BOOK REVIEW

READING AMERICAN INDIAN LAW

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Given the importance of nearly 200 years of federal Indian law, the Indian law scholarship that has helped frame modern thinking on the practice area deserves examination. Yet, as the editors of *Reading American Indian Law: Foundational Principles*[1] highlight, it is easy to overlook the Indian law scholarship that now permeates our classrooms, court opinions, and conversations. The editors of *Reading American Indian Law* bring us back to a somewhat foundational issue: Indian law as we know it today exists because of the impactful scholarly contributions of people like David Getches, Philip Frickey, Matthew L. M. Fletcher, Kristen Carpenter, Bethany Berger, Angela Riley, Robert Williams, and more. As the editors point out, this body of legal scholarship helps "to contextualize the changing doctrines announced by the Court, reconcile contradictory authority, challenge assumptions of race/place/power, and push for courts, tribal leaders, legislators, lawyer, educators, and students to adopt new ways of thinking about our fundamental doctrine."[2] As the editors of the compilation note, so much attention has been paid to case law that we have rarely compiled and

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1. READING AMERICAN INDIAN LAW: FOUNDATIONAL PRINCIPLES (Grant Christensen & Melissa L. Tatum eds., 2020).

2. *Id.* at 1.

studied the impact of the scholars—those who make the field what it is.[3]

The push and pull between primary and secondary resources in law presents a particularly interesting question: How do we know what we know? If you are an attorney arguing a case before the U.S. Supreme Court or arguing in the Idaho Supreme Court, precedent from the highest court in your jurisdiction is your authority. But crafting one's argument can take several different approaches. Obviously, it would be malpractice for an attorney to not engage any on-point case law, either for or against their proposition. Yet, if a question was thoroughly answered, the practitioner would not be before an appellate court. Beyond understanding the black letter law and precedent, the appellate practitioner understands the value of legal scholarship. After all, legal scholarship, produced by law professors, law students, and practitioners alike, can influence the types of arguments attorneys make. Indeed, legal scholarship can even help jurists arrive at their opinions.

However, so much of our work in both legal practice and academia focuses on what the courts say. After all, that is a very important piece of the puzzle in a legal system that is built upon stare decisis.[4] Stare decisis, or the principle "to stand by things decided," has been the guiding principle of the United States court system since before the foundation of the United States, as it was adopted from English common law.[5] For the United States, the principle of stare decisis aimed to strengthen the young nation's constitutional protections by protecting the "stability of its institutions."[6] While our legal system is predicated on the notion that we have a body of settled constitutional interpretations and standards, legal scholarship sometimes moves the needle on well-settled law by explaining court opinions, the

3. *Id.*

4. H. Campbell Black, *The Principle of Stare Decisis*, 34 AM. L. REG. 745, 745–46 (1886).

5. *Id.*

6. *Id.* at 747.

court system, applicability of decisions in the law, and pathways forward.

In this compilation, legal scholars and professors Grant Christensen and Melissa Tatum compiled a list of the most popular Indian law scholarship of the last 50 years. Both prolific Indian law scholars in their own right, Christensen and Tatum highlight the work of these chosen scholars. In discussing the impetus for taking on this project, they note:

> We realized that while we often refer to cases with students, we rarely if ever discuss scholars. Yet, in our own scholarship, much of what we read and write is influenced by the voices of other scholars and their interpretations of history, philosophy, law, and culture.[7]

In this book, by highlighting the importance of the scholarship excerpts, they create a time capsule of Indian law that demonstrates where Indian law jurisprudence and scholarship is headed in the twenty-first century while considering where scholarship has been. This book showcases and asks contemporary students and scholars of Indian law alike to consider how we know what we know. Hence, this book review focuses on the methodologies the editors used in selecting works of Indian law for their book, the benefits of using this book, and the importance of continuing to promote Indian law scholarship and jurisprudence.

I. EDITORS' METHODOLOGIES AND ARTICLE SELECTION

In *Reading American Indian Law*, the editors chose sixteen excerpts to include in the book. The editors formatted this book to suit the major themes of federal Indian law: core concepts, voices from Indian country, property law, and "(mis)understandings." Prior to each section, the editors introduce the section and how the articles within the section discuss one of these themes. In each of these sections, the editors include pieces that

7. READING AMERICAN INDIAN LAW, *supra* note 1, at 7–8.

demonstrate the breadth of federal Indian law. These articles are from a variety of contemporary scholars while also paying tribute to some scholars who are no longer with us, including Phillip P. Frickey and David H. Getches.

Before each article, the editors preview the article with a summary of the work and pose some questions for the reader to contemplate, making the book a good read for law students, graduate students, and undergraduate students alike. The selected works come from a variety of law reviews and journals. For a law school course, this book would make an excellent supplement for an Indian law textbook or perhaps as a text for a course in Advanced Topics in Indian law.

Describing their methodology, the editors detail how they created a selection process that did not allow them to simply choose the articles they qualitatively believed were foundational to Indian law. Instead, they chose to measure impact by identifying the 3,334 law review articles published in the 30-year period between 1985 and 2015.[8] After creating a score that considered things like the number of times each article was cited, the editors were able to find a score for each article that allowed them to rank the articles.[9] As the editors note, they chose articles that reflect the broader themes of Indian law, and not necessarily pieces that may carry an equal amount of impact but focus on niche topics in Indian law.[10]

Admittedly, the selections seem like the deep cuts of federal Indian law, especially some of the works from the 1980s. Yet, the editors' methodology demonstrates one of their organizing principles: What is foundational in Indian law is somewhat of an open question, especially as the body of scholarship becomes increasingly more diverse. Combing through the list of the top 100 articles that the editors include, it paints a vivid, but diverse,

8. *Id.* at 8.
9. *Id.*
10. *Id.* at 9.

picture of Indian law scholarship during that 30-year period.

II. THE CONTRIBUTIONS OF *READING AMERICAN INDIAN LAW*

Indian law itself is as old as, if not older than, the laws of the United States.[11] In the Introduction, the editors walk readers through the emergence of Indian law scholarship. While most Indian law scholars know the basic history surrounding Indian law that starts with colonization, winds through attempts at assimilation and termination, and finally arrives at an era of self-determination, *Reading American Indian Law* also tells the story of foundational Indian law scholarship.

As the editors note, the modern field of federal Indian law did not start to emerge until the 1970s—inspired by attorneys who worked in public interest fields.[12] The emergence of a diverse body of Indian law scholarship came soon after, as scholars noticed the Supreme Court deviated from traditional principles of Indian law.[13] The Introduction cites *Montana v. United States* as a turning point in Indian law scholarship, leading scholars "to bifurcate their approaches to the development of legal scholarship" and introduce "competing ideas to explain the Court's behavior and to question the origins of the field."[14]

This examination of scholarly approaches is itself interesting, especially as the editors ask: "Is there space for multiple voices and perspectives within the field of Indian law?"[15] As scholars of the contemporary era, we seem to take for granted that the field has a somewhat unified voice that articulates points of tribal sovereignty and the trust responsibility the federal government owes

11. *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 384 (1896) (stating tribal self-governance predates the U.S. Constitution).

12. READING AMERICAN INDIAN LAW, *supra* note 1, at 5.

13. *Id.* at 5–6.

14. *Id.*

15. *Id.* at 7.

to tribes. Yet, the editors point out how much of Indian law scholarship is interdisciplinary today precisely because contemporary scholarship is organized around principles of understanding the Supreme Court. As our goals shifted from articulating the knowns of federal Indian law to engaging the Supreme Court decision-making process, our concepts of scholarship have changed such that the foundation of Indian law has also shifted.

III. CONCLUSION: PROMOTING FEDERAL INDIAN LAW SCHOLARSHIP

It is not unusual for Indian law scholars and practitioners to experience pushback amongst our peers who do not understand what the field is, its importance, and what its contributions are to the legal field as a whole. In 2022 alone, there have been two major Indian law cases before the United States Supreme Court.[16] There have been numerous scholarly articles on these cases from well-established Indian law scholars, emerging voices in Indian law, and many other scholars who want to offer their analyses for understanding issues of federal Indian law. A book like *Reading American Indian Law*, which compiles some of the foundational pieces of scholarship since the 1980s, helps center that scholarship.

Although some might question the article selection process because it focuses on some of the broader themes of Indian law, this book demonstrates just how far ideas in Indian law can go. As part of the school of interdisciplinary Indian law scholars, this book challenges some of my own notions of scholarship within this field. As I read through the selected works, I wondered which articles that Supreme Court cases precipitated, and which articles informed the Court's

16. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022); Haaland v. Brackeen, 944 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted*, 42 S. Ct. 1205 (2022) (No. 21-3761).

decision-making. I also wonder how ideas evolve over time, especially as many of the scholars listed in the top 100 and featured in this book are scholars with whom I still regularly engage and see at conferences. *Reading American Indian Law* fulfills its promise of distilling and presenting some of the most important pieces of Indian law scholarship to the reader in a way that makes sense. For gaining a basic understanding of some of the voices that have built modern Indian law, I cannot recommend this book enough for scholars, practitioners, and students alike.