Essays

LAWS FOUNDED IN JUSTICE AND HUMANITY: REFLECTIONS ON THE CONTENT AND CHARACTER OF FEDERAL INDIAN LAW

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Federal Indian law, like many other specialized fields of discourse, has traditionally avoided discussions of justice and humanity. Instead, it has concentrated on the discernment of "the law" and its application to some six hundred-odd Indian tribes and groups for whom the United States alleges to have responsibility and over whom the federal government purports to exert a trust and supervisory function. Federal Indian law itself is a mythical creature because it is composed of badly written, vaguely phrased and ill-considered federal statutes; hundreds of self-serving Solicitor's Opinions and regulations; and state, federal, and Supreme Court decisions which bear little relationship to rational thought and contain a fictional view of American history that would shame some of our country's best novelists.

Until very recently, the case dealing with Indians was a rare bird, and consequently, scholars and commentators who dealt with the subtleties of this field wove their theories out of the bits and pieces that were available, determined to make a rational structure out of a conglomerate of data that said very little about anything. There was no uniformity in the manner in which the United States had treated Indian tribes. Efforts to make it appear that some great design or persistent neutrality existed in the field only served to submerge the actual facts of history beneath doctrinal explanations which had little, if any, evidence to support them. In recent years a new wave of practitioners of federal Indian law have thrown caution to the winds and produced a massive amount of new literature which pretends that a few popular concepts can be used to explain a very complicated, very diverse body of data.

Most of the new literature reads like a mechanic's manual, describing a machine with only three moving parts and using some multisyllabic words that are assumed to communicate some meaning beyond their ordinary

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meaning in common usage. No effort is made to examine the larger philosophical context of law and ask whether or not federal Indian law actually fits into this context. The tortured reasoning of various Supreme Court opinions receives no criticism and the idea that historical incidents may well have determined the context and content of the law, regardless of what either the Congress or Supreme Court might have intended, are quite foreign thoughts in modern federal Indian law. When law is made in this fashion, it becomes the exclusive province of the practitioner, and he acts pretty much the way a priesthood demands that he act. Law develops a language all its own and is no longer perceived to have any relationship with the lives of ordinary people.

In order for law to have an influence in the lives of ordinary people, it must have something to do with the emotional feelings of justice, it must speak to our basic humanity, and it must give us common sense directions as to what behavior and beliefs are right and wrong. Thurman Arnold once wrote that "law is primarily a great reservoir of emotionally important social symbols,"[1] and he further suggested that law is "an attitude or a way of thinking about government. It is a way of writing about human institutions in terms of ideals, rather than observed facts."[2] Unfortunately, in much legal writing the reservoir of emotional symbols is discarded and the ideal is treated as if it were the norm. Legal scholarship, like much of western intellectualism, often commits what Alfred North Whitehead called the Fallacy of Misplaced Concreteness[3]—the tendency to mistake the abstract for the concrete, the shift toward reification of concepts which depend for their validity on their ability to communicate observed facts. Misplaced concreteness is the hallmark of federal Indian law.

The raw data of federal Indian law is the documentary record of how the United States government has treated Indians. This data is primarily historical, but it is clothed in a legal/political vocabulary to make it appear that the United States acted with a certain measure of justice. The vocabulary, instead of remaining within its historical context, has become the data for legal scholars, and they, in turn, have acted as if the different branches of the federal government have always deliberated on the course of action they would take when dealing with Indians. It is standard practice to attribute an "intent" to congressional acts although an examination of the *Congressional Record* and committee reports rarely show any real understanding of the condition of Indians or what the United States, following the dictates of federal law, should be doing about the Indians. Supreme Court decisions are treated as if the Justices were well schooled in American history and law and understood the questions they were asked to decide. Administrative practices, even those obviously following the personal preferences of commissioners and agents and not the existing law of the day, are given great weight in determining the interpretation of law and the intent of Congress.

A rough historical sketch of federal Indian law would suggest that there

1. T. ARNOLD, THE SYMBOLS OF GOVERNMENT 34 (1962).
2. *Id.* at 33.
3. A. WHITEHEAD, SCIENCE AND THE MODERN WORLD 75 (1950).

was a treaty-making period when the United States was vitally interested in obtaining as much land as possible from the Indian tribes. This period was followed by a prolonged experiment in social engineering during which the vesting of private property in the hands of tribal members was thought to lead to assimilation of the Indians and disappearance of the tribes. This period ended with the passage of the Indian Reorganization Act[4] in 1934 when the Congress authorized self-government for the reservations. We now appear to be in the final stages of self-government and are moving back to a period of negotiated settlements which resemble the old treaty-making procedures.

Very few doctrines of present federal Indian law are capable of explaining what the United States did, whether or not it was legal in the sense that governments must bind themselves to certain principles of law, and what the Indians did or felt in response to the government overtures. Indeed, what is missing in federal Indian law are the Indians. It is assumed without further inquiry that the tribes meekly bowed to the dictates of federal actions simply because these actions were clothed in the trappings of law. Thus, it is believed that the 1871 disclaimer of treaty-making put an end to tribal rights to negotiate and discouraged Indians from trying to better their situation with the federal government. By the same token, the General Allotment Act[5] is thought to have made allotments on the reservations without further ado. Self-government was supposed to have come to all tribes equally in 1934, and even the termination policy of the 1950s is interpreted as if it reached all tribes in the same way.

Once history is discarded and a uniform interpretation of federal activities is substituted, it begins to appear as though certain concepts were foremost in the minds of courts and Congress from the very beginning. Indeed, in *Lone Wolf v. Hitchcock*,[6] the Supreme Court blithely stated that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . ."[7] This statement is patently false on its face as a historical analysis and completely overlooks everything that had transpired until that point. Again, it is believed that the United States assumed control over the seven major crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny by statute after the decision in *Ex Parte Crow Dog*.[8] The historical fact is that this statute, even though it specifically states "all Indians * * * within any Territory of the United States, and either within or without an Indian reservation, shall be subject [to it] . . . ,"[9] was not applied to the Five Civilized Tribes of the Indian Territory who were believed to be exempted from it.

Examples of this inconsistency in describing the historical basis of Indian law and deriving principles of law for Indians are so numerous that a historian with very little training could poke gigantic holes in the logical

4. Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934).
5. Ch. 119, § 1, 24 Stat. 88 (1887) (codified as amended at 25 U.S.C. § 331 (1983)).
6. 187 U.S. 553 (1903).
7. *Id.* at 565.
8. 109 U.S. 556 (1883).
9. Major Crimes Act, ch. 341, 23 Stat. 362, 385 (1885).

arguments and profound reasoning of most of the Supreme Court decisions dealing with Indians. If our doctrines are so easily discredited and discarded, how did they get that way? Are we taking corrective measures? And, what really goes to make up the body and principles of federal Indian law? It is a long story. We are making things worse with each generation of legal scholars, and it may be entirely possible that federal Indian law should not exist as a separate part of American domestic law but should become the primary province of historians and political scientists.

Until 1934, there was no body of federal Indian law worth mention. Very few law articles on Indians existed, and those that were published were, often as not, a nostalgic bemoaning of the fate of the Indian or liberal efforts to prove that Indians were very law-abiding citizens if given the chance to appear in court like other citizens. One of the tasks which the New Deal administration set for itself was the gathering of the major strands of thought which were believed to constitute federal Indian law with the mission of making it comprehensible within a handbook context. A fortunate conjunction of three of the brightest New Deal minds, Harold Ickes, Nathan Margold, and Felix Cohen, embarked on this task with a vigor that only the New Dealers seemed capable of mustering. In 1942, the Department of the Interior released the *Handbook of Federal Indian Law*,[10] compiled by a team of government lawyers headed by Felix Cohen. With this publication, and in large measure because of this publication, federal treatment of Indians became a "field" of law with its own structure and, unfortunately, with a set of doctrines. Subsequent generations of lawyers and law students promptly began producing the jurisprudential midrash that is necessary to keep a field viable instead of allowing it to lapse back to the status of an interesting topic.

Constructing this new field was a major accomplishment even though the outlines of the field were fraught with inconsistencies from the very inception. In the *Handbook*'s introduction, Nathan Margold offered four leading principles he believed represented the recurring patterns of federal Indian law: (1) the principle of the political equality of the races; (2) the principle of tribal self-government; (3) the principle of federal sovereignty in Indian Affairs; and (4) the principle of governmental protection of the Indians.[11] It does not take much knowledge of American history to understand that these principles are supported by radically different bodies of evidence. Political equality of the races has not been a principle of American government at any time—de jure or de facto—until very recent events and even now statistics show a great difference in how the races receive services, are allowed to vote, and participate in American institutions.

Tribal self-government is a cruel fiction promulgated during the immediate past half-century with an eye toward improving the image of the government. Since every aspect of tribal government must have the approval of the Secretary of the Interior, one must go back almost until the beginning days of the republic to find a time when self-government was a reality. Federal sovereignty, on the other hand, has been the dominant theme for two

10. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942 ed.).
11. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW xxiii (1970 ed.).

centuries and during the last hundred years it has been a persistent reality for most tribes. Governmental protection of Indians is such a weak point that Margold himself was embarrassed to mention it. "Without attempting to anticipate the judgment that history will render on this conflict of doctrine," he lamely confessed, "it may be said that *at least the theory* of American law governing Indian affairs has always been that the Government owed a duty of protection to the Indian in his relations with non-Indians."[12]

Margold never saw the inconsistency, or indeed the irony, in his derivation of four principles of federal Indian law. Instead, he argued that "this tremendous and unwieldy mass of legislation, comprising more than 4,300 distinct enactments, may be viewed in its entirety as the concrete content of the abstract principle of federal protection of the Indians."[13] Of this great mass of some 4,300 distinct enactments, only a miniscule number tried to protect the Indians. The vast majority of these laws strip the tribes of their land, deny rations if they do not work, deny the right of free speech and freedom of religion, provide for the capture and transportation of Indian children from their homes, and even try to regulate the right to bestow personal goods on relatives and friends upon the death of the Indian. When similar versions of these laws were enacted by Nazi Germany they were not regarded as a clever way to protect the Jewish population of Europe.

Although Margold penned his comments with rose-colored glasses obstructing his vision, he was not a complete scoundrel. He warned readers that the *Handbook*

> does not attempt to say the last word on the varied legal problems which it treats. If one who seeks to track down a point of federal Indian law finds in this volume relevant background, general perspective, and useful leads to the authorities, the handbook will have served the purpose for which it was written.[14]

Moreover, Margold admitted that "federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored."[15] But then he backtracked and tried to pass off Interior's creation as a worthy accomplishment. Warning against constructing a mere chronology, Margold called for a systematic analysis, "the more so because *no treatise has ever been written on the subject of federal Indian law. Indeed the subject hardly exists as yet, except as a mass of rules and laws relating to a single subject matter.*"[16]

Margold's caveats were dismissed by subsequent generations. Courts cited sentences from the *Handbook* with approval as if they were using Gospels and, one might add, with considerably more frequency. Several generations of law students have poured over "Cohen" like seminarians over their breviaries. The *Handbook* has been updated twice; both subsequent versions are pale and confused imitations, and the treatise of which Margold spoke has yet to be written. Why should it be written? The *Handbook* has already

12. *Id.* at xxv (emphasis added).
13. *Id.* at xxvii.
14. *Id.*
15. *Id.*
16. *Id.* at xxviii (emphasis added).

achieved the status of a canon—and it was done by the federal government, thus lending a sense of accuracy and infallibility to it for most readers. Instead of being a resource, a handbook where one can find leads for research, the *Handbook* has become the sole authority, the place where one terminates the search for understanding.

Can a group of emotionally important social symbols which, according to Margold, are useless without their historical context, be placed in a theoretical framework and make sense? Here, Arnold's insights become important: "Clothe any situation with the atmosphere of law and it becomes our duty to formulate logical rules and systems. We achieve order and certainty—not now, but in the future—by this constant statement and restatement."[17] The process of legal scholarship, however, is to refine concepts continuously with the goal of achieving clear, precise, and fundamental principles. The problem with present scholarship in federal Indian law is that everyone takes the *Handbook* as the basic data, acting as if it expressed ultimate truth for its time, and the present mission is conceived as one of simple updating and accumulation of additional evidence under the Cohen rubrics.

There are many ways to understand the history of American Indians and the United States government. Indeed, we might view the subject anthropologically, psychologically, economically, or religiously and find entirely different leading principles which should govern the relationship between the Indians and the federal government. Any one of the above cited ways of viewing political history would do a better job of discerning the possible intent of Congress and the policy perspective of the Supreme Court. All of these approaches would bring a critical perspective that law seems unable to provide. Arnold suggests that "the legal scholar exists only in answer to a demand that someone be entrusted with the task of making the phrase appear to have deep and complicated rational and scientific implications."[18] Why should the legal profession see itself as needing to fulfill this niche? Why is it seemingly unable to confront and make sense of the multitude of human experiences of justice? Perhaps, it is simply part of our western heritage. Arnold observes that "in a society which preferred processions or rituals to libraries, the scholar would perform the same function in an entirely different way."[19] If law has any correlation with our expectation of justice, this situation cannot be comforting.

A major portion of the task of doing federal Indian law, it would appear, is to confront the image which legal practitioners have of themselves and their duties and to find a way to extend the scope of their inquiry beyond mere legal data such as laws, cases, and regulations. The manner in which Cohen and his disciples have treated their topics provides good examples of where and how legal scholarship becomes narrow and excludes data on a doctrinal basis. The treaty-making process is one area where legal scholars have failed miserably and where, subsequently, tribes have been denied elementary forms of simple justice.

17. T. ARNOLD, *supra* note 1, at 86.
18. *Id.* at 216.
19. *Id.*

The Constitution does not direct the United States to make treaties with Indian tribes. The practice of using a treaty format was well established by the European powers, and the United States simply continued using treaties because it was in competition with these powers and needed to appear to have their political status. George Washington expressed his sense of confusion when Indian treaties began to arrive at his desk and so he inquired of Congress exactly how he was supposed to handle them. Informed that he should execute and enjoin observance of a treaty, Washington asked:

> If, by my executing that treaty, you mean that I should make it (in a more particular and immediate manner than it now is) the act of Government, then it follows, that I am to ratify it. If you mean by my executing it, that I am to see that it be carried into effect and operation, then I am led to conclude, either that you consider it as being perfect and obligatory in its present state, and, therefore to be executed and observed; or, that you consider it as to derive its completion and obligation from the silent approbation and ratification which my proclamation may be construed to imply.[20]

These words are not those of a confident, informed president but simply demonstrate the state of confusion that existed at the beginning of the Republic when the United States had to make sense of its relations with the Indian tribes. This language is not that of law but of diplomacy, not grist for scholars' mills in the field of jurisprudence but the stuff of which history is made. Implying recent or contemporary doctrines back into this material in order to discover "principles" is hazardous at best and does violence to the material and the derived principles which cannot withstand any scrutiny.

Thereafter, until 1867, it was never clear exactly how a treaty became law. Kappler's volume two on Indian Treaties[21] lists as valid treaties documents which have been ratified by Congress and not proclaimed and treaties which have not been ratified by Congress but have been proclaimed. In March, 1867, Congress acted to prohibit the President, the Secretary of the Interior, and the Commissioner of Indian Affairs to make any further treaties with Indian tribes under any existing law of the United States.[22] But, in June of that year it repealed its prohibition,[23] and in July it authorized a special Peace Commission to deal with the western Indian tribes with whom the United States was at war because of the Sand Creek massacre and other depredations American troops visited upon the tribes.

Debate about the prohibition against treaties in 1871 revolved about the question of depriving the president of his powers to recognize Indian tribes as nations with whom the United States could make treaties. Senator Harlan of California argued against enacting a prohibition on future treaties and suggested that time would resolve the question of dealing with Indians, either by their disappearance or by their desire to become citizens.

In my judgment, it is only in this way that you can ever undertake to

20. Washington, *The Six Nations, The Wyandots, and Others*, in 1 AMERICAN STATE PAPERS, INDIAN AFFAIRS 58 (Sept. 17, 1789).
21. II LAWS AND TREATIES (C. Kappler ed. 1904).
22. Act of Mar. 29, 1867, ch. 13, 15 Stat. 1 (1867).
23. Act of July 20, 1867, ch. 32, 15 Stat. 18 (1867).

> deal with these tribes. The United States has no peaceful control over them for any purpose whatever except through treaties made with them. It is by treaties that you exercise your authority. It is by treaties or by war that you regulate your relations with them; and yet here is a provision that we shall not again make treaties with them.[24]

These are hardly the words of a confident senator who is encouraging his colleagues to exercise unlimited plenary power over Indian tribes.

Following the passage of the 1871 rider prohibiting treaties, Congress continued to make treaties and agreements with the tribes until 1911 when the practice died of its own volition, the tribes having become so intimidated and helpless as to be willing to agree to almost anything to escape the attentions of the government. The agreement with the Southern Utes concerning the cession of lands in the Mesa Verde National Park[25] is thus the last formalized and formally ratified agreement with the tribes. But the practice of negotiated agreements with the tribes during the period 1871 to 1911 is hardly that of a federal government exercising unlimited powers in the field. Congress authorized commissions to deal with the tribes, first for land cessions and later for allotment of the reservation lands. Thus, the Jerome Commission, Dawes Commission, and so forth were authorized by statute and were definite congressional initiatives designed to control the process of negotiating agreements with American Indians by Congress.

This history, which is vitally important in understanding and determining Indian legal rights, is swept under the carpet by the propensity of legal scholars to avoid the historical context in which events occurred and to concentrate instead on the documents themselves and the federal courts' interpretation of them. It is singularly instructive to examine how subsequent editions of the *Handbook* have treated both the history and status of treaties and the treaty-making process. The original *Handbook* notes that "the period of Indian land cessions was marked by the 'agreements' through which such cessions were made."[26] It then footnotes both statutes and cases to show that for all practical purposes in the eyes of the courts and Congress, agreements were the equivalent of treaties; they "differed from formal treaties only in that they were ratified by both houses of Congress instead of by the Senate alone."[27] This statement, we must remember, is made with the idea that the *Handbook* is truly just a *source* of information, not an *authority.*

The 1958 revision of the *Handbook* repeats Cohen's original statement that agreement preserved the substance of treaty-making, reproducing the statement above, but then adding gratuitously: "[S]uch claims and assertions are erroneous. What heretofore may have been the nomenclatural designation and notwithstanding loose use of terms applicable to international law or treaty lawmaking, these agreements can now be easily recognized as a sort of a congressional lawmaking device known as 'legislative oversight.' "[28] There is no basis whatsoever for this statement. Legislative oversight is

24. CONG. GLOBE, 42d Cong., 1st Sess. 1825 (1871).
25. Act of June 30, 1913, ch. 4, 38 Stat. 82 (1913).
26. F. COHEN, *supra* note 10, at 67.
27. *Id.*
28. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 212 (1958 ed.).

designed to examine whether and to what degree a particular statute and its provisions are meeting the needs they designed to address. A treaty that set aside some thirty million acres of land as an occupancy area for a group of tribes can hardly be subjected to "oversight" agreements which confiscate some seventeen million additional acres. No recent studies are cited which would provide evidence of the accuracy of this statement; in fact no explanation at all is offered for the radical departure from the original text.

The 1982 version of the *Handbook* appears to paraphrase the two previous versions, choosing to adopt a non-committal middle course of interpretation. This edition states that "although formal treaty making was abandoned, the federal government continued to make agreements with Indian tribes, *many similar to treaties*, that were approved by both Senate and House."[29] It then cites a former Commissioner of Indian Affairs who didn't like agreements and wanted them terminated. And then, it concludes: "the federal government continued to deal with Indian tribes after 1871 by agreements, statutes, and executive orders that had legal ramifications similar to treaties,"[30] thereby eliminating any reference to the original text which cited both statutes and cases to demonstrate that the agreements were regarded as equivalent to treaties and were seen as wholly new negotiations.

What has happened to Indian rights over the course of publishing these three editions of the *Handbook of Federal Indian Law*? First, we have increasingly less scholarship evident in the succeeding two editions of the *Handbook*. The editors start at the original text and begin to paraphrase, adding their own interpretations as they see fit, interpretations which show no understanding and perhaps a deliberate neglect of anything historical. Second, there is no effort to speak with any precision about the role of Congress, the status of Indian tribes, or even the nature of the documents that represent the process of agreement. Third, entirely gratuitously, executive orders are added to the statutes and agreements as a way of dealing with Indians as if the executive and legislative branches saw these devices as equivalent methods of accomplishing their ends. If executive orders were equivalent to treaties, agreements, and statutes, why was George Washington so hesitant about how he should ratify and execute a treaty?

Law review literature dealing with American Indians shows us a curious development which bears on the question of emotional symbols that come to be regarded as the substance of law. There are approximately forty articles dealing with Indians and their legal rights in the *Index to Legal Periodicals* before 1932, a good portion of which are published in non-legal journals. Moreover, a good portion of the articles appearing in legal journals deal with either the Pueblos of New Mexico or probate problems among the Five Civilized tribes of Oklahoma. The amount of legal literature did not increase much until 1958, the date of the publication of the revised version of the *Handbook*. After 1958 there is a virtual explosion of articles on a wide variety of subjects, almost all of which can be regarded as efforts to expand

29. *Id.* at 107 (1982 ed.).
30. *Id.*

on some of the ideas found in the *Handbook* and now, unfortunately, becoming a kind of midrash on Cohen's work.

During the treaty and agreement making period, there was very little concern over the federal government's trust responsibility to Indians and virtually no questions about the tribes' ability to make decisions for themselves, decisions which involved the future of the tribe and the disposition of millions of acres of land. With the era of self-government, beginning in 1934, legal scholars began to raise the question of Indian political competency, asking whether a tribe has certain rights, with the underlying assumption that the Indians will almost certainly do the wrong thing if they are allowed to make decisions by themselves. One can only conclude that a century of education and familiarity with western civilization has severely handicapped their potential to ask and answer hard questions. These attitudes testify to the basic insight of Thurman Arnold and suggest that beneath the doctrines of law lie emotional strata which are considerably more important than the dogma they shape.

During the last three decades, when federal Indian law has been regarded as a specialized subfield, we have witnessed a process of canonization whereby certain ideas are elevated to the rank of inherent doctrines and become part of the faith rather than the law. Indian tribes today are believed to be political sovereigns with a vast reservoir of undetermined powers. This belief is due more to the ranting of Indian militants than to scholarly research since most of the writing done in federal Indian law during this time has been in the nature of reporting the current status of the doctrines than in grappling with the data. This condition is all too easily demonstrated.

Monroe Price, in his casebook on *Law and the American Indian*[31] takes as his starting point "the problem of jurisdiction—the flow of power over Indian affairs from government to government."[32] This casebook is the first effort to present a systematic view of Indian law since Cohen; and Price declared that "it is meant as a complement to Felix Cohen's monumental text," adding further that "*on most subjects, however, the Handbook represents the first and virtually only authoritative word.*"[33] Paying homage to Cohen is proper, but elevating a handbook to the status of a treatise while doing so is highly suspect and means that principles and doctrines sketched out as a means of locating resources now achieve a status whereby it becomes unnecessary to use the *Handbook* as a resource. Scholars then start with the *Handbook* and not with the data, erroneously believing that many questions have already been laid to rest.

Getches, Rosenfelt, and Wilkinson, in the foreword to their casebook which followed Price by six years, credit Cohen with bringing "order and a philosophical perspective to the field of Indian law."[34] The authors do not, however, identify exactly what the philosophical perspective is, and if they are assuming that such a viewpoint is clearly understood, they have not paid heed to the disastrous efforts of Nathan Margold in his attempt to make the

31. M. PRICE, LAW AND THE AMERICAN INDIAN (1973).
32. *Id.* at vii.
33. *Id.* (emphasis added).
34. D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW xiii (1979).

field of Indian law comprehensible. History, which was understood as the most critical element in Indian law by Margold, now receives a "historical treatment" and we are told that "this material is truly fundamental and is an integral part of Indian law."[35] But we are not told what this historical material actually is, and we can only conclude that the historical summaries of Indian law substitute for the *process* of historical research to find Indian law and its roots. What actually happened in certain instances is now replaced with an interpretation of what is believed to have characterized a particular period of time.

The first six chapters of this casebook are treated as a preliminary discussion of basic doctrines in the field, leading up to chapter seven which deals with jurisdiction. "Jurisdiction is the linchpin of Indian law. The issues raised illustrate well the tensions which exist among the three sovereigns which operate in Indian country and in doing so provide further definition to the concept of tribal sovereignty."[36] Indians cannot help but be cheered by this sentence—but what does it mean? What are these "tensions" that exist in Indian country? Here, we are hoping to relieve actual emotional tensions with an application of doctrine. This remedy is not suitable for the problem, and its result can only be to discredit law itself.

It is important to review this process of development. We started with a handbook which suggested that it was simply a resource, a place where scholars and lawyers could begin to find the elements of federal Indian law. But, we are warned that a true understanding is dependent upon a knowledge of the historical basis of existing law. We then moved to a virtual canonization of the *Handbook* which is no longer a mere handbook but has now become a treatise, and we are told that federal Indian law can be understood as the tracing of the flow of power from and between various governments. But, we have no understanding of the nature of these governments, no idea how they originate, what powers they possess, and what their previous relationships have been.

The flow of power as a definitive concept becomes reified, and we move to the subject of jurisdiction with the promise that if we believe in and understand this concept, we will more clearly see the nature of tribal sovereignty. Tribal sovereignty, therefore, is assumed at the beginning, and upon the premise that it has substance and reality we examine jurisdiction which then clarifies for us the reality of tribal sovereignty. Unfortunately, it makes a great deal of difference whether we conceive of tribal sovereignty in its original historical context or within the historical context of the New Deal and the effort of Cohen, Margold, and others to bring order to the field. Here is the difference. Prior to the Indian Reorganization Act, tribes were presented with certain kinds of decisions and they were believed to possess inherent powers to control their domestic affairs. After the Indian Reorganization Act, the Secretary of the Interior was allowed to approve or disapprove the actions of a tribal government in almost every field. The shift in focus here is critically important. In a fundamental sense, tribes move from having

35. *Id.* at xiv.
36. *Id.*

inherent sovereignty to having some strange version of a delegated authority. This shift in emphasis drastically confuses the question of jurisdiction since many powers which the tribes would ordinarily exercise are now subject to the approval of the Secretary of the Interior. So, jurisdiction does become a major contemporary problem. Its historical roots, however, would suggest an entirely different analysis in which the nature of sovereignty would come first, and questions about jurisdiction would arise in that context.

Legal doctrines frequently provide such a pervasive atmosphere for legal practitioners that they come to believe that doctrine and principle are real and that all other aspects of the human experience are a function of them. Reification of doctrines caused in part by a religious faith in the integrity and coherence of law, often runs to great extremes before it is domesticated. An early Supreme Court decision on the treatment of Blacks and a recent case on Indians can be used to demonstrate the problem which naive reification of the law can create.

In 1829, the Supreme Court heard a rather unique case, *Boyce v. Anderson*.[37] There, Robert Boyce, owner of four slaves, delivered them to Paul Anderson, owner of the steamboat *Washington*, for passage and delivery to another owner and destination. During the course of the journey downstream, the steamboat caught fire and blew up. The slaves drowned when the yawl in which they were taken off the boat upset. Boyce's theory of recovery, based upon scientific evidence of the day, for which we can honestly read "prejudicial folklore," was that Blacks were not sentient beings and, therefore, Anderson should have taken special care of them—as if they were cattle, horses, or other domestic animals which needed care. John Marshall wrote the opinion denying Boyce's theory, but not in terms that would have given any real comfort to Blacks at the time. He noted that Blacks had volition and feelings, avoiding the necessity of finding that they were also sentient beings, and stated that they could not be handled as commercial packages unless stipulated for by special contract. "In the nature of things," Marshall noted, "he resembles a passenger, not a package of goods."[38]

Marshall did not bend a whole lot from the common legal doctrine that a slave was property. In his view, the Black slave only *resembled* a passenger, he was not really a passenger, and with special provisions before shipping he could easily become a package of commerce, thereby creating a liability for the steamboat owner. It would have been very interesting had this line of thought continued to grow and develop. Viewed in today's terms, the whole idea is ludicrous, but seen in the legal terminology which justified slavery, we have legal doctrines almost overcoming human reality.

Recent Indian litigation provides a somewhat similar example. The Suquamish Indian Tribe, located in the state of Washington, adopted a law and order code in 1973. Some of the provisions applied to both Indians and non-Indians, and, as might be expected, a case arose in which the tribe attempted to exert its jurisdiction over non-Indians for violations of the code within the

37. 27 U.S. (2 Pet.) 150 (1829).
38. *Id.* at 155.

boundaries of the reservation. The lower courts upheld tribal jurisdiction, but the Supreme Court reversed in *Oliphant v. Suquamish Indian Tribe*,[39] creating a purported history of the question of inherent jurisdiction that can only be classified as non-fiction writing with great difficulty. The Court need not have strained itself. The facts of the situation make the Indian argument not only moot but demonstrate that it was based on an idea of sovereignty having little relation to actual reality.

The Port Madison Reservation where the tribe lived contained 7,276 acres, 63% of which, or approximately 4,584 acres, was owned by non-Indians. While 2,928 non-Indians lived on the reservation, only fifty Indians resided there.[40] The factual situation, therefore, was somewhat bizarre. The attorneys for the Indians were arguing that fifty Indians, 1.7% of the reservation population, should have basic municipal jurisdiction over nearly 3,000 non-Indians, more than 98.3% of the population of the reservation. The doctrine of tribal sovereignty, perhaps relevant for a large reservation such as the Navajo with millions of acres of land and over 100,000 Indian residents, was expected to control the court's thinking in defiance of the actual facts. Surely, here was an instance of a doctrine run amok.

When attorneys and scholars come to believe that doctrines have a greater reality than the data from which they are derived, all aspects of the judicial process suffer accordingly. Consequently, it becomes exceedingly difficult to introduce the necessary changes in interpretation and emphasis so that if principles and doctrines are to be found and articulated, they bear some resemblance to what has happened. Judges, Justices, and legal scholars seem to be particularly sensitive to changes in the historical interpretations which hold the possibility of casting doctrines in a different light. Justice Rehnquist provides a classic example of the application of this attitude. In *United States v. Sioux Nation of Indians*,[41] one of the sporadic, yet seemingly perpetual, visits of the Black Hills claim to the Supreme Court, the Court decided to adopt the version of Sioux-American history articulated by the Court of Claims and Indian Claims Commission in 1974, a history that was a bit more accurate than an earlier version promulgated by the Court of Claims in 1942.[42]

The first version of this history claimed that President Grant and the Army vigorously rounded up and ejected gold miners who had slipped into the Black Hills in defiance of the 1868 Sioux treaty. The later version coyly admitted that in November, 1875, Grant secretly called off the army and allowed anyone who wanted into the region a free run of the territory. The second version placed considerable blame on the United States and consequently resulted in a decision for the Indians. Justice Rehnquist took umbrage and vigorously dissented from the majority. Parts of his opinion are unprecedented in judicial history.

Accusing his fellow justices of adopting a view of the settlement of the west "which is not universally shared," Rehnquist argued that:

39. 435 U.S. 191 (1978).
40. *Id.* at 193 n.1.
41. 448 U.S. 371 (1980).
42. Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613, 634 (1942).

> There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. It seems to me quite unfair to judge by the light of "revisionist" historians or the mores of another era actions that were taken under pressure of time more than a century ago.[43]

This outburst can be translated for the lay person as "sure we stole the Black Hills. But, the Indians beat their wives and so that makes us even."

Rehnquist, once elevated to the level of name-calling, then continued in this vein and produced a spate of jurisprudential confusion worthy of a man appointed by the only president ever to be impeached and forced to resign to avoid conviction. "Different historians," he wrote, "not writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees, have taken different positions than those expressed in some of the materials referred to in the Court's opinion."[44] No specific names were mentioned in this strange breed of historian, but Rehnquist concluded that "[t]his is not unnatural, *since history, no more than law, is not an exact (or for that matter an inexact) science.*"[45] Perhaps, history is exact only when it is arranged according to one's doctrinal preferences and remains neither exact or inexact when it is left to its own devices.

Justice Blackmun, writing for the majority, did not directly confront Justice Rehnquist's emotionalism but tried to cool him down with a comment in a footnote. Suggesting that Rehnquist's allusion to historians writing for the purpose of having their conclusions inserted in congressional reports was puzzling, Blackmun reminded Rehnquist that:

> The primary sources for the story told in this opinion are the factual findings of the Indian Claims Commission and the Court of Claims. A reviewing court generally will not discard such findings because they raise the specter of creeping revisionism, as the dissent would have it, but will do so only when they are clearly erroneous and unsupported by the record. No one, including the Government, has ever suggested that the factual findings of the Indian Claims Commission and the Court of Claims fail to meet that standard of review.[46]

And then Blackmun hammered the final nail into Rehnquist's angry rhetorical coffin: "The dissenting opinion does not identify a single author, nonrevisionist, neorevisionist, or otherwise, who takes the view of the history of the Black Hills that the dissent prefers to adopt, largely, one assumes, as an article of faith."[47] As in religion so it is in law, doctrine breeds intense faith but rarely intelligence.

If the history upon which legal decisions depend is simply an article of faith, derived no doubt from the childhood memories of judges and Justices, then we are removed a considerable distance from not only Cohen's *Handbook* but from law itself. When law degenerates into a situation where the

43. *Sioux Nation of Indians*, 448 U.S. at 435 (Rehnquist, J., dissenting).
44. *Id.*
45. *Id.* (emphasis added).
46. *Id.* at 421 n.32.
47. *Id.*

historical facts determined by a lower court can be challenged by a Supreme Court Justice on the basis that he prefers a different version coinciding with his own personal perspective, then we are admitting that law is merely a matter of personal emotional preference of judges and Justices.

Tribal sovereignty, the fundamental principle that we can discover by understanding how Getches, Rosenfelt, and Wilkinson explain jurisdiction, is a highly emotional symbol. During the 1970s thousands of Indian activists screamed about its virtues in hundreds of rallies and protests. The American Indian Policy Review Commission of 1975-1978 made this a cornerstone of its report and sparked a bitter and emotional dissent by its co-chairman Lloyd Meeds.[48] White House assistants and even presidents began to speak of a "government-to-government" relationship between Indian tribes and the United States. There are, however, immense difficulties in bringing a contemporary symbol directly into the field of law as a viable doctrine.

In *McClanahan v. State Tax Commission of Arizona*,[49] the Supreme Court had to confront the question of sovereignty in a large tribe context. Arizona attempted to levy a personal income tax on an Indian whose entire income derived from reservation sources, thus placing her wholly within the jurisdiction of her tribe. Clearly, this effort was a unilateral action by the state, a bold stroke to sweep away all pretensions of tribal political independence and place the tribe among the lesser subdivisions of the state. The Court described tribal sovereignty as a "platonic notion," and it suggested that modern cases were moving away from abstractions, thereby allowing it to substitute an abstraction of its own for the well-reasoned Indian argument.[50] "The Indian sovereignty doctrine is relevant, not because it provides a definitive resolution of the issues in this suit, but because it provides a *backdrop* against which the applicable treaties and federal statutes must be read."[51] Treaties and statutes, of course, testify to the existence and importance of tribal sovereignty, but if the Court affirmed the doctrine in clear and unmistakable terms, it would appear to be participating in the activist groundswell on behalf of the idea. So, doctrine in this instance played the role which history is supposed to play in providing a context within which legal concepts make sense.

Tribal sovereignty, nevertheless, became a reified doctrine in the policy-making sphere of Indian affairs. Building upon the idea that they were dealing with a quasi-sovereign nation, Congress and the executive branch since 1970 have moved toward negotiations as a means of resolving disputes with Indians. The first step in this process originated with the refusal of Taos Pueblo to take money as compensation for the loss of their sacred Blue Lake area. In 1970 Congress enacted legislation restoring the area to the Pueblo[52] and, as many conservatives had feared, the floodgates opened and other tribes sought to negotiate their differences with the United States, thus exer-

48. INDIAN POLICY REVIEW COMM'N, FINAL REP. (1978).
49. 411 U.S. 164 (1973).
50. *Id.* at 172.
51. *Id.* (emphasis added).
52. Act of Dec. 18, 1971, Pub. L. No. 91-550, 84 Stat. 1437 (1970).

cising a basic power of sovereignty. In 1971, Congress passed the Alaska Native Claims Settlement Act,[53] and in 1978, the Rhode Island Indian Claims Settlement Act.[54] Two years later Congress approved a negotiated settlement for the large claims of the Passamaquoddy, Penobscot, and Houlton Band of Maliseet tribes of Maine.[55] Similar settlements are now pending in Washington state and Minnesota. This method is as popular as microwave popcorn and as easy to use.

Legal doctrines are an integral, if not unintentional, part of negotiated settlements. The threat of decades of litigation with its corresponding emotional uncertainty as to its outcome makes a negotiated settlement most attractive to everyone. Were it not for the acceptance of legal doctrines as absolute realities in the legal universe of discourse, negotiations would not be possible. On the other hand, if the historical element had always been preserved so that the United States had always acted in good faith towards the Indians, litigation would not be necessary. We might even conclude that the misplaced concreteness of federal Indian law has compelled people to return to the original point of departure to secure some mutually agreed upon basis for having relations between Indians and the United States Government.

It seems ironic that while Getches, Rosenfelt, and Wilkinson were busy at work on their casebook clarifying the problem of jurisdiction so that tribal sovereignty would stand out in all its splendor, the practical world of Indians and members of Congress were working out a method for resolving disputes that accepted as a historical fact the sovereignty of Indian tribes. The difference here is actually immense, but it may escape the notice of people trained to believe that law reigns supreme in the field of political institutions. Negotiation allows people to give and take, and they do not agree unless they feel they have done their very best to represent their case. The emotional feeling which participation in decision-making provides generates a sense that some measure of justice has been done.

Litigation and unilateral legislation, on the other hand, do not seek to resolve disputes as much as they seek to apply what is believed to be preexisting law to new fact situations and declare winners. Justice is rarely mentioned and few opinions of courts speak glowingly of having done justice to the parties. Whatever motives of justice may inspire congressional action, the usual practice of allowing the administrative branch to promulgate the rules and regulations under which the statute will be enforced and the programs implemented quickly blunts any sense of having won something. More often than not, litigation quickly follows each new federal statute to ensure that bureaucrats do not take away the hard-won legislative victories.

If we have moved from negotiating treaties in 1778, through periods of oppressive unilateral actions by the federal government, to the present posture of adopting negotiated settlements once again, then federal Indian law is something entirely different than we have previously imagined. Margold's four principles, viewed in the light of present practices are principles which

53. Pub. L. No. 92-203, 85 Stat. 688 (1971).
54. Pub. L. No. 95-395, 92 Stat. 813 (1978).
55. Act. of Oct. 10, 1980, Pub. L. No. 96-420, 94 Stat. 1785 (1980).

should have governed the relationship with Indians, but did not—with the sole exception of the primacy of the federal government in Indian Affairs. The continuing principle, or historical theme, of federal Indian law would appear to be that of changing the conditions of the relationship with the consent and participation of the Indian tribes.

The larger historical pattern suggests a cyclic interpretation of history, not a linear history as legal doctrines would require. Treatment of Indians seems to be coming back to the principle of consent, and this principle is a wholly political principle. It is NOT a legal doctrine. Within this cyclic perspective, it is not difficult to judge the right and wrong of actions of the federal government. Indeed, the more information we have about specific events and incidents within this larger historical loop, the more our perspective of what the substance of law is changed. The emotional outburst of Justice Rehnquist is triggered by a more specific rendering of history and it is in the specifics, in the more accurate historical statement, that law begins to approach a measure of justice.

The practitioners of federal Indian law, like many people who have been trained in American law schools, conceive of law as an isolated subject, a set of truths or principles existing in a nebulous heaven where all inconsistencies are ultimately resolved. Flowing down from this unreachable and perhaps incomprehensible realm of eternal truths are concepts which continue to expand as decades and centuries pass. As courts apply what they believe to be legal doctrines, vast subfields emerge and great intellectual deltas of the original conceptual river begin to spread out. The dominant questions, which one can find posed with great seriousness wherever and whenever law students and attorneys gather, always begin with the prefix: "yes, but what did Justice Douglas REALLY MEAN?" The assumption underlying this question suggests that law is clear, but our method of intuiting it is flawed.

How, we may ask, did federal Indian law become part of legal scholarship and not historical scholarship? Since the relationship between Indians and the United States has always been political, we cannot expect practitioners of Indian law to give us the answer. We turn instead to observers of the American scene and we find in Alexis de Tocqueville a delicious insight worthy of our attention. "There is hardly a political question in the United States which does not sooner or later turn into a judicial one,"[56] de Tocqueville tells us. It is simply a part of the American character. We give to our judicial branch the task of thinking out, on our behalf, all the difficult questions which we do not want to answer. So, it is entirely natural that we expect the courts to derive our doctrines of law and we allow scholars to tell us what principles connect these doctrines.

Looking back at American history we can see that as the process of treaty and agreement making declines, litigation begins to fill its place. We are no longer making law and adjusting human conditions, we have begun to make law an oppressive and obtuse thing. Lawyers become clerics in the temple of justice and like any other group of priests, it is assumed that justice

56. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (1969).

is done if the job is done properly. Consequently, there is no need to discuss justice; there is only the requirement of understanding law. Thurman Arnold, with whom we began our critical review of federal Indian law, states that "[p]rinciples, once formulated into a logical system and accepted seem to paralyze action in the actual arena of human affairs."[57]

In his short acknowledgment in the original version of the *Handbook*, Felix Cohen wrote that what made the work possible was "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."[58] Nathan Margold also warned about enthusiastic exegesis which neglected the human content of what he called law-in-action:

> Language on statute books, in the field of Indian law as in other fields, frequently has only a tenuous relation to the law-in-action which courts and administrators and the process of government have derived from the words of Congress. The words of court opinions frequently have as tenuous a relation to the actual holdings.[59]

The connection between doctrines and principles exists primarily in the minds of practitioners. When we include the essential related fields of human thought and inquiry cited by Cohen—economic, political, social, and moral problems—then the writing of tracts on federal Indian law cannot be a simple effort to discover what the current state of the law might be. Rather, there is a requirement that the understanding of law be filled with the contents of these other fields. Otherwise, the relationships will be, as Margold has warned, extremely tenuous in their connections, having little to do with actual human affairs.

The major problem with the four principles articulated by Nathan Margold is that they are not principles of law but rather principles of arranging the material. They are themes which seem to recur because the materials are viewed primarily from a legal perspective. We cannot really learn how federal Indian law functions because all new data falls within the boundaries of these descriptive principles. Scholars, whether they be Felix Cohen, David Getches, or anyone else, are always trapped within their own conceptual system. If history is taken more seriously and allowed to provide the basic context for Indian law, a much different orientation occurs.

In 1789, Congress passed the Northwest Ordinance,[60] a declaration of the principles and structures which would be used to add new states to the federal union. A set of seven articles was adopted which "shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent."[61] The policy towards Indians is articulated in the third article of this compact: "The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken away from

57. T. ARNOLD, *supra* note 1, at 5.
58. F. COHEN, *supra* note 28, at xxxii.
59. *Id.* at xxviii.
60. Act of Aug. 7, 1789, ch. 13, 1 Stat. 50 (1789).
61. *Id.* at 52.

them without their consent . . . but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them . . . ."[62] These words should not be regarded as mere poetic sentiment; they are the clearly defined principles which Congress intends as standards of behavior for the United States. It is to these ideas that courts and Congress must remain faithful.

When the principle of utmost good faith is placed alongside Margold's four informative principles, Price's definition of how power is supposed to flow, and the idea that jurisdiction is the dominant theme in federal Indian law, it is possible to render a comparative judgment on the data which composes federal Indian law. Overwhelming federal sovereignty does not become a plenary power because it is now possible to judge the exercise of such power in terms of avowed policy. Most important, however, it does not allow courts to assume without further examination that because Congress had acted legislatively in the field of federal Indian law its actions have had an intent, have received clear and careful thought, and that they are subject to some measure of self-control.

The *Lone Wolf* case, generally regarded as the most extreme expression of federal powers and correspondingly the nadir of Indian rights, can be seen in a much different light when it is placed next to the principles articulated in the Northwest Ordinance. The facts in *Lone Wolf* have never made sense, either in terms of its historical context or in terms of the logic of the decision. The Jerome Commission negotiated an agreement with the Kiowa, Comanche, and Apache tribes fully understanding the necessity of obtaining the approval of three-quarters of the adult males as required by the treaty of 1867, provisions incidentally that were insisted upon by the United States, not by the Indians. Not only did Congress take several sessions to pass the agreement in amended form, the Bureau of Indian Affairs made several glaring errors in its census of exactly how many Indians were living on the reservation, what age an Indian needed to be to be considered as an adult, and whether or not the negotiations had conformed with the treaty, then the existing law governing the agreement.

Congress radically amended the provisions of the document prior to its final passage and, in effect, covered up for the bad management and incompetency of the Bureau of Indian Affairs. When Lone Wolf filed suit against the Secretary of the Interior in the district court in Washington, D.C., it then fell to the judicial branch to set things right. The Supreme Court, defying not only the Northwest Ordinance but the prior treaties and statutes as well, declared that it had always been within the power of Congress to act in plenary fashion in Indian affairs.[63] This statement raised certain questions which, unfortunately, legal scholars have been unwilling or unable to ask. If there had always been a plenary power available to Congress, then why didn't it simply use that method from the very beginning? Why all the hoopla over treaties and agreements? Why, at that very moment, were a number of treaty and agreement commissions in the field on several reserva-

62. *Id.*
63. *Lone Wolf*, 187 U.S. at 555.

tions asking the tribes to make treaties and agreements with the United States?

The Supreme Court, of course, in seeking to cover up the failures of both the executive and legislative branch, had to use an incredible chain of logic even to reach the proposition of the existence and use of plenary power. Against the Indian argument that the treaty barred radical congressional amendment without the approval of the Indians according to treaty formula, the Courts stated:

> to uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, *in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands*, of all power to act, if the assent of the Indians could not be obtained.[64]

No one could argue that a sovereign lacks sufficient power to act in an emergency, but where is the emergency here? Congress had dilly-dallied for more than eight years before passing its own version of the agreement. The sense of urgency, therefore, is slight. What is the care and protection that Congress is allegedly exercising here? The Court later rules that "in effect, the action of Congress now complained of was but an exercise of such power [administrative power], a mere change in the form of investment of Indian tribal property . . . ."[65] The emergency described a few pages before has now become a deliberate investment decision. But the Court continued on: "we must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made . . . ."[66] And, why must we presume that principle?

Apparently, we presume good faith because the Northwest Ordinance requires the United States to act in good faith. But the mention of utmost good faith is prescriptive, not descriptive, and the Court should have admitted as much. Part of the difficulty here is the division of the federal government into three branches. While these branches may limit each other when dealing with strictly domestic matters, when confronted with the necessity to deal with entities outside the domestic realm, the branches tend to support each other, and Indians, although declared by John Marshall to be domestic dependent nations, still were regarded as being outside the scope and protection of any branch of government if it meant placing that branch in conflict with either of the others. The trauma of the Cherokee cases of the 1830s was not going to be repeated.

Only in very recent times have the federal courts begun to probe beneath the presumption that everything done to Indians by the Congress is done in good faith. In most litigation prior to 1968, it was almost standard for the federal courts to insist that the United States, through Congress, was simultaneously trustee of Indian property and arm's-length sovereign dealing with a smaller nation which depended on it for sustenance. In *Three*

64. *Id.* at 564 (emphasis added).
65. *Id.* at 568.
66. *Id.*

Tribes of the Fort Berthold Reservation v. United States, the Court of Claims stated that "Congress can own two hats, but it cannot wear them both at the same time."[67] It then suggested a guideline for determining in which capacity Congress was acting, retaining the gratuitous excuse of *Lone Wolf*, the transfer of assets in forms of investment, as a function of a trustee and therefore not a constitutional taking of property. While this development is something of an improvement, it is certainly not consonant with either Margold's principles or the policy declared in the Northwest Ordinance. Rather, it smacks of the traditional desire of the three branches of government to make it appear as if they all have been acting with some measure of legality. We are still dealing with the judicial construction of a fictional intent of Congress that is as hypothetical as the alleged emergency which formed the basis of the *Lone Wolf* decision.

The overwhelming proportion of lawyers practicing federal Indian law will no doubt continue to use the various versions of the *Handbook of Federal Indian Law* as their bible, and we will no doubt continue to see casebooks and law review articles pick themes which they believe provide the critical concept for the proper interpretation of this body of material. Only with singular difficulty will history, economics, politics, and morality find entrance into this field. The mythical, doctrinally determined history which is now entrenched in federal Indian law will be replaced with a more accurate history only with exceptional difficulty and hardship. Alexis de Tocqueville once commented that "once an opinion has spread on American soil and taken root there, it would seem that no power on earth can eradicate it."[68] Not only are we dealing with a fictional history promulgated by the winners, we are dealing with a belief long fostered by the legal profession that federal Indian law is comparable to other fields of law which are informed by a few basic principles and doctrines. This attitude must fall before anything significant can be accomplished.

67. 390 F.2d 686, 691 (Ct. Cl. 1968).
68. A. DE TOCQUEVILLE, *supra* note 56, at 640.