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Manifest Destiny Through Court Reform?

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Book Notes

Manifest Destiny Through Court Reform?

Indian Territory and the United States, 1866–1906: Courts, Government, and the Movement for Oklahoma Statehood. By Jeffrey Burton.* *Norman, Oklahoma: University of Oklahoma Press*, 1995. Pp. xix, 314. $28.95.

I

The last thirty years of the nineteenth century were, in the words of one historian, "the most critical period in the whole history of Indian-white relations in the United States."[1] During this time, the paradigm of federal Indian policy gradually shifted from one of exclusion and separation—embodied by the forced removal of tribes and their sequestration on isolated reservations[2]—to one of assimilation and coerced inclusion—best symbolized by the General Allotment Act of 1887,[3] which authorized the President to terminate tribal existence by allotting communally owned property to individual members. The so-called "Indian Territory," which consisted of more than 60,000 square miles (in what is now the state of Oklahoma) designated for the perpetual and exclusive use of several southeastern tribes,[4] was not spared from this general trend. During this period, it was transformed from a land populated by sovereign tribes into a territory, and then a state, of the United States.

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1. FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865–1900, at v (1976) [hereinafter AMERICAN INDIAN POLICY].

2. *See, e.g.*, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14 (1987) ("A central thrust of the old laws . . . was to create a measured separation."); 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER 179 (1984) [hereinafter GREAT FATHER].

3. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (1994)).

4. *See* ROY GITTINGER, THE FORMATION OF THE STATE OF OKLAHOMA, 1803–1906, at 13–29 (1939); FRANCIS PAUL PRUCHA, ATLAS OF AMERICAN INDIAN AFFAIRS 69–72 (1990). The original denizens of Indian Territory were the Five Civilized Tribes (the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles). As a result of the federal consolidation policy of the 1870s, this region also became the home of various tribes from across the western United States. 1 GREAT FATHER, *supra* note 2, at 563–66.

Some claim that land greed and the demands of a rapidly growing industrial civilization were the forces behind this transformation.[5] Others have emphasized the role played by well-intentioned humanitarian desires to "civilize" and Christianize the Indians.[6] Jeffrey Burton's *Indian Territory and the United States, 1866–1906* contributes a refreshing perspective to this debate. Focusing on the role played by the strategy of federal court reform in the destruction of tribal governments (pp. xii, 21, 25), he concludes instead that the real culprit behind the assimilationist revolution in Indian Territory was the federal government, "acting not for homestead or commercial interests but for itself as a political organism" (p. xii). *Expansionism*, pure and simple, was the controlling ideology of the paradigm shift (pp. xiii, 122).

Although insightful in his analysis of the growth and operation of federal courts in Indian Territory, Burton fails on two crucial grounds. First, his focus on court reform comes at the cost of neglecting other "strategies" used by the United States in this drama—most notably Supreme Court decisions recasting the sovereign status of Indian tribes and awarding Congress plenary power over Indian affairs. Second, Burton's expansionist thesis falls short: The evidence shows instead a thoroughly heterogeneous cauldron of causes. In the final analysis, Burton's greatest error is his acceptance of the oft-held assumption that "anti-Indian" sentiments—whether capitalist, expansionist, or even racist—were responsible for the paradigm shift in Indian policy. A comprehensive story must include the good-hearted Christian desire to free the individual Indian from the bonds of primitive communalism and transform him into a property-owning, freely contracting American citizen.[7]

II

Burton's discussion of federal courts in Indian Territory begins with an account of their legal origin in the treaties the United States and the Five Tribes entered into in the aftermath of the Civil War. Considered "defeated rebel regime[s]" (p. 15) because of their alliance with the Confederacy, the tribes were coerced into several crucial concessions (pp. 15–19). The 1866 treaties included not only provisions for land cessions, for instance, but also a "subtler, but far deadlier . . . menace": permission for the United States to create federal courts in Indian Territory (p. 20). These court provisions would eventually be used "to dislocate and disarm the tribal governments" (p. 21).

5. This "classic hypothesis" (pp. xi–xii) underlies several standard works on the history of Oklahoma. *See, e.g.*, GITTINGER, *supra* note 4, at vii–viii (describing "desires of land-hungry white settlers" and eagerness of railroad officials to secure share of Indian Territory lands); EDWIN C. MCREYNOLDS, OKLAHOMA: A HISTORY OF THE SOONER STATE 278–81 (1954) (citing effect of grazing contracts, discovery of coal in Territory, and admission of railroad in increasing pressure for opening land).

6. *See, e.g.*, AMERICAN INDIAN POLICY, *supra* note 1, at 387–88.

7. *See, e.g.*, AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE "FRIENDS OF THE INDIAN," 1880–1900, at 3, 6 (Francis Paul Prucha ed., 1973) [hereinafter AMERICANIZING THE AMERICAN INDIAN].

This potential breach in the wall of tribal sovereignty,[8] however, was not immediately exploited because it was too subtle an instrument for those in Congress concerned with the status of Indian Territory. From the signing of the treaties until the abolition of tribal courts in 1898, congressional radicals—especially those in the House—repeatedly sought a one-strike solution to "the Indian problem": immediate territorialization and allotment of tribal property (pp. 15, 27, 36, 43–45, 134). Because the vast majority of the members of Congress cared little about Indian policy but nonetheless disfavored legislation explicitly breaching treaty guarantees, nothing was done for several decades (pp. 25, 29, 132, 194).

From 1834 to 1889, jurisdiction over federal matters in Indian Territory belonged to federal district courts located outside of the region.[9] During this period, a general disorder pervaded Indian Territory. Caused largely by the inability of either weak tribal governments racked by internal disturbances (pp. 83–92, 173–76) or distantly located—and often corrupt (pp. 54–62)—federal courts to control misbehaving U.S. citizens residing in Indian Territory (pp. 24, 40), this lawlessness was a major impetus behind the eventual decision to introduce federal courts there. Contributing greatly to disorder was the growing presence of U.S. citizens—both illegal intruders and licensed immigrants[10]—who neither were subject to the criminal jurisdiction of tribal courts (pp. 73, 92, 117)[11] nor feared the enforcement powers of far-off federal tribunals (p. 63).

Gradually recognizing that the introduction of federal courts into Indian Territory would both bring order and be within treaty limits, congressional reformers began to seize upon the court provisions of the 1866 agreements. Beginning in 1889 and continuing through the next decade, the federal government, through a step-by-step insertion of federal courts into Indian Territory, eventually took this land under its exclusive judicial control.[12] In

8. The tribes' right to self-government had been preserved in the agreements governing their removal from the Southeast. *See, e.g.*, ANGIE DEBO, AND STILL THE WATERS RUN 5 (1940).

9. Under the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729, the federal court for the District of Arkansas held jurisdiction over all federal matters in Indian Territory (pp. 10–11). In 1883, jurisdiction was divided among three federal districts outside of but contiguous to Indian Territory (p. 121).

10. The number of U.S. citizens in the Indian Territory grew swiftly. In 1880, there were as many as 20,000 U.S. citizens in a total population of 74,000 (p. 120). By 1890, there were 109,000 U.S. citizens in a total population of 178,000 (p. 178).

11. Under the Trade and Intercourse Act of 1834, ch. 161, § 25, 4 Stat. at 733, federal courts had exclusive jurisdiction to try U.S. citizens for crimes committed in Indian country.

12. The first of these was the Courts Act of 1889, ch. 333, 25 Stat. 783, 783–88, creating a new U.S. district court in Muskogee possessing civil jurisdiction in all federal matters and criminal jurisdiction over minor federal violations (p. 151). The three outside courts designated by the 1883 Act continued to possess jurisdiction over higher crimes until the Courts Act of 1895, ch. 145, 28 Stat. 693, 693–98, which gave exclusive jurisdiction over federal matters to three newly created federal district courts located in Indian Territory (p. 216). One year later, as a rider to the Indian Appropriations Act of 1897–1898, ch. 3, 30 Stat. 62, 83 (1897), Congress transferred all tribal court jurisdiction to the federal courts in Indian Territory (p. 232).

1898, as part of the Curtis Act,[13] Congress abolished the tribal courts and transferred their jurisdiction to federal courts (pp. 234–35).

Only a formal death certificate awaited in 1906, the date set by the Curtis Act for the official abolition of the tribal governments.[14] For although they were often incompetent and corrupt, "these courts and the laws upon which they stood represented the clearest tangible expression of a national identity" (p. 238). As two pro-Cherokee advocates noted, "Without courts, why enact laws? There will be no need then of any legislation. Hence their local self-government is absolutely destroyed" (p. 233).

III

The strength of Burton's book lies in its detailed accounts of the debates, strategies, and compromises surrounding these "court bills" in Congress. His analysis of, for instance, the legislative history of the Courts Act of 1895—which placed three federal courts with full jurisdiction in Indian Territory—reveals a Congress driven by sectional interests and torn by ideological extremists (pp. 205–16). We see an initially radical anti-tribal proposal moderated by lobbying from Indian delegates and Congressmen seeking to preserve regional interests in the Arkansas and Texas courts. Burton paints a fascinating picture of Congress at work.

Unfortunately, however, Burton fails to convince the reader either of the primacy of the court reform instrument or of the centrality of expansionist goals in the drive toward territorialization. To begin with, he does not make good on his promise to subject the tool of court reform "to comparative analysis" (p. xi). Although Burton asserts that "judicial [reform] . . . precede[d] political reform" in the process leading to the termination of the Five Tribes (p. 25), he in the end merely reaches the relatively anodyne—and commonplace[15]—conclusion that court reform was one of many contributors to this process.[16] The presidential proclamations declaring recently acquired tribal lands open for homesteading,[17] the allotment policy pursued by the Dawes Commission beginning in 1893 (pp. 195, 233),[18] and the immigration

13. Ch. 517, 30 Stat. 495, 504–05 (1898).

14. *Id.* at 512.

15. *See, e.g.*, AMERICAN INDIAN POLICY, *supra* note 1, at 388–92.

16. He describes, for instance, the opening of the "Unassigned District" in conjunction with the 1889 Court Act as a "double thrust at tribal sovereignty" (pp. 138–70), and acknowledges that white immigration "helped to hasten" the entrance of federal courts (pp. 110–11).

17. For example, within one day of the opening of the two million acres of the Unassigned District purchased from the Creeks and the Seminoles in 1889, more than 50,000 U.S. citizens were residing in this area (pp. 155–56). By 1895, nearly all of the western half of Indian Territory had become part of the Oklahoma Territory (p. 170).

18. The allotment policy was the primary instrument used to effectuate the paradigm shift of the late-nineteenth century. *See, e.g.*, 2 GREAT FATHER, *supra* note 2, at 659, 748–50.

of U.S. citizens into Indian Territory (pp. 117, 194),[19] for instance, all either preceded or were contemporaneous with the establishment of federal courts with full jurisdiction in Indian Territory.

Burton's focus on court reform comes at the further cost of neglecting entirely one crucial actor in this drama: the U.S. Supreme Court. The late nineteenth century witnessed a dramatic transformation in federal Indian law. In two seminal opinions of the 1830s involving the Cherokee Nation, Chief Justice Marshall had laid out the contours of the relationship among the federal, state, and Indian sovereigns. He held that, although tribes did not possess the status of full-fledged foreign sovereigns, they were also more than mere private associations: They were "domestic dependent nations"[20] and "distinct political communities, having territorial boundaries, within which their authority is exclusive."[21] Half a century later, however, few found such claims convincing.[22] Though the Court paid nominal respect to Marshall's language, several crucial decisions effectively overruled the 1830s cases. Four years before the creation of the first federal court in Indian Territory, for instance, the Court had already unanimously held that "the soil and people [within U.S. geographical] limits are under the political control of the Government of the United States, or of the States of the Union. *There exist within the broad domain of sovereignty but these two.*"[23] The Court of this era also gave plenary and unreviewable discretion to Congress in the realm of Indian affairs: Congress now possessed "full administrative power . . . over Indian tribal property,"[24] and it could pass laws "in conflict with [earlier] treaties made with the Indians."[25] The Court's grant of formal legal authority to Congress to engage in such intrusions upon tribal sovereignty added legitimacy—and perhaps even served as an impetus—to congressional action.

Burton's claim that the true motivation behind the liquidation of Indian Territory was the bare expansionist hunger of the federal government is also not persuasive. Although he *suggests* a link between the growing U.S. imperialist presence overseas and the destruction of Indian Territory (p. 252), Burton makes no extended argument to this effect and concedes that other

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19. By 1890, U.S. citizens comprised *over 60%* of the population in Indian Territory (p. 178). Based on such figures, congressional reformers argued effectively that federal intrusion into Indian Territory "is not the fault of the Government of the United States, but comes from [the tribes'] own acts in admitting whites to citizenship under their laws and inviting white people to come within their jurisdiction, to become traders and farmers and to follow professional pursuits" (p. 204).

20. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (dismissing suit against Georgia brought by tribe in Supreme Court because tribes were not "foreign states").

21. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) (finding that state laws have no effect in tribal territory).

22. As one Senator stated in 1882 in reference to the *Worcester* opinion, "I do not understand it. I have never understood it, and in the providence of God I never expect to understand it" (p. 284 n.57).

23. United States v. Kagama, 118 U.S. 375, 379 (1885) (emphasis added); *see* Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 653 (1890).

24. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

25. *Id.* at 566.

goals were behind the push toward territorialization and statehood (pp. 168–69, 253).[26] His gravest error, however, is his assumption that "anti-*Indian*" concerns—whether capitalist or expansionist—were solely responsible for the demise of Indian Territory. A full account must acknowledge the humanitarians who sought to improve the status of *individual* Indians by "freeing"[27] them from the tight bonds of tribal communities.[28] By the 1880s, these reformers vigorously sought the "abolition of the reservation system" and the transformation of tribal Indians into private-property-owning, God-fearing U.S. citizens.[29] In Indian Territory, these demands translated into the drive toward territorialization.[30]

Although Burton's analysis of the federal government's use of court reform in the service of American expansionism brings a fresh perspective, his omission of other crucial contributors in this process signals a central weakness of the book: its failure to link events in Indian Territory with the larger contemporaneous movement toward assimilation. The whole picture shows that not merely court reform, but Court decisions, and not merely expansionism, but also humanitarianism, were principal actors in the destruction of the tribes of Indian Territory.

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26. *See, e.g.*, GITTINGER, *supra* note 4, *passim*; AMERICAN INDIAN POLICY, *supra* note 1, at 384–87.

27. For example, the Board of Indian Commissioners proclaimed that the date of passage of the Dawes Act "may be called the *Indian emancipation day*." BOARD OF INDIAN COMM'RS, ANNUAL REPORT (1888), *quoted in* S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 95 (1973).

28. It is well documented that "[m]ost legislation and activity concerning Indian policy after 1868 bore the imprint of humanitarian ideas and demands." ROBERT WINSTON MARDOCK, THE REFORMERS AND THE AMERICAN INDIAN 227 (1971); *see also* 2 GREAT FATHER, *supra* note 2, at 669 ("The Dawes Act . . . was an act pushed through Congress, not by western interests greedy for Indian lands, but by eastern humanitarians who deeply believed that communal landholding was an obstacle to the civilization they wanted the Indians to acquire . . . ."). One must not forget, however, that these largely well-intentioned efforts had dire consequences for the lives of Indians. *See id.* at 895–96; *cf.* WILCOMB E. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM 8 (1973) ("[T]he overwhelming majority of Indians opposed the breakup of the tribal system, [yet] the Indian voice was either not heard, not heeded, or falsely reported.").

29. *See* AMERICANIZING THE AMERICAN INDIAN, *supra* note 7, at 3. Several little-known Supreme Court decisions of this era demonstrate that the Court's regard for the property and contract rights of the *individual* Indian was no less than its regard for the rights of Lochnerian bakers. *See, e.g.*, Choate v. Trapp, 224 U.S. 665, 677 (1912); Jones v. Meehan, 175 U.S. 1, 21 (1899).

30. The reformers also sought to extend the "rule of law"—and its virtues of neutrality, publicity, and nonretroactivity, *see, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 235–38 (1971)—to the Indians by including them under the coverage of American law. Professor Thayer of Harvard, for instance, believed that such reform was necessary to protect individual Indians: Under the old system, they "are left without any protection from the Constitution . . . [and are] under an arbitrary and despotic control, unregulated by courts of justice." James Bradley Thayer, *Report of the Law Committee* (1888), *reprinted in* AMERICANIZING THE AMERICAN INDIAN, *supra* note 7, at 174. The insertion of federal courts into Indian Territory was but one aspect of the extension of the rule of law. *See* James Bradley Thayer, *A People Without Law* (1891), *reprinted in* AMERICANIZING THE AMERICAN INDIAN, *supra* note 7, at 177–78 (discussing recent extension of federal courts into Indian Territory as evidence that Indians of this region were already better off than Indians elsewhere).