

## FOREWORD

*Kevin Noble Maillard\**

"We in this country," begins Felix Cohen in the Handbook of Federal Indian Law, "are slowly learning to appreciate the significance of the problem of Indian rights."<sup>1</sup> Originally published in 1942, Cohen's statement persists as a legal and social truth: the vast and immense subject of Federal Indian Law remains an underexamined and misunderstood body of legal literature. As in Cohen's time, the sheer scope of this field is quite unfathomable to most law students, practicing attorneys, and law professors, who may very well have completed their legal education without significant practical or intellectual engagement with this subject. With few exceptions, Eastern law schools, Ivy League law schools, and top-ranked law schools in general, do not place great curricular or scholarly interest in Indian law. Considering the massive scope of litigation that directly or indirectly invokes this topic, the dearth of attention is alarming. Since 1980, the Supreme Court has decided on no less than fifty Indian law cases.<sup>2</sup>

Despite the undisputed prominence of Indian issues in legal activity, it is largely ignored by our peer institutions. From a circle of ten major law schools, few offer a yearly course on federal Indian Law. Furthermore, of the faculty at these same schools, few list it as a specialty field. What we need in our collective legal discussions is a fundamental understanding and active engagement with the principles and conflicts that concern Indians and tribes in present-day society.

This Symposium issue takes heed to that task. On February 1 and 2, 2002, the *University of Pennsylvania Journal of Constitutional Law* hosted its annual Symposium, with the topic of Native Americans and the Constitution. This event aimed to initiate such a discussion amongst our peer law schools, and to produce a solid body of literature to facilitate further debates and research. With the contributions of scholars, attorneys, judges, activists, and students, the Symposium proved to be a historic one: it marked the first conference

---

\* Symposium Editor, *University of Pennsylvania Journal of Constitutional Law*, J.D., 2002, University of Pennsylvania Law School.

<sup>1</sup> FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW xxi (1988).

<sup>2</sup> American Indian Policy Center website, "Contemporary Threats to Tribal Sovereignty from the Courts," [http://www.airpi.org/research/st98cont\\_courts.html](http://www.airpi.org/research/st98cont_courts.html) (last visited Jan. 13, 2003).

devoted to Indian issues at Penn Law School. For two days, friends and colleagues gathered in Philadelphia to discuss and exchange, meet and greet, with a hearty helping of good food and beautiful surroundings. Participants and attendees were treated to four panel discussions and a documentary film.

For me, the most invigorating aspect of the Symposium was the great diversity of the participants. These varied histories and backgrounds offered a robust difference of viewpoints, which is the hallmark of any great conference. In addition to the renowned scholarship of Richard Collins, Catherine Struve, and Carol Tebben, we also learned from judges from no less than three tribal supreme courts, including Rebecca Tsosie, Robert Clinton, and Frank Pommersheim. Attorneys from Indian advocacy groups, including Keith Harper, Marcella Giles, and Eileen Shimizu, contributed a practical viewpoint, while friends such as Bob Preucel from the University of Pennsylvania Museum and Steven Paul McSloy of Cravath, Swaine, and Moore contributed artistic and corporate viewpoints. And law students, including Sarah Katz and Alva Mather, demonstrated a commitment to Indian Law by organizing a panel on the Indian Child Welfare Act. Added to this mix were a literary critic, Eric Cheyfitz, a historian, Sally Gordon, and a variety of Choctaws, Creeks, Seminoles, Yacquis, Cherokees, Ottawas, and Chippewas.

The papers featured in this issue reflect that robust diversity. Eric Cheyfitz's piece, "The Colonial Double Bind: Sovereignty and Civil Rights in Indian Country," addresses the issue of federal constitutional authority over Indian tribes. This plenary power, he demonstrates, creates conflicts between rights and sovereignty, thus creating a gap between tribal governments and their constituents. Cheyfitz argues for the delineation of colonial sovereignty from indigenous autonomy, to result in a renewed recognition of Native conceptions of relation and governance. Carol Tebben focuses on a governmental separation as well in "An American Trifederalism: Based upon Constitutional Status of Tribal Nations." Her article recognizes the role of tribes within the federal structure, while questioning their vitality in the absence of constitutional enumeration. Noting the ironic inverse relationship between tribal independence and federal recognition, Professor Tebben argues clearly that constitutional recognition of tribes as recognized sovereigns can generate a more meaningful separation.

Two other papers, in different ways and methods, address civil protections for tribes, their members, and their property. Catherine Struve's piece, "How Bad Law Made a Hard Case Easy: *Nevada v. Hicks* and the Subject Matter Jurisdiction of Tribal Courts," combines areas of civil procedure, Indian Law, and constitutional law to question the outcome of *Nevada v. Hicks*. As Professor Struve notes, the Supreme Court confirmed a presumption against tribal regulatory jurisdiction,

following a standard established in *Montana v. United States*. She argues that, had the court followed a more traditional conception of sovereignty, the analysis of subject matter jurisdiction in tribal courts would not have been as simple as held in *Hicks*. To ensure jurisdiction under this alternative route, congressional removal would be necessary. Shifting to another type of jurisdiction, Richard Collins compares religious freedoms and sacred sites of indigenous groups. Professor Collins examines four countries, the United States, Australia, Canada, and New Zealand, to pose questions about sacred land under government ownership. He argues that common law and secular justifications for recognition of religious claims afford less protection than specific statutes aimed at facilitating Native religious rights.

Frank Pommersheim's article, "Is There a (Little or not so Little) Constitutional Crisis Developing In Indian Law: A Brief Essay?" takes issue with the elusive status of Indian tribes as mentioned in the Constitution. Calling for concerned parties to "bring the canary up to the miner's surface," Professor Pommersheim chronicles a century of landmark cases that has left the status of tribes virtually undefined. To correct this incomplete judicial doctrine, Professor Pommersheim calls for a constitutional amendment to institute an enduring structure for tribal sovereignty.

Rebecca Tsosie, in "Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples Fit Within Civil Society?," addresses the tension between tribalism and constitutionalism in an effort to assess whether indigenous people's claims are aligned with the tenets of civil society. In positing tribalism, the self-definition of political and cultural identity by indigenous groups, with constitutionalism, the establishment of interpersonal relations within such a democracy, Professor Tsosie locates these ideologies within a global debate on multiculturalism. This examines the continuum between separatism and assimilation.

Finally, Gloria Valencia-Weber's piece, "The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets," argues that *Nevada v. Hicks* stands as a judicial smallpox blanket, slowly but dangerously eroding the vitality of tribal governments. In her analysis of historical considerations of conquest, conflict, and constitution, she outlines the development of governmental relations between tribes, states, and the federal government. According to these established yet rootless principles, Professor Valencia-Weber argues, the court has unjustifiably presumed state power over tribal governments.

In many ways, organizing the Symposium was the realization of my reason for attending law school. I am wholeheartedly thankful for the faculty members, staff, and students who contributed their time and efforts to make it a continuing success: Catherine Struve, Jason Abel, Ernie Gonsalves, Andrew Smith, and Licha Nyiendo. I also ex-

tend thanks to the editors of the *Journal of Constitutional Law* for helping with planning and editing the article submissions. Finally, I would like to recognize present and future Native alumni of Penn Law School; may this initial contribution serve as encouragement for the continued betterment of Indian communities.