Fall 2009

Book Review: *American Indian and the Law* By N. Bruce Duthu

David E. Wilkins
*University of Minnesota*

Follow this and additional works at: [http://digitalcommons.unl.edu/greatplainsresearch](http://digitalcommons.unl.edu/greatplainsresearch)

“. . . [T]he question is whether the law ought to be praised or cursed for what it has done to the Indian.” This was the seminal and troubling question raised by Petra Shattuck and Jill Norgren in their well-constructed book Partial Justice: Federal Indian Law in a Liberal Constitutional System in 1991. It is a question that has bedeviled Native peoples and non-Natives for decades.

N. Bruce Duthu is the latest academic to weigh in on this contentious debate. Drawing on a wealth of historical, political, and especially legal data, Duthu charts a balanced course through the uneven ground of treaty, constitutional, statutory, and case law to “show how federal Indian law reflects the paradoxes and tensions of our past but also contains the critical elements that could be useful in developing a more respectful and mutually beneficial framework for political relations.”

The tidy book is divided into four coequal parts that focus respectively on Native sovereignty; Native territoriality—the ways and means that Indigenous peoples both lost and retained ownership of their lands; Native-state philosophical tensions—the battle between individual civil rights and collective tribal rights; and Natives and intergovernmental relations—particularly as played out in the diplomatic arena.

Besides wrestling with the broad question of how “the law” should be viewed in its application to Native peoples, the other major question suffusing this study is “where and how do Indian tribes sit within the architecture of American constitutional democracy?” While admitting that there is still no “clear answer” to this foundational question, Duthu acknowledges that Native nations are in a position of what he mildly terms a “legal deficit” vis-à-vis the U.S. He attributes this “deficit” to two sets of reasons: the federal government’s use of a particularized creation story about nation-building and national identity that diminished and marginalized Indigenous peoples as savages and incompetents; and omnipresent racism that laces many laws, policies, and court cases. Evidence abounds that these two factors were indeed important, but I am not convinced they have sufficient explanatory power to characterize adequately the ongoing political and legal conundrums in which Native nations find themselves in relation to the U.S. today.

Throughout the book Duthu effectively employs a number of case studies that help to situate the abstract legal doctrines in real world contexts, and he offers several
solid prescriptions that should be considered if the U.S. wants to develop more amicable relations with Native peoples. These include restarting the treaty process, disavowing the absolutist definition of congressional plenary power, and clarifying the relationship between tribal nations and state governments.

Finally, as solid as the book is, I have a few minor complaints. First, it was disappointing to see the overused “pendulum” metaphor used yet again to describe federal Indian policy. There really was nothing pendulum-like about federal policies that were aimed at Indigenous peoples since their legal, economic, cultural, and political conditions dramatically deteriorated once sustained contact occurred, with only an occasional blip in favor of a particular tribe or nation or individual Indian.

Second, and most problematic, Duthu, like many who are deeply invested in the American legal system, find themselves in a quandary. On the one hand, legal professionals must acknowledge that the law has been the primary weapon used by the U.S. to elevate itself to a superior position regarding Native peoples. On the other, Duthu claims that despite the preponderance of “ideological and institutional forces” that constrain and frustrate tribal nations in the U.S., “the significant point to take away from all this is that none of these barriers are really insurmountable.” But the data he relied on and the history he explored suggest that there may indeed be an element of insolubility about Indigenous-state relations that will make it difficult ever to clarify the relationship permanently in a manner that shows genuine respect for Native sovereignty.

Notwithstanding these gripes, I emphatically recommend this book to those interested in learning the history and contemporary status of Native nations and the ambivalent role that “the law” has played and continues to play, in addressing Indigenous status. **David E. Wilkins**, Department of American Indian Studies, University of Minnesota.