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Robert Laurence

INDIAN-LAW SCHOLARSHIP AND TRIBAL SURVIVAL: A SHORT ESSAY, PROMPTED BY A LONG FOOTNOTE

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Volume 34 of the *Arizona State Law Journal* contains the latest piece of scholarship by Robert N. Clinton, who holds the Barry Goldwater Chair of American Institutions at Arizona State University.[1] That article's thesis is set forth so plainly and unambiguously in its straightforward, uncolonated title — "*There Is No Federal Supremacy Clause for Indian Tribes*" — that there is little need to give a synopsis here, beyond this: Professor Clinton sets out to prove that Congress lacks constitutional authority to impose its, or the nation's, will on American Indian tribes. From the conclusion:

> The short version of this lengthy exegesis on the illegitimacy of the federal Indian plenary power doctrine and the lack of federal supremacy over Indian tribes is simply that the emperor has no clothes! It is high time legal scholarship routinely speaks truth to power in the hope that constitutional scholars, lawyers, and judges will conclude finally that what Congress and the Supreme Court have long claimed as a legitimate federal plenary power over Indian tribes, in fact, simply has no constitutional textual or original historical basis. The federal Indian plenary power doctrine is nothing more than a raw assertion of naked colonial power ostensibly cloaked with an aura of constitutional legitimacy by mere judicial *fiat*.[2]

Professor Clinton's article is what we have come to expect from one of the handful of people who can legitimately claim to be the leading Indian-law scholars of the last quarter of the twentieth century. It is massive; it is original; it is constitutionally precise; it is historically astute. And, it could be expected to provoke a response from me, the famous defender of the plenary power of Congress, at least to the extent that saying that I can "live with" the plenary power was a defense of it, which it was not.[3]

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* Robert A. Leflar Distinguished Professor of Law, University of Arkansas.

1. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002). Volume 34, No. 1 of the *Arizona State Law Journal* contains the proceedings of a Symposium on "Cultural Sovereignty: Native Rights in the 21st Century."

2. *Id.* at 259.

3. *See* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the*

However, the present short essay is not that response. I had my say on the plenary power years ago, for which I received no particular outpouring of friendly scholarly support. Truth be told, I can still live with the plenary power of Congress over the Indian nations,[4] but for present purposes that is neither here nor there. You will find here no careful critique of *There Is No Federal Supremacy Clause for Indian Tribes*. I have negotiated that limb before and see no need to venture out there again now. If a reader wishes to conclude that the absence of that critique means that I find nothing particularly objectionable in Professor Clinton's treatment, I will not protest.

Herein, I intend to be brief, and set forth some thoughts prompted by exactly one footnote in *There Is No Federal Supremacy Clause for Indian Tribes*, footnote 458, the first paragraph of which is set forth here in full:

> After hearing a necessarily abbreviated oral presentation of portions of this article, Philip S. Deloria, the Director of the American Indian Law Center, Inc., rightly cautioned the author that if tribal leaders irresponsibly flaunt federal law in response to the author's legal theories, it could make life far worse for many Indian communities, whose socioeconomic data already places them at the bottom of most material and health measures of American society. These perceptive comments suggest that, whatever the original constitutional theory of federal power with respect to Indian tribes and irrespective of the nature of the relationship developed when treaties were negotiated, the model of the tribal-federal relations in fact has been a historically evolutionary one in which Indian tribes increasingly have become enmeshed with, controlled by, and economically dependent upon the federal government. Whatever its theoretical constitutional legitimacy, that practical reality clearly suggests that tribal leaders and tribal judges must be extremely cautious in exercising the powers they legitimately can claim.[5]

Indian Nations, 30 ARIZ. L. REV. 413 (1988).

4. I am with the vast majority of scholars in finding the sweeping plenary power the courts have created for themselves under the federal common law to be difficult to abide. *See* Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, As Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393 (1995).

5. Clinton, *supra* note 1, at 245 n.458.

The second paragraph of footnote 458 cites to the famous debate between me and Professor Robert A. Williams, Jr. of the University of Arizona College of Law over the fact and the legitimacy of the plenary power,[6] and concludes with this thought by Professor Clinton: "The mere fact that tribes often may have little practical choice but to accept exercises of federal plenary power does not necessarily constitutionally legitimate the use of that power by the federal government. This essay primarily addresses that latter question."[7]

For those eager for controversy, for those anticipating with some relish a theoretical cat-fight between old friends and grey-bearded scholars, let me note at the outset that the present essay will not be that, nor will it even be a particularly sharp critique of Professor Clinton's footnote 458. As my title sets forth, I was merely "prompted" in the present direction by that note, which raises, I think, important questions concerning the relationship between Indian-law scholarship and tribal survival. To Professor Clinton's credit, he has set forth Sam Deloria's criticism for all readers to see, when he might have chosen not to memorialize it in a footnote, and those not in attendance at the meeting mentioned would have never known of the exchange, and I would not have been prompted to join the debate, on Sam Deloria's side, as you will soon see.[8]

So the fact that Professor Clinton's footnote 458 prompted the present short essay does not mean that I want to hold him up for special criticism, though

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6. My offering in this debate is cited in note 3 *supra*. Professor Williams' is Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219. We exchanged responses beginning at 30 ARIZ. L. REV. 439 (1988).

7. Clinton, *supra* note 1, at 245 n.458. Footnote 458 is subtended to the first sentence of a two-paragraph "important cautionary practical note" that is largely duplicative of the sentence quoted in the text at *supra* note 5, beginning with the words "[w]hatever its theoretical constitutional legitimacy. . . ." These two paragraphs, together with footnote 458, have a tacked-on feeling, and one suspects that Professor Clinton's article was largely complete at the time of the oral presentation to which Sam Deloria reacted, and the caution urged by the latter became the former's cautionary practical note on pages 245-46 of the article's text. As I find the footnote more succinct and its attribution to Sam Deloria appropriate, I will concentrate here on the margin, not the text.

8. Mr. Deloria, himself, contributed to the symposium issue that includes Professor Clinton's article. *See* Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L.J. 55 (2002). That article, which is the written rendition of a speech, explores a broad range of issues and reacts to the views of several other participants in the symposium, and is entirely consistent with the comments related to us by Professor Clinton in his footnote 458. My comments here are on those latter thoughts alone, and I will not be analyzing Mr. Deloria's thought-provoking speech *qua* essay.

I will characterize *There Is No Federal Supremacy Clause for Indian Tribes* as an unusually good example of the kind of scholarship that might pose a threat to tribal survival in the twenty-first century. Many other law professors have suffered the criticism attributed to Mr. Deloria in footnote 458, and there is no need to exclude the present writer from that list. Nor is Mr. Deloria the only one who offers such criticism. Nor is such criticism always made publicly; as some of us know, a private comment can be withering.

Thus, with the thought firmly held by writer and readers alike that "There, but for the Grace of God, go I," I make the following observations, prompted by 34 *Ariz. St. L.J.* 113, 245, n. 458:

1. We have more influence over tribal decision makers when we are talking to them than when we write in our scholarly journals.

The publication of Indian-law scholarship has expanded greatly in the last quarter century.[9] How could I, a man of many words myself, find this expansion to be anything but laudable? And it is, if for no reason greater than that it shows that professors whose subject is ours are writing and getting tenure for doing so. But let's be honest: there is no good evidence that scholarly writing in the law reviews has any regular influence on the way that tribal decision makers make their decisions.[10]

It is one of the odd facts of the scholarly world we inhabit that we Indian-law scholars spend more of our time talking to nonlawyers than do scholars in most other fields. For one thing, many tribal judges and tribal-court advocates are not law-trained, yet they attend many meetings that might otherwise be characterized as "continuing legal education." Hence, nonlawyer

9. Here is a very unscientific measure of that expansion: The *Index to Legal Periodicals* for the time period September 1980 through August 1981 contains forty entries under "Indians." The same index for the time period September 2000 through August 2001 contains 140 entries under two categories, "Indians" and "Indigenous Peoples." As some of these entries are duplicates, these numbers do not precisely count the number of published articles, but they do make the trend clear.

10. This observation leaves aside for the present the question of whether the evidence is good or not that scholarly writing in the law reviews influences courts and, if so, in which ways. While it is surely true that most of the modern scholarship mentioned in the previous footnote may generally be characterized as "tribal advocacy," the same period of time has exhibited a general erosion of the concept of tribal sovereignty as recognized by the courts. How sad it was to see Dean Newton's fine scholarship on the workings of tribal courts cited by Justices Souter, Kennedy, and Thomas as part of their reason for concurring in *Nevada v. Hicks*, 533 U.S. 353 (2001). *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998), *cited in Hicks*, 533 U.S. at 423 (2001) (Souter, J., concurring).

tribal decision makers attend meetings where the speakers are commonly lawyers and law professors. The annual Indian Law Conference, sponsored by the Federal Bar Association, is only the best example of this phenomenon, but it is far from unique.

It takes no empirical study to convince me that it is when I stand at the lectern at such meetings, and when I engage in informal discussions in the surrounding hallways, that I am able to be most persuasive regarding my theoretical positions to these nonlawyer tribal decision makers. On the other hand, most theoretical essays in most law reviews have a *very* limited readership, and one that is made up mostly of writers of similar theoretical essays. I don't expect most tribal decision makers to read seventy-three pages of Indian law *cum* modern physics in the *Arizona Law Review*[11] and, frankly, they're not my audience when I'm writing theoretical pieces like that one, or this one. My influence comes when I'm talking to a small group of tribal officials about conflicts of interest in very small tribes, and the fact that the article mentioned dubs these conflicts as examples of "scalar asymmetry" is largely irrelevant to that influence. As a matter of fact, I concede that calling them "scalar asymmetries" can actually get in the way of convincing tribal decision makers that I know what I'm talking about or that anything I know should be relevant to what they do in their tribal offices.

So, I take these observations to be nearly self-evident: that we Indian-law scholars have direct access to tribal decision-making processes that makes our field special, if not unique, and that this access is more — much more — effective and real when we are speaking at Indian-law conferences than when we are writing for the law reviews.

It is equally self-evident to me that most of us believe in the importance of tribal survival to the very core of our scholarly selves.

What is missing, in my view, prompted as I have been by Professor Clinton's footnote 458, is the link between these self-evident truths. Indeed, the linkage itself may be less evident than the truths being linked, but we are lucky enough to have around us Sam Deloria, and those like him, nonscholars in the traditional sense perhaps, but those who have fought and are fighting the very real, nontheoretical battles for tribal survival every day, on the ground, in tribal council chambers, in tribal attorney generals' offices, and in tribal education-contracting departments. Mr. Deloria's comment upon hearing Professor Clinton's talk, related to us in footnote 458, was a reminder to the theorist, and through him to all theorists, that he was talking, right then, to

11. The reference is to Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861 (2000).

tribal leaders, and the impact of his theoretical thesis would never, ever, be greater on those leaders than it was right then, when the audience was live and the words were spoken. Such a reminder can be dramatic, as, reading between the lines, it may have been during the Clinton-Deloria exchange related in the footnote. (I wasn't there.) One is reminded of the occasion in the film *The Bridge on the River Kwai* when Colonel Nicholson realizes that his theories regarding the maintenance of prison camp morale were about to result in the easy transportation of the enemy's troops across the bridge. "Oh my God. What have I done?" Whether Professor Clinton suffered such an epiphany I do not know, but I would have.

2. "Necessarily abbreviated oral presentations" of scholarly matters are likely to be misleading.

It occurs to me that Professor Clinton concedes a good part of Mr. Deloria's point when he writes, a little defensively to my ear, that his co-panelist had heard only "a necessarily abbreviated oral presentation of portions of this article."[12] It goes without saying, doesn't it?, that a theorist's oral presentation of his or her scholarly thesis will often be "necessarily abbreviated." Does that mean, in turn, that theorists should never speak about their work, but only write? Surely not. There are important occasions to share one's thoughts that necessarily require abbreviation of those thoughts.

However, Mr. Deloria's point flows to here from the prior observation. It is specially, if not uniquely, the case that Indian-law theorists find themselves talking to tribal decision makers, rather than merely other theorists. And this talk is not in the abstract; the tribal decision makers are attending the conference not to theorize, but to get ideas about how to do their jobs. If the oral presentation of a Indian-law scholar's theories to an audience of tribal decision makers is necessarily abbreviated and, as such, potentially misleading, then those misled are the persons making the day-to-day decisions on which tribal existence depends.

I have emphasized already that the position Professor Clinton found himself in, and about which footnote 458 is written, is not an unusual one for Indian-law theorists. However, the thesis of his *Arizona State Law Journal* article is especially susceptible to the dangers of which Sam Deloria warns. *There Is No Federal Supremacy Clause for Indian Tribes* sets out the theoretical foundation for a tribe to deny the legitimacy of federal power over it.[13] "The

12. Clinton, *supra* note 1, at 245 n.458.

13. Professor Porter's article in the same issue of the *Arizona State Law Journal* is of the same ilk. *See* Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST.

federal Indian plenary power doctrine is nothing more than a raw assertion of naked colonial power ostensibly cloaked with an aura of constitutional legitimacy by mere judicial *fiat*."[14] Stated orally, and in necessarily abbreviated form, to an audience partly made up of tribal decision makers, the message given and perhaps received is that the decision makers and their tribes can tell the federal government to butt out, to stuff its directives or contracting requirements, to "irresponsibly flaunt federal law," in Professor Clinton's more formal words.[15]

Sam Deloria's reproof, then, goes like this: Oral presentations are necessarily abbreviated and, without great care, necessarily misleading. When the listeners are nonlawyer tribal decision makers, such misleadings can have real impacts on the ways tribes do business, and when the message is that the federal government is without power over tribes, the consequences may threaten in real ways the survival of the tribe.

3. Tribal leaders are unlikely to read the entire article.

Professor Clinton apparently concedes the point of Sam Deloria's reproof, for he has included footnote 458, and the "cautionary note" in the text of *There Is No Federal Supremacy Clause for Indian Tribes*, urging tribal leaders not to react "irresponsibly" based on his scholarship. But, does the concession of the point fix the problem? I think not.

Tribal decision makers are not like our co-theorists, and, as set out in Observation 1 above, they do not attend our scholarly discussions for the same reasons that other scholars, or practicing lawyers, attend them. All of us are comfortable referring friendly—or, for that matter, unfriendly—co-theorists to the article where our thoughts are set out more fully, unabbreviated, and

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L.J. 76 (2002). Professor Porter writes: "At a minimum then, scholars who write about the [Supreme] Court's Indian law decisions *as if they were legitimate* contribute to the elevation of American, rather than Indigenous, conceptions of Indigenous nation sovereignty." *Id.* at 98. This sentence is quite similar in its import to Professor Clinton's sentence, quoted in the text above at footnote 2, beginning with the words "It is high time . . . ."

14. Clinton, *supra* note 1, at 259.

15. *Id.* at 245 n.458. The meaning of what would, or would not, be "responsible" is shown in the paragraph in the text following the one to which footnote 458 is subtended: "Tribal governments, leaders and judges must exercise tribal sovereignty responsibly in ways that both foster the social, economic, and political welfare of tribal members and facilitate the intergovernmental cooperation on which tribal well-being often depends." *Id.* at 246.

The word "irresponsibly" is a little presumptuous for my tastes; "ill-advised" might be better. Nonetheless, I suspect that Professor Clinton and I would agree on the broad outlines of what would be the kind of actions and positions we would urge against. Professor Porter is of a different mind. *See infra* note 17.

straight. Speaking about them is a common and acceptable way of abstracting our theories for manageable discussion, and it is not too much to expect a fellow scholar to read 147 pages in the *Arizona State Law Journal.*

However, regarding the common incompleteness of "necessarily abbreviated oral presentations" to tribal decision makers, it is no answer to Sam Deloria, nor is it to me, to say, "well, if they'd just read the complete text then they'd get the correct message." They won't, and they don't.

Do I engage here in the unfair stereotyping of tribal decision makers as people unwilling — or worse, incapable — of reading 147 pages in the *Arizona State Law Journal*? No. Putting aside again the question of who exactly *does* read the theoretical lead articles in our better law reviews, I certainly will not take to task the tribal decision maker who finds that he or she has better things to do with time that is inherently limited. I don't believe that such articles — including, incidentally, this one — are written with an audience of tribal decision makers in mind, and if we don't write for them, why should we be surprised if they don't read them? The most effective way to communicate with the people who manage the practical concerns of tribal survival is to *talk* to them, and to answer their questions. As I've mentioned, we Indian-law theorists are granted extraordinary access to those occasions. Publishing careful theoretical scholarship has its own virtues and gives rise to its own odd pleasures, but it's not the way to change the day-to-day operation of a tribal budget office, if that is what one is trying to do.

Thus do we come to the essential quandary of the theoretician speaking to an audience of nontheoreticians: Oral presentations, as Professor Clinton correctly notes, are "necessarily abbreviated," which abbreviation will likely lead to oversimplification, incompleteness, and misleadingness, difficulties usually cured by reference to the published article. But the complete theoretical discussion as published will not be read by the nontheoreticians, so the mislead stays in place. Add to this the dramatic nature of the thesis of *There Is No Federal Supremacy Clause for Indian Tribes*, and one arrives at Sam Deloria's rebuke to Professor Clinton, reported in footnote 458.

And the response is?

4. A footnote is no cure.

Given this quandary, there is something profoundly ironic, and almost a caricature of academia, lying in footnote 458, as well as the two-paragraph "important cautionary practical note" to which it is subtended. Only a scholar would turn to the footnote as a cure,[16] and a more ineffective cure cannot be

16. Readers familiar with my work may have already remarked on the relative lack of exotic

imagined: "You told the Assistant Secretary to get the hell off the reservation? Didn't you read 34 *Ariz. St. L.J.* 113, 245, n.458?! You tribal decision makers are going to be the death of me."[17]

I can only presume that Sam Deloria never read footnote 458 in Albuquerque; that rebuke I could have heard by opening my window here in Fayetteville.

5. "Speak truth to power" is advice more easily given than followed.

Professor Clinton in *There Is No Federal Supremacy Clause for Indian Tribes* twice uses the admonition to "speak truth to power." One admonition comes in the conclusion and is addressed to his fellow theorists; I have quoted that passage above, at the outset.[18]

The other time the admonition appears it is directed not to us theorists, but to tribal leaders, and is part of the "important cautionary practical note" to which footnote 458 is subtended:

> The international human rights movement often employs the slogan "speaking truth to power." [Footnote omitted.] This essay constitutes an effort to accomplish precisely that result. There is, however, a difference between "speaking truth to power" and acting recklessly. Any tribe must pick its battles cautiously. Part

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footnotes in the present essay; I am as fond of them as anyone. Now, I take it, you understand the reason for my present marginal restraint.

17. Professor Porter's article advances the position that the Assistant Secretary of the Interior *ought* to be told to get off the reservation, and that Indian law scholars are complicit in the destruction of tribal societies if we urge otherwise. *See, e.g.*, Porter, *supra* note 13, at 100. Thus can we measure the distance between the principals: Professor Porter *wants* tribal leaders to act in ways that Professor Clinton would call "irresponsible." So large is that distance that it seems hardly important to note that the distance between Professor Porter and me is somewhat larger. The distance between Mr. Deloria and Professor Porter is incalculable.

I find it difficult to respond to Professor Porter's off-the-chart theories; I react similarly to the arguments of tax protestors and other extreme libertarians who refuse to concede to the legitimacy of the government's authority over them. *See, e.g.*, United States v. Ambort, 193 F.3d 1169 (10th Cir. 1999); Turner v. Bar Ass'n, 407 F. Supp. 451 (D.C. Ala. 1975) and *In re* Daly, 189 N.W.2d 176 (Minn. 1971). It's not that they're wrong, exactly, but that they are grounded in such an entirely different world view from mine that it's hard to find the point at which to begin the debate.

Professor Porter, incidentally, would probably reject my comparison of his position to that of the tax protestors, because he thinks libertarians claiming a "sovereignty of the person" are selfish and that only Indian tribes may legitimately find illegitimate the application of government regulations to them. *See* Porter, *supra* note 13, at 106-07.

18. *See supra* note 2 and accompanying text.

> of that caution must involve full consciousness of the risks, the costs, and the chances of success.[19]

Professor Clinton then cites the example of the man who faced down the tank in Tianamen Square, ending with the thought that: "Any tribe seeking to speak truth to power must assure that its actions do not result in the tribe being crushed under the metaphorical weight of federal tanks."[20]

Sam Deloria's comments, set forth in footnote 458, can be seen as a reminder to scholars to treat very, very differently these two admonitions. For Professor Clinton to remind us theorists, in general, and me, in particular, to "speak truth to power" is merely to raise again the question of whether it is a legitimate position for a scholar to "live with" the plenary power, as opposed to speaking the theoretical truth about it. That is precisely the debate that I do not intend to revisit here, but no one, including me, would think that Professor Clinton somehow acts improperly when he reminds me to get with it. In fact, I can always use the reminder, and I scanned *There Is No Federal Supremacy Clause* with interest.

But the admonition to "speak truth to power" has a very different sense when it is directed to tribal decision makers, not fellow theorists. It is too easy, Sam Deloria seems to be saying, for us theorists to sit in our plush, or not, offices, with our life-tenured jobs, and advise the leaders of tribes of which we are not members to stand up to the Assistant Secretary or the Attorney General, or some GS-13 BIA bureaucrat and tell him, her, or them that the United States has no legitimate power over the tribe. To abuse Professor Clinton's metaphor, it can be like standing safely aside while urging the man in Tianamen Square to stand up to the tank. We're not the ones who are going to be crushed if the protest fails.

Spurred, I believe, by Sam Deloria's rebuke, Professor Clinton stuck his "important cautionary practical note" on the 132nd and 133rd pages of his article. It helps, for it states an important message that Professor Porter, for instance, rejects. But it doesn't help enough. The Delorian rebuke, after all, applies much more to the "necessarily abbreviated oral presentation," than it does to the published article, which, under the observations set out above, will not be read by those who were misled by the abbreviation, or potentially so. The true and decisive cautionary note should be addressed to us as theorists: "*Think*, damn it, about what you are saying, and to whom."

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19. *Id.*
20. *Id.*

I come, at the end of this short essay, to another aspect of Indian-law scholarship — indeed of Indian law itself — that may fairly be called unique: As this essay's title indicates, I believe Indian-law scholarship concerns itself with the survival of the tribes. I am writing about tribal survival right here, right now; Professor Clinton was writing about tribal survival in *There Is No Federal Supremacy Clause for Indian Tribes*; Professor Porter was writing about tribal survival in *The Meaning of Indigenous Nation Sovereignty*, though perhaps he would define "survival" differently from the rest of us.[21] Sam Deloria was talking about tribal survival at the conference reported in footnote 458, and he talks about it every day at the American Indian Law Center in Albuquerque. We are not commercial-law theorists talking to a bunch of bankers' lawyers about the theories of insolvency, which, as a matter of fact, is exactly what I do with the other half of my scholarly life. And banks are worthy-enough institutions for whose demise I do not wish. But when I am talking and writing about commercial law, it does not occur to me that I am talking about the survival of the banking industry. That work is mundane, and thankfully so.

But, as Indian-law scholars we are saved from such mundaneness. Tribes as governments are fragile, made so by centuries of mostly European aggression, some of which meets the modern definition of genocide. While it might appear short-sighted to anticipate the coming demise of governments that have survived so long and endured so much, most of us write Indian-law scholarship with it very much in mind that we write to preserve the tribes. We may disagree on the "how?," but we are pretty much together on the "what?," and the "why?."

All of this, then, works together and raised Sam Deloria's ire, as reported in footnote 458. We are Indian-law theorists and are paid well to be such. Our theories bear upon tribal survival. We are listened to by tribal decision makers, often in contexts where our theories, convoluted or tidy, may not be fully set forth. Within those contexts, our influence is great, partly because many in the audience are not lawyers, and partly because they are the ones who make the real decisions about the way tribes govern. And it is not

21. Professor Porter anticipates a renewed attempt by the United States to terminate the tribes that lie within its borders and seeks to ensure that tribes will, in some form, survive this termination. *See* Porter, *supra* note 13, at 105. Most of us would choose to advance the likelihood of tribal survival by working against the return of the failed policy of termination, but to Professor Porter, "making new investments of our human capital and financial resources into lobbying the Congress, advocating before the Supreme Court or trying to 'change the system from within,' is most likely a wasted effort in the long-run." *Id.* at 111.

reasonable to expect that those listeners will always, or even often, become readers of the law reviews where our theories are set out in full.

The solution to the Delorian quandary is not, I believe, to stop writing, as the present essay proves as well as anything. Nor to add cautionary footnotes here and there in our written work. Nor to stop speaking with and to tribal decision makers. Nor to withhold our theories from them, nor to dumb them down. The solution is this: to understand the colossal influence that we are granted as Indian-law scholars, to appreciate the special efficacy that prevails when we speak to tribal decision makers, either face-to-face or at Indian-law conferences, to realize the practical impact that our thoughts can and do have on tribal survival, and to beware at every instant of how a "necessarily abbreviated oral presentation" of a theory that appears so thoughtful in print may have disastrous consequences in the hands of those who will never read the footnotes.