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## Foreword

Eric D. Eberhard

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## FOREWORD

This issue of *Washington Law Review* includes material from Part Two of the 34th Annual Indian Law Symposium that was held virtually on April 21 and 22, 2022. It was devoted to an in-depth review of the Final Draft of the *Restatement of the Law of American Indians*. With very few exceptions, the panelists and speakers at the Symposium were among the scholars, judges and practitioners who participated in the development of the Final Draft of the *Restatement* over the course of the years from 2011 to 2021.

The Symposium was co-sponsored by the American Law Institute, *Washington Law Review*, and the Native American Law Center at the University of Washington School of Law.

Included in this issue are the transcripts of remarks made at the Symposium by Professor Matthew Fletcher from the University of Michigan and the Reporter for the *Restatement*, Judge William Fletcher from the Court of Appeals for the Ninth Circuit, and Justice Raquel Montoya-Lewis from the Supreme Court of the State of Washington. This issue also includes articles on topics covered at the Symposium and written by three of the panelists, Professor Ann E. Tweedy from the University of South Dakota, Professor Robert J. Miller from Arizona State University, and Associate Professor Kirsten Matoy Carlson from Wayne State University.

The significance of the *Restatement* can be seen in the deeply moving stories that are a hallmark of the remarks made by Professor Fletcher, Judge Fletcher, and Justice Montoya-Lewis. The transcripts of their remarks underscore the importance of what we heard from them at the Symposium in a very direct way. We can readily see how each of them have been impacted by and are having a lasting impact on the law as it is developed and applied.

What we know as American Indian Law is a heady and often dense stew of statutory law, including the treaties; decisional law from the federal, tribal, and state courts; constitutional and common law, and an ever-growing branch of administrative law. It is laden with history and circumstance in a way that most other areas of the law are not.

The *Restatement* stands as an important milestone in American Indian Law. It is accurate to say that the law of the tribes in the United States is the oldest law in the nation. It is also accurate to say that the tribes are the oldest continuously functioning sovereigns in the United States. On one

hand the *Restatement* is long overdue recognition of those facts. On another hand it is also the “shield” that Professor Fletcher so eloquently described in his remarks. The *Restatement* is important both for what is included and what is not included, as Judge Fletcher made profoundly clear in his remarks about the need for legislation to remedy the failure of the courts to protect sacred sites and Native religious freedom. The *Restatement* is an affirmation of the point that Justice Montoya-Lewis made so movingly about the importance of Native stories and lived Native experience under American Indian law as it is developed and applied in the courts in the United States.

Professor Tweedy’s analysis of the *Restatement*’s treatment of off-reservation treaty hunting and fishing includes recommendations for a more robust approach to that area in future versions of the *Restatement*, including a greater reliance on historical law and the Indian canons, among other tools. Professor Miller’s analysis of the harmful impact of the narrow application of tribal sovereign immunity by the state and federal courts to tribal economic activities includes recommendations for strategies that will effectively enable the tribes to use the *Restatement* as a shield. Professor Carlson’s analysis documents how the federal courts have failed to stay apace the Congress in the strengthening of tribal self-determination over the last half-century. She concludes that the clarity the *Restatement* brings to the foundational principles of federal Indian law as articulated by Congress during that time will be helpful as the tribes use the *Restatement* as a shield.

I highly recommend this issue of *Washington Law Review* to all who work in the field of American Indian Law and to Native peoples who live under it and know its boundaries and limits. As you read the issue, you will see themes emerge that speak to the need for and the importance of the *Restatement*.

The videos of the remarks made by Professor Fletcher, Judge Fletcher and Justice Montoya-Lewis are available for download from the Digital Commons at: <https://digitalcommons.law.uw.edu/ils/>.

Eric D. Eberhard  
Professor from Practice  
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