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Review Essay

American Indian Legal Status: A Review of Recent Interpretations

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David H. Getches, Daniel M. Rosenfelt, and Charles F. Wilkinson. **Cases and Materials on Federal Indian Law**. St. Paul: West Publishing Co., 1979. 660 pp. $18.95.

Russell Lawrence Barsh and James Youngblood Henderson. **The Road: Indian Tribes and Political Liberty**. Berkeley: University of California Press, 1980. 301 pp. $14.95.

While the literature of Indian-white relations is immense, Americans seem more interested in the dramatic conflicts of the frontier era than in what has happened to native people after the frontier period ended. This is particularly so regarding Indian legal status in the United States despite the crucial importance of questions of tribal sovereignty and treaty rights. The complexity of Indian-related treaties, statutes, administrative policies, and court decisions by itself has deterred scholarly analysis. Codification of United States Indian Law (ordered by Commissioner of Indian Affairs John Collier) was completed in 1942. The *Handbook of Federal Indian Law*, by Felix Cohen, became the bible of the field, relied upon by lawyer and judge alike. A new revision of the handbook will soon be published, under the general editorship of

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Rennard Strickland, to update Cohen and incorporate the mass of new material which has made United States Indian law practically a separate field unto itself.

In the 1970s there has been an outpouring of essays and case analyses in specialized Indian law periodicals[1] and in several western state law journals.[2] In 1973 the first comprehensive casebook appeared, by Professor Monroe E. Price.[3] Now we have the appearance of two new books, very different in style and approach, but valuable for understanding native legal status.

David H. Getches, Daniel M. Rosenfelt, and Charles F. Wilkinson's *Cases and Materials on Federal Indian Law* is designed as a casebook for use in law classes. It excerpts not only statutes and court opinions, but also includes commentary by lawyers and historians. Major topics include federal and state relations with tribes, tribal self-government, and jurisdiction as well as Indian rights concerning citizenship, land, water, hunting, and fishing. In a technical sense, the book is flawed by the lack of a bibliography, but it is useful for introducing readers to the specifics of litigation relating to Indians.

Designed for lawyers training other lawyers to win cases for their clients, the casebook necessarily takes a practical approach that concentrates on white-authored law. Traditional native law is scarcely touched upon in the casebook, except to note the great variety in Indian judicial decision-making. Traditional legal practice, on retribution to the family of the injured party, and on social pressure in the form of ridicule, is only briefly mentioned. Likewise, the authors' pragmatic approach means that the casebook generally accepts the current interpretation of federal courts, and emphasizes the aspects of influential decisions which seem favorable to Indians today.

The danger of such an emphasis is that it obscures the crucial role that the judiciary has played in the erosion of Indian rights. As long as court decisions are unquestioned, lawyers are left only with their skills at picking up tidbits. Accordingly, selections in this casebook train law students how to use court precedent to protect Indian rights of inheritance, domestic relations, taxation, and membership in the tribe. The picture which results is that the courts have been the major protector of Indians.

If one examines the history of court decisions on Indian rights, it is easy to discover many cases in which courts have protected Indians from non-Indian individuals and state or local governments. At the same time, and often in the same decisions, federal

courts have used their precedent-making powers to establish *greater* degrees of federal control over tribes. For example, nowhere does the Constitution specify that Congress shall have "plenary power" over indians; this defacto colonial status has been established in federal law by several Supreme Court decisions.[4]

This casebook recognizes the crucial nature of treaties in developing arguments for tribal sovereignty, but it notes also that judicial interpretation of treaty rights is in disarray. A typical example is the question of deciding treaty abrogation. A selection by Wilkinson and Volkman notes that courts have tended to interpret ambiguous expressions in treaties in favor of Indians. Nevertheless, confusion results from judicial attempts to decide exactly when a treaty has been abrogated by Congress. Wilkinson and Volkman suggest that courts should require Congress to make a *specific* abrogation before it can be interpreted that a treaty right has been abolished by general statutes or administrative directives. They feel that abrogation should only occur by an act of Congress, rather than by "judicial guesswork."

These reform-oriented strategies are most important for lawyers to develop realistic means of preserving Indian treaty rights. But another level of strategy is needed, and that is to question the legal bases for the actions of Congress and the courts. Nowhere does the casebook dispute Congress's right unilaterally to abrogate treaties, without freeing the tribe from its obligations in the treaty. A different approach to question the doctrine of "plenary power" over tribes is never explored.

The Constitution provides *only* for Congress's power over "commerce" with Indians, and for the power to make treaties with Indian tribes. Federal power, then, is applicable only to those rights that the treaty provides. If Congress wishes to abrogate a treaty right, it could be argued, then the tribe no longer has to follow its provisions of the treaty. Publicity and embarassment to federal officials might help to serve as a deterrent to the casual abrogation of Indian treaties by the U.S. government. If a certain treaty right has to be abrogated, Congress could negotiate with the tribe for new treaty terms, compensation, or return of lands.

Such a proposal is admittedly not going to be easily accepted by the Supreme Court. Black civil rights groups did not have an easy job overturning a half-century of judicial precedent based on *Plessey v. Ferguson* (1896); that eventually did occur with the *Brown v. Board of Education* ruling in 1954. Despite limitations on federal power over tribes, the nature of Indian litigation today

still rests on the plenary power doctrine of cases like *Lone Wolf v. Hitchcock* (1903) and *U.S. v. Kagama* (1886). The point in this suggestion is not to have lawyers abandon their present approaches, but to encourage them (and the tribes who hire them) to think in terms of long range strategies rather than merely individual cases. Only by inventive thinking can nineteenth-century judicial precedents be challenged, and that is one possible technique for reestablishing tribal self-government and treaty rights.

As it exists, this volume is very effective in detailing the various approaches that lawyers have employed to gain Indian citizenship rights. What is missing is a basic recognition of the traditional non-citizenship viewpoint, in which Indian people express a desire for retaining or reoccupying their lands rather than merely gaining a better Claims Commission monetary settlement. This view is often associated with the Indians' rejection of United States citizenship, and of the Bureau of Indian Affairs-approved tribal governments. The American legal establishment has yet to understand and deal with a traditionalist legal system that operates on the basis of consensus and non-participation in disagreeable institutions, rather than a "majority rules" participatory government.

The traditionalist perspective has been adapted into constitutional form in Russel Lawrence Barsh and James Youngblood Henderson's *The Road: Indian Tribes and Political Liberty*. The authors begin with the viewpoint that the legal legacy is little more than institutionalized prejudice, so judicial precedent becomes meaningless. They propose a federal-tribal "compact" theory of government, which reconciles Indian sovereignty with United States traditions of self-government. The authors are not talking about individual Indian civil rights, but political rights of tribal governments. Indeed, they are somewhat hostile to the civil rights approach of non-reservation Indians. As urban Indians grow in number and political influence, they redirect more money and public attention away from the questions of tribal sovereignty. Barsh and Henderson feel that urban Indians have greater access to state and local government services and should confine their struggles for minority civil rights inclusions on those levels, rather than subtract from the federal monies to the tribal governments. That is, the authors make a distinction between ethnic minority status, and the political entities of tribal governments.

The first part of the book is filled with comparisons with the American War for Independence. The Founding Fathers defined liberty as the power to govern oneself, and they put themselves

under the authority of the Constitution in order to accomplish this. Unlike the states, Indians did not vote to be included under the compact of the Constitution. Their relationship with the United States (except for commerce) was not defined in the Constitution. So, the authors argue, the compacts in which Indian tribes' relations with the United States are defined, are treaties. Tribal legal status, then, is qualitatively different from that of other Americans; it is "treaty federalism, as opposed to constitutional federalism" (p. 69). Consequently, any judicial interpretation must be based on the treaty rather than the Constitution, and any changes in the tribal treaty status must be renegotiated by mutual agreement of the two governments.

Barsh and Henderson demonstrate that by signing an internationally-recognized form of relation between independent governments, the United States was following in the footsteps of the British in accepting tribal sovereignty. Most Indian treaties were not signed as unconditional surrenders after a war of conquest. Instead, the treaties are "filled with the language of mutual concession and mutual recognition" (p. 278). Many tribes signed treaties without ever making war. Yet, court decisions have proceeded as if all Indians are conquered subjects under Congress's total control. The authors argue that the crucial events in the loss of native self-government began in the 1870s and 1880s when Congress stopped making treaties and the Supreme Court handed Congress new "plenary power" over Indian domestic affairs. The crucial decision was *U.S. v. Kagama* (1886), which established a federal despotism Barsh and Henderson call "domestic colonialism" (p. 75). The judicial emphasis that Indians were "dependent wards" freed Congress from constitutional restraints and from enforcement of the treaties. The authors recognize that Indians lost their self-government more by legal maneuvering than by military conquest.

In contrast to many scholars' praise of John Collier's Indian New Deal of the 1930s, Barsh and Henderson have more negative responses. They see Collier's programs as a "two-edged sword" (p. 112), which endorsed the concept of inherent tribal sovereignty, but also continued to allow the federal government to intervene domestically without being limited to treaty agreements. The constitutions established under the Indian Reorganization Act (IRA) were "nothing more than new Indian Office regulations" (p. 122), and the veto power of the Secretary of Interior kept IRA tribal governments impotent. Collier's programs to provide jobs only moved the reservations into the capitalist cash economy.

While the author's arguments certainly apply to the weakness of tribal governments, their attacks on Collier seem excessive. The IRA did not provide as much tribal power as Collier wished, and he was battling against entrenched assimilationist views that were opposed to *any* tribal sovereignty. His vagueness and concessions to the assimilationists may be understood in this context.

Barsh and Henderson's inability to see Collier's actions within the context of the times make this part of the book weak, but at least they provide a consistent interpretation to explain why tribal sovereignty has taken such blows since the 1940s. They see the era since the IRA as "the triumph of the doctrine of plenary power" of the federal government over tribes (p. 112). Part III of the book is an excellent assessment of the role of the judiciary in the weakening of tribal sovereignty. Since Congress enacted termination legislation for some tribes, the courts have been called on repeatedly to define sovereignty. Court decisions since 1953, the authors relate, "have confused the issues so thoroughly" that there is much inconsistency (p. 137). The courts therefore are "at least as much to blame for its abuse [of government power over Indians] as Congress and the Interior Department" (p. 138).

The authors see a crucial court decision in *Williams v. Lee* (1958). That decision reversed earlier more negative judgments on tribal rights, but left an ambigious legacy. *Mescalero Apache v. Jones* (1973) further muddied the waters by viewing each tribe as unique, with few generalizations to be made. This decision weakened the argument of inherent tribal sovereignty. Further, the 1978 decision *Oliphant v. Suquamish Indian Tribes* announced that tribal governments had no authority over non-Indians and continued to refer to "dependent status" as justification for weakening tribal power (p. 290).

In recent years the courts have drifted away from traditional federal guarantees of protection against State encroachment into tribal jurisdiction. The courts have held that States can have some jurisdiction over reservations as long as they do not "infringe" on Indian self-government. But this decision opened another area of dispute concerning what constituted "infringement." The authors charge that the courts have "never fully appreciated the interaction of the various Indian decisions and took little time to reread them" (p. 184).

Lawyers themselves have little incentive to clean up the legal jumble since the complexities of Indian law provide them with lucrative business. Lawyers also have much incentive to push tribes

toward cash settlements of land claims, of which they get a standard ten percent, rather than to insist on landholding treaty rights.

Barsh and Henderson argue that the restrictions on tribal governments are not consistent with past United States policies toward other territories. U.S. insular territories were first established in 1898 on the model of Indian reservations, but they have graduated to a status of statehood (Hawaii), commonwealth (Puerto Rico), or even independence (Philippines). Indian tribes today do not even have the self-government of the nineteenth century settler territories in the West. The Secretary of the Interior and the Solicitor have powers that no federal bureaucrats had over territories. The tribes do not have delegates in Congress to voice their influence directly, as Western territorial representatives did, and tribes do not control the salaries of federal appointed officials as was done with western territories. Despite many suggestions for an Indian State, from the 1820s to the 1870s, reservations are not offered eventual statehood as occurred with other lands. The only choice that has been open to Indians has been continued federal plenary power, or incorporation into an existing State through termination of federal status. The fear of termination has paralyzed the efforts of many tribes to move toward genuine self-government.

To deal with this impasse, the authors make several concrete proposals for change. The tribes first must recognize that the costs of BIA regulation (bureaucratic infringements, loss of self-government, etc.) outweigh the benefits. Then the tribes must convince Congress to abolish the BIA and distribute the Indian appropriation monies as direct revenue-sharing grants to the tribes. Barsh and Henderson recommend utilizing the current anti-Washington sentiment favoring decentralization and libertarianism as a means of persuading the government to change. They suggest repealing all of Title 25 of the U.S. Code, except for sections 16 and 17 of the IRA, to "eliminate most bureau functions with no diminution of tribal powers" (p. 228). They recommend that the tribes be granted powers similar to States, including taxation, civil and criminal law, and jurisdiction over both Indians and non-Indians.

The endless policy changes brought about by Congress, the Interior Department, and the Supreme Court have created some of the biggest problems facing Native Americans. To deal with Indian legal status on a more permanent basis, Barsh and Henderson emphasize the need for a constitutional amendment to clarify reserved territorial powers of tribes and reject federal plenary power. By this amendment, no State could exercise any power over Indian

territory without the tribe's consent, but a tribe could choose to incorporate itself into a surrounding State if it wished. Otherwise, the tribe would have the same powers of self-government as the States.

The authors would incorporate the tribes into the federal system by establishing two tribal caucuses. A Senate caucus would consist of one delegate from each tribe; a House caucus would be apportioned on the basis of tribal membership. Each of these caucuses would elect two Senators and two Representatives to Congress to give Indians direct representation on the national level. While rejecting the argument for complete independence, the authors insist on incorporation into the federal model on a level equal to the States.

The combination of self-government, removal of State and federal bureaucratic controls, and direct representation in Congress seems a radical break from the past. Yet, the authors are careful to point out that their proposed changes are consistent with the federal model. Their visionary approach, combined with political justification based on American traditions, makes this book one of the most creative and original treatises to be written in the field of Indian law. Few will agree with every idea presented, and doubtless their suggestions would not be a panacea for all of the problems facing Native Americans today. But, Barsh and Henderson are bold enough to suggest several valuable, concrete proposals for an alternative Indian legal status.

These suggestions, it seems to the reviewer, offer a more realistic compromise than current debate suggests. On the one hand, there seems little chance that the United States will recognize the complete independence for Indian tribes that some activists have called for. The activist publicity, however, has had an important effect in clarifying the choices open to native peoples. Without the independence movement, state-status seems extreme, yet within the context of complete independence the solutions offered by Barsh and Henderson can be seen as a genuine compromise. On the other hand, current developments (especially with the recent settlement on the Maine land claims of the Penobscot and Passamaquoddy Indians) are focusing on a legal status as municipalities for tribal governments. If tribes settle for this solution, as an alternative to BIA paternalism, they will open themselves to being co-opted by the state governments.

As long as Indians are within State control, they are subject to a status that might end up being little better than termination. Even the cities, with all of their voter influence, have difficulty operating

as municipalities in a federal system. Indians, with less population, would fare even worse. The voter strength they do possess could be weakened by gerrymandered redistricting, and state governments can always change their constitutions to take more governing powers away from local governments. In a federal system, Barsh and Henderson point out, the only real centers of power are the national government and the state governments. The only real choices for Indians are independence, statehood, commonwealth territory, or continued outside domination (either BIA colonialism, or state government control through municipal status or termination). In deciding how best to proceed, tribal governments should educate themselves about the advantages and disadvantages of other post-colonial governments: the Philippines chose independence, Hawaii became a state, and Puerto Rico evolved from a territory to a commonwealth. Perhaps commonwealth status makes Puerto Rico similar to the "domestic dependent nations" status that John Marshall outlined in his *Cherokee Nation v. Georgia* (1831) decision. Indian leaders should closely monitor the "independence vs. statehood vs. commonwealth" controversy, currently being debated in Puerto Rico, before deciding future directions for tribal legal status.

These two recently published books make significant contributions to the study of American Indian law, but each in a different way. The Getches et al. *Cases and Materials on Federal Indian Law* is valuable for law students who must learn to work within the current tangled web of litigation and court precedent. It offers valuable source material that brings together in convenient form the background data for the field. They suggest approaches to argue the Indian case more effectively. Some of the articles even urge reforms that should be enacted to make legal interpretation more clear. On the other hand, *The Road: Indian Tribes and Political Liberty* by Barsh and Henderson, offers the kind of original thinking that can help to produce a climate for significant legal changes. Anyone interested in the current legal status of Native Americans, not just law students, can profit from this book.

NOTES

1. *American Indian Law Review* (1973-) from the University of Oklahoma College of Law; *American Indian Law Newsletter* (1968-) from the American Indian Law Center, University of New Mexico School of Law; as well as various publications from the Native American Rights Fund (Boulder, Colorado) and the

Institute for the Development of Indian Law (Washington, D.C.) represent the most significant recent periodicals in the field.

2. The best bibliography to this literature is Joseph D. Sabatini, *American Indian Law: A Bibliography of Books, Law Review Articles and Indian Periodicals* (Albuquerque: American Indian Law Center, School of Law, University of New Mexico, 1973), but it is greatly in need of being updated. A superb recent work is Imre Sutton, *Indian Land Tenure: Bibliographical Essays and A Guide to the Literature* (New York: Clearwater Publishing Co., 1975), which evaluates a wide range of writings relating to the legal status of Indian lands. A more recent effort is Laura N. Gasaway, James L. Hoover, and Dorothy M. Warden, *American Indian Legal Materials: A Union List* (Stanfordville, N.Y.: Earl M. Coleman Publisher, 1980), but it disappointingly only includes books. Though it misses much of the most valuable recent study that has appeared in periodicals, this Union List does have a useful index. Several law journals have devoted special issues to Indian legal status, for example, *Law and Contemporary Problems* XL (Winter 1976).

3. Monroe E. Price, *Law and the American Indian: Readings, Notes and Cases* (Indianapolis: Bobbs-Merrill Co., 1973).

4. The argument that Indians occupy a status as colonial subjects has been developed in two articles by Robert K. Thomas, "Colonialism: Classic and Internal," and "Powerless Politics," both in *New University Thought* 4 (1966): 37-44, 44-53. The historical background of this legal status development in terms of United States Supreme Court decisions is traced in Walter L. Williams, "From Independence to Wardship: American Legal Conceptions of Indians, 1831-1903," in *The First Americans: Essays on Indian History and Culture*, eds. Barry Bienstock and Alden Vaughan (Boston: D. C. Heath, forthcoming). Comparison of Indian legal status with that of insular colonial subjects, seeing Indian policy was a precedent for American imperialist expansion abroad, is made in Walter L. Williams, "United States Indian Policy and the Debate over Philippine Annexation: Implications for the Origins of American Imperialism," *Journal of American History* 66 (March 1980):810-31.

5. There is much controversy over The Indian New Deal, but most of the published sources take a more positive view of Collier's program. For varied perspectives see the papers delivered at a 1953 symposium of the American Anthropological Association, *Indian Affairs and The Indian Reorganization Act: The Twenty Year Record*, ed. William H. Kelly (Tucson: University of Arizona Press, 1954). A legal evaluation is presented in "Tribal Self-Government and The Indian Reorganization Act of 1934," *Michigan Law Review* 70 (April 1972):955-86. A more recent study from Collier's viewpoint is Kenneth R. Philp, *John Collier's Crusade for Indian Reform, 1920-1954* (Tucson: University of Arizona Press, 1977). Other aspects of the Indian New Deal are dealt with in Henry F. Dobyns, "Therapeutic Experience of Responsible Democracy," in *The American Indian Today*, eds. Stuart Levine and Nancy Lurie (Deland, FL: Everett / Edwards, 1968), pp. 171-85; Peter M. Wright, "John Collier and the Oklahoma Indian Welfare Act of 1936," *Chronicles of Oklahoma* 50 (Autumn 1972):347-71; Donald Parman, "The Indian and the Civilian Conservation Corps," *Pacific Historical Review* 40 (February 1971):39-57; and Donald Parman, *The Navajos and The New Deal* (New Haven: Yale University Press, 1976).