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Felix S. Cohen's Handbook of Federal Indian Law, 1982 ed. (1982)

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BOOK REVIEW

FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 1982 EDITION

Charlottesville: Mitchie Bobbs-Merrill, 1982.
Pp. v, 912, $80.00.

Reviewed by Russel Lawrence Barsh*

I am led to believe that it will always be easy for a king to make the lawyers the most useful instruments of his power.

—Alexis de Tocqueville[1]

Forty-one years ago, the legend goes, Harvard-educated Interior Department Solicitor Felix Cohen brought order and light into what Justice Frankfurter called the "mish-mash" of Indian affairs law. Cohen's work was published by the government as a guide for Indian Bureau employees, but quickly assumed the role of an undisputed authority in litigation.[2] Lawyers read Cohen instead of the cases, and judges quoted or paraphrased Cohen in their opinions. The treatise attracted almost biblical reverence, a Prosser in a rather arcane sub-discipline.

It is in the nature of treatises to make a lawyer's task easier. Treatises locate and summarize the case record, making it more accessible to the unfamiliar, hasty, and inexperienced. Inherent in this is the tendency to establish more or less authoritative interpretations in gray areas, steering practitioners away from the disputed points that make new law. Treatises jeopardize critical thinking when they reconcile what judges have said and rationalize complexity into neat rules. This danger is greatest where the intellectual turf is truly perplexing, the subject political, and the bench and bar relatively unmotivated and ignorant. In such instances treatises become more than scholarly summaries. They become the law.

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1. A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 265 (J. Mayer ed. 1969).

2. R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 112–13 (1980).

Felix Cohen was a man with a mission. He had a fervent confidence in the watchdog role of law in democracy, and a faith that lawyers could lead Indians out of political bondage. In his preface to the original edition of the *Handbook,* he wrote that:

> What has made this work possible, in the final analysis, is a set of beliefs that form the intellectual equipment of a generation—a belief that our treatment of the Indian in the past is not something of which a democracy can be proud, a belief that the protection of minority rights and the substitution of reason and agreement for force and dictation represent a contribution to civilization, a belief that confusion and ignorance in fields of law are allies of despotism, a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights, a belief that understanding of the law, in Indian fields as elsewhere, requires more than textual exegesis, requires appreciation of history and understanding of economic, political, social, and moral problems.[3]

In short, Cohen belonged to that New Deal generation which believed that reason and enlightened central planning could remake and improve the social order. The law as he conceived it was an evolving instrument of human progress which, like any tool, worked best if well understood and properly used.

In this spirit Cohen injected something of his own humanistic views into the *Handbook,* above and beyond what was to be found in the cases. In the treatise's most frequently quoted passage, he admonished his readers that:

> Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.[4]

The foundation of this relation, Cohen argued, was the "right of conquest" in the law of nations.

3. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW xviii (1941 ed.) [hereinafter cited as 1941 HANDBOOK].

4. *Id.* at 122.

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[5]

Although Cohen did not acknowledge the debt, this formula was a paraphrase of Lord Mansfield's description of the political status of conquered peoples in *Campbell v. Hall*[6] two centuries earlier. Cohen employed an obsolete imperial British doctrine to conceptualize a contemporary American situation.

Cohen's characterization of tribal authority as residual, rather than delegated, was consistent with the Roosevelt Administration's plan for re-recognizing and rebuilding tribal institutions, but proved embarrassing in the Eisenhower era. It cut against the legitimacy of congressional enactments systematically "terminating" tribes and throwing them and their lands on the states without Indian consent. The *Handbook* became a political pawn. It was pointedly edited and reissued in 1958, carefully bowdlerized to remove concessions to the sovereign sources of Indian rights. When official national policy swung back to the New Deal position in the late 1960's, it was time for a new *Handbook*. The new edition predictably restores the conceptual framework of the 1941 original.

The problem is that much has happened in the world since 1941, and the new edition seems unaware of it all. Before Pearl Harbor the United States could pride itself as the paragon of human rights, and think its aboriginal policies the most enlightened in the world. But the Universal Declaration of Human Rights, penned in large part by Eleanor Roosevelt and proclaimed by the United Nations in 1948,[7] set in motion a new era of international law. Judged by this evolving set of standards, U.S. Indian

5. *Id.* at 123 (footnotes omitted).

6. 98 Eng. Rep. 1045, 1047–48 (1774); *see also* Rex v. Vaughan, 98 Eng. Rep. 308 (1769) (discussing political status of conquered peoples); Memorandum, 24 Eng. Rep. 646 (1722) (same); Dutton v. Howell, 1 Eng. Rep. 17 (1693) (same). For a thorough discussion of conquest in imperial British Law, see R. Barsh & J. Henderson, Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and "Constitutional Renewal" (unpublished manuscript, to be published in J. CANADIAN STUDIES).

7. G.A. Res. 217A (III), U.N. Doc. A/777 (1948).

administration is woefully archaic, a throwback to an earlier era in the struggle for human dignity.

In the past few years American diplomats have been called increasingly to account for apparent conflicts between U.S. Indian policy and United Nations norms. Their characteristic reply has been silence, and that unfortunately is also the reply of the editors of the new *Handbook*. It contains three references to "international law"—every one of them to the customs and practices of the old European empires. U.S. legal traditions described by the *Handbook* are indeed reasonably consistent with these well-worn imperial doctrines, as the editors appear eager to demonstrate. But this is like justifying a modern practice of hanging thieves in chains because such was the usual punishment in 1650. The new *Handbook* makes no reference to any principle of international law developed after 1800.

THE LEGITIMACY OF POWER

"Cohen was the Blackstone of American Indian law," the revision's editors proclaim in their introduction.[8] "He brought organization and conceptual clarity to the field."[9] But Blackstone's opus became a conceptual straightjacket once its novelty had passed, rooting nineteenth-century English law in the morality and political dogma of the eighteenth century. American lawyers in the first decades of the Republic fought a bitter campaign to extirpate Blackstone from the literature because of its great power to perpetuate implicitly monarchist thinking under the guise of neutral common-law rules. Blackstone's erudite exposition of property law, for example, was compelling and elegant, but entirely inappropriate in a new nation that lacked a landed peerage and ancient manorial titles.[10]

Like Blackstone's *Commentaries,* the *Handbook* may be destined to be admired by scholars as an historical milestone, but quickly surpassed in practice by more progressive thinking. Like the *Commentaries,* the *Handbook* may be viewed by coming generations as more of an excuse for the status quo of its time than a contribution to the growth of the living law.

The heart of the revised edition's political theory is to be found in a passage that closely tracks the 1941 original.

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8. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW viii (1982 ed.) [hereinafter cited as 1982 HANDBOOK].

9. *Id.*

10. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 at 44, 114–19, 162 (1977); P. MILLER, THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 223–30 (1965).

> Perhaps the most basic principle of all Indian law . . . is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by expressed acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished." . . . The tribes began their relationship with the federal government with the sovereign powers of independent nations. *Upon coming under the authority of the United States,* a condition acknowledged in treaties and agreements between tribes and the federal government, *certain limitations upon the external powers of tribal self-government necessarily followed.* But the United States from the beginning permitted, then protected, the tribes in their continued internal government. In so doing, the United States applied a general principle of international law to the particular situation of the Indians.[11]

This begs the fundamental political and moral issue: the *legitimacy* of federal power to limit tribal sovereignty. The editors devote a chapter to locating Indian affairs among the constitutionally enumerated powers of the United States government, but this only addresses the allocation, within the federal system, of whatever just authority over tribes the United States possesses. How the nation as a whole acquired lawful power over particular tribes in the first place is a question the editors carefully avoid, and one for which they have no convincing answer. Like Cohen, they resort ultimately to aggression and Anglo-American superiority to justify the political status quo, repeating his discussion of "conquest."[12]

The revised edition's editors purport to rely on "accepted political theory and international law concerning dominance of weaker by stronger nations," asserting that "a subject nation must yield to the overriding legislative authority of the dominant nation and may depend upon the stronger nation for protection, but it is otherwise independent."[13] The formation of "protectorates" or "dependencies" in eighteenth- and nineteenth-century law, however, was a matter of consent. It arose from free association of the weaker with the stronger under treaties of protection or guarantee.[14] It did not arise from nature or status.

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11. 1982 HANDBOOK, *supra* note 8, at 231–32 (emphasis added) (footnotes omitted). The italicized portion indicates that limitations on tribal sovereignty are implied from the fact that the tribes are under U.S. authority. *See* note 51 and accompanying text *infra* (discussing implied limitations on sovereignty). This is a subtle change from Cohen's original language, which stated that tribal sovereignty is limited only by express treaties and legislation. *See* text accompanying note 4 *supra*.

12. *Compare* 1982 HANDBOOK, *supra* note 8, at 241–42 (revised edition's discussion of "conquest" principles) *with* 1941 HANDBOOK, *supra* note 3, at 123, *reprinted in* text accompanying note 5 *supra* (original edition's discussion of "conquest").

13. 1982 HANDBOOK, *supra* note 8, at 232.

14. H. WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 33–34 (1866), *reprinted in* CLASSICS OF INTERNATIONAL LAW 44–45 (J. Scott ed. 1936).

The editors concede that all Indian treaties did not expressly establish such a relationship, but toss away this historical problem casually in a footnote: "In 1831 the Supreme Court found that all Indian tribes are dependent nations in regard to the United States, rendering such provisions legally unnecessary."[15] They cite *Cherokee Nation v. Georgia*[16] for this sweeping proposition but refer to no particular page at which it is to be found. Nor could they, for the Supreme Court said no such thing. *Cherokee Nation* dealt with an individual tribe which had, in fact, expressly accepted U.S. protection. Any doubt that the Cherokee treaty, and not the Cherokees' race, was the source of the relationship was dispelled by the Court in *Worcester v. Georgia*[17] one year later.

By characterizing dependency as a concomitant of race rather than consent, the revised *Handbook* perpetuates the most invidious conceit of nineteenth-century European imperialism, that brown nations necessarily and inevitably come under the suzerainty of white nations. Documents of consent are immaterial; for their own good the poor savages are *presumed* to consent. By invoking the "white man's burden" and "trusteeship" to justify ignoring the requirement of specific consent in forming protectorates, late nineteenth-century British, French and German imperialists briefly deviated from generally established norms, and this pretense has been universally condemned by jurists and the United Nations for more than thirty years.[18]

CONTEMPORARY INTERNATIONAL NORMS

According to the United Nations Charter, all "peoples" have the right of "self-determination," and it is the duty of states administering non-self-governing territories:

> [T]o develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.[19]

The International Covenants on Human Rights,[20] signed by President

15. 1982 HANDBOOK, *supra* note 8, at 65 n.37.
16. 30 U.S. (5 Pet.) 1, 17 (1831).
17. 31 U.S. (6 Pet.) 515, 546–47, 553–54 (1832).
18. The rise and fall of the "white man's burden" in international law since the 1880's is detailed in R. Barsh, Indigenous North America and Contemporary International Law (unpublished manuscript, to be published in OR. L. REV.).
19. U.N. CHARTER art. 73.
20. G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49 (1966).

Carter in 1977,[21] are multilateral United Nations treaties establishing universal, peremptory norms that supersede contrary provisions of domestic law.[22] Each Covenant affirms that "[a]ll peoples have the right of self-determination. . . . [They may] freely pursue their economic, social and cultural development. . . . [They may,] for their own ends, freely dispose of their natural wealth and resources. . . . In no case may a people be deprived of its own means of subsistence."[23] The same principles are incorporated in the 1975 Helsinki Final Act, a multilateral human rights treaty between NATO and Warsaw Pact nations signed by President Ford.[24]

Options for the exercise of self-determination must include "(a) [e]mergence as a sovereign independent State; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent State,"[25] and "the freely expressed wishes of the people concerned,"[26] ascertained by "democratic" means,[27] are dispositive. Alien domination of non-self-governing peoples is to be brought to a speedy and unconditional end; "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying" peoples' free choice.[28] In short, the Charter and interpretive resolutions have condemned "trusteeship" to the ash-heap of legal history. No state has a legal right to subject another to "tutelage" on the excuse of the latter's helplessness or ignorance, and existing de facto guardianships are subject to immediate dissolution upon a determination of the administered people's own aspirations for their future political status.

Territorial integrity and economic self-determination are points on which federal decisions and international norms conflict most sharply. All United States land titles ultimately rest on the doctrine of "discovery," i.e., that British exploration of the Atlantic coast established a British (and, by succession, American) monopoly on the purchase of native lands.[29] Originally the notion that this preemption right was a form of actual present legal title—so called "naked" title subject to unextinguished native "occupancy" rights—was little more than a convenient conceptual handle used to describe the coexisting interests of natives and

21. 13 WEEKLY COMP. PRES. DOC. 1488 (Oct. 5, 1977).

22. H. GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 11–13 (1980).

23. G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49 (1966).

24. Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, § 1(a)I, *reprinted in* 73 STATE DEP'T BULL. 323, 324 (September 1, 1975).

25. G.A. Res. 1541, 15 U.N. GAOR Supp. (No. 16) at 29 (1960).

26. U.N. CHARTER art. 76(b).

27. G.A. Res. 637, 7 U.N. GAOR Supp. (No. 20) at 26 (1952).

28. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 67 (1960).

29 1982 HANDBOOK, *supra* note 8, at 487–89.

colonists.[30] By the end of the last century, however, "discovery" was routinely identified as a source of congressional power to confiscate tribal territories at pleasure.[31] Compensation was thus required under the fifth amendment only if the particular tribe's "aboriginal" right to the soil had been "recognized" by a treaty or other federal action prior to the confiscation.[32] The revised *Handbook* embraces these principles uncritically.[33]

In the law of nations, the assertion of title through discovery and settlement was justified under the rubric of *terra nullius*: it was just for the first settler to claim "empty lands" claimed and held by no other. Indian and other aboriginal lands were classified as "empty" by fiction—they were *legally* empty because their inhabitants were not civilized. The whole cant of *terra nullius* and discovery was rejected definitively by the International Court of Justice in 1975 in a case of two United Nations Members' conflicting claims to lands actually occupied by unorganized tribal peoples. In that case, both litigants lost because the world court concluded that neither had acquired the natives' prior rights by some acceptable, bilateral means.[34]

From an international standpoint, then, U.S. Indian law contravenes peremptory international legal norms on at least three points: (1) tribes have not been permitted to choose their political status by democratic means; (2) tribes' exercise of self-government can be limited or abolished unilaterally by Congress; and (3) tribal territory can be disposed of unilaterally by Congress, even to the point of rendering tribes incapable of subsisting without foreign aid. Both the original and revised editions of Cohen's work emphasize the sui generis, as opposed to delegated, nature of tribal sovereignty. If tribes do, in fact, derive their political character from their original status as states and peoples, then Congress has no legitimate authority to intervene in their affairs except as provided expressly by treaty. On the contrary, Congress has an affirmative duty to afford tribes an opportunity to chart their own destiny. This is not a duty of trusteeship or protection, but one of noninterference.

Against this background, the revised edition's conviction that U.S. Indian policy comports with international law is puzzling. "Plenary power" cannot be reconciled with universal self-determination; it is a nineteenth-century doctrine injected into a twentieth-century situation,

30. Barsh & Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 633–37 (1981).

31. *Id.* at 637–40; *see also* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) (discussing prior cases on discovery).

32. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288–89 (1955).

33. 1982 HANDBOOK, *supra* note 8, at 491.

34. Western Sahara, 1975 I.C.J. 6 (advisory opinion, May 22, 1975).

and it flows from a discredited and antiquated morality.[35] Nor can the editors of the revision justify their omission of United Nations law by arguing that it has no place in municipal courts. A growing number of American courts recognize international law as a rule for decision, especially where it is articulated in treaties of the United States and not expressly contradicted by subsequent federal legislation.[36]

THE NATURE OF TRUSTEESHIP

The editors of the revised *Handbook* struggle to reconcile "the inherent tension between broad federal authority and specific federal trust obligations,"[37] trimming some of the rough edges of contemporary United States decisions and suggesting moderate limitations on congressional discretion in this area. They contend that "plenary power" is not absolute in the sense of being unlimited or unreviewable, but merely broader in subject matter than the Constitution's enumeration of federal powers over other citizens. Analogizing to the exclusive legislation clause and judicial decisions according Congress extraordinarily broad police powers in the territories and possessions under the property clause, they suggest that there is nothing anomalous about the use of "plenary power" in our jurisprudence and that "trust responsibility" prevents its abuse.[38]

The *Handbook* neglects to point out, however, that Americans emigrating to the District of Columbia or to the unorganized territories volunteered to live under such a regime; Indians did not. It was imposed upon them by a course of judicial decisionmaking years after the tribes entered into treaty relations with the United States,[39] and often contradicted the express terms of the treaties that were made.[40] Moreover, congressional

35. *See generally* A. SNOW, THE QUESTION OF ABORIGINES (1921) (discussing plenary power doctrine).

36. *E.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 883–84 (2d Cir. 1980); Lareau v. Manson, 507 F. Supp. 1177, 1188 n.9 (D. Conn. 1980); Fernandez v. Wilkinson, 505 F. Supp. 787, 796–98 (D. Kan. 1980), *aff'd*, 654 F.2d 1382, 1388 (10th Cir. 1981). *But cf.* Huynh Thi Anh v. Levi, 586 F.2d 625, 629–30 (6th Cir. 1978) (rejecting Geneva Convention and U.N. Articles as basis for private right of action).

37. 1982 HANDBOOK, *supra* note 8, at 207.

38. *Id.* at 207, 217.

39. *See* Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Cherokee Nation v. S. Kansas Ry., 135 U.S. 641, 657 (1890); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902); Morrison v. Work, 266 U.S. 481, 485 (1925).

40. Indian treaties contain many different formulations of the United States' acquired or delegated powers. In the eighteen Pacific Northwest treaties, for example, sixteen tribes "acknowledge themselves subject to the Government of the United States" and two "acknowledge their dependence," but only four "engage to submit to and to observe all laws . . . which may be prescribed by the United States." 2 C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 655, 657, 661, 665, 669, 674, 682, 694, 698, 702, 714, 719, 722, 764, 772, 776, 781, 785 (1904). On the plains, six tribes

power over the territories has always been temporary in that it is limited to the period preceding statehood.[41] In the case of the tribes, however, it appears to be permanent and intractable.[42]

Under recent Supreme Court rulings, congressional action must be tied to a rational purpose to survive fifth amendment review.[43] The *Handbook*'s editors are forced to argue that this does not prevent Congress from breaking treaties or from regulating Indians' lives in ways inimical to their welfare.[44] Nonconfiscatory federal actions survive judicial scrutiny so long as they purport to implement United States obligations; the courts will not look behind congressional judgments of what is best for Indians.[45] The *Handbook* concludes that the rationality standard "does not allow a reviewing court to second guess a particular determination by Congress that a statute is an appropriate protection of the Indians' interests. Congressional discretion is necessarily broad in that respect. Nor does [the rationality requirement] mean that Congress could never pass a statute adverse to the best interests of the Indians."[46]

What is left, then, of the limitations on "plenary power" that the editors rely upon to prevent oppression? Their discussion of "trust responsibility" falls back in the end on administrative rather than legislative conduct, concluding that the executive branch must always act in good faith

agreed only to Congressional legislation "not inconsistent" with their treaties; four to "full power" to legislate "for their welfare and best interest;" four to U.S. power to "prescribe and enforce . . . rules and regulations;" two "acknowledge themselves to be subject to the exclusive jurisdiction and authority of the United States;" and nine recognize federal power "to enforce such laws [as may] be prescribed." *Id.* at 588, 591, 598, 600, 614, 618, 628, 631, 634, 636, 641, 790, 796, 800, 807, 883, 885, 887, 892, 896, 898, 899, 901, 903, 905, 906. A number of other plains tribes acknowledged federal power to "pass such laws, on the subject of alienation and descent of property and on all subjects connected with the government of the said Indians on said reservations, and the internal police thereof, as may be thought proper"—but not to take their property without their consent. *Id.* at 977, 984, 990, 998, 1008, 1012, 1015, 1020. A plenary-type federal power was therefore created, in some instances, by treaty, with specified exceptions or limitations. These provisions were not exacted from all treaty tribes, however, nor can they sensibly be applied to non-treaty tribes.

41. R. BARSH & J. HENDERSON, *supra* note 2, at 207–11.

42. *See, e.g.*, St. Pierre v. Commissioner of Indian Affairs, 9 I.B.I.A. 203, 241–45 (1982), in which the Board of Indian Appeals, an administrative tribunal of the Interior Department, ruled that the United States cannot re-delegate tribal sovereignty or terminate its trusteeship, even if that is what the tribe desires. Although this is not a decision of the high court, it is indicative of the political mood in the government.

43. *E.g.*, Morton v. Mancari, 417 U.S. 535, 555 (1974).

44. 1982 HANDBOOK, *supra* note 8, at 219, 221. *See* United States v. Antelope, 430 U.S. 641 (1977) (example of inimical treatment of Indians).

45. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 83–85 (1977). In United States v. Sioux Nation, 448 U.S. 371 (1980), the Supreme Court ruled that the 1877 congressional expropriation of the Black Hills was subject to fifth amendment review and just compensation, but in Oglala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1252 (1982), the tribe was barred from testing the substantive constitutionality of the expropriation in order to have it nullified and set aside.

46. 1982 HANDBOOK, *supra* note 8, at 221.

to "protect trust rights over conflicting public purposes except where specifically authorized to do otherwise by Congress."[47] If in doubt as to congressional intent, the Administration is supposed to resolve legislative conflicts in tribes' favor.

Even this modest limitation has been questioned by the Supreme Court in a decision rendered shortly after the revised *Handbook* went to press. In *Merrion v. Jicarilla Apache Tribe*,[48] the majority held that Interior Department officials may *balance* tribal interests with the interests of nonmembers, and ensure that tribal actions are "consistent with national policies."[49] If this is where the Court is now headed, "trusteeship" is meaningless except as an excuse for unbridled federal discretion at both the legislative and executive levels.

Is it the role of a treatise to put bad law in the best possible light, or to criticize it? The revision's editors take the first view. Their whole theory of judicial limitations on federal Indian powers ultimately rests on a single district court's ruling that federal officials must consult with Indians and consider their interests before taking adverse action.[50] Perhaps the *Handbook* will have sufficient credibility and authority to reverse the trend set in motion by *Merrion* and make "trust responsibility" a real safeguard. Unfortunately, however, the revised edition's persistent use of trusteeship to explain the nature of federal powers over Indian tribes is likely to entrench this notion even more, thus taking U.S. law further out of line with international standards.

The editors of the revised edition missed another opportunity to take the courts to task for unprincipled and ill-suited law. The Supreme Court's 1978 decision on tribal criminal jurisdiction over nonmembers revolutionized Indian law by finding limitations on tribal sovereignty "necessarily implied" in tribes' "dependent status."[51] Previously only an express legislative enactment could divest a tribe of residual powers; now the courts have been invited to look for divestitures concealed in the very idea of being tribal and Indian.

Astonishingly, the revision speaks as if implicit divestiture has always been part of Indian law, and includes it in its restatements of "basic prin-

47. *Id.* at 228.

48. 102 S. Ct. 894 (1982).

49. *Id.* at 903.

50. 1982 HANDBOOK, *supra* note 8, at 226–27 (citing Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972).

51. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978). *See also* Barsh & Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979) (discussing *Oliphant*); Collins, *Implied Limitations on the Territorial Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979) (same).

ciples'' without acknowledging its relative novelty.[52] Implicit divestiture endows federal judges with the same sweeping discretion to limit tribal self-government that Congress has long enjoyed. The only practical way to contain it is for Congress expressly to recognize or to delegate those powers of tribal self-government threatened by judicial expurgation. It is a racist doctrine both because it is based on the idea that Indians as a class are inherently incapable or ill-suited to enjoy certain rights and because it has only been applied to immunize non-Indians from the obligations of tribal law.

''Plenary power'' was a fairly novel idea in Felix Cohen's time, and his original *Handbook* played a large role in establishing it.[53] His pleas for congressional moderation and wisdom in its exercise, though, have largely been ignored. What the 1941 *Handbook* did for ''plenary power,'' the new edition promises to achieve for implicit divestiture of tribal powers. The 1982 edition also contains a plea for moderation, but, if the past teaches us anything, courts will quote the revision liberally for the existence of this principle, and ignore the suggestion that it be invoked with care.

CONCLUSION

The revised *Handbook* did not begin as an independent scholarly work. Like the 1941 original, it was commissioned by the government and written at public expense. Indeed, the revision of Cohen's work was so sensitive that it took a special Act of Congress to initiate it[54] and fourteen years (and several staff turnovers) to complete it.[55] Given these extraordinary circumstances, the bar has every right to expect an extraordinary book.

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52. 1982 HANDBOOK, *supra* note 8, at 231–32, 244–45. As explained in Barsh & Henderson, *supra* note 51, the *Oliphant* Court's derivation of implied divestiture from Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), was erroneous.

53. The first articulation of ''plenary power'' by the courts appeared in Cherokee Nation v. Hitchcock, 187 U.S. 294, 306 (1902). The only previous discussion of the doctrine in relation to conquest and the scope of residual tribal sovereignty was in an Interior Department Solicitor's opinion, 55 I.D. 14, 17 (1934), which was signed by Cohen's supervisor, Nathan Margold, and likely penned by Cohen himself.

54. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 701(a)(2), 82 Stat. 73, 81 (codified at 25 U.S.C. § 1341(a)(2) (1976)).

55. An Indian Civil Rights Task Force was established in the Solicitor's Office, Department of the Interior, in 1971 to carry out this task, but was disbanded in 1975. The University of New Mexico's American Indian Law Center approached Interior in October, offering to complete the project ''outside the editorial control of the government'' and without federal funds, in eighteen months. A November 1975 contract gave the Center access to the Task Force's files, and assigned it the copyright with the understanding that the revision would be published and sold ''at reasonable prices.'' In May 1979 the Center advised Interior that it would need $58,700 in federal funds to complete the work that year, since ''neither the magnitude of the project nor the necessity for such meticulous

In some respects it is. For lucidity and style it far surpasses the Cohen volume—a remarkable achievement for a book written by committee. It will no doubt find its way into the libraries of most practitioners in this field, if for no other reason than for its comprehensive cumulation of the case record in a readily accessible format. By comparison with the growing body of periodical literature on Indian law, however, the revision is strikingly uncritical. Its review of recent federal legislation, for example, is little more than a section-by-section skeleton—all dry bones and no flesh. Controversies over these enactments' interpretation, implementation, and effects are scarcely acknowledged, and very little of the scholarly literature is even mentioned. This approach contrasts markedly with the extensive bibliography provided by Cohen forty years ago.[56] A treatise need not take sides, but it should explore the issues.

While the editors of the revised *Handbook* may have viewed their conceptual conservatism as faithfulness to the Cohen original, it in some respects betrays Cohen's own aggressive vision of conceptual innovation as a moral and political weapon in law. This is all the more tragic (and dangerous) in a volume that has much to commend it to practitioners and is likely to be around for many years to come. It is literate, thorough, and speaks with the voice of enlightened modern authority—an awesome and fascinating intellectual dinosaur.

editorial work was anticipated." Interior eventually contributed $88,000 to the revision which, combined with private contributions, brought its total editorial cost to $271,000. Information provided under the Freedom of Information Act to the Indian Law Resource Center, Washington, D.C., July 20, 1982 and August 19, 1982 (copy on file with the *Washington Law Review*).

56. 1941 HANDBOOK, *supra* note 3, at 638–43.