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## Diminishment of Indian Reservations: Legislative or Judicial Fiat

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## DIMINISHMENT OF INDIAN RESERVATIONS: LEGISLATIVE OR JUDICIAL FIAT?\*

MR. GRIJALVA:<sup>1</sup> Thank you to all the hearty souls who came here at four o'clock and stayed thereafter. This is the Diminishment of Indian Reservations panel, and it starts to address more directly some of the issues that raise or at least provide the foundation for the panels you heard this morning. Most of the body of federal Indian law stems out of the reality that there are these things called "Indian reservations" in the United States. Several years ago, I was involved in a land planners conference and one of the co-presenters was a planner from the Colville Indian Nation, Mike Marschand, and Mike had a hobby of collecting old maps. He was interested in old maps of the territory we now know as the United States. And he told the audience at the panel presentation about how the turn-of-the-century maps and some of the early 1900s maps always had these blank spots on the maps; that there would be streams and mountains and trees and little things and then there would be this white blotch, this almost literal hole in the map. Those "holes" were Indian country or in some cases Indian reservations. And the analogy he drew was to the early maritime explorers where, you know, once they had explored a territory, they would chart out the area, the reefs and the coves, et cetera, all the features that made sense to sailors at the time. But there was an area beyond which nobody had ever gone. And Mike explained that on most of those early maps the way they represented that was simply to draw in dragons or sea serpents or some other similar scary feature to suggest nobody really knows what's beyond here. It might be the edge of the world. It might be a sea serpent that would eat your boat or your sailors. So the implicit assumption was don't go into this area. And Mike likened that to the kind of maps that showed Indian reservations as this white blotch, this place where nobody really knew what was inside the boundary. And that was true for a period of time.

Later there were several policies, one in particular, the allotment policy, of the federal government back at the turn of the century that took what previously might be called "islands of territory," territory that was predominantly Indian, inside the boundaries and opened that

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1. Assistant Professor of Law the University of North Dakota School of Law in Grand Forks, North Dakota where he teaches American Indian Law, Environmental Law, Administrative Law, and Intellectual Property.

territory up for one reason or another to the presence of non-Indians. And the presence of non-Indians within the boundaries of the reservation caused at least a natural reaction, which was to ask a question. Tribal governments like all governments have an inherent responsibility to their citizenry to protect their citizens from the potential health risk, the health and welfare of these citizens. And the question was, where we have these noncitizens, these non-Indians, within our boundaries, do we as government have any control over their activities, their activities that may harm or affect or risk the health and welfare of our natural resources, of our environment, and of our citizens?

The question that we talk about in this afternoon's panel is really the aftermath of the allotment period and also other policies of the United States that allow the presence of non-Indians within the boundaries of Indian reservation and what the Supreme Court has done in terms of grappling with the notion of what exactly is the result when there are non-Indians on the reservation. Is this still an Indian reservation as everyone thought it was? Is it something different? Have the lines changed? Or are the lines the same with something different happening within the lines?

Our first presenter has already been introduced, Robert Laurence from the University of Arkansas. And he's going to present the main foundation for the panel, and I'll turn it over to Bob now. Thank you.

PRESENTATION BY 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.*

MR. GRIJALVA: Thank you, Professor Laurence. We have four panelists and I realize it looks like three but my best information is our fourth panelist is on his way from the airport. Briefly to Professor Laurence's left we have Professor Frank Pommersheim from the University of South Dakota, you've already met Professor N. Bruce Duthu from Vermont Law School, and to his left is Alex Skibine from the University of Utah. We're going to start with Professor Skibine who received his B.A. from Tufts University in 1973 and his J.D. from Northwestern in 1983.

MR. SKIBINE: I will say this about Professor Laurence's paper. I agree with him that *Hagen* is a better decision than *Bourland*. *Bourland* is a horrible decision that cannot be justified except for the fact that it

was written by Justice Thomas who has adopted Justice Steven's view of indian sovereignty. Remember that Justice Stevens wrote the dissenting opinion in *Merrion v. Jicarilla Apache Tribe*<sup>2</sup> where he took the position that tribal self-government and sovereignty could not justify the tribe's right to tax non-Indians. The tribe, according to Stevens, could only rely on the right to exclude in order to tax the non-Indians.

Having stated that, the fact that we consider *Hagen* a more justifiable decision than *Bourland* does not make *Bourland* a good decision. We should not think that, somehow, the Indians got a better deal in *Hagen* than they got in *Bourland*. Although some may take the position that as precedents go, *Hagen* is less harmful from the Indian point of view than *Bourland*, I am not sure about that either. Let me explain why.

Under previous decisions, the Court has to find "clear indications of congressional intent" before holding that a reservation has been disestablished. Although the Court in *Hagen* purported to find "clear indications of congressional intent" to disestablish the reservation, the mental gymnastics the Justices had to do in order to find this "clear" intent indicates that the intent was anything but clear. Invigorated by the *Hagen* decision, the State of Utah is already challenging other parts of the reservation as having been disestablished. The States's thinking here is that if the Court can find clear indications of congressional intent in *Hagen*, it should have no trouble finding "clear indications" in other cases where a reservation was opened up for settlement by non-Indians.

I believe that the problem lies in the methodology used by the Court to find "clear indications of congressional intent." A test first formulated in *Solem v. Bartlett*.<sup>3</sup> Any test that starts by saying that it is looking for "clear" indications of congressional intent and then lists as a factor in determining the clear intent the present day demographics of the reservation cannot legitimately talk in terms of clear indications of congressional intent.

Before the decision came down, I had a feeling that the Indians would lose the case. My feeling was derived from two factors: the first one was the demographics of the present day reservation, the second was the current composition of the Court. So I wrote an essay in the Journal of Contemporary Law at the University of Utah. The tile of the essay was *Removing Race Sensitive Issues from the Political Forum or Using the Judiciary to Implicitly Take Someone's Country*. The first paragraph of the essay reads as follows:

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2. 455 U.S. 130 (1982).

3. 465 U.S. 463 (1984).

Now that the Israelis and the Palestinians are finally willing to talk to each other, one is to wonder who will have jurisdiction over the Jewish settlement in the West Bank. Although Israel seems willing to recognize some Palestinian territorial sovereignty in the West Bank, it is unlikely that Israel will automatically recognize full Palestinian sovereignty over the Jewish settlements. Should the Israeli Supreme Court decide the issue by determining whether the Israeli Knesset, when it allowed the settlements, intended to disestablish the West Bank as a political unit and integrate it in the rest of Israel. Nobody would ever suggest that this is how you should resolve this issue.<sup>4</sup>

Yet this is exactly how the Court resolved the issue in *Hagen*. The Court asked "what did Congress have in mind when they allowed non-Indians in 1902 to come into the Utes' Country?" Needless to say, Congress in 1902 was not kind to Indians. It was engaged in an effort to assimilate the Indians into the rest of the United States population by breaking up their tribal land base and giving this land to non-Indians. Some have called this policy genocidal. By looking at congressional intent derived from the early 1900s to decide present day issues, are we not reviving these former colonial type policies and hiding behind them even though they have long been discredited? Would anyone cite as authority the racist policies of nineteenth century congresses to determine the present day rights of African Americans?

The correct rule should be that if in 1902, the Ute Chiefs could not from a simple reading of the act determine with certainty that their reservation had been disestablished, then it should not be held to have been disestablished. If the 1902 Act had been a treaty, the Court would look at what the understanding of the Indians was at the time the treaty was signed. It would also resolve all ambiguities in favor of the Indians. Why should this 1902 Act be interpreted any differently than a treaty? The 1902 Act originally did have a provision for the Indians to consent to the opening of their reservation. The consent provision was removed when the Act was amended in 1905. The reason for the removal of the consent provision was that the Court in 1903 decided *Lone Wolf v. Hitchcock*<sup>5</sup> where it held that Congress could abrogate treaties previously made with the Indian tribes without requiring the consent of the tribes.

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4. Alex Tallchief Skibine, *Removing Race Sensitive Issues from the Political Forum or Using the Judiciary to Implicitly Take Someone's Country*, 20 J. CONTEMP. L. 1 (1994).

5. 187 U.S. 553 (1903).

Is this is enough of a reason not to have rules of treaty interpretations be applicable to the 1902 Act? I do not think so.

I believe that the Court should have recognized that there were ambiguities and should have resolved the matter in favor of the Indians. This would have thrown the ball back to Congress. If Congress feels that there are some problems with tribal jurisdiction over non-Indians, Congress should revisit the issue and make clear either what it meant in 1902, or better, it should implement legislation which would make more sense in today's world. In effect, I was hoping that after the Supreme Court of Utah decision came down, the Tribe and the State could sit down together and negotiate a deal. In my Utah Journal of Contemporary Law essay, I suggest that the state of Utah could have started the negotiation by stating something along the following lines:

All right, we now have a decision from the Tenth Circuit Court of Appeals in favor of the Utes and one from the Utah Supreme Court in favor of the state of Utah. We all know what is at stake here. Who has jurisdiction over the lands originally set aside for the exclusive use of the Ute Tribe. Unfortunately, When Congress allowed non-Indians to purchase land inside the reservation, it forgot to spell out who would have jurisdiction over these lands. We believe that it is not fair for the tribe to continue to retain control over some of the areas which are now owned and populated almost exclusively by non-indians. Yet, we recognize that within other areas of the reservation, the tribe has a legitimate governmental interest because most of the land is owned by the tribe or its members and the areas are either vacant or mostly populated by Indians. Let us therefore strike a deal which would preserve both parties legitimate governmental interests. We could then present an agreement to our congressional delegation who would introduce legislation in the United States Congress implementing the agreement.

This agreement would resolve once and for all the jurisdictional issues on the Ute Indian reservation. This dialogue, of course, never took place and now we have to live with the *Hagen* decision. Besides finding clarity where there is none, decisions such as *Hagen* are wrong for another reason. These decisions continue to reaffirm the validity of cases such as *Lone Wolf* under which Congress can pass laws disestablishing Indian reservations without Indian consent. I believe that the so-called "plenary" power of Congress over Indian affairs is a myth. The Constitutional power of Congress over Indian affairs is derived from the Commerce Power and from the treaty power. In other words, Con-

gress has plenary power over Indian commerce and has plenary power to sign whatever treaties it wants to sign with the tribes *as long as the tribes agree to it*. But it is only by signing these treaties that Congress can “potentially” acquire plenary power over the Indians themselves. Without these treaties, Congress has only plenary power in commercial matters. Therefore, Congress should not be recognized as having plenary power to diminish these reservations if these reservations were established by treaties or, if not established by treaties, the Indians subsequently acquired vested title in these reservations. This is why my idea of resolving disputes with the tribes by agreements makes more sense.

MR. GRIJALVA: Thank you, Professor Skibine. You know, it’s difficult in 1995 to question Professor’s Skibine’s comment that this is a political issue that we ought to have agreement. We have two semi-independent parties, if you will, who should come together and come to some agreement on these important decisions. But at the turn of the century the plenary power that Sam Deloria referred to this morning was essentially a conception, some would say a legal fiction, that the Supreme Court had carved out for Congress to determine unilaterally what’s in the best interest of the Indian tribes even when it doesn’t seem to be in the best interest of the Indian tribes and even when the Indian tribes would object to the decision or the impact of it. These sorts of situations are really the result in many instances of Congress letting non-Indians onto the reservation without any real consideration of the impacts on the Indian interests or any consideration of the possible consent that the tribe might offer or might refuse.

Our next presenter is Professor Frank Pommersheim from the University of South Dakota. He received his B.A. from Colgate University in 1965 and his J.D. from Columbia Law School in 1968 with an advanced degree, M.P.A., from Harvard in 1984. He is Chief Judge of the Cheyenne River Sioux Tribal Court of Appeals and an Associate Justice with the Rosebud Sioux Tribal Court of Appeals. Professor Frank Pommersheim.

MR. POMMERSHEIM: Thank you. I wanted to make two general sets of observations. First, some background observations about the nature of the diminishment process itself and then some specific observations about the *Bourland*<sup>6</sup> case.

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6. South Dakota v. Bourland, 113 S. Ct. 2309 (1993).

First of all, there is a universe of six diminishment cases,<sup>7</sup> (three of which occurred in South Dakota) and in which three times the Supreme Court found diminishment. It's important to remember that in the context of diminishment it doesn't simply say that certain portions of a reservation where non-Indians live are no longer part of the reservation. Many times as is dramatically evidenced at Rosebud, for example, it effectively has taken Indian people who thought they lived on their reservation and told them that they don't live on their reservation. And that particular kind of decision has incredible legal, cultural, and psychological impact. So it's important to remember that diminishment doesn't only affect non-Indians and jurisdictional authority. It affects real Indian people in terms of where they're actually living. I think it's important to keep that in mind.

When I think of the universe of the six diminishment cases, when I think about them and teach about them, I think that they're kind of a unique set of cases in a totally negative way, and I want to share with you why I think they're negative. First of all, in any of the diminishment cases that found diminishment, if the Court had applied in any genuine manner the canons of construction, they would have had to have found the opposite result. It's impossible to justify any diminishment decision if the canons of construction are applied. These diminishment statutes are rank with ambiguity and according to the canons, ambiguity is to be resolved in favor of the Indians. But in a diminishment area that is simply not the case because when you get to *Solem*, you have Justice Marshall saying that the test goes beyond what the language of the statute says.

Okay. Surrounding circumstances. Why the surrounding circumstances in the context of the canons of construction? The subsequent jurisdictional history, how could that possibly be relevant? And then the capstone, of course, is demographics. It is simply totally irrational from my point of view to say that current demographics are relevant in determining whether Congress intended to diminish a reservation three-quarters of a century ago. I mean, you just can't have it that way. And if you want an accurate predictor about the results in

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7. *Seymour v. Superintendent*, 368 U.S. 351 (1961) (Colville Indian Reservation in Washington; not diminished).

*Mattz v. Arnett*, 412 U.S. 481 (1973) (Klamath River Reservation in California; not diminished).

*DeCoteau v. District County Court*, 420 U.S. 425 (1975) (Lake Traverse Reservation in South Dakota; diminished).

*Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (Rosebud Sioux Reservation in South Dakota; diminished).

*Solem v. Bartlett*, 465 U.S. 463 (1984) (Cheyenne River Sioux Reservation in South Dakota; not diminished).

*Hagen v. Utah*, 114 S.Ct. 958 (1994) (Uintah and Ouray Reservation in Utah; diminished).



the case, don't look at what the legislation says, just go to the demographics. In a diminishment case you can have absolute certainty of result by checking out the demographics. If the demographics are unfavorable to Indians, they will lose. And I'm hard put to see how that could ever be a principled decision.

Again, I think this unusual process was essentially identified by Justice Marshall in his dissent in *Rosebud Sioux Tribe v. Kneip*<sup>8</sup> in which he admits that what is actually happening in trying to ferret out legislative intent in the context of these turn-of-the-century statutes to allow non-Indians to homestead on a reservation is a completely fictionalized process. And I just want to read a quotation from Justice Marshall's dissent in *Rosebud Sioux Tribe v. Kneip* in which he basically says this:

Congress manifested an almost complete lack of concern with the boundary issue. The issue was of no great importance in the early 1900s, and it was commonly assumed that all reservations would be abolished when the trust period on allotted lands expired. There was no pressure on Congress to accelerate this timetable so long as settlers could acquire unused land. Accordingly, Congress did not focus on the boundary question. For the Court to find in this confusion and indifference a clear congressional intent to disestablish a reservation is incomprehensible.

And I think that's the definitive notion about what is actually happening in diminishment cases. So, as I indicated before, given that it's a highly fictionalized process, it is not surprising that demographics are essential and indeed they're the most reliable criteria in finding diminishment. And I think that's a very questionable practice, to put it mildly. I think in the diminishment area, and I don't think I'm exaggerating, maybe some of my colleagues or some of you think that I am, I just think that the process is not a very principled one.

I want to now turn to make some observations about how I understand the *Bourland* case. I found Bob's paper provocative in that area, though, I think in some ways I disagree with it. I'm still working with his hyphens to understand them, and I think Bob, if he's willing to give me a private tutorial, I might accept that.

MR. POMMERSHEIM: The context of *Bourland*, to refer to *Bourland* as involving non-Indian land, I think grants it too much and is ultimately misleading because *Bourland* is not, from my point, about

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8. 430 U.S. 584 (1977).

non-Indian land and the tribe's loss of jurisdictional authority over non-Indian land because obviously the word "non-Indian" means it's owned by a non-Indian. *Bourland* has to do with the tribe's loss of authority over federally-held land on a reservation. I think that's a cardinal distinction and I don't think we should say that it involves non-Indian land. The reason I suggest this is that *Bourland*, for me, is not related to *Hagen*. It's not a diminishment case. It's an extension of *Montana*<sup>9</sup> because my understanding is that *Montana* stands for the ugly proposition that there is no presumption of tribal sovereignty over non-Indian fee-held land on the reservation. The notion would be, well, when you get to *Bourland*, you're not talking about non-Indian land held in fee by actual non-Indian people who homesteaded on a reservation. You're talking about land owned by the federal government that was taken for the Oahe Dam Project.

The question, I think, in *Bourland* was should *Montana* be extended to federally-held land on the reservation in terms of presuming that the tribe doesn't have jurisdiction? And I don't think there was any justification for that because one of the interesting things in *Bourland* is that, in fact, the tribe was exercising jurisdiction over Indians and exercising jurisdiction concurrently with the state over non-Indians. I mean, that was, in fact, the working rule. And so, I think the danger of *Bourland* is that it extends *Montana* into an area where it ought not to apply; that is, land owned by the federal government on the reservation.

I'll suggest one distinction for making that a meaningful distinction. One of the ways—I mean, the Courts haven't thought about it this way, but I think one possible way of thinking about *Montana* is to say that when non-Indians were being allowed to homestead on the reservation, they had the right to own property and to have a certain bundle of property rights. Perhaps one way of thinking about what the federal government was allowing non-Indians to have when they homesteaded on the reservation was a certain kind of limited immunity from tribal regulation, not that the state automatically had the right to regulate non-Indians but just to immunize for some limited purposes related to owning property on the reservation to free non-Indians from potential tribal regulation. To me, that's at least a reasonable way of conceiving of how we might think about what was happening when non-Indians were allowed to homestead on the reservation. If you work with that assumption, it doesn't really apply when it's the federal government. When the federal government is the property owner, there's no need to prevent the tribe from exercising jurisdictional

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9. *Montana v. United States*, 450 U.S. 544 (1981).

authority over both tribal members and non-Indians on that federally-held land because non-Indians aren't property holders in the context of being on and using that federally-held land. Since they're not private property owners, why should they be immunized from potential tribal regulation? I would argue that they should be subject to tribal regulation.

I think it's important to see *Bourland* not in the context of diminishment but in the context of *Montana* and the continual erosion, and I really agree with Bob on this, of the ability of the tribes to at least have the initial notion that they do have authority over non-Indians. I mean, *Montana* reversed the presumption in favor of the tribes having jurisdiction. Among other things, the real error of *Montana* is that it reversed the presumption of tribal jurisdiction over non-Indians and put tribes constantly on the defensive of always having to justify their regulatory authority over non-Indians by going to the *Montana* exceptions. And *Bourland* just extends this.

I'll close with a last observation about language. It's not helpful to me to think about *Bourland* as involving "judicial diminishment" because diminishment is firmly implanted in my own mind as having to do with the boundaries of the reservation. That's what diminishment means to me. I think if you think about *Bourland* as involving "judicial diminishment," I think it is really dangerous. I think a more accurate term, and Bob sort of provoked me to think about this, is jurisdictional diminishment. That's what the result of *Bourland* is, not to reduce the boundaries of the reservation, but to constrict the tribe's jurisdiction. And so I think it's more accurately thought of as an example of jurisdictional diminishment and not judicial diminishment.

In thinking about *Bourland*, which I've written a little bit about, I think it's just another example of what we see in the United States Supreme Court and that's what I regard as a sense of judicial amnesia; that the Supreme Court is continually losing its way in being able to think about tribal sovereignty. It no longer has any kind of working conception about what tribal sovereignty is as a doctrinal framework to apply to cases. It's basically gone. It started in my view to disappear in *Montana*, and *Bourland* is just a further extension. The real risk is that pretty soon it will just be applied uniformly to non-Indians wherever they are on the reservation. Unless the Supreme Court comes back to having some kind of doctrinal footing for thinking about tribal sovereignty and how you deploy the doctrine and actually thinking about real cases, one can't be optimistic about the future.

I think we're on a very dangerous line of cases in the United States Supreme Court. I certainly don't know what the answer is except to try to harken back, if not to the court, at least with our students and people we work with on and off the reservation to remember that Indian law can't survive unless there is a doctrinal understanding of what tribal sovereignty means, at least as a core understanding. Obviously, people can disagree at the margins, but without a meaningful doctrine of tribal sovereignty one cannot have much hope for the field of Indian law. And I want to encourage people to be thinking about that, writing about it, talking about it. Thank you.

MR. GRIJALVA: Thank you. Professor Duthu from Vermont Law School, whom you heard earlier in the trust responsibility panel, is going to take up the issue of the Indian Civil Rights Act.

MR. DUTHU: It's hard to know where to start on an issue as intensely divisive as this one. Professor Laurence has really written, I think, a very provocative piece, and the part that I'm going to address is the remedy that he calls for at the very last part of his paper and devotes, unfortunately, just a couple of paragraphs to it without telling me very much more about why he feels that that's really the appropriate response. It's certainly, for those of us familiar with Professor Laurence's writings, a familiar theme, one that he has urged before, and that is to dissuade or perhaps to curb the Supreme Court's growing appetite for taking big chunks out of tribal power. Maybe one of the things we can throw at them, some Alpo to keep them from having to turn on the tribes, would be to know that the federal courts stand ready to police or monitor exercises of tribal power both over natives and non-natives in an Indian Civil Rights context so we can watch over them a little more closely. I want to examine that response very briefly for you and begin with a point that Professor Pommersheim just made, which is a feeling that the Court has lost its way, lost its bearings, and is suffering from judicial amnesia. I have a different perspective on that. If they had judicial amnesia, I could forgive them. I think they know exactly what they're doing.

A few weeks ago, I spent some time in Washington looking through Justice Thurgood Marshall's papers. Some of you may have already done that as well; unfortunately, no smoking guns there. But it was very interesting to pour through some of the tidbits of information that went back and forth among the justices in their Indian law decisions. One of several things I detected is a clear sense of what it is that they're doing, a very clear sense that they understand, at least to some extent, the larger considerations that are going on. There are some very, very interesting dialogues or debates, and some which are actually quite petty. You may

be interested to know, for example, that Justice Blackmun was prepared to dissent in an Indian law case because Justice Marshall used the term "parameter." That shocked me, that a justice whom I had admired and still admire, could be so darn petty. I kept looking and looking and found an earlier memo in which Justice Blackmun said, in effect, "This is my annual reminder that for any of you who use my least favorite word, 'parameter,' that I will not join an opinion that uses that term." "The mathematicians," he said, "can suffer on to themselves. We don't have to import their confusion into the adjudication process here." At least I had an explanation, but I still didn't understand why Justice Blackmun would get so upset by the use of the term "parameter."

Another point that Professor Pommersheim made is that we have difficulty finding, at least I do and my students do, finding the beginning point for seeing when did this start unraveling? When did the Supreme Court begin to show its animosity, this demonstrable thirst for taking some swipes at tribal power? At an Indian law conference at NYU several years ago, I heard the litigator, Craig Dorsey, who argued the *Smith*<sup>10</sup> case, say that among those who practiced Indian law, it was considered malpractice to take a case that conceivably could end up in the Supreme Court because it could "mess up Indian law for everybody else." That was pretty intense language coming from someone who had just gone through that experience.

Where was the beginning point? Professor Pommersheim points to *Montana*.<sup>11</sup> I find it a little bit earlier than that. We could go all the way back to the original sin. What was the original sin? 1492? I don't know. But for me, original enough, is 1978 with the *Oliphant*<sup>12</sup> decision. That's my beginning point in an article I wrote that looks at that jurisprudence where the Court really manufactured a theory by which they could limit tribal power, the theory of implicit divestiture. We understood that Congress could divest tribes of governmental power unilaterally or tribes could cede powers bilaterally. But in *Oliphant*, the Supreme Court informed us that these were not the only two means by which tribal powers could be divested. Tribes could also lose powers implicitly when they exercised powers inconsistent with their status as "dependent nations." They're "gettin' above their raisin'" as folks back in Louisiana might say. Don't know really what that means. There's really no basis or grounding for the theory of implicit

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10. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

11. *Montana v. United States*, 450 U.S. 544 (1981).

12. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

divestiture, and, yet, we see in the very next case, 16 days later, the Court in the *Wheeler*<sup>13</sup> decision basically expands and misreads *Oliphant* as suggesting that tribal powers do not extend to nonmembers. Well, those of you who are familiar with *Wheeler* know that that was pure dictum because *Wheeler* did not involve nonmembers. It involved a member of the Navajo Nation. What does *Montana* do? *Montana* converts the dictum of *Wheeler* into part of its holding, and, hence, the "general proposition" that Justice Thomas talks about in *Bourland*.<sup>14</sup> So if I were tracing it back, I would say it goes beyond *Montana*. It goes back to *Wheeler*, and *Wheeler's* misreading of *Oliphant*. And, of course, you can read the literature of those who have trashed *Oliphant*, and I won't take this occasion to do that.

Solutions. Why the Indian Civil Rights Act as a stop gap? Well, I'm not so sure I disagree with Professor Laurence. I'm also not so sure I disagree with Professor Williams that the ICRA is statutorily mandated auto-genocide. As long as a tribal court hears the footsteps of the federal super power, ready to take a swipe for a tribal court "going astray" and adapting its tribal court decision to suit an external reviewing federal court, then there is a check on the exercise and the autonomy of that tribal judicial process. And to that extent, I think it is auto-self-genocidal in that you are not making decisions that you would otherwise make if you were free to make them.

But maybe the ICRA doesn't go far enough. And let me offer one proposed solution just for the sake of argument. Suppose we decided that if the real problem that we're having in this whole endeavor is that the Court is reluctant to expose non-Indians, nonmembers (they use those terms sometimes interchangeably in the jurisprudence) to the power of the tribal court, if that's the problem, why don't we pass another removal bill? But this time we would not be removing the Indians from the southeast or the northeast and putting them into the center of the country. We would remove the non-Indians, give them a certain amount of time to vacate, pay them just compensation because we'll assume that they will have legitimate and vested interest in their property claims, and those who choose to remain, say, after five years would become fully subject to the power of the tribe.

The territorial component of tribal sovereignty, which the Court sometimes points out, would actually mean something. It would mean that everyone would have to observe and respect the territorial boundaries of the reservation. All civil and criminal matters would be subject

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13. *United States v. Wheeler*, 435 U.S. 313 (1978).

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

to the power of the tribe. "You don't like it, here's your check. You can move." Well, of course we know that would not happen. But I point that out to let you know or to remind you that was exactly the kind of solution that the Congress thought of when it was deciding on how to rectify a land dispute between two tribes, the Hopi and the Navajo. What do we do? We move them.

We wholesale remove individuals from their ancestral lands where they have cultural, religious, spiritual ties to a land and say, "You're on the wrong side of the fence because we've drawn these lines," so now thousands of these families have to move here and a few families have to move there. So while it may be an exaggerated option in the context of nonmembers, it certainly was not an exaggerated option when it came to native people.

What is my more practical solution—one that actually has a chance to find some sensitive or receptive ears? I agree that the best option is to have Congress pass some sort of statute which would do a number of things. One is to confirm, and not leave it up to ad hoc judicial adjudication, tribal authority within their territorial boundaries and say that it is coextensive with the definition of Indian country; embodied in 18 U.S.C. § 1151, which includes all lands within the exterior boundaries of the reservation notwithstanding the issuance of patents therein. But we're back to the problem presented in *Oliphant*. Does that mean we have to legislatively reverse the *Oliphant* decision? Note that Congress did legislatively reverse the *Duro v. Reina*<sup>15</sup> decision in which the Court had taken another bite of tribal sovereignty by holding that tribes had been divested of criminal authority over nonmember Indians. Congress has restored that but we know from the legislative history, as related by Professor Deloria and others, that several senators supported the legislation only after assurances that the *Oliphant* ruling would be untouched. There is a potential constitutional problem with regard to subjecting American citizens to the adjudicatory power of political bodies that do not offer the full panoply of constitutional protection. That was an issue discussed in *Duro* citing the Court's own precedent involving military tribunals, and that is a concern. I don't have an answer for that, nor do I have a definitive answer of whether or not a legislative reversal of *Oliphant* is really what would cure all of these problems. All I can tell you, and I'll close with this, is that the Congress and the tribes need to be talking quite aggressively and assertively to prevent the Supreme Court from simply going along the path that it

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15. 495 U.S. 676 (1990).

started in *Oliphant*, and continued in *Bourland*, because it is severely damaging the ability of tribes to develop and function as governments. Thank you.

MR. GRIJALVA: Thank you, Professor. I'm informed that Professor Harbison did make it to North Dakota finally but it's been a long, trying day on the airplane. He and I are going to present on the Clean Water Act and tribal government regulation on water quality tomorrow morning at 9:30 and we invite you back then. Thanks very much for your attendance. We would be happy to take a question or two if you let us stay that long.

FROM THE AUDIENCE: How did we get *Hagen* in the first place? I've struggled with the procedural setting of the *Hagen* decision in light of *State of Utah v. Ute Indian Tribe* and I don't see how we got there. Did Martin Seneca miss the boat? Did Rob Thompson miss the boat in not raising a collateral estoppel challenge? How did we get *Hagen*? I'm a Utahan. I practice out there in that area representing developers on that reservation. I don't understand how we got *Hagen* in the first place, especially now that we have the demographics test that I find so objectionable myself.

MR. SKIBINE: I was not at the argument but somebody relayed the argument to me. I think at one point Martin Seneca was making this argument at the Supreme Court and Justice Rehnquist basically dismissed the argument by saying something to the effect, "We took the case, didn't we," kind of implying that this issue was moot, now that the Supreme Court had decided to hear the case.

FROM THE AUDIENCE: Isn't there a statement saying collateral estoppel wasn't issued or wasn't addressed and went to the merits? That really bothered me.

MR. LAURENCE: I think Alex is probably right. I mean, once the Court has taken cert, you know what they think about the Tenth Circuit opinion, so you're probably wasting your time arguing. You know they could have denied cert and left the Tenth Circuit decision stand. They do say it wasn't raised below. I don't know if it was raised below. If you're asking why wasn't it raised below, I don't know.

I think the most interesting part of it is that the tribe asked to intervene and they were denied the right to intervene. And that struck me as odd, although I suppose that intervention in a criminal case would be unusual procedurally. But there's something very ironic about the Supreme Court talking about the statements made by the tribe back in 1902 and 1903 at the very same time they won't let the tribe participate in 1995. Now that strikes me as odd.



**MR. POMMERSHEIM:** It's interesting if you go back to the opinion actually in a collateral case before the Utah Supreme Court, there is a dissent, by I think Justice Zimmerman, sort of raising this question of how the majority could fly in the face of the Tenth Circuit decision that basic federal principles apply. One would think that a state supreme court would be obligated to follow the Tenth Circuit's construction of federal law and federal Indian law to boot. And this was an individual sort of criminal defendant and Justice Zimmerman in his dissent comments on his brief, which only had two pages that dealt with the diminishment question, and Justice Zimmerman said that he tried to encourage the tribe to intervene and they finally did but they apparently thought that the diminishment question was not a real issue but one of the main issues was whether this defendant was actually Indian. And they apparently devoted a good deal of their brief about whether this criminal defendant was Indian. Didn't say anything really about the diminishment question. Justice Zimmerman said he tried to get the Justice Department to come in. They were very reluctant. When they finally did, what they submitted was their brief in opposition to cert. from five to ten years ago. They didn't offer anything contemporaneous. So Justice Zimmerman's dissent, I think, is a really strong statement that this thing was artfully, or not so artfully, maneuvered to achieve the exact result that it did and the fact that the Supreme Court not only accepted cert but made the decision it did is all the more shocking.

**MR. SKIBINE:** On the other hand, this was a case where petition for cert was filed from the Tenth Circuit and the Supreme Court looked at it and denied it in 1985.

**FROM THE AUDIENCE:** A question on another line. Looking at the distinction that's been drawn here between non-Indian-reservation land and non-Indian reservation land, we tend to look at that distinction with reference to non-Indian parcels. This whole discussion has been focused that way on jurisdiction over non-Indians. In some ways isn't the distinction under present doctrine, however bad it may be, an important distinction with respect to jurisdiction over members as between those two patterns? And if I'm right about that, then doesn't that suggest a significant component of territoriality rather than ownership to tribal—and I wanted to use the next word importantly—sovereignty? And doesn't it then provide us a window of how to get back to Professor Pommersheim's observation, which is if tribes have sovereignty over the territory of their reservation, whoever owns it for their members, how did they lose it for other folks?

MR. LAURENCE: That seems to me to be consistent with Frank's major criticism of what I said. And so maybe this is a response to both of them, although it surely taxes your patience I think to stay. I'm impressed that there are this many people sitting here at twenty minutes to six. Thanks.

MR. DUTHU: You're not going to get out of answering.

MR. LAURENCE: I think the *Oliphant-Duro-Montana-Bourland* line is the most destructive line of current Supreme Court cases, at least from the view from my non-Indian office off reservation. I don't know what people are thinking on reservation, but to me that's a pretty damaging line. I call it "judicial diminishment" partly to try to embarrass the Court into seeing what it's doing; that it is preempting under common law something that Congress can do if it wants. And it used to do it, at least in the six cases under discussion, and assuming the proper construction of the early homesteading statutes. And if that's the way Congress used to do it, that is, in homesteading statutes, then it hasn't done it very often, not very recently. But my notion that what they're doing with the *Oliphant-Bourland* line (and I certainly agree with Frank that *Bourland* extends *Montana*<sup>16</sup>) is preempting under common law something that Congress can do if it wants to, and which it hasn't wanted to very often lately. And so my trying to draw those two together is partly an attempt to wake up the observer—not the observers—we're all awake—the *judges* to see the similarity in the results that they are reaching under common law, and how demeaning that is to the legislative process that Congress by and large is choosing not to exercise these days.

MR. POMMERSHEIM: I think one of the things that Bob said in his paper that is really important and I think it's a given for a lot of teachers and writers in the field is that, really, sovereignty has to be coextensive with territory or it's not any kind of general sovereignty. If it's limited to only certain kinds of places over certain kinds of individuals, it's by definition incomplete and inadequate sovereignty. When we talk about sovereignty, it has to be coextensivewith reservation boundaries.

MR. DUTHU: I would just add that I think for me the diminishment or the beginning of the end in terms of where tribes are losing power over non-Indians is when tribes become quite aggressive in asserting their sovereignty, beginning to play the role of government.

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16. In my paper, I say that *Bourland* did not extend *Montana* since the case was remanded to apply the "*Montana* exception." But Professor Pommersheim here makes a different point, that *Bourland* extends *Montana* by applying it to government land. He is surely right.

And the Court, without any clear conception of its theory of tribal sovereignty, is responding with suspicion that the tribal courts are simply not going to be able to afford a measure of justice that we have come to expect in both the state and the federal courts. Never mind, as folks have pointed out in their scholarship, that the states did not come on board in terms of being held to the same constitutional standards that the federal courts are held to up until the '60s when you start looking at the incorporation of various constitutional rights as binding upon the states and yet we demand that those protections be extended right away by the tribes. As Professor Monette pointed out, the opportunity for tribes to exercise, truly exercise, their governmental powers is circumscribed by this inability to give tribes time to make the same mistakes that all governments have made. They just made them very early by comparison, and yet tribes are not given this opportunity to experiment.

MR. GRIJALVA: We'll revisit that theme in the morning with the Clean Water Act presentation but thank you all for staying. We reconvene tomorrow morning at 9 a.m. Thank you very much.