

OBJECTS IN MIRROR ARE CLOSER THAN THEY APPEAR*

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I. REMEMBRANCE

The words of the Ba'al Shem Tov inscribed at Yad Vashem, the Holocaust Memorial in Jerusalem, remind us that "The key to redemption is remembrance."¹ Remembrance itself is a *mitzvah*, a sacred obligation anchored in repeated scriptural injunctions. Children who become bar and bat mitzvot at age thirteen may learn that the verb *zakhor* (remember) occurs 13 x 13 or 169 times in the Bible and they are taught that this numerology is significant. The word appears "usually with either Israel or God as the subject, for memory is incumbent upon both."² Yet there are crucial differences—as well as significant overlaps—between memory of the past, meaning in history, and the kind of historical inquiry that is largely concerned with accurate chronology and concrete facts. Too often, the term "history" is used to blur or ignore these differences. Indeed, incorrect history and inadequate memory are in and of themselves devastatingly destructive for

* © Aviam Soifer. This title is the warning on the right, sideview mirror of automobiles sold recently in the United States. Steve Wizner pointed out some of the greater implications of this curious phrase to me. The phrase conveys an idea that is strange both as a matter of technology and of ontology. (Is it not possible, and safer, to make objects appear as they are or further than they are—if the phrase is correct in suggesting that objects are what we believe they are?) Cf. "Movement in the Distance Is Larger Up Close," a poem in LAWRENCE JOSEPH, *BEFORE OUR EYES* 66 (1993) (invoking Walter Benjamin's *History's Optic*).

I briefly explored the relationship of law, history, and mirrors in Aviam Soifer, *Beyond Mirrors: Lawrence Friedman's Moving Pictures*, 22 *LAW & SOC'Y REV.* 995 (1988). Now I argue that lack of awareness of what exists behind us is particularly troubling in the context of judicial opinions that deal with Native American legal claims. A short version of this argument will appear as "*The Task of Hearing What Has Already Been Said*": *History and Native American Legal Claims*, 23 *ISRAEL Y.B. HUM. RTS.* 1 (1994).

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¹ It seems fitting to begin with this quotation, which concluded my discussion of the role of "involuntary groups" in Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 *WASH. & LEE L. REV.* 381 (1991). This essay continues that exploration.

² YOSEF HAYIM YERUSHALMI, *ZAKHOR: JEWISH HISTORY AND JEWISH MEMORY* 5 (1989).

those who have endured the gravest wrongs in the past.

To illuminate this point, this Essay considers several recent invocations of history by American judges. It does so in the context of Native American legal claims,³ but its point about the demands and abuse of history has broader implications. My argument is that each of three distinct judicial approaches to the past exemplified by these decisions is seriously flawed. Taken together, however, these cases underscore how claims purportedly derived from history can become a powerful whipsaw. As we will see, these decisions employ history inconsistently, yet with devastating effectiveness. They demonstrate how commonplace it is for judges to make claims from history, while blithely remaining blind to the crucial understandings at the confluence of memory, meaning, and historical accuracy.

Judicial lapses in remembrance are hardly trivial. Indeed, such flaws extend far beyond specific results—the bottom lines—in the three decisions at issue. None of these cases is in itself obviously of great import. Even the two United States Supreme Court decisions appear almost insignificant in their specific outcomes. But the horrors of this century show that even if “[r]esponsibility for a burdened past can justifiably become less preoccupying as other experiences are added to the national legacy,” it remains inestimably important to understand that “like the half-life of radioactive material, there is no point at which responsibility simply goes away.”⁴

II. NATIVE AMERICAN LEGAL CLAIMS

Decisions that undermine Native American legal claims are hardly unusual in our nation's history. Yet three very recent decisions, *Blatchford v. Native Village of Noatak*,⁵ *State v. Elliott*,⁶

³ I generally use the term “Native American,” but I also employ “Indian” when that seems to make historical or stylistic sense. The claims I discuss involve quite different legal matters. They concern, respectively, government benefits, land claims, and sovereignty over hunting and fishing rights.

⁴ CHARLES S. MAIER, *THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY* 15 (1988).

⁵ 111 S. Ct. 2578 (1991).

⁶ 616 A.2d 210 (1992), *cert. denied*, 113 S. Ct. 1258 (1993).

and *South Dakota v. Bourland*,⁷ vividly indicate routine ways in which judges emulate soldiers and settlers in a rush to establish a new “reality on the ground,” a legal *fait accompli* that somehow is said to legitimize unburdening the American landscape of its most longstanding population.

It is a remarkable irony that, at the core of all three judicial opinions discussed in this Essay, we will find the assertion that it is history itself that compels the extirpation of memory, meaning, and precision about the country’s past burdens. Even in our modern (or postmodern) world, measured judicial words still are able to do immeasurable violence to what was and what could be.

That bitter irony is equalled—if not exceeded—when we begin to analyze some techniques that contemporary judges employ to devalue and ultimately to dismiss the weight of words. Justice Antonin Scalia, now joined by his acolyte, Justice Clarence Thomas, likes to insist that there must be strict judicial fidelity to legal texts. Yet when we turn to majority opinions written by Scalia and Thomas respectively, we will see that these judges simply wave away directly relevant texts and language, claiming that they must do so in the service of history.

As part of the Court’s unseemly gallop in the direction of more limited governmental responsibility towards Native Americans—or towards anyone else, for that matter—a majority of the Justices resort to some great spirit of abstract concepts and to dubious claims of implicit past understandings. We will see that the Vermont Supreme Court similarly invokes history. The Vermont version is an even more abstract concept of implicit, cumulative, and undifferentiated past encumbering. In a peculiar kind of symbiosis, these judges assign responsibility to history for the outcomes they obviously must struggle to reach. They purportedly use history to trump texts that point in the opposite direction. Although all three decisions invoke “history,” it will become obvious that in all three memory is made irrelevant, meaning is stretched past the breaking point, and accuracy about the past is rendered entirely irrelevant.

The first decision pays homage to Abstract History, the next to Cumulative History, and the last to Implicit History. *Noatak*

⁷ 113 S. Ct. 2309 (1993).

purports to rely on the logic of history,⁸ *Elliott* on the gathering weight of history,⁹ and *Bourland* on what history the Court claims it can infer.¹⁰ All are entirely unsatisfactory.

In their quest for the compulsion of history, moreover, the judges play fast and loose with legal language and with meaning itself. There seems to be a widespread desire to find a fixed, unitary, and "correct" rule for interpreting language. History must carry all that baggage in these decisions. Unfortunately, these three decisions exemplify the way contemporary American judges tend to seek a unified, generalized vision—and dub it History.

This propensity is particularly ironic in the context of legal claims by Native Americans. It also contrasts sharply with Native American perspectives. Among Native Americans, as Brian Swann put it, "[r]eality is not 'controlled,' no matter on how high a plane. We would do better to talk of reciprocity, balancing, right acting and right telling in the interests of equilibrium."¹¹ It is dangerous to generalize sweepingly. At a minimum, however, qualities such as reciprocity, balancing, right acting, and right telling might be said to encapsulate vital elements of good, or even great, judgment. It is noteworthy, therefore, when we find such qualities obviously absent in contemporary judicial responses to the legal claims of Native Americans.

A. NATIVE VILLAGE OF NOATAK: HISTORY AS ABSTRACTION

Judicial myopia about history in the context of Native American rights is itself a tragic old story.¹² The recent case of *Blatchford*

⁸ See *infra* notes 14-24 and accompanying text.

⁹ See *infra* notes 39-46 and accompanying text.

¹⁰ See *infra* notes 64-77 and accompanying text.

¹¹ SMOOTHING THE GROUND: ESSAYS ON NATIVE AMERICAN ORAL LITERATURE xi (Brian Swann ed., 1983). Swann quotes Lame Deer's explanation: "We Indians live in a world of symbols and images where the spiritual and the commonplace are one." *Id.* at xii (quoting JOHN FIRE ET AL., LAME DEER, SEEKER OF VISIONS 101 (1972)).

¹² See generally ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3; Rennard Strickland, *Dances with Lawyers: Wolves, Judges, and Other Medicine Men*, 69 TEX. L. REV. 995 (1991) (reviewing WILLIAMS, *supra*). For a snappy yet careful overview, see PETRA SHATTUCK & JILL NORGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM (1991).

*v. Native Village of Noatak*¹³ proves, however, that a story need not be old to be tragic, comic, or both. In this seemingly dry, technical decision about the sovereign immunity of state governments, Native American tribal identity became entangled in the loose ends of one of the most abstract and convoluted categories in American constitutional law. In holding that a native village could not sue Alaska, Justice Scalia's majority opinion began by conceding that "Indian tribes are sovereigns."¹⁴ Scalia had to admit that the Court was not relying on the text of the Eleventh Amendment, but rather on "the presupposition of our constitutional structure which [the Eleventh Amendment] confirms."¹⁵ (This reliance on untethered structural presuppositions is striking in itself, but even more so because it emerged from the word processor of a Justice who insistently claims to be a strict textualist.) Yet our concern is not with a mystical form of Eleventh Amendment doctrine. What is significant about *Native Village of Noatak* is how the Court hacked through a basic historical riddle: the Gordian Knot of the legal status of Native American tribes.

From the decisions of Chief Justice John Marshall through the Court's most recent precedents, the sovereignty of tribes in North America has been anomalous, inconsistent, and remarkably malleable. Pronouncements on the subject by all the branches of the federal government, and by both federal and state courts, have fluctuated with changing demands made by the majority culture.¹⁶

¹³ 111 S. Ct. 2578 (1991). Justice Scalia wrote for the majority and Justice Blackmun dissented, joined by Justices Marshall and Stevens.

¹⁴ *Id.* at 2581.

¹⁵ *Id.* The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. For the remarkably convoluted history of the amendment, see JOHN ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987). That Scalia and his fellow textualists practice a peculiar and an inconsistent brand of originalism is obvious to any reader of the Court's opinions, but the point is captured succinctly in George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 *YALE L.J.* 1297 (1990); and Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 *U. PA. L. REV.* 1333 (1992).

¹⁶ Milner Ball provides a wonderfully clear and convincing demonstration of inconsistencies and obtuseness within the "shabby tales composed by the Supreme Court," Ball, *supra* note 12, at 139, as the Justices repeatedly have manipulated legal doctrine to reassert the apparent paradox that "the Court's law is that might is the basis of federal power over Indian nations," *id.* at 137.

Today, however, it is allegedly again clear that surviving Native American tribes did retain their sovereignty; tribal self-determination is again repeatedly said to be an overriding value.¹⁷

The puzzle presented in *Noatak*, therefore, was whether renewed legal sensitivity about tribal sovereignty involves recognition of sovereignty akin to that of foreign states or sovereignty that is analogous to that of the fifty states within the federal union.¹⁸ This categorization was crucial: Eleventh Amendment doctrine has it, on the one hand, that the amendment shields states within the United States from suit by foreign sovereigns. On the other hand, any state may sue another state without confronting an Eleventh Amendment barrier.¹⁹ The suit came to the Court from as far away as possible—the Native Village of Noatak is located on the Bering Strait—and the Justices got nowhere near either the practical realities of the case or any relevant history.

The suit arose when Alaska reneged on a 1980 statute that granted every Native Village \$25,000.²⁰ On the advice of Alaska's Attorney General, however, the legislature later expanded the recipient class, thereby diluting each Native Village share so that Noatak never received its full initial allotment.²¹ The case

¹⁷ See generally Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984). For example, the Court celebrated self-determination in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) ("These Acts reflect Congress' desire to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.' ") (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).

¹⁸ *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991).

¹⁹ Compare *Monaco v. Mississippi*, 292 U.S. 313 (1934) (holding Court has no jurisdiction over suit brought against state by foreign state) with *South Dakota v. North Carolina*, 192 U.S. 286 (1904) (holding Court has jurisdiction over action brought by one state against another). For the current doctrine and background of the legal tangle surrounding the "anachronistic fiction" of sovereign immunity, see *Oklahoma Tax Comm'n*, 498 U.S. at 514 (Stevens, J., concurring); ORTH, *supra* note 15; Vicki C. Jackson, *Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

²⁰ *Noatak*, 111 S. Ct. at 2580.

²¹ *Id.* Noatak was joined by two other tribal entities in its suit. The State Attorney General had advised that the 1980 statute, in specifying Native Villages for beneficial treatment, violated equal protection. *Id.* Though Alaska has run into equal protection difficulties in attempts to distribute some of the bounty from the oil pipeline to citizens, on the basis of their relative longevity within the state, *Zobel v. Williams*, 457 U.S. 55 (1982), the Attorney General's opinion here seems at least dubious. It would not have been difficult, for example, to prove through the totality of circumstances the kind of past discrimination

presented an array of complicated jurisdictional issues,²² but the majority ignored those in order to answer with a simple, sweeping, surprising assertion: Native American tribes are like foreign nations.²³ Such tribes are Native and American; they are under the plenary power and alleged protection of the federal government; and their members are all citizens of the United States; but the Court chose to see a tribe as a tribe that is more like Monaco than Montana.

What appealed to Scalia and his colleagues, of course, was that the Court's stark choice immunized states against tribal claims. The Court's holding about tribal identity was anything but the product of enlightened revisionist history. Rather, Scalia offered only a pseudo-formalist choice, purportedly premised on the original intent of the constitutional framers: "Just as in *Monaco* with regard to foreign sovereigns, so also here with regard to Indian tribes, there is no compelling evidence that the Founders thought such a surrender [of immunity] inherent in the constitutional compact."²⁴ But this is remarkably abstract metaphysics. There is no "compelling evidence" about an issue no one could have imagined at the time.

As Judge John T. Noonan, Jr. held for the lower court in the case, Indian tribes clearly were treated as separate sovereigns long before 1789.²⁵ They could be found in every original state and relations with them were sensitive and dangerous. Moreover, when a major political crisis arose over Georgia's defiance of the Court in

needed to defend the statutory plan if any plaintiff actually had been able to overcome jurisdictional difficulties and wished to launch an equal protection attack.

At the most basic level, the treatment of Alaska's native peoples—who welcomed white settlers—as directly analogous to "conquered" tribes in the "lower 48" states flies in the face of history, despite the lumping together of all Native Americans for purposes of federal government control upheld in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). Moreover, recently the Court repeatedly has upheld differential treatment of Native Americans quite readily, arguing that such classifications are political, not racial, and therefore need only be rationally related to some acceptable governmental purpose. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535 (1974) (holding no racial discrimination in Indian preference in employment); *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979) (holding no equal protection violation in inconsistent state jurisdiction over Indian territory).

²² *Noatak*, 111 S. Ct. at 2580.

²³ *Id.* at 2581-82.

²⁴ *Id.* at 2582.

²⁵ *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1162 (9th Cir. 1990).

the context of the Cherokee Removal policy during Andrew Jackson's presidency, Chief Justice John Marshall explicitly rejected the idea that tribes were foreign states.²⁶ Marshall held that an Indian tribe might be a nation, but that such a tribe "is not a foreign state, in the sense of the constitution."²⁷ Marshall directly denied the claims of state sovereignty Georgia had pursued so vigorously as to threaten the survival of the new nation.²⁸ *Noatak*, by contrast, is so committed to state sovereignty that the decision simply turns somersaults with the Marshall opinions that have been the bedrock of American Indian law for over 150 years. Scalia set out to create his alternate legal universe as if these elemental precedents did not exist. The Marshall Court made clear that the Constitution could not "comprehend" Indian tribes within the "general term 'foreign nations.'"²⁹ John Marshall, moreover, surely was not committed to finding some legal mask for relegating Indian claims to the unsympathetic mercies of state court systems.

It is therefore a fundamental irony that the *Noatak* Court blithely plunged into the flood of legal developments over several centuries with eyes closed tight against the fact that, in those precedents, Indian tribes have been deeply, tragically *sui generis*. The Justices attempted to float free, using only a flimsy syllogism. Scalia simply assumed that the relevant inquiry involves only the relative role of the states, foreign nations, and tribes at the time of the constitutional convention. It is plausible to imagine, according to Scalia, that the states surrendered sovereign immunity on a theory of mutuality in 1789.³⁰ Yet Scalia claimed that "[t]here is

²⁶ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831).

²⁷ *Id.* at 17-18. In this decision, and again in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Marshall emphasized the relationship between the federal government and the Indian tribes. Marshall's approach as well as his language cannot be reconciled with that of the *Noatak* Court's embrace of Alaska's state sovereign immunity claims. Instead, Marshall constructed the "dependent domestic nations" categorization of tribal relationships to the federal government that has dominated, and haunted, Indian law ever since. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. For a careful study of the background of the Georgia cases, see Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

²⁸ *Cherokee Nation*, 30 U.S. (5 Pet.) at 20-21.

²⁹ *Id.* at 19. Therefore, the Court held, Indian tribes could not invoke the United States Supreme Court's original jurisdiction under Article III, which foreign nations clearly could invoke. *Id.* at 20.

³⁰ *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2582 (1991).

no such mutuality with either foreign sovereigns or Indian tribes.³¹ *Ergo*, Indian tribes are like foreign nations.

At first glance, the holding that there is tribal sovereignty analogous to that of foreign nations might seem a great victory for tribal identity. If it were taken seriously and followed in other contexts, it would have important unanticipated implications, for example, in the realms of international law and human rights guarantees. The analogy to foreign nations serves to underscore a whole series of basic contradictions in the legal status of Native Americans. Within the logic of *Noatak*, for example, tribal Indians have had a unique form of dual citizenship thrust upon them. As we will see, however, the Court's approach in *Noatak* actually is but one in a set of extremely statist decisions that have emerged recently when the Court deals with rights claimed by Native Americans, either as individuals or as members of groups.³² The Court's belated rediscovery of tribal sovereignty, deemed to be akin to foreign sovereignty in *Noatak*, seems merely a stepping stone toward further shrinkage of the legal protections of Native Americans. This is sovereignty without authority. It is abstract history without respect for precedent. Under *Noatak*, Native Americans are doubly alienated.³³

Even when the Justices do recognize tribal authority, they re-

³¹ *Id.* at 2582-83. The specific state sovereign immunity issue had been discussed earlier only in scattered dicta, largely because the prevalent theory was that the federal government had plenary power over the tribes, including the right and the duty to sue states on their behalf, thus overcoming any Eleventh Amendment barrier. A 1966 statutory change explicitly altered federal court jurisdiction to give tribes the ability to sue by themselves, but the Court in *Noatak* held that Congress had not been adequately explicit to lift the states' Eleventh Amendment barrier. *Id.* at 2584-86.

³² When Native American religious claims were at stake, for example, Scalia again wrote for the Court and purported to recognize the "relative disadvantage" of minority religious practices. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 890 (1990). Yet he relegated such religious claims exclusively to protection through the political process, proclaiming this to be the "unavoidable consequence of democratic government." *Id.*

³³ See *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (holding foreign citizens not entitled to protection from kidnapping by federal government); VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984) (reviewing history of Indian self-government); Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of American Indian Law*, 31 ARIZ. L. REV. 202 (1989) (discussing "fictional" history of Indian law).

emphasize Congress's plenary power over tribes.³⁴ To be sure, it is not easy to classify tribal groups or to categorize the range of their authority. As a legal entity, the tribe has not been respected as "a distinct political society, separated from others, capable of managing its own affairs and governing itself"³⁵ since the days of John Marshall. Even Marshall's idea of a "domestic dependent nation"³⁶ marked an unwieldy, ambiguous compromise. But if ever freedom of association should have constitutional clout, it ought to be in cases brought by remaining Native American tribes that assert tribal rights.³⁷ Yet in *Noatak*, the Court raced high enough up the ladder of legal abstraction to ignore centuries of history. From that height, it was relatively easy to proclaim Native American tribes to be akin to foreign nations without thinking about possible implications.³⁸ Centuries of development, and the

³⁴ See, e.g., *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (holding, in a unanimous decision, that a state may not tax tribal members but, despite longstanding practice, may prospectively tax sales by tribal members to non-members); *Duro v. Reina*, 495 U.S. 676, 684 (1990) (holding "inherent sovereignty of the Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (rejecting individual sex discrimination claim against tribe on jurisdictional ground, holding that Indian Civil Rights Act of 1968 protects tribal sovereignty but emphasizing Congress's plenary power to override tribal authority if it sees fit). Ironically, in *Hodel v. Irving*, 481 U.S. 704, 718 (1987), the Court unanimously held that Congress's plenary power did not extend to a good faith effort to deal with a serious, intractable problem: the "extreme fractionation of Indian lands." Although the Court conceded that the congressional plan would benefit all members of the tribes, and that the fractionation problem was a product of the "disastrous" federal allotment policy and would be compounded over time, the Justices determined that the right of individual property holders to pass on even de minimus property holdings was so vital as to invalidate the statute on constitutional grounds.

³⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

³⁶ *Id.* at 17.

³⁷ I make an extended argument for redefining and recognizing the importance of such a right in a book I am finishing, which has the working title, *KEEPING COMPANY: THE SUBSTANCE OF PLURALISM IN AMERICAN LAW AND HUMANITIES* (forthcoming).

³⁸ Part of the problem, of course, is that there may not be any implications in a Court that seems little concerned about consistency even within contemporary decisions. In *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 249 (1985), for example, the Court simply proclaimed that tribes are not akin to foreign nations for purposes of invoking the political question doctrine. See generally David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A. L. REV. 759 (1991) (arguing that law separating Indians and non-Indians involves a suspect classification, but that tribal sovereignty means that equal protection has "a special and different meaning in Indian country"); a response by Carole Goldberg-Ambrose, *Not Strictly Racial: A Response to "Indians as Peoples,"* 39 U.C.L.A. L. REV. 169 (1991); and Williams's reply, David C. Williams, *Sometimes Suspect:*

Court's own building-block decisions about tribal status, simply landed in the Justices' conceptualist dustbin.

B. *STATE V. ELLIOTT*: HISTORY AS CUMULATIVE

Just as formalistic manipulation of categories can be used to defeat tribal legal claims, so can purportedly hard-boiled, contemporary policy judgments. The Vermont Supreme Court, for example, recently denied the aboriginal rights of Abenaki Indians to fish in the streams of their ancestral homelands without state licenses.³⁹ The case arose when Native Americans staged a "fish-in" demonstration. The defendants were members of a group of thirty-six people whose defense against charges of fishing without a license invoked "aboriginal rights," premised on their membership in a viable tribe that had existed from "time immemorial" and that had never ceded its land.⁴⁰

The Vermont Supreme Court succinctly and unanimously rejected the Native American claims. The core of Justice Morse's opinion for the court was that the Indian claims had been voided by "the increasing weight of history."⁴¹ As the court reversed a trial court decision that had dismissed the criminal charges against the Abenaki, the justices maintained that it simply did not matter that the Abenaki had never ceded their claims by treaty. The court held that the extinguishment of Native American claims occurred, not through any discrete events, but rather via "the cumulative effect of many historical events."⁴²

The cumulative events the court relied upon involved the period preceding Vermont's statehood, which the court conceded was such "a confusing era"⁴³ that the court refused to decide whether the government of Vermont did or did not enjoy legal sovereignty over the land in question.⁴⁴ Nonetheless, the alchemy of teleological

A Response to Professor Goldberg-Ambrose, 39 U.C.L.A. L. REV. 191 (1991).

³⁹ *State v. Elliott*, 616 A.2d 210 (Vt. 1992), cert. denied, 113 S. Ct. 1258 (1993).

⁴⁰ *Id.* at 211. Under Vermont law, there is an exception to fishing license requirements for persons who fish on their own property. *Id.* at 211 n.1.

⁴¹ *Id.* at 218.

⁴² *Id.*

⁴³ *Id.* at 221.

⁴⁴ *Id.* at 220.

faith transformed old wrongs. Progress, or at least a long line of dubious white land grabs and unsubstantiated legal maneuverings, obliterated clear, longstanding aboriginal rights.⁴⁵ The court simply inferred that the early white settlers of Vermont—in the admitted absence of any explicit legal extinguishment of aboriginal title—eliminated Native American claims through the simple expedient of cumulatively wishing to do so. Moreover, specific attention to history might undercut the basic ideal of treating everyone the same. As the local state attorney said in celebration of the decision: “We think this affirms our position all along . . . that all Vermonters are equal before the law.”⁴⁶

C. SOUTH DAKOTA V. BOURLAND: HISTORY AS IMPLICIT

The United States government and the Sioux Nation signed the Fort Laramie Treaty in 1868. This was their second effort to end the Powder River War, which began when the United States Army came to the aid of settlers who claimed sovereignty over the Great Plains. Under the 1868 treaty, the Sioux agreed to remain within the “Great Sioux Reservation,” some twenty-six million acres “set apart for the absolute and undisturbed use and occupation” by the

⁴⁵ The Vermont Supreme Court described the lower court’s “exhaustive effort” that produced “extensive and meticulous findings” and determined that the Abenaki had settled in northwest Vermont by 9300 B.C. and had occupied that area as “an intact tribe” from that date to the present. *Id.* at 214. But the supreme court decided that voluminous genealogical, ethnological, and archeological evidence of an unbroken tribal presence faded away before the dubious claims of squatters and adventurers. Joseph W. Singer does a fine job of documenting how bizarre the court’s interpretation of early Vermont history really is in Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994); see also MICHAEL A. BELLESILES, *REVOLUTIONARY OUTLAWS: ETHAN ALLEN AND THE STRUGGLE FOR INDEPENDENCE ON THE EARLY AMERICAN FRONTIER* (1993).

For anthropological and legal critiques of another attempt to wrestle with a similar, longstanding clash of cultures in a contemporary courtroom, see *Identity in Mashpee*, in JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 277 (1988); Gerald Torres and Kathryn Milun, *Translating Yonnonondio by Precedent and Evidence: the Mashpee Indian Case*, 1990 DUKE L.J. 625.

⁴⁶ *Vermont Court Says History Voids Land Claims of Abenaki Indians*, N.Y. TIMES, June 18, 1992, at D23.

Sioux.⁴⁷ The United States also agreed that non-Indians would not "ever be permitted to pass over, settle upon, or reside in" the Great Sioux Reservation.⁴⁸ By 1889, however, Congress had decided to remove a great deal of land from the existing reservation and to subdivide the remaining territory into several reservations.⁴⁹ Moreover, by then Congress already had superimposed the allotment policy of the Dawes Act of 1887, which sought explicitly to break up the tribal structure, transform Indian land into individual fee simple parcels, establish the federal government as trustee for the bulk of the land, and gradually permit resale of land to non-Indians.⁵⁰

Over a century ago, nonetheless, even the Supreme Court recognized that it was tragically clear that the "very weakness and helplessness" of the Indians actually came about "due to the course of dealing of the Federal Government with them."⁵¹ The Court also emphasized that the federal government owed the Indians a

⁴⁷ Treaty with the Sioux Indians, Apr. 29, 1868, U.S.-Sioux Tribes, 15 Stat. 635, 636. Despite a requirement in that treaty that there be no further cession of lands without formal written approval "by at least three-fourths of all the adult male Indians," *id.* at art. XII, within a decade Congress explicitly broke the 1868 treaty. In 1877, Congress formally adopted a purported agreement signed by 10% of the Sioux men. The 10% who "agreed" also gave up hunting rights in some unceded land in exchange for the rations desperately needed for survival. In the wake of the ferociously severe winter of 1875-76, the Battle of Little Big Horn and the later slaughter of the Sioux at Wounded Knee, some of the Indians—denied even subsistence rations by official congressional policy and deprived of all their horses and weapons—gradually relinquished their claims to the Black Hills and other land. The bare bones of this legal and social history is set out in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 377-81 (1980).

⁴⁸ Treaty with the Sioux Indians, Apr. 29, 1868, U.S.-Sioux Tribes, 15 Stat. 635, 636.

⁴⁹ Act of Mar. 2, 1889, ch. 405, 25 Stat. 888. Of those rights guaranteed the Sioux under the 1868 Fort Laramie treaty, this 1889 Act now guaranteed only those "not in conflict" with the new statute. *Id.* § 19, 25 Stat. at 896.

⁵⁰ The General Allotment (Dawes Severalty) Act of 1887, ch. 119, 24 Stat. 388, was a reform measure premised on the assumption that, because of their tribal units, the Indians lacked what Dawes described as the "selfishness which is at the bottom of civilization," *quoted in* ANGIE DEBO, *AND STILL THE WATERS RUN* 21-22 (1940) (recounting liquidation of civilized Indian tribes). Its story is told well in D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* (Francis P. Prucha ed., 1973).

⁵¹ *United States v. Kagama*, 118 U.S. 375, 384 (1886) (upholding the Major Crimes Act of 1885, removing jurisdiction over seven criminal offenses from the tribes).

duty of "care and protection."⁵² It followed, said the Court, that "technical rules" ought not to be used against Indian claims; rather, equitable principles and "that larger reason which constitutes the spirit of the law of nations" provided a legal basis to favor the substance of Indian claims despite technical barriers.⁵³

James Bradley Thayer, a renowned Brahmin and Harvard Law School professor, in 1891 described for the educated general readership of the *Atlantic Monthly* a flood of abuses and misconceived efforts to aid Indians, whom he considered "A People Without Law."⁵⁴ Thayer argued that now the federal government owed an affirmative duty. "The mere neglect or refusal to act is itself action," Thayer explained, "and action of the worst kind."⁵⁵ Thayer invoked history to demolish the very notion that neutrality or neglect could constitute fairness in the context of governmental dealings with Indian tribes. He wrote against the vivid backdrop of devastation wrought through past encounters by government officials with the Indians.

Litigation by some members of the Sioux Nation to gain compensation for the undisputed abrogation of the Fort Laramie Treaty by Congress and the seizure of their lands in the Black Hills has dragged on since 1920. The latest—but surely not the last—round of litigation culminated in *United States v. Sioux Nation of Indians*.⁵⁶ In *Sioux Nation*, Justice Blackmun's majority opinion held that Congress could constitutionally waive the *res judicata* effect of a prior Court of Claims decision and thereby allow the Sioux to sue.⁵⁷ For our purposes, what is striking is Rehnquist's

⁵² *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). For further details about the legal entanglements of the Choctaw, who had been slaveholders and who aligned themselves with the losing side in the Civil War, see Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 266-68 (1987).

⁵³ *Choctaw Nation*, 119 U.S. at 28.

⁵⁴ James Bradley Thayer, *A People Without Law* (pts. 1 & 2), 68 ATLANTIC MONTHLY 540, 676 (1891).

⁵⁵ *Id.* at 678.

⁵⁶ 448 U.S. 371 (1980). The interesting technical and constitutional aspects of Justice Blackmun's majority opinion, allowing the new judicial review on the merits, and then Justice Rehnquist's vigorous dissent, need not concern us here. In addition to the majority and dissenting opinions, Justice White filed a single-paragraph opinion concurring in part and concurring in the judgment. *Id.* at 424 (White, J., concurring).

⁵⁷ *Id.* at 407.

strong objection to Justice Blackmun's reliance on "revisionist historians" and on "a view of the settlement of the American West which is not universally shared."⁵⁸

To Rehnquist, it was somehow shocking that the majority used history "not universally shared." Rehnquist seemed upset primarily because he believed that the Court and Congress had been overly sensitive in response to the long history of depredations against the Sioux.⁵⁹ Rehnquist insisted that while the Government "undoubtedly" employed "greed, cupidity, and other less-than-admirable tactics . . . during the Black Hills episode," it also was significant that "the Indians did not lack their share of villainy either."⁶⁰ Rehnquist set out to correct the "stereotyped and one-sided impression" created by the majority by pointing out that different historians take different positions.⁶¹ Rehnquist then asserted, "This is not unnatural, since history, no more than law, is not an exact (or for that matter an inexact) science."⁶² Even this summary—a remarkably tangled sentence that employs a quadruple negative—was not sufficient to put history in its proper place.

Instead, Rehnquist felt obliged to conclude his angry dissent with another curious historiographic reflection: "But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: 'Judge not, that

⁵⁸ *Id.* at 435 (Rehnquist, J., dissenting).

⁵⁹ *Id.*

⁶⁰ *Id.* To bolster his point, Rehnquist ripped out of context a quotation by the historian Ray Billington in a National Park Service guidebook, as is clear even from the paragraph Rehnquist quoted. On this subject, I benefitted greatly from a student paper by Joseph Alexander, Jr., class of 1993, Boston University School of Law. Rehnquist went on to quote an appalling generalization in SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 540 (1965), in which Morison said of the Plains Indians, "They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching." *Sioux Nation*, 448 U.S. at 437. Rehnquist appeared to endorse the accuracy of Admiral Morison's account. To be charitable, however, perhaps Rehnquist simply sought to demonstrate that historians disagree.

⁶¹ *Sioux Nation*, 448 U.S. at 435 (Rehnquist, J., dissenting). Rehnquist could not resist a snide distinction between historians who take different positions—those who are "not writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees,"—and unspecified other historians who are exactly that venal in Rehnquist's view. *Id.*

⁶² *Id.*

ye be not judged.'⁶³ To draw such a stark dichotomy between historical and legal matters in the context of the Sioux case was noteworthy in itself. The paradox of Rehnquist's effort to undercut judging within the process of adjudication is startling. In a sense, it encapsulates why lack of remembrance is so devastating in the judicial context. Weirdly, Rehnquist here seems to jettison the very idea of legal precedent. The wound done to justice is clarified starkly by Rehnquist's attempt to segregate entirely judicial and historical functions.

When the Supreme Court revisited the Fort Laramie Treaty and its long and convoluted legal aftermath a few years later in a different and less dramatic context, historical accuracy simply washed away entirely. If judges ignore history at their peril, they hardly compensate by making up history as they go. Even a great desire to embrace winners' history ought not to permit what purports to be implicit history to trump the explicit historical record. In *South Dakota v. Bourland*,⁶⁴ Justice Thomas's majority opinion held that a series of Federal Flood Control Acts in the 1940s and 1950s deprived the Sioux not merely of still more of their trust lands, but also of the power to regulate hunting and fishing by non-Indians within the reservation.⁶⁵ The Tribe had decided it would no longer allow non-Indians to hunt deer on the sole basis of their South Dakota hunting licenses. Instead, the Tribe now sought to regulate the hunting itself, and to do its own licensing of non-Indians on reservation lands taken for flood control purposes by the federal government.⁶⁶

To the *Bourland* majority, the *purpose* of the relevant federal legislation—which nowhere even mentioned abrogation of Indian sovereignty over hunting and fishing—was not decisive. It was not even relevant. Instead, Thomas emphasized that “the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control.”⁶⁷ This, of course, is circular reasoning. The effect was not that effect until the Court so legitimized it in this opinion. The Court's logical legerdemain here—its emphasis on effect and its

⁶³ *Id.* at 437.

⁶⁴ 113 S. Ct. 2309 (1993).

⁶⁵ *Id.* at 2315-16.

⁶⁶ *Id.* at 2314.

⁶⁷ *Id.* at 2318.

view that congressional purpose simply was irrelevant—is even more striking because it contrasts so starkly with the Court's repeated insistence over the past several decades that a demonstration of discriminatory purpose is a necessary prerequisite to proof of an equal protection violation.⁶⁸ Effect will not suffice to prove constitutional discrimination, but it is adequate to remove the jurisdiction of what *Noatak* had recently emphasized was another sovereign. The blatant overriding of tribal sovereignty in *Bourland* was based entirely on unwritten, implicit practices.

This is particularly ironic against the backdrop of the Court's concession that "pursuant to its original treaty with the United States, the Cheyenne River Tribe possessed both the greater power to exclude non-Indians from, and arguably the lesser-included, incidental power to regulate non-Indian use of, the lands later taken for the Oahe Dam and Reservoir Project."⁶⁹ That the greater power includes the lesser power is a favorite trope of the conservative wing of the Court. Therefore, such a statement was ominous even when it initially appeared to favor tribal control. The concept quickly was inverted and used against the Sioux. Premising his claim on two shaky recent precedents, Thomas wrote that "when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of exclusive use and occupation of the conveyed lands."⁷⁰ Thomas then administered the *coup de*

⁶⁸ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding minority set-aside invalid because no identified earlier racially discriminatory purpose had been specified); *Washington v. Davis*, 426 U.S. 229 (1976) (holding invidious discrimination must be traceable to a racially discriminatory purpose). There has been considerable discussion of this doctrinal development over the past two decades. For a summary of that literature and my own critique, see Soifer, *supra* note 1.

⁶⁹ *South Dakota v. Bourland*, 113 S. Ct. 2309, 2316 (1993).

⁷⁰ *Id.* Thomas relied on *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) and *Montana v. United States*, 450 U.S. 544 (1981). For a devastating critique of the sharply-divided decision in *Brendale*, and of its relationship to *Montana*, see Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

Thomas's reliance on *Montana* is particularly illogical and directly undercuts the legal claim he makes about what was implicit in the 1940s. *Montana* marked a great departure from earlier precedent. Thomas himself acknowledged this elsewhere within *Bourland*. He even criticized the dissenters for their failure to recognize the new reality in federal Indian law created by *Montana* when he complained that the dissent "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore *not* inherent." *Bourland*, 113 S. Ct. at 2320 n.15 (citation omitted) (quoting *Montana*, 450 U.S. at 564). *Bourland's* use of *Montana* as a

grace. He proclaimed, "The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others."⁷¹

By this logic, there is virtually nothing left of tribal sovereignty. Congress has plenary power. This greater power necessarily includes implicit power to abrogate all lesser tribal powers whenever Congress wishes. And, according to this bizarre logic, the tribe should have understood, many years prior to this judicial proclamation of a radically new doctrine, that they were giving away all lesser tribal power when they yielded to governmental demands for land under the Flood Control Act of 1944.

If this logic were not faulty enough, the majority soon made its position even less defensible. Congress had reserved limited land-use rights for the tribe. Somehow this protection of tribal rights supported the repeal of all other rights by implication. Thomas put it bluntly: "When Congress reserves limited rights to a tribe or its members, the very presence of such a limited reservation of rights suggests that the Indians would otherwise be treated like the public at large."⁷² This is a striking example of the Power of the Initial (Legal) Presumption. Here the presumption works with devastating effectiveness against any and all tribal claims because it simply assumes that Indians are in no way special historically. Although a tribe may be akin to a foreign nation under *Noatak*,⁷³ it and its members are "like the public at large" unless Congress

substitute for history is a bizarre version of *nunc pro tunc*.

The Court's willingness in *Bourland* to play fast and loose with tribal sovereignty over property stands in bitter contrast to the constitutional reverence for individual control over property articulated in *Hodel v. Irving*, 481 U.S. 704, 716 (1987). In *Hodel*, the Court deemed one's right to pass on property to heirs to be similar to the right to exclude others, which the Court proclaimed "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). *Hodel* invalidated a 1983 federal statute that allowed tiny fractions of property tracts to escheat to tribes, although the Court conceded that "fractionation" of individual Native American land holdings has become "a serious public problem," *id.* at 718; that encouraging consolidation "is a public purpose of high order," *id.* at 712; and that "consolidation of Indian lands in the Tribe benefits the members of the Tribe," *id.* at 715.

⁷¹ *Bourland*, 113 S. Ct. at 2316. The Court did not reach the question of whether a different result might follow were the government's greater power said to imply the loss of lesser Indian power over "a 'closed' or pristine area" or in other contexts. *Id.* at 2316 n.9.

⁷² *Id.* at 2319.

⁷³ See *supra* notes 14-38 and accompanying text.

explicitly states otherwise as a matter of largess.⁷⁴

Thomas gave lip-service to the standard principle that “ ‘statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’ ”⁷⁵ Over 150 years ago, the Court said that Indian occupancy rights were “as sacred as the fee simple of whites,”⁷⁶ and that Indian tribes retain a “right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government.”⁷⁷ The flamboyant presumptions and spurious logic of contemporary decisions such as *Noatak* and *Bourland* turn older ideas and precedents upside down. To be sure, the ongoing conquest of Indian lands—and the often brutal collaborative actions by Congress, the Executive, and the courts—hardly heeded the words of early judicial decisions that sought to protect Indian legal claims. Surely this harsh historical reality does not excuse judges today who play fast and loose with precedents and with purportedly logical constraints. If anything, past judicial complicity in outrages perpetrated against Native Americans ought to make today’s judges particularly sensitive to historical claims. Yet Abstract History, Cumulative History, and Implicit History all seem to flow together in the three decisions we considered. At their confluence, history is, in fact, not relevant.

CONCLUSION

The careless, perhaps even cynical manipulation of foundational words and past deeds in these three contemporary opinions contrasts starkly with the power of words and the great weight of the past articulated in Native American cultures. That tradition

⁷⁴ *Bourland*, 113 S. Ct. at 2319.

⁷⁵ *Id.* at 2316. This is boiler-plate language that stretches back for more than a century. Thomas quoted *Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 693 (1992), which quoted older decisions for the idea. Other citations he omitted would have emphasized both the longevity and the respectability of the idea that, in construing statutes and treaties, “[t]he language used in treaties with the Indians should never be construed to their prejudice,” as Chief Justice John Marshall put it in the famous decision, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

⁷⁶ *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

⁷⁷ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

emphasizes "the rich complexity of meanings"⁷⁸ in traditional American Indian narratives. Karl Kroeber and other authors in his compilation convincingly make the case that "[i]t is our scholarship, not Indian literature, which is 'primitive' or undeveloped."⁷⁹

To understand the tremendous and tragic gap exemplified in these judicial opinions, it is hardly necessary to develop expertise in American Indian literary art, for example, or in anthropology. Moreover, one surely must be wary of the familiar tendency to romanticize some mythic Noble Savage. Yet this brief legal review of undramatic recent decisions concerning Native Americans emphasizes how lacking in nuance—indeed how primitive—contemporary judicial approaches to history, meaning, and accuracy actually are.

All these judges claim to rely on history, but they all betray a failure to remember. Whether tragedy or farce, the different judicial invocations of history demonstrate law-office history at its worst. The judges not only fail to comprehend the meaning of history. They are also strikingly inept in their consideration of the history of meaning. The lack of understanding that is so clear and the correlative denigration of the need for mutual translation in these decisions demonstrate that our mainstream legal culture has gleaned little from the nation's long history of partial justice toward Native Americans. If we have learned anything from our past mistakes, it may be an urge to repeat them exactly.

To rely on history in the cause of violence entails willingness to pursue a gruesome curse. As Nobel Prize-winning poet Joseph Brodsky said about bloodshed in the Balkans, "Whenever one pulls the trigger in order to rectify history's mistakes, one lies. For history makes no mistakes, since it has no purpose."⁸⁰ But it is radically different when we consider history in the context of the legitimized force—and the legitimating functions—of those

⁷⁸ Karl Kroeber, *An Introduction to the Art of Traditional American Indian Narration*, in *TRADITIONAL LITERATURES OF THE AMERICAN INDIAN: TEXTS AND INTERPRETATIONS* 1, 8 (Karl Kroeber ed., 1981). Kroeber and the other authors in this compilation explore the interworking of texture, text, and context within American Indian oral traditions, and they probe the complexity of any translation.

⁷⁹ *Id.* at 9.

⁸⁰ Joseph Brodsky, *Blood, Lies And the Trigger Of History*, N.Y. TIMES, Aug. 4, 1993, at A19.

remedies that judges have the power either to impose or to reject. Judges ought to be held to a higher standard than soldiers in the intertwined matters of history and justice.

Indeed, history should be a constant concern for those who judge. To abuse or ignore history is to forget a crucial link. Finding out what happened and why should be crucially relevant when judges consider Native American legal claims. Legal amnesia is always unjust. But injustice is compounded—and becomes almost unbearably poignant and powerful—when failures of memory, meaning, and history are invoked to brush away the claims of Native Americans.⁸¹ Native Americans as a group have been victimized by past legal machinations more than most people in the United States. No ahistorical antiseptic can camouflage the wound. No judicial cleansing will eliminate the stain.

⁸¹ Judicial writing that assaults the past in the name of history, such as the opinions discussed in this Essay, might be the greatest contemporary indignity for Native Americans. As Sam Stanley put it, "Indians have a perspective toward modern life which involves their own past deeply. The treaties, which most non-Indians regard trivially, are a sacred part of their life. . . . They had their roots here thousands of years before Europeans arrived. They are acutely aware of the specific ways in which they lost possession of over 98 percent of the land to non-Indians. All of this involves history, and it is living history to Indians—handed down orally in every tribe, a part of their collective bitter experience." SAM STANLEY, *AMERICAN INDIAN ECONOMIC DEVELOPMENT* 6 (1978), quoted in a fine paper by Melissa Williams, *Memory, History and Membership: The Moral Claims of Marginalized Groups in American Political Representation* 15 (presented at the Annual Meeting of the American Political Science Association) (Sept. 1992) (on file with the *Georgia Law Review*).

