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## Scholarship, Pedagogy, and Federal Indian Law

Philip P. Frickey  
*University of Minnesota*

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# SCHOLARSHIP, PEDAGOGY, AND FEDERAL INDIAN LAW

*Philip P. Frickey\**

AMERICAN INDIAN LAW IN A NUTSHELL. Second Edition. By *William C. Canby, Jr.* St. Paul: West Publishing Co. 1988. Pp. xliii, 336. \$ 12.95.

What follows is largely a review in search of a book. That alone hardly makes this essay unique, since law reviews publish a wide variety of things under the rubric of book reviews. Yet using a nutshell even as a point of departure for a broader discussion about a field of law will probably strike many as atypical, if not bizarre. Because nutshells are study aids for law students, law professors tend to dismiss them as beside the scholarly point — they are seen as too succinct and summary to be worthy of critical attention.<sup>1</sup> This reaction ignores two important variables: the aspirations of the author and the alternative sources of exposition in the particular field of law. If the author sees herself as providing analysis and perspective, not just an understandable array of rules, the reader may well see through the black letter superstructure and better grasp the fundamental nature of that area of the law. Even a work designed primarily as a study aid might fill part of a scholarly void if other general sources in the area are either focused differently or nonexistent.

As a student a decade ago, I remember encountering two nutshells of scholarly note: one on federal jurisdiction, by David Currie,<sup>2</sup> the other on criminal procedure, by Jerold Israel and Wayne LaFave.<sup>3</sup> From the perspective of a student, these nutshells were valuable because they presented more than a concise synthesis of the state of the law. These nutshells encouraged readers to analyze, not memorize. Later, as a law clerk in the federal courts, I turned to the Israel and LaFave nutshell frequently, in part because there was nothing else that could be consulted as quickly and painlessly. In retrospect, I suspect

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\* Associate Professor of Law, University of Minnesota. B.A. 1975, University of Kansas; J.D. 1978, University of Michigan. —Ed. Carol Chomsky, William Eskridge, Daniel Farber, Nell Jessup Newton, Gerald Torres, and Robert A. Williams, Jr. provided helpful comments on an earlier draft.

1. See Conkle, Book Review, 5 CONST. COMMENTARY 214, 214-15 (1988). Professor Conkle identified this stereotype but did not fall victim to it.

2. D. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL (1976).

3. J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL (2d ed. 1975). No doubt there were other superior nutshells in my student days, but the Currie book and the Israel and LaFave book are the ones that I still remember as being highly useful.

that Israel and LaFave were led to create such a thoughtful nutshell not only because of their own scholarly bent, but also because there was no general treatise or hornbook on criminal procedure.<sup>4</sup> They have since filled that void themselves, expanding their nutshell into a multi-volume treatise for practitioners<sup>5</sup> and a one-volume hornbook for students.<sup>6</sup>

Federal Indian law<sup>7</sup> is in somewhat the same position today as criminal procedure was a decade ago. There is a thorough one-volume treatise published in 1982, *Handbook of Federal Indian Law*,<sup>8</sup> but it is becoming outdated and, in any event, seems focused more on the problems of the practitioner than those of the law professor or student.<sup>9</sup> Unlike criminal procedure, however, there has been relatively little scholarly writing of a general nature about federal Indian law. Yet, even in such a sparse field, the publication of a nutshell is unlikely to have any significant scholarly impact. The formidable requirements of the nutshell format — severe length limitations coupled with the primary goal of analyzing the law simply and clearly for student consumption — make that impossible. But an excellent nutshell can assist, perhaps even encourage, the scholarly mission by stimulating an analytical approach to law school teaching and learning. The nature of federal Indian law, coupled with the absence of any convenient one-volume scholarly treatment, makes this kind of opportunity peculiarly available even for the lowly nutshell.

Judge William Canby first exploited this opening in 1981, when the first edition of his nutshell on federal Indian law was published.<sup>10</sup> A second edition recently appeared.<sup>11</sup> For those of us who teach in this area, the publication of the second edition is a welcome event that,

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4. Indeed, law review writing sometimes treated Israel and Lafave's nutshell much like a treatise, which indicated both the quality of the book and the lack of alternatives. See, e.g., Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 167 n.59, 174 nn.93 & 95 (1977).

5. W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* (1984).

6. W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* (1985). The nutshell remains, however, in updated form. See J. ISRAEL & W. LAFAVE, *CRIMINAL PROCEDURE IN A NUTSHELL* (4th ed. 1988).

7. 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.

8. FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* (R. Strickland ed. 1982) [hereinafter *HANDBOOK OF FEDERAL INDIAN LAW*]. This volume is a substantial updating of the classic work in the field by Felix Cohen, see F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1942). Cohen's book should not be confused with a 1958 volume issued by the Department of the Interior that purported simply to update the 1942 book but in fact took a much less generous approach to tribal sovereignty and Native American rights. See OFFICE OF THE SOLICITOR, U.S. DEPT. OF THE INTERIOR, *FEDERAL INDIAN LAW* (1958).

9. See *infra* text accompanying notes 68 & 74-81.

10. W. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* (1981).

11. W. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* (2d ed. 1988).

notwithstanding the limitations of the nutshell format, should contribute to our scholarship as well as to our students' learning.<sup>12</sup> To understand why requires a look at both the peculiar nature of federal Indian law and the other general scholarship in this area. This examination, in turn, leads to some insights about an agenda for future scholarship, including the need for a scholarly hornbook. In the last analysis, evaluating the nutshell in a broad context illuminates much about the strengths and weaknesses of this area of law.

## I

Over one hundred years ago, a *Harvard Law Review* article proclaimed that "[t]he American student could select few single subjects the survey of which would bring under view a greater variety of important general principles, or afford more scope for forensic reasoning in the application of such principles, than the law relating to Indians."<sup>13</sup> Today, the few students who survey federal Indian law — in academic year 1987-1988, only thirty-four American law professors indicated that they offered such a course or seminar<sup>14</sup> — would probably be amused by this century-old assertion. The important general principles in this field seem conflicting and confounding, regardless of the student's forensic reasoning skills.<sup>15</sup> Although seemingly amenable to black letter rule "codification" on the surface, federal Indian law, upon careful examination, may often appear closer to the novelist Mark Harris' card game TEGWAR — "The Exciting Game Without Any Rules"<sup>16</sup> — except that the federal government always gets to deal.

In my experience, students and novice professors alike initially find that learning, teaching, and writing about federal Indian law are foreign experiences. There are probably myriad reasons why this is so, but I wish to dwell upon five. Each demonstrates that federal Indian law desperately needs a single source — and a good nutshell helps, for starters — that is current, broad in scope, and analytical and detached in outlook.

First, federal Indian law is highly complicated and often inconsistent. To take just one complicated example, consider the authority of the federal government, the states, and the tribes to exercise sovereignty over Indian country. State authority to regulate in Indian

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12. For enthusiasm of a somewhat different sort about the first edition of Canby's nutshell, see Clinton, Book Review, 33 J. LEGAL EDUC. 377 (1983).

13. Abbott, *Indians and the Law*, 2 HARV. L. REV. 167, 167 (1888).

14. ASSOCIATION OF AM. LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 993 (1987-1988). In addition, some law schools offer the course through a part-time or adjunct instructor, and some colleges and junior colleges provide some variety of instruction on this subject.

15. See *infra* text accompanying notes 92-99.

16. M. HARRIS, BANG THE DRUM SLOWLY 8 (1956).

country within the state may be barred by comprehensive federal statutes and treaties that leave no room for the exercise of state authority,<sup>17</sup> by less explicit federal laws read generously to preserve tribal sovereignty,<sup>18</sup> or by federal common law designed to protect the right of reservation Indians to self-government.<sup>19</sup> Even so, the states may be allowed to regulate if the conduct sought to be regulated would have effects outside Indian country.<sup>20</sup> The standards for each of the three preemptive strands, and for the state's buffering authority surrounding Indian country, are far from clear.<sup>21</sup> However, the tribe's correlative inherent authority to regulate its own members in Indian country is well established,<sup>22</sup> and that authority, because it is inherent in the tribe's sovereignty and predates European "discovery" of this continent, is unbounded by specific provisions of the federal Constitution.<sup>23</sup> Yet these matters, too, can be modified by federal law.<sup>24</sup> In contrast to these somewhat clear approaches to the tribe's authority over its members, tribal power to regulate the activities of nonmembers in Indian country seems to turn on an elusive balancing of the intrusiveness of the regulation upon the autonomy of the nonmember, the extent to which the tribe has historically exercised such authority, the importance of the regulation to tribal self-government, and perhaps even whether the nonmember is a Native American.<sup>25</sup> Here, too, the principles are opaque and difficult to aggregate. For instance, it takes some extreme mental gymnastics to explain why a tribe should have expansive authority to tax a nonmember corporation doing busi-

17. *See, e.g., Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 690 (1965) (comprehensive federal regulation of Indian traders preempts application of state gross proceeds tax to federally licensed trader doing business in Indian country).

18. *See, e.g., McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 165 (1973) (treaty and federal statutes, read against backdrop of tribal sovereignty, implicitly forbid state taxation of income earned by Native Americans in Indian country).

19. *See, e.g., Williams v. Lee*, 358 U.S. 217 (1959) (state court may not assert jurisdiction over action brought by non-Indian against Indian for alleged breach of contract in Indian country). *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), makes clear that the three potential bars each require an independent inquiry, and that any one of them can prevent state regulation.

20. *See, e.g., Rice v. Rehner*, 463 U.S. 713, 725 (1983) (liquor sold for off-premises consumption); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (cigarettes sold under conditions giving Native Americans competitive advantage over non-Indian tobacco dealers).

21. *See generally Canby, The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1 (1987).

22. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 356 (1977) ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members."); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) (Indians are regarded "as a separate people, with the power of regulating their internal and social regulations . . .").

23. *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

24. *See, e.g., Indian Civil Rights Act of 1968*, 25 U.S.C. §§ 1301-1303 (1983) (requiring tribal courts to accord defendants a variety of constitutional rights).

25. *See Canby, supra note 21*, at 15-21.

ness in Indian country,<sup>26</sup> but no authority to impose, through the use of Anglo-American criminal procedure largely consistent with the Bill of Rights and including habeas corpus review in the federal courts,<sup>27</sup> even a small sanction upon a nonmember (or non-Indian) who committed a crime there.<sup>28</sup>

Second, federal Indian law is influenced heavily by particularly elusive historical and societal factors. Federal Indian policy has oscillated from forced assimilation to limited respect for tribal self-government.<sup>29</sup> Self-appointed supporters of better treatment for Native Americans have sometimes persuaded the federal government to adopt well-intentioned approaches that ultimately redounded to the extreme detriment of the supposed beneficiaries.<sup>30</sup> Two centuries of deprivations, coupled with the current poor socioeconomic status of Native Americans, may feed a white guilt that seemingly leads just as easily to forced assimilation ("make them like us, and their lot in life will improve to our level") as to tribal self-determination. Most important for law professors and students may be the recognition that federal Indian law has historically greatly abetted the invasions of the Indians' sovereignty and land rights.<sup>31</sup> In 1823, in *Johnson v. M'Intosh*,<sup>32</sup> the Supreme Court concluded that, in light of European "discovery" and supposed domination, tribes held their traditional lands essentially at the federal government's sufferance and could not convey their interests without federal approval. Chief Justice Marshall stated:

We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny,

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26. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

27. Criminal defendants in tribal courts are granted by statute most of the guarantees of the Bill of Rights and the right to habeas corpus review in the federal courts. Indian Civil Rights Act of 1968 §§ 201-203, 25 U.S.C. §§ 1301-1303 (1982).

28. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that an Indian tribe did not have criminal jurisdiction over a non-Indian who resided on the reservation). More recent cases suggest that the distinction relevant to a tribe's criminal jurisdiction is between tribe members and nonmembers, rather than between Indians and non-Indians. See p. 136 (discussing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and *United States v. Wheeler*, 435 U.S. 313 (1978)). The federal courts of appeals are split on the issue. Compare *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988) (Indian/non-Indian approach), with *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988) (member/nonmember approach).

29. For a brief but thoughtful historical overview, see W. CANBY, *supra* note 11, at 9-31.

30. The most vivid instance is the General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (1887), which was promoted by well meaning white reformers (as well as others with less noble goals) but resulted in massive destruction of the tribal land base and impractical ownership patterns of land that has remained in Indian hands. For a concise discussion of the Allotment Act, see pp. 19-22.

31. See generally Strickland, *Genocide-at-Law: An Historical and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713 (1986).

32. 21 U.S. (8 Wheat.) 543 (1823).

whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.<sup>33</sup>

The "actual state of things"<sup>34</sup> that Marshall stressed in a later opinion, and in which subsequent Justices have acquiesced, is unlike almost anything else a law student encounters and a law professor ponders. Simply put, the deprivations suffered by Native Americans have roots unique from those suffered by other disadvantaged minorities in American society.<sup>35</sup> Similarly, Indian tribes have unique rights as well, including the right to limited internal sovereignty,<sup>36</sup> treaty rights,<sup>37</sup> and limited rights rising from their "trust" relationship with the federal government.<sup>38</sup> This, too, distinguishes them from other American minorities, which have been largely unsuccessful in pursuing group rights.<sup>39</sup>

Third, federal Indian law, although heavily rooted in history, is

33. 21 U.S. (8 Wheat.) at 588. On the prohibition of tribal transfer of land held by original Indian title, Marshall wrote:

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

21 U.S. (8 Wheat.) at 591-92. The text reflects the traditional understanding of *M'Intosh*. See, e.g., HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 486-87; pp. 12-13. Recently, several commentators have reread *M'Intosh* in a manner more respectful of tribal authority. See Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 23-46; Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75 (1977).

34. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832), Marshall said:

[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

35. By this I do not mean to ignore the raw violence in which the American history of slavery is rooted. It is important to recognize, however, that the taking of the Native American's land — and the supposed justifications supporting it — do not have parallels in the experience of other disadvantaged American minorities. The comment in the text is not intended to assess the comparative immorality of the dominant American society's treatment of particular minorities.

36. See *supra* text accompanying notes 22-24.

37. Absent either consensual modification or unilateral Congressional abrogation of an Indian treaty, discussed *infra* in text accompanying notes 69-70, the provisions of the treaty remain intact despite any tensions between their terms and modern conditions. See, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979). Charles Wilkinson has rightly contended that this "insulation against time" is an important right that is preservative of Indian sovereignty. See C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 32-52 (1987).

38. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286 (1942) (federal government breached trust duty by failing to pay money in accordance with requirements of treaty).

39. See generally Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (proposing expansion of group rights for minorities). In general, it appears that Congress has been more receptive than the courts to group rights for American minorities. For example, following the Supreme Court's refusal to do so in *Mobile v. Bolden*, 446 U.S. 55 (1980), Congress provided a measure of voting rights to racial groups constituting a minority of a state or local electorate. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973).

constantly evolving. The Supreme Court decides several federal Indian law cases a year, constituting a percentage of the Court's workload that exceeds its attention to seemingly less peripheral subjects such as securities regulation and bankruptcy.<sup>40</sup> In part, at least, this is because of the disproportionate significance of Indian claims in today's world. For example, voidable conveyances from tribes two centuries ago continue to cloud land titles in the eastern United States.<sup>41</sup> The scarce water resources of the western United States, so essential for agricultural development, are subject to supervening Indian claims.<sup>42</sup> And more aggressive assertions of sovereignty by tribal governments have led to serious confrontations about the scope and limits of federal, state, and tribal power.<sup>43</sup> At a minimum, federal Indian law needs a reliable source that incorporates this evolution. Better yet would be a single source that analyzes that law in its context in modern society.

Fourth, many of the most interesting aspects of federal Indian law, for better or worse, are the handiwork of judges — for example, original Indian title,<sup>44</sup> the status of tribes as “domestic dependent nations,”<sup>45</sup> the “plenary power” of Congress over tribes,<sup>46</sup> the supposed trust relationship between the federal government and the tribes,<sup>47</sup> the congeries of approaches taken to state and tribal authority to regulate in Indian country,<sup>48</sup> the canons for construing federal treaties and statutes involving Indians,<sup>49</sup> even the standards for assessing the geographic limits of Indian country itself.<sup>50</sup> Just how well the Supreme Court has performed its expansive role in federal Indian law is the subject of sharp controversy.<sup>51</sup> To understand this area of law, one

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40. See C. WILKINSON, *supra* note 37, at 2.

41. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17 (1979).

42. See *Winters v. United States*, 207 U.S. 564 (1908); Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515 (1988).

43. See, e.g., *supra* notes 25-28 and accompanying text.

44. See *supra* text accompanying notes 32-33.

45. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

46. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

47. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286 (1942); Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984).

48. See *supra* text accompanying notes 17-28.

49. See *infra* text accompanying notes 69-70 & 74-79; Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth" — How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975).

50. See, e.g., *Solem v. Bartlett*, 465 U.S. 463 (1984).

51. Compare, e.g., Ball, *supra* note 33, and Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (critical of the Court's performance), with C. WILKINSON, *supra* note 37 (on balance, complimentary of the Court's performance).

must adopt a decisionmaking pose and search for the factors underlying the Court's resolution of particular controversies.<sup>52</sup> This is no small task, both because the basic concepts — for example, tribal sovereignty — are decidedly foreign to most persons, and because the Court's opinions often fail to stress facts that, as a practical matter, probably strongly influenced the outcome of the case. Illustratively, *Oliphant v. Suquamish Indian Tribe*,<sup>53</sup> in which the Court held that tribal courts have no criminal jurisdiction over non-Indians,<sup>54</sup> takes on new light when it is noted that the reservation in question contained almost 3000 non-Indian residents and only fifty tribal members. One can discover this only by reading a footnote in the opinion, which makes the point in a matter-of-fact manner.<sup>55</sup> Today, as in the days of Chief Justice Marshall, the judicial perception of "the actual state of things" remains crucial.

Finally, major precedents in this field are relevant to a variety of diverse inquiries. For example, the three seminal opinions of Chief Justice Marshall — *Johnson v. M'Intosh*,<sup>56</sup> *Cherokee Nation v. Georgia*,<sup>57</sup> and *Worcester v. Georgia*<sup>58</sup> — together represent the foundation for understanding tribal sovereignty and federal power over tribes. Recent cases — for example, *Oliphant*,<sup>59</sup> *Montana v. United States*,<sup>60</sup> and *Rice v. Rehner*<sup>61</sup> — are important precedents on those matters as well. When more specialized areas of federal Indian law are examined, however, these cases appear to fall into different categories. For example, *M'Intosh* involves original Indian title,<sup>62</sup> *Cherokee Nation* provides the basis for the federal trust responsibility,<sup>63</sup> *Worcester* creates a strong presumption against state regulation in Indian country,<sup>64</sup> *Oliphant* involves tribal criminal jurisdiction,<sup>65</sup> and *Montana*

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52. For an interesting attempt at this strategy, see Comment, *The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 Wis. L. REV. 989.

53. 435 U.S. 191 (1978).

54. 435 U.S. at 204.

55. 435 U.S. at 193 n.1. Even when the Court candidly admits that demographics are important to the decision, it has great difficulty articulating a principle under which such facts are legitimately legally significant. See, e.g., *Solem v. Bartlett*, 465 U.S. 463, 471-72 & n.13 (1983) (relying in part upon subsequent demographic developments in deciding whether an area remained Indian country, but admitting that this was "an unorthodox and potentially unreliable method").

56. 21 U.S. (8 Wheat.) 543 (1823); see *supra* notes 32-33 and accompanying text.

57. 30 U.S. (5 Pet.) 1 (1831).

58. 31 U.S. (6 Pet.) 515 (1832).

59. 435 U.S. 191 (1978); see *supra* text accompanying notes 53-55, and *infra* notes 71-73 and accompanying text.

60. 450 U.S. 544 (1981).

61. 463 U.S. 713 (1983).

62. 21 U.S. (8 Wheat.) 543, 572 (1823).

63. 30 U.S. (5 Pet.) 1 (1831).

64. 31 U.S. (6 Pet.) 515 (1832).

and *Rice* deal with tribal authority to regulate hunting and fishing<sup>66</sup> and liquor transactions,<sup>67</sup> respectively. A reader who consults specialized discussions in federal Indian law sources can easily lose sight of the forest for the trees. Only a general source with a vision that sweeps across federal Indian law can attempt to avoid the tendency of the field to unravel into a congeries of technical specialties of seemingly little relationship.

*Handbook of Federal Indian Law*,<sup>68</sup> the one-volume treatise published in 1982 by a consortium of scholars, cannot fully carry the freight of all these needs. The *Handbook* synthesized the state of the law in 1982, and along the way it made some concrete suggestions for legal evolution. On the whole, however, it did not subject federal Indian law to probing, fundamental analysis. In short, the *Handbook* largely performs the role of a good practitioner's treatise: it explains, indeed helps construct, the current state of the law and identifies some lines of argument that arise out of the law "as is." That is valuable to the law professor and student, but the *Handbook* falls short of satisfying their need for a comprehensive source. This is because the professor and student should be concerned not so much about the intricacies of the current state of the law, but rather about how that law developed, what normative and empirical assumptions underlie its principles, where that law is likely to go, and how one might craft arguments to take it on another course. The *Handbook*, though a valuable and worthwhile enterprise, is aimed largely in a different direction.

In this scholarly vacuum, Judge Canby has succeeded in employing the nutshell format to good effect. Indeed, this second edition may reach the limits of scholarship possible in that format. Of course, because of the page limitations and simplifying exposition required for a study aid, he cannot engage in wide-ranging analysis of every problem. Nonetheless, he frequently deals with the major developments in federal Indian law, not as dry legal rules, but as intellectual problems. In particular, his second edition often uses a probing approach that seeks to open the student's mind to the essential controversies lurking beneath the black letter rules. Perhaps Canby's eight years as a federal appellate judge, coupled with the fourteen years he spent as a law professor teaching and writing about federal Indian law, make him uniquely qualified to introduce students to the subject. In essence, he gives the students some perspective. In the snarl of federal Indian law, that contribution should not be underestimated.

A good example is his discussion of the judicial treatment of In-

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65. 435 U.S. 191, 193 (1978).

66. 450 U.S. 544, 547 (1981).

67. 463 U.S. 713, 715 (1983).

68. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8.

dian treaties. In *Lone Wolf v. Hitchcock*,<sup>69</sup> the Supreme Court held unequivocally that Congress has the authority unilaterally to abrogate an Indian treaty.<sup>70</sup> Canby's analysis of *Lone Wolf* demonstrates that even a nutshell can provide a perspective, rather than just state a legal rule. He explains that *Lone Wolf*'s conclusive presumption of congressional good faith in treaty abrogation ran contrary to the facts of that case and implies, at least to the sensitive reader, that the *Lone Wolf* rule is normatively deficient (pp. 92-93). He then notes that a critical question is the method by which Congress may abrogate treaties: May abrogation be accomplished only by express statutory provision, or should the courts construe unclear statutory language to effect a treaty abrogation if that seems consistent with congressional intent (p. 93)? Canby forthrightly acknowledges that the judicial role in these cases depends in part "upon a weighing and balancing of policy issues that may exist quite independently of the intent or purpose of Congress" (p. 94). He then explains that the trust relationship between the federal government and the tribes — a judicially created doctrine that he analyzes thoroughly (pp. 32-56) — should count heavily against implied treaty abrogation (p. 94).

This discussion illuminates for the student — and professor — that normative judgments continue to rest at the heart of modern federal Indian law; that Indian law continues to be largely judicially constructed; and that its critics miss the mark if they aim only at Congress, the state legislatures, or the tribes themselves. In particular, Canby rightly stresses that the canons of construction announced by the Supreme Court to guide interpretation of federal treaties and statutes dealing with Indians (pp. 88-91) are based on normative factors. These canons, phrased sympathetically to protect Indian interests, arise not only from the judicially created trust responsibility, but also "[t]o compensate for the disadvantage at which the treaty-making process placed the tribes" (p. 88). He also forthrightly recognizes that the Court invokes the sympathetic canons selectively, and he makes no attempt to gloss over the fact that the Court occasionally even ignores them (pp. 90-91).

A second good example of the useful perspective Canby provides is his treatment of *Oliphant*<sup>71</sup> and its aftermath (pp. 69-70). *Oliphant* held that tribes have no criminal jurisdiction over non-Indians because that power would be inconsistent with their status as "domestic dependent nations," even though no federal treaty or statute divested the tribe in question of this authority.<sup>72</sup> Canby sets the stage well, noting first that Chief Justice Marshall, who developed the notion that the

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69. 187 U.S. 553 (1903).

70. 187 U.S. at 566.

71. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

72. 435 U.S. at 212; see *supra* notes 27-28 and accompanying text.

tribes' sovereignty was truncated by their dependent relationship to the federal government, had articulated only two limitations inherently arising from this status: Tribes could not convey land without federal government approval, and tribes could not enter into treaties with foreign powers.<sup>73</sup> Canby also explains that Marshall's analysis was based upon European notions of international law "which the Indian tribes might have thought quite irrelevant, but in Marshall's view that was the only kind of law that the Supreme Court could apply" (p. 67). Canby stresses that some 150 years passed before the Court in *Oliphant* recognized a third inherent limitation on tribal sovereignty arising from dependent status (p. 69). "While the two limitations originally delineated by Chief Justice Marshall . . . were almost inevitable concomitants of dependent status, that of *Oliphant* was considerably less so" (p. 69). "By opening the door to additional judicial limitations upon tribal sovereignty," Canby continues, "*Oliphant* poses a significant potential threat to tribal autonomy" (p. 70). He concludes by noting several decisions following *Oliphant* that have made further judicial inroads upon tribal sovereignty based upon dependent status and stresses that the Court has yet to articulate a clear standard for these cases (p. 70). In later sections focusing on criminal jurisdiction in Indian country, Canby returns to *Oliphant*, more directly criticizes the opinion, and explains the practical difficulties arising from the decision for the enforcement of criminal law in general, and hunting and fishing regulation in particular (pp. 137-39, 315).

Canby's perspective and candor on these two topics, so useful to the law student and professor alike, can be profitably contrasted with the approach taken to them in the *Handbook of Federal Indian Law*. The *Handbook* makes the sympathetic canons of construction one of the cornerstones of federal Indian law.<sup>74</sup> This may well exaggerate them beyond their practical significance. In some cases the sympathetic canons are trumped by other canons — for example, that waivers of sovereign immunity must be clearly stated,<sup>75</sup> or that there is a strong presumption against federal conveyance of a riverbed<sup>76</sup> — and in other cases they are just ignored.<sup>77</sup> More generally, canons of construction are of limited utility in controlling judicial discretion in public law,<sup>78</sup> and there is little reason to suppose that federal Indian law is any different.<sup>79</sup>

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73. The relevant decisions are succinctly analyzed at pp. 66-69.

74. See HANDBOOK ON FEDERAL INDIAN LAW, *supra* note 8, at 221-25.

75. See *United States v. Mitchell*, 445 U.S. 535 (1980).

76. See *Montana v. United States*, 450 U.S. 544 (1981).

77. See *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985).

78. See generally W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 639-95 (1988) (analyzing the canons of statutory interpretation and suggesting their contingent nature).

79. See generally Kearl, *On Teaching Federal Indian Law: A Commentary on Getches*,

The *Handbook's* absence of critical analysis of the canons is not unique. One searches the *Handbook* in vain for any criticism — or praise, for that matter — of *Lone Wolf*, *Oliphant*, or the decisions following *Oliphant* that have further undercut tribal sovereignty. The *Handbook* does criticize dicta in *Oliphant* concerning a different matter,<sup>80</sup> which reveals one of its basic expository strategies: It evaluates open questions but simply acknowledges seemingly settled answers.<sup>81</sup>

## II

There is no single, general source that approaches federal Indian law with scholarly detachment and piercing analysis, with what my colleague Irving Younger called the “the play of intelligence.” In the context of federal Indian law scholarship, his advice about legal writing is so squarely appropriate that it merits extended quotation:

You must see through and around your subject, measuring it by more than one measuring stick, turning it over, testing it, arriving at a just and clear-headed assessment of its position in the hierarchy of things.

The word that best expresses this requisite distance is “detachment,” understood as a certain amusement with the enterprise upon which you are engaged, a sense of humor about yourself and your works. If a lawyer has it, the lawyer’s writing will unfailingly communicate the play of intelligence (“play” here being as important as “intelligence”).<sup>82</sup>

There are, of course, law review articles on federal Indian law with this scholarly perspective, as well as some thoughtful books and book-length monographs worth particular attention.<sup>83</sup> None of these

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*Rosenfelt & Wilkinson's Cases and Materials on Federal Indian Law*, 6 J. CONTEMP. L. 1, 13-19 (1979).

80. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 340-41. The dicta involve whether a tribal court has concurrent jurisdiction over a tribal member who has committed a crime that could be prosecuted in federal court under the Major Crimes Act, included as § 9 of the Appropriations Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §§ 1153, 3242 (1982)).

81. I do not mean to suggest that Canby takes a critical approach to each topic surveyed in his nutshell. For example, he simply reports the holding in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), that there is no fifth amendment right to compensation when the federal government takes lands held by original Indian title. See p. 259. *Tee-Hit-Ton* is subject to severe criticism both for the *carte blanche* given the federal government to take Indian lands and the implicit racism in the opinion. See, e.g., Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?*, 5 FED. L. REV. 85, 99 (1972); Mickenberg, *Aboriginal Rights in Canada and the United States*, 9 OSGOOD HALL L. J. 119, 136 (1971); Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L. J. 1215 (1980). In fairness to Canby, however, it would be highly difficult, if not impossible, to analyze critically all aspects of federal Indian law within the confines of the nutshell format. Moreover, even his uncritical citation of *Tee-Hit-Ton* is better than the treatment of that case in the *Handbook*, *supra* note 8. The *Handbook* includes a string citation to earlier cases that implies that *Tee-Hit-Ton* flowed inexorably from prior precedent. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 491 n.162. On the contrary, Professor Newton has demonstrated that, based on existing law, the *Tee-Hit-Ton* Indians had a strong claim to fifth amendment compensation. See Newton, *supra*, at 1220-46.

82. Younger, *Ler's Get Serious*, 73 A.B.A. J. 110, 110 (May 1, 1987).

83. For books and book-length monographs, see, for example, R. BARSH & J. HENDERSON,

sources, however, provides an analytical survey across the breadth of the field that is both accessible to the novice and still thought-provoking to the expert. The best source the field has to offer on this score is Canby's pedagogical aid, which may indirectly encourage some scholarship through its useful application of perspective to the knotty problems in the area.

A nutshell cannot remake such a field, and Canby makes no claim to do so. He does not include any discussion of the exciting debates that are beginning to emerge in federal Indian law scholarship.<sup>84</sup> Nor does the nutshell consider the alternative visions recently proposed by critics, which range from a fundamental recasting of Indian law<sup>85</sup> (in part based on notions of sovereignty under international law<sup>86</sup>), to a less radical and more traditional "lawyerly" use of analogies to general constitutional precedents to propose new constitutional rights for tribes and individual Native Americans.<sup>87</sup> Such developments are perhaps too far afield for a nutshell. Yet, a concluding chapter briefly surveying "contemporary theoretical controversies" would have been very useful for students and professors alike. So, too, a short survey of contemporary practical problems would have been helpful. Another timely addition, in this era of the bicentennial of the Constitution, would have been a discussion of the place of tribes in the constitutional system.

What federal Indian law needs today is what criminal procedure needed a decade ago: An outstanding, probing hornbook, written largely for law students and professors, but which would also provide substantial benefits to judges, practitioners, and legislators. Such a volume would have one primary goal: to assess the breadth of federal Indian law from a detached, scholarly perspective, critically assessing not only where we are, but how we got here, as well as the multiple paths that could lie ahead. What is needed is decidedly not a treatise rationalizing the law of insular colonial administration,<sup>88</sup> but rather a work that is critical and searching, asking fundamental questions rather than imposing artificial coherence upon a chaotic field. In short, we need a general work of scholarly curiosity.

Unfortunately, the prospects for such a hornbook are dismal. As a

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THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980); C. WILKINSON, *supra* note 37. Ball, *supra* note 33.

84. See, e.g., *supra* note 51.

85. See Ball, *supra* note 33; Williams, *supra* note 51.

86. See, e.g., Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INTL. L. 369 (1986); Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507 (1987).

87. See Newton, *supra* note 46.

88. I am indebted to Robert A. Williams, Jr., both for encouraging me to clarify the fundamental premise of the book that should be written and for the phrase in the text defining the counter-example of what I have in mind.

sitting appellate judge, Canby is presumably in no position to do what Israel and LaFave did in expanding a nutshell into a hornbook. Many of the prominent scholars in federal Indian law are members of the editorial board of the *Handbook*, and it seems likely that few, if any, of them have the time to undertake the different and difficult task of writing a hornbook while maintaining their affiliation with the *Handbook*. There are not many others actively writing in this field, and few of them may be interested in undertaking such a daunting project in an area seemingly far removed from the mainstream of public law scholarship. In addition, the field has not yet generated many Native American legal scholars. Thus, it would be difficult for a team of hornbook authors to avoid the "imperial scholar" problem, identified by Richard Delgado,<sup>89</sup> in which non-minority voices perpetually drown out unique minority perspectives. Indeed, Delgado's fears seem particularly applicable to federal Indian law. As Rennard Strickland, one of the few Native American legal scholars, has said, those "who would make effective law and policy for Indian people must first *understand* Indian people."<sup>90</sup> Finally, another overall disincentive is the relatively low regard for hornbooks held by some elite law faculties. In any event, the economics of publishing may well rule out a hornbook even if a good scholarly team could be assembled. The market for such a hornbook is probably tiny: few students take the course in law school, and relatively few attorneys practice in the area. Indeed, it has been reported that it took a subsidy of \$271,000 — a substantial portion of which was federal money — to produce the *Handbook*.<sup>91</sup>

Perhaps the saddest consequence of this probable state of scholarly affairs is practical rather than academic. In the long run, public law scholarship and the practice of public law are inexorably linked. A first-rate hornbook, both by its own analytical force and by its derivative effect upon a generation of scholars, teachers, and students *cum* practitioners, might help federal Indian law evolve into a more analytically satisfying regime. At present, this law is in need of a transfusion of critical insight. This area of law has developed extraordinarily haphazardly. Congress has periodically fluctuated in its policy concerning Indian tribes<sup>92</sup> and adopted important statutes without much deliberation.<sup>93</sup> The Supreme Court has often drifted along with the congress-

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89. Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

90. Strickland, *Friends and Enemies of the American Indian: An Essay Review of Native American Law and Public Policy*, 3 AM. IND. L. REV. 313, 318 (1975).

91. See Barsh, Book Review, 57 WASH. L. REV. 799, 810 n.55 (1982) (reviewing HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8). The *Handbook*, which has not been updated since its 1982 publication, carries a retail price of \$80.

92. See generally pp. 9-31 (discussing the history of federal Indian law and policy).

93. For example, Congress in 1953 adopted a statute drastically extending the criminal and civil judicial jurisdiction of several states into Indian country, Act of Aug. 15, 1953, Pub. L. No. 280, § 1162, 67 Stat. 588. The statute received little congressional deliberation. See generally

sional tide.<sup>94</sup> Nonetheless, the Court's meanderings are reflected only tangentially in its opinions: it apparently has never directly overruled a precedent involving federal Indian law.<sup>95</sup> The Court's decisions have simply piled up one on top of the other, leading commentators to bemoan "the Court's lack of consistency and predictability."<sup>96</sup>

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Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

94. The Court has attributed to Congress a "plenary power" over Indian affairs and has never struck down as unconstitutional a federal statute regulating tribes. See generally Newton, *supra* note 46. For example, the Court decided *United States v. Sandoval*, 231 U.S. 28 (1913), during the period in which federal policy was to break up tribal landholding and encourage individual Indians to hold property and adopt white ways. The issue in that case was whether a federal law making it a crime to introduce liquor into Indian country applied to the New Mexico Pueblos. The answer turned on whether their lands were "Indian country" subject to the authority of Congress. Unlike most Indian tribal lands, which American courts have conceptualized as held by the United States in trust for the tribes, the New Mexico Pueblos owned their lands communally in fee simple under grants from the Spanish government that were later confirmed by Congress. Despite this lack of any federal-tribal relationship based on land title, the Court held that the lands in question were subject to congressional authority because the Indians in question were a dependent Indian community. The Court stated in part:

The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people. . . . [T]hey have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities. . . .

With one accord the reports of the superintendents charged with guarding their interests show that they are dependent upon the fostering care and protection of the Government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants. . . .

[It] is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guardianship and protection as dependent wards turns upon other considerations. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders. . . . "It is for [Congress], and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

231 U.S. at 39, 40-41, 45-46 (*quoting* *Tiger v. Western Investment Co.*, 221 U.S. 286, 315 (1911)) (citation omitted).

95. This observation, consistent with that of others who teach federal Indian law courses, is difficult to document, both because of the nuances associated with judging what constitutes the "overruling" of precedent, and the enormity of examining all of the Court's federal Indian law cases (for one thing, what is "federal Indian law" is debatable at the margin). In any event, no federal Indian law decision leaps out upon a perusal of the lists of overruling decisions provided in Congressional Research Service, Library of Congress, *Constitution of the United States 1789-97* (1973) and S332-33 (1980 Supp). To be sure, there are instances in which later cases deviate from precedent and admit as much. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 411-15 (1980) (cutting back on the implications of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), discussed *supra* in text accompanying notes 69-70).

96. Pelcyger, *Justices and Indians: Back to Basics*, 62 ORE. L. REV. 29, 30 (1983); see, e.g., Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5

The Court's rudderless course is understandable. As Russel Barsh has noted:

[J]udges and lawyers share an education that excludes mature consideration of tribal government. Few law textbooks in general use accord Indian law serious treatment. Ignorance is a powerful helpmate of confusion. In an appeal in which the advocates and judges have only briefly investigated an unfamiliar topic, we can expect what is in fact in evidence in the Supreme Court record: abused precedents, citations to inconsistent chains of precedent, essential cases and statutes overlooked, significant social and economic facts disregarded.<sup>97</sup>

My own experiences lend force to Barsh's assertions. Neither I nor, so far as I know, any other of the Supreme Court clerks during the 1979 Term had taken a course in federal Indian law.<sup>98</sup> Nonetheless, we were called upon to help with several major decisions.<sup>99</sup> Upon reconsideration, those decisions of the 1979 Term, like so many others in this field, embody only an illusion of coherence — and a frail one at that, since my students have little difficulty seeing through it. Yet, because I do not question the good faith of the Justices, the illusion may well amount to an unintentional — and therefore all the more pernicious — self-delusion. A first-rate hornbook, and the scholarship it could provoke, might expose this illusion and illuminate the essence of the controversies in this area.

For the present, we have a growing wave of thoughtful law review writing, an excellent nutshell, and a useful treatise. Although these are more tools than have ever before been available, they alone surely cannot remake the field. But Native Americans, and their tribes, are not going away, and neither will the controversies of federal Indian law. It remains to be seen whether legal academia responds to the challenge. The highest ideals of the academy support making the effort, of course, but the practicalities of the scholarly and economic marketplaces are extraordinary impediments. Until federal Indian law is seen as an important area of public law rather than an esoteric backwater, few new scholars will have the practical incentive to enter the field. And any enhanced scholarly status for federal Indian law is unlikely to develop without a recognition that insights in this area may cast light on some fundamental general problems of American public

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AM. INDIAN L. REV. 1, 1 (1977); Clinton, *State Power over Indian Reservations: A Critical Comment on the Burger Court Doctrine*, 26 S.D. L. REV. 434, 439-40 (1981).

97. Barsh, *supra* note 96, at 56-57.

98. I do not mean to overstate this limitation. Former Supreme Court clerks are notorious for overestimating their value to the Court. My point is simply that there probably is no area of law that routinely comes before the Supreme Court in which law clerks are of less potential assistance to the Justices.

99. See *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *United States v. Mitchell*, 445 U.S. 535 (1980).

law: to name just two, the treatment of minorities and the exercise of judicial decisionmaking unconstrained by constitutional or statutory text. That recognition, in turn, will not occur without scholarship illuminating the linkage between federal Indian law and such enduring public law dilemmas.<sup>100</sup> While the academy stagnates in this chicken-and-egg stalemate, the marginality of this field of law — and of those Americans subjected to it — endures.

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100. Scholarship is about inquiry, not outcomes. There is no guarantee that more probing scholarship about federal Indian law will improve the lot of Native Americans; indeed, at least in the short run, it could prove counterproductive in particular disputes. Separating the roles of practitioner, law reformer, and scholar is not easy, particularly in a small field as overlaid with the present effects of past deprivations as federal Indian law. But if law professors have a unique role in the American legal system, they also necessarily have unique correlative responsibilities.