

HEINONLINE

Citation: 24 N.M. L. Rev. 315 1994



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Jun 8 15:14:49 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0028-6214](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0028-6214)

REMEMBERING WHAT HURTS US MOST: A CRITIQUE OF THE *AMERICAN INDIAN LAW DESKBOOK*

AMERICAN INDIAN LAW DESKBOOK

By the Conference of Western Attorneys General
Nicholas J. Spaeth, Chair, Editing Committee;
Julie Wrend, Clay Smith, Chief Editors
(University Press of Colorado, 1993)

*Reviewed by Joseph William Singer**

[M]uch of what has been published [about American Indian law] has been polemical rather than pure scholarship, not surprising given the emotion this topic often arouses.¹—*American Indian Law Deskbook*

How much do we remember of what hurts us most? I've been thinking about pain, how each of us constructs our past to justify what we feel now.²
—*Sherman Alexie*

A new treatise on American Indian law has been published under the auspices of a group of Attorneys General from some of the states in the western United States.³ The good news is that the *American Indian Law Deskbook* is up-to-date, short, and clear. The bad news, however, is that the book fails to live up to its promise of “objectivity.” The authors have an ax to grind. To put it simply, they consistently argue in favor of increasing state power in Indian country and against the exercise of tribal sovereignty when it affects non-Indians in any way. These value choices are evident not only in the ways in which the authors characterize the holdings of cases but in the choice of which cases to criticize and which to leave uncriticized. It is important for judges, practicing attorneys, law professors, and students to understand this when using this book. Although the authors claim that their goal is “objective” scholarship,⁴ readers should understand that the book actually presents an extended brief for the continued expansion of state power in Indian country.

* Professor of Law, Harvard University. Thanks and affection go to Martha Minow, Nell Jessup Newton and Aviam Soifer.

1. CONFERENCE OF WESTERN ATTORNEYS GENERAL, *AMERICAN INDIAN LAW DESKBOOK* xiii-xiv (Nicholas J. Spaeth et al. eds., 1993) [hereinafter *DESKBOOK*].

2. SHERMAN ALEXIE, *THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN* 196 (1993).

3. The principal authors are Clay Smith, Solicitor, Montana; Paula Smith, Assistant Attorney General, Utah; Steve Strack, Deputy Attorney General, Idaho; Lawrence Coniff, Assistant Attorney General & Senior Counsel, Washington; Charles Carvell, Assistant Attorney General, North Dakota; Harley Harris, Assistant Attorney General, Montana; John Bartlett, Deputy Attorney General, Nevada; Julie Wrend, Assistant Attorney General, Colorado. In addition, the editorial committee included Nicholas J. Spaeth, Attorney General of North Dakota; and Jim Johnson, Senior Assistant Attorney General, Washington.

4. *DESKBOOK*, *supra* note 1, at xiv.

The *Deskbook* does have its virtues. It is up-to-date and this is a good thing because the law in this area is changing so rapidly. The *Deskbook* reviews and analyzes the important cases decided by the United States Supreme Court over the last ten years—cases which are missing from the 1982 edition of Felix Cohen's *Handbook on Federal Indian Law*⁵ and which are necessary to any understanding of current law. The *Deskbook* is also relatively short and clearly articulates broad principles underlying federal Indian law, thereby attempting to clarify an extremely complicated and intractable subject.

Nonetheless, being up-to-date, short, and clear is an evil, rather than a virtue, if the analysis of recent cases distorts the meaning of older cases and if the description of basic principles oversimplifies the law and misleads the reader. In an area of law as complicated as American Indian law, being short and clear is decidedly not a virtue. Unfortunately, the *Deskbook* is subject to these criticisms. It presents a biased, over-simplified view of the law that is likely to mislead both litigants and judges.

The authors read extremely broad holdings into a few recent cases, effectively suggesting that these recent cases have implicitly overruled significant and long-standing precedents which appear to protect competing interests. In so doing, the authors fail adequately to consider alternative interpretations of the cases they discuss, including the ways in which the holdings of the cases they champion may be narrowly construed in a manner more consistent with prior law. Further, the authors stalwartly reconcile cases that appear to contradict each other or to reflect competing philosophies. Such cases might profitably be understood as embodying the conflicting policies of promoting versus terminating tribal sovereignty which have existed at various points in American history. Instead of situating such cases historically and describing them as evidence of competing lines of precedent which have not been (and may never be) fully reconciled, the authors attempt to reconcile these cases by privileging the policy of one case and making the others appear either to constitute narrow exceptions to those basic principles or to be wrongly decided. As a result, the authors fail to recognize the unique and complex character of American Indian law. Because American Indian law cases are only infrequently overruled and because they embody contradictory philosophies, the courts often interpret them in ways that make them quite fact-specific and of little precedential value. A better way to understand such cases is to see them as embodying tensions or contradictions which are not clearly resolved.

The *Deskbook* not only oversimplifies the law but does so in a predictable way. The authors consistently promote the expansion of state power in Indian country which suggests a cramped and narrow interpretation of tribal sovereignty. Given who they are, it is not surprising that the authors believe that it is important to increase the power of

5. FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (2d ed. 1982).

state governments in Indian country and to decrease or eliminate the power of tribal governments over non-members, especially non-Indian residents living on reservations. One might even say the authors have a vested interest in moving American Indian law in such a direction. The authors felt free to criticize existing cases on the basis of these controversial political views. There is nothing wrong with this; the authors are entitled to express their views. However, the authors claim that the *Deskbook* represents "pure scholarship" unhampered by such political goals or controversial views about the appropriate relations among the federal, state, and tribal governments.⁶ Nothing could be further from the truth. Not only do the authors' views determine which judicial opinions they choose to criticize, but those views infect the *Deskbook's* interpretation of existing case law. The *Deskbook* consistently oversimplifies the case law and interprets it in a way that comports with the authors' political views, while failing to acknowledge those views.

Have no doubt about it: The *Deskbook* is not "pure scholarship," but a brief for the authors' position, and not a very good one at that. It is not very good because it fails to acknowledge the existence of competing lines of precedent, competing plausible interpretations of existing cases, changing conceptions of the appropriate relations between American Indian nations and the United States and the ways in which these changing conceptions furnish a necessary backdrop against which formative cases must be read and interpreted.

These failings are important. Indian law is complicated and few law students or judges know anything about it. This means that judges (and their law clerks) are likely to cite the *Deskbook* and rely on it for guidance in deciding cases in the future. In so doing, these judges, their clerks, and the lawyers who practice before them, may wrongly presume that the *Deskbook* lives up to its promise of "objective" or "pure scholarship,"⁷ and eschews "polemical" and "emotional"⁸ argument. My main purpose in writing this review is to alert them to the "polemical" nature of the *Deskbook* itself.

In addition to misleading judges and their clerks, the authors fail to let Indian nations know that they may have plausible legal claims not acknowledged in the *Deskbook* and therefore may wrongfully inhibit Indian nations and their attorneys from pressing, in a litigation, legislative or political context, legitimate tribal interests. Perhaps more important, as a text written with the needs of the Western Attorneys General's offices in mind, the *Deskbook* fails to alert assistant attorneys general of the kinds of arguments that advocates for Indian nations are likely to make, and to give them the tools to respond to such arguments. For every broad interpretation the *Deskbook* provides of a case granting extensive state power in Indian country, advocates for Indian nations,

6. *DESKBOOK*, *supra* note 1, at xiii.

7. *Id.* at xiii-xiv.

8. *Id.* at xiii.

like myself, can come up with a dozen strategies for reading the case narrowly as a way to protect tribal sovereignty and property. For every narrow interpretation of a case recognizing tribal sovereignty, we are able to respond with a dozen strategies for justifying the existence of broad tribal power. Those strategies are not only based on normative or political arguments; rather, in coming up with interpretations of federal Indian law that support a broader interpretation of tribal sovereignty and a narrow interpretation of state sovereignty, we can appeal to numerous cases—none of which has ever been overruled and each of which is still cited and relied upon in the interpretation of American Indian law.

American Indian law is one of the most complicated areas of federal law—perhaps the most complicated one we have. Very few cases are ever overruled, and many cases continue to be cited fifty, one-hundred, and one-hundred-fifty years after they were decided. Conflicting lines of precedent and conflicting philosophies concerning the relation of American Indian nations to the United States provide a rich source of authority on both sides of most contested questions. The existence of conflicts, gaps, and ambiguities in enforceable judicial authority may be more true in American Indian law than in any other field of law. Even the excellent *Nutshell on American Indian law*, authored by Judge William C. Canby, Jr., summarizes the law by describing conflicting lines of precedent.⁹

Yet the *Deskbook* presents the case law as if it establishes a few broad principles which can be illustrated by reference to multiple judicial authorities. The authors often describe a general principle and several cases which are purported to support it. In the course of discussing the principle, the authors may mention in passing major exceptions to the principle they have sought to emphasize. However, they usually return to an unqualified statement of the general principle in summarizing the meaning of the cases they have discussed.¹⁰ What worries me is whether judges—and their clerks—will read that carefully. There is a great danger that they will notice the general principle and fail to focus on the exceptions because those exceptions are deliberately marginalized. If a judge or clerk looks for language to quote, they are likely to quote the *Deskbook's* description of the general principle established by the case without attending to its limits. Yet in many cases, the exceptions come close to swallowing the rule. In other cases, the authors have deliberately sought to change the law by reversing the usual statement of the law. A conventional reading of the cases often creates a presumption in favor of tribal sovereignty and against state sovereignty; the authors often reverse the principle, arguing that state power prevails unless it is overcome by federal or tribal interests.

For example, the authors begin their discussion of general civil-regulatory jurisdiction in Indian country by suggesting that, while tribes retain

9. JUDGE WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (2d ed. 1988).

10. See *infra* text accompanying notes 16-31.

“some quantum of inherent authority that exists outside any affirmative congressional grant of power . . . , [the] states may regulate the on-reservation activities of tribes, their members, and nonmembers where, on balance, state interests in such regulation are consistent with or otherwise outweigh any federal and tribal interests emanating from applicable federal statutes and regulations or from treaties.”¹¹ This description of the law suggests that states are presumptively entitled to regulate on-reservation activities of tribes and their members, but that such a presumption can be overcome by an overriding federal interest. This is an extremely odd way to describe the existing law. In fact, *sixteen* pages later, the authors note that “a state’s interests will justify regulation of a tribe or its members only in ‘exceptional circumstances.’”¹² It would therefore be more accurate—or less misleading—to explain that states generally have no power to regulate tribes or their members inside Indian country.

The authors also mislead the reader by using string citations in footnotes to support the broad principles they have announced. While the long footnotes are a valuable source guide for research, they deceive the reader by pretending that the facts of the cases in the footnotes are irrelevant. This is a grave mistake; both the historical period in which those cases were decided, and their particular facts, create important ambiguities in the law. Moreover, the authors often fail to draw the reader’s attention to cases which “go the other way.” Sometimes they note opposing cases by citing them in a footnote with the designation “Cf.,” without addressing directly—that is, in the text—the contradiction between the interpretation they offer and the result in the decided case.

A few examples should suffice to elucidate the *Deskbook’s* oversimplified and biased view of American Indian law. Let us start with property rights. An early chapter, entitled *Indian and Reservation Lands*, summarizes the rules and principles governing tribal property. The authors note the distinction between original Indian title and recognized title. “There are two sources of tribal land occupancy rights: an aboriginal entitlement premised on exclusive use of a particular territory at the time of first Euro-American contact; or an entitlement arising subsequent to such contact pursuant to the governing sovereign’s laws.”¹³ The *Deskbook* notes that the most significant difference between these two types of property rights is that lands held under aboriginal title have been held not to constitute “property” for purposes of the Fifth Amendment’s Takings Clause.¹⁴ Significantly, although the authors criticize numerous cases, they chose not to criticize the case which established this principle. They voice *not a single word of criticism* of this outrageous rule of law, first promulgated in 1955 in *Tee-Hit-Ton Indians v. United States*,¹⁵ in

11. DESKBOOK, *supra* note 1, at 98.

12. *Id.* at 114.

13. *Id.* at 39.

14. *Id.* at 40.

15. 348 U.S. 272, 279 (1955).

the midst of the Termination Era. The authors fail to note the racist arguments underlying the opinion and its technical deficiencies in misrepresenting precedent.¹⁶ They also fail to note the ways in which the *Tee-Hit-Ton* doctrine denies American Indian nations—and their members—equal protection of the laws.

Nor do the authors note *Tee-Hit-Ton's* implicit reliance on *Lone Wolf v. Hitchcock*,¹⁷ a case that has often been called the *Dred Scott*¹⁸ of American Indian law. *Lone Wolf* held that Congress could abrogate Indian treaties with impunity and that there were no constitutional limits of any kind on Congressional power over Indian nations.¹⁹ *Lone Wolf* itself is cited only twice in the entire book, and each time approvingly and without comment or criticism. The *Deskbook* authors cite *Lone Wolf* favorably for the proposition that “[t]reaty-secured rights can be legislatively abrogated”²⁰ without noting that this ruling justified and promoted forced allotment of Indian lands and immunized the United States from the takings clause for more than thirty years—during which two-thirds of all Indian land was transferred from Indian nations to non-Indians. On page 177 of the *Deskbook*, the authors note, *in a footnote*, that the federal government has the power to quantify Indian water rights protected by the *Winters* doctrine, and that the ability to *define* Indian water rights “stems from the power to affect, and even dispose of, Indian property rights.”²¹ In so arguing, the authors ever so gently suggest that *Lone Wolf* gives the federal government the power to *abrogate*, rather than *define*, tribal property rights. Further, by citing *Lone Wolf*, they suggest that it would be legitimate for the federal government to “dispose of” tribal property rights *without the consent of the affected tribe and without compensation*.

This suggestion misstates current law. Water rights are property rights which cannot be taken without just compensation if they are recognized by treaty. Although *Lone Wolf* has never been formally overruled, its conclusion that Congress may abrogate recognized title without paying compensation *has* been decisively (although not completely) rejected.²² Moreover, citing *Lone Wolf* approvingly in this manner is extremely offensive. It is as if the treatise writers had cited *Dred Scott*²³ approvingly for the proposition that African Americans are not persons within the meaning of the Constitution, without acknowledging both the fundamental injustice of that proposition and the fact that it was altered by the Fourteenth Amendment.

16. Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980); Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. REV. 1 (1991); Joseph William Singer, *Well Settled? The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. ____ (forthcoming 1994).

17. 187 U.S. 553 (1903).

18. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

19. *Lone Wolf*, 187 U.S. at 565.

20. DESKBOOK, *supra* note 1, at 14.

21. *Id.* at 177 n.67.

22. See *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

23. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

In addition to supporting the expropriation of Indian property without just compensation, the authors mildly suggest that “[a]lthough aboriginal title in the past constituted a significant basis for tribal occupancy rights, that title has likely been extinguished in its entirety.”²⁴ This is an inaccurate, implausible, and destructive assertion. Two pages before making this provocative claim, the *Deskbook* accurately states the canons of interpretation governing extinguishment of original Indian title. Extinguishment can “be effected *only by Congress, through either treaty ratification or statute*, or the Executive Branch acting pursuant to legislative direction and by the voluntary abandonment of aboriginal territory by the involved tribe.”²⁵ If this is correct—and it is—then it is highly unlikely that all original Indian title has been lawfully extinguished.

First, consider that the state of New York violated the Trade and Intercourse Acts and illegally attempted to extinguish the original Indian title to vast stretches of land belonging to the Six Nations in the Iroquois League without prior approval of the federal government. The United States Supreme Court has recognized a common law right of action against the states for violation of the Trade and Intercourse Acts.²⁶ It has further recognized that a breach of trust action may, in some cases, be made against the *federal* government for failing adequately to protect tribal property rights.²⁷ Second, consider that non-Indian settlement in New England often forced resident tribes to retreat to other lands in Massachusetts, Connecticut, Vermont, and Canada where they continued to live among the growing non-Indian population without receiving compensation for the lands they were forced to abandon.²⁸ Although the Vermont Supreme Court recently ruled that the title of the Abenaki Nation to all its lands in the State of Vermont was extinguished by the “increasing weight of history,” its decision both misapplies existing extinguishment doctrine and deprives the Missisquoi Abenakis of equal protection of the laws, as the contrary conclusion of the trial court in that case demonstrates.²⁹

To support the argument that original Indian title has been fully—and lawfully—extinguished, the authors cite Felix Cohen’s analysis of original Indian title for the proposition that “[f]ortunately for the security of American real estate titles, the business of securing cessions of Indian titles has been, on the whole, conscientiously pursued by the Federal Government”³⁰ While it is true that the United States followed a

24. DESKBOOK, *supra* note 1, at 45.

25. *Id.* at 41-42 (emphasis added).

26. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

27. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992).

28. Singer, *Well Settled?*, *supra* note 16.

29. *State v. Elliott*, 616 A.2d 210 (Vt. 1992). For extended critiques of this opinion, see Singer, *Well Settled?*, *supra* note 16; John Lowndes, *Aboriginal Title: Extinguishment by the Increasing Weight of History*, 42 BUFF. L. REV. ____ (forthcoming 1994).

30. DESKBOOK, *supra* note 1, at 45 n.33.

consistent *policy* of negotiating treaties with Indian nations prior to authorizing land settlement by United States citizens, it is also true that this principle was violated in various ways in *practice*, as the above examples demonstrate. The only other authority cited to support the proposition that original Indian title has been fully extinguished is a case which goes the other way. This case holds that the original title of the Cayuga Nation had *not* been extinguished; the authors simply note this case in the footnote with an ironic "Cf."³¹

Regarding the issue of tribal sovereignty, the *Deskbook* authors are in favor of the proposition that Indian nations have no regulatory or adjudicatory power over nonmembers unless those nonmembers have established a voluntary relationship with the tribe or a tribal member through contract or through entering tribal land. Effectively, the *Deskbook* proposes an extremely broad interpretation of the plurality decision in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.³² *Brendale* addressed the question of whether the state or the Yakima Nation (or both concurrently) had the power to apply its zoning law to fee land owned by nonmembers inside the reservation. Four members of the Supreme Court³³ who joined a plurality opinion written by Justice White would have held that Indian nations have no power whatsoever over fee lands owned by nonmembers anywhere inside the reservation.³⁴ Three members of the Court³⁵ who dissented in an opinion written by Justice Blackmun would have held that Indian nations retain regulatory power over all lands inside the reservation unless that power is expressly abrogated by Congressional statute or treaty.³⁶ Two Justices, Stevens and O'Connor, cast the deciding votes holding that Indian nations have regulatory power over nonmember lands only if they are located in areas of the reservation with no "significant" nonmember ownership.³⁷

The *Brendale* decision is inherently unstable. First, the rule of law promulgated by the Court is not easily administrable; it is hard for states and Indian nations to know whether or not they have the power to impose their zoning regulations on particular parcels. Second, the compromise adopted by the Court is fully accepted by only two of its members. Third, three Justices have left the Court since 1989. Justice White, author of the plurality decision, has retired from the bench. It is likely that Justice Thomas will take his place as an advocate of the plurality de-

31. *Cayuga Indian Nation of New York v. Cuomo*, 771 F. Supp. 1924 (N.D.N.Y. 1991). The authors' parenthetical description of this case reads: "holding the defense of laches unavailable to private and public landowners against 185-year-old aboriginal title claim even though decision 'may eventually cause disruption in Cayuga and Seneca Counties.'" *DESKBOOK*, *supra* note 1, at 45 n.33. This description of the case appears to acknowledge that the statement in the text is false.

32. 492 U.S. 408 (1989).

33. Chief Justice Rehnquist, Justice White, Justice Scalia and Justice Kennedy.

34. *Brendale*, 492 U.S. at 425-26 (opinion of White, J.).

35. Justice Brennan, Justice Marshall and Justice Blackmun.

36. *Brendale*, 492 U.S. at 466-67 (opinion of Blackmun, J.).

37. *Id.* at 441-42 (opinion of Stevens, J.).

cision.³⁸ Justices Brennan and Marshall have also left the Court. Justice Souter, it seems, will probably refuse to join the plurality decision given the fact that he and Justice Blackmun were the only two Justices to dissent from the Court's recent decision in *South Dakota v. Bourland*.³⁹ Souter will most likely join Stevens and O'Connor in their compromise view. Given this line-up—four Justices supporting the plurality decision, two (or three) Justices supporting the compromise position, and one Justice remaining from the dissent—Justice Ginsburg has the deciding vote. It is difficult to predict how Ginsburg will view these questions, but all indications show that she would be far more likely to join her colleagues Stevens, O'Connor, and Souter than sign-on with the plurality. If this is an accurate depiction of the current Court, the plurality opinion in *Brendale* does not represent the current law, and is not likely to do so in the near future. Yet the authors of the *Deskbook* argue for the position taken by the plurality opinion of Justice White.⁴⁰ Moreover, not only do the authors argue for the plurality opinion, but they use it as a basis for describing the principles underlying tribal and state sovereignty in Indian country.

The authors begin their discussion of "General Civil-Regulatory Jurisdiction in Indian Country" in Chapter 5 by discussing *Oliphant v. Suquamish Indian Tribe*,⁴¹ a 1978 case which held that tribes have no criminal jurisdiction over non-Indians.⁴² The Court, however, has never interpreted tribal *civil* regulatory power as narrowly as it has interpreted tribal *criminal* jurisdiction. To use *Oliphant* as the primary precedent from which to understand the extremely complicated mix of civil regulatory doctrines not only misrepresents those doctrines but suggests that tribal power is far narrower than it is and that state power is far broader than it is.

After discussing *Oliphant*, the authors move on to *United States v. Wheeler*,⁴³ a case which reasoned that inherent tribal sovereignty pre-exists and is not derived from federal power, although it is subject to plenary federal power. The Court's holding made dual prosecutions of a tribal member under tribal law and federal law permissible under the Double Jeopardy Clause since the federal prosecution does not constitute a second prosecution by the same government. The authors cite *Wheeler* for the proposition that "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe" and

38. As evidence, see Justice Thomas's opinion in *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993).

39. 113 S. Ct. 2309, 2321 (1993) (Blackmun, J., dissenting).

40. In fact, the authors argue for an interpretation of tribal sovereignty which is even more limited than Justice White's *Brendale* opinion. Justice White recognized a tribal right to go into state court to challenge state power when it has a significant effect on tribal interests. The *Deskbook* authors mention this limitation on state sovereignty when they discuss *Brendale* but ignore it in most of their discussions about the legitimate scope of tribal power.

41. 435 U.S. 191 (1978).

42. *DESKBOOK*, *supra* note 1, at 101.

43. 435 U.S. 313 (1978).

that "the powers of self-government . . . are of a different type [since they] involve only the relations among members of a tribe."⁴⁴ The *Desk-book* comments that this principle "distinguishes between internal and external relations,"⁴⁵ suggesting that tribes retain no inherent sovereign power over nonmembers.

This description of *Wheeler* is inaccurate. First, tribes clearly retain inherent sovereign power over nonmembers who enter tribal land or who enter consensual relations with the tribe. Even the plurality opinion of *Brendale*⁴⁶ and the recent opinion in *Bourland*⁴⁷ recognize this. Second, the quoted language in *Wheeler* merely stated that the areas of sovereignty which have been divested have been in the category of member-nonmember relations; it did not in any way constitute a statement that *all* sovereignty over nonmembers has been divested. As noted above, this is simply not true.

Immediately after the authors' discussion of *Oliphant*, *Wheeler*, and *Santa Clara Pueblo v. Martinez*,⁴⁸ they note that *Washington v. Confederated Tribes of Colville Indian Reservation* affirmed the power of Indian nations to impose sales taxes on non-Indians who purchase cigarettes on the reservation.⁴⁹ The authors correctly note that this case stands for the proposition that tribes retain sovereign power over "consensual on-reservation transactions between tribes and nonmembers."⁵⁰ On the other hand, they fail to note that tribes retain sovereign power over non-Indians who enter tribal land, whether or not they have otherwise established a consensual relationship with the tribe or its members. Thus, the authors mischaracterize *Montana v. United States*⁵¹ as standing for the proposition that "far from being the rule, the presence of inherent tribal authority over nonmembers was the exception."⁵² In fact, *Montana* held that tribal power over nonmembers was the exception *only* in the case of regulation of activities of nonmembers *on fee lands* inside the reservation.⁵³ While it is true that *Montana* appears to have effectuated a dramatic—and unfortunate—change in the law of tribal sovereignty, tribal power over nonmembers is much broader than the authors want to admit. Finally, they note in passing, but fail to emphasize, that the rules promulgated in *Montana* and *Brendale* in no way apply to non-Indian conduct on tribal lands.⁵⁴

44. DESKBOOK, *supra* note 1, at 103 (quoting *Wheeler*, 435 U.S. at 326).

45. *Id.* at 102.

46. See *supra* note 33.

47. See *supra* note 39 and accompanying text.

48. 436 U.S. 49 (1978) (affirming the power of tribes to determine their own membership).

49. 447 U.S. 134 (1980).

50. DESKBOOK, *supra* note 1, at 104.

51. 450 U.S. 544 (1981).

52. DESKBOOK, *supra* note 1, at 105.

53. See *Montana*, 450 U.S. at 565.

54. Not until the authors turn to *Duro v. Reina*, 495 U.S. 676 (1990), on page 109, do they note that "inherent tribal regulatory authority extends to nonmembers only when express or constructive consent is present, such as through voluntary on-reservation business transactions with tribes or use of tribal lands." DESKBOOK, *supra* note 1, at 109.

It must be conceded that the authors appear to have foreseen—and would doubtless applaud—the broad language of the recent United States Supreme Court case of *South Dakota v. Bourland*.⁵⁵ *Bourland* appears to deprive Indian nations of all regulatory power over non-members for conduct inside reservations unless those non-members have either voluntarily entered a contract with the tribe or have entered tribal land. Yet, there are many conventional ways to limit the holding of *Bourland*, consistent with Indian law precedent. As a factual matter, *Bourland* is limited to the question of whether tribes retain the right to regulate hunting and fishing of non-members on lands inside the reservation owned in fee by the United States. In addition, *Bourland* can be viewed as a narrow statutory interpretation question; the opinion rests on a construction of the particular statute which authorized the taking of property of the Cheyenne Sioux Tribe for use to build a dam. Viewed in this way, the opinion has *no precedential value*. Perhaps it can be cited for the narrow proposition that when Congress passes a statute authorizing the taking of tribal property, compensates the tribe for the property taken, and the statute effectuating the taking recites that the sum paid by the United States “shall be in final and complete settlement of all claims, rights, and demands”⁵⁶ of the tribe or its allottees, that we have sufficient evidence of Congressional intent to extinguish all tribal power over non-Indians on the taken lands.⁵⁷ In sum, although it is certainly possible that *Bourland* may presage the adoption of an extremely restrictive theory of tribal sovereignty, it is by no means certain—especially when we consider the replacement of Justice White by Justice Ginsburg.

The *Deskbook's* interpretation and heavy reliance on *Brendale* fails to adequately consider precedents that go the other way. Specifically, it leaves no room for the 1985 case of *National Farmers Union Insurance Cos. v. Crow Tribe*⁵⁸ and the 1987 case of *Iowa Mutual Insurance Co. v. LaPlante*.⁵⁹ In both cases, the Supreme Court held that tribal courts had initial jurisdiction to determine whether they had subject matter jurisdiction over tort suits involving relations between tribal members and nonmembers on the reservation, *even when the lawsuit is based on conduct occurring on fee lands owned by nonmembers*.⁶⁰ It may therefore be possible to interpret *Montana*, *Brendale*, and *Bourland* as encompassing land use regulation but having no relevance to other areas of civil regulatory jurisdiction, such as taxation, contract, tort, or family law.

In *National Farmers*, a young boy who was a tribal member was injured by a motorcycle driven by someone else on the grounds of a

55. 113 S. Ct. 2309 (1993).

56. *Id.* at 2317 (quoting Act of Sept. 3, 1954, Pub. L. No. 776, 68 Stat. 1191).

57. Tribal power over its members persists because the statute did not expressly diminish the borders of the reservation, and existing presumptions protect tribal sovereignty by requiring clear evidence of an intent to diminish reservation borders.

58. 471 U.S. 845 (1985).

59. 480 U.S. 9 (1987).

60. See *Farmers Union*, 471 U.S. at 856-57; *Iowa Mutual*, 480 U.S. at 14-16.

school owned and operated by a school district which constituted a subdivision of the state of Montana. The plaintiff sued the school district in tribal court for negligent failure to adequately supervise the children while in the school's parking lot.⁶¹ When the school district failed to appear to defend the claim, the tribal court entered a default judgment against it. The school and its insurer filed a claim in federal district court for a declaration that the Crow Tribal Court lacked jurisdiction over the school district. The Court held, *unanimously*, that the federal courts could not hear the case until the plaintiffs had exhausted all possible remedies in the tribal court.⁶²

The Court refused to extend the rule of *Oliphant* that tribes lack criminal jurisdiction over non-Indians to the civil jurisdiction area. Justice Stevens concluded that:

[T]he answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require. Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.⁶³

In *Iowa Mutual*, a tribal member employed and insured by an insurance company was injured in an accident on the reservation and sued the insurance company in tribal court for bad faith refusal to settle. The Court extended the ruling of *National Farmers* (premised on federal question jurisdiction) to diversity jurisdiction, holding that "[c]ivil jurisdiction [over the activities of non-Indians on reservation lands] presumptively lies in tribal courts unless affirmatively limited by a specific treaty provision or federal statute."⁶⁴

The *Deskbook* authors criticize these two cases and suggest that they should be interpreted in light of *Brendale*⁶⁵ and *Duro v. Reina*.⁶⁶ They argue that *Iowa Mutual* has "spawned confusion"⁶⁷ by suggesting that tribal courts have subject matter jurisdiction over all claims involving non-Indian activities on the reservation. The authors would read *Iowa Mutual* as holding that the tribe has adjudicatory jurisdiction (power to hear a case in tribal court) only where it has regulatory jurisdiction (the power to apply tribal law)⁶⁸ and that the tribe has no power to apply

61. *Sage v. Lodge Grass School Dist.*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6019 (Crow Tribal Ct. 1982).

62. 471 U.S. at 855.

63. *Id.* at 855-56.

64. 480 U.S. at 18.

65. 492 U.S. 408 (1989).

66. 110 S. Ct. 2053 (1990).

67. *DESKBOOK*, *supra* note 1, at 126, 134.

68. *Id.* at 136.

tribal law to nonmembers for conduct on nontribal land. This interpretation of *National Farmers* and *Iowa Mutual* would force the tribes to engage in the pointless exercise of taking jurisdiction over tort claims involving nonmember activities on fee lands only to issue repeated rulings that the tribe has no jurisdiction over the case. Such an absurd exercise would effectively make a mockery of both *National Farmers* and *Iowa Mutual*.

Further, the authors argue that tribal courts only have jurisdiction over cases in which tribal law applies or in which the nonmember has consented to the tribal court's jurisdiction.⁶⁹ They would therefore find a tribal court powerless to hear a tort claim by a tribal member against a nonmember occurring on fee land inside the reservation if the Supreme Court extends *Brendale* and *Montana* from land use regulation to the area of tort law, or if the issue to be determined in court concerns the question of whether state law has been preempted by a federal statute.⁷⁰ The authors presume that tribal courts have no special expertise in interpreting and applying state or federal law and therefore have no legitimate right to adjudicate controversies not based on tribal law even when the case concerns activity on the reservation which affects the tribe or its members. They note, but deplore, the fact that "[l]ower federal courts have thus far generally failed to recognize [this] limitation on *Iowa Mutual* deferral."⁷¹

Yet the authors give no reason for interpreting tribal subject matter jurisdiction so narrowly. Significantly, the Supreme Court, in *Santa Clara Pueblo v. Martinez*,⁷² interpreted the Indian Civil Rights Act of 1968 (ICRA) as granting extremely limited federal court jurisdiction. While the Act imposes many of the requirements of the Bill of Rights on tribal governments, the Court interpreted the Act as granting tribal courts the sole power, in most instances, to interpret and apply the federal standards imposed by the Act itself. The ICRA therefore represents a major instance in which the Court recognizes the competence of tribal courts to apply and enforce federal law—even when it limits the power of tribal governments.

The *Deskbook* of course takes a dim view of the ruling in *Santa Clara Pueblo v. Martinez*, noting that "[h]earings held before the United States Commissioner on Civil Rights concerning ICRA enforcement included allegations of repeated due process violations by tribes" and obliquely suggesting that Congress consider passing an amendment to the ICRA to allow for federal court jurisdiction to challenge the actions of tribal governments and courts.⁷³ The authors nowhere criticize the failure of federal courts to take tribal interests seriously. They fail to note, for example, that the trial court in *Brendale* found, and the Supreme Court

69. *Id.*

70. *Id.* at 127-31.

71. *Id.* at 130.

72. 436 U.S. 49 (1978).

73. *DESKBOOK*, *supra* note 1, at 165-66.

agreed, that the construction of twenty houses on a large parcel of land would not imperil "any interest of the Yakima Nation" even though the tribal zoning ordinance would have prohibited development entirely.⁷⁴ As I have previously argued, this conclusion "grants tribal interests *no weight at all*."⁷⁵

The relationship between the adjudicatory jurisdiction cases (*National Farmers* and *Iowa Mutual*) and the legislative jurisdiction cases (*Montana*, *Brendale*, *Bourland*) is complicated and the reach of both of these lines of cases is not yet settled. The *Deskbook* proposes a simple solution: tribes have no power over nonmembers unless the nonmember has entered tribal land or made a contract with the tribe or a tribal member. Yet this simple solution privileges the holdings of *Brendale* and *Bourland* over the holdings of *National Farmers* and *Iowa Mutual*. It also assumes that the legislative jurisdiction cases apply to all issues rather than being limited to the area of land use regulation. An alternative reading of these cases is possible and it would not implicitly overrule (or give little scope to) the adjudicatory jurisdiction cases, but it would limit the damage the land use regulation cases have had. The authors never consider seriously alternative interpretations. Nor do they confront the fact that their proposals, if accepted, would impose the continued abrogation of solemn treaties.

The truth about the legal relationships between American Indian nations and the United States is complex. The *Deskbook* reduces that complexity to serve the purpose of ensuring that non-Indians are never involuntarily subject to the authority of Indian nations. The authors do not recognize that this purpose inevitably makes Indian nations involuntarily subject to the authority of non-Indians and of the government of the United States. Most significantly, the authors fail to acknowledge that such a policy entails the abrogation of treaties. This failure to remember the past or to acknowledge lawful obligations is a mechanism for denial "of what hurts us most," effectively "construct[ing] the past to justify what we feel now."⁷⁶

In Sherman Alexie's powerful new book, *The Lone Ranger and Tonto Fistfight in Heaven*, a character named Norma was always trying to save the tribe, "watching out for those of us that were so close to drowning."⁷⁷ In her role as "cultural lifeguard,"⁷⁸ she taught that "[e]verything matters Even the little things."⁷⁹ Because everything matters, it is essential not to reduce the complexity of human experience to satisfy our need for order. "'Listen,' Norma said. 'Pete Rose played major league baseball in four different decades, has more hits than anybody in history. . . . But after all that, all that greatness, he's only remembered

74. *Brendale*, 492 U.S. at 432.

75. Singer, *Sovereignty and Property*, *supra* note 16, at 37.

76. ALEXIE, *supra* note 2, at 196.

77. *Id.* at 199.

78. *Id.*

79. *Id.* at 200.

for the bad stuff.”⁸⁰ Just as it is important to remember the fullness of a person’s life, it is important not to deny the past to justify the present. In oversimplifying the law, the *Deskbook* tries to avoid grappling with the current implications of past injustice. The details that are overlooked and the case law that is reduced to slogans will not disappear simply because they are unacknowledged by the authors. Redemption comes from remembering the details.⁸¹ Everything matters, especially the little things.

80. *Id.* at 210.

81. “The key to redemption is remembrance.” Aviam Soifer, “*The Task of Hearing What Has Already Been Said: History and Native American Legal Claims*,” 28 GA. L. REV. ____ (forthcoming 1994) (quoting Baal Shem Tov).

