In addition, one should keep in mind the political process backdrop that Professor Frickey emphasizes, which ensures that any abuses of tribal power will be redressed in Congress. Yet the Court, in striving for surface norms of fairness to states and non-Indians, actually deviates from norms in the fields of taxation, civil procedure, and federal courts.

The last “new exceptionalist” example that warrants discussion here is *City of Sherrill v. Oneida Indian Nation*.³⁷ In *City of Sherrill*, the Court applied the equitable doctrines of laches, acquiescence, and impossibility to defeat a tribe’s claim that it should be free from local property taxes. The tribe owned the properties in question in fee simple and had purchased them on the open market, but the parcels were within the original boundaries of the tribe’s reservation, and the Supreme Court had earlier held that the tribe’s lands had been taken from it in violation of federal law.³⁸ The tribe therefore argued that by reacquiring its treaty-guaranteed lands, it united its treaty-based title with present legal title, and the categorical prohibition on state or local taxation of tribal property within tribal territory should apply.³⁹ As I discuss elsewhere, the Court could not have found for the City of Sherrill on the merits without doing serious damage to the Indian law doctrines of reservation diminishment and state taxation of tribal property.⁴⁰ Instead, the Court held that the tribe was barred by hoary equitable defenses from asserting its sovereignty.

³⁵ See *id.*

³⁶ Professor Frickey notes that the Court was likely troubled by the absence of a removal statute for nonmember defendants analogous to the provision for removal from state to federal court found in 28 U.S.C. § 1441 (2000 & Supp. II 2002). See Frickey, *supra* note 1, at 459. This is surely correct. But even the federal removal statute provides an exception for diversity cases in which the defendant is a citizen of the state in which she has been sued. See 28 U.S.C. § 1441(b). If Congress were to pass a removal statute applicable to tribal court cases, it is fair to ponder the question whether a nonmember who has significant ties to the reservation and resides on or proximate to the reservation should be placed in the same nonremovable situation as the state citizen defendant. In other words, if the federal removal statute’s diversity provision contains “fairness to defendant” elements, there is every reason to surmise that similar elements will dictate an analogous tribal removal statute, and that those elements will not necessarily mimic the Court’s evolving “members only” rule.

³⁷ 125 S. Ct. 1478 (2005).

³⁸ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

³⁹ See *City of Sherrill*, 125 S. Ct. at 1489.

⁴⁰ See Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Felix S. Cohen’s Handbook of Federal Indian Law 2005 Edition*, 41 TULSA L. REV. (forthcoming Winter 2005) (manuscript at 105–06, on file with the Harvard Law School Library).

City of Sherrill is the apex to date in the Court's new exceptionalism in federal Indian law. The Court's application of laches was exceptional in two ways. First, the defense of laches, an affirmative defense susceptible to waiver by the defendant, had likely been waived by the City of Sherrill due to its failure to raise it either in its petition for certiorari or its briefs before the Court.⁴¹ Second, a fair examination of the factual and legal backdrop to *City of Sherrill* reveals that neither of the core elements of laches, the plaintiff's inaction or the risk of a remedy's undue disruption, was present.⁴² The Oneida Indian Nation had acted with dispatch regarding its claim to be free of local taxes, and in the longer historical time frame of its land claims, had consistently pursued all avenues of legal redress as soon as it was feasible, legally and politically, to do so.⁴³ In terms of disruptiveness, the remedy sought by the tribe would only have required that the City of Sherrill stop taxing several parcels of land. No one would have been ejected from their property. The City would not have had to relinquish regulatory or zoning authority over the area. The lower courts would not be involved in any drawn-out enforcement process. In short, no disruption would have occurred.⁴⁴

City of Sherrill also, not coincidentally, reveals the Court's deep skepticism about the continuing vitality of tribal sovereignty. To hold that sovereignty can just dissipate with the passage of time, notwithstanding the perseverance of the tribal governmental entity asserting it, and that government's very concrete efforts to restore its functions and its homeland, is puzzling. Where and when did the sovereignty go? My sense is that the Court's unstated answer is that it is nowhere to be found because it has been a fiction for decades. Despite the facts on the ground about what tribal nations are doing and have been doing since the 1960s, the Court has conceived of them in the same way that some lower courts did at mid-twentieth century, during the heyday of the termination era.

The Court's apex of new exceptionalism in *City of Sherrill* is correspondingly a nadir for the legal doctrine of tribal sovereignty. The Court arrived at *City of Sherrill* as a result of the logic of its own opinions over the last three decades. The Court created its own "path dependence," following one decision after another down the road of un-

⁴¹ See *City of Sherrill*, 125 S. Ct. at 1497 n.5 (Stevens, J., dissenting) (noting the probable waiver of the equitable defenses, and at a minimum the failure to present them properly before the Court); see also *id.* at 1490 n.8 (majority opinion) (acknowledging that "[w]e resolve this case on considerations not discretely identified in the parties' briefs").

⁴² See Krakoff, *supra* note 40 (manuscript at 108-13) (analyzing historical and recent facts behind *City of Sherrill*).

⁴³ See *id.* (manuscript at 110-13) (discussing the tribe's persistent and timely pursuit of legal remedies for its land claims violations).

⁴⁴ See *id.* (manuscript at 112-13) (describing the absence of disruptiveness of the remedy).

raveling tribal inherent powers one patch of land at a time, and allowing state regulation one tax at a time. The beleaguered version of tribal sovereignty that underlies these decisions finally gave way in *City of Sherrill*, reduced to ancient “embers”⁴⁵ that the Court snuffed out.

Outside of the Court’s chambers, tribal sovereignty burns on. The Oneida Indian Nation itself is a good example. The Oneidas came back from the brink of near extinction as a result of an economic development strategy that included gaming. Today, the Oneidas have several economic enterprises, including their successful casino, a marina, a fishing lodge, gas stations, convenience stores, and automotive maintenance shops.⁴⁶ The Oneidas boast that they are the largest employer in Oneida and Madison Counties.⁴⁷ In addition, the Oneida Indian Nation has its own police force, provides educational services and after-school programs, runs a housing program, and is engaged in a project to preserve the Oneida language.⁴⁸

The Supreme Court’s vision of tribal sovereignty is sharply at odds with the facts of tribal sovereignty on the ground. The task for current scholars of federal Indian law is to tell the stories about modern tribal sovereignty, which inevitably must include some powers over non-Indians, with the long-range ideal of installing these stories somewhere in the conscience of the federal judiciary, if not now then at some future point in time. The negative feedback loop of the Court’s encounters with modern Indian nations has to stop somewhere. Or, as Professor Frickey suggests, the Court should just stop doing federal Indian law.

⁴⁵ *City of Sherrill*, 125 S. Ct. at 1490.

⁴⁶ See Oneida Nation Enterprises, <http://www.onenterprises.com> (last visited Jan. 17, 2006).

⁴⁷ See Oneida Indian Nation, The Nation Next Door, <http://www.oneida-nation.net/bro1.html> (last visited Jan. 17, 2006).

⁴⁸ See *id.*