

The Last Indian Raid in Kansas: Context, Colonialism, and Philip P. Frickey's Contributions to American Indian Law

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INTRODUCTION: WHAT'S NOT THE MATTER WITH KANSAS?

There are a lot of things that are not the matter with Kansas.¹ For example, Lucas, Kansas, is the home of the Garden of Eden museum, a colored cement sculpture gallery constructed by Samuel P. Dinsmoor, a Civil War veteran and free thinker who explored his commitment to reasoned enlightenment through his elaborate and weirdly gothic art.² Kansas also boasts the first Pizza Hut; the original building is now on exhibit at the Wichita State campus.³ And Kansas has a fierce history of abolitionism; some of the most violent pre-Civil War skirmishes over slavery erupted in Bloody Kansas, which also hosts the John Brown Museum.

But there are two excellent things about Kansas more relevant to this symposium. First, Phil Frickey, who was one of the best scholars and mentors in the field of American Indian law, was born and raised there. Second, Kansas can rightly brag about the Kansas State Historical Society, whose relevance will become clear soon. But what, other than Phil's origins, does Kansas have to do with the big questions in American Indian law today? The answer is that an event described as the "Last Indian Raid in Kansas" by some, and the

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† Professor, University of Colorado Law School. I am grateful to Kathryn Urbanowicz for research assistance, to my colleagues at the University of Colorado Law School who provided helpful comments during a workshop on an early draft, to Dean Christopher Edley and Dan Farber for organizing this wonderful symposium, to Chuck and Diane Frickey for hosting me in Oberlin, and to Phil Frickey for everything.

1. See THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004) (best selling book exploring the state's transformation from bastion of progressive populism to stalwart of social and political conservatism).

2. See S. P. Dinsmoor's Garden of Eden, <http://www.garden-of-eden-lucas-kansas.com/> (last visited Aug. 5, 2009).

3. See Wichita State University, Original Pizza Hut, <http://webs.wichita.edu/?u=mark1&p=pizzahut> (last visited Aug. 5, 2009).

“Odyssey of the Northern Cheyenne” by others, touched down in the little town of Oberlin, Kansas, where Phil Frickey grew up. That event, whatever one chooses to call it, illustrates the centrality of the structural, intergovernmental relationship⁴ between tribes and the United States, and the importance of grounded research about the contexts of federal Indian law—themes that Phil developed and championed in his scholarship.

This Article will first describe, in Part I, the trajectory of Phil’s Indian law scholarship, tracking in particular the development of the major themes just described—the centrality of the structural relationship between tribes and the federal government, and the importance of context. In Part II, it will delve into the story of Oberlin, Kansas, and the Northern Cheyenne Odyssey, drawing lessons for contemporary Indian law consistent with Phil’s observations about the field. Those lessons are, first, that it is key to frame Indian law disputes as structural questions between sovereigns; and, second, that academics can provide crucial, rigorous, contextualized research about the terrain in which these disputes occur.

Finally, in Part III, this Article applies lessons from the Last Indian Raid to a contemporary Indian law issue—the boundaries of tribal control over Indians who are not members of the governing tribe. Telling thicker stories, whether about the Last Indian Raid or this particular Indian law issue, allows us to peek behind the arid judicial formulations of Indian law to see the more complicated and often troubling reality about the life of Indian law. That, at least, is one of the lessons that Phil tried to teach through his scholarship, and it guides this inquiry as it has many others.⁵

I

THE STAGES OF PHIL FRICKEY’S SCHOLARSHIP IN AMERICAN INDIAN LAW

My first encounter with Phil was through his writing. I was living in Tuba City, Arizona, on the Navajo Nation and working for DNA-People’s Legal Services.⁶ I was giving myself a crash course in American Indian law, reading

4. The phrases “structural relationship” and “intergovernmental relationship” will be used throughout this Article to refer to the idea that Indian tribes have a unique legal and political relationship with the U.S. government. Phil has argued that when courts address questions about tribal sovereignty, they should be mindful of the history of power and conflict through which that relationship was wrought, as well as the judiciary’s limited competency to address such questions. See Part I.B., *infra*.

5. The influence that Phil Frickey has had on younger Indian law scholars can be detected partially through the number of authors that thank him in their initial footnote. I am going to cite just to a small sample here, because an exhaustive list would cause this Article to skyrocket past the editors’ word count limitation. See, e.g., Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313 (2008); Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579 (2008); Kevin K. Washburn, *American Indians, Crime and the Law*, 104 MICH. L. REV. 709 (2006).

6. DNA-People’s Legal Services is a nonprofit law firm providing free representation to Navajo, Hopi, and other clients throughout its service area in the four corners region of the

by the propane light in my hogan⁷ in the evening, and hoping that my clients and coworkers would not notice my stunning ignorance in the field. One of the first articles I read was *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*.⁸ The piece resonated because it outlined a way of thinking about the foundational cases in Indian law—the trilogy by Chief Justice John Marshall⁹—that required neither ignoring the discovery doctrine’s racist assumptions, nor discarding the cases altogether. The assertion that Chief Justice Marshall’s *approach* to Indian law questions mattered at least as much as any core of unassailable principles generated by the cases made sense to me in a way that other scholarship did not.¹⁰

From then, I was hooked on Frickey. Somehow Phil, writing from the secluded vantage point of an academic with little time or experience in Indian country, could nonetheless make his work relevant to a legal services lawyer living on the largest Indian reservation in the country. Living amidst Navajo and Hopi people—with the nearest courthouse, police, and emergency services for miles being those of the Navajo Nation—it made sense to me that “a revival of Chief Justice Marshall’s legacy” would “compel[] [judges] to view Indian law afresh in today’s context. The issues would be structural, involving conflicts among sovereigns”¹¹

This Part will trace the development of Phil’s Indian law scholarship, describe the value he has added to the field, and highlight some recurring themes. As I see it, Phil’s body of work has the following trajectory: it starts from the perspective of an insightful, if perplexed, outsider and culminates with the view of a wise and prodding elder.¹² Along the way, Phil provided clear-eyed descriptions, nuanced normative prescriptions, and sometimes-bracing, yet always tactful, criticism of both of judges and scholars.

In the field of American Indian law, phases of federal-tribal relations are

Southwest. “DNA” is the acronym for the Navajo phrase: “Dinebeina Nahiilna Be Agha’diit’ahi,” which translates roughly to “Lawyers working for the Revitalization of the People.”

7. Hogans are traditional Navajo one-room dwellings with eight sides and a single door facing the east.

8. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) [hereinafter Frickey, *Marshalling Past and Present*].

9. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that Indian tribes have inherent sovereignty to govern their members and their territory, and that the individual states lack the power to impose their laws on tribes); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (holding that Indian tribes are domestic dependent nations, a status distinct from both foreign nations and individual states); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that the federal government has the exclusive power to acquire property from tribes).

10. See Frickey, *Marshalling Past and Present*, *supra* note 8, at 408–17 (describing Marshall’s interpretive approach in *Cherokee Nation v. Georgia* and *Worcester v. Georgia* as quasi-constitutional).

11. *Id.* at 428.

12. This latter perspective is particularly evident in Phil’s last articles, which encourages and instigates a new and improved realism in Indian law scholarship.

typically divided roughly into the following periods: Discovery; Treaty Making; Removal and Relocation; Allotment and Assimilation; Indian Reorganization and Self-Government; Termination; and, finally, Self-Determination.¹³ To describe the evolution of Phil's approach to American Indian law, I will borrow some, but not all, of these labels, and apply them to the different periods of Phil's scholarship. I will start with what I view as Phil's initial "Discovery" of Indian law and end with his last phase, for which I have taken some liberties with the label. In terms of federal policy, the United States is still (at least in some branches of government, excluding the Supreme Court) in the era of Self-Determination. Where we should be moving, however, both in the realm of scholarship and policy, is more expansive: building on self-determination to include reconciliation and revival.

A. Discovery¹⁴: Phil Frickey Discovers American Indian Law

In his first Indian law article, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, Phil canvassed then-recent Indian law cases. He concluded that the predominant scholarly view of Indian law, which he termed "foundationalist," had failed to capture or shape recent judicial activity in the field.¹⁵ The foundationalists argued that Indian law was best seen as a set of core principles, first announced by Chief Justice Marshall and coalesced in the mid-twentieth century by Felix Cohen in his famous treatise.¹⁶ These principles include plenary congressional power over Indian affairs, retained inherent tribal sovereignty, and canons of interpretation requiring the Court to construe Indian treaties and legislation for the benefit of the tribes.¹⁷ However, by 1990 the Court was abandoning these principles in certain cases, particularly those involving either tribal jurisdiction over non-Indians or intrusions of state authority into Indian country. And even in the cases that came out favorably for the tribal interests the Court apparently did not rely on foundationalist principles.

13. See, e.g., VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 1-24 (1983). The periods, as outlined by these authors, are: Discovery, Conquest, and Treaty-Making (1532-1828), Removal and Relocation (1828-1887), Allotment and Assimilation (1887-1928), Reorganization and Self-Government (1928-1945), Termination (1945-1961) and Self-Determination (1961-present).

14. The period of "Discovery, Conquest and Treaty-Making" comprises the phase of initial contact between European nations and the indigenous nations of North America. The term "Discovery" (which has to be read with appropriate irony) derives from the European international law doctrines employed to assert dominion and control over indigenous lands and peoples under certain specified conditions. See *id.* at 2-4.

15. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1239 (1990) [hereinafter Frickey, *Congressional Intent*].

16. See FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1942).

17. See Frickey, *Congressional Intent*, *supra* note 15, at 1206-07 (describing the foundational approach and criticizing on descriptive and practical grounds).

Phil's big message in *Congressional Intent* was that it is neither credible nor efficacious to hew to a pristine, coherent view of federal Indian law:

It is clear . . . that foundational theory . . . is an unlikely candidate for resolving particular disputes in federal Indian law. In [the recent] cases, no single value is privileged, and the several values involved are too complex and cross-cutting, the facts of the cases too uneven, and the strands of doctrine too tenuous to aggregate into a foundational theory that can control future cases.

. . . .

If defenders of the faith successfully persuaded the Court to preserve what remains of tribal autonomy, the strategy would at least have the virtue of effectiveness. But . . . today's Court has little difficulty in avoiding the defenders' conceptual arguments and continuing the erosion of tribal independence.¹⁸

The Court was not listening to the foundational arguments. Even if it had been, foundationalism, from a scholarly perspective, is unsatisfying, even anachronistic. It veers toward an odd and unconvincing formalism and depicts judging as a mechanistic process divorced from context and contemporary values.

Phil differed by offering a dynamic account of the field, proposing that certain key background values did a lot of work in contemporary Indian law cases. These values included a wavering respect for tribal rights, reluctance to give effect to congressional intent that has been rendered obsolete by later enactments, and the search for manageable judicial standards.

Additionally, in *Congressional Intent*, Phil touched on themes that would recur and become more developed in his later works. One is the revitalizing role that critical scholarship plays in the field. Another is the emerging significance of international norms with respect to indigenous peoples. And finally, one that emerges very prominently in Phil's later work is the tension between tribes' right to be apart from the U.S. constitutional order—a right embodied in the sovereign-to-sovereign relationship at the heart of federal Indian law¹⁹—and the seemingly ineluctable pull of mainstream constitutional and public law values.²⁰

I read *Congressional Intent* shortly after I came to Boulder and was trying desperately to catch up on scholarship in Indian law. Just as *Marshalling Past and Present* (published later, but read earlier by me) instantly resonated, so did this piece. For a practitioner who had learned the field by working in Indian country, the idea that context and values, rather than dry concepts, were doing the work made a great deal of sense. And as a new but always skeptical scholar, I found compelling the argument that Indian law, like all law, was conceptually

18. *Id.* at 1206–07 (footnote omitted).

19. *Id.* at 1201.

20. *See id.* at 1234 (describing the difficulty of “accommodating Anglo-American procedural and substantive values while preserving Indian traditions of dispute resolution”).

untidy, bearing the messy imprint of conflicts over values and power,

*B. Treaty Period*²¹: *Phil Frickey's Insights about Chief Justice Marshall's Approach to Treaties*

During Phil's Treaty Period, he pursued one thread from *Congressional Intent* in depth: that Chief Justice Marshall, in his Indian law trilogy, did more than state a formula. In *Marshalling Past and Present*,²² Phil argued that Marshall adopted an interpretive stance toward treaties that protected the tribal prerogative to remain a separate people:

In *Cherokee Nation and Worcester*, Chief Justice Marshall repeatedly stressed the sovereign-to-sovereign relationship between tribes and the British crown and its successor, the United States. He rightly understood that this relationship extended far beyond anything like a contractual model. Rather, it involved a mixture of brute force . . . and territorial sovereignty In this context the treaty became, in essence, the piece of positive law that reflected the *constitutive* relationship between two sovereigns. This linkage between the tribe and the United States, as a matter of law rather than sheer power, was the element missing in *Johnson v. McIntosh*.²³

Marshall's recognition of a sovereign-to-sovereign structure within the ineradicable colonialism that preceded it sketched an enduring framework for courts to follow. Summing up this idea, Phil wrote: "[T]he spirit of the structural, constitutive approach would force judges to do the hard work exemplified by Marshall in *Worcester*—to challenge rather than to accept blindly assumptions rooted in colonialism, of which there are many today . . ." ²⁴ The hard work consists of seeing the individual dispute in any given case through the lens of the historical inequities that produced, nonetheless, an institutional and legal commitment to the preservation of tribes as sovereign peoples.

One might see Phil's work during his Treaty Period as a move closer to foundationalist theory, but to do so would be a mistake. First, Phil had already emphasized in his earlier work that the *concepts* behind the foundationalist approach are good ones: if they guide judges to see the conflicts before them as structural ones between sovereigns, contesting their respective interests against the limiting backdrop of colonialism, then those concepts are tools as good as

21. The "Treaty-Making" period in U.S.-Tribal relations commenced when European nations first began to enter into treaties with the indigenous nations of North America (during the 1500s), and continued until the United States shifted to a policy of removing tribes from their aboriginal homelands (during the 1820s). See DELORIA & LYTLE, *supra* note 13, at 2–6. The United States continued to enter into treaties with tribes well after the beginning of the removal phase, however, and did not formally end treaty making until 1871. See *id.* at 5.

22. See Frickey, *Marshalling Past and Present*, *supra* note 8.

23. *Id.* at 408 (footnote omitted).

24. *Id.* at 428.

any others.²⁵ Second, Phil's essential aim in *Marshalling Past and Present* was to rescue Chief Justice Marshall's methodology from the caricature that the central principles of foundationalism appeared to have become to the contemporary Court. For example, according to Phil, the Indian law canon counseling courts to uphold treaty terms unless statutes explicitly abrogate them "has little bite because it seems so blatantly normative—'you should help those poor Indians'—and normative in a fuzzy, liberal direction at that."²⁶ Phil's goal was to remind the Justices about the structural, institutional, and political reasons to emulate Chief Justice Marshall in *Worcester*, not to chide them into accepting blindly (and, let's face it, utterly unwillingly) a formula for coming out in favor of tribes.

C. Removal Period²⁷: Phil Frickey's Prescription to Remove Indian Law from Conventional Understandings

In Phil's Removal Period, he wrote two articles suggesting that Indian law should be removed from the domain of ordinary domestic litigation. In *Adjudication and Its Discontents*,²⁸ Phil critiqued two law review articles: one for marginalizing Indian law norms and interpretive approaches in the context of Native Hawaiian claims;²⁹ the other for overstating the extent to which a single explanation—the Court's move toward a members-only view of tribal sovereignty—drives all contemporary cases.³⁰ (Sadly, this thesis, by L. Scott Gould, appears more convincing with every subsequent Supreme Court case.)³¹ As Phil put it, both of these articles come up short because each, in a different way, attempts to make Indian law simpler and neater than it is. Consistent with his claims in *Marshalling Past and Present*, Phil cautioned against either looking solely to doctrinal formulations (without doing the hard work of also consulting the history and norms that give rise to those formulations) or ascribing to the Court a unitary purpose where none exists. Such scholarship

25. Frickey, *Congressional Intent*, *supra* note 15, at 1239.

26. Frickey, *Marshalling Past and Present*, *supra* note 8, at 424 (footnote omitted).

27. The period in U.S.-tribal relations of "Removal and Relocation," dating from 1828–1887, included federal policies of forcibly relocating tribes from their aboriginal homelands to smaller reservations, typically further west. See DELORIA & LYTLE, *supra* note 13, at 6–8.

28. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997) [hereinafter Frickey, *Adjudication and its Discontents*].

29. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996).

30. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

31. See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (holding that tribal court lacked jurisdiction over discrimination claim brought by tribal members against non-Indian bank). *Plains Commerce* is just the latest in a series of cases winnowing the circumstances in which tribal courts have jurisdiction over non-Indians. See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1216–22, 1233–36 (2001).

misprescribes what the Court ought to do next (the doctrinal mistake)³² or misdescribes what the Court has already done (the theoretical mistake).³³

The piece's enduring value, however, is its conclusion, where Phil suggests that the greater promise for a decolonized, antiformalist Indian law lies in the realm of political negotiation and creative intergovernmental relationships, rather than federal court litigation. Here are Phil's words on the subject:

In the last analysis, negotiation seems to promise to bring Indians into Indian law far better than does adjudication. Negotiation turns not on incoherent or misunderstood legal doctrines, but on practical realities. . . .

. . . [I]n a field with too much law and too little life, it might be time for scholars to focus at least as much on questions of legal process as on matters of legal doctrine.³⁴

The other article from Phil's Removal Period, *Domesticating Federal Indian Law*,³⁵ suggested a different kind of removal: removing a deeply colonialist version of the congressional plenary power doctrine, and returning conceptions of Indian sovereignty to their international law roots. This removal would render contemporary Indian law consonant with evolving international-law support for cultural and political self-determination for indigenous peoples.

This article is Phil's most normative and idealistic piece. It is right in its diagnosis, but perhaps, in hindsight, unduly optimistic in its prescription. Although the United Nations finally ratified the Declaration of the Rights of Indigenous Peoples, the United States was one of just four countries that voted against the Declaration.³⁶ While some members of the Court embrace internationalization of domestic legal norms, the debate about uses of foreign law is fractious, and, as recently as 2005, all of the Justices appeared to agree that foreign sources of law are not binding.³⁷ Therefore, as long as American Indian law is viewed as domestic law, albeit with international origins, rather than a species of international law as such, it seems unlikely that the Court will stray from its self-directed course.

Nonetheless, there is a broader, less judicially focused way in which Phil's prescription may yet come true. As other countries adopt and enforce the U.N. Declaration, it will normalize and make its way into the domestic law of

32. This is Benjamin's mistake, according to Phil. See Frickey, *Adjudication and Its Discontents*, *supra* note 28, at 1763–64.

33. This is Gould's mistake, according to Phil. See *id.* at 1776–77.

34. Frickey, *Adjudication and Its Discontents*, *supra* note 28, at 1783–84.

35. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996).

36. See United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

37. See Norman Dorson, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 530 (2005).

other countries. In Belize, for example, the country's highest court cited the Declaration in support of its decision to recognize indigenous claims to property.³⁸ Furthermore, as global environmental problems like climate change highlight disparate effects on indigenous peoples as well as the unique solutions they can contribute,³⁹ it seems at least plausible that international law will eventually influence aspects of our federal Indian law. And even if it does not, international fora provide a new avenue for advocacy, and tribes are indeed using these to assert their own agendas.⁴⁰

D. Allotment, Assimilation, Termination⁴¹: Phil Frickey on the Supreme Court's Unfortunate Assimilationist Tendencies

Phil wrote two major articles during this stage, in which themes touched on in earlier work emerge fully. One theme is that the Court is slowly erasing Indian law as a separate field by harmonizing it with general public law.⁴² This tendency does violence to the unique structural relationship between tribes and the federal government. It thereby freezes tribes in the past, foreclosing the possibility that they can evolve as sovereigns to assume functions and responsibilities consonant with their contemporary status in society. Phil also criticizes the Court for not adopting any defensible guiding principle, either jurisprudential or value based, for the Court's harmonization of Indian law with general public law.

The tone in these pieces alternates between optimism and despair. Phil is generous to the Court, searching diligently for some principled meta-approach to the Indian law cases examined during this period. But he does not spare the

38. See *Cal v. Attorney Gen.*, [2007] Consol. Claims Nos. 171 & 172 (Belize).

39. See Sarah Krakoff, *American Indian Tribes, Climate Change, and Ethics for a Warming World*, 85 *DENV. U. L. REV.* 865 (2008) (describing disparate effects of climate change on indigenous peoples and suggesting that native cultural and spiritual values may provide the best sources for meaningful response).

40. See, e.g., *Dann v. United States*, Case No. 11.140 (Judgment on the Merits), Inter-Am C.H.R., Report No. 75/02, doc. 5, rev. 1 (2002) (claim for violation of Declaration of Rights and Duties of Man brought by Western Shoshone tribal members against the United States).

41. From 1887–1928, the United States passed laws and enforced policies aimed at breaking up the tribal land base and eliminating Native culture and religion. This period in U.S.-Indian relations is described as the Allotment and Assimilation period. See DELORIA & LYTTLE, *supra* note 13, at 8–12. After a respite for tribes during which official federal policy supported tribal self-governance, Congress once again took aim at the separate political existence of tribes. Congress severed the federal relationship with several tribes and passed laws authorizing state jurisdiction over many others. That period, lasting from 1945–1961, is known as the Termination era. See *id.* at 15–21. I created the label for this period in Phil's scholarship from a conglomeration of these two distinct periods in Indian law history dominated by the federal goal of eliminating tribes as separate sovereigns.

42. See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 *HARV. L. REV.* 431 (2005) [hereinafter Frickey, *(Native) American Exceptionalism*]; Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1 (1999) [hereinafter Frickey, *A Common Law for Our Age of Colonialism*].

Justices when their solutions appear implausible: “Taken as a whole, the judicial method in the [reservation] diminishment cases might appear to be essentially lawless. . . . In totality, the cases suggest that, to adapt an old joke about Congress, no Indian reservation is safe while the Supreme Court is in session.”⁴³ And later in the same article: “[B]y refusing to admit that it is implementing a general (and repudiated) congressional purpose rather than explicit congressional intent, the Court has sought to shift the blame for the erosion of tribal authority to a century-old Congress rather than where it belongs—the current Court.”⁴⁴

By the end of both of these articles, Phil suggests that the best the judiciary can do is stay out of it.⁴⁵ The damage has been done, and the Court lacks the tools—empathy, contextual understanding, a vision of vibrant, contemporary sovereign tribal governments, an adaptable and historically grounded sense of pluralism—to stop the hemorrhaging of Indian law.⁴⁶ Phil concludes:

In the last analysis, it should be unsurprising that federal Indian law has turned out as confused as it is. For beneath questions about constitutional text, original intent, common law authority, and so on lies a much more fundamental normative confusion—regarding the founding of the United States and the development of our constitutional traditions. We have every right to be confused about what we should make of our origins, our evolution, our sense of nationhood, and our creation of a constitutional democracy through colonialism.

....

After five hundred years, it is high time to face this most fundamental of confusions. . . .

....

. . . Yet for the past three decades, the highest Court of the United States has been on a decisional path that undercuts tribal prerogatives, and recently several Justices openly challenged the notion that tribes should be recognized as self-governing in the first place. Whatever the appropriate answers are for America, it is exceedingly doubtful that these judicial solutions are among them. Whatever processes would produce appropriate results, it is equally doubtful that case-by-case

43. Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 42, at 24.

44. *Id.* at 25.

45. *Id.* at 81 (“[T]he simplest option for the Court would be to freeze the law as it now stands, embrace what it can retrieve of the traditional concepts, and force Congress to undertake any further relief for nonmembers in Indian country.”).

46. Frickey, *(Native) American Exceptionalism*, *supra* note 42, at 487 (suggesting that the best the Court can do at this point is to “return to a more modest judicial role, one that provides side constraints—constitutional and canonical—on the congressional power to invade tribal prerogatives and that leaves room for the affected parties to negotiate rather than litigate most issues of twenty-first-century federal Indian law”).

litigation is among them.⁴⁷

Others in the field have similarly suggested that the best the Court can do is to stay its hand.⁴⁸ Indeed, a fairly large group of academics and practitioners meets regularly to discuss how to keep Indian law cases out of the Supreme Court if at all possible, and if it is inevitable that they are headed that way, strategizes about how to cabin the likely damage.⁴⁹ Yet throughout his previous work, Phil maintained a hopeful and respectful tone toward the Court, and his complicated sense of what Indian law was never seemed to cloud his optimism about what it might be if the judiciary listened and tried. In these last two pieces, *(Native) American Exceptionalism* in particular, Phil's optimism seemed to have come to an end.

*E. Self Determination, Reconciliation, and Revival*⁵⁰

From the despair in these last two articles, Phil moved to his last stage, which is in some ways the most intriguing and engaged period of his scholarship. Throughout all the phases of his work, Phil mentored students and scholars throughout the country. But in this period, he incorporated that mentoring into his writing, and elevated it almost to the level of exhortation. One senses that Phil did all he could to describe, explain, justify and critique the Court. He would never have put it this way, but I will: no one did that kind of work better than Phil, and yet the Court remained oblivious. Therefore, towards the end of his career, Phil changed his approach.

In *Transcending Transcendental Nonsense*,⁵¹ Phil uses Felix Cohen's legal realism as a jumping-off point for encouraging a new realism in Indian law. What Indian law scholarship needs more of, according to this piece, is not carping and whining about the Court, nor treatise-like scholarship that approaches Indian law as if it is a set of foregone quasiscientific principles derived from quasireligious origins.⁵² Rather, Indian law scholarship needs

47. Frickey, *(Native) American Exceptionalism*, *supra* note 42, at 488–90.

48. See, e.g., Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797 (2006); Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005).

49. See ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 584 (2008) (describing Native American Rights Fund's Tribal Supreme Court Project).

50. The period of Self-Determination in federal-tribal relations dates from 1961, when Termination policies were abandoned, to the present. Congress and the executive branch have consistently supported policies of tribal self-government throughout this period. See DELORIA & LYTLE, *supra* note 13, at 21–24.

51. Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649 (2006).

52. As Phil put it: "the classic treatise assumes law is found, not made, and consists of abstract rules with eternal life, not necessarily tentative conclusions subject to reconsideration and extinction at the intersection of law and life. The highest goal of the treatise is to be like the Bible with pocket parts." *Id.* at 652.

more nuanced, contextual study of actual happenings in Indian country that relate to or derive from law.

In a speech delivered at the University of Kansas's annual conference on tribal law and institutions, Phil provided some of his own context, describing growing up in the small town of Oberlin, Kansas.⁵³ Phil used his personal experiences to make the point that in Oberlin and other small towns, formal law often plays a background role to social and cultural norms. The formal legal institutions are there if residents need them, but they do not play a prominent role in most of what actually happens. Despite this, small-town America is not the object of undue suspicion by members of the dominant society. To the contrary, small towns are often idealized for just this sort of legal informality. Tribal communities, however, are sometimes subject to a fair amount of suspicion based on the *assumption* that they operate like small town America, whether they actually do or not.

More often than not, at least five and sometimes nine justices of the Supreme Court make uninformed assumptions of this kind. For example, in *Nevada v. Hicks*, Justice Souter concurred in the decision, which held that a tribal court lacked jurisdiction over tort and civil rights claims brought by a tribal member against state law enforcement personnel, and stated in his reasoning that the "law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' which would be unusually difficult for an outsider to sort out."⁵⁴ Justice Souter implied that it would therefore be unfair to subject such outsiders to the tribal court's jurisdiction.⁵⁵ Yet it is not clear why such a mixture would be any more difficult to sort out in tribal courts than it is in state courts, which blend common law, state statutes, federal law, and perhaps municipal law and assorted regulations. Similarly, in *Oliphant v. Suquamish Indian Tribe*—the Court's debut of its contemporary common law methodology for divesting tribes of retained inherent powers—the Court pointed to the alien and unrepresentative nature of tribal courts in its concluding paragraphs to bolster its holding that tribes lack criminal jurisdiction over non-Indians.⁵⁶

Phil's point about Oberlin, Kansas, is that scholars should, among other things, do the important work of describing and assessing how contemporary tribal institutions and communities actually work so that the suspicions are harder to justify. I will use Oberlin for a different but related purpose—to tell a story, not about the workings of tribal institutions *per se*, but about the

53. Philip P. Frickey, *Address at University of Kansas Conference on Tribal Law and Institutions, February 2, 2008: Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB. POL'Y 24 (2008).

54. *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) (internal citation omitted).

55. *See id.* at 385 (indicating that the purported difficulty of discerning tribal law supports the conclusion that the tribe lacks jurisdiction).

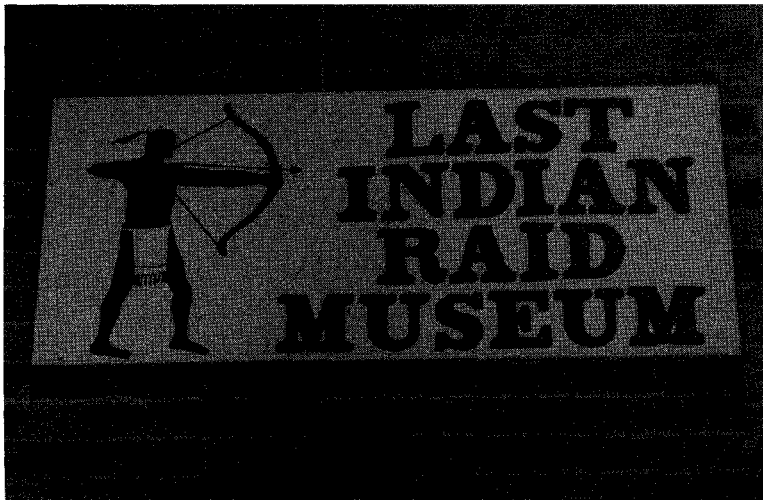
56. 435 U.S. 191, 210–11 (1978).

inextricably intertwined fate of American Indian tribes and all the immigrants that followed in the wake of Columbus. That fate is a product of the United States' reactions to the unrelenting claims of Indian nations to persist on their own terms. The institutional relations that grew out of these origins comprise the core of federal Indian law, a point that Phil emphasized throughout his work.

II

THE LAST INDIAN RAID IN KANSAS, OR THE ODYSSEY OF THE NORTHERN CHEYENNE?

If one happens to peruse the Oberlin, Kansas, website, one of the first things to catch the eye is a prominent photo of a sign that reads "The Last Indian Raid Museum."⁵⁷ Today, the museum is officially known as the Decatur County Museum, but the webmasters for Oberlin and the Museum have not caught up with that change.⁵⁸ And a good thing too, or this researcher would not have stumbled on the incredible story of Indian-non-Indian relations that touched down near Oberlin, in Decatur County, Kansas, in the autumn of 1878.



Decatur County Museum, June 2009 (Photo by Sarah Krakoff)

What was The Last Indian Raid? The Kansas Historical Society has made many historical documents available online, so the curious can learn about the Last Indian Raid from early local accounts. If one starts with those, one learns

57. See Town of Oberlin, Kansas, <http://www.oberlinkansas.org/towns/oberlin.html> (last visited Aug. 5, 2009).

58. As I later confirmed in person, the most prominent signs on the museum still announce "The Last Indian Raid Museum," and the current brochure reads "Last Indian Raid on Kansas Soil; Visit the Decatur County Last Indian Raid Museum." See Last Indian Raid on Kansas Soil (brochure from the Decatur County Museum) (on file with author).

that the raid took place over the span of a couple of days from September through October, 1878, when a group of Indians tore through northwestern Kansas, stopping in Decatur County long enough to kill several settlers.

According to one local paper, the Indian perpetrators were "Cheyennes who had broken out of their reservation in Indian territory" and were seeking revenge for an 1875 attack on a group of Indians at Cheyenne Hole in Decatur County.⁵⁹ According to this account "[the Indians] did not do any real damage until they reached Decatur County where they raided a ranch home and killed nineteen settlers."⁶⁰ Another Kansas newspaper, however, estimated the total number of people killed in Kansas as "from seventy-five to one hundred."⁶¹ According to this paper, the Northern Cheyenne "had been moved from their northern hunting grounds against their will" and "chafed under the restrictions of the agency."⁶² Yet another source reported that the Cheyenne left the reservation in the Indian Territory because they were "dissatisfied with the rations."⁶³

Yet even while these very local accounts were cementing into the Last Indian Raid story, other histories were being recorded. For example, an individual named Wild Hog was one of the Northern Cheyenne men to take part in the Raid. When Wild Hog was imprisoned after surrendering to the U.S. cavalry in Fort Robinson, Nebraska, he provided a first-hand account of the Cheyenne's trek.⁶⁴ After the Sioux and the Northern Cheyenne fought together at the 1876 Battle of the Little Bighorn, a disaffected Cheyenne named Broken Dishes agreed with the U.S. Cavalry's Colonel Mackenzie to remove the Northern Cheyenne to the Indian Territory (present-day Oklahoma). Without the counsel or consent of the rest of the tribe, Mackenzie ordered the removal to proceed, and the Northern Cheyenne were forced to join the Southern Cheyenne on a small, malaria-ridden reservation. Fifty children died of measles and many others were stricken with malarial fevers.⁶⁵

The Northern Cheyenne begged for permission to go back home to the Northern Plains.⁶⁶ In fact, they had understood that they could return home at any time if they found the conditions in the Indian Territory unsatisfactory. But

59. Kirby Ross, *Forgotten History—Phillips County Indian Scares, The Last Indian Raid Scare of 1878*, PHILLIPS COUNTY REV., available at <http://www.phillipscountyreview.com/pages/indianscare4.pdf>.

60. *Id.*

61. T.A. McNeill, *When Kansas Was Young: The Last Indian Raid in Kansas*, THE WESTERN STAR (Jan. 23, 1920), available at http://www.rootsweb.ancestry.com/~kscomanc/indian_raid_1878.html.

62. *Id.*

63. 1 KANSAS: A CYCLOPEDIA OF STATE HISTORY, EMBRACING EVENTS, INSTITUTIONS, INDUSTRIES, COUNTIES, CITIES, TOWNS, PROMINENT PERSONS, ETC. 328 (Frank W. Blackmar ed., 1912).

64. See *The Captive Cheyennes*, LAWRENCE STANDARD (Oct. 9, 1879), available at www.kansasmemory.org/item/210684.

65. *Id.*

66. *Id.*

Mackenzie refused their requests. It was then that a group plotted to leave under the leadership of Dull Knife and Little Wolf, another respected Northern Cheyenne chief. According to Wild Hog, the eventual violence in Oberlin began in southwest Kansas, initiated by soldiers who fired shots when the migrating Cheyenne intended only to talk.⁶⁷

Historians have largely corroborated Wild Hog's version, while providing broader perspective. According to historians' accounts, the Last Indian Raid was but one segment of the Northern Cheyenne's multi-year struggle to return to the northern plains.⁶⁸ While a telling of this story could probably begin even earlier,⁶⁹ it is reasonable to start when Wild Hog did, with the Battle of the Little Big Horn in June, 1876, when some Northern Cheyenne sided with the Sioux in their famous defeat of Lt. Col. George Armstrong Custer's Seventh Cavalry.⁷⁰ This clash embroiled the Northern Cheyenne in the Great Sioux War and intensified the Cavalry's efforts to subdue the Cheyenne and remove them to the Indian Territory.⁷¹ Just five months later, in November of 1876, Colonel Mackenzie led Cavalry members in an attack in Wyoming Territory on the winter lodges of a band of Northern Cheyenne led by Dull Knife, Little Wolf, and Wild Hog.⁷² The Cavalry killed or wounded close to one hundred Northern Cheyenne and burned their lodges filled with food, robes, hides, and supplies. The attack marked the beginning of the end of Northern Cheyenne resistance to removal. The band fled north to Montana, and some took refuge with the Oglala Lakota, but by spring of 1877, Little Wolf and Dull Knife had surrendered at Fort Robinson, Nebraska:

For many Cheyennes, hope died when Little Wolf surrendered in February of 1877. When Dull Knife's party arrived on April 21, although other bands were still scattered, the process of defeat was finalized. The thirteen-year history of resisting the whites, which started in the wake of the Sand Creek Massacre of the southern people in 1864 and ended with Mackenzie's destruction of the Northern Cheyenne village in the Big Horns, had for many seemed a lifetime.⁷³

67. *Id.*

68. JOHN H. MONNETT, *TELL THEM WE ARE GOING HOME: THE ODYSSEY OF THE NORTHERN CHEYENNE* (2001). Monnett's is the most scholarly work addressing the Northern Cheyenne's Odyssey. *See also* STAN HOIG, *PERILOUS PURSUIT: THE U.S. CAVALRY AND THE NORTHERN CHEYENNES* (2002); VERNON R. MADDUX & ALBERT GLENN MADDUX, *IN DULL KNIFE'S WAKE: THE TRUE STORY OF THE NORTHERN CHEYENNE EXODUS OF 1878* (2003).

69. For example, the story could begin with the Sand Creek Massacre in 1864, when Colonel Chivington led the Cavalry in slaughtering a band of Southern Cheyenne that included many women and children. *See* MONNETT, *supra* note 68, at 13.

70. *See id.* at 4, 11.

71. *See id.*

72. *See id.* at 3-4; *see also* HOIG, *supra* note 68, at 10-17.

73. MONNETT, *supra* note 68, at 12-13.

A. The Relocation of the Northern Cheyenne to Indian Territory

From Fort Robinson, the Northern Cheyenne were forced to relocate to Darlington Agency in the Indian Territory. There is some confusion over the Northern Cheyenne's acquiescence to the removal. According to Wild Hog, the disgruntled Broken Dishes entered into the disfavored agreement with Mackenzie.⁷⁴ Historian Richard Monnett, however, indicates that Calfskin Shirt (a minor chief) and Standing Elk (who had come under Calfskin Shirt's influence) were the ones who promised the Cavalry that the Northern Cheyenne would move.⁷⁵ Regardless of who acquiesced, it is clear that Little Wolf, Dull Knife, and Wild Hog, whom the tribe viewed as its legitimate leaders, resisted the removal. Those chiefs relented only after believing they had a promise that they could return north if they found the conditions at Darlington Agency unsatisfactory.⁷⁶ The Northern Cheyenne thus consented to their removal conditionally, and, though angry, they nonetheless peacefully followed their military escort south:

"Lots of Cheyenne were angry," Wooden Leg [a Northern Cheyenne tribal member] recalled, but most, like Little Wolf, became resigned to the move, at least for the moment. "My two sons . . . said it was the only thing our family could do," Iron Teeth [another tribal member] remembered. "I suppose all of the other Cheyennes felt the same way. So all of us were taken to the lands of the South."⁷⁷

On August 5, 1877, the Northern Cheyenne arrived at Darlington Agency, which registered 937 Indians, including approximately 235 men, 312 women, and 386 children.⁷⁸ (Also registered at Darlington Agency, having made the trek with the Northern Cheyenne, were four members of the Arapaho tribe.)⁷⁹ The conditions at Darlington Agency quickly proved disastrous. According to Monnett, "[T]hree calamities overtook the Northern Cheyennes . . . hitting the close followers of Little Wolf and Dull Knife especially hard. Disputes with the Southern Cheyennes, inadequate food, and epidemics devastated the newcomers until they could no longer tolerate life in Indian Territory."⁸⁰

With respect to the first problem, the Northern and Southern Cheyenne were initially pleased to reunite, but it had been more than a decade since they had been together. In the interim, the Northern Cheyenne had forged close ties with the Lakota, many of them marrying into Lakota society and adopting aspects of Lakota culture and religion. By contrast, the Southern Cheyenne had created familial and cultural ties with other southern tribes, including the

74. See *The Captive Cheyennes*, *supra* note 64.

75. MONNETT, *supra* note 68, at 22–23.

76. *Id.* at 23.

77. *Id.* at 24 (citations omitted).

78. *Id.* at 25.

79. *Id.*

80. *Id.* at 27.

Kiowa, Comanche, and Arapaho.⁸¹ Inadequate government supplies (which pitted the groups of Cheyenne against each other), as well as Little Wolf and Dull Knife's resistance to what they perceived to be the assimilationist ways of the southern people, widened the rift.⁸²

Second, government provisions were low from the start. The Treaty of 1876, which outlined the terms of removal, promised that every Indian would receive a daily ration of one-and-a-half pounds of beef, one-half pound of flour, and one-half pound of corn.⁸³ The stipulated food was either never provided, or on occasion withheld in an attempt to "force speedy compliance with mandated agricultural training."⁸⁴ "'We were always hungry,' Wild Hog later testified, 'we never had enough.'"⁸⁵ The plan to convert the Northern Cheyenne to farmers was equally poorly planned and provisioned. The Darlington Agency lacked agricultural supplies, and in any event the Northern Cheyenne had arrived at Darlington too late to plant crops for the following year's harvest.⁸⁶ In addition, Little Wolf's and Dull Knife's followers resisted their forced conversion to yeoman farmers, so the Indian Agent at Darlington provided what little equipment there was to those who more readily accepted assimilation.⁸⁷

Finally, malnutrition combined with disease to render conditions at Darlington Agency intolerable for the Northern Cheyenne. In addition to being weakened by hunger, they lacked immunity to the heat-borne illnesses—measles and malaria—that ran through the camps.⁸⁸ The Darlington Agency did not keep precise records of the number killed by disease at the time, but Wild Hog recounted that fifty Northern Cheyenne children had died.⁸⁹ Other estimates varied, with one indicating that fifty-eight children died from all the camps during the winter of 1877–1878, and another that forty-one of Little Wolf's band alone died during the same period.⁹⁰ Many who survived suffered the recurring misery of malaria, made more acute by the inadequate provision of medical supplies. For example, quinine did not arrive at the Agency until the winter of 1879, after Little Wolf and Dull Knife had fled.⁹¹ As recounted by the

81. See *id.* at 27–28; see also HOIG, *supra* note 68, at 36 ("Despite the happy reception they had received when they arrived, their relations with the southerners had quickly become strained. The southerners contemptuously called them 'Sioux Cheyenne' because of their close association and intermarriage with that tribe." (citation omitted)).

82. MONNETT, *supra* note 68, at 28.

83. *Id.* at 31 (citing 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 189 (1904)).

84. *Id.* at 31.

85. *Id.* at 32 (citation omitted); see also Editorial, *The Refractory Cheyennes*, N.Y. TIMES, Oct. 15, 1878, at 4 (describing testimony by army officers admitting that rations were short and irregularly delivered at Darlington Agency).

86. MONNETT, *supra* note 68, at 36.

87. See *id.*

88. See *id.* at 37.

89. See *The Captive Cheyennes*, *supra* note 64.

90. See *id.*; see also HOIG, *supra* note 68, at 47.

91. See MONNETT, *supra* note 68, at 38.

Northern Cheyenne tribal member Wooden Leg, "'To us it was a new kind of sickness . . . Chills and fever and aching of the bones dragged down most of us to thin and weak bodies.'"⁹²

By summer of 1878, ravaged by illness and chafing at confinement, the Northern Cheyenne longed acutely for the northern plains and mountains. Little Wolf resolved to lead his people back home, with Dull Knife in agreement.⁹³ Little Wolf approached the Indian Agent John D. Miles some time between July and early September. He stated to Agent Miles that his people wished to return to the north, and requested permission to go to Washington to negotiate with higher authorities if Miles lacked the power to authorize their return.⁹⁴ Agent Miles refused, stating that Little Wolf and his people would have to stay at least another year before Miles would consider allowing them to leave.⁹⁵ Little Wolf and the other Northern Cheyenne leaders viewed this refusal as a violation of the terms of their agreement to come to Darlington Agency, which included the proviso that they could leave if conditions were unsatisfactory.⁹⁶ They returned to camp to discuss Miles's position, and the Agency police soon approached to see if Little Wolf's band intended to leave. Little Wolf sent the police back with the message that he was going to move his band further up river and would report back to Agent Miles when they had decided what to do.⁹⁷

Conditions in the camp were now edgy, and three of Little Wolf's followers fled on their own to return to their home territory.⁹⁸ Miles demanded that Little Wolf turn over ten of his men as hostages until Miles's soldiers could recover the three who had escaped. Little Wolf refused, arguing that the three would never be recovered, and that he would therefore lose the ten hostages permanently.⁹⁹ Agent Miles insisted, and still Little Wolf refused: "'You and I have always been friends,' Little Wolf said, 'but today I cannot do for you what you ask. I do not want any trouble, nor do I wish to have blood shed at this agency, but I cannot do what you ask.'"¹⁰⁰ Agent Miles would not relent on his demand, and Little Wolf refused to give in. He shook Miles's hand and left, requesting that the Agent at least give him and his followers time to get beyond Darlington Agency so that blood would not be spilled there:

"My friends," he informed them with finality, "I am now going to my camp. I do not wish the ground about this agency to be made bloody, but now listen to what I say to you. I am going to leave here; I am

92. *Id.* (quoting THOMAS B. MARQUIS, *WOODEN LEG: A WARRIOR WHO FOUGHT CUSTER* 320 (Univ. of Neb. Press 1986) (1931)).

93. *See id.* at 38–39.

94. *See id.* at 40.

95. *See id.* at 40.

96. *See id.*; see also *The Captive Cheyennes*, *supra* note 64.

97. MONNETT, *supra* note 68, at 40.

98. *See id.* at 40.

99. *See id.* at 40–41.

100. *Id.* at 41.

going north to my own country. I do not wish to see blood spilt about this agency. If you are going to send your soldiers after me, I wish that you would first let me get a little distance away from this agency. Then if you want to fight, I will fight you, and we can make the ground bloody at that place.”¹⁰¹

Little Wolf returned to his camp, and he and Dull Knife left the Agency late on September 9, 1878, leading a total of 353 Northern Cheyenne, including ninety-two men, 120 women, sixty-nine boys, and seventy-two girls.¹⁰² Of the men, “[o]nly 60 or 70 were seasoned warriors.”¹⁰³

B. The Flight to Kansas and Military Conflict Between the Northern Cheyenne and the Federal Cavalry

So far, the story of the Last Indian Raid is one of a people being treated as an object of military strategy and subject to the predominant policies of the era, including: armed conflict, treaty making, confinement to reservations, and assimilation.¹⁰⁴ From the Northern Cheyenne perspective, the government broke its promise to permit the Cheyenne to decide for themselves whether to stay at Darlington Agency, and the Cheyenne had no obligation to be subject to the increasing misery and attrition they suffered there.¹⁰⁵ This perspective differs quite markedly from the early Kansas accounts. Those accounts understandably begin with the killings of the settlers, but then frame the actions of the Northern Cheyenne either as acts of revenge or petulant anger at being “dissatisfied” with rations.¹⁰⁶ The broader historical context reveals, consistent with Phil Frickey’s persistent suggestion about how best to view American Indian law, a structural relationship between peoples—the Northern Cheyenne and the expansionist United States at late-nineteenth century. As historian Monnett editorialized:

The Indian Bureau only had themselves to blame for the exodus of Little Wolf’s and Dull Knife’s Northern Cheyennes from Darlington Agency. Their demands that the Indians learn agriculture and send their children to the agency school for subservient labor roles within white society were too precipitate to be effective. To expect peoples, who in 1877 had been at war with the United States, under the stress factors of inadequate food and epidemic, to become assimilated into their enemy’s culture within one year, was not only unwise policy, but

101. *Id.* at 42.

102. *Id.* at 43.

103. *Id.* at 43.

104. See ANDERSON ET AL., *supra* note 49, at 77–103.

105. See *The Refractory Cheyennes*, *supra* note 85 (articulating support for the view that the government’s broken promises caused the Northern Cheyenne exodus from the Oklahoma reservation.)

106. See sources cited at notes 59–63, *supra*.

was also an ethnocentric, paternalistic, and arrogant assumption.¹⁰⁷

These events bring us to the brink of the Cheyenne's flight through Kansas. The cavalry responded to a series of impressive maneuvers by the Northern Cheyenne with initial hesitation and then military bungling. This eventually led to the killings and mistreatment of the settlers in and around Oberlin, who were largely innocent bystanders to the larger conflict. The first battle with the Cavalry, and the first deaths of white civilians, occurred just south of the Kansas border. The Northern Cheyenne refused to surrender and evaded capture at The Battle of Turkey Springs, Indian Territory, on September 13, 1878.¹⁰⁸

Around the same time, young Northern Cheyenne scouts killed Rueben Bristow and Fred Clark, cattle hands working for a nearby ranch.¹⁰⁹ Motivations for the killings remain unclear. Some writers, including Mari Sandoz, have claimed that the civilians had already fired at the Northern Cheyenne at Turkey Springs, intimating that the scouts were acting only in response to the attack.¹¹⁰ Monnett rejects the connection, arguing that there is some dispute about whether Bristow and Clark were killed before or after the Battle at Turkey Springs.¹¹¹ And even if they were killed after the battle, Monnett contends the scouts were unlikely to have heard about it: "[t]hus the incident likely was not an act of revenge by the Cheyennes for Turkey Springs."¹¹² However, Monnett allows for the possibility that Bristow and Clark were shooting at the Northern Cheyenne to protect their livestock. Thus, while orders came from Little Wolf and Dull Knife for the scouts to fire only on the military, the boundaries of the conflict were likely far more fluid in the eyes both of white cowboys and settlers as well as the younger Northern Cheyenne.¹¹³

As they headed north, the Northern Cheyenne continued to evade the military, and crossed the state line into Kansas some time on late September 16 or early September 17. The federal troops¹¹⁴ caught up with them on September 18, and a slow and painstaking chase across the plains followed. There were battles at Sand Creek on September 21–22 and at Punished Woman's Fork on September 27. Also on September 27, the Fourth Cavalry destroyed the Northern Cheyenne's pony herd.¹¹⁵ By this time, in addition to the two cowboys just south of Kansas, the Northern Cheyenne had killed ten people,

107. MONNETT, *supra* note 68, at 42.

108. *See id.* at 53–57.

109. *See id.* at 57.

110. *See id.* at 57–58; MARI SANDOZ, CHEYENNE AUTUMN 28 (1953).

111. *See* MONNETT, *supra* note 68, at 58.

112. *Id.*

113. *See id.* at 59.

114. Additionally, civilians, interested in defending their range rights in southwestern Kansas, joined the military.

115. *See* MONNETT, *supra* note 68, at 61–74.

wounded five others, and taken or destroyed 640 head of livestock.¹¹⁶ The people of Kansas paid increasing attention, with some newspapers fostering hysteria by including dramatic depictions of settlers abandoning their homes in fear and others downplaying the attacks out of concern for hurting the local economy.¹¹⁷

Unfortunately, the worst attacks were yet to come. The Northern Cheyenne's loss of their pony herds precipitated greater scavenging for supplies by the young scouts. Deprived of their horses, food, and other necessities, scouts had a greater impetus to raid non-Indians, despite Little Wolf's and Dull Knife's repeated commands not to involve civilians. From September 30 to October 1, young Northern Cheyenne scouts killed a total of thirty-one settlers in Decatur and Rawlins Counties. The details of these events are painful, and include mistreatment and assault of women and children. Apparently, the Cheyenne disregarded some of the settlers' willingness to surrender their belongings in exchange for keeping their lives.¹¹⁸ Below is just one snapshot of the incident, recounted by someone who lived through it:

[A] very pathetic scene occurred during the night. One of the guards heard someone moving, halted them, and upon investigation found it to be old Mrs. Laing and two young daughters, who had come from their home on the north fork some eight miles northwest of Keefer's ranch. After the Indians had destroyed their home and mistreated them, finally throwing the two young girls into a straw bed and were about to set fire to it, an old chief interfered and taking the mother and girls outside told them to go. They had traveled most of the night trying to find some place of refuge.¹¹⁹

Brutality was not the sole province of the Northern Cheyenne, however. Some of the Oberlin settlers, in search of the Cheyenne perpetrators, bludgeoned a feeble elderly Northern Cheyenne to death, scalped a younger Northern Cheyenne who had been wounded, and shot and killed another, leaving his body behind, unburied and sticking out of a prairie dog hole.¹²⁰

And as the Northern Cheyenne fled north, the events of September 30–October 1, 1878, followed them. Outrage and fear among the white population generated greater military support and determination. Though Little Wolf's and

116. See *id.* at 74.

117. See *id.* at 75.

118. See *id.* at 78–103; HOIG, *supra* note 68, at 137–45. *But see* SANDOZ, *supra* note 110, *passim* (minimizing killings and abuse by the Cheyenne and explaining the Kansas deaths as revenge killings for the 1875 massacre of Cheyenne at Sappa Creek).

119. F.F. Bliss, *Personal Recollections of the Indian Raid September 30, 1878* (1929), reprinted in *A GENERAL HISTORY OF THE INDIAN RAID SEPTEMBER 30, 1878 IN DECATUR COUNTY, KANSAS* 22 (Sharleen Wurm ed., 2004) (available at the Decatur County Museum and on file with author).

120. See MONNETT, *supra* note 68, at 89–90 (describing these events, and also noting the difficulty of discerning whether the second was a distinct victim or both accounts were two slightly different descriptions of the same Cheyenne victim).

Dull Knife's bands succeeded in crossing into Nebraska together, they parted ways in mid-October, 1878, under the increasing pressure from the federal troops.¹²¹ Little Wolf wanted the people to remain together and to continue north to the Powder River country. Dull Knife preferred to head to the Red Cloud agency near Fort Robinson, where some of his people had relatives among the Oglala Lakota.¹²²

C. The Capture of the Northern Cheyenne by Federal Troops and their Subsequent Attempt at Escape

Dull Knife led roughly 149 people toward Red Cloud, not realizing that the Agency had been closed. On October 23, 1878, Dull Knife and his followers met with federal troops and reluctantly surrendered to them, agreeing to be led to Fort Robinson. Dull Knife, Wild Hog, and other leaders attempted to negotiate an agreement to allow them to join the Oglala Lakota at their new agency, but Captain Johnson, the military leader on site, refused.¹²³ The military forced the Cheyenne, now considered prisoners of war, to Fort Robinson and placed them in barracks. Military officials informed the Cheyenne that they would have to stay for three months while the government decided whether to return them to the Indian Territory or allow them to settle with the Sioux on one of the northern reservations.¹²⁴

For the first two months of captivity, conditions were tolerable and the Northern Cheyenne remained optimistic that, upon their release, they would be permitted to stay in the North.¹²⁵ Relations between some of the soldiers and the Northern Cheyenne were mutually respectful and friendly, occasionally even playful.¹²⁶ Yet plans were being made behind the scenes to return Dull Knife and his people to the Indian Territory.¹²⁷ The state of Kansas wanted the Northern Cheyenne turned over to them for temporary custody while they investigated the killings in Decatur County and elsewhere, and eventually the Secretary of the Interior, Carl Schurz, agreed.¹²⁸ He sent orders to Fort Robinson to march the Northern Cheyenne back to Kansas, for eventual return

121. *See id.* at 109–10.

122. *See id.* at 110.

123. *See id.* at 113.

124. *See id.*

125. *See id.* at 116–17; *see also* SANDOZ, *supra* note 110 (describing the beginning of the Northern Cheyenne's captivity at Fort Robinson as a positive change from the preceding, harrowing journey).

126. *See* MONNETT, *supra* note 68, at 116 (quoting Sergeant Carter P. Johnson, one of the guards at Fort Robinson, as recalling that the Northern Cheyenne were "comfortable enough" and that they "would often stick their heads out of the windows and talk with the guards outside. They had a club . . . which they had pulled out of the barracks. They would sometimes stick this out and wave it, in fun") (citation omitted).

127. *Id.* at 117.

128. *See id.*

to the Darlington Agency.¹²⁹ Dull Knife and Wild Hog refused to go, asserting: “That is not a healthful country, and if we should stay there, we would all die No, I am here on my own ground, and I will never go back. You may kill me here; but you cannot make me go back.”¹³⁰

In the face of resistance, Captain Henry W. Wessells, temporary commander of Fort Robinson, issued two orders. The first, on January 5, 1879, cut off food and firewood to the Cheyenne to force them to comply. The second, on January 8, cut off all water.¹³¹ The Northern Cheyenne, now confined full-time to their barracks, still refused to comply. Instead, they plotted an escape, planning to use the handful of weapons that they had concealed from the soldiers by hiding them in women’s dresses and floorboards.¹³² On January 9, 1879, the roughly 125 weakened Northern Cheyenne, mostly women and children, burst forth from the barracks shooting and prepared for death:

They prepared to make a dash for freedom—or death. George B. Grinnell states that it was Little Shield who said, “Now, dress up in your best clothing. We will all die together.” Said another, according to Grinnell, “We may as well die here as be taken back south to die there.” Yet another Cheyenne, according to Grinnell’s interviews, said, “It is true that we must die, but . . . we will die fighting.”¹³³

Many did die. The escape from Fort Robinson was fantastic yet doomed. Women fled while carrying their children; the ones who survived the initial rounds of bullets hid in bluffs and caves. Many were found and bludgeoned or killed at close range, sometimes by civilians who had enlisted themselves in the battle.¹³⁴ Yet it took Captain Wessells and his soldiers until January 22 to subdue the last of the escapees. On that day, eighteen men and older boys, as well as fourteen women and young children, resisted in a final battle against nearly 150 soldiers.¹³⁵ The Northern Cheyenne were hunkered down in a pit behind a shelter they had constructed. Toward the end, the ferocity of their determination not to give in was evident in the following agonizing details:

After ordering a cease fire, Captain Wessells called out for the Indians in the pit to surrender. . . . During this lull in the fighting a young girl raised a carbine over the rim . . . as a signal to the soldiers that she wanted to come out. . . . But she never had the chance to escape, for in the next instant her mother caught her by the hand and slit her throat, screaming that they would never surrender.¹³⁶

129. *See id.*

130. *Id.* at 118 (quoting GEORGE BIRD GRINNELL, *THE FIGHTING CHEYENNES* 418 (1982)).

131. *See id.* at 120.

132. *See* MONNETT, *supra* note 68, at 125.

133. *Id.* at 124.

134. *See id.* at 130–37.

135. *See id.* at 149–50.

136. *Id.* at 151–52.

Another mother also attempted to kill her child and then herself rather than give up to the soldiers.¹³⁷ In the end, both daughters survived, but when one of the soldiers offered to assist one of the mothers, who was bleeding profusely, “she grasped his hand and spit into his face in one last act of hatred and defiance.”¹³⁸

Several Midwestern and East Coast newspapers covered the Northern Cheyenne’s treatment at Fort Robinson, and their courageous and ill-fated flight.¹³⁹ Word got back to the public and Washington, D.C., and galvanized support for the Northern Cheyenne, despite the negative publicity following the Kansas killings. The following editorial in the *New York Times* provided extensive detail about the Cheyenne odyssey from start to finish, and though critical of the Northern Cheyenne in some respects (and in particular with regard to the killings in Kansas), it nonetheless reserved the harsher judgment for the federal government:

The bloody affair at Fort Robinson is, let us hope, the final scene in an Indian drama which, from beginning to end, has been a disgrace to the Government and the people. The Cheyenne bands of Dull Knife and Old Crow are not, it is true, the sort of Indians to excite sentimental sympathy. . . . They committed many outrages, on their road through Kansas Nevertheless, it is a demonstrable fact that the Government had been shamefully remiss in its treatment of these Indians, and thus tempted them to the revolt which has had so bloody a course and ending.

. . . .

That the dead of Winter should be chosen for their return to the Indian Territory was quite worthy of a Governmental policy which has repeatedly picked out this season for such purposes; that their refusal to go should be followed by disciplining them with starvation was perhaps not unexpected, because the Government first agrees to give Indians specific annual rations as a consideration for going to the Indian Territory, and then, when they have gone, cuts down the rations unless they will work. It had been intended to give up a good part of these Indian warriors in Kansas, on the way back, so that they might be tried and hanged; and it should not be surprising that they preferred to die in battle rather than at the end of a rope. These dead Indians have been officially abused with consolatory vigor as lazy, trouble-making, hoe-hating red rascals, who would rather hunt buffalo than draw rations, and who would rather die than obey department circulars; but is there, after all, in this whole miserable business anything but a

137. *See id.* at 152.

138. *Id.* at 153.

139. *See, e.g., Shooting Down Fleeing Indians*, N.Y. TIMES, Jan. 11, 1879, at 1 (reporting from Nebraska on January 10 and recounting the escape by Dull Knife’s band from Fort Robinson).

shameful record for the country and for the white race?¹⁴⁰

The Government itself, in a sense, eventually agreed with the sentiments in the editorial. President Hayes “expressed concern over alleged ‘unnecessary cruelty’ at Fort Robinson,” and the army ordered an investigation of the events even before the remnants of the Northern Cheyenne were subdued.¹⁴¹ Most of Dull Knife’s people were allowed to remain north, with the Oglala Lakota at Pine Ridge. Dull Knife and his immediate family had never been captured, and they too ended up at Pine Ridge, where Dull Knife’s descendants live to this day as enrolled members of the Oglala Lakota.¹⁴²

Kansas succeeded at having Wild Hog and six other Northern Cheyenne turned over to the state for prosecution, although it was never clear that these seven men were implicated in the civilian deaths.¹⁴³ Indeed, a Kansas jury acquitted Wild Hog and the others for insufficient evidence against them.¹⁴⁴ In part, their successful defense was due to a change of venue from western Kansas to Lawrence, in the east, where sentiment concerning the Northern Cheyenne’s actions had evolved.¹⁴⁵ Wild Hog and his codefendants apparently also benefitted from an arguably incompetent and distracted prosecuting attorney, who neglected the case in favor of pursuing his romantic interests.¹⁴⁶ Favorable press, along with persistent Northern Cheyenne advocacy, also eventually helped to secure a reservation in Montana for the tribe in 1884.¹⁴⁷

A series of withdrawals and subsequent executive orders expanded the tribe’s land, and in 1900 the name was changed from the Tongue River Reservation to the Northern Cheyenne Indian Reservation, which it remains today.¹⁴⁸ Although it is unclear whether Wild Hog was able to return north himself, his testimony during senate hearings on the Northern Cheyenne Odyssey was particularly compelling and helped to sway public opinion in favor of his people.¹⁴⁹

140. Editorial, *The Cheyenne Tragedy*, N.Y. TIMES, Jan. 12, 1879, at 4.

141. See MONNETT, *supra* note 68, at 147.

142. See JOE STARITA, *THE DULL KNIFES OF PINE RIDGE: A LAKOTA ODYSSEY 3* (Univ. of Neb. Press 2002) (1995).

143. See MONNETT, *supra* note 68, at 173–75.

144. See *id.* at 181–82 (2001).

145. See *id.* at 181 (describing how eastern Kansas newspapers, influenced by changing attitudes of the army toward the events and coverage by the northeastern press, had begun to report the conditions at Darlington Agency and other facts sympathetic to the Cheyenne defendants to the exclusion of covering the alleged crimes).

146. See *id.* (describing one historian’s account of how the district attorney fell in love with a New York woman during late summer of 1879, and therefore neglected his prosecutorial duties that fall).

147. See *id.* at 193.

148. See *id.*

149. See *id.* at 184.

D. The Enduring Legacy of the Last Indian Raid

A snapshot of contemporary life on the Northern Cheyenne Indian Reservation reveals that the independent spirit of Wild Hog, Dull Knife, and the other Northern Cheyenne leaders continues. Today there are 9,496 enrolled Northern Cheyenne tribal members, over 4,000 of whom reside on the reservation. Ninety-nine percent of the reservation is composed of tribally owned land. The Northern Cheyenne tribal government has an executive, legislative, and judicial branch. The judiciary consists of ten judges, including two elected trial judges, four appointed appellate judges, and four appointed *pro tem* judges.¹⁵⁰ Chief Dull Knife College, the tribal community college, offers vocational training, an associate of arts degree, and an associate of applied science degree.¹⁵¹ The Northern Cheyenne economy is based on natural resource development, agriculture, and various local businesses and service industries. The tribe itself is the largest employer, followed by the St. Labre Indian School, the Indian Health Service, and the Lame Deer Public Schools. Unlike most non-Indian rural communities in Montana, which are shrinking in size, the Northern Cheyenne population is young and growing.¹⁵²

All of these details might seem ordinary today, given that there are over 560 federally recognized tribes, many of which have tripartite systems of government and collectively possess over fifty-six million acres of tribal land.¹⁵³ However, their importance is apparent when contrasted with the events in September–October, 1878, in western Kansas—the surprised and terrified settlers, the famished and determined Indians (a fleeing nation), as well as the aftermath of mourning, anger, and, yet, eventual reconciliation. That context of power, violence, and conflict forms the backdrop of contemporary tribal sovereignty for the Northern Cheyenne, and similar yet distinctive versions can be told for every American Indian nation in the country.

IV

LESSONS ABOUT CONTEXT FOR CONTEMPORARY INDIAN LAW

A. General Lessons

Whether one sees the events just described as The Last Indian Raid (the individual-conflict view) or as an installment in the Odyssey of the Northern Cheyenne (the conflict-between-sovereigns view) depends on one's frame of reference. If the timeframe is those few terrifying days in 1878 and the

150. See DUANE CHAMPAGNE, *SOCIAL CHANGE AND CULTURAL CONTINUITY AMONG NATIVE NATIONS* 297–300 (2007).

151. See *Demographic and Economic Information for Northern Cheyenne Indian Reservation 2* (March, 2008), available at http://www.ourfactsyourfuture.org/admin/uploadedPublications/2695_N_Cheyenne_RF08_Web.pdf.

152. See *id.*

153. See ANDERSON ET AL., *supra* note 49, at 34.

perspective is that of the settlers, the Last Indian Raid view prevails. If the perspective includes Northern Cheyenne tribal members, regional and national reporters, and, eventually, even congressional and executive branch politicians, a shift toward the Northern Cheyenne Odyssey view occurs. As demonstrated in the previous Part of this article, the views of historians, who provide the longest and deepest perspective, seal the Northern Cheyenne Odyssey characterization as the more accurate one. To be clear, perceiving the struggles between the Northern Cheyenne and the United States as conflicts between sovereigns does not diminish the tragedy of the killings near Oberlin. It should, however, help us to see the historical and political forces that led to them, and to understand that the Northern Cheyenne's claims to govern themselves in their own lands were justified, even if a handful of acts by individual tribal members were not.

Phil Frickey's scholarly contributions, recounted in Part I, repeatedly call for the Northern Cheyenne Odyssey perspective of federal Indian law. When deciding questions that touch on tribal sovereignty, courts should recall they are wading into the story of colonialism—the strange, wavering, and occasionally guilt-ridden American version of it—and that the judicial role should temper rather than foment that inherently political and often violent process.¹⁵⁴

Judicial restraint in cases that call for the diminishment of tribal powers does not mean that the interests of non-Indians will be overlooked. If Indian tribes overstep the boundaries of acceptable procedural and substantive justice in ways that impinge on non-Indian rights, Congress can (and most likely would) respond.¹⁵⁵ The Northern Cheyenne Odyssey view, in other words, does not erase the story of individual hardship. Rather it allows us to see the sufferings and struggles of all involved, and to assess fairly the appropriate roles for government actors (including federal judges) who attempt to call the shots.

B. A More Specific Lesson Drawn from the Facts of the Northern Cheyenne Odyssey: Tribal Jurisdiction over Non-Member Indians

Some would consider their scholarly duty discharged by telling the story of the intertwined fates of the Northern Cheyenne and the settlers of Oberlin, Kansas—a story that intimately illustrates Phil's points that Indian law is, centrally, about construing the structural relationship between Indian nations and the federal government, and that grounded research is necessary to

154. See Part I, *supra*; see also Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 33 (2002) (describing how the Supreme Court has failed to heed this concern, and instead has “elevated [itself] into . . . arguably our most powerful contemporary agent of an ongoing, evolving colonialism”).

155. See *id.* at 29–33 (noting that the Supreme Court has assumed the role of curbing tribal powers when they impinge on non-Indian rights, and that this presents questions about institutional competence and fairness given that it would be easier for non-Indians to convince Congress to curb tribal powers than it has been for tribes to petition Congress to restore them).

illuminate the contours of that relationship. But this might not be enough for Phil himself, who excelled not only at making apt generalizations about law and its interpretation, but also at commenting in sharp detail on how those generalizations apply to contemporary issues and cases. It is therefore appropriate to apply the lessons from the Last Indian Raid/Northern Cheyenne Odyssey to a contemporary issue in Indian law: the recurring question about the boundaries of tribal membership and the legal significance that should be accorded to those boundaries.

Whether tribal governments have power over American Indians who are not members of the governing tribe (typically referred to as nonmember Indians) is a recurring and fraught issue in Indian law. In *Duro v. Reina*, the Supreme Court held that tribes did not have inherent authority to prosecute nonmember Indians for crimes and found that the tribes' limited sovereignty extended no further in criminal matters than to tribal members.¹⁵⁶ The *Duro* Court was following and extending the reasoning of *Oliphant v. Suquamish Indian Tribe*, which held that tribes lacked criminal jurisdiction over non-Indians.¹⁵⁷

Scholars heavily criticized *Oliphant* for its freelancing common law approach,¹⁵⁸ but the disappointment and frustration with *Duro* was even greater.¹⁵⁹ *Oliphant* created a practical vacuum in law enforcement in Indian country, because state and federal jurisdictions often fail to investigate non-Indian crime in remote reservation locations. But *Duro* created a legal vacuum. States do not have jurisdiction to prosecute crimes in Indian country committed by Indians, and the federal government lacks the authority to prosecute misdemeanor crimes committed by Indian perpetrators against Indian victims. The only government with the authority to prosecute nonmember Indians for certain categories of crimes against other Indians was and remains the tribal government.¹⁶⁰ The Supreme Court recognized this in *Duro*, but blithely dismissed it as a problem that could be addressed by agreements with states or corrected by Congress.¹⁶¹ Congress swiftly answered the call, passing the so-

156. 495 U.S. 676, 685 (1990).

157. 435 U.S. 191, 211 (1978).

158. See Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 42, at 34–39 (reviewing *Oliphant* and related cases in search of a principled account of the Court's approach, and concluding that "[o]ne is left wondering whether there is anything more substantial than a judicial gut instinct at work in these cases"); see also, Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979) (criticizing the Court's parsing of the historical documents).

159. See Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004) (recounting strongly negative reactions by tribal leaders and academics).

160. The exception to this is PL 280 jurisdictions, where states assumed criminal authority over Indian country. But the weaknesses in the PL 280 states serve only to highlight the larger problem of the impracticality of turning to states to address Indian country crime. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

161. See *Duro*, 495 U.S. at 697–98. This seems a strange and unworkable suggestion given

called *Duro*-fix amendment to the Indian Civil Rights Act.¹⁶² The *Duro* fix provided a concise and elegant solution to the problem by amending the definition of “powers of self-government” in the Act to include the “inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians”¹⁶³ and also adding a definition of “Indian” that included members of any Indian tribe.¹⁶⁴

Tribal support for the *Duro* fix was unified and strong.¹⁶⁵ In addition to creating law enforcement problems, *Duro* embraced an ahistorical conception of tribal affiliation and belonging.¹⁶⁶ The category of “tribal member,” while critical for tribes’ ability to define the participants in their body politic, is also an artifact of the complicated hierarchical relationship between tribes and the federal government. The long and often excruciating process of severing tribal sovereignty from intact territorial authority has led to rules that define tribal members by lineage rather than residency. That this is a necessary, albeit unsettling and imperfect, adaptation to a lopsided struggle over tribal political survival cannot be fully defended here.¹⁶⁷ But the details from the Last Indian Raid in Kansas support the proposition that American Indians, despite the overlay of descent-based membership rules, had and continue to have much more fluid affinities between and among the entities that became “federally recognized tribes.”¹⁶⁸

Today, the Northern Cheyenne and the Lakota of the Pine Ridge Reservation are two distinct, federally recognized tribes with their own enrollment criteria. Yet the lives of the Northern Cheyenne and the Lakota interweave throughout the story of the Last Indian Raid. During the Great Sioux War, the Northern Cheyenne fought alongside the Lakota, and some Northern Cheyenne fled to live with the Lakota first after the Battle at Little Big Horn, and again after Mackenzie burned the Northern Cheyenne villages.¹⁶⁹ Yet another time, after the events in Kansas when Little Wolf and

reluctance by tribal governments to allow state jurisdiction in Indian country and state fiscal and political concerns with doing so.

162. See 25 U.S.C. § 1301 (2006).

163. 25 U.S.C. § 1301(2) (2006).

164. 25 U.S.C. § 1301(4) (2006).

165. See Berger, *supra* note 159, at 11–17.

166. See STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 72–84 (1988) (describing Pre-European contact groupings of indigenous peoples based on linguistic and cultural affiliation, with only rough correspondence to contemporary federally recognized tribes).

167. For fuller treatment of the issue of tribal membership and its relation to tribal governance and race, see Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 *UCLA L. REV.* 943 (2002); Carole Goldberg, *Descent into Race*, 49 *UCLA L. REV.* 1373 (2002).

168. For a similar argument in the modern context, see Benjamin J. Cordiano, Note, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades After Duro v. Reina*, 41 *CONN. L. REV.* 265, 293–303 (2008) (examining law enforcement problems stemming from lack of jurisdiction over nonmembers on two reservations).

169. See MONNETT, *supra* note 68, at 5, 11, 20–21.

Dull Knife's bands separated, Dull Knife sought to be reunited with Lakota relatives and friends at the Red Cloud Agency.¹⁷⁰ And finally, Dull Knife and his immediate family settled with the Lakota after the escape from Fort Robinson, leading to the Northern Cheyenne chief's family becoming known today as the "Dull Knives of Pine Ridge."¹⁷¹

The Northern Cheyenne/Lakota story of interconnectedness is not unique.¹⁷² Contemporary "federally recognized tribes" do not represent natural categories extending back to pre-colonial times, and no one with even the most cursory knowledge of American Indian history would argue that they do. Still, the legal category of "federally recognized tribe" today is an essential ingredient in the inevitably unsavory stew that constitutes the relationship between tribal sovereigns and the federal government. Recognizing and respecting that relationship should also entail a willingness to see that the stories behind it are nuanced and complicated.

At times, that nuance should come forward to aid in the interpretation of the legal categories. Should federally recognized tribes have powers over nonmember Indians? As the Northern Cheyenne/Lakota connection indicates, they always have and, as a cultural matter, always will. Some of those nonmembers became members, depending on flukes of historical timing. Some did not. Should an individual's formal status as a contemporary tribal member determine whether tribes should be able to govern them? Or should more practical matters be determinative, such as *de facto* participation in the tribal community, notice of tribal authority, or a potential vacuum of enforcement if the tribe cannot govern? The Court has repeatedly opted for the former,¹⁷³ while Congress, at least once, has recognized the persuasiveness of the latter set of considerations.

The Court may some day face the question of criminal authority over nonmember Indians again. It has already affirmed the *Duro* fix in the context of a double jeopardy challenge to a federal prosecution that followed a tribal conviction for the same acts, which raised the issue of Congress' authority to affirm tribal inherent criminal authority over nonmembers.¹⁷⁴ But the Court set aside equal protection and due process issues, indicating that such challenges should be brought in the context of the tribal criminal proceedings.¹⁷⁵ So far,

170. *Id.* at 110.

171. *See* MONNETT, *supra* note 68, at 110 and accompanying text; *see also* STARITA, *supra* note 142.

172. *See* ANDERSON ET AL., *supra* note 49, at 248 (describing several examples of federally recognized tribes that either divide people of common ethnic, linguistic and cultural groupings, or combine people of diverse groupings).

173. *See Duro v. Reina*, 495 U.S. 676 (1990); *see also* *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160–61 (1980) (nonmember Indians residing on reservation treated the same as non-Indians for purposes of state taxation because "nonmembers are not constituents of the governing Tribe").

174. *See United States v. Lara*, 541 U.S. 193 (2004).

175. *Id.* at 208–09.

lower courts have rejected these challenges, but the commitment to tribal authority over nonmembers often appears to be thin if not begrudging.¹⁷⁶ Will a thicker understanding of tribal commingling help the courts to overcome their distaste for the messy ways in which equal protection and sovereign power interact in federal Indian law? This commentator is doubtful, but that does not make the true and complicated story any less worth telling.¹⁷⁷

CONCLUSION

Perhaps it is just a coincidence that Phil was raised in Oberlin, Kansas, the site of the Last Indian Raid, but maybe there is something more to it, something about being from a town where “[b]ig, exciting, calamitous events have come snapping down on the [surrounding] prairie like the bars of giant mouse traps.”¹⁷⁸ Yet Oberlin has done more than escape its own traps. It has reached some reconciliation and accommodation with its past. On the 100th one hundredth anniversary of the Last Indian Raid, the city invited Northern Cheyenne tribal members to Oberlin to participate in commemorations of the events.¹⁷⁹ And in a small but significant gesture, the historical marker near the graves of the settlers who were killed during the events of September-October, 1878, was at some point revised. The old version reflected predominately the settlers’ view, and read:

In September, 1878, homesick Northern Cheyennes, numbering 89 men, 112 women and 134 children, stole away from their Oklahoma reservation under the leadership of Chief Dull Knife. Harassed only by a small troop detachment and cowboys they moved through Kansas killing and plundering. Western counties were terrorized, but Fort Leavenworth discounted reports and delayed help. Weeks later 149 of the Indians were captured in northern Nebraska. Most of them were later killed in prison breaks and few were returned to Oklahoma. Their escape across three states pursued by troops from three military departments was considered a remarkable feat. Innocent victims were forty Kansas settlers murdered on their farms. Here in Decatur county nineteen were killed on Sappa creek. A monument stands in the cemetery east of this marker.¹⁸⁰

176. See, e.g., *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005).

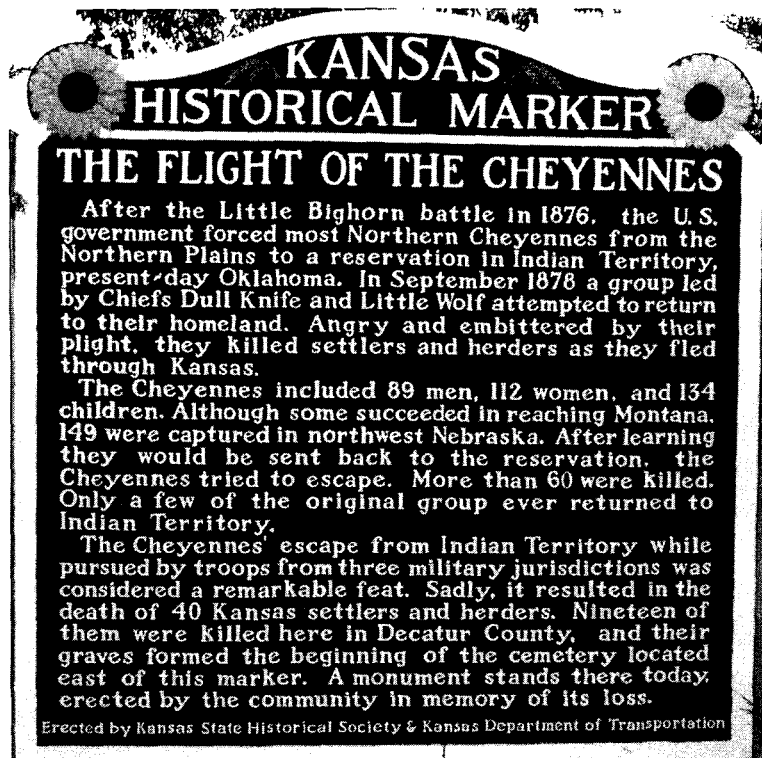
177. As Phil has emphasized, a basic purpose of scholarship, even legal scholarship, is “to make our claims about the world as valid and trustworthy as possible” *Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1, 6 (2007–2008).

178. Ian A. Frazier, *A Reporter at Large: Authentic Accounts of Massacres*, NEW YORKER, Mar. 19, 1979, at 61.

179. See *id.* at 62. The Northern Cheyenne intended to come, but could not make it. See *id.*

180. Text of Former Decatur County Historical Marker on US-36, Oberlin, Kansas, <http://skyways.lib.ks.us/history/sappa.html> (last visited Aug. 29, 2009).

Today, as any visitor to the graveyard where the settlers are buried can see, the marker tells both sides of the story, starting with the Battle of the Little Big Horn and ending with the Northern Cheyenne's imprisonment and escape from Fort Robinson. Oberlin has adopted the Northern Cheyenne Odyssey version of events, even while it clings to its identity as the site of the Last Indian Raid in Kansas:



(Historical Marker on US-36, Oberlin, Kansas. Photo by Sarah Krakoff, June 2009)

Maybe coming from a town that lived through violent conflict resulting from the tragic circumstances of our nation's origins predisposes one to delve into those roots. Maybe knowing that one's town—just a small and shrinking Kansas plains community—managed to reach some reconciliation gives one the hope that the rest of the country can too.

In *Marshalling Past and Present*, Phil wrote, “Federal Indian law is rooted in the most basic of propositions about the American constitutional system: it is inescapably the product both of the colonization of the western hemisphere by European sovereigns and of the corresponding displacement of indigenous peoples.”¹⁸¹ As Phil repeatedly emphasized, the way forward that

181. Frickey, *Marshalling Past and Present*, *supra* note 8, at 383.

neither erases nor entrenches this brutal origin story is to recognize the sovereign status of American Indian tribes, a status that they never relinquished. Scholars and courts should also confront honestly the contextual and conceptual difficulties of having semi-autonomous nations within our borders.

The story of the Last Indian Raid in Kansas, more properly the Odyssey of the Northern Cheyenne Nation, highlights the difficulty, yet also the possibility, of embracing this awareness in our lawmaking and legal scholarship. Initially, the local press portrayed this story as one of individual wrongdoing that occurred in the span of a few days. Yet when the lens is widened to some extent by simultaneous reporting from other perspectives, including that of the Cheyenne, it becomes clear that the Last Indian Raid in Kansas is actually part of a larger national struggle by the Northern Cheyenne to return home.

The striking paradox of this country is that, despite the many inhumane U.S. policies depriving tribes of their land, livelihood, and culture, other forces have also always been at work. These include the forces that resulted in the acquittal of Wild Hog and his peers. They also include the forces that responded to the Northern Cheyenne's relentless efforts to get back to the Northern Plains by creating a permanent homeland in Montana. They include the forces in Oberlin that attempt to forge a common future out of a deeply divided past, and the forces that today encourage and promote tribal self-governance. Phil Frickey was one of those forces, and his scholarship will continue to be. It makes sense that Phil's history and the history of the Northern Cheyenne are intertwined in this way. If there ever is a reconciliation and revival internal to federal American Indian law (that is, the Indian law written by federal judges), Phil Frickey will have been a major force in that too.

