

Philip Frickey: An Annotated Bibliography

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INTRODUCTION¹

Philip Frickey began his academic career when he joined the University of Minnesota Law School in 1983—this after spending a few years in private practice and, before that, clerking for Judge John Minor Wisdom of the Fifth Circuit Court of Appeals and Justice Thurgood Marshall of the U.S. Supreme Court. At Minnesota, Frickey began his long-term collaboration with fellow professor Daniel Farber. Frickey and Farber published two books and eight articles together, beginning with their groundbreaking article “The Jurisprudence of Public Choice.”² Farber and Frickey followed this article with their well-received book *Law and Public Choice: A Critical Introduction*. In his review, Edward L. Rubin exhorted that:

Law and Public Choice, quite simply, should be read by everyone who thinks seriously about law. For readers unfamiliar with public choice, it offers an excellent description of those aspects of the subject that have been incorporated into legal scholarship. For readers already familiar with public choice, the book provides a thoughtful and incisive analysis, which both critiques its use in law and explores its potential value for the field.³

During this same period, Frickey began his collaboration with William Eskridge, whom he met when they both worked for Shea & Gardner in

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1. This Introduction was prepared in part by Professor Daniel Farber.
2. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987). The article has been cited over 375 times, according to the HeinOnline citator.
3. Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CALIF. L. REV. 1657 (1993) (reviewing DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991)).

Washington, D.C. Frickey and Eskridge published the first casebook to address comprehensively the topic of legislation. A few years later, they jointly edited Henry Hart and Albert Sacks's materials on legal process theory.

One can begin to calculate the inestimable impact of Frickey's contribution to legal thought through a (somewhat cursory) citation analysis.⁴ We can glean some interesting observations from the trajectory of citations to Frickey's work over time.⁵ The total number of citations to Frickey's work (3,544) is noteworthy.⁶ Citation counts are notoriously imperfect as a measure of scholarly impact, but, even so, the number is impressive.

The citation count is particularly noteworthy because so much of Frickey's recent work has been in the field of Indian law.⁷ As Graph 1 illustrates, in a typical year very few citations even use the term "Indian law," so relatively few opportunities exist to garner citations for this work. Of course, there may be works about Indian law that do not actually use the term anywhere, but the comparison with works using the term "constitutional" in Column 7 gives some sense of the amount of scholarly interest in the two areas.⁸ Even though only some of Frickey's work is in the broader area of constitutional law and public law, a 2008 study ranks him as twelfth among all American scholars in that area.⁹

4. This citation analysis was prepared by Professor Daniel Farber.

5. The discussion in the text is based on Graph 1. All Westlaw searches were conducted on December 10, 2009.

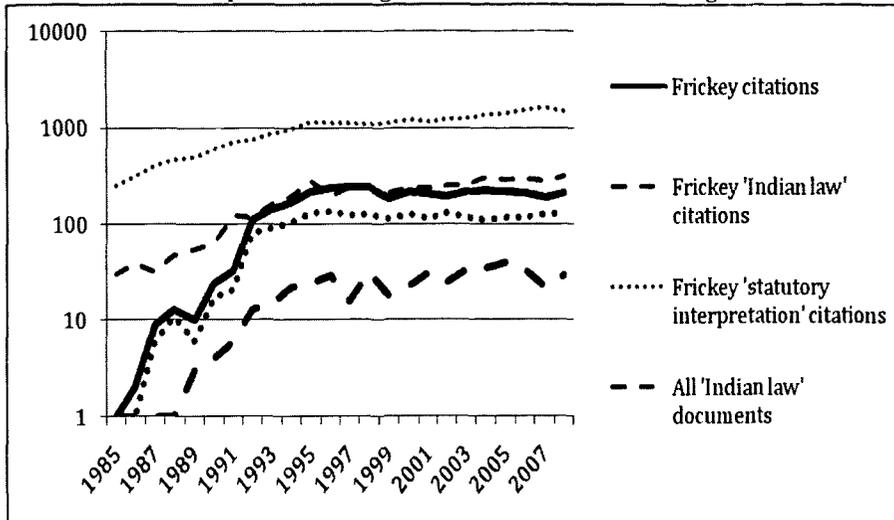
6. This count is underinclusive, in part because it was not standard to include the author's first name in citations during the early years of Frickey's career. In addition, it may miss some later citations where only an initial is used or where the first name contains a typo. The total number of documents in Westlaw's JLR file of journals and law reviews containing simply the name Frickey is 4,371. As Table 2 shows, the number of cites containing the first name begins to converge with cites to the last name by 1995, and spot checks show that the annual difference remains minor after that.

7. The phrase "Indian law" is standard within the field, rather than "Native American law" or "U.S. law of Indigenous Peoples." As Frickey once explained, "By 'federal Indian law,' I mean simply federal law concerning Native Americans. Since this is the conventional name for the field, I will use it even though it perpetuates a misnomer relating to Christopher Columbus' geographical confusion." Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1200 n.7 (1989) (reviewing WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (2d ed. 1988)).

8. In addition, some uses of the term "Indian law" may refer to India rather than Native Americans.

9. Brian Leiter, *Most Cited Law Professors by Specialty, 2000–2007*, http://www.leiterrankings.com/faculty/2007faculty_impact_areas.shtml (last visited Dec. 13, 2009).

Graph 1. Illustrating citation trends from 1985 through 2007.



The citation numbers reflect Frickey's emergence as a national scholarly figure. Between 1991 and 1995, his citations rose from 33 to 218, a level at which they have steadily remained.¹⁰ The citations were a lagging indicator of his scholarly achievement; in 1991, the University of Minnesota recognized his professional stature with the award of an endowed chair.

Finally, the citation study highlights the pathbreaking nature of his casebook on legislation. The casebook, coauthored with Professor William Eskridge, was published in 1988,¹¹ when the total number of documents using the term "statutory interpretation" was still low. Of course, the phrase is an imperfect proxy for the subject matter of an article, but it is striking how few articles used the phrase at all in the mid-1980s, when the table begins. The number would have been much lower when work on the book began. Documents using this term have quadrupled since the book appeared. Rather than synthesizing a body of scholarship that already existed, the Frickey-Eskridge casebook appears to have spurred this growth. A more refined study of the databases would undoubtedly reveal more information about Frickey's influence, but even this cursory search makes clear the importance of Frickey's work and its impact on legal scholarship.

This bibliography attempts to capture all of Frickey's published scholarly work. The bibliography includes materials presented at workshops sponsored by the Minnesota Attorney General's office, but we elected not to include

10. The abrupt rise between 1990 and 1992 is partly an artifact of a change in citation style in favor of including the author's first name. The rise in citation to Frickey's work actually began in the late 1980s.

11. See *infra* Part I.A.3.

participation in conferences and lectures where no transcript or substantial account was subsequently published. Nor do we include his editorial board positions or legislative testimony. We have excluded teacher's manuals, study guides, and supplements to casebooks. We have included both materials of sole authorship and coauthorship, noting coauthors where appropriate. As indicated above, Frickey worked extensively over the years with William Eskridge, Jr., and Daniel Farber.

The bibliography is arranged, first, by topic. Frickey's work on constitutional law, statutory interpretation, and related jurisprudential matters comprise Part I. Part II includes his work on federal American Indian law. Each part is arranged by publication format—books and portions of books, articles and essays, book reviews and review essays, and papers. Within each format subdivision, works are listed in reverse chronological order by the date of first publication. We have, however, almost exclusively prepared annotations based upon the most recent editions. To the best of our knowledge this is the only bibliography of Frickey's work.

The creation of this annotated bibliography would not have been possible without the generous support of the University of California, Berkeley, School of Law (Berkeley Law) Law Library. Special thanks are due to Marci Hoffman and Daniel Farber for championing the project. They both provided critical guidance at key points in the process. This project would not have succeeded without the cooperation of librarians at the University of Minnesota Law Library and at the library of the Minnesota Attorney General's office. Quinn Rotchford and Claudia Macias offered invaluable assistance in locating materials and providing early summaries of some works.

All citations are based on the format prescribed in the eighteenth edition of *The Bluebook*.¹² We have, however, included certain additional information in the citation when we thought this information might be helpful to the reader. Of particular note, and contrary to *Bluebook* specifications, we have included place of publication and publisher for all books. We have also indicated the full extent of journal articles, rather than merely their first pages. Coauthors are listed in parentheses after the title. For books, the date of original publication and the edition used for the annotation are both listed. In instances where a work is reprinted, this information is provided after the initial citation.

The publications comprising this bibliography were compiled using a number of sources, including consultation with Frickey himself. In addition to searching the major legal online service full-text journal databases, we also explored the legal indexes LegalTrac and Index to Legal Periodicals. The coverage on Westlaw and LexisNexis simply does not span the full extent of Frickey's scholarly career. For example, he first published in 1985 in

12. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

Constitutional Commentary, a journal whose coverage begins in 1995 on LexisNexis, and in 1993 on Westlaw, with only selected coverage from 1985 on Westlaw. For books, we searched the catalogs of the University of Minnesota, the Berkeley Law Library, all of the University of California campus libraries, and WorldCat.

I

CONSTITUTIONAL LAW AND STATUTORY INTERPRETATION

A. Books and Portions of Books

1. *Avoiding Constitutional Questions in the Early Warren Court: Judicial Craftsmanship and Statutory Interpretation*, in EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 209–34 (Harry N. Scheiber ed., New York: Lexington Books in cooperation with IGS Press for the Institute for Legal Research at the University of California, Berkeley, 2007).

Earl Warren and the Warren Court comprises essays written by leading experts from the fields of law, history, and social science on the most important areas of the Warren Court's contributions in American law and abroad. Many of the essays were presented at a Symposium marking the fiftieth anniversary of the Warren Court at University of California, Berkeley, School of Law on February 27 and 28, 2004. Frickey contributed an essay based on a larger study entitled *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397–464 (2005). Here, Frickey describes the Warren Court's use of the avoidance canon in the 1950s and the important foundational work laid in the early Warren years that set the stage for later important decisions.

2. *Transcending the Routine: Methodology and Constitutional Values in Chief Justice Rehnquist's Statutory Cases*, in THE REHNQUIST LEGACY 266–78 (Craig M. Bradley ed., New York: Cambridge Univ. Press, 2005).

A legal biography presenting an intensive examination of Chief Justice William Rehnquist's thirty-three-year legacy—based on his Court opinions, primarily in the area of constitutional law. Discusses Justice Rehnquist's narrow approach to statutory construction and his extensive reliance upon certain constitutional values, particularly federalism and separation of powers, in interpreting statutes.

3. LEGISLATION AND STATUTORY INTERPRETATION (with William N. Eskridge, Jr. & Elizabeth Garrett) (New York: Foundation Press; Thompson/West 2d ed. 2006) (2000).

This authoritative overview of the legislative process and statutory interpretation moves smoothly and understandably between the theoretical and the practical. In-depth discussion of the theories of legislation and representation, electoral and legislative structures, extrinsic sources for statutory interpretation, and substantive canons of statutory interpretation.

4. *The Process of Common Law Adjudication*, in COMMON LAW / COMMON VALUES / COMMON RIGHTS: ESSAYS ON OUR COMMON HERITAGE BY DISTINGUISHED BRITISH AND AMERICAN AUTHORS 111–17 (St. Paul: West Group/American Bar Association, 2000).

This volume presents together the distinct viewpoints of British and American authors on a variety of legal topics. Frickey's brief essay provides a succinct and highly readable American counterpoint to Dame Mary Arden DBE's treatment of common law adjudication in Britain. Discusses the evolution of the common law system since independence and highlights the interaction between adjudication and codification.

5. THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (with Henry M. Hart, Jr., Albert M. Sacks & William N. Eskridge, Jr.) (Westbury, NY: Foundation Press, 1994).

Professors Eskridge and Frickey served as publication editors for Hart and Sacks's 1958 "tentative edition" of *The Legal Process*, considered the most influential "unpublished" casebook of the twentieth century. Provides detailed information on the making and application of law, and tools for fast, easy, on-point research. Includes selected cases designed to illustrate the development of a body of law on a particular subject. Text and explanatory materials designed for law study accompany the cases. Professors Hart and Sacks conclude that the "hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."

6. *An Historical and Critical Introduction to The Legal Process* (with William N. Eskridge, Jr.), in HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Westbury, NY: Foundation Press, 1994).

A comprehensive historical and critical introduction to Hart and Sacks's Legal Process materials to situate them jurisprudentially. The introduction serves both to demonstrate the robustness of the legal process themes but also to provide guidance on how the material can be taught to a modern audience.

7. CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (with Daniel A. Farber & William N. Eskridge, Jr.) (St. Paul: West Group, 2009) (1993).

Taking a different approach than is used by many constitutional law casebooks, this work examines how constitutional law has responded to larger changes in American society—from the development of a national market to the women's and gay rights movements.

8. LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (with Daniel A. Farber) (Chicago: Univ. of Chicago Press, 1991).

An influential resource used widely by legal scholars, *Law and Public Choice* presents an accessible introduction to the driving principles of public choice. In this, the first systematic look at the implications of social choice for legal doctrine, Professors Farber and Frickey carefully review both the empirical and theoretical literature about interest group influence and provide a nonmathematical introduction to formal models of legislative action.

9. CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (with William N. Eskridge, Jr. & Elizabeth Garrett) (St. Paul: West, 4th ed. 2007) (1988).

The first casebook to address comprehensively the topic of legislation. Compiles pathbreaking materials on theories of legislation, the legislative process, representational structures, campaign finance, regulation of lobbying, direct democracy, the relation of statutes and the common law, statutory interpretation, and statutory implementation. Appendix contains the canons of statutory interpretation as invoked by the Supreme Court from the 1986 through the 2006 Terms, with citations to relevant case law. All editions with William N. Eskridge, Jr. Third edition with William N. Eskridge, Jr. and Elizabeth Garrett.

B. Articles and Essays

1. *Foreword: The Dangling Constitutional Conversation*, 32 U. DAYTON L. REV. 305–06 (2007).

Symposium issue memorializing the 2006 meeting of the Legislation Section of the Association of American Law Schools on “Enacting and Interpreting Statutes in the Constitution’s Shadows.” In his two-page introduction to the issue, Frickey asks a question that he sees as framing the Symposium: Is it possible for a newly constituted Supreme Court to engage in a dialogue about important constitutional issues rather than issuing decisions that avoid them?

2. *Honoring Hans: On Linde, Lawmaking, and Legacies*, 43 WILLAMETTE L. REV. 157–73 (2007).

This article reprints Frickey's keynote address at the 2006 Willamette University College of Law Symposium, "Unparalleled Justice: The Legacy of Hans Linde," supplemented by light footnotes. Frickey details the biographical highlights of Justice Linde's life. Frickey ponders the connection between Linde's unique biography (an immigrant whose family fled Nazi Germany and who went on to serve in important positions in all three branches of our government) and his views on the judiciary and a democratic society. Justice Linde pioneered the concept that state courts should consider state constitutional challenges first, and only resolve federal issues if necessary. Frickey goes on to discuss Justice Linde's contribution to scholarship on the Supreme Court's evolving interpretation of perennial constitutional issues. Over the years, Justice Linde extended this analysis to the state and local level as well, for the interaction between a legislative body passing laws and a judicial body subsequently interpreting those laws exists at every level of government.

3. *Structuring Purposive Statutory Interpretation: An American Perspective*, 80 AUSTRALIAN L.J. 849–61 (2006).

Provides insight into how sections 15AA and 15AB of the Acts Interpretation Act 1901, an Australian law pertaining to statutory interpretation, can promote a defensible, limited purposivism. The two sections provide that statutory interpretation in Australia is guided by considering statutory purpose. Frickey presents the legal process approach developed by Hart and Sacks as a model for conducting such inquiries.

4. *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971–99 (2005).

Symposium article from the University of Loyola Law Review's Symposium on "Theories of Statutory Interpretation." Frickey addresses the hurdles that impede the interpretive-regime change to what has been dubbed "the new textualism." The movement, championed by Justice Antonin Scalia and driven by a handful of judges and legal scholars, must cope with the limited role played by precedent on methodological issues, the impracticability of a smooth transition, the entrenchment of alternative, incompatible canons of interpretation, and the plain reality that textualism is at odds with the average American lawyer's instincts.

5. *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397–464 (2005).

An overview of the evolution of statutory interpretation during the 1950s,

focusing on Court-Congress relations and judicial opinions from a divided Supreme Court under enormous political pressure to dilute constitutional rights in response to arguments of necessity and national security. Frickey argues that, while most people remember the landmark cases issued by the Warren Court in the 1960s (*Mapp* and *Miranda*, *Baker* and *Reynolds*, *Griswold* and *Loving*, school prayer, etc.), a series of cases from the 1950s were important precursors to many of these more famous rulings. He postulates that by deciding cases at a sub-constitutional level through use of the avoidance canon, the Court was able to defuse political opposition while incrementally adjusting public law to better respect individual liberty.

6. *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707–56 (2002) (with Steven S. Smith).

This essay analyzes the Court's performance at the juncture of constitutional law and political science in a series of new decisions addressing federalism issues. The authors argue that the techniques of judicial review exercised in these cases analyzed are "contrary to any plausible scholarly understanding of Congress as an institution." The essay seeks to advance the discussion of the new federalism cases in two ways. First, from the perspective of public-law theory, the authors contextualize the federalism cases within broader jurisprudential frames of reference, examining theories of due process of lawmaking and the intersection of judicial review and statutory interpretation. Second, from the perspective of social science, the authors present an interdisciplinary evaluation of the legislative deliberation model based on a more complete understanding of congressional decision-making processes.

7. *Wisdom on Weber*, 74 TUL. L. REV. 1169–1206 (2000).

Slightly expanded and lightly footnoted version of the John Minor Wisdom Lecture given on February 7, 2000, at Tulane Law School. Frickey clerked for Judge Wisdom in the Fifth Circuit before going on to clerk for Justice Marshall at the Supreme Court, although he was not a clerk for either jurist when either court heard *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). *Weber* is one of a handful of truly important precedents on racial affirmative action. Frickey provided detailed analysis of *Weber* in other articles and books, as it raises prototypically interesting issues of statutory interpretation. This article presents a biography of the case and the people associated with it, focusing on the nature of the controversy and the competing theories at work.

8. *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199–222 (1999).

Slightly revised and lightly footnoted version of a lecture given on March 3, 1999, to inaugurate the Irving Younger Professorship at the University of Minnesota Law School, a chair first held by Frickey. Discusses the Supreme Court's consideration of formalist and anti-formalist factors.

9. *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421–47 (1998).

Slightly edited and lightly footnoted version of the John C. Paulus Lecture delivered at Willamette University College of Law on February 27, 1998. The lecture was the keynote address at a symposium on the problems and promise of direct democracy in Oregon. Frickey discusses the history of participatory and representative democracy, the interplay of the federal Constitution's Republican Form of Government Clause and state-level direct democracy, the current status of state legislatures, and implications for direct democracy today. He then addresses four problems he identifies with modern direct democracy: "the role of consultants, the role of opportunistic and entrepreneurial politicians, the absence of deliberation, and the role of courts."

10. *Legislative Processes and Products*, 46 J. LEGAL EDUC. 469–77 (1996).

Overview of the most important developments in statutory interpretation over the previous decade, providing law professors teaching statutory subjects suggestions on ways to incorporate new materials, especially the Supreme Court debates, into substantive courses.

11. *The Fool on the Hill: Congressional Findings, Constitutional Adjudication and United States v. Lopez*, 46 CASE W. RES. L. REV. 695–730 (1996).

In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down federal legislation as beyond Congress's commerce power for the first time since the New Deal. In this essay, Frickey asks what role congressional processes and findings play in assessing the constitutionality of federal legislation adopted pursuant to the commerce power. After examining how the Court tends to treat congressional findings and analogous precedents outside the Commerce Clause arena, he concludes that the approach taken in *Lopez* may be a plausible technique to encourage appropriate congressional procedures and consideration, but in principle cannot be cabined short of having applications outside the review of commerce-power exercises.

12. *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 N.Y.U. ANN. SURVEY AMER. L. 477–534 (1996), *reprinted in* 1 N.Y.U. J. LEGIS. & PUB. POL'Y 105–62 (1997).

An essay identifying the constitutional and interpretive problems arising with exercises of direct democracy, examining the judicial use of canons of interpretation when a ballot initiative displaces existing law, and briefly considering an alternative constitutional view of direct democracy. Frickey cautiously endorses the use of the avoidance canons where constitutional line drawing is difficult.

13. *Faithful Interpretation*, 73 WASH. U. L. Q. 1085–94 (1995).

One of three essays presented by different authors at the 1995 Northwestern University/Washington University Law and Linguistics Conference on the topic of statutory interpretation. Examines the linguistic underpinnings of statutory construction and interpretation.

14. *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26–108 (1994) (with William N. Eskridge, Jr.).

Frickey and Eskridge argue that a formalist view of the judiciary is outdated and a more nuanced view of the courts is required to understand their decisions. Arguing that courts act to restore equilibrium in law—interpreting “statutes to reflect legislative deals in the short-term and new political balances over time,” they assert that, when in disequilibrium, the Court will shift public policy to be more reflective of its own preferences. The Court’s decisions are most comprehensible, according to the authors, if viewed as a complex amalgam of rule-of-law and substantive values applied selectively by a strategic Court.

15. *The Making of The Legal Process*, 107 HARV. L. REV. 2031–55 (1994) (with William N. Eskridge, Jr.).

Describes the history of Professors Henry M. Hart, Jr., and Albert M. Sacks’s development of teaching materials on *The Legal Process: Basic Problems in the Making and Application of Law*, which Professors Eskridge and Frickey edited for publication in 1994. The commentary mirrors much of the information contained in the Introduction to the book. Here, the authors reflect on the origin of the materials and their influence on legal scholars over the several decades in which they were used in law school courses but never officially published.

16. *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241–67 (1992).

An essay expanded from a lecture inaugurating the Faegre & Benson professorship at the University of Minnesota on March 3, 1991. The essay explains in lay terms why scholarship on legislation has exploded and why pedagogy on legislation is important and challenging. Frickey's goal is to stimulate a greater appreciation for the field and a stronger sense for the centrality of legislation theory in the law school curriculum and in the practice of law.

17. *Constitutional Structure, Public Choice, and Public Law*, 12 INT'L REV. L. & ECON. 163–65 (1992).

A brief comment on the value that public choice theory brings to the judicial decision-making process. Frickey proposes that, while imperfect and subject to manipulation, public choice theory continues to be a valuable interpretive paradigm.

18. *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593–646 (1992) (with William N. Eskridge, Jr.).

Frickey and Eskridge presented an earlier version of this article at the Vanderbilt Law Review Symposium, "A Reevaluation of the Canons of Statutory Interpretation," held on November 8, 1991. The article argues that canons are one means by which the Court expresses the value choices that it makes—i.e., that the precise way in which the Court deploys substantive canons of statutory construction reflects an underlying "ideology," or mix of values and strategies that the Court brings to statutory interpretation. Tests the hypothesis by examining Court decisions from three consecutive periods—middle Burger (1975 to 1980), late Burger (1981 to 1985), and Rehnquist (1986 to 1991)—when the membership and dynamics of the Court changed in significant ways.

19. *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457–76 (1992) (with Daniel A. Farber).

In their forward to a Symposium on "Positive Political Theory and Public Law," Frickey and Farber define positive political theory before exploring its relationship to public choice theory. After discussing positive political theory's contribution to legal analysis, the authors conclude that the best normative link with positive political theory is process-based fairness norms.

20. *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685–727 (1991) (with Daniel A. Farber).

A response to Bruce Ackerman's Article, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985), and to Justice Scalia's view that large majorities, as distinct from racial minorities, lack political power, and therefore need judicial protection. After reviewing the judicial history of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and its legacy, as well as Ackerman's argument, the authors conclude that the position advanced in *Carolene Products* continues to have merit because racial discrimination persists. As such, the authors criticize the attempt to justify judicial hostility toward affirmative action on the basis of any empirical argument that the losers under affirmative action suffer from systematic political disadvantages. They argue that current social and political dynamics favor retaining private affirmative action claims.

21. *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875–906 (1991) (with Daniel A. Farber).

An essay originally presented at the Symposium on "The New Public Law" held at University of Michigan Law School on October 5–6, 1990, subsequently reprinted in SAUL LEVMORE, FOUNDATIONS OF TORT LAW (New York: Foundation Press, 1994). Explores how modern common law judges should view their role vis-à-vis the legislature. The authors use two lines of cases—one dealing with tort in admiralty and one with federal common law nuisance—to consider when statutes should be considered to displace common law and when courts should defer reforming common law in favor of encouraging legislative action.

22. *Lawnet: The Case of the Missing (Tenth) Amendment*, 75 MINN. L. REV. 755–67 (1991).

A brief, whimsical essay, part of the Minnesota Law Review's seventy-fifth anniversary issue featuring publications from Minnesota faculty. In the essay, styled as a noir detective story, Frickey and his students search for a missing constitutional amendment, reviewing along the way a Circuit Court split over the forced retirement of appointed elderly state judges and the Supreme Court's likely approach to reviewing the matter in *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990).

23. *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321–84 (1990) (with William N. Eskridge, Jr.).

In this exhaustively researched essay, the authors argue that

foundationalism is a flawed strategy for theorizing about statutory interpretation and that a more modest approach, grounded upon practical reason, is both more natural and more useful. After examining why foundational theories fail to explain adequately the statutory interpretation process, the authors provide their alternative proposal, and conclude that if courts were to take an approach based on practical reason, they would be more likely to consider the “evolutive” arguments that emphasize changes in circumstances between enactment and decision. Includes an extensive discussion of *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and introduces Frickey’s “Funnel of Abstraction.”

24. *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013–19 (1988) (with Daniel A. Farber).

A brief essay response to Michael E. DeBow and Dwight R. Lee’s, *Discussion of Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993 (1988), itself a response to an essay (*The Jurisprudence of Public Choice*) by Frickey and Farber. Discusses the impact of public choice theory on our understanding of political behavior and public law theory.

25. *Legislative Intent and Public Choice*, 74 VA. L. REV. 423–69 (1988) (with Daniel A. Farber), earlier version distributed as Working Paper No. 39, John M. Olin Program in Law & Economics, Stanford Law School (Nov. 1987).

In this Symposium article, Frickey and Farber apply public choice analysis to judicial interpretation of statutes. Proposes that the legislative process can be classified into specific types of decision-making processes and that these processes can then inform later judicial interpretation.

26. *Constitutional Scholarship: What Next?*, 5 CONST. COMMENT. 67–68 (1988).

Contribution to a Symposium on the state of constitutional scholarship, featuring a large number of brief, informal comments under a single title. Frickey provides two suggestions for future constitutional scholars. First, while they retain the vitality of an interdisciplinary approach, they should also recognize the vulnerabilities associated with such a course of study. Second, they should look to the arguments successfully adopted by state courts when interpreting state constitutional law when dealing with thorny issues.

27. *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615–56 (1987) (with Daniel A. Farber).

An article presented for the Melville B. Nimmer Symposium at the

University of California, Los Angeles. The authors analyze a number of contemporary constitutional interpretation theories, positing that each of the unified theories, while based on important First Amendment values, works mischief in particular applications. Offers practical reason as a viable alternative to foundationalism and argues that, even though it is difficult to define rigorously, it is readily recognizable and when embraced can transcend ad hoc eclecticism and create a coherent legal tradition.

28. *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691–731 (1987) (with William N. Eskridge, Jr.).

From a special issue on legislation, this article makes the case for courses on legislation and statutory interpretation in law schools. Explains how a systematic inquiry into legislation can improve a student's understanding of the practical dynamics and theory in statutory lawmaking. Argues that statutory legal reasoning is an exercise distinct from judicial reasoning, and that lawyers today need both to be competent practitioners.

29. *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873–927 (1987) (with Daniel A. Farber), *reprinted in* PHILOSOPHY OF LAW: CRITICAL CONCEPTS IN PHILOSOPHY 304–64 (Brian H. Bix ed., New York: Routledge, 2006).

Suggests that the motivations of politicians are far too mixed to be understood through the generalizations of conventional public choice theorists. Public choice theory, however, does inform thinking on public law and its conclusions that flaws in the legislative process are sufficiently serious to warrant cautious judicial intervention. Examines economic theory of legislation and formal theories of social choice. Concludes with some legal implications of the social science literature regarding legislatures.

30. *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237–78 (1986).

Revised version of a working paper prepared for the Hubert H. Humphrey Institute of Public Affairs, University of Minnesota, originally titled *The Constitutionality of the Legislative Veto in Minnesota*. Examines the constitutionality of legislative committee rule-suspension authority in light of the U.S. Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983). Concludes with an examination of the apparent inconsistency between the constitutionality of broad delegation of rulemaking authority to agencies and the unconstitutionality of the legislative veto. Finds that the different constitutional concerns arising from these mechanisms explain their disparate constitutional treatment.

31. *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276–313 (1985).

An assessment of Judge John Minor Wisdom's voting rights opinions. Describes Judge Wisdom as one of the most important Fifth Circuit judges in the transformation of the South following enactment of the Voting Rights Act of 1965 and credits Judge Wisdom with helping to expand the franchise to Southern blacks and others previously shut out of the political process.

32. *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMMENT. 341–52 (1985).

Essay examining the treatment of stare decisis in the majority and dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Describes the Justices' disagreements about state sovereignty in *Garcia* and in their related decision nine years earlier in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

33. *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMMENT. 123–46 (1985).

Essay examining the potential reasons for Justice Blackmun's change of opinion between *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

C. Book Reviews and Review Essays

1. *Public Choice Revisited*, 96 MICH. L. REV. 1715–45 (1998) (with Daniel A. Farber) (reviewing MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (Cincinnati: Anderson Publishing Co., 1997)).

Stearns's textbook is the first of its kind, aimed at providing law students with a comprehensive introduction to public choice theory. Part I of this essay chronicles Stearns's account of public choice and public law. Parts II and III examine the larger context surrounding the public choice debate and provide insight into the contribution public law dialogue can make to legal education.

2. *Whose Votes Count?: Affirmative Action and Minority Voting Rights*, 5 CONST. COMMENT. 451–56 (1988) (reviewing ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (Cambridge, Mass.: Harvard Univ. Press, 1987)).

Frickey describes Thernstrom's book as a well-researched, thoughtful, and highly readable critique of what Thernstrom views as unthinking and unjustified affirmative action in American electoral politics. Frickey finds that

while Thernstrom's arguments are nuanced and evince an understanding of the reality of local Southern politics, he is unconvinced that the Voting Rights Act of 1965 was meant solely to enable minorities to cast votes. Rather, he thinks civil rights statutes should have some room to grow and change as society adapts to them.

3. *Handbook of Legislative Research*, 3 CONST. COMMENT. 577–81 (1986) (reviewing HANDBOOK OF LEGISLATIVE RESEARCH (Gerhard Loewenberg, Samuel C. Patterson & Malcolm E. Jewell eds., Cambridge, Mass.: Harvard Univ. Press, 1985)).

A collection of review essays providing an assessment of the state of political science research concerning legislatures. Frickey recommends the compendium to law professors working in the area of public law, stating that the collection will provide much needed concrete examples of how legislation works. His only major criticism of the book is that it relies too heavily on traditional political science perspectives, and fails to take into account developments in public choice theory.

4. *The Willowbrook Wars*, 3 CONST. COMMENT. 270–81 (1986) (with David I. Levine) (reviewing DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS* (New York: Harper & Row, 1984), reprinted in part in R. THOMPSON & J. SEBERT, *REMEDIES: DAMAGES, EQUITY AND RESTITUTION* (2d ed. New York: M. Bender, 1989)).

The book provides a reasonably careful and generally balanced history of one of the most well-known institutional reform cases in the United States, as well as the implementation of the complex consent decree that moved many mentally retarded institutionalized persons into community group homes in New York City. After providing an overview of the book's contents, Frickey and Levine place the material in the larger context of public law reform and the role of the judge in such reform. The reviewers recommend the book for constitutional law students and scholars, and those interested in institutional reform litigation.

5. *Majority Rule, Minority Rights, and the Right to Vote: Reflections upon a Reading of Minority Vote Dilution*, 3 LAW & INEQ. 209–43 (1985) (reviewing MINORITY VOTE DILUTION (Chandler Davidson ed., Washington D.C.: Howard Univ. Press, 1984)), Section III reprinted as *The Voting Rights Act Protects Minority Votes*, in *AMERICA'S ELECTIONS: OPPOSING VIEWPOINTS* 27–31 (Thomas Modl ed., St. Paul, Minn.: Greenhaven Press, 1988).

Frickey provides a thoughtful reflection of the essays presented in this collection along with his own thoughts on minority voting rights. He recommends the book for both specialists and novices in this area.

D. Papers and Presentation Materials

1. *Managing Court-Congress Confrontations: Interpretation to Avoid Constitutional Issues*, BULL. AM. ACAD. ARTS & SCI. 7–10 (2004).

Presented at the conference “Earl Warren and the Warren Court: A Fifty-Year Retrospect” at University of California, Berkeley, School of Law on February 27–28, 2004. Discusses the landmark decisions of the Warren Court, especially its use of the avoidance canon when deciding cases involving federal legislation.

2. *Judicial Review and the Legislative Process: Some Empirical and Normative Aspects of Due Process of Lawmaking* (Boalt Working Papers in Public Law, Paper No. 80, 2001), available at <http://repositories.cdlib.org/boaltwp/80>.

Presented at the annual conference of the American Political Science Association, August 2001. Uses the Supreme Court case *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), to discuss the Court’s expanding review of the legislative record when evaluating the constitutionality of statutes that limit the rights or powers of states. Frickey concludes that while some models of the due process of lawmaking have merit, the Court’s review of Congress’s deliberative process is unlikely to be productive.

3. *U.S. Supreme Court Trends, in CONSUMER HEALTH LAW ISSUES* (Minnesota Attorney General, Saint Paul: State of Minnesota, 1998).

Materials from a Minnesota Continuing Legal Education seminar given at the University of Saint Thomas on June 19, 1998, outlining a discussion of the *Lochner* Era, the repudiation of *Lochner*, and the rise of the *Carolene Products* theory. The presentation is a general overview of issues heard by the Supreme Court and is not limited to those impacting consumer health law.

4. *The Congressional Process and the Constitutionality of Federal Legislation to End the Economic War Among the States*, THE REGION (The Federal Reserve Bank of Minneapolis, June 1996), reprinted in 11 STATE TAX NOTES 53 (July 1, 1996).

Presented at the Conference on the Economic War Among the States, Washington, D.C., May 21–22, 1996. Responds to Melvin Burstein and Arthur Rolnick’s contention that Congress should prohibit state and local subsidies and preferential taxes used to attract new businesses and to keep existing businesses from exiting in response to offers from rival jurisdictions. Frickey recounts a brief history of the Court’s review of Congress’s regulation of commerce before discussing the Court’s 1995 and 1996 decisions striking down federal

legislation on the grounds that it exceeded Congress's constitutional commerce power.

5. *The Supreme Court, 1995 Term: Significant Constitutional Decisions*, in CONSTITUTIONAL LITIGATION (Minnesota Attorney General, Saint Paul: State of Minnesota, 1996).

Materials from a Minnesota Continuing Legal Education seminar given at the University of Saint Thomas on June 14, 1996, outlining the most significant cases of the 1995 term in the areas of constitutional structures, equal protection, due process, and First Amendment rights.

6. *Current Controversies in Statutory Interpretation*, in CONTEMPORARY LEGAL ISSUES (Minnesota Attorney General, Saint Paul: State of Minnesota, 1994).

Materials from a Minnesota Continuing Legal Education seminar given to the Attorney General's Office on June 24, 1994, outlining the historical British approach, the early American approach, midcentury American approach, and the pre- and post-Justice Scalia approaches to statutory interpretation.

7. *The Conscientious Senator and Judge Bork*, 5 MJF PRO BONO REPORT (Minnesota Justice Foundation Newsletter), Oct. 1987, at 3.

Responding to a request from the Minnesota Justice Foundation, Frickey expresses his view that the Senate should consider the judicial philosophy of Supreme Court nominee Robert Bork in the confirmation process.

8. THE CONSTITUTIONALITY OF THE LEGISLATIVE VETO IN MINNESOTA (Minneapolis: Hubert H. Humphrey Institute of Public Affairs, University of Minnesota, 1985).

Working paper providing a legal analysis of the legislative veto system as used in Minnesota in light of a Supreme Court ruling that congressional veto of administrative rules is unconstitutional. Part of a study commissioned by the Minnesota Legislature to assess the legislature's capacity to deal with complex and controversial issues. Concludes that, while there are differences between the Minnesota and federal practices, the Minnesota system probably violates the state constitution's requirements for separation of legislative and executive powers. Frickey offers some alternative suggestions of how that function might be discharged.

II INDIAN LAW

A. Books and Portions of Books

1. *AMERICAN INDIAN LAW: CASES AND COMMENTARY* (with Robert T. Anderson, Bethany Berger & Sarah Krakoff) (St. Paul: West, 2008).

With an eye to historical underpinnings, this book treats the relationship between tribal sovereigns and state and federal governments, as well as tribal jurisdiction over land and people, environmental regulation, water rights, religion, and culture. Additional chapters are devoted to Alaska, Hawaii, and international and comparative legal issues. The Epilogue summarizes the various scholarly approaches to synthesizing American Indian law: foundationalist, critical, pragmatist, realist, and skeptical.

2. *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* (contributing author) (Nell Jessup Newton ed., Newark, NJ: LexisNexis, 3d ed. 2005).

A revitalization of a classic treatise featuring contributions from leading Indian Law scholars. The third edition takes a dramatically different approach from the previous two editions, reflecting the continuing evolution of law and scholarship. Early chapters in the new edition address history, definitions of terms and concepts, and principles of interpretation in Indian law. Subsequent chapters attend to tribal governments and their relationships with federal and state governments, and issues surrounding jurisdiction. The final chapters focus on salient areas of jurisprudence, including civil rights, liquor and gaming laws, property, natural resources, and more.

B. Articles and Essays

1. *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* 24–33 (2008).

Frickey reflects on the evolution of responses to tribal law in the U.S. federal regime, and on scholarly perceptions and misperceptions about how tribal judiciaries function. He observes that there is little scholarly literature on “law on the ground in Indian country, as mediated through tribal institutions,” and exhorts his audience to fill this gap in the literature using empirical tools to provide federal judges with reliable, current data. Frickey’s assessment is optimistic, noting that the field is beginning to move away from doctrinal work and toward a “new legal realism” characterized by empirical, grounded, experimental examinations of tribal law and institutions.

2. *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649–66 (2006).

An essay based on a presentation at the University of Connecticut School of Law in October 2005, at an event honoring the publication of the new edition of Felix S. Cohen's *Handbook on Federal Indian Law*. Frickey recommends legal scholarly attention to Indian law "on the ground," an avenue for empirical legal scholarship that would put reliable data before federal courts deciding disputes involving questions of sovereignty and tribal law. He welcomes the new edition of Cohen's *Handbook* as "an opportunity for scholarly and practical engagement with federal Indian law, rather than merely a purported systemization and restatement of it."

3. *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431–90 (2005).

Frickey explores the confusion surrounding "the internal incoherence of Indian law," notably the Supreme Court's federal Indian law jurisprudence. He first recounts the tradition of Indian law exceptionalism developed by a Court wary of too thorough an assimilation of tribal interests to the federal constitutional framework. Following decades of reaction by the Court to increasing congressional assumption of authority over tribes, the Court began steadily to pursue Indian law matters on an ad hoc basis, effectively developing what Frickey dubs "a common law for our age of colonialism." He notes that the ensuing mix of what he regards as thin-principled, fact-bound rules culminated in the Court's 2004 ruling in *United States v. Lara*, 541 U.S. 193 (2004), in which conflicting statutory and common law provisions respecting tribal criminal jurisdiction over nonmember defendants triggered acknowledgement of a constitutional crisis. The Court's response, according to Frickey, was a "fractured" opinion resorting to "mysticism" and insufficient respect for precedent.

4. *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5–36 (2002).

The Supreme Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), attributing plenary authority to Congress over Indian affairs, even permitting Congress to violate terms of treaties, has in Frickey's view left a legacy of "a drastic vision of colonialism," and of devastation owing to the ensuing fragmentation of Indian lands through allotment. He examines *Lone Wolf* as a singular encapsulation of a more widespread incoherence in Indian law, and he analyzes the incoherence in terms of normative/substantive, practical, institutional, and academic problems, concluding somewhat wistfully that the Court might do best to avoid Indian law altogether.

5. *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1–85 (1999).

Confronting the doctrinal morass of Indian law disputes in the Supreme Court, Frickey seeks to identify a principle affording coherence. He reluctantly identifies one by suggesting that the Court presumes congressional intent, even where Congress has stated no such intent. He concludes that the evolution of the Court's common law jurisprudence, uninformed by explicit legislative direction, ultimately demonstrates that it is "the Court, not Congress, that has exercised front-line responsibility for the vast erosion of tribal sovereignty."

6. *The Status and Rights of Indigenous Peoples in the United States*, 59 HEIDELBERG J. INT'L LAW 383–404 (1999).

Frickey describes and provides historical context for the basic legal constructs of American federal Indian law. He concludes that Indian tribes will likely weather the current trends of Supreme Court nonresponsiveness and congressional hostility, having already endured hundreds of years of colonialism.

7. *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754–84 (1997).

In a commentary addressing the "unruliness of federal Indian law," Frickey recommends shifting analysis away from doctrine to "the institutions and processes that shape federal Indian law." Frickey proposes an approach recognizing that tribes are sovereign entities, not merely groups of subordinated people. He believes adopting such an approach would promote negotiation among tribes and federal agencies, with outcomes more productive than the piecemeal work currently produced by the federal courts. He acknowledges the "formidable challenges associated with attempting to bring about a greater degree of conciliation in federal Indian law."

8. *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31–95 (1996).

An essay describing how the "anomalous" character of the relation of Indian tribes to the United States was translated into law by the Supreme Court in *United States v. Kagama*, 118 U.S. 375 (1886). Henceforth, Congress had plenary power over the affairs of Indian tribes, and the ensuing history of relations with the tribes has entailed a struggle between the interests of colonization and constitutionalism. Frickey argues that international law notions of inherent sovereignty of nations, particularly those stemming from the field of immigration law, should limit the powers of Congress through the judicial process. He seeks to revive Chief Justice Marshall's legacy of mediating constitutionalism with colonialism, and to assure that the plenary power is appropriately checked by judicial review.

9. *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381–440 (1993).

Frickey argues that Federal Indian law should be recognized as a central component of American public law, not as the marginalized, prohibitively complex “backwater” depicted by decades of disengaged jurisprudence. He finds in Chief Justice Marshall’s Indian law jurisprudence an interpretive methodology superior to that of subsequent Courts. Justice Marshall’s Indian law opinions struggled to reconcile the underlying colonial and constitutional interests at odds in disputes over the appropriate degrees of federal and state control and tribes’ sovereign independence. Frickey recommends renewed attention to the sovereign-to-sovereign relationships among the parties as reflected in treaties and other constitutive documents.

10. *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137–240 (1990).

Surveying a number of cases, Frickey questions the reliability of the commonly held views that Congress may exercise plenary power over Indian affairs only when it clearly and expressly asserts its intentions, and that ambiguous legislation requires temperance of harsh results through traditional canons of statutory interpretation favoring the tribes. Instead, he argues that the Supreme Court has wielded a more dynamic approach to interpretation against clear congressional directives. Further, he does not find that there are unifying presumptive principles underlying the outcomes of cases he examines. Frickey proposes an alternative nonfoundationalist, antiformalist approach grounded in “practical reason” and drawn from the evolution of Chief Justice Marshall’s early jurisprudence. He shows how Justice Marshall took account both of “colonial preunderstandings” (i.e., of settled outcomes among sovereign nations in circumstances of conquest and colonization) and of his own “role as Chief Justice of the highest court of a colonizing government.”

C. Book Reviews and Essay Reviews

1. *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973–92 (1996) (reviewing FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* (Berkeley, Cal.: Univ. of California Press, 1995)).

Professor Pommersheim writes that tribal courts can serve as a bridge between local tribal culture and the dominant legal culture. The ensuing dialogue may then lead both to decolonization in federal Indian law and to increased tribal sovereignty. Frickey praises Pommersheim’s detailed discussion of reservation life, which helps to focus attention on the context of tribal affairs. He is critical, however, of Pommersheim’s frequent resort to abstract concepts, which he identifies as an inherent difficulty in antiformal

scholarship. Frickey supports Pommersheim's ultimate goal of persuading the larger legal community to afford tribes the ability to construct institutions—specifically tribal courts—which may then develop a “truly indigenous law.”

2. *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199–215 (1989) (reviewing WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (St. Paul, Minn.: Thomson/West, 2d ed. 1988)).

Responding to the dearth of scholarly writing of a general nature about federal Indian law, Frickey welcomes Judge Canby's new edition of his *Nutshell* on federal Indian law. His examination of the book leads to insights about an agenda for future scholarship, including the need for a scholarly hornbook and further analysis of the marginalized field of study.

D. Presentation Materials

1. *An Introduction to Federal Indian Law: Jurisdiction, Tribal Sovereignty, and Tribal Courts* (Summer Program of Continuing Legal Education: Univ. of Minnesota Law School, 1999).

An outline to a Continuing Legal Education presentation on June 8, 1999, at the University of Minnesota Law School. Part I covers the legacy of the Marshall Court, and Part II continues with historical developments during the 19th Century. Parts III and IV survey the effects of non-Indians in Indian Country, Part V addresses Tribal Courts, and Part VI examines P.L. 280 (Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588). The concluding two parts briefly remark upon special topics and local controversies.