THE CURSE OF RELEVANCE: AN ESSAY ON THE RELATIONSHIP OF HISTORICAL RESEARCH TO FEDERAL INDIAN LITIGATION*

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INTRODUCTION: THE CURSE OF RELEVANCE

More than practitioners of most historical disciplines, practitioners of Native American legal history suffer under a curse—the curse of relevance. This curse is not unique to Native American legal history. It also exists, for example, in the study of American constitutional history.[1] Nevertheless, for reasons addressed below, it is an important problem in Native American legal history.

While scholars of Native American legal history respond to this curse in different ways, the implications of the problem pervade the discipline and must be addressed. This Essay discusses some of the problems of this curse, indicating its potential to skew work in this area and therefore warp our understanding of Native American legal history. The Essay also takes a first step toward attempting to place this curse into some appropriate intellectual framework.

As graphically demonstrated in Francis Jennings' pioneering work *The Invasion of America*,[2] questions of perspective are critical in Native Ameri-

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1. *See generally* Bell v. Maryland, 378 U.S. 226, 286-346 (1963) (six justices divided evenly in concurring and dissenting opinions over the original understanding of the fourteenth amendment); United States v. Lovett, 328 U.S. 303, 315-18, 321-25 (1946) (majority and concurring opinions in disagreement over the meaning of the constitutional prohibition against bills of attainder contained in U.S. Const. art. I § 9). For a detailed discussion of the problem of history in constitutional interpretation see C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

2. F. JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST 15-16, 32 (1975):

> European explorers and invaders discovered an inhabited land. . . . They did not settle a virgin land. They invaded and displaced a resident population. . . .
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> . . . [M]ost . . . historians also repeat identical mythical phrases purporting that the land-starved people of Europe had found magnificent opportunity to pioneer in a savage

can legal history. A scholar's viewpoint in the development of the legal relations between Native Americans and non-Indians makes an immense difference to the scholar's research agenda, analysis of the primary legal and historical materials, and formulation of historical conclusions.

If the scholar views the function and role of Indian law, particularly federal Indian law, as regulating, rationalizing, and legitimizing the colonial expropriation of Native American resources and displacement of indigenous populations by European settlers, mirroring the protrayal of American history advanced by Frederick Jackson Turner and his disciples,[3] the scholar is likely to focus on traditional historical materials, mostly written non-Indian accounts, and to examine only the non-Indian side of legal developments in deciphering the meaning of such materials.[4] If, on the other hand, the researcher sees that history, like Jennings does, as the evolving saga of cross-cultural relations between two civilized, feudal societies brought about by the historical phenomena of the cross-cultural contact spawned by the Europeans' discovery of other continents and peoples, that scholar is likely to strive for an anthropological understanding of the process of cross-cultural contact.[5] This researcher is equally interested in non-traditional historical sources that reveal the Indian cultural experience with and their responses to the process of colonial contact and regulation. This scholar utilizes non-traditional sources of ethnohistory as well as more traditional written non-Indian sources to help illuminate the dimly lit historical record left by seventeenth, eighteenth or nineteenth century tribes, which lacked a tradition of written language.

If the scholar views the historical time line, as suggested by leaders of the American Indian Movement, as the story of the survival of Indian legal and cultural institutions in the face of a European invader bent on mass

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wilderness and to bring civilization to it. As rationalization for the invasion and conquest of unoffending peoples, such phrases function to smother retroactive moral scruples that have been dismissed as irrelevant to objective history. Unfortunately, however, the price of repressing scruples has been the suppression of facts.

. . . .

It is customary for our histories to dwell at some length on the immensity of the task of "settling" North America, mentioning the hazards of vast wilderness, the logistical problems of supplying colonists from faraway Europe, the strangeness of the flora and fauna, and the hostilities that the natives were sooner or later bound to display. The implications of this use of the words *settlement* are worth notice. First, it vaguely implies that preexisting populations did not classify as humanity, for it is not used to apply to Indians; only Europeans "settle." It also dismisses the Indians' ability to wrest a generally satisfactory living from the "wilderness" and to travel over established trails to known destinations. Most inaccurate is the word's bland misdirection about the Europeans' intentions, for their common purpose was to exploit rather than to settle. Among the early European visitors, residence was merely a means of increasing the efficency of exploitation. A taste for permanent habitation came later. Regularly the first Europeans were welcomed by natives with gifts of food and tokens of honor until the moment came when the gifts were demanded as tribute and the honors commanded as homage—a moment that sometimes came very rapidly. At the outset native hostility was never directed against European settlement as such; what made trouble was the European purpose of settling on top.

3. F. TURNER, FRONTIER AND AMERICAN HISTORY 1 (1920); R. BILINGTON, WESTWARD EXPANSION 1-3 (4th ed. 1974).

4. *See, e.g.*, W. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES (1973).

5. *See, e.g.*, M. GREEN, THE POLITICS OF INDIAN REMOVAL (1982); F. HOXIE, A FINAL PROMISE; THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

racial and cultural genocide, then the only appropriate reason to resort to traditional non-Indian historical materials is to reflect non-Indian awareness or concessions of culpability. Indian legal history under this perspective is a saga of the evolution of Native American legal institutions under the aegis of an illegitimate colonial oppressor.[6]

The historical perspectives and preconceptions that researchers bring to the historical materials with which they deal, therefore, color the manner in which they form historical agendas, propose historical hypotheses, read primary historical materials, and formulate conclusions from the materials at hand. Such perspectives even color the reasons why scholars might undertake to research Native American legal history.

These problems of perspective are endemic to all legal history, indeed to all historical inquiries. Why, then, do they pose a special problem for Native American legal history? The answer lies in the curse of the contemporary relevance of the historical inquiry. Indian legal history is not merely an intellectual link with the evolution of past legal traditions; it is also the contemporary life blood out of which current Indian law problems are often resolved by the courts. In his foreword to the classic 1942 edition of Felix Cohen's famous treatise on federal Indian law, Nathan Margold, then Solicitor of the Department of the Interior during the famous reign of John Collier as Commissioner of Indian Affairs, observed "[f]ederal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored."[7]

Over the past two decades, the United States Supreme Court and lower federal courts have grappled with weighty historical questions whose answers the judiciary believes will supply the resolution of contemporary legal disputes. For example, in *United States v. Sioux Nation*,[8] decided in 1980, the Supreme Court addressed the thorny historical question of whether the Congress of 1877 intended to compensate the Sioux Nation with rations and other consideration in exchange for the forced expropriation of the Black Hills and other land formerly part of the Great Sioux Reservation. The majority, relying considerably on the work of historians, thought that Congress had no such intent. In dissent, Justice Rehnquist stated "[i]t seems to me quite unfair to judge by the light of 'revisionist' historians or the mores of another era actions that there were taken under pressure of time more than a century ago" and "both settler and Indian are entitled to the benefit of the Biblical adjuration: 'Judge not, that ye be not judged.' "[9]

Similarly, in recent eastern Indian land claims litigation, the Supreme Court has twice answered legal questions involving the impact of federally enacted statutes on allegedly invalid state treaties and cessions of Indian land, many between 150 and 200 years old.[10] Indeed, still pending in the

6. *See, e.g.*, V. DELORIA, JR., CUSTER DIED FOR YOUR SINS (1969); P. MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE (1980).

7. N. Margold, *Introduction* to F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at xiii (1942).

8. 448 U.S. 371 (1980).

9. *Id.* at 435, 437.

10. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Oneida Indian Nation v.

New York federal courts are cases assessing the legal implications of the Articles of Confederation and federal ordinances and treaties adopted thereunder on state-initiated Indian land cessions.[11]

Other recent cases have raised historical questions of whether past actions of Congress have diminished or disestablished Indian reservations.[12] The Supreme Court has suggested that the appropriate test in such cases is whether the Congress that approved the statutes or agreements ceding surplus land during the allotment-policy era clearly and specifically intended to accomplish such a diminution in the political landbase of the tribe.[13] Yet, the same Court simultaneously conceded that the Congresses of the allotment era simply were not concerned with this issue since they anticipated and intended that allotment would ultimately eliminate Indian reservations.[14] Thus, in attempting to maintain fidelity to historical accuracy, the Court is asking Native American legal history to carry more weight than the primary historical materials can conceivably bear.

REASONS FOR THE RELEVANCE OF NATIVE AMERICAN LEGAL HISTORY

The relevance of Native American legal history to contemporary Indian litigation is the product of two interrelated phenomena. First, for a considerable period of time, Indian legal concerns simply went unredressed. In 1830 Chief Justice Marshall said in *Cherokee Nation v. Georgia*, "[a]t the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government."[15]

Thus, even while cases of Indian rights brought by or against individual

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County of Oneida, 414 U.S. 661 (1974). *See also* South Carolina v. Catawba Indian Tribe, 106 S. Ct. 2039 (1986).

11. *See, e.g.*, Oneida of the Thames Band v. State of New York, 757 F.2d 19 (2d Cir. 1985); Oneida Indian Nation of Wisc. v. State of New York, 732 F.2d 261 (2d Cir. 1984); Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070 (2d Cir. 1982), *aff'g in part* and *rev'g in part* 520 F. Supp. 1278 (N.D.N.Y. 1981). For other Indian litigation involving the Articles of Confederation, see United States v. Oneida Nation, 576 F.2d 870 (1978); Six Nations v. United States, 173 Ct. Cl. 899 (1965). Other cases involving old land cessions in New York include County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (remanding case to the Court of Appeals for the Second Circuit); Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297 (N.D.N.Y. 1983) (order denying motion to dismiss). *Cf.* Canadian St. Regis Band of Mohawk Indians v. New York, 573 F. Supp. 1530 (N.D.N.Y. 1983) (order denying plaintiffs' motions for certification of a plaintiff class and dismissing claims by individual plaintiffs).

12. For cases where the Court found diminution, see Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975). For cases where the Court found Indian reservations to be neither dismissed nor disestablished, see Solem v. Bartlett, 465 U.S. 463 (1984); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962).

13. *See* Solem v. Bartlett, 465 U.S. 463, 470-72 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977); DeCoteau v. District County Court, 420 U.S. 425, 444 (1975); Mattz v. Arnett, 412 U.S. 481, 504-05 (1973); Seymour v. Superintendent, 368 U.S. 351, 355-57, 359 (1962).

14. The Court in Solem v. Bartlett offered this concession:

> Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act.

465 U.S. at 468-69.

15. 30 U.S. (5 Pet.) 1, 18 (1831).

Indians were sometimes litigated in the nineteenth and early portions of the twentieth century, the idea became prevalent that tribally initiated litigation to redress harms done to Indians could not be entertained without an express Act of Congress conferring jurisdiction on the courts and investing the Indian complainants with the requisite capacity to sue. Marshall had said "[i]f it be true, that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted."[16] This position, which probably emerged from the above-quoted language of Chief Justice John Marshall in *Cherokee Nation*, was also echoed by the Court seventy years later in *Lone Wolf v. Hitchcock*.[17] For over 150 years, many Indian legal questions therefore were thought to be political questions not subject to judicial resolution. Furthermore, many doubted that Indian tribes had capacity to sue in their own names, separate from their trustee, the federal government, to redress legal harms done to them. As late as 1942, Felix Cohen could write that tribal capacity to sue without the benefit of express Congressional authorization remained an unsettled question.[18]

It was not until Congress enacted the Indian Claims Commission Act in 1946 that the nation systematically began to clear away 200 years of unredressed tribal claims.[19] Even then, congressional response was grudging—the jurisdiction of the Indian Claims Commission and the Court of Claims being limited under the Act to monetary damages in claims brought against the United States.[20] Any tribe seeking the return of land or other resources allegedly illegally taken from them or desiring the enforcement of any claim against a party other than the United States, such as a state government, still faced insurmountable barriers to the initiation of such litigation if they could not persuade their alleged guardian, the federal government, to institute protective litigation.[21]

Such barriers to Indian litigation finally shattered when Congress enacted 28 U.S.C. § 1362 in 1966.[22] This statute authorized Indian tribes with governing bodies recognized by the Secretary of the Interior to file federal

16. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).

17. 187 U.S. 553, 568 (1903).

18. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 284 (1942).

19. Act of Aug. 13, 1946, Pub. L. No. 726, 60 Stat. 1049 (formerly codified at 25 U.S.C. §§ 70-70v (1976)) (omitted from 1982 Code; the Indian Claims Commission terminated on Sept. 30, 1978, pursuant to section 70v of Title 25).

20. *Id.* 60 Stat. 1049, 1050 (formerly codified at 25 U.S.C. § 70a (1976)).

21. In a suit by the Passamaquoddy Tribe seeking to compel the federal government to litigate the tribe's possessory claim against the State of Maine, the Court of Appeals noted that "without United States participation, the Tribe may find it difficult or impossible ever to secure a judicial determination of the claims." Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376 (1st Cir. 1975). *See generally* Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 52-54 (1979).

22. 28 U.S.C. § 1362 (1982) reads as follows: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

In Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 473 (1976), the Court noted that in enacting this statute "Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee."

question claims in federal court irrespective of amount in controversy. It also resolved any lingering doubt about the legal incapacity of an Indian tribe, as a ward of the federal government, to enforce its own legal rights without the benefit of legal proceedings initiated by its alleged guardian, the federal government. Thus, beginning in 1946 and accelerating since 1966, the second half of the 20th century has witnessed a burgeoning growth in the litigation of ancient Indian law questions and the concomitant demand that such questions be resolved with fidelity to Native American legal history. Native American legal history no longer could remain solely the scholarly domain of academically minded antiquarians. The demands of modern Indian litigation made Native American legal history the daily currency of Indian rights advocates and their opponents.

By happy coincidence, the second major feature contributing to the relevance of Native American legal history was the lack of statutes of limitations or other time bars otherwise precluding the litigation of such old claims.[23] The inapplicability (until recently)[24] of most time bars to Indian claims is the result of a complex doctrinal dynamic involving several analytically separate legal doctrines, including *inter alia*: 1) the traditional doctrines that the United States, the guardian of most Indian resources, is not bound by state statutes of limitation;[25] 2) the inapplicability to Indian lands of certain federal statutory time bars, like the federal Color of Title Act;[26] 3) the inconsistency between time bars created under state law and the policies that underlie the federal statutory restraint on alienation of Indian lands now found in 25 U.S.C. § 177;[27] and 4) notions of the supremacy of rights created under federal law over state doctrines creating such time bars, such as state statutes of limitation.[28] The Court recently reaffirmed this traditional, yet remarkable, solicitude for old Indian claims in *County of Oneida v. Oneida Indian Nation*.[29]

While such legal principles demonstrate the continued legal vitality of the backlog of Indian claims that mounted unredressed over the past two centuries, they do not resolve the question of how courts cope with and ameliorate whatever adverse effects the claims' ancient origins pose for the litigation process. Statutes of limitations are designed in part to prevent the

23. *See generally* F. COHEN, *supra* note 18, at 510-12.

24. *See* 28 U.S.C. §§ 2415-16 (1982). This statute, first enacted in 1966, has been repeatedly amended in recent years and now imposes a complex statute of limitation on old Indian damage, but not possessory, claims.

25. *E.g.*, Narrangansett Tribe v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 805-06 (D.R.I. 1976).

26. 43 U.S.C. § 1068 (1982). *See, e.g.*, United States v. Schwarz, 460 F.2d 1365, 1372 (7th Cir. 1972) (construing the Color of Title Act). *But see* United States v. Mottaz, 106 S. Ct. 2224 (1986) (applying 28 U.S.C. § 2409a(f) limitation against Indian claim.)

27. *See* United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422-23 (4th Cir. 1938); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 784 (D. Conn. 1976). *But see* South Carolina v. Catawba Indian Tribe, 106 S. Ct. 2034 (1986).

28. *E.g.*, *Narragansett Tribe*, 418 F. Supp. at 804.

29. 470 U.S. 226 (1985). Finding no "applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims [were] barred or otherwise . . . satisfied," the Court held that the 175 year old federal common law cause of action for violation of the Oneidas' possessory rights was still viable. *Id.* at 253.

prosecution of stale legal claims on the assumption that with passage of time the available reliable evidence diminishes—witnesses die or become otherwise unavailable and memories fade.[30]

Certainly in modern Indian land claims litigation in New York no one can take George Washington's deposition to determine what he meant when he told the Seneca in 1790 that the recently enacted restraint against alienation contained in the Trade and Intercourse Act of 1790 represented the "security for the remainder of your lands" and that "[n]o State, no person, can purchase your lands, unless at some public treaty, held under the authority of the United States."[31] This uncertainty makes Native American legal history relevant. While the parties cannot depose George Washington, they can depose and cross-examine historical experts. Practitioners of the antiquarian craft of Native American legal history therefore find themselves cast into a relevant role. The historical researcher is the Indian litigation substitute for the eyewitness. The problem, however, is that the very process of substitution potentially clouds the vision the scholar has of the now only dimly lit past. Thrusting the scholar into the rough and tumble adversary process may make the ultimate illumination of that past less, rather than more, likely.

THE IMPACT OF CONTEMPORARY RELEVANCE

In the American adversary legal system, relevance poses potential costs to the quality of American Indian legal history. If the research work is commissioned for litigation, or even done with an eye toward issues raised in ongoing Indian rights cases, two separable phenomena potentially can color the historical judgments offered by the researcher. First, the complex of *contemporary* legal issues can cloud or skew the understanding of primary historical materials produced by generations that might never have been concerned with the legal, social, political, or economic questions confronting contemporary federal Indian litigation. Indeed, by not recognizing the manner in which contemporary relevance can cloud the lenses of the historical telescope, both historical researchers and legal practitioners run the risk of misperceiving the legal significance of any historical conclusions derived from the inquiry.

For example, in *Oliphant v. Suquamish Tribe*,[32] Justice Rehnquist relied

30. H. WOOD, THE LIMITATION OF ACTIONS § 7 (1883).

31. I AMERICAN STATE PAPERS: INDIAN AFFAIRS 142 (W. Lowrie & M. St. Clair Clarke eds. 1832).

Compare County of Oneida v. Oneida Indian Nation, 470 U.S. 226, n.8 (1985) (President Washington's words are "some contemporaneous evidence" contradicting the Court's finding that Congress did not intend the 1793 restraint against alienation to preempt common law remedies for dealing with violations of Indian property rights) *with* Clinton & Hotopp, *supra* note 21, at 36-37 (President Washington's remarks are an attempt to appease the Seneca by explaining the purpose of the 1790 Act).

32. 435 U.S. 191 (1978). It is interesting to note the odd way the Court used the Western Territory Bill to support the proposition that Indian tribes had not retained inherent criminal jurisdiction over non-Indians. This Bill was introduced in 1834 for the purpose of creating an Indian territory. The area was to be a political territory where a confederation of tribes would have broad governing powers. Justice Rehnquist found it significant that the Bill precluded tribal exercise of criminal jurisdiction over United States officials and citizens passing through the Indian Territory.

significantly on early nineteenth century opinions of the Attorney General and a court decision, together with the behavior of Congress and federal and tribal treaty negotiators, to establish the proposition that Indian tribes had not retained inherent criminal jurisdiction over non-Indians. What Justice Rehnquist seemingly failed to see was the difference between the modern legal question and the one asked in the early nineteenth century.

The question in *Oliphant* was whether a twentieth century tribal court operating with written laws under practices derived primarily from Anglo-American legal traditions in clearly-defined geographic islands within the states known as Indian country could exercise tribal criminal jurisdiction over non-Indians. These non-Indians, as a remnant of the long abandoned allotment policy, owned land and resided on the reservation and, while excluded from tribal political processes, formed the dominant population group on that reservation. This question posed a far different issue than the early nineteenth century concern over whether tribes located in an ill-defined Indian Territory beyond the frontier line of settlement could apply traditional non-Western forms of social control or more rudimentary court structures to non-Indians in their territory, most of whom were likely to be federal employees or agents, traders, or citizens passing through on their way to riches located elsewhere.[33]

It is not apparent why the answer to the historical question should resolve the present issue, except for the persistent insistence of the relevance of Native American legal history to the resolution of contemporary federal Indian law questions. Furthermore, it is evident from Justice Rehnquist's opinion that the need to resolve the contemporary issue also skewed his sense of history. Thus, his opinion brushed aside a number of early Indian treaties, treaties that declared that non-Indian United States citizens who illegally entered and settled in Indian country were subject to tribal punish-

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Id. at 197-212. Left unmentioned in the opinion is the fact that the Bill never passed. One ostensible reason for its defeat is that Congress recognized there were existing tribal governments exercising governing powers.

33. Citing legislative history from the Western Territory Bill of 1834, Justice Rehnquist found the Bill precluded tribal exercise of criminal jurisdiction over non-Indians for "quite practical" reasons:

> Officers, and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulation, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended. The want of fixed laws, of competent tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection be extended. H.R. Rep. No. 474, 23rd Cong., 1st Sess. 18 (1834).

Id. at 202.

After a century and a half, Justice Rehnquist apparently found the rationale of the defeated bill's legislative history equally compelling:

> By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R. Rep. No. 474, 23rd Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Id. at 210.

ment.[34] Since these treaties were seemingly inconsistent with the remainder of Justice Rehnquist's theory, he simply misinterpreted them by suggesting that they did not really provide what they seemed to say.[35]

Under the modern state of Indian legal history, the curse of relevance has produced an important schism in the approaches scholars take to the Native American legal history that is being done. The result of the schism is two rather different paradigms for such work, each of which has its own problems.

First, there are scholars who recognize the costs of legal relevance to both historical objectivity and the freedom to make independent historical judgments. These practitioners seem to eschew addressing historical issues or materials having any contemporary relevance. Their work is often descriptive and narrative. Their work tries, often successfully, to find legal order where others had thought none existed. Their history attempts to be as pure and objective as the frailities of human nature permit.

These works tend to be almost journalistic in character, chronicling the who, what, when, and occasionally, why of the historical development of Native American institutions and policy. Such work is often interesting and descriptive. It makes fascinating reading. These visions of the saga of Native American legal history attempt to speak from the perspective of the appropriate era, but always in twentieth century language. Ultimately, however, their work somehow seems unsatisfying. It is lacking precisely because of the curse of relevance. The choice of subject matter almost never has contemporary legal significance. It is designedly written without reference to contemporary Indian law issues. Scholars practicing this approach miss an important and unique opportunity to inform the legal process and society about historical issues that cry out for the application of their talents. Their work is not lacking, however, because it is irrelevant to contemporary Indian litigation. Rather, it seems to be lacking because it *could* have been relevant.

It is true, few would criticize researchers in Roman or midievil English legal history for their failure to be relevant. They rarely have any opportunity to perform that role. Their basic historical work advances the general understanding of the origins of our legal system. Unlike many legal historians, Native American legal historians regularly have the opportunity to do relevant work. In some sense, their failure to seize that opportunity and apply their skills to solve pending Indian legal questions seems like a missed opportunity.

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34. *See, e.g.*, Treaty of Hopewell, art. V, Nov. 28, 1785, United States-Cherokee, 7 Stat. 18, 19; Treaty of Aug. 7, 1790, art. VI, United States-Creek Nation, 7 Stat. 35, 36; *see generally* 2 C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES, 11, 12, 25, 27 (1904).

35. A typical provision of these treaties states that "[i]f any citizen of the United States . . . shall attempt to settle on any of the lands hereby allotted to the Indians . . . such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please." *See, e.g.*, Treaty of Jan. 3, 1786, art. IV, United States-Choctaw Nation, 7 Stat. 21, 22; 2 C. KAPPLER, *supra* note 33 at 11, 12 (1904). In a footnote, Justice Rehnquist suggested these treaty provisions did not constitute a congressional recognition of inherent Indian criminal jurisdiction over illegal settlement, but were meant to discourage such illegal settlement. *Oliphant*, 435 U.S. at 197-98 n.8. Of course, these provisions were designed to discourage illegal encroachment on Indian lands *by recognizing and emphasizing the tribal criminal control over Indian country*, even as to illegal white settlers.

On the other end of the spectrum are Native American legal historians whose historical agenda and perspectives are shaped primarily, if not exclusively, by the dockets of Indian litigation. This is a sin to which many lawyers researching American legal history fall prey. The goal is not to inform others of the dynamic relationships that shaped the development of the legal institutions affecting Native Americans in some distant era, but rather to inform the modern legal community of the manner in which those long passed events should shape, or cloud, the resolution of contemporary legal issues.

Classic historians could rightly say that these scholars look at history through the wrong end of the historical telescope. They demand that legal history supply answers to contemporary questions possibly never asked in the distant era being studied. This perspective pervades their framing of hypotheses, their selection of historical materials, their analysis of the primary historical materials selected, and their conclusions. Rightly perceiving federal Indian law as the law of the conqueror, rather than of the conquered or displaced, such scholars tend to rely primarily or exclusively on the traditional non-Indian sources for their historical research. This approach frustrates efforts to understand Native American legal history as an on-going process of cross-cultural contact and adaptation. True, their work is relevant, but its very relevance clouds its objectivity. The demands or perceived demands of litigation have skewed sources and perspective. The work has become one-sided, not deliberately, but because of the perceived needs of litigation. Such scholars eagerly seize the opportunity for relevance, but they may lose their individual scholarly objectivity or, at least, create the *appearance* of nonneutrality—again the curse of relevance to the study of Native American legal history.

Another problem created by the curse of relevance is how the adversary system skews the reading of historical materials and the conclusions drawn from them. The adversary system pushes historical analysis into extreme positions. Indian rights advocates generally need historical conclusions that paint a clear pro-Indian view, while their adversaries need their conclusions drawn along equally sharp antagonistic lines. Furthermore, Indian litigation tends to breed political polarization among its participants, both Indian and non-Indian.[36] Questions of law and history are converted into black and

36. One of the most plaintive and elegant manifestations of this concern is found in the preface to the excellent volume J. HALEY, APACHES xiv (1981):

> The writing of Indian history also suffers from the related complication of having becoming increasingly politicized in our own time. It has evolved from, (for lack of better terminology) an Old School into a New School. It is but a slight exaggeration to assert that for generations of literary commentators, the Indians seem to have had it coming to them. They were seen as primitive obstacles to the progress of civilization, violent and unordered, inevitably to be swept from before its approach. There were exceptions to this sentiment, of course, such as the classic *A Century of Dishonor*, but by and large, it is only since the publication not that long ago of a few important watershed books like *Cheyenne Autumn* and *Bury My Heart at Wounded Knee* that scholarly opinion has swung the other way. Historical thought, like history itself, has swings of its pendulum, and indeed this one has swung so fast that the meaning of much of the scholarly vacillation has to be questioned. Savaging the morality of American expansions seems to have become all the rage. I do not think it too cynical an observation to make that where in a communist autocracy history is rewritten to suit the rule in power, in American History sometimes seems to be re-evalu-

white issues. There is no middle ground.

True historical objectivity, however, often requires that the scholar refrain from imposing on an ambiguous historical record a clear interpretation that the ambiguity of the record cannot bear. Legal historians often must couch and hedge conclusions to conform the ambiguity of the historical record with which they deal. The adversary process, however, does not cope well with such ambiguity.[37] Attorneys want their case strengthened by the strongest historical statement available from their experts or from the literature. Thus, the curse of relevance pushes scholars of Native American legal history toward levels of conclusory clarity not necessarily warranted by the available historical record.

EXORCISING THE CURSE OF RELEVANCE

Having reflected upon the ills of Native American legal history created by the inevitable curse of relevance, it is worth considering how, if at all, these evils can be exorcised or ameliorated. The author offers no remedy that will automatically eliminate historical excesses the curse imposes on Native American legal history. Rather, one potential solution to this problem lies in heightening the sensitivities of both legal practitioners and judges in this area concerning the limits and appropriate uses of Native American legal history. Another lies in having historians and other scholars interested in Native American legal history carefully consider contemporary Indian litigation and the doctrinal demands and conventions of contemporary Indian rights litigation when planning their research agendas and methodologies.

Practitioners of Indian law and judges must temper the demands they place on Native American legal history. They must recognize that they often inappropriately require that Indian historical materials answer con-

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ated to suit the social trends in fashion. Instead of writing by regulation of censors, much recent writing in American Indian history seems regulated by undertoning chants of "Four legs good, two legs better," and if the current writer in American history does not jump on the Poor Little Indians bandwagon he risks, if not his reputation, certainly the favor of his times. This very emphatically does not assert that there is ever a final, definitive "history" of any topic to which nothing can be added. But, in the Old School, white people on the frontier were the heroes and Indians were the villains; in the New School, Indians are the heroes and whites are the villains. A historian of any detachment at all has to question whether we have truly rethought the subject or simply switched wardrobes on the characters.

. . .

. . . To take sides in writing history is to seek those ephemeral easy answers. Much more important, to write history without taking sides is the only way I can express my personal opinion that surely, by today's stage in our development, the time has come to stop debating whose fault our history is, and begin trying to understand what it has meant, and proceed from here.

37. In an Article criticizing the Warren Court for the erroneous use of constitutional history in several of its opinions, Alfred Kelly concludes that "law office history" is by nature and necessity one-sided. Furthermore, he finds that such history appearing in briefs is not generally judicially resolvable into any semblance of historical truth. That result is largely due to the different premises operating in the adversarial system. The guiding purpose underlying the preparation of "law office history" is advocacy. Such purpose should be alien to the professional historian. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155-56 (1965).

temporary legal questions that are beyond the competence of the historical record to resolve.

Part of the reason for this insistence on solving Indian law issues with fidelity to the historical records is the unusual way in which conventional approaches to statutory interpretation are applied in federal Indian law. In a democratic society, the courts sensibly choose to interpret any act of Congress as that enacting body understood it.[38] Therefore, courts seek to give an unclear statute an interpretation that reflects original congressional intent. This rule prefers the interpretation intended by the peoples' representatives to a more free-wheeling interpretive style that would leave the issue to the discretion of an unelected and nonaccountable federal judiciary. When this rule is applied to relatively recent statutes, whether in the Indian affairs area or otherwise, it obviously makes good sense.[39] When, however, this rule is woodenly applied to old statutes in the field of Indian affairs, without sensitivity to subsequent oscillations of federal Indian policy, the rule sometimes demands that historical research be undertaken to resolve a question the enacting Congress did not and could not anticipate.

This problem emerges because of the extraordinary fluctuations of federal Indian policy over the last 150 years between policies of assimilation and of policies protecting Indian autonomy and self-determination.[40] While these oscillations produced changes in the broad contours of the federal Indian policy, the mere fact of a policy change did not rid the United States Code or the Statutes at Large of the statutory litter of the past. Implemented federal Indian laws often have continuing legal consequences. Statutes affecting Indian rights are not so readily repealed. Thus, courts frequently find themselves interpreting statutes enacted by Congress in some prior policy era, such as the assimilationist policies of the allotment period (1887-1934) or the termination era (1946-1962), at a point in time, such as the recent period of support for tribal self-determination, when the conceptualization of Indian issues held by the enacting Congress radically departs from the array of problems that animate the current legal issues under a policy of self-determination.[41]

For example, in *DeCoteau v. District Court*,[42] the Supreme Court

38. *E.g.*, Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). *See also*, Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 IOWA L. REV. 711, 717-18 (1982); Kernochan, *Statutory Interpretation: An Outline Method*, 3 DALHOUSIE L.J. 333, 347-48 (1976).

39. *See, e.g.*, Matter of Appeal in Pima County Juvenile Action No. S-903, 130 Ariz. 202, 635 P.2d 187 (Ct. App. 1981) (interpreting Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-63 (1982)).

40. For a historical overview of these policy shifts in policy, *see* F. COHEN, *supra* note 17, 47-206; (1982 ed.); M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 68-91 (2d ed. 1983); W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 9-31 (1981).

41. *See* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (*codified at* 25 U.S.C. § 450a (1982) and elsewhere in titles 25, 42, and 50, U.S.C. app.) (providing for stronger tribal control over federally funded programs for Indians); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (*codified at* 25 U.S.C. § 1901-63 (1982), (providing for greater tribal involvement in child custody or adoption proceedings involving certain Indian children).

For a striking example of the inconsistent ways courts have approached this interpretation problem, *see infra* text accompanying notes 52 and 53.

42. 420 U.S. 425, 426-27 (1975).

claimed that existing legal doctrines required it to determine whether Congress' 1891 approval of an agreement whereby the Sisseton and Whapeton bands of the Sioux Nation ceded surplus land on their 1867 treaty reservation and opened such land to non-Indian settlement under the aegis of the allotment policy had disestablished the Lake Traverse Reservation in North Dakota. Of course, what Congress was trying to do during allotment was to provide for a gradual 25 year liquidation of Indian reservations. Thus, the question of the impact of the 1891 Act on the continued existence of the reservation probably never occurred to any member of Congress since they assumed that the Act merely initiated a process that would eventually, but not immediately, accomplish that liquidation.

Furthermore, in 1891 the distinction between reservation status and land ownership was not a legally-significant one. Congress did not decouple the political-jurisdictional issue of Indian country from the property based issue of land ownership until 1948 when it enacted the contemporary definition of Indian country found in 18 U.S.C. § 1151(a). This position was in great part a response to the ravages of the allotment policy on Indian reservations.[43] As is evident from the subsequent enactment of section 1151(a), several different federal Indian policies, including the Indian Reorganization Act, termination, and the recent protection of tribal self-determination, have intervened in the interim.

The *DeCoteau* Court addressed the implications of the 1891 Act in order to resolve a question of jurisdiction—the authority of a state to entertain child custody proceedings involving Indian parents and children having substantial contacts with the area comprising the 1867 treaty boundaries of the reservation. The only reason anyone was asking the legal question had to do with the twentieth century policy of protecting tribal self-government. It was not a question salient to the Congress that drafted the 1891 Act. The 1891 Congress simply had not assumed the continued existence of Indian country after the expiration of the trust restraints contained in the allotment measures. Consequently, the answer to the historical question simply cannot be gleaned from the historical record. Ultimately, in *Solem v. Bartlett*, Justice Marshall, speaking for a unanimous Court, seemingly conceded this point:

> Another reason why Congress did not concern itself with the effect of the surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past.... Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel off one reservation.[44]

In *DeCoteau*, however, Justice Stewart relied on late nineteenth century statements by tribal leaders, federal negotiators, and members of Congress

43. 18 U.S.C. § 1151(a) (1982) provides that Indian country includes "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." This legislation codifies earlier judicial precedent holding that all land inside the boundaries of an Indian reservation remains Indian country even if patents have been issued for parcels therein. *See* United States v. Celestine, 215 U.S. 278 (1909).

44. 465 U.S. 463, 468 (1984).

that were addressed to the then salient question of *land ownership* to resolve a quite different concern over jurisdiction defined in terms of reservation diminishment.[45] Stewart's inquiry was at best misguided and at worst an outright misuse of Native American legal history. While the *Solem* Court subsequently conceded the difficulty, if not outright impossibility, of such inquiries, it has not rejected their necessity. Indeed, the rule articulated in *Solem* requires ascertaining the intent of the enacting Congress.[46]

A more sensible approach to such legal problems is not to require the legal history to carry an impossible burden. Rather, lawyers and judges must recognize that in federal Indian law the rules of construction should not always favor construing a statute as an *enacting* Congress might have understood the law. The Court must be sensitive to whether the history surrounding the enactment of law made the contemporary legal issue a relevant concern at the time of enactment. If it did not, the search for original understanding is truly an elusive and imaginary epistemological undertaking.

Even if the enacting Congress considered the question, adherence to democratic theory does not *always* require that the statute be interpreted in the fashion reflected by the enacting Congress. Often subsequent changes in federal Indian policy have so altered the dimensions of the legal question, without actually repealing or modifying the pertinent statute, that enforcing the intent of the enacting Congress could frustrate the policy objectives more recently offered by Congress. For example, when the 1948 Congress enacted the definition of Indian country found in 18 U.S.C. § 1151(a), it affirmatively expressed a distaste for checkerboard jurisdictional arrangements,[47] preferring instead the unitary jurisdictional lines of the reservation's exterior boundaries. While the Court recognized this fact in *Seymour v. Superintendent*[48] and *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*,[49] the significance of this Congressional judgment was utterly lost in cases like *DeCoteau* and *Solem*. In such cases, the search for the original intent of a nineteenth century Congress frustrates more recent congressional objectives. While recent policies usually have not repealed old statutes, courts can clearly delineate the more modern policy contours. These newer approaches should be factored into the judicial decisionmaking process to facilitate more accurate legal assessments of the relevance of Native American legal history to contemporary questions.

Thus far, the Court's record in such questions is inconsistent. It is not even entirely clear that the federal judiciary has yet perceived this very real

45. 420 U.S. 425, 432-42 (1975).

46. 465 U.S. 463, 469 (1984).

47. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 509-10 (1976).

48. 368 U.S. 351 (1962). In rejecting the argument that jurisdiction over a particular crime committed within the reservation boundaries was contingent upon land ownership, the Court noted that a contrary conclusion would force law enforcement officers to search tract books to determine whether such jurisdiction rested in the state or federal government. The Court found that "[s]uch an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and [could] see no justification for adopting an unwarranted construction of that language where the result could be merely to recreate confusion Congress specifically sought to avoid." *Id.* at 358.

49. 425 U.S. 463, 478 (1976).

interpretive problem. This inconsistency is best demonstrated by the Court's divergent responses to whether courts should consider the Congressional record underlying the 1968 revisions made to Public Law 280[50] in interpreting the meaning of the original 1953 statute. Public Law 280 was a termination era measure designed to provide a half-way point toward termination by subjecting the members of affected Indian tribes to state criminal and civil adjudicatory jurisdiction.[51] Initially Congress implemented this policy without tribal consent as part of an effort to accelerate a termination of the federal trust relationship with such tribes. By 1968, the federal Indian policy shifted. The federal government decried termination and was moving toward a policy of strengthening and fostering a government to government relationship with Indian tribes. The requirements of tribal consent written into the 1968 amendments and the provision for retrocession to the federal government of jurisdiction that the states had already secured were reflections of the new policy direction.[52] In *Bryan v. Itasca County*,[53] Justice Brennan resorted to statements contained in the legislative history of the 1968 amendments to interpret the scope of civil authority vested in the states under the 1953 Act. While such an inquiry constitutes an unorthodox historical inquiry into the drafters' intent, it is probably more reflective of Congress' most recent pronouncement on the issue and therefore more consistent with democratic theory. There is little reason why a democratic society should feel bound by a much older pronouncement from a Congress in session during a long ago abandoned federal policy, when recently Congress has fundamentally altered its approach in ways that clearly impact on, but do not directly repeal or alter, the earlier Congressional judgment.

By contrast, in *Washington v. Confederated Bands and Tribes of the Yakima Reservation*,[54] the Court was faced with divining the answer to a

50. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (§ 7 repealed and reenacted as amended in 1968) (*codified as amended* at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1982)).

51. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 537 (1975); F. COHEN, *supra* note 18, at 175-177.

52. *See* Goldberg, *supra* note 51, at 550.

53. 426 U.S. 373 (1976). The Court held that section 4 of the 1953 Act did not grant states the power to impose taxes on reservation Indians. It characterized section 4(a) as providing for state civil adjudicatory jurisdiction and not civil regulatory powers over reservations. Finding support for this interpretation in the legislative history of the 1968 amendments to this Act, the Court noted:

> It is true . . . that the primary interpretation of § 4 [of the 1953 Act] must have reference to the legislative history of the Congress that enacted it rather than to the history of Acts of a later Congress. Nevertheless, Title V of the 1968 Act is intimately related to § 4 . . . and we previously have construed the effect of legislation affecting reservation Indians in light of "intervening" legislative enactments. Moe v. Salish & Kootenai Tribes, 425 U.S. at 472-75.

Bryan, 426 U.S. at 386-87.

54. 439 U.S. 463, 493-99 (1979). One issue before the Court in *Yakima* was whether Public Law 280 authorized the State of Washington's 1963 assumption of only partial subject matter and geographic jurisdiction over Indian reservations located within the State. In finding the State's unilateral assumption of such jurisdiction valid, the Court relied on the language of section 7 of the 1953 Act. Unlike sections 2 and 4, which commanded certain states to assume criminal and civil jurisdiction over Indian country "to the same extent that such state[s] [have] jurisdiction over" other criminal offenses and civil causes of action, section 7 of the original Act granted other states the option to assume such jurisdiction "at such time and in such manner as the people of the State shall . . . obligate and bind the State to assumption thereof." Even though there was nothing explicit in section 7 that would allow a state to assume less than full criminal or civil jurisdiction, Justice Stewart characterized that statutory language as "critical," while acknowledging in footnote 45 of

question under Public Law 280 to which Congress apparently had not directed much attention in 1953, but as to which it expressly drafted amendatory language to settle in 1968. Nevertheless, Justice Stewart's majority opinion suggested that the language and history of the 1953 statute provided "surer guidance."[55] Certainly, it did provide surer guidance as to what Congress meant in 1953, but should that really be the issue? Justice Brennan's approach in *Bryan* suggests not.

MAINTAINING A BALANCED PERSPECTIVE

Just as legal practitioners need to appreciate the limitations of Native American legal history, practitioners of the discipline of Native American legal history need greater sensitivity to the conventions of the courts and legal practitioners confronted with using such materials. Several troublesome realities confront those concerned with the relevance of their historical work.

The first reality is a simple Machiavellian fact about the nature of federal Indian law. It is a law imposed by a dominant, originally colonial, non-Indian society on a group that today constitutes a relatively weak and defenseless minority. While shaped through bilateral treaty and other negotiations, *relevant* Native American legal history generally must look primarily to conventional non-Indian sources. These sources reflect the will of the dominant colonial authority and the manner in which the federal government established and altered the legal relationships that form the core of the legal history of the regulation of cultural contact between Indian societies and the more newly arrived non-Indian governments. Generally, the relevant question under this colonially derived body of legal doctrine is not what Indian tribes or their governing institutions were doing at a particular time. Instead, the relevant question is how the federal government, and sometimes the states, responded to whatever new legal challenges that the exigencies of Indian policy posed.

Like all legal rules, there are important exceptions to this rule. Sometimes the legal doctrines themselves call for inquiries that demand research into legal norms, institutions, and understandings of the Indian tribes. Two specific examples immediately come to mind. In ascertaining whether Indian tribes retained inherent sovereignty over a particular subject matter, *Oliphant v. Suquamish Tribe*[56] suggests that courts should inquire both into the tribe's behavior and the federal government's position after tribes had established dependency relationships with the United States. For example, research reflecting tribal efforts, particularly among the Five Civilized Tribes, to enforce criminal or other laws against non-Indians or non-members would have great utility in resolving such questions of inherent tribal power.

Similarly, ever since Chief Justice Marshall's classic opinion in *Worces-*

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the opinion that the language of the 1968 amendments might resolve the issue differently for future assumptions of jurisdiction. *Id.* at 497-98 n.46.

55. *Id.* at 497.

56. 435 U.S. 191, 196-206 (1978).

ter v. Georgia the courts have stated they "will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection' and counterpose the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' "[57] Thus, attempting to ascertain the Indian understanding of any treaty subject to construction is absolutely critical—another historical inquiry with direct legal relevance to litigation. Indeed, the use of anthropologists and historians was terribly important to the successful resolution of a number of cases interpreting treaties in the Pacific Northwest reserving to the affected tribes the right to hunt and fish at their "usual and accustomed stations" "in common with" the citizens of the states.[58]

By and large, the simple reality that federal Indian law is understood, is enforced, and seems to constitute the law by which a colonial power subjugated another people into an awkward feudal dependence, indicates a certain diminished relevance for historical inquiries that focus primarily on the evolution of tribal legal traditions. On the other hand, using non-traditional sources for basic historical research on the emergence and evolution of Native American legal traditions, such as the pioneering works of Hoebel,[59] Llewellyn,[60] Reid,[61] and Strickland,[62] could help elevate the perceptions of and approach to federal Indian law. Such basic research could change federal Indian law from a twentieth century anachronistic remnant of our colonial traditions to a body of jurisprudence more conducive to and sympathetic with the cultural preservation, autonomy, and adaptation of evolving Native American tribal institutions. In suggesting that such studies are less relevant, therefore, the author does not mean to condemn such work or the scholars undertaking it, or to suggest that such work is less worthy of attention. Such basic ethnohistorical work certainly advances the state of knowledge in quite the same way that the study of fifteenth century English legal history does. Rather, the author is simply saying that such work is less relevant since it is less immediately useful to most contemporary Indian rights litigation. Such studies are more like basic than applied historical science.

The second, and equally significant reality confronting historians concerned with relevance, is the fact that contemporary Indian litigation is focused on legal issues, not, as is much history, on eras and evolutions. For

57. United States v. Winans, 198 U.S. 371, 380-81 (1905) quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548-56, 582 (1832). *See also* Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 675-76 (1979); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Jones v. Meehan, 175 U.S. 1, 11 (1899); Choctaw Nation v. United States, 119 U.S. 1, 27-8 (1886), for similar expressions of the proper method of interpreting treaty language. For the derivation of these principles, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548-56, 582 (1832).

58. *See e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

59. E. HOEBEL, THE LAW OF PRIMITIVE MAN (1954).

60. K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

61. J. REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT (1976).

62. R. STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

example, how the allotment policy gradually changed over time and where the Cheyenne River Act of 1901[63] fits into the evolution is less relevant to a reservation diminishment case, like *Solem*,[64] than precisely what Congress meant when it enacted the statute in 1901. This point marks an important difference in perspective between applied, relevant Native American legal history and more conventional historical approaches. Scholars of Native American legal history interested in the contemporary relevance of their work simply cannot afford to ignore the constellation of contemporary legal issues that have emerged out of the period they are studying. Of course, that awareness also contains the hidden curse of relevance, the possibility that one's historical objectivity will be colored both by the scholar's political predilections and by modern concerns that have converged to form the contemporary legal question. Ignoring modern relevance, however, offers no better assurance that modern concerns and culture have not clouded one's historical lenses. Therefore, failing to consider the curse of relevance only increases the likelihood that a study will be less relevant to contemporary Native American legal issues—another missed opportunity.

CONCLUSION

Physicists long have been concerned about the potential for inaccuracies in their work caused by Heisenberg's uncertainty principle—the idea that the very process of scientific measurement of the natural world changes that world and colors the data derived from the exploration.[65] Awareness of this principle, however, permits natural scientists to correct their data for introduced measurement error and to attempt more closely to approximate the ultimate, but wholly illusive, goal of uncolored, objectively-discerned knowledge. In many ways, to Native American legal history, the curse of relevance is that it introduces, or more accurately exacerbates, uncertainty. Blind rejection of relevance, however, like blind rejection of measurement error in the natural world, does not advance the state of knowledge. The curse of relevance to Native American legal history remains, whether or not scholars wish to concede it. Only through increased sensitivity to the manner in which the curse of relevance affects the craft can researchers studying Native American legal history perform their equally important roles of advancing basic and applied legal history to illuminate the saga of legal relations between the aboriginal occupants of North America and the European settlers bent on displacing them.

63. Act of May 29, 1908, ch. 218, 35 Stat. 460.
64. 465 U.S. 463 (1984).
65. W. HEISENBERG, THE PHYSICAL PRINCIPLES OF THE QUANTUM THEORY 3, 62-63 (1930).