ANTIPODEAN REFLECTIONS ON AMERICAN INDIAN LAW

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"Travel narrows." – Morris Zapp[1]

I. INTRODUCTION, WITH A SELF CAUTIONARY NOTE

As Morris Zapp observes, travel as a liberal or liberating phenomenon is overrated. Too often travelers see what they expect to see, and take from their experiences away from home mere justifications for the prejudices they left with. Conservatives tend to discover abroad rationalizations for their conservatism; liberals, their liberality. I count myself among those who have seen remarkable things abroad – women making gravel by hand in Sri Lanka; churches designated as museums and closed on Sunday in Ceausescu Romania; a west African bus with twenty-four passengers aboard, waiting two hours in the sun for the twenty-fifth and final seat to be sold – and who have advanced superficial, American explanations for what they have seen. "We don't make gravel by hand in the U.S." is a statement that is true, or mostly true at any rate, but the narrowing of which Zapp warns is caused by the conclusions that flow too easily from the observation. They are too likely to be conclusions about Sri Lankan society and economics that may be summarized as some form of this: "I like it in the U.S. better."

Those who have sampled my work on the cross-boundary enforcement of tribal and state judgments know that I find there to be something profoundly understandable in a society's tendency to prefer its own ways of doing things over the ways of its neighbors.[2] Thus there is nothing inherently off-base about the expression "I like it in the U.S. better," or similar sentiments of the rightwiseness of local sensibilities. The insight of Zapp is that travel can exacerbate this natural

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1. DAVID LODGE, CHANGING PLACES 42 (Penguin Books ed., 1992).

2. *See, e.g.*, Robert Laurence, *The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUINNIPIAC L. REV. 115 (1998).

tendency, reinforcing it so that it becomes narrow, self-serving, and complacent.[3]

Zapp speaks too absolutely, of course. With care, one can watch gravel-making – with heavy hammers, bloody fingers and dirty, cloth bandages – and be changed. One can come away broadened, Zapp to the contrary notwithstanding. The requisite for such broadening is that one be introspective and to wonder how one's experiences might change one's perspective on the way things are done at home. The anti-Zappist principle is this: Travel broadens if it is allowed to challenge one's preconceptions about the way things are done at home.

It is with Zapp in mind that I begin these reflections on a summer's travel to New Zealand, a winter in which I traveled around, visited some family, and talked about American Indian law at three New Zealand law schools.[4] Two Zappist narrowing mishaps are threatened following such a trip. First, one might decide that what he knows about American Indian law is directly or indirectly, in part or in whole, applicable to the body of law concerning the Maori people of that country. In actual fact, American Indian law just might be applicable, directly or indirectly, in part or in whole, to Maori law; it is just such a possibility that justified the trip that I made and the friendly attendance of so many people at the talks I gave. But the application, or not, of American principles to New Zealand is not for me to say, for I know far too little about Maori law to make such an application. It was for my listeners to apply what I said to their law, if that seemed right to them.

The second narrowing mishap would be for me to make a superficial inspection of the legal relationship between the Maoris and the New Zealanders whose origins are in Europe – "Pakeha" is the Maori term for these non-Maori people[5] – and to announce the superiority, or not, of the body of law that we call American Indian law. Shallowness is not a scholar's virtue, and I hope to avoid

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3. Zapp's quotation also speaks against the opposite kind of smugness displayed by the typical xenophile and place-dropper, a malady from which I, alas, have not always been immune, perhaps as recently as the previous paragraph. But that's another matter. I trust that I will be able to avoid such self-satisfaction henceforth, at least henceforth in the present paper. *But see* text at note 59, *infra*.

4. The three law schools were Waikato University School of Law in Hamilton; Victoria University School of Law in Wellington; and Canterbury University School of Law in Christchurch. I am very grateful to my hosts and hostesses at those three fine institutions for making my visits with them smooth-running and stimulating.

5. *See* XI OXFORD ENGLISH DICTIONARY 77 (2d ed. 1989); THE REED DICTIONARY OF NEW ZEALAND ENGLISH 816 (1st ed. 2001); THE WILLIAMS DICTIONARY OF THE MAORI LANGUAGE 252 (7th ed. 1975). New Zealand also has sizable, but smaller, populations whose origins are in Asia and the Pacific Islands, and a small population from Africa, including Africans whose earlier origins are European, but "Pakeha" appears to be used only to refer to white New Zealanders. *See* Andrew Sharp, *Blood, Custom, and Consent: Three Kinds of Maori Groups and the Challenges They Present to Governments,* 52 U. TORONTO L.J. 9 (2002). It is unclear whether the term "dominant society," which I generally use to describe the non-Indian super-majority here in the United States, would seem sensibly used by New Zealanders to refer the collective non-Maori majority.

the same here. This essay will not present an American law professor's take on Maori law, a rich field, full of nuances at whose presence I can only guess.

Rather, the present essay is Anti-Zappist in intent. What I intend to do here is to open up for inspection from a new perspective some of the foundational principles of American Indian law, perspectives provided by a vantage point thousands of miles away, where the winter is in July, flightless birds abound, and the night sky is filled with strange constellations. A new look at one's familiar field is nearly always a good thing, and necessary to avoid the narrowing influences of travel.[6]

I begin with a new look at a statement I have offered in the past as the central proposition of American Indian law.

II. MCCLANAHAN

Justice Thurgood Marshall, writing for the unanimous Court in *McClanahan v. Arizona State Tax Commission*,[7] observed that "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."[8]

This statement, it has always seemed to me, should be understood as no mere platitude. That which the Court wishes us to remember is factually, indisputably true. It is, to me, the essential truth of North American life. That is not to say, of course, that it always *is* remembered; it is easy enough to point to cases in which our courts seem clearly to have not heeded the Supreme Court's injunction.[9] There are surely millions of European-Americans, African-

6. For an essay of similar intent, and based on a much longer sojourn in New Zealand than mine, *see* Marguerite L. Spencer, *Public Interest Law: Improving Access to Justice: A White American Female Civil Rights Attorney in New Zealand: What Maori Experiences Teach Me about the Cause*, 28 WM. MITCHELL L. REV. 255 (2001).

7. 411 U.S. 164 (1972).

8. *Id*. at 172.

9. As Justice Reed famously wrote in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-89 (1955): "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." Years later, Professor Philip Frickey responded: "Every learned schoolchild would be appalled by this point, for it cannot be defended as accurate, if incomplete. Instead, it is just plain wrong, a mixture of myth and ethnocentrism masquerading as past legal practice." Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 32 (1996). As Professor Frickey noted, the quotation is especially misguided in a case, like *Tee-Hit-Ton*, dealing with Alaska Natives, for little force was used to remove these peoples from their homelands. For an interesting discussion of the historical context of Justice Reed's remark, *see* Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of*

Americans, and Asian-Americans who, on a day-to-day basis, forget that the tribes were here first; Native Americans have longer memories – no surprise there.[10] Nor, it must be conceded, is it the case that merely remembering the antiquity of

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American Indian Lands, 148 U. PA. L. REV. 1065, 1129-30 (2000).

10. I am tempted here, for symmetry's sake, to use the term "American-Americans" to refer to the descendants of those who were here first, thereby embroiling myself in the what-to-call-them controversy, one that I have largely avoided in the past. As is commonly noted, most Indians call themselves "Indians," which is good enough for me. "Native Americans" is a term used mostly by non-Indians of certain political sensibilities to refer to Indians, and I tend not to use it, except as above, when I wish to add a linguistic emphasis to an observation about the origins of the ancestors of present-day Americans. (European-Americans of certain different political sensibilities mostly want us to ignore our origins and all be unhyphenated Americans, except, of course, on Columbus Day, when opposition to the holiday becomes anti-Italian-American, *cf*. Michael Wilson, *Columbus Day Parade Goes On, as Mayor and Sopranos Dine in the Bronx*, N.Y. TIMES, Oct. 15, 2002, at B1; Josh Kramer, *Letter to the Editor*, N.Y. TIMES, Oct. 15, 2002, at A26; Benedict Caterinicchio, M.D., *Letter to the Editor*, N.Y. TIMES, Oct. 15, 2002, at A26.) For a rather testy exchange between two Indian Indian-law scholars, neither of whom cares much for the expression "Native American," about the use of the expression "Native American," *see* Robert B. Porter, *The Demise of the* Ongwehoweh *and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 107-08, 108 n.4 (1999) [hereinafter Porter, *Demise of the* Ongwehoweh]; John P. LaVelle, *Strengthening Tribal Sovereignty through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL'Y 533, 534-37 (2001); Robert B. Porter, *Two Kinds of Indians, Two Kinds of Indian Nation Sovereignty: A Surreply to Professor LaVelle*, 11 KAN. J.L. & PUB. POL'Y 629, 639-42 (2002) [hereinafter Porter, *Two Kinds of Indians*].

Some Americans, of uncertain political sensibilities, object to the term "Native American" on the grounds that anyone actually born here fits that description, but that objection is botanically, if not politically, incorrect. When we refer to a "native plant," the reference is not to whether the individual tree, shrub, or blade of grass sprouted where it is found, but whether the species has a long-standing botanical history in that locale. Likewise with Americans. Professors Porter and LaVelle are native Americans, small "n," even if they do not like the term "Native Americans," capital "N." Professor Alexander Tallchief Skibine of the University of Utah is a native American in this sense, even though he himself sprouted in France, but I am not, even though I sprouted in Virginia.

This botanical observation has some antipodean connection, for New Zealand is famously plagued by non-native plant and animal species such as rabbit, possum, ferret, and gorse that threaten to drive to extinction native species that are without suitable defenses. Flightless birds such as the kiwi and the penguin are especially threatened by the presence of non-native predators. And among these non-native predators can be counted humans, Maori and European alike. While the former arrived in New Zealand roughly six hundred years before the latter, from an American perspective both were late, non-native arrivers *vis-a-vis* the native plant and animal communities, and the animals they brought with them – for example the rat and the dog – devastated the native flora and fauna. American Indians, on the other hand, have a much, much longer relationship with the Western Hemisphere and its plant and animal life.

the tribes means that the Indians should, or will, prevail in all controversies.[11]

It is enough that the starting point when one approaches the field of Indian law is with the antiquity of the tribes and the youthfulness of the United States. The dominant society is young, large, vibrant, headstrong, diverse, self-indulgent, and very much these days full of itself as "The World's Only Remaining Super-Power." Tribes, on the other hand, tend to be old, small, homogeneous, vibrant in their own ways, introspective, and aware of their own fragility.[12] When approaching a conflict between the two, the Supreme Court seemed correct to me in admonishing that it will serve the younger government well to keep in mind that the elder government is indeed that, especially when the courts of the younger government are attempting to determine the extent of that more ancient sovereign power.

My short time in New Zealand, however, has made me think anew about the quotation from *McClanahan*. It began simply enough by wondering aloud before my audiences about whether a *McClanahan*-like quotation would be apt regarding Maori-Pakeha relations. Does the Maori claim to sovereignty long predate that of the present nation of New Zealand? How old is New Zealand?

With Queen Elizabeth as the official Head of State of New Zealand, with her picture on the money, and with her Union Jack ensconced on the New Zealand flag, my first impression was that New Zealand was as old as the British Crown, say a thousand years, more or less. This would be roughly the same as the length of time that the Maori people have lived in Aotearoa, as is their name for the islands and the country, and *McClanahan*'s reminder would not apply.

But everywhere I went and whomever I asked, I heard it said with considerable pride that New Zealand was a young country. I believe that I was making a typically American mistake and drawing too much substance from the symbolism of the Queen as Head of State. It is easy enough to date our "claim to sovereignty" to July 4, 1776, made actual by the Treaty of Paris in 1782. And

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11. There are scholars who advance a position that comes close to this notion that the antiquity of the tribes resolves all disputes in favor of the Indians. *See, e.g.*, Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75 (2002).

12. One must be very careful when indulging in stereotypes such as these. There are some five hundred federally recognized tribes within the United States – about 150 of which are in Alaska – and many more self-proclaimed tribes that are seeking federal recognition. There is extraordinary variety within this group among the tribes, greater variety, it is commonly said, than among the various nations of Europe. Generalities are dangerous and can be unfair. *See generally* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 7-12 (4th ed. 1998).

Fragility, especially, is a problematic characterization to apply to Indian tribes, or to any government a thousand years old. It is true enough that tribes live these days on the edge of extinction, and their members represent less that one percent of the population of the United States. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 16 (122d ed. 2002). On the other hand, it seems rather near-sighted to predict the demise of governments that have lasted so long and survived so much.

without such a declaration of independence,[13] my American perspective lead me to the conclusion that New Zealand's "claim to sovereignty" was never made independently from Britain's. Hence Maori sovereignty and Pakeha sovereignty were each about a thousand years old and *McClanahan* is not transferable from American Indian law to Maori law. Without *McClanahan*, the entire shape of the body of law changes, so important to American Indian law is that case and its reminder.

In that direction lies the narrowness that Zapp warned against, and recall that I am not here to re-invent Maori law. Rather, my look is inward: Did Justice Marshall indeed state a fundamental truth in *McClanahan* as I have always thought? Even given that tribal claims to sovereignty are in fact much, much older than those of the United States, why, exactly, must that truth "always be remembered"? Does it matter how old the dominant society is? And how does one measure the age of a government's claim to sovereignty? I believe that questions such as these lead us to a discussion of the difference, if any, between colonialism and invasion, and invite inspection of the increasingly common colonialism-based model offered in the literature for American Indian law.[14]

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13. There is, in fact, a New Zealand Declaration of Independence, but it works the opposite from the way our Declaration works. In 1835, with British settlers already in possession of sizeable portions of the islands, some land was bought by a Frenchman named Baron de Theirry, who spoke of establishing a sovereign nation. To prevent this from happening, James Busby, the British Resident, called a meeting of thirty-four Maori chiefs and persuaded them to sign a Declaration of Independence (He whakaputanga o te Rangatiertanga o Nu Tirene), which they did. However, unlike our Declaration, this one asked King William IV "to be the parent of their infant state . . . its protector from all attempts upon its independence." *See* CLAUDIA ORANGE, THE TREATY OF WAITANGI 21 (1987).

14. *See, e.g.*, Porter, *Two Kinds of Indians*, *supra* note 10; Porter, *supra* note 11; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002) [hereinafter Clinton, *No Federal Supremacy*]; Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123 (2000); Robert B. Porter, *Legalizing, Decolonizing and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125 (1999); Liam Seamus O'Melinn, *The Imperial Origins of Federal Indian Law: The Ideology of Colonization in Britain, Ireland, and America*, 31 ARIZ. ST. L.J. 1207 (1999); Porter, *Demise of the Ongwehoweh*, *supra* note 10; Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace,* 82 CAL. L. REV. 981 (1994) [herinafter Williams, *Linking Arms*]; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993) [hereinafter Clinton, *Redressing Legacy of Conquest*]; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989) [hereinafter Williams, *Documents of Barbarism*]; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail*

I have never been one to use the colonialism model for American Indian law, which I would call the colonialism "metaphor," except that begs the question. But mostly I avoided the term, as opposed to confronting it. "Colonialism" never seemed to me to fit quite right, but it was hard to explain why. It was the antipodean perspective which, for the first time, made me begin to understand this misfit.

It has to do with the existence, or not, of a "homeland" for the colonists. This brings me back to the Queen's picture on New Zealand money, and other such indicia of modern colonialism.[15] The colonialism model, it seems to me, fits best when the newcomers consider themselves, as individuals, to be only temporarily "in country," or, if longer, then still as *ex pats*. The colonizing power may consider itself to be there indefinitely, as, for example, Britain once claimed to be true for Cyprus, even late in the day when the Empire was disintegrating.[16]

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of Decolonizing and Americanizing the White Man's Indian Jurisprudence, 1986 Wisc. L. Rev. 219 (1986) [hereinafter Williams, *Algebra of Federal Indian Law*].

15. The Queen, wearing the Sovereign's Badge of the Order of New Zealand, is portrayed on the NZ$20 note. The other notes carry portraits of famous New Zealanders, male and female, Pakeha and Maori: Sir Edmund Hillary, the explorer; Kate Sheppard, the universal suffrage leader; Sir Apirana Ngata, the Maori leader and politician; and Lord Rutherford, the scientist. New Zealand coins carry the portraits of animals, not people.

The mention of Edmund Hillary requires noting that we are now fifty years past the conquest of Mt. Everest by Hillary and Tenzing Norgay on May 29, 1953. A recent article on the expedition described the choice of Hillary this way: "[John Hunt's] companion to the summit was one of the New Zealanders, emphasizing that this was a British expedition in the most pragmatic sense – for in those days New Zealanders, like Australians and even most Canadians, thought themselves as British as the islanders themselves." Jan Morris, *Finally the Top of the World*, SMITHSONIAN, May 2003, at 54. Mr. Morris, who currently lives in Wales, was the reporter on the Everest expedition for THE TIMES (London). S*ee id*. at 58. Elsewhere in the article he writes: "The empire was fading not in despair, but in regret and impoverishment. The British no longer wished to rule the world, but were understandably sad to see their national glory diminished." *Id*.

16. *See* BRIAN LAPPING, END OF EMPIRE 320-21 (1985). July 25, 1954, is a key date in the history of British colonialism in Cyprus. On that day, Henry Hopkinson, the Minister of State at the Colonial Office addressed the House of Commons regarding a new constitution that was being proposed for the colony. The official report of House of Commons debates – the so-called Hansard Report – contains the following rendition of Mr. Hopkinson's response to a question from the floor:

> It has always been understood and agreed that there are certain territories in the Commonwealth which, owing to their particular circumstances, can never expect to be fully independent. (Hon Members: "Oh!") I think the right Hon. Gentlemen will agree that there are some territories which cannot expect to be that. I am not going as far as that this afternoon, but I have said that the question of the abrogation of British sovereignty cannot arise – that British sovereignty will remain.

Id. Mr. Lapping continues:

> This was 1954: India, Pakistan, Burma, Ceylon and Palestine were

But the individuals still look to the Motherland as home. To me, the Union Jack on the New Zealand flag is a powerful symbol that for some New Zealanders at least – *most*, perhaps, on some level – Britain is still "home," and that meets my definition of colonialism.

European-Americans, on the other hand, by and large lost that sense of an overseas Motherland, and made America their home. Thomas Jefferson said it plainly enough in an address to representatives of the Osage tribe:

> It is so long since our forefathers came from beyond the great water, that we have lost the memory of it, and seem to have grown out of this land, as you have done . . . . We are now of one family, born in the same land, & bound to live as brothers; & the strangers from beyond the great water are gone from among us.[17]

This statement seems antithetical to the colonial mind-set, as I understand it to be. It is unimaginable that such a statement would ever have come from, say, a Viceroy of India. Jefferson's statement represents an intention to make *this* our homeland, cutting, not all ties perhaps, but the ties of *home*, from whence we came. Of course, any individual may say and do such a thing, but when the President of the United States says it, it means, I think, that the colonial period is over.

I note quickly that, by rejecting the colonialism model, I am not left with admiration for, nor do I exonerate, the European-Americans. They were surely invaders, willing to treat with the tribes, but just as willing to impose their will if the tribes did not consent to westward expansion. For example, consider the case of *South Dakota v. Yankton Sioux Tribe*.[18] In that case Justice Sandra Day O'Connor for the unanimous Court quoted a communication from John J. Cole, an emissary from the federal government to the Yankton representatives, during a

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> independent; the Sudan and the Gold Coast were close to it; the principle that Britain's purpose in running the Empire was to advance subject peoples to self-rule had been published by the Labour Government in a white paper in 1948 and accepted, though without enthusiasm, by their post-1951 Conservative successors . . . . Hopkinson's "never" rang round all Britain's colonies: it enraged anti-imperialists everywhere. Some slighting remarks about Greece by [Oliver] Lyttleton [the Colonial Secretary] as he tried to back Hopkinson in the subsequent debate turned the Cyprus situation into a crisis.

Id.

17. STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON AND THE OPENING OF THE AMERICAN WEST 343 (1997) (citing LETTERS OF THE LEWIS AND CLARK EXPEDITION, WITH RELATED DOCUMENTS 1783-1854 201-02 (Donald Jackson ed., 2d ed. 1978)).

18. 522 U.S. 329 (1998).

lengthy negotiation regarding the sale to the United States of lands guaranteed to the Yankton Sioux tribe by the Treaty of 1858:[19]

> I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes . . . . Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result! Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.[20]

The issue before the Court in *Yankton Sioux Tribe* was whether the statute that followed those negotiations was intended by Congress to result in the diminishment of the Yankton reservation down merely to include the lands that remained with the tribe itself after the sale, or whether, on the other hand, the sale of the lands to the United States, ratified by Congress via statute, left the reservation boundary intact. The purpose of Justice O'Connor's quotation seems to be that, with the hard negotiating position taken by the United States, as exemplified by this communication, it was appropriate for the modern Court to interpret the resulting sale and legislation as having been on the government's most extreme terms:

> Given the Tribe's evident concern with reaffirmance of the Government's obligations under the 1858 Treaty, and the Commissioners' tendency to wield the payments as an inducement to sign the agreement, we conclude that the saving clause pertains to the continuance of annuities, not the 1858 borders.[21]

Perhaps so, but it is more than a little difficult today to read Mr. Cole's words to the effect that if the Indians do not sign then three-fourths of them will starve the following winter and that will be all right with the United States government. As an American, it is hard to know which is worse: that those words

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19. Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743.

20. *Yankton Sioux Tribe*, 522 U.S. at 346-47 (quoting Council of the Yankton Indians (Dec. 10, 1892), *transcribed in* S. Exec. Doc. No. 27, at 74).

21. *Yankton Sioux Tribe*, 522 U.S. at 347.

were spoken by our government in 1892, or that their quotation by Justice O'Connor failed to provoke so much as a raised eyebrow by a Justice on our Supreme Court in 1998, an opinion concurring in the result, perhaps, but expressing a sorrow with the modern relevance of such a cold-hearted and ruthless statement.

So, I do not seek here a white-washed rendition of American history; I only question the application of the colonialism model to modern American Indian law. Perhaps this comparison will help: One of the most effective tools of British colonialism in India was the early exclusion of Indians – *east* Indians, here – from the Indian Civil Service (ICS), an exclusion that lasted until 1921.[22] At that time, due to pressures brought to bear by the Indian National Congress, natives of India were allowed to sit for the civil service examination.[23] However, it remained true for some time, as it had always been true, that the examination was given only in London, and Indian applicants were forced to make the trip half-way around the world to gain a job at home.[24] It is difficult not to have a certain grudging admiration for this practice, a tidy combination of British racism and legal formalism. It was in one sense superficially even-handed towards all ICS applicants, allowing those maintaining the *status quo* to note that the pre-existing discriminatory regime had been fixed and all applicants were henceforth to be treated alike in the administration of the ICS exam. At the same time, the new regime was nearly as effective at keeping the ICS all-white as was the prior exclusionary rule. In 1922, one Indian qualified for the ICS.[25]

Now compare this cynical British twentieth century practice to an equally cynical one of the Americans of the nineteenth century, as found in the case of *Minnesota v. Mille Lacs Band of Chippewa Indians*.[26] In two treaties, in 1837[27] and 1842,[28] several bands of Chippewa Indians ceded all of their lands east of the Mississippi River, in what are now the states of Wisconsin and Minnesota, to the United States, while retaining unceded lands in what is now Minnesota, as well as hunting, fishing, and gathering rights on the ceded lands. (I will return to these so-called "usufructuary" rights below.[29]) However, the government wanted more: President Zachary Taylor ordered the Chippewas removed from the ceded lands,[30]

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22. Paper by R.K. Mishra, National Civil Service System in India: A Critical View (1997) (Professor Mishra, of the Institute of Public Enterprise, Osmania University Campus, Hyderabad, India, prepared this paper for a symposium on "Civil Service Systems in Comparative Perspective" at Indiana University, Bloomington, April 5-8, 1997. The paper is published on-line at http://www.indiana.edu/~csrc/mishra1.html.).
23. *Id.*
24. *Id*.
25. *Id*.
26. 526 U.S. 172 (1999).
27. Treaty with the Chippewa, July 29, 1837, 7 Stat. 536.
28. Treaty with the Chippewa, Oct. 4, 1842, 7 Stat. 591.
29. *See* text at notes 73-89, *infra*.
30. *See Mille Lacs Band*, 526 U.S. at 179.

and considerable pressure was put on the Indians to leave and to re-establish themselves on the unceded lands. As related by the modern Supreme Court:

> The Government hoped to entice the Chippewa to remove to Minnesota by changing the location where the annuity payments – the payments for the land cessions – would be made. The Chippewa were to be told that their annuity payments would no longer be made at La Pointe, Wisconsin (within the Chippewa's ceded lands), but, rather, would be made at Sandy Lake, on unceded lands, in the Minnesota Territory. The Government's first annuity payment under this plan, however, ended in disaster. The Chippewa were told they had to be at Sandy Lake by October 25 to receive their 1850 annuity payment. By November 10, almost 4,000 Chippewa had assembled at Sandy Lake to receive the payment, but the annuity goods were not completely distributed until December 2. In the meantime, around 150 Chippewa died in an outbreak of measles and dysentery; another 230 Chippewas died on the winter trip home to Wisconsin.[31]

Now, the idea of distributing the entitlements under a treaty at the place not where the Indians are, but where you want them to be, making them walk across two states to get there, and then being late with the distribution, is a heartless, manipulative act of the same ilk as making Indians from India travel to London to take an examination to gain employment in India. However, the two cynical programs serve two different ends: the British to keep the Indians under their administration, the American to remove the Indians from their prior homes. Neither is an admirable goal, but only the first, it seems to me, is "colonialism." Perhaps "post-colonialism" is the better term for the North American experience.[32]

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31. *Id*. at 180 (citations omitted).

32. *See* Nan Seuffert, *Postcolonial Law: Theory and Law Reform Conference: Race-ing and Engendering the Nation-State in Aotearoa/New Zealand*, 10 AM. U. J. GENDER SOC. POL'Y & L. 597 (2002). *But see* N. Bruce Duthu, *Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature*, 13 HARV. HUM. RTS. J. 141 (2000). Professor Duthu observes:

> One must acknowledge the persistent debate among literary scholars as to the meaning of "post-colonial" and the possibility that this very concept subverts rather than enhances efforts to enlarge the literary discourse to include texts emerging from survivors of colonialism. As Anne McClintock writes, the very word "post" "reduces the cultures of peoples beyond colonialism to prepositional time. The term confers on colonialism the prestige of history proper; colonialism is the determining marker of history."

Or perhaps "neo-colonialism."[33]

I must now return to my antipodean reflections and specifically to my discovery that many New Zealanders think of their country as young, not old. The money, the flag, the Queen as head of state, and so on may be only the *trappings* of antiquity, misinterpreted by this American with his inbred anti-royalist genes. "[T]hat they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved."[34] When Thomas Jefferson wrote those words, we are taught at a young age, he meant them. However, if the dominant society of New Zealand considers itself a young one, notwithstanding the antiquity of the sovereignty claimed by its head of state, then perhaps it is indeed a society substantially younger than Maori society, and Thurgood Marshall's *McClanahan* reminder is apt.

More to the point of these reflections on American Indian law, perhaps if it is so difficult to determine the antiquity of a dominant society's claim to sovereignty, then it is not, in fact, so important that we do so. Perhaps it is not as essential to the structure of American Indian law as I once thought that the tribes are so much older than the formal American government. Perhaps *McClanahan*'s reminder is, in fact, a platitude. Perhaps there is, in fact, no difference between colonialism and invasion. Perhaps the colonialism model is the correct one.

I don't think so - not yet at least. As I am fond of pointing out, a student of mine observed some years ago that: "All of American Indian law can be summarized in one statement and one question: (1) They were here first; and (2) So what?" The statement remains true, as it ever was. And the question remains as apt. And I stress as always that the question is not dismissive of the foundational truth embodied in the statement, but only requires that the principle of American Indian law being advanced be tied by its proponents to the foundation. Thurgood Marshall's *McClanahan* reminder remains as always a part of the answer to the "So what?" question, but, also as always, it is not the answer itself.[35] The difference between the ages of the relevant governments never determines alone any particular issue, but it shapes the inquiry and serves as a "backdrop" to the analysis, to use another of Justice Marshall's terms from *McClanahan*.[36] At the very least it represents an honest humility, a demonstration

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Id. at 148, n.22 (*quoting* ANNE MCCLINTOCK, THE ANGEL OF PROGRESS: PITFALLS OF THE TERM 'POSTCOLONIALISM,' IN COLONIAL DISCOURSES/POSTCOLONIAL THEORY 255 (Francis Barker et al. eds., 1994)).

33. *See* Carey N. Vicenti, *The Social Structures of Legal Neocolonialism in Native America*, 10 KAN. J.L. & PUB. POL'Y 513 (2001).

34. THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).

35. *See* Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861 (2000) (explaning in greater detail the connection between the *McClanahan* quotation and the answer to the question).

36. *McClanahan*, 411 U.S. at 172.

of respect that seems appropriate, given the history of the continent.[37]

All of that remains true, though I admit that my trip to New Zealand, showing to me, as it did, a dominant society with the trappings of age but the self-identity of youth, has made me wonder more than I have before about the meaning of *McClanahan* and its place in the body of American Indian Law. To me, it remains literally true that we must always "remember[] that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government,"[38] but how far that recollection will carry one is still a matter of important debate.[39]

III. TWO BILLBOARDS

By happenstance, I arrived in New Zealand very near the start of their frenzied, three-week national election campaign to choose a new Parliament. It was thus the case that as I made my way upon arrival, woozy with jet lag, through the early-morning rush hour traffic, and the rain, driving on the wrong side of the road from the airport to downtown Auckland, that I spotted outdoor political advertising; couldn't miss it, in fact. The first said: "Close the Book on Treaty Claims." And the second: "One Law for All NZers." I will discuss them in that order.

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37. This demonstration of respect for the ways of another is not unlike the issue of the way in which an English-only traveler comports himself when abroad. It is true enough that the common "Do you speak English?" addressed to a shopkeeper can, in some places, be tantamount to asking "Are you educated?," so common is the teaching of English as a second language. On the other hand, to presume that English is a second language of commerce has always seemed to me to be presumptuous in many parts of the world. The English-only traveler needs some expression, I think, to demonstrate that he recognizes that he is asking the shopkeeper to speak a language other than her own. "May we speak English?" might be better than "Do you speak English?"

This observation seems appropriate here, given the fact that I began with Morris Zapp's criticism of travelers, even though it is largely inapplicable to New Zealand. One hears Maori spoken, and sees it written, but non-English speakers among the Maori appear to be even rarer than they are among American Indians. To ask "Do you speak English?" to either a Maori or an American Indian strikes my ear as entirely dismissive of the realities of North American or New Zealand life and insulting to the education of the person addressed. I can imagine circumstances, though, where the "May we speak English?" entreaty might be appropriate and appreciated.

38. *McClanahan*, 411 U.S. at 172.

39. S*ee* Williams, *Algebra of Federal Indian Law*, *supra* note 14; *see also* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' "Algebra,"* 30 ARIZ. L. REV. 413 (1988).

A. "Close the Book on Treaty Claims."

The first of these billboards was plainly related to the famous Treaty of Waitangi,[40] and its import was obvious to any student of American Indian law, for the same issue arises with respect to our many more numerous treaties between the United States and the various North American Indian tribes.[41] That issue: repose.

When National, the principal center-right party of New Zealand, made closing the book on claims under the Treaty of Waitangi a campaign issue, it was urging that a quick and enforceable deadline be established after which the Maori descendants of the parties to the Treaty could no longer sue for violations of the Treaty.[42] Labour, the principal center-left party, in fact agreed that the time was

40. Treaty of Waitangi, Feb. 6, 1840, Eng.-Maori, 89 Consol. T.S. 473-75; *see generally*, ORANGE, *supra* note 13. So important a role does the Treaty of Waitangi play in New Zealand life, and as it is the only treaty entered into between the Maori and the Pakeha, it is simply known as "the Treaty," a usage I will employ here.

41. Treaties between the United States and American Indian tribes are numerous; between 1778 and 1868, 397 were promulgated by the President and ratified by the Senate. Even though treaty-making formally ended in 1871, *see* 25 U.S.C. §71 (2000), another 73 agreements between the United States and the various tribes were entered into after that date, and were still ratified by Congress. Another five agreements, contracts, and conventions were made, with uncertain legal implications. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 446-519 (1994).

42. I should not be understood to suggest here that only individual Maoris have rights under the Treaty of Waitangi and that there is no New Zealand equivalent to our tribes. The Treaty was negotiated among representatives of the British Crown and representatives of the Maori iwi, or tribal groups, much as American Indian treaties were between the United States and the tribes. The Treaty has three articles, and there are two versions of it, one in English and one in Maori, resulting in considerable contemporary and modern confusion about exactly what it means. Briefly, that confusion is this: In Article One the Maori surrendered something to Queen Victoria and in Article Two, they retained something for themselves. In English, what they surrendered was "sovereignty," and what they retained was "possession." In Maori, what they surrendered was "kawanatanga," and what they retained was "rangatiratanga." *See* ORANGE, *supra* note 13, at 40-43. It is among those four terms and their various meanings that the issue of the self-governing status of the present Maori iwi is established under New Zealand law. For a careful inspection of these issues, *see* Benedict Kingsbury, *Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law*, 52 U. TORONTO L.J. 101 (2002).

Two things are clear: First, Article Two of the Treaty permits transactions in land between the Maori and the Crown exclusively, and is, in a sense, the New Zealand equivalent of our *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). It is this restriction that gives rise to the present land claims upon which National wants to "close the book." Second, Article Three of the Treaty makes all Maori British subjects, granting them all rights and privileges thereof. As such, it would seem to be the equivalent of our Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b)), about which Professor Porter takes such great umbrage. *See* Porter, *Demise of the* Ongwehoweh, *supra*

approaching after which treaty claims would die, but preferred a later date and a different process for what these days is called closure.[43]

The issue of repose, and the question of when a cause of action may no longer be brought, is dealt with in the common law by reference to a legislatively enacted statute of limitations and at equity by the doctrine of laches.[44] The issue is closely related to the idea of adverse possession of property, and you will permit me, please, a digression into this familiar property law doctrine, for reasons that will shortly become plain. Once the owner of property may no longer bring his, her, or its cause of action in ejectment to recover possession of real property due to the running of the statute of limitations, that property is deemed to belong to the possessor, notwithstanding the absence of record title, and a suit to quiet title will lie to demonstrate that ownership to the world.[45] Some cases go farther and hold that once title has passed under the doctrine of adverse possession, courts will entertain the fiction that the adverse possessor originally entered the property properly, so that the possession of the property prior to the running of the statute was not a trespass.[46]

A key question, then, in applying the doctrine of adverse possession is when does the true owner's cause of action in ejectment arise, thereby causing the statute of limitations to begin running? The usual rules are that the cause of action accrues when the adverse possessor begins "openly and notoriously" using the property in the way property of that kind is used.[47] This analysis causes the doctrine of adverse possession traditionally to be applied differently to personal

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note 10. Presumably Professor Porter would be more approving of indigenous citizenship in the dominant society when it was done via treaty, rather than unilaterally via statute, which is not to say that he would find the Treaty of Waitangi free of genocidal motives. (Incidentally, "Ongwehoweh" means "real people" in the Seneca language, this being one of the few acceptable post-Holocaust uses of such a term. Surely the Senecas did not use the term as part of a Nazi-style attempt to annihilate the "not-real people." Professor Porter uses the word in contrast to "Native Americans," designating with the latter term those Indians who have sold out.) *See id.* at 107-08, 107 n.3, 109 n.10.

43. *See Working with Maori: Making the Difference. Together* (Off. of the Prime Minister, Wellington, N.Z. & Off. of Maori Affairs, Wellington, N.Z.), Summer 2002, *available at* http://www.liveupdater.com/labourparty/DocumentLibrary/Working_with_Maori_Summer_2002.pdf (last visited Aug. 12, 2003) (setting out the Labour Party's position on Treaty claims); *see also Treaty Policy – Time to Move on*, *at* http://www.national.org.nz/wcontent.asp?PageID=100004949 (last visited Aug. 12, 2003) (setting out the National Party's policy).

44. For a discussion of the relationship between the doctrine of laches and the running of statutes of limitations, *see* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 2.4(4) (2d ed. 1993).

45. This latter proposition is established, for example, by *Sharon v. Tucker*, 144 U.S. 533 (1892).

46. *See, e.g.*, Counce v. Yount-Lee Oil Co., 87 F.2d 572, 575-77 (5th Cir. 1937).

47. *See* RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 48-54 (4th ed. 1991).

property as distinguished from real property.[48] The courts have struggled with the question of whether the "open and notorious" requirement means that personal property must also be used that way, which is not the way that people generally use personal property. *O'Keeffe v. Snyder* is a familiar case, in which the Supreme Court of New Jersey attempted to resolve the matter.[49] The majority put the burden on Georgia O'Keeffe, the plaintiff and original owner of the property, to show that she had been diligent in looking for her paintings while they had been out of her possession.[50] The dissent thought that, as the original owner, it was not proper that Ms. O'Keeffe explain her actions; it is the adverse possessor, Justice Handler thought, who should have this burden.[51]

This relationship between possession of property, ownership of property, and repose is raised by National's billboard. If the protections of the Treaty of Waitangi were not observed, resulting in improper transfers of land from Maori hands to Pakeha hands, and if these improper transfers happened a long time ago, then the varying interests of repose come into play. "It may not yet be too late to make claims," the billboard was saying, "but it will soon be too late, and the sooner the better."

Very similar issues have arisen in the United States, culminating in the holding of the Supreme Court in *County of Oneida v. Oneida Indian Nation of New York*,[52] in which the Court had to decide whether causes of action attacking conveyances of Indian land contrary to the federal Trade and Intercourse Acts[53] survived the passage of 190 years.[54] The majority of the Court thought that the specific statute of limitations passed by Congress to cover the situation allowed the claim still to run,[55] and that the doctrine of laches did not apply in an action at law.[56] The dissenters thought that the doctrine of laches was the perfect approach

48. *See id.* at 54, 78-79.

49. 416 A.2d 862 (N.J. 1980). The plaintiff in this famous case was Georgia O'Keeffe, the matriarch of American painting. The defendant was an art dealer in whose gallery some of O'Keeffe's lost paintings were offered for sale. The artist, not an especially good sport in her later years, sued in replevin.

50. *Id.*

51. *Id*. at 507-08 (Handler, J., dissenting).

52. 470 U.S. 226 (1985).

53. Trade and Intercourse Acts 25 U.S.C. § 177 (2003). There were several successive versions of the Acts passed during the early years of the Republic. *See* Act of July 22, 1790, ch. 33, 1 Stat. 137 (expired); Act of Mar. 1, 1793, ch. 19, 1 Stat. 329 (repealed 1796); Act of May 19, 1796, ch. 30, 1 Stat. 469 (expired 1799); Act of Mar. 3, 1799, ch. 46, 1 Stat. 743 (expired 1802); Act of Mar. 30, 1802, ch. 13, 2 Stat. 139 (repealed 1834); Act of June 30, 1834, ch. 161, 4 Stat. 729 (current version at 25 U.S.C. § 177 (2003)). *See generally* John Edward Barry, Oneida Indian Nation v. County of Oneida*: Tribal Rights of Action and the Indian Trade and Intercourse Act*, 84 COLUM. L. REV. 1852 (1984).

54. *Oneida Indian Nation*, 470 U.S. at 229.

55. *Id.* at 240-44.

56. *Id*. at 244.

to the problem and the fact that plaintiffs had sued at law should not be an irremediable impediment to its application.[57]

Adverse possession is a traditional topic for first year law students, and on those occasions when I teach the Property course, I have the students read the cases mentioned. More to the point of the present discussion, on those occasions when I have taught Property to pre-first-year students in the American Indian Law Center's Pre-Law Summer Institute, I have put into the materials the same cases. As a general proposition, and for reasons that are perhaps obvious, the Indian students tend to be suspicious of the notion of adverse possession and approving of the *Oneida* case. That one becomes the owner of property by wrongly possessing it for a lengthy period of time does not go down well with many first year law students, and the pre-law Indian students often do not find adverse possession to be a friendly entrée to American property law.

I recall one specific session with these Indian law students some years ago. We had been working our way through the cases mentioned above, getting the principles of adverse possession on the floor, figuring out the holding of the *Oneida* case, and then tackling the problem of the *O'Keeffe* case. I was enjoying myself with these materials, as I almost always do. And then came perhaps the most interesting class I have ever taught. Several tribal judges were visiting the American Indian Law Center and came to visit my Property class, where *O'Keeffe* was still on the floor. As the students continued to try to sort out the mysteries of the adverse possession of personal property, and with the tribal judges sitting amongst the students, it seemed appropriate to open the discussion up for some judicial input.

The question was this: To what extent is repose a principle under your tribe's law? Now, few of these tribal judges were law-school trained, which meant that most were answering my question not with the answer they had themselves received by reading cases like *O'Keeffe v. Snyder* or *Sharon v. Tucker*. Rather their answers came from deep within the customs and traditions of their tribes. And as should be a surprise to no one, those answers reflected a profound respect for repose. Repose is, generally speaking, a conserving and conservative notion, one that is likely to be found in very traditional societies, as Indian tribes often are. As the various judges spoke that morning in Albuquerque, I heard those principles come through.

That is not to say that repose as found reflected in the traditions of many tribes necessarily leads to the doctrine of adverse possession in all of its Anglo-American detail. Especially with respect to adverse possession of real property, one might expect a different tribal reaction to the idea that ownership of property changes hands merely by the passage of time. In any event, the issue is largely moot, for in few tribes is realty held by individuals in such a way that an action in ejectment would ever expire, allowing application of the doctrine of adverse

57. *Id*. at 263-71.

possession.[58] More broadly though, one thinks of conflicts between removed eastern tribes and the western tribes on whose traditional homeland the removed tribes now sit. Irrespective of the circumstances of the relocation and of the old enmity that resulted, in most cases, most parties would now accept, under the principles of repose, modern reservation boundaries, and conflicts between, say, the Choctaws and the Quapaws, or the Cherokees and the Osages have become largely theoretical, at least as far as the actual ownership of the land goes.[59]

Should the U. S. government undergo some sort of revolutionary change that resulted in, first, a rethinking and, then, an abandonment of the old removal policy, a wrenching decision would have to be made about how, whether and which reservations would be undone and the land returned to its original occupants. Such a re-distribution of land, which seems entirely theoretical to both American and New Zealander ears, is in fact exactly what has been happening since the fall of Eastern European communism in the late 1980s and early 1990s.[60] Two personal recollections seem apt: (1) I recall being shown the sights of the town of Sopron in western Hungary by a good friend who grew up there. As we walked down a certain street, I noticed that her father had remained back at the corner. When I asked why, I was told that this was the street where the family had lived until the communist government expropriated the house in the 1950s and moved the family to an apartment in an unlovely high-rise, and that her father had refused to walk down the street ever since. (2) I recall listening to Professor Nell Jessup Newton, now Dean at Connecticut Law School, give a talk in Budapest on American Indian land expropriations, at a conference prompted by the decision of the governments of many of the formerly communist countries to undo the communist expropriations that had so affected my friend's father.[61]

The wrenching question, of course, is one of repose, and for the Eastern European governments, one question is how far back to accomplish the fix.[62]

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58. The impediment to fee simple ownership on reservation is the Indian Reorganization Act, 25 U.S.C. § 462, which extended infinitely the trusteeship of the United States over much of Indian Country. Thus, in most cases, fee title to on-reservation land lies with the government, against whom adverse possession does not lie. *See generally* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 612-28 (Rennard Strickland, ed. 1982.

59. The land on which the Choctaw Nation now lives was originally the land of the Quapaw Tribe, whatever "originally" means. Here I mean "originally" in the sense of immediately prior to European contact. *See* Treaty with the Quapaw, Aug. 24, 1818, U.S.-Quapaw, 7 Stat. 176. The land on which the Osage Tribe now lives was purchased from the Cherokees. *See generally* Alex Tallchief Skibine, *The Cautionary Tale of the Osage Indian Nation's Attempt to Survive Its Wealth*, 9 KAN. J.L. & PUB. POL'Y 815 (2000).

60. *See*, *e.g.*, Stefan Wagstyl, *Lost Property of a Generation*, THE FINANCIAL TIMES, Feb. 10, 2001, at 1.

61. *See* Nell Jessup Newton, *Compensation, Reparations and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453 (1994).

62. *See generally* Michael Heller & Christopher Serkin, *Private Law: Revaluing Restitution: From the Talmud to Post-Socialism*, 97 MICH. L. REV. 1385 (1999) (reviewing

Only to the 1940s and 1950s, the expropriations being those of the communists? Or back to the 1930s, those expropriations being the Nazis'? Or further back: the Turks affected land titles during their 150-year occupation of Hungary, ending around 1700. At some point, it seems, the principle of repose dominates and it becomes too late to undo past acts, even though they now seem wrong. The American experience regarding the litigation of Indian land claims is surely relevant to the plans of the Europeans and it was to that end that Professor Newton was invited to speak. I happened to be staying in Budapest at the time, engaged in what some might see as American commercial neo-colonialism,[63] and was lucky enough to hear her talk. It was my observation at the time that her European audience was handicapped by its Hollywood image of American Indians and failed to appreciate the clear relevance of her cross-ocean insight.

It is a fairly long journey from a political billboard seen through the early morning Auckland rain, back to a Property law classroom in the Albuquerque desert, and back further to a seminar in post-communist Budapest, but it is a journey dealing with a key question of American Indian law. The question for Americans and New Zealanders is substantially easier than it is for Hungarians, for the oceans' expanse and the existence of the treaties means that the issues for the former are readily identifiable, and the time since the takings are relatively short, at least from the European perspective. But that only makes the issues easier, not easy. The Supreme Court in the *Oneida* case was correct in its decision regarding the applicability of the statute of limitations. The more difficult question is the one the majority was able to avoid on procedural grounds: when should the broader principle of laches lay the matter to rest? In a non-judicial sense, the Auckland billboard shows that the issue is one of national political import in New Zealand, as it is not here, a point I will return to later, following a discussion of the second billboard.

B. "One Law for All NZers."

The message here – from ACT,[64] one of New Zealand's non-center right

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HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES (1998)); Irma Jacqueline Ozer, *Reparations for African Americans*, 41 HOW. L.J. 479 (1998); Matias F. Travieso-Diaz, *Legal and Practical Issues in Resolving Expropriation Claims; Very Limited Resources Available to Provide Remedy*, N.Y. L.J., Feb. 20, 1996, at 55 (citing Katherine Simonetti et al., *Compensation and Resolution of Property Claims in Hungary*, *in* CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES (JoAnn Klein ed., 1994); Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L. L. 621 (1996).

63. *See* Robert Laurence, *The State of Hungarian Insolvency Law*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 495 (1997) (another Zapp-influenced article).

64. "ACT" is an acronym for "The Association of Consumers and Taxpayers." ACT styles itself "The Liberal Party," but to an American observer, "libertarian" would be a

parties – is more subtle, but, to the ear of one trained in American Indian law, clear: "The Treaty of Waitangi gives rights to New Zealanders of Maori descent, and these rights are not shared by the Pakeha. That's not fair." American Indians encounter the same attitude. For example, Professor Charles Wilkinson quotes an internal Forest Service memorandum regarding the recognition of treaty rights within the National Forests to this effect:

> We believe that to extend this right to camp at developed sites without charge and without a stay limit is an unsustainable and unsupportable expansion of those rights . . . . If we were to enter into an agreement with the Nez Perce, why would we expect their demands to stop at campgrounds? . . . These demands not only raise the legal question of treaty rights but also the legal issue of equal protection under the equal protection clause of the Constitution. We doubt treaty rights supersede the constitutional rights of all citizens to equal protection.[65]

More generally, Francis Paul Prucha, in discussing the "backlash" against treaty rights in the 1960s and 70s, notes that "[t]he [anti-treaty] arguments were couched in terms of 'equal rights' and 'equal opportunities' for all American citizens, and Indians were denounced as 'super citizens' because the courts recognized rights for them that were not accorded non-Indians."[66]

American courts have, in fact, and as Professor Prucha's quotation implies, been generally protective of treaty rights in the face of formal equal protection challenges.[67] Justice Scalia, though, has raised the specter of the limitation of treaty rights with his oft-quoted pronouncement that "[i]n the eyes of government, we are just one race here. It is American."[68] This was not part of the

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closer description. *See* Act: The Liberal Party, at http://www.ACT.org.nz (last visited Aug. 29, 2003). *But compare* Libertarianz Party of New Zealand, *at* http://www.libertarianz.org.nz/ (last visited Aug. 29, 2003) (representing the views of the New Zealand Libertarian Party).

65. Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce*, 34 IDAHO L. REV. 435 (1998) (quoting Memorandum from Charles W. Cartwright, Jr., Regional Forester, Southwestern Region, to Region One Forester Regarding Nez Perce Tribal Relations (Nov. 7, 1996)). *See generally* Carole Goldberg, *Not "Strictly" Racial: A Response to "Indians As Peoples*," 39 UCLA L. REV. 169 (1991); Ralph Johnson, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

66. Prucha, *supra* note 41, at 423.

67. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979); Puget Sound Gillnetters Ass'n v. Moos, 603 P.2d 819, 824 (Wash. 1979).

68. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

holding in the *Adarand Constructors*, which in any case did not involve Indians or their treaties.[69] There is every reason to suspect that Justice Scalia did not intend his nicely turned phrase to have a literal Indian-law application; to do so would undo nearly two centuries of federal court recognition of Indian treaties[70] and run afoul of the Supremacy Clause of the Constitution.[71] It is possible that Justice Scalia would argue that treaty rights apply only to the sovereign entity of the tribe itself and not to its natural-person members, thereby leaving individual Indians with only those rights shared by the populace as a whole. But that too would be contrary to settled Supreme Court precedent.[72]

Thus, it is not formally litigated equal protection challenges to their treaties that Indians must fear; rather, it is the informal public-opinion challenges, reflected in the political realities of congressional activity, that represents the greatest threat. Consider, again, the case of *Minnesota v. Mille Lacs Band of Chippewa Indians*,[73] discussed above.[74] The Mille Lacs Band, as well as other bands of Chippewas, brought suit seeking declaratory relief that their 1837 and 1842 usufructuary treaty rights to hunt, fish and gather off-reservation remained intact and could not be limited by state regulation of those activities. Over dissents by the Chief Justice, joined by Justices Scalia, Kennedy, and Thomas,[75] and by Justice Thomas himself,[76] the Court upheld continued existence of the treaty rights.[77]

Now, several observations are in order: First, it is the existence of treaty rights such as found in the Chippewa treaties of 1837 and 1842 that gives rise to complaints of unfair violations of equal protection.[78] "One law for all Minnesotans" would be the American equivalent of the ACT billboard, referencing the fact that the treaty rights are not shared by non-signatories to the

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69. *See id.* *Adarand Constructors* dealt with the legality of affirmative action programs aimed not specifically to benefit American Indians.

70. Indian treaties were recognized by the Supreme Court as binding law as early as 1810. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

71. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all *Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2 (emphasis added).

72. *See* United States v. Dion, 476 U.S. 734, 738 n.4 (1986) (*citing* United States v. Winans, 198 U.S. 371, 381 (1905); Kimball v. Callahan, 590 F.2d 768, 773 (9th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979); United States v. Felter, 752 F.2d 1505, 1509 (10th Cir. 1985)).

73. 526 U.S. 172 (1999).

74. *See supra* notes 26-33 and accompanying text.

75. *Mille Lacs Band*, 526 U.S. at 208 (Rehnquist, C.J., dissenting).

76. *Id*. at 220 (Thomas, J., dissenting).

77. *Id*. at 176.

78. *See* Prucha, *supra* note 41, at 419-22, Plates 41-43 (showing treaty protesters alleging "equal protection" violations).

treaties.[79]

Second, in the original deal, the Indians ceded to the United States a good part of what is now Minnesota and Wisconsin in exchange for valuable consideration, part of which was the hunting, fishing, and gathering rights retained and at issue in the litigation.[80] A century-and-a-half later the non-Indians who live on that ceded land have become very accustomed to the land belonging to them and, before them, to their non-Indian predecessors in title. The fact that the Chippewa Indians were the original owners may seem to the present-day owners to be of no modern relevance, something we think about on Thanksgiving and Columbus Day, and during a couple of weeks of eighth grade history, but not otherwise.[81] And without remembering the original deal, then the Indians' rights to hunt, fish and gather seem to be special rights, unavailable to the larger society and superficially violative of the equal protection rights of the majority. But it seems entirely appropriate for the Indians to say, "Hey. *You got Wisconsin*."

As a third observation, note these two political realities. First, it seems to me that the political will does not exist in the nation to abrogate all Indian treaty rights. True enough, that has been attempted in the past, most recently in the tellingly-named "Native American Equal Opportunity Act."[82] But many Americans accept the fact that Indians hold a high moral ground relating to their ancient occupancy of the continent, the circumstances of their loss thereof, and the role treaties played in that process. As the first President Bush said in his inaugural address, "Great nations like great men must keep their word. When America says something, America means it, whether a treaty or an agreement or a vow made on marble steps."[83] It is, of course, entirely unclear that the new

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79. *Id*.

80. *See Mille Lacs Band*, 526 U.S. at 175-76.

81. When I first mention title-searching to my first-year students, and say that because of our archaic property rules, the chain of title must be established "all the way back to the Indians," the comment always provokes a snicker from the class. The students – I daresay most Americans – need to be reminded that this is not a joke, nor a quaint relic from the distant past; rather it is a fundamental truth of North American life.

82. H.R. 13329, 95th Cong., (2d Sess. 1978). *See generally*, Prucha, *supra* note 41, at 423-25.

83. George Bush, Inaugural Address (Jan. 20, 1989), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE BUSH, BOOK I, at 1, 3. Students of Indian law recognized the first sentence in this quotation as almost identical to a sentence from Justice Black's dissent in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). President Bush substituted "must" for Justice Black's "should." For reasons that are sad, but plain, Justice Black's comment most often shows up in Indian cases in dissents, rather than majority opinions. *See, e.g.*, Hagen v. Utah, 510 U.S. 399, 422 (1994) (Blackmun, J., dissenting); South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 529 (1986) (Blackmun, J., dissenting); Seneca Nation of Indians v. United States, 338 F.2d 55, 57 (2d Cir. 1964) (Moore, C.J., dissenting); State v. Cutler, 708 P.2d 853, 867 (Idaho 1985) (Bistline, J., dissenting). In non-Indian cases, the quotation more often is in the majority opinion. *See, e.g.*, Cent. Intelligence Agency v. Sims, 471 U.S. 159,

President was intending his remark to refer to Indian treaties.[84] In fact, it would be remarkable if any modern President would turn the nation's attention to Indian affairs in an inaugural address, a point I will return to below. Nevertheless, as a general matter I believe President George H.W. Bush's remark rang true to many American ears, enough so to keep a sweeping abrogation of treaties politically non-viable.[85] Second, nor does the political will exist to re-create all of the rights embodied in treaties via modern statutes. For Congress to enact into statutory law the Chippewas' off-reservation hunting, fishing, and gathering rights would put enormous pressure on Minnesota's and Wisconsin's congressional delegations, which in turn would put pressure on the rest of the Congress regarding what would likely be seen as a local issue of importance to North Country voters and their representatives.

So, treaty rights cannot be sweepingly destroyed by the political process, at least not in the present political climate, nor can they be sweepingly re-created by modern-day statutes. Thus the old treaties remain, new treaties are not permitted,[86] and the Supreme Court has to figure out what Zachary Taylor intended in an 1850 Executive Order of ambiguous meaning.[87] In *Mille Lacs Band*, the Court held that President Taylor did not terminate the tribes' hunting, fishing, and gathering rights under his Executive Order of February 6, 1850.[88] Four Justices vigorously dissented.[89] Among the three opinions written, the careful dissection, not to say divination, of President Taylor's words was impressive.

As a fourth observation, note that the non-Indian public's objection to treaty rights is based on a short-sightedness that is consistent with Thomas Jefferson's sentiment that I quoted with approval above: "It is so long since our forefathers came from beyond the great water, that we have lost the memory of it,

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175 (1984); Heckler v. Mathews, 465 U.S. 728, 748 (1984); Astrup v. Immigration & Naturalization Serv., 402 U.S. 509, 514 (1971); United States v. Ortiz, 315 F.3d 873, 887 (8th Cir. 2002); United States v. Ala. Pub. Utils. Comm'n, 23 F.3d 257, 262 (9th Cir. 1994).

84. The passage quoted comes from the part of his address where the new President turned his thoughts "[t]o the world, . . . offer[ing] new engagement and a renewed vow." The "new closeness with the Soviet Union" was specifically noted. Bush, *supra* note 83, at 3.

85. President George W. Bush seems less committed to the sanctity of treaties than his father was. *See generally*, Diane Marie Amann & M.N.S. Sellers, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV: The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002).

86. Treaty-making ended in 1871. *See* Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (current version at 25 U.S.C. § 71(1988)).

87. *Mille Lacs Band*, 526 U.S. at 179.

88. *Id*. at 188-94.

89. *Id.* at 208 (Rehnquist, C.J., dissenting); *id*. at 220 (Thomas, J., dissenting).

and seem to have grown out of this land, as you have done." [90] It is worth noting, however, that it was difficult for Jefferson to forget the presence of the Indians to the west; they were still a force to be reckoned with, and he can be forgiven for advancing to them the position that he, like they, was from here. In modern America, however, Indians are so few that we do not pay them much attention, and they pass largely unnoticed among the great mass of the rest of us. It is one thing for Jefferson, six generations or so removed from Europe,[91] to declare himself as much an American as the Indians.[92] It is another thing for modern Americans to be so unmindful of who was here first as to forget how they came to own Wisconsin in the first place and what the original deal was.[93]

C. Political Billboards and American Indian Law

Which brings me back to the two billboards, and this observation, broader than the ones made so far: the fact that two political parties would make the Treaty of Waitangi an issue in a national election campaign demonstrates a New Zealand phenomenon without parallel in the United States, at least for the last three-quarters of a century or so. As we have seen, the treaty issues of repose, represented by the National billboard, and of equal protection, represented by the ACT billboard, are live issues here, both in litigation and in local politics. But it is hardly imaginable that they would become part of a national election campaign, just as it is hard to imagine that George H.W. Bush was thinking about Indian treaties when he made the "Great nations . . ." reference in his inaugural speech. American Indians represent less than one percent of the population of the United States and it is difficult to identify a single member of Congress whose election regularly depends upon the support of American Indians.[94] Here in the United States the issues remain largely local, largely western, and rarely within the national political consciousness.[95]

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90. *See* AMBROSE, *supra* note 17.

91. This is a difficult calculation to make, due to the complexities of genealogy. I came up with the figure of six generations this way: President Jefferson's father was Peter (generation 1), whose father was Thomas Jefferson II (generation 2), whose mother was Mary Branch (generation 3), whose father was Christopher Branch III (generation 4), whose father was Christopher II (generation 5), whose father Christopher I (generation 6) was born in England. *See* John W. Pritchett, *The Family History of John W. Pritchett*, *at* http://www.virginians.com.html.

92. *See* AMBROSE, *supra* note 17.

93. *See Mille Lacs Band*, 526 U.S. at 190-91 (stating the position of the State of Minnesota regarding the present validity of the treaty terms).

94. Which is not to say that Indian votes do not matter, especially in close races. *See*, *e.g.*, T.R. Reid, *New Indian Voters Turned Race in S.D.; Turnout Key to Democrat Johnson*, WASH. POST, Nov. 8, 2002, at A10.

95. Gambling is changing this political dynamic. In the pre-casino era of Indian politics, one of the realities of the workings of the Congress was that issues of Indian law were of little concern to members without Indian country in their states or districts, who

This observation leads to an interesting *gedanken experiment*: what if African-Americans had treaty rights? African-Americans, after all, represent about the same proportion of the United States population as Maoris do in New Zealand.[96] If African-Americans had treaty rights, then one would expect the national political consciousness to include questions such as we have seen raised in New Zealand by National and ACT. Questions of repose and equal protection, then, would come out of the courtroom and head into the national voting booth. It is impossible to know how these politics would play out, but it seems generally to comport with my limited understanding of American politics that the mainstream center-right party, that is to say the Republicans, would carry the banner of repose, as was done by the National Party in New Zealand, while the misshapen notion that treaty rights offend notions of equal protection would be advanced by a more conservative faction within the Republican Party, or by a right-wing minor party.[97] Of course, with the much larger voting block that African-Americans have over Native Americans in the United States, the dynamics of the political treatment of those questions would change dramatically.[98]

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would generally defer to their western colleagues when Indian law issues arose. With the advent of reservation casino gambling, however, this reality changed. Now members from states with few Indians, say the Senators from Indiana, can envision the opening of a casino outside Indianapolis, so (1) Indian law is now important to them and (2) they have a very narrow concentration on the legal issues raised. They become less likely to defer to their western colleagues at the same time that they see little of Indian law beyond the issue of reservation gambling. *See, e.g.*, Editorial, *Dear Sen. Inouye: Please Help Miami*, THE INDIANAPOLIS STAR, Aug. 24, 2002, at 12A. It is worth noting that I have commonly used Indiana, a randomly-chosen state without Indian country, as a hypothetical to demonstrate this changed political dynamic. It was only for the preparation of this essay that I did a NEXIS search and found, not only that the issue has arisen in Indiana, but that it is alive right now. And it is presented in the classic way: as the editorial cited shows by its plea to a Senator from Hawaii, the Senators from Indiana are reluctant to push for recognition of the Miami Nation of Indiana. The editorial states, "Senators Lugar and Bayh have been sympathetic to the Miami over the years, but recently said they're afraid the tribe might open a casino." *Id*.

96. In 2000, African-Americans represented 12.3% of the population of the United States. *See* U.S. Census Bureau Population, *at* www.census.gov/statab/www/poppart (last visited Aug. 28, 2003). In 2001, Maoris represented 14% of the population of New Zealand. *See* Ministry of Maori Development, *Maori Population, at* www.tpk.govt.nz/maori/population(last visited Aug. 28, 2003).

97. New Zealand has a system of proportional representation in Parliament, which increases the political influence of minor parties on the extremes, hence ACT.

98. *See Government Apologises for the Taranaki Wars*, THE NEW ZEALAND HERALD (on-line edition), June 4, 2003, *available at* http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3505616&reportID=1162603:

> Treaty negotiations under minister Margaret Wilson was to read out the apology today at Pariroa Pa near Hawera to acknowledge breaches of the Treaty of Waitangi. "The crown profoundly regrets, and unreservedly apologizes to Ngati Ruanui, for its actions which

Africans, though, came to this country as legal individuals, not as tribes, and there was never any treaty-making between them and the U.S. government. Furthermore, the actual individuals who were brought to this continent are now dead, claims for reparations having to be made by their descendants. The corporate entities that we call "Indian tribes," however, as well as the corporate entity we call "The United States of America," are of potentially endless duration, and are with us still. In a very real way, the actual parties to an 1837 treaty such as was at issue in the *Mille Lacs Band* case may negotiate or litigate past wrongs in 2003, while the Africans who directly suffered the wrongs of slavery are long dead.

Hence, compensation for a generations-old Indian treaty abrogation can still find its way directly to the wronged party,[99] but the wrongs of slavery must find a different theory of recovery, usually implied-in-fact or implied-in-law contract.[100] African-Americans are a greater political force in the United States than are Indians, but without the recognition of the continuing corporate existence of tribes, and the formality of treaties, the case for reparations appears to be politically non-viable, at least at the present.[101] If, on the other hand, African-Americans had treaties, then the case for reparations would be theoretically cleaner, but the validity and interpretation of those treaties would be a matter of national political concern and, as I saw in New Zealand, the calls for "closing the book on treaty claims" and "one law for all Americans" would likely be carried forward by various national political parties, to what end no one can be sure.

> have resulted in the loss of life and the virtual landlessness of Ngati Ruanua in Taranaki and have caused suffering and hardship to Ngati Ruanue over the generations to the present day," Ms. Wilson said. The text of the apology was agreed with the iwi and included in the Ngati Ruanui Claims Settlement Act. The settlement includes a combination of cash and crown-owned land worth a total of [NZ]$41 million.

Id.

99. It does not go without saying that a cause of action lies for the unilateral abrogation of an Indian treaty by the United States, but in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Supreme Court held that many such abrogations are, in fact, compensable in the United States Claims Court.

100. *See* Heller & Serkin, *supra* note 62.

101. *See generally*, William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2003); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998); Eric K. Yamamoto, *Racial Reparation: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993).

IV. CONCLUSION

Those of us who do American Indian law are rather famous for seeing it everywhere. Judith Resnik saw it at work in the basic underpinnings of American federalism.[102] Robert A. Williams, Jr. saw it in a Papal Bull of Innocent IV in the thirteenth century.[103] Rennard Strickland saw it in a pre-surrealistic painting.[104] Robert N. Clinton once made a "vision quest" in search of it.[105] I once saw it in a science fiction story.[106] It surprises no one who is familiar with the field, with geography or with the history of British colonialism, that there were issues relating to indigenous people awaiting me in New Zealand. What surprised *me* was that my short time there raised so many questions regarding the field that I thought I knew so well from home. The questions, which are numerous, and the insights, such as they are, of American Indian law may be everywhere. But so, too, apparently, are new vantage points from which to view the field. The perspective one gains from there is invaluable, and shows the way to a broader understanding of American Indian law. So, in this instance at least, and as I hope this essay has demonstrated, Zapp was wrong.

102. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

103. Williams, *Algebra of Federal Indian Law, supra* note 14 at 229-39.

104. Rennard Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 ME. L. REV. 213 (1979).

105. Clinton, *Redressing Legacy of Conquest*, *supra* note 14.

106. Robert Laurence, *Civil Procedure in Low Earth Orbit: Science Fiction, American Indians and Federal Courts*, 24 N.M. L. Rev. 265 (1994).