Introduction

Responding to a Changing Field

Grant Christensen and Melissa L. Tatum

Thirty years ago the Indian law community was small enough that it was possible for even a scholar new to the field to keep up with most of the Indian law scholarship published annually. However, as our field has proliferated, it has also fragmented, and today more than two hundred pieces of new legal scholarship are published annually in law reviews alone.* These law reviews are not just ivory tower musings; there are now some scholarly contributions which are as fundamental for the study of Indian law as many cases or statutes. These articles help to contextualize the changing doctrines announced by the Court, reconcile contradictory authority, challenge assumptions of race/place/power, and push for courts, tribal leaders, legislators, lawyers, educators, and students to adopt new ways of thinking about our fundamental doctrine. However, with so many new contributions we realized that new scholars may miss some of the most impactful articles, and even the progenitors of the field will have forgotten about some of the best ideas put forward by colleagues over the years. While several federal Indian law textbooks exist to preserve judicial doctrine, there is no definitive collection of related legal scholarship.

This text attempts to remedy this omission by selecting sixteen of the most impactful law review articles published between 1985 and 2015. We divided the selected articles into four equal parts, each centered amid an ongoing critical scholarly debate that is fundamental to the development of Indian law but beyond the scope of judicial analysis. Part I explores the legal fictions and political realities inherent in addressing colonialism, including questions of sovereignty, legal pluralism, and race. Part II questions the legitimacy of federal courts to make decisions

* Parts of the material below, including the ranking of the 100 most impactful pieces of Indian law scholarship, were taken from our law review article, Grant Christensen & Melissa L. Tatum, *Reading Indian Law: Evaluating Thirty Years of Indian Law Scholarship*, 54 Tulsa L. Rev. 81 (2018).

involving a sovereign people without respect for their voices and traditions. Part III engages with the struggle to define the nature of property and ownership of both tangible and intangible assets, including allotments, cultural property, and traditional knowledge. Finally, Part IV concludes by looking at the structure of law itself and inquires whether the rules of the system justly allocate power between competing sovereigns.

The remainder of this introduction serves several purposes. It starts by providing a short narrative of the history of federal Indian policy and its impact on federal Indian law. Building upon this history, it proceeds to lay a foundation for the creation of federal Indian legal scholarship and articulates the emergence of different voices in the field. This multiplicity of voices raised questions about identifying and defining the foundations of Indian law precipitating the research upon which this text is based. The introduction continues with a discussion of our methodology for the selection of these incorporated texts and finishes with both a few short concluding remarks from the authors and a ranking of the 100 most impactful Indian law pieces from 1985 to 2015.

HISTORY OF INDIAN LAW AND POLICY

The foundations of federal Indian law are inextricably intertwined with the history of the United States and with the history of federal Indian policy. It is thus impossible to assemble a book exploring those foundations without discussing the relevant history.

When Europeans began exploring the "New World," they often chose to negotiate agreements or treaties with the Indigenous governments. The earliest treaties were negotiated as between equals and were often favorable to the tribes. These agreements were occasionally mutual aid or military alliances. Indeed, one of the grievances enumerated in the Declaration of Independence was that the king had "excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions." Despite the unconscionable rhetoric of "Indian Savages," the placement of Indians in the Declaration is proof that the relationship between tribal governments and the United States can trace its origins back to the very founding of our government.

The newly formed United States of America chose to continue the practice of dealing with Indians through treaties. The Articles of Confederation reserved to the federal government "the sole and exclusive right and power of *** regulating the trade and managing all affairs with the Indians" (Article IX). When it became clear that the Articles of Confederation were not working and needed to be replaced, the new Constitution reserved to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Article I, Section 8), and provided that representation in the legislature "shall be

apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons" (Article I, Section 2).

Tribal governments were thus not considered part of the United States, at least not initially, and the practice of negotiating treaties continued until ended by Congress in 1871, when treaties were replaced by the more euphemistic "Agreements." As time progressed and treaties became agreements, the relationship between Indian tribes and the United States became less focused on securing mutual aid and alliance and more focused, at least from the perspective of the federal government, on acquiring land. To keep a separation between settlers and Indians, the United States first sought to remove and resettle tribes west of the Mississippi River. However, as the boundaries of the new nation advanced ever westward, the focus shifted to negotiating agreements that confined Indians to reservations.

In 1849, the federal government moved its office of Indian Affairs from the Department of War to the Department of Interior, and the process of incorporating tribes into the United States began. In the late 1800s, federal Indian policy officially shifted to one of allotment and assimilation, with the intention of eliminating tribal governments and incorporating Indians into the larger US population. This policy proceeded along two parallel paths. Indian Agents were assigned to administer reservations, eradicating traditional religions and cultural practices by enforcing the newly promulgated Code of Indian Offenses. Indian Agents also facilitated the process of removing Indian children from their families and placing them in Christian-run boarding schools. These schools sought to eradicate traditional religious and cultural practices.

Congress "allotted" reservations, dividing the land into parcels and assigning a set number of acres to individual members of the tribe. The extra, or "surplus," land was then sold to non-Indians. The title to these individually assigned parcels was held in trust by the federal government for a set period of years, after which the restrictions on alienation were released. Not all reservations were allotted, but a significant portion of the reservations suffered this fate. A great deal of fraud, corruption, and mismanagement grew out of the allotment process, with approximately two-thirds of the land initially reserved for tribes flowing out of tribal hands. The "checkerboard" nature of landownership on these allotted reservations has caused, and continues to cause, problems for tribal governments seeking to exercise governmental authority over the lands within their territorial boundaries.

In the late 1920s, a study commissioned by the federal government resulted in what has become known as the Meriam Report. This report contained a detailed examination of the dismal social and economic conditions on reservations and concluded that the allotment policy had been a failure. In response to this report, Congress enacted the Indian Reorganization Act (IRA) in 1934. The IRA officially

repudiated the allotment policy and encouraged tribes to reorganize their tribal governments. The IRA provided a mechanism by which tribes could adopt a constitution, although they were not required to do so, and created the foundation for tribal courts. In recognition of the fact that governments need revenue to operate, and the allotment policy had destroyed the tax base on most reservations, the IRA also encouraged tribes to establish businesses and develop their local economies.

Congress changed direction again in the 1950s, adopting a policy of "terminating" not the tribal government, but the official relationship between tribes and the United States. Congress also enacted two key laws during this time. One, which became known as Public Law 280, transferred some federal responsibilities to states. Six states were ultimately given no choice about accepting these transferred powers, while other states had the option to select what, if any, authority they would assume. The second law, the Indian Relocation Act, created a process for relocating individual Indians from reservations to large cities, resulting in the creation of an urban Indian population.

The termination process was not applied to all tribes, but most of those who were terminated suffered hardship. Some tribes have successfully sought to reestablish official relationships with the United States. Others are still seeking to revoke their terminated status.

The Termination Era was short-lived and officially ended when President Nixon announced the launch of a new era of federal Indian policy in 1970. This new era would again encourage tribal self-determination, and the federal government would deal with tribal governments on a government-to-government basis. Emblematic of this change was the enactment in 1975 of the Indian Self-Determination and Education Assistance Act. The ISDEAA established a mechanism through which tribes could contract to administer services previously provided by the federal government. Known as 638 contracting, this process enabled tribal governments to run services including schools, police departments, and hospitals, in a manner which was culturally appropriate to each tribal community.

From its beginning and through most of the 1970s, a consistent narrative flowed through federal Indian law. While the policies changed, the principles of federal Indian law did not. Those principles stated that tribes were sovereign, although their sovereignty had been diminished upon incorporation into the United States, and that the federal government retained primary authority over Indian affairs. Until the 1970s the Supreme Court continuously deferred to Congress in the area of federal Indian policy. The specific policies changed from assimilation to reorganization to termination to self-determination, but the Supreme Court's deference to Congress did not. This clear narrative of deference ended in the 1970s at the same time that federal Indian law emerged as a discrete academic discipline. The confluence of these events would dramatically change the field.

AN EMERGENCE OF VOICES

The 1970s saw an emergence of voices in federal Indian law, not just in the legal academy, but also in the judicial and political worlds. While the political branches of government continued to implement the announced policy of tribal self-determination, culminating in tribal courts prosecuting non-Indian persons, tribal governments levying taxes on non-Indians and non-Indian businesses, and demanding recognition of treaty-protected rights to hunt, fish, and gather both on and off the reservation, the Court pushed back. No longer wedded to the original Indian law canons, including deference to Congress, the Court took a more active role in rewriting federal Indian law and redefining the power of tribal governments.

These changes in the Supreme Court coincided with the rise of federal Indian law as a discrete academic discipline, with two textbooks being published in the 1970s and a growth in the number of schools hiring faculty to teach and write in the area. The first scholars predominantly came from the public interest world, thereby cementing a close relationship between the legal academy and the practicing bar. The scholarship that emerged from these first faculty was rooted in the historic principles of federal Indian law and the canons of construction, which provide that ambiguities in treaties and statutes should (1) be resolved in favor of the Indian tribal interest and (2) be interpreted as Indians would have understood them.

These scholars spoke with a consistent voice that there was one narrative underlying federal Indian law. They drew upon a series of three cases decided by Chief Justice Marshall in the early 1800s that established the basic principles governing the relationship between tribes, states, and federal government. In explaining the Court's behavior, these first scholars returned consistently to the foundational ideas established a century earlier. They may have argued among themselves about the application of those ideas, but the ideas themselves were not in question.

By the end of the 1970s the Supreme Court began to depart radically from this shared history and the principles laid out in the Marshall Trilogy. Tribal court jurisdiction provides a good contextual example. In *Williams v. Lee* (1959) a pair of Navajo Indians challenged the authority of the State of Arizona to hear a claim for repayment of a debt incurred when a non-Indian shopkeeper extended the tribal members' credit at a store located on the reservation. The Supreme Court held that Arizona had no authority to hear the case; "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Two decades later the Court had suddenly become much more protective of non-Indians. In *Montana v. United States* (1981) the Crow Tribe sought to require non-Indians to comply with Crow rules banning non-Indians from fishing on the Crow reservation. The Court held that the Tribe could not regulate the non-Indian conduct while on non-Indian land within the reservation: "exercise of tribal power beyond what is necessary to

protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." As it became clear that the Supreme Court was not interested in remaining faithful to the foundational principles, the legal academy began to search for alternative explanations for the Court's behavior. It is at this point that the voice of the legal academy ceased to be unified, and a search for new perspectives precipitated an emergence of different voices.

At this juncture Indian law scholars in the academy began to bifurcate their approaches to the development of legal scholarship. Some held fast to the traditional approach rooted in history, while others sought new and different ways to conceptualize the emerging doctrines. Even within these alternative approaches, there was no one unified voice but rather competing ideas to explain the Court's behavior and to question the origins of the field.

Rooted in history, one group focused on rethinking the approach taken by practitioners in litigating Indian law cases. This scholarship re-centered itself from a focus on the principles laid out in the Marshall Trilogy to an attempt to reconcile the new reality of an unbounded Supreme Court. It sought out the practical, attempting to show a way forward for practitioners to use more traditional areas of law to advocate for tribal clients. For example in *United States v. White Mountain Apache* (2003), instead of focusing on the historical or treaty relationship between the Tribe and the United States, advocates returned to trust law, something with which the Court was comfortably familiar. In *White Mountain* the Tribe argued that Fort Apache, located on the reservation, had been permitted to fall into disrepair. It sought compensation from the United States to restore the Fort to working condition. The Court agreed, recognizing that the property in question was held by the United States as trustee for the tribal beneficiary, and accordingly found for the Tribe; holding that the United States had breached its trust responsibility.

Other scholars looked farther afield in seeking to explain and confront the Court's departure from the traditional approach to Indian law. These scholars were less interested in technical niceties of the law, and more interested in philosophical and jurisprudential explanations – rethinking the relationship between tribes, states, and the United States. Critical perspectives flourished among this group, finding a basis in Critical Legal Studies, Critical Race Theory, American Indian Studies, and related disciplines. Rather than speaking to practitioners, much of this scholarship looked for alternative solutions to the problems created by the Court's changing jurisprudence. The solutions offered by this group were varied; some encouraging the development of tribal voices and strengthening tribal governance while others critiqued even the ability of the existing power relationship to reach an effective solution. These scholars collectively offered new voices and perspectives from which to approach the discipline of federal Indian law.

This diversity of approaches meant there was no longer a unified foundation; it has made the field more exciting and challenging, but at the same time it has also

made it more difficult to succinctly articulate the foundations of the field. Who owns federal Indian law? Does it belong to those who continue to ground the approach in nineteenth-century cases, territorial boundaries, and competing conceptions of individual rights; or does it more properly belong to those critical scholars who have encouraged a reexamination of judicial doctrine and the involvement of tribal government? Is there space for multiple voices and perspectives within the field of Indian law?

SEARCHING FOR THE FOUNDATIONS OF INDIAN LAW

These questions arose for us during a conversation about the role of Indian legal scholarship in the law school curriculum. We first met in 2009 at the University of Arizona, where Melissa was on the faculty and Grant had enrolled in the Indigenous Peoples Law and Policy LLM program. After graduation, Grant was immediately hired as an adjunct professor in Indian law at the University of Toledo and then a visiting professor at the University of Oregon before accepting his first tenure track appointment. Melissa had joined the academy almost two decades earlier. We therefore became Indian law professors at two very different points in the history of the field, and brought with us different perspectives.

Melissa graduated from the University of Michigan in 1992. During her time there, no federal Indian law course was offered. She became interested in the topic through her service as a member of the *Michigan Law Review*. While she received some guidance from interested faculty, there was no formal training available to her in law school. Therefore her knowledge of Indian law was built by studying the existing tradition and history-bound scholarship that existed at that time, and her first contributions built upon that narrative.

In contrast, by the time Grant got to law school in 2004 he was able to join the Indian Law Summer Program offered by Lewis & Clark – where he spent an entire summer semester studying federal Indian law, several advanced Indian law electives, and an externship placement working with tribes through the Department of Energy's Bonneville Power Authority. He was able to continue his study of Indian law in a dedicated year-long graduate program at the University of Arizona in 2010. Through the culmination of these courses Grant was exposed to different narratives in Indian law, exploring the diverse voices and perspectives in the field. As a result of this more comprehensive experience as a student, Grant's first scholarship was more conversant with the different perspectives that had further developed by the time he entered the academy.

This book grew out of a conversation we initiated during the Federal Bar Association's annual Indian Law Conference in 2014. Now colleagues, we began discussing the difference between using legal scholarship and black letter case law when teaching Indian law to students. We realized that while we often refer to cases with students, we rarely if ever discuss scholars. Yet, in our own scholarship, much of

what we read and write is influenced by the voices of other scholars and their interpretations of history, philosophy, law, and culture. Was it possible to design materials that would correct for this omission and bring these important voices expressing foundational ideas back into the classroom?

To answer this question we would have to identify what scholarship would be included. While we each had personal favorites, we endeavored to apply a rigorous approach to identifying the most important Indian law scholarship. Perhaps in this way we, too, could add something important to the field.

HOW THE PIECES WERE SELECTED: MEASURING ARTICLE IMPACT

We wanted to ensure that the pieces we included in this text were not just pieces that we qualitatively thought to be exceptional, but rather that our selection would be informed by a more rigorous methodological approach. We began by using the *Index to Legal Periodicals* and the National Indian Law Library's annual bibliography to identify the 3,334 law review articles dealing with Indian law and published in academic journals between 1985 and 2015.

There are two principal electronic databases for legal materials in the United States: Lexis and Westlaw. To help measure the relative impact of each article, we started by putting each citation into Lexis. A preliminary score was then created for each article by totaling the number of citations by courts, in law reviews, and in treatises that Lexis recorded. This preliminary score treated every citation identically and did not attempt to weight any one citation higher than any other. To correct for the element of time, because articles decided thirty years ago will have more citations than those decided two years ago, we then divided the number of citations by the number of years the article had been in print. The denominator was determined by subtracting the year of publication from 2017. This created a citations-per-year metric for each article which allowed us to compare articles directly against each other.

We are aware that it is possible that Lexis and Westlaw may record slightly different citation counts because they index slightly different lists of journals and treatises. To correct for this we took all articles that had an average of 2.0 citations per year in the preliminary Lexis score and used Westlaw's KeyCite feature to verify their citations. For each of these articles we recorded the number of court citations identified by KeyCite. Encouragingly, these counts were virtually identical. We also recorded the number of citations in "Secondary Sources" in order to mirror the analysis used in Lexis.

To create a final impact score we added the number of case, law review, and treatise citations from Lexis with the number of case and secondary source citations from Westlaw. We then divided that total citation count by the number of years since the article was published. This created a score which is roughly twice the number of citations per article per year. It gives equal weight to both Lexis and

Westlaw citations. It essentially double counts a citation that was indexed by both search engines while still giving an article full credit when it was identified in a source captured by only one search tool.

The result was a single score that allowed direct comparisons between articles. By sorting articles by their combined score, a ranking of Indian law scholarship emerged that was exact enough to identify the top 100 Indian law articles when measured by their relative citation count. We have included a complete list of the 100 most impactful articles at the end of this introduction.

An important caveat: we recognize that the topic of an article will have an important effect on its citation count. The articles that are the most cited tend to deal with observations that affect the entire field or that have applications in many different Indian law contexts, like sovereignty, tribal property, or federal–tribal relations. Alternatively, some of the most cited pieces deal with singular topics that exist throughout Indian country and are regularly the subject of observation or critique, like the Indian Child Welfare Act or the status of tribal attorneys. Articles that cover these universal issues are much more likely to be widely cited and therefore be elevated in the ranking system. We also recognize that there are some very important articles in our field that, because they deal with niche issues that may affect only one tribe or region, are not cited enough to make their way into the top 100 articles listed here. Their omission certainly does not take away from their importance or say anything about the merits of their scholarship, they were simply not considered for inclusion in this volume.

QUALITATIVE SELECTION

We decided to limit our selection of articles for this volume to sixteen of the 100 most impactful pieces of scholarship, but have qualitatively chosen those sixteen contributions from that list. There are many reasons we did not simply select the first sixteen. First, any ranking system has inherent limitations and sometimes a couple of citations could dramatically alter an article's relative ranking. Additionally, because the purpose of this volume is to explore contributions that are foundational to the field, simply taking the top sixteen would not provide the rich diversity of ideas that exists in legal scholarship. Finally, we wanted to ensure a diversity of authors and perspectives so that this contribution is as comprehensive as possible.

Our qualitative selection should not be taken to imply that scholarly pieces in the top 100, but not included in this volume, are of any less importance to the field. When compiling a volume of this nature, inevitably some lines must be drawn and some articles selected over others. We have included the entire list of articles at the end of this introduction, and incorporated many of them by reference throughout this volume, precisely because each makes an important contribution to Indian law scholarship.

CONCLUDING REMARKS

The field of Indian law has evolved tremendously over the last thirty years. Helping courts, practitioners, tribal governments, scholars, congresspersons, and students make sense of these changes and critique them has been the primary work of tremendous contributions to Indian law scholarship. The sixteen articles highlighted here, and hundreds more, deserve to be celebrated and even more widely read by all audiences.

It is our hope that readers will not use the rankings below to quarrel over whether Professor Clinton's work on plenary power is really five places more important than Professor Resnik's work on the federal courts. In many ways a direct comparison of the substantive ideas embedded in these works is truly impossible. Instead we hope to celebrate all of these pieces as making foundational contributions to our field. This selection, excerpting sixteen of these works, is our first attempt to highlight and celebrate the incredible scholarly contributions of our friends, colleagues, mentors, and peers.

When we started this project, we knew our field had grown but we never expected to find more than 3,000 Indian law articles. At times we were haunted by the collective works of legends in our field who have walked on: Bill Rice, David Getches, Philip Frickey, and so many others. After cataloging three decades' worth of Indian law scholarship, we have both rediscovered old favorites and come across new pieces that have challenged and informed our own understanding of what 'Indian law' really is. We hope this book ultimately sparks some of those same feelings of rediscovery and excitement in every reader.

THE RANKINGS

The top 100 Indian law articles as determined by the ranking system are reported here, ranked by their score. When an article had multiple authors, the authors' names are reported in the order they appeared in the article. Citation abbreviation for each journal conforms with the Bluebook rules for journal citation. When two or more articles had an identical score, they have been given an identical rank and listed in alphabetical order by the first author's surname. The next number is then skipped to ensure that only 100 articles are listed. For example, there are two articles with a score of 8.43 and thus tied for 54th place. Each of those articles is ranked 54th and the next article is ranked 56th.

Represented among these top 100 articles are professors who authored the first wave of Indian law legal scholarship like Philip Frickey and David Getches, the first indigenous voices like Robert Williams and Gloria Valencia-Weber, as well as newer members of the academy like Matthew L. M. Fletcher, Angela Riley, and Bethany Berger.