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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

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

ROBERT LAURENCE*

"You own the stars?"

"Yes."

"But I have already seen a king who —"

"Kings do not *own*, they *reign over*. It is a very different matter."**

I. INTRODUCTION

This paper will explore the distinction being made by the Businessman to the Little Prince, to wit, the distinction between ownership of land and sovereign power over it. I will conclude that the distinction is a crucial one to the continued viability of federal Indian law, but that it is a distinction losing its force in the field, which bodes ill.

I will first discuss the recent case of *Hagen v. Utah*,[1] in which the Supreme Court returned again, for the sixth time, to the question of whether an Indian reservation had been diminished in size by a prior congressional enactment.[2] In deciding that this particular reservation had been diminished, the Court dealt a blow to the particular tribe involved, but not very much to Indian law in general. The Court held that there were certain lands over which the tribe did not have sovereign power, because the size of the reservation had intentionally been reduced by Congress years ago.[3] The tribe still retained governmental power over its reservation, but, due to congressional fiat, that reservation was smaller than it once was.[4] This is a potentially destructive, but, at the same time, potentially controllable, method of analysis, because it puts the ultimate decision in Congress, where effective tribal advocates have at least a chance to limit reservation diminishment.

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

** ANTOINE DE SAINT-EXUPÉRY, THE LITTLE PRINCE 45 (Katherine Woods, trans. 1943).

1. 114 S. Ct. 958 (1994).
2. Hagen v. Utah, 114 S. Ct. 958 (1994).
3. *Id.* at 961.
4. *Id.*

I will next discuss another recent case, *South Dakota v. Bourland*,[5] in which the Supreme Court continued its inspection of the powers that Indian tribes have over non-Indians and their property.[6] In *Bourland*, using analysis not unlike the *ipse dixit* of the Businessman to the Little Prince, the Court denied tribal power over land, within the reservation, but owned by non-Indians.[7] This, I will conclude, is the unfortunate continuation of the pernicious method of diminishment of Indian reservations under federal common law, begun in the notorious *Oliphant v. Suquamish Indian Tribe*.[8] Diminishment by judicial, not legislative, fiat preempts legislative prerogative and makes it much harder for tribal advocates to guard the remaining vestiges of tribal sovereignty.

Hagen-type diminishment reduces tribal power by re-drawing reservation boundaries through the interpretation of old congressional enactments.[9] *Bourland*-type diminishment reduces tribal power by making land ownership, not reservation boundaries, the key to tribal power.[10] The convergence of these two lines of analysis reduces tribal governmental power to the bare minimum, and perhaps below. An entity that has jurisdiction only over its own lands and its own members is more accurately denominated a "club" than a "government," and I fear that, unless diverted, this convergence will leave tribal sovereignty a mere symbol of pre-Columbian days.

Finally, I will offer a solution to this threat, a solution sure to be controversial. Understanding the irony of my position, I will nevertheless suggest that the Indian Civil Rights Act (ICRA)[11] may, in the end and to everyone's surprise, be the savior, not the destroyer, of tribal sovereignty as we have come to know it late in the twentieth century. The ICRA is disliked by many tribal advocates and has been described by Professor Robert A. Williams, Jr. as "a highly efficient process of legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expressions of

5. 113 S. Ct. 2309 (1993).
6. South Dakota v. Bourland, 113 S. Ct. 2309 (1993).
7. *Id.* at 2316-17.
8. 435 U.S. 191 (1978).
9. *Hagen*, 114 S. Ct. at 965.
10. *Bourland*, 113 S. Ct. at 2321.
11. 25 U.S.C. §§ 1301-41 (1982). The official designation of the Act which created the ICRA is Civil Rights—Riots—Fair Housing—Civil Obedience, Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (1968) (codified at 25 U.S.C. §§ 1301-41 (1982)). What is commonly called the Indian Civil Rights Act is found in 25 U.S.C. §§ 1301-03 (1982). *See* 25 U.S.C. § 1301 (containing pertinent definitions); § 1302 (containing the substantive protections of the ICRA; § 1303 (containing a habeas corpus provision).

difference . . . from the white man's own hierarchic, universalized worldview."[12]

Could such a statute be the *savior* of tribal sovereignty? We shall see.

First, though, a point more grammatical than anything else. I will be using throughout this paper two similar, but fundamentally different terms: "non-Indian-reservation land," and "non-Indian reservation land." The first term refers to land, owned by whomever, that does not lie on an Indian reservation; the second refers to white-owned land within the boundaries of a reservation. *Hagen* deals with non-Indian-reservation land;[13] *Bourland* with non-Indian reservation land.[14]

If you will accept these jurisprudentially significant hyphens,[15] my position can be stated rather succinctly: Congress has the power unilaterally to diminish the size of a reservation, thereby designating surrounding areas as non-Indian-reservation land, most all of it owned by whites. This power has been rarely exercised of late, but was more commonly used years ago, as *Hagen* shows.[16] But, as the case also shows by implication and as many other cases show directly, often Congress has *not* diminished the size of a reservation down to the Indian-owned lands, thereby leaving much non-Indian reservation land. To deny tribal power over these lands, as *Bourland* did, is to reach the same result as legislative diminishment, without congressional action. To augment legislative diminishment with common-law diminishment is to derogate congressional authority in the field. When Congress can do, and has done (though rarely and not recently), by statute what the Court is currently doing by edict, the Court has forgotten its constitutional character.[17]

With that introduction, I begin.

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12. 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, 274 (1986).

13. 114 S. Ct. 958 (1994).

14. 113 S. Ct. 2309 (1993).

15. I am not always so enamored of the application of grammar to law, *see* Robert Laurence, *A Section-by-Section Chart Summarizing the Recent Changes in the Federal Bankruptcy Code, Affixed to a Short Essay in Praise of the Sensibility of Judges and in Derogation of Small Roman Numerals, Jurisprudentially Significant Hyphens and Title V of the Bankruptcy Reform Act of 1994*, 47 ARK. L. REV. 857 (1994) (summarizing changes to the Bankruptcy Code).

16. *See* 114 S. Ct. at 967.

17. In this regard, the present paper might be seen as a special case of Professor Ball's more sweeping attack on modern Indian law jurisprudence, set forth in Milnar Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1.

II. LEGISLATIVE DIMINISHMENT: *HAGEN V. UTAH* AND ITS PREDECESSORS

Hagen v. Utah[18] is the sixth Supreme Court case to ponder the question whether an allotment-era statute, opening a reservation for white settlement, worked a diminishment of the reservation down to the lands allotted to the tribe and its members, or, on the other hand, left the reservation boundary intact and merely allowed whites to homestead on the reservation.[19] Familiarity with the five cases preceding *Hagen* is presumed.[20] The following table collects some interesting information about the prior cases and *Hagen*.

NAME	PROCE-DURAL POSTURE	DISPSI-TION	COURT DIVISION	VOTES BY PRESENT MEMBERS OF THE COURT
Seymour	State habeas corpus	Supreme Court of Washington reversed	Unanimous not to diminish	None remains
Mattz	State forfeiture proceeding	California Court of Appeal reversed	Unanimous not to diminish	Rehnquist votes not to diminish

18. 114 S. Ct. 958 (1994).

19. Hagen v. Utah, 114 S. Ct. 958, 966 (1994) (ruling that the Surplus Land Act diminished the reservation). During the allotment period, which comprised, roughly, the last three decades of the 19th century and the first three of the 20th, millions of acres of Indian land were opened for white settlement. Much, but not all, of the rest of Indian country was allotted to individual Indians, with fee title held in trust by the United States. For a good general discussion of the allotment period, see CLINTON ET AL., AMERICAN INDIAN LAW 147-52 (3d ed. 1991).

20. The five cases, in reverse chronological order, are: Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975) (consolidating two cases from below); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). For a discussion of these cases see Tassie Hanna & Robert Laurence, *Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation*, 40 ARK. L. REV. 797 (1987) [hereinafter Hanna & Laurence, *Treaty Abrogation*], and Robert Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 HOW. L. REV. 3 (1984).

DeCoteau No. 73-1148	State habeas corpus	South Dakota Supreme Court affirmed	6-3 to diminish	Rehnquist votes to diminish
DeCoteau No. 73-1500	Federal habeas corpus	8th Circuit reversed	6-3 to diminish	Rehnquist votes to diminish
Rosebud	Federal declaratory judgement	8th Circuit affirmed	6-3 to diminish	Rehnquist and Stevens vote to diminish
Bartlett	Federal habeas corpus	8th Circuit affirmed	Unanimous not to diminish	Rehnquist, Stevens and O'Connor vote not to diminish
Hagen	Direct appeal from state conviction	Supreme Court of Utah affirmed	7-2 to diminish	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas and Ginsberg vote to diminish; Souter votes not to diminish

Of the five cases, three were unanimous decisions finding no diminishment[21] and two were divided decisions finding a diminishment.[22] In *Hagen*, a divided court found the reservation diminished, in an opinion by Justice O'Connor; Justices Blackmun and Souter dissented.[23]

21. *Bartlett*, 465 U.S. at 481; *Mattz*, 412 U.S. at 506; *Seymour*, 368 U.S. at 356.
22. *DeCoteau*, 420 U.S. at 449; *Rosebud*, 430 U.S. at 615.
23. Hagen v. Utah, 114 S. Ct. 958, 968 (1994).

When Tassie Hanna and I wrote about reservation diminishment following the fifth case, *Solem v. Bartlett*, we observed that:

> The handiest way to explain the diminishment quintet is to say that, first, the language of the abrogating statute controls. That factor alone is enough to explain four of the cases. [The statute in] *DeCoteau* used the word "cede" and the reservation was diminished; [those in] *Seymour*, *Mattz*, and *Bartlett* did not and the reservation remained intact. Agreement and a sum-certain payout are not requirements for a diminishment, but, in combination with clear language, ensure it. The other factors mentioned by Justice Marshall in his review of the law are likely to be too equivocal to overcome the wording of the statute. Only in *Rosebud* did these other factors play a decisive role and then only with respect to the later statutes. The 1904 act used the word "cede" and carried along with it the 1907 and 1910 acts, which did not.[24]

The Solicitor General reached a similar conclusion about the state of the law after *Bartlett*,[25] and he argued in *Hagen* that a "clear-statement rule" had been established by the prior cases, "pursuant to which a finding of diminishment would require both explicit language of cession or other language evidencing the surrender of tribal interests and an unconditional commitment from Congress to compensate the Indians."[26] The majority of the Court disagreed, and Justice O'Connor wrote: "Although the statutory language must 'establis[h] an express congressional purpose to diminish,' [citing *Bartlett*], we have never required any particular form of words before finding diminishment."[27] This statement is technically true; *DeCoteau* and *Rosebud* found diminishments without requiring that any particular word appear in the abrogating statute.[28] Nevertheless, the Solicitor General was right and, at the very least, Ms. Hanna and I could be forgiven for thinking that there was a Supreme Court requirement, however stated, that the abrogating statute contain language of cession.

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24. Hanna & Laurence, *Treaty Abrogation, supra* note 20, at 815-16.

25. While Ms. Hanna and I shortened the name of the case to "*Bartlett*," the Court in *Hagen* calls it "*Solem*." Whichever choice I make in this paper will lead to some confusion; I will stick with "*Bartlett*" for the same reason we chose it originally: Solem, as the warden of the South Dakota penitentiary, is more likely to have his name repeated in the style of other habeas corpus cases, while Bartlett is not.

26. *Hagen*, 114 S. Ct. at 965.

27. *Id.* (citation omitted).

28. *DeCoteau*, 420 U.S. at 449; *Rosebud*, 430 U.S. at 615.

Hagen focused on the language "restored to the public domain," found in the initial 1902 Act that attempted to open the reservation of the Utes to white settlement.[29] "Cede," the word sought, if not "required" by several of the pre-*Hagen* cases, is a more definitive word than "restored to the public domain," showing that the tribes were, in fact, giving up sovereign authority, voluntarily or not, over their lands, and there was a certain sense to "requiring" it. Justice Blackmun dissented in *Hagen* on that ground, among others.[30] However, the *Hagen* Court's focus on "restored to the public domain" was still and all a focus on statutory language and, thus, fit under the Solicitor General's "clear-statement rule." In fact, the 1902 Act fairly clearly had reservation diminishment in mind, as the Act contemplated both the tribes' agreement to the change and a payment of a sum certain, per acre, for the land,[31] circumstances important to the finding of diminishment in the prior cases.[32]

The problem is that this Act was premised on Indian consent, consent that was never obtained.[33] The 1903 and 1905 Acts and President Theodore Roosevelt's proclamation of 1905 did away with the requirement of consent,[34] but their language was not so clear as the 1902 Act's, containing conflicting references, on the one hand, to "restored to the public domain,"[35] and on the other hand to "opening lands for settlement and entry."[36] The latter language is similar in import to

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29. *Hagen*, 114 S. Ct. at 961-62, 967 (discussing the Act of May 27, 1902, ch. 888, 32 Stat. 263).

30. *Id.* at 971. In his dissent, Justice Blackmun stated:

> [T]he only two cases in which this Court previously has found diminishment involved statutes and underlying tribal agreements to "cede, sell, relinquish, and convey to the United States all [the Indians'] claim, right, title, and interest" in the unallotted lands or to "cede, surrender, grant, and convey to the United States all [the Indians'] claim, right, title, and interest" in a defined portion of the reservation. The Court held that in the presence of statutory language "precisely suited" to diminishment, supported by the express consent of the tribes, "the intent of all parties to effect a clear conveyance of all unallotted lands was evident."

I need hardly add that no such language or underlying Indian consent accompanies the statute at issue in this case. *Id.* at 973 (brackets in original) (citations omitted).

31. *Hagen*, 114 S. Ct. at 961-62.

32. *See, e.g., DeCoteau*, 420 U.S. at 448.

33. *Hagen*, 114 S. Ct. at 961.

34. *Id.* at 962-64 (discussing the Act of March 3, 1903, ch. 994, 32 Stat. 998 (directing the Secretary of the Interior to open the Uintah reservation, even without the Indians' consent, by October 1, 1904); the Act of April 21, 1904, ch. 1402, 33 Stat. 207 (deferring the opening date until March 10, 1905); the Act of March 3, 1905, ch. 1479, 33 Stat. 1069 (deferring the opening date until September 1, 1905, or earlier by Presidential Proclamation); and the Proclamation of July 14, 1905; 34 Stat. 3119-20 (President Theodore Roosevelt) (opening the land for white settlement on August 28, 1905)).

35. *Hagen*, 114 S. Ct. at 963 (quoting the Presidential Proclamation of July 14, 1905, 34 Stat. 3119-20 (quoting the Act of May 27, 1902 which used the language "shall be restored to the public domain.")).

36. *Hagen*, 114 S. Ct. at 962-63, nn.3-5 (providing the text of the Acts of March 3, 1903, April 21, 1904, and March 3, 1905, which contain repeated references to the "opening" of the land).

language held in the prior cases *not* to diminish the reservation; merely opening a reservation for white settlement leads to the creation of non-Indian reservation land.[37] *Hagen* focused on "restored to the public land," in holding that the series of acts and proclamations created non-Indian-reservation land.

In this sense *Hagen* is the child of *Rosebud*, an opinion written by then-Justice Rehnquist in 1977 which found diminishment in a most creative way. In both *Hagen* and *Rosebud*, the consent of the Indians to the opening of the reservation was first sought, but the reservation was opened without an agreement ever being consummated.[38] In both cases, there was arguably diminishment language in the early statutes, bills, and agreements construed, but not in later ones.[39] And in both cases, *Lone Wolf v. Hitchcock*[40] played a key role. That case, of course, held that Congress did not need the consent of the Indians to abrogate a treaty, at least to the extent that the Court refused to enjoin, on due process grounds, Interior Secretary Hitchcock from enforcing an abrogating statute.[41] In both *Hagen* and *Rosebud*, the Court used the *Lone Wolf*

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37. In *Seymour*, the Court wrote:

> [I]t seems clear that the purpose of the 1906 Act was neither to destroy the existence of the [southern half of the] Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation. The [1906] Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356. And this, from *Rosebud*: "The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud*, 430 U.S. at 586-87, quoted in *Hagen*, 114 S. Ct. at 973 (Blackmun, J., dissenting).

38. *See Hagen*, 114 S. Ct. at 962-63 (discussing the effect of the Act of March 27, 1902, which contemplated the Indians' consent and the Act of March 3, 1903, which opened the reservation without consent); *Rosebud*, 430 U.S. at 587-88 (regarding an agreement between the United States and the Indians which, if ratified, would have diminished the reservation, but which was never ratified).

39. *See supra* notes 29-37 and accompanying text (discussing *Hagen*); *Rosebud*, 430 U.S. at 595-61 (discussing the differences between the Act of April 23, 1904 (using language of cession), and the Acts of May 30, 1910, and March 2, 1907 (using no language of cession)).

40. 187 U.S. 553 (1903).

41. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). In United States v. Sioux Nation, 448 U.S. 371, 410-15 (1980), the Court stopped just short of overruling *Lone Wolf*, holding instead that, while the United States had the power to abrogate an Indian treaty unilaterally, it was potentially liable in the Court of Claims for doing so. *Lone Wolf* had appeared to go much farther, threatening to make all abrogations non-judiciable political questions, even in the face of proof of congressional bad faith. *Lone Wolf*, 187 U.S. at 568. One of the unfortunate things about *Rosebud* and *Hagen* is that they breathe life back into the long-discredited *Lone Wolf*, a case that sounds rather ruthless to a modern reader. I concede, however, the rationality of the Court's method of statutory construction, as it is not beyond conjecture that Congress's method of doing business might have changed after *Lone Wolf*. Note, however, that the statute in *Bartlett*, 465 U.S. at 481, was enacted after *Lone Wolf* and the unanimous Court did not find it to abrogate the treaty and diminish the reservation.

decision to explain away Congress's failure to obtain consent and the dropping of any cession language from post-1903 enactments.[42]

So, the kernel of *Hagen* appears only to be a refinement, not a rejection, of the Solicitor General's "clear-statement rule."[43] "Cede" is clearly diminishment language, but "restore to the public domain" is only marginally less clear, and note incidentally that Justice O'Connor gave special emphasis to the word "*restore*."[44] True, the *Hagen* opinion resurrected the factors beyond the clear-statement rule, to wit, the contemporaneous events surrounding passage of the homesteading acts, the subsequent jurisdictional history, and the present demography of the opened areas.[45] These factors had appeared to suffer the Court's misgivings, but not rejection, in *Bartlett*.[46] Justice O'Connor turned briefly to discuss contemporary historical evidence, subsequent history and present demographics, finding all of these factors consistent with her reading of the abrogating statutes and declarations.[47] But then, Justice Marshall for the unanimous Court in *Bartlett* had given the same sort of glance at these factors,[48] even while emphasizing the importance of the language of the abrogating statute.[49] So, here again, *Hagen* did not break much new ground.[50]

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42. *Hagen*, 114 S. Ct. at 968; *Rosebud*, 430 U.S. at 594.

43. *Hagen*, 114 S. Ct. at 968.

44. *Id.* at 966. It is, of course, true that in many cases the land in question will never have been part of the "public domain" in the first place, but rather will have been aboriginal land held by the tribes roughly since the Bering Strait froze over. In such a case, the abrogating statute would place the land for the first time in the public domain. In *Hagen*, the reservation was created, not by treaty, but by executive order, out of land which was already in the public domain. *Id.* at 961. Whether the *Hagen* case is extendable to treaty reservations is unclear. Note that in the cases prior to *Hagen*, two involved executive order reservations, *see Seymour*, 368 U.S. at 354; *Mattz*, 412 U.S. at 490 n.9, two involved treaty reservations, *see DeCoteau*, 420 U.S. at 431; *Rosebud*, 430 U.S. at 589, and one a statutory reservation, *see Bartlett*, 465 U.S. at 465.

45. *See Hagen*, 114 S. Ct. at 968-70.

46. *Bartlett*, 465 U.S. at 475-80.

47. *Hagen*, 114 S. Ct. at 968-70. The Court made special reference and attached special relevance to a discussion of the matter of reservation diminishment at meetings between the United States and the Utes held from May 18 to May 23, 1903. *Id.* at 968. Given the importance of communication directly between the executive branch and the Indians, ponder the considerable incongruity contained in the present Supreme Court's denial of the tribe's request to participate in the *Hagen* case. *See* Hagen v. Utah, 113 S. Ct. 2438 (1993) (denying the motion of the Ute Indian Tribe for leave to intervene). In *Hagen*, Justice Blackmun found the factors, especially the contemporary historical evidence, ambiguous at best, as often is and will continue to be the case. 114 S. Ct. at 975 (Blackmun, J., dissenting). Justice Blackmun stated:

> "Although the Court relies on the negotiation history of the 1902 Act and that of the Act of Mar. 3, 1903 to support its conclusion, nothing in the negotiations with the Ute Indian Tribe 'unequivocally reveal[s] a widely held, contemporaneous understanding' that the Uintah Reservation boundaries would be diminished."

Id. (citations omitted) (quoting *Bartlett*, 465 U.S. at 471).

48. *Bartlett*, 465 U.S. at 479-80.

49. *Id.* at 475.

50. There is one place at which *Hagen* threatens an unfortunate shift in Supreme Court jurisprudence, and that is at the point where Justice O'Connor too easily compared Indian reservations

"In the end," Tassie Hanna and I observed after *Bartlett*: "Justice Marshall was left with the foundation of reluctance, undisturbed by equivocal evidence of what Congress said, what it meant and what it was thought to have meant later."[51] It is the variable solidity of this foundation of reluctance that seems to be the principal difference between *Bartlett* and *Hagen*. While Justice O'Connor mentioned the historical reluctance with which allegations of diminishment have been met, something is missing; the Court somehow doesn't *feel* very reluctant. Buried in a long paragraph outlining the Court's approach to diminishment questions is the observation that "[t]hroughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment."[52] For that proposition, Justice O'Connor cited two cases which did not themselves show much in the way of reluctance to cut back on tribal authority.[53] The Court did not express any general or particular reluctance again.[54]

What could explain this deterioration in the reluctance with which the Court approaches diminishment cases? For one thing, there has been a major makeover of the Court since *Bartlett*; five Justices have joined the Court, four of whom voted to diminish the Utes' reservation.[55] Perhaps we are seeing a shift away from reluctance to diminish. On the

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to bird sanctuaries and military bases:

> This power of reservation was exercised for various purposes, including Indian settlement, bird preservation, and military installations, "when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain." It follows that when lands so reserved were "restored" to the public domain—*i.e.* once again opened to sale or settlement—their previous use was extinguished.

Hagen, 114 S. Ct. at 966 (citations omitted). This quotation does not stand up to careful inspection. Many, if not most, Indian lands were not open for sale or settlement in the first place, as the Court recognized that the possessory rights of Indians were subject to divestment only by the federal government, if at all, and could not be subject to divestment by individual land purchasers. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 603-05 (1823).

51. Hanna & Laurence, *Treaty Abrogation*, *supra* note 10, at 815.

52. *Hagen*, 114 S. Ct. at 965. Justice Blackmun responded:

> Although the majority purports to apply these canons in principle, . . . it ignores them in practice, resolving every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation.

Id. at 972 (Blackmun, J., dissenting).

53. South Dakota v. Bourland, 113 S. Ct. 2309 (1993); County of Yakima v. Confederated Tribes and Bands of the Yakima Nation, 502 U.S. 251 (1992) (holding that a county could impose an *ad valorem* tax on non-Indian reservation land).

54. *Cf. Hagen*, 114 S. Ct. at 971 (Blackmun, J., dissenting). "'Great nations, like great men, should keep their word,' and we do not lightly find that Congress has broken its solemn promises to Indian tribes." *Id.* (quoting F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1959) (Black, J., dissenting)). Justice Blackmun's reluctance to abrogate is felt throughout the dissent.

55. *See* table in Part II (providing a graphic depiction of the structure of the Court and the justices voting for diminishment).

other hand, three Justices voted against diminishment in *Bartlett* and for diminishment in *Hagen*, suggesting that, at least for these three, the shift is based on principle, not personnel.[56]

It is possible that the reluctance that the Court feels toward the diminishment of the reservation relates to one of the factors that Justice O'Connor's opinion in *Hagen* pulled back into the analysis: the present demographics of the area at issue. Note that it is, and always has been, something of a stretch to relate the present demography of the land to the question of whether Congress in the early part of this century intended, with an inartfully written statute, to turn non-Indian reservation property into non-Indian-reservation property.[57] It is easier for me to relate demography to judicial reluctance, or not, than to congressional intent.

I am suggesting that there is one way to read *Bartlett* and *Hagen* together. When the Court looked at the lands in question in *Bartlett* and found them inhabited mostly by Indians, it was reluctant to find legislative diminishment under an early statute. But, when the Court found the lands inhabited mostly by whites, in *Hagen*, its reluctance to diminish was not heartfelt and was directed elsewhere; it was now quietly reluctant to find that tribal jurisdiction extended over these non-Indians, in the face of a federal homesteading statute. As Justice O'Connor thought relevant to note, in *Bartlett* the seat of the tribe's government was on the opened land, whereas in *Hagen* the largest city in the opened area was 93% white.[58]

As theoretically irrelevant (or at least "unorthodox and potentially unreliable," in the *Bartlett* Court's words) as present demography is to the interpretation of early statutes, it seems realistically to be a factor that plays a role in the Court's analysis, most obviously in the ebb and flow of reluctance to diminish the reservation. Similar forces were at work in

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56. *See* table in Part II. Blackmun, the ninth Justice, voted against diminishment in both cases.

57. The Court in *Bartlett* called this demographic factor "unorthodox and potentially unreliable." 465 U.S. at 472 n.13. One might have expected Justice Scalia, the leader of the Court when it comes to the restructuring of the rules of statutory construction, to have objected to the introduction of 1994 demography into the calculus of interpretation for a 1902 statute. *Cf.* MCI Telecommunications Corp. v. American Tel. and Tel. Co., 114 S. Ct. 2223 (1994) (interpreting the meaning of the word "modify" in § 203 of the Communications Act of 1934, 48 Stat. 1064 (1934), *codified at* 47 U.S.C. § 203(a)). In particular, the issue was whether Congress' use of the word granted the Federal Communications Commission the authority to make large, or only small, changes in the statutory requirements. *Id.* at 2228. The Court held the latter, after lengthy and careful parsing of conflicting dictionary definitions of the word. *Id.* at 2229-31. The three dissenting Justices thought that a Senate report was relevant to the inquiry. *Id.* at 2233-34 (Stevens, J., dissenting) (quoting S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934)). Justice Scalia, writing for the majority, cited no legislative history and thought it more relevant to discuss various critical reviews of particular dictionaries that contained what the critics, and the Court, considered to be non-standard definitions of the word "modify." *Id.* at 2230 n.3.

58. *Hagen*, 114 S. Ct. at 970.

South Dakota v. Bourland, with respect to what I call "judicial diminishment," to which I now turn my attention.

III. JUDICIAL DIMINISHMENT: *SOUTH DAKOTA V. BOURLAND* AND ITS PREDECESSORS

South Dakota v. Bourland[59] involves non-Indian reservation land, to wit, the Oahe Reservoir, which lies within the boundary of the Cheyenne River Sioux Reservation.[60] That reservation was held, in *Bartlett*, not to have been diminished by the 1908 homesteading act, which opened the land for white settlement, but, the Court held, left the reservation boundary intact.[61] At an earlier stage of the *Bourland* litigation, the State of South Dakota had tried again, this time arguing that the reservation had been diminished in the *Hagen* sense by the Cheyenne River Act of 1954.[62] The District Court held against the State on that issue,[63] and that determination was not appealed.[64] In the Supreme Court's opinion, it appears settled that the Cheyenne River Sioux Reservation was never diminished by Congress, either in 1908 or in 1954: "Like this case, *Montana* [*v. United States*], concerned an Indian tribe's power to regulate non-Indian hunting and fishing *on lands located within a reservation* but no longer owned by the tribe or its members."[65] But, in denying tribal authority over those lands, the Court reached a result virtually indistinguishable from *Hagen*-style reservation diminishment by legislative fiat. That is to say, the treatment given by *Bourland* to tribal power over non-Indian reservation lands all but converts them into non-Indian-reservation lands, without the benefit of a congressional statute diminishing the reservation.

Often the most telling part of the Court's opinion in Indian law cases is the initial sentence of the analysis. Here is Justice Thomas's from *Bourland*: "Congress has the power to abrogate Indians' treaty rights, though we usually insist that Congress clearly express its intent to do so."[66] Beginning the sentence with the power to abrogate, modifying the word "insist," and even joining the two thoughts with the casual

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59. 113 S. Ct. 2309 (1993).

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

61. Solem v. Bartlett, 465 U.S. 463 (1984).

62. *See Bourland*, 113 S. Ct. at 2313-14 & n.2 (citation omitted) (describing the conveyance of land by the Cheyenne River Sioux Tribe).

63. *See id.* at 2314.

64. *See id.* at 2321 n.1 (Blackmun, J., dissenting).

65. *Bourland*, 113 S. Ct. at 2316 (emphasis added) (discussing Montana v. United States, 450 U.S. 544 (1981)).

66. *Bourland*, 113 S. Ct. at 2315-16 (citations omitted).

"though," sets the tone for the opinion; this is one of those cases where tribal sovereignty will not be advanced with any enthusiasm, if at all.

In addition to the discouraging start of the Court's opinion, there is a certain sourness throughout it. Especially in responding to the dissent, the Court exhibits a surliness that I find distasteful (a surliness, incidentally, totally absent from *Hagen*, even in the face of a sharp opinion by the same two dissenters).[67] For instance, the Court wrote:

> The dissent apparently finds ambiguity in [Section 2 of the Flood Control Act of 1944], on the grounds that it "does not address the question of *which* rights Congress intended to take." The self-evident answer is that when Congress used the term "all claims, rights and demands" of the Tribe, it meant *all* claims, rights and demands.[68]

This is a clever, if sarcastic, turn of phrase, but note the sentence to which it is subtended: "This provision reliably indicates that the Government and the Tribe understood the Act to embody the full terms of their Agreement, including *the various rights that the Tribe and its members would continue to enjoy* after conveying the 104,420 acres to the Government."[69]

Thus, the Court's marginal sarcasm is misplaced, as the Tribe did retain rights under the very statute that the Court uses to make the "self-evident" and collegiality-disrupting point that the taking of all rights means the taking of all rights. One would think it equally self-evident, and more apropos, that the taking of fewer than all rights, leaves some untaken.

The *Bourland* opinion goes beyond surliness and becomes damaging to the body of Indian law in the Court's footnote 15:

The dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument is simply another manifestation of its disagreement with *Montana*, which announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of the nonmembers of the tribe." While the dissent refers to our "myopic focus" on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over

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67. I hesitate to attribute this surliness to Justice Thomas, himself, as he secured the votes of six colleagues for the opinion as published, and avoided any concurrences on the grounds of non-judicious temperament or otherwise.

68. *Bourland*, 113 S. Ct. at 2317 n.10 (citation omitted).

69. *Id.* (emphasis added).

nonmembers "cannot survive without express congressional delegation," and therefore is *not* inherent.[70]

This is a too-eager destruction of the civil-side application of inherent tribal sovereignty, and the Court knows it. The very next paragraph of the opinion in the text following this footnote concedes that tribal power over non-members remains inherent even under *Montana* in at least two circumstances: (1) the inherent ability, without congressional approval, to "regulate activities of nonmembers who enter 'consensual relationships' with the tribe or its members"[71] and (2) the inherent ability to exercise civil authority, without congressional approval, over the conduct of non-members "'when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[72] These are sweeping and important exceptions found in *Montana*, and, *Bourland*'s footnote 15 to the contrary notwithstanding, they remain good and active law. As the Court properly noted, these possible exercises of inherent civil authority were "[left] to be resolved on remand."[73]

Thus, it is hard to know whether *Bourland* extends *Montana* or not. Footnote 15 would seem to, but the text following the footnote would not. I believe I will rely on the text over the footnote, which seems entirely fair, until the Court requires otherwise.

Bourland's footnote 15 is sure to be cited *to* lower courts, and more dangerously, *by* lower courts for the proposition that there is no inherent civil-side tribal authority over non-Indians. Meanwhile, the Court's nearby acknowledgment in *Bourland*'s text that there is, in fact, inherent civil-side tribal authority over non-Indians may go by the wayside.[74] For those who care about tribal sovereignty, the risk that the footnote will come to control the text is too great for the mere chance to take a literary swipe at the dissenters, if that is what Justice Thomas was doing.

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70. *Id.* at 2320 n.15 (citations omitted).

71. *Id.* at 2320 (quoting *Montana*, 450 U.S. at 565).

72. *Id.*

73. *Bourland*, 113 S. Ct. at 2320.

74. In the recent case of United States *ex rel* Morongo Board of Mission Indians v. Rose, 34 F.3d 901 (9th Cir. 1994), the court cited *Bourland*'s footnote 15 for what it perceived as a "narrow view," *id.* at 906 n.3, of inherent tribal sovereignty, even while finding that the tribe had inherent authority, under both *Montana* and *Bourland*, to regulate the activity of the defendant in that bingo-related case.

The emphasis I fear on *Bourland*'s footnote rather than the text is found in one awfully enthusiastic discussion of the case. *See* Timothy R. Malone & Bradley B. Furber, *Civil Jurisdiction of Indian Tribes over Nonmembers: The Supreme Court Sheds New Light on an Old Problem*, 8 NAT. RESOURCE & ENV'T 83, 85-86 (1993).

Even for those who don't care about tribal sovereignty, it would seem both injudicious and petty.[75]

Even if *Bourland* does not extend the reach of *Montana*, it does continue the Court's trend of restricting the ability of tribes to exercise jurisdiction over non-Indian reservation land. Let us parse the holding of the Court carefully: "*Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands."[76] This is a truism, qualified only by the observation that, ever since *Johnson v. M'Intosh*,[77] a tribe is able to convey ownership only to the United States. Continue: "The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others."[78] A footnote follows the word "case," in which the Court limited its holding to those parts of the reservation "broadly opened to the public."[79] There is likely to be much litigation over the meaning of these words; for example, does the granting or taking of an easement across a reservation for an interstate highway "broadly open" a reservation? Just the roadway? Some land on either side? The entire reservation? If a tribe loses all power over reservation lands to which

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75. There is another point, not precisely germane to the present topic, where *Bourland* is seriously damaging to careful Indian law analysis. This involves the question of the abrogation of Indian treaties by federal statutes apparently inconsistent with the treaty, when the statutes do not expressly show an intent to abrogate. Until *Bourland*, United States v. Dion, 476 U.S. 734 (1986), set a very strict test for these so-called "quiet" abrogations: "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty." *Id.* at 739-40. "Essential," "actually," and "chose" are three strong words in the *Dion* test, and, if nothing else, showed that in circumstances where the statute is not expressly abrogatory, careful consideration by a court is necessary before finding the intent to abrogate. *Bourland* applied *Dion* in one seven-sentence paragraph. *Bourland*, 113 S. Ct. at 2319. The first five sentences state the *Dion* case, including the test, quoted just above. Next comes a one-sentence application of *Dion* to the *Bourland* facts, followed by a sweeping conclusion: "When Congress reserves limited rights to a tribe or its members, the very presence of such a limited reservation of rights suggests that the Indians would otherwise be treated like the public at large." *Bourland*, 113 S. Ct. at 2319. If such a "suggestion" is to be shown, either in this particular case or in general, it would take more than a short-shrift, one-sentence analysis to show it. And even if such a "suggestion" were shown, it turns *Dion* on its head to equate a mere "suggestion" with actual congressional consideration and choice.

In any event, *Bourland* does not seem to implicate *Dion* at all. In *Dion* the Court had found only after careful consideration that the Bald Eagle Protection Act, 16 U.S.C. § 668, which was entirely silent regarding Indian treaties, abrogated the Yankton Sioux's treaty rights to hunt on their reservation. In *Bourland*, the statutes at issue were clearly treaty-abrogating ones and the question was which treaty rights survived the abrogation of some. *See supra* notes 37-39 and accompanying text. The next time a *Dion*-type "quiet" abrogation is present, advocates for the tribes should be able to convince the Court, if ever one-sentence analysis is appropriate, it is not under *Dion*'s "actual consideration and choice" test.

76. *Bourland*, 113 S. Ct. at 2316.

77. 21 U.S. (8 Wheat.) 543 (1823).

78. *Bourland*, 113 S. Ct. at 2316.

79. *Id.* n.9.

non-members have motorized access, a tribe's reluctance to allow such access would be understandable. Congress, of course, could always take the land unilaterally and the tribe be damned, but one hopes that such eras in white-Indian relations are long past. One perhaps unintended result of *Bourland* is to drive tribes to increasing defensiveness and insularity. Continue:

> In taking tribal trust lands and other reservation lands for the Oahe Dam and Reservoir Project, and broadly opening up those lands for public use, Congress, through the Flood Control and Cheyenne River Acts eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.[80]

The Court itself had rejected this overly facile tie-in between the power to exclude and the power to regulate, at least in the context of the power to tax, in *Merrion v. Jicarilla Apache Tribe*,[81] and, in fact, Justice Stevens dissented in *Merrion* on just these grounds.[82] Of course, in *Merrion* the tribe had itself opened its reservation to the non-Indians by contract, while in *Bourland* the opening had been done by Congress, but therein lies just exactly the point: The Court seems to have lost sight of the distinction between the opening of a reservation that we see at work in *Hagen* and the opening of a reservation that we see in *Bourland*. It is to that distinction that I now turn.

IV. THE FUNDAMENTAL DISTINCTION BETWEEN SOVEREIGNTY AND OWNERSHIP

We have then, in *Hagen*, a congressional statute, or series of statutes, that was held to have taken land from the Ute tribe, restored said land to the public domain, and reduced the size of the reservation to include only the land owned by Indians.[83] And we have, in *Bourland*, a congressional statute that took the land from the tribe, opened it up for recreational use by whites, but left the land within the existing boundaries of the reservation.[84] If *Hagen* makes any sense, the

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80. *Id.* at 2316-17.

81. 455 U.S. 130 (1982). In *Merrion*, the Court found that the Tribe retained the inherent right to impose taxes in mining activities on the reservation "as part of its power to govern and to pay for the costs of self-government." *Id.*

82. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 185 (1982) (Stevens, J., dissenting).

83. *See supra* notes 18-57 and accompanying text.

84. *See supra* notes 58-80 and accompanying text.

difference between these two statutes should be important, else why spend so much time determining whether the statute "restored the property to the public domain" or merely "opened the reservation for white settlement"?

But note how similar the *Hagen* and *Bourland* results are, for in both cases, the tribes lost regulatory control over the lands in question. In *Hagen*, the Court concluded that Congress intended for the reservation to shrink in size to include only Indian-owned land, but in *Bourland*, having concluded that Congress did *not* intend that result, the Court nevertheless denied tribal regulatory jurisdiction over the land.

And note, too, the actual results in the two cases. Because the Ute reservation was diminished by statute, state jurisdiction attached to the land and Mr. Hagen stayed in state prison for the crime he committed in Myton, Utah. Federal jurisdiction in Myton is no greater than it is in Salt Lake City; this is non-Indian-reservation land. On the other hand, the Cheyenne River Sioux Reservation was *not* diminished by statute, so the usual barriers to state power arose.[85] Tribal jurisdiction over the "broadly opened" areas was removed by *Bourland*, leaving the federal government as the only government with jurisdiction.[86] On what basis does this difference make sense?

Thus has the Court apparently adopted the view of the Businessman in *The Little Prince*.[87] In *Bourland*, the tribe may "reign over" the land in question, at least to the extent that the land is still part of its reservation, but that sovereignty becomes less important than the harsh reality of who "owns" the land.[88] But then, why the *Hagen* fuss, and what about *Bartlett*, *Mattz*, and *Seymour*?

As much as many of us abhor the allotment period,[89] and the diminishment statutes that were a part of allotment, the Court's theory in the *Seymour-Hagen* line of cases makes logical sense, once one is convinced that in some cases Congress intended to reduce the size of the reservation. But it is the logical sense of this line of statutory cases that shows the weakness of the *Oliphant-Montana-Bourland* line of common

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85. *See* Williams v. Lee, 358 U.S. 217 (1959) (ruling that the state court had no jurisdiction over a non-Indian doing business on a reservation seeking relief for unpaid goods sold on credit); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (ruling that the state had no jurisdiction to impose a tax on the income of Indians residing on the reservation whose income is wholly derived from reservation sources); County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (finding that the Indian General Allotment Act permitted a county to impose an *ad valorem* tax on reservation land patented in fee but it did not allow a county to enforce excise tax on sales of such land).

86. *Bourland*, 113 S. Ct. at 2320-21.

87. *See supra* note **.

88. *Bourland*, 113 S. Ct. at 2320-21.

89. *See* GETCHES ET AL., FEDERAL INDIAN LAW 168-214 (3d ed. 1993).

law cases. Given that Congress can directly reach the *Bourland* result by reservation diminishment if it chooses to, and that, in the case of the Cheyenne River Sioux reservation, it chose not to, what justifies the Court's diminishing of the reservation by judicial edict under the common law? Nothing, but the no-nonsense assessment of the Businessman: "Kings do not *own*, they *reign over*. It is a very different matter."[90]

In *Bourland*, the Court took the same no-nonsense approach, reducing, with a glibness approaching the Businessman's, the tribe's status as a government to irrelevancy. We know that the Oahe Reservoir is on-reservation, but the reservation government has no regulatory power over the land and water. It is true, of course, that many tribal leaders and others would agree with the Businessman about the practical economic and social effects of land ownership on those reservations where much land is held by non-Indians. But every government must face this potential conflict between sovereign and private interests, and, even given the practical importance of land ownership, no government willingly surrenders sovereign regulatory power over land just because it is owned by non-citizens.

V. THE IRONIC ROLE OF THE INDIAN CIVIL RIGHTS ACT

Thus, *Bourland* is wrong not only because it is inconsistent with the *Hagen* analysis and thereby destructive of congressional prerogative, but also because it ignores the important difference between ownership and sovereignty. And why is the Court attracted to the Businessman's pragmatic philosophy, especially when it entails the pre-emption of an independent and more logical alternative theory, that of legislative reservation diminishment? I believe it is at this point that *Hagen* and *Bourland* fold in together, and I return to a point made above.

Recall that the most obvious difference, I thought, between *Bartlett* and *Hagen* was the change in the Court's apparent reluctance to find congressional diminishment of the reservation. And, I thought, the best way to explain this variable reluctance was by observing the Court's variable interest in present-day demographics of the land at issue. When the land concerned is mostly held by Indians, as in *Bartlett*, the Court was reluctant to find diminishment, but not when the land was mostly non-Indian, as in *Hagen*. Likewise, in *Bourland*, the Court was reluctant

90. DE SAINT-EXUPÉRY, *supra* note **, at 45.

to allow tribal jurisdiction to extend to non-Indian lands, even when they clearly *are* on-reservation lands.

Thus, both cases dealt, in different procedural postures and against fundamentally different statutory backgrounds, with the question that permeates all of federal Indian law: to what extent will Indian tribes be allowed to exercise power over non-Indians and, more broadly, to what extent are Indian tribes *governments*? Ever since *Oliphant*, at least in the modern era, the Court has become increasingly frank in its misgivings about allowing tribes to exercise power over non-Indians and their lands. These misgivings become manifest when one considers *Hagen*'s attention to the logically problematic present-day demographics and *Bourland*'s subtle pre-emption of the *Hagen* diminishment analysis.

There is at least a modicum of sense to these misgivings. Modern federal Indian law is driven by the notions of self-determination and difference. Unless and until all reservations are diminished in the *Hagen* sense, self-determination for tribes will implicate the rights of non-citizens, as is the case for all governments. And, as long as Indian law is about difference and not sameness, those non-citizens will be treated differently from the way they are at home. It is true, of course, that when an American visits or resides in Malaysia, for instance, the rules are different from those at home, but it is also true, and has been at least since *Cherokee Nation v. Georgia*,[91] that the visit to or stay on an Indian reservation will not be treated under our domestic law as if it were a visit to Malaysia.

It is not necessary, in my view, for one to ignore the fact that things are done differently on Indian reservations. In fact, the vibrancy of the field is premised on the necessity that one *not* ignore those differences. Furthermore, it is too much to expect those on either side of the border to be easily persuaded that those different ways are preferable to the way things are done at home. Only those of the New Age ilk become immediately converted to Indian ways merely on having them explained. And *vice versa*, as Chief Justice Robert Yazzie of the Navajo Supreme Court wrote to me recently: "Navajos are notorious for taking that from the dominant society which we find useful and rejecting the rest."[92] And finally, in my view, it is not necessary for either the dominant or tribal society to act as though those differences were not important. Modern American Indian law requires that the intersection between dominant-society law and tribal law be very carefully tended.

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91. 30 U.S. (5 Pet.) 1 (1831).

92. Letter to the author from Robert Yazzie, Chief Justice of the Navaho Supreme Court, used here with his permission.

As should be clear by now, I prefer *Hagen* to *Bourland*, but neither case carefully tends that intersection. Both cases diminished the reservations involved, removing most applications of tribal law to non-members and therefore most questions of the difference between off- and on-reservation rules. In an entirely different context, Justice Cardozo said, "Spoliation is not management,"[93] and the same thought applies here. The relationship between Indian and non-Indian law needs management, not the destruction of the tribal regulatory regime.

It is likely that the Court did not undertake that careful management because no common law or statutory rules apply to federal court inspection of tribal civil process, save the *Hagen* and *Bourland* lines which altogether destroy tribal authority. The Indian Civil Rights Act, which would allow a federal court to traffic, not in the destruction of tribal law, but in its modification, lost all, or most, civil-side application in *Santa Clara Pueblo v. Martinez*.[94] It is for this reason that I make the controversial observation that, if the ICRA were still in the hands of federal judges to be used to inspect tribal process for what might be called "ICRA fairness," the Court might lose the reluctance that we saw in both *Hagen* and *Bourland* to allow any application of tribal civil law to non-Indians.

VI. CONCLUSION

There are two qualifications to the conclusion that an effective civil-side ICRA would lessen the Supreme Court's reluctance to permit tribes to exercise jurisdiction over non-Indians. First, it didn't work in *Oliphant*. The presence of habeas corpus and criminal-side ICRA collateral attack did not keep the Court from denying tribal criminal jurisdiction over Mark Oliphant, and with him, all non-Indians.

Second, I'm not at all sure that what I propose is what the tribes want. The restoration of tribal power over non-Indians is something that will probably be more important to some tribes than to others. And even to those tribes for whom such restoration is important, the ICRA's price—oversight of tribal decision-making by federal judges—may be too dear. Recall Professor Robert Williams' description: "a highly efficient process of legal auto-genocide."

I respond as follows: First, I grant that the ICRA did not keep *Oliphant* from happening; I'm not certain a renewed ICRA will stop *Bourland* in its tracks, either. But nothing else seems to be working.

93. Shoshone Tribe v. United States, 299 U.S. 476, 498 (1936).
94. 436 U.S. 49 (1978).

Since 1978, when both *Martinez* and *Oliphant* were decided, when the ICRA was removed from the civil side, and when criminal jurisdiction over non-Indians was denied, the tribes have had increasingly unfettered power to do less and less. One supposes that eventually the tribes will have entirely unfettered power to do essentially nothing. These trends must be stopped or the tribes renamed as Indian clubs or tribal corporations.

Second, I defer to tribal judgments. It seems to me—a non-Indian on a college campus—that the final fight for a doctrine recognizable as tribal sovereignty will be over civil regulatory and adjudicatory jurisdiction over non-Indians. If that's not a realistic view, and if the fight is really over bingo parlors and waste dumps, religious freedom and U.N. recognition; if it's more important to hold the ICRA at bay, even at the cost of civil power over non-Indians, then so be it. It seems otherwise to me, but we should all listen to those closest to the question, those who live, work and exercise jurisdiction, or not, on and near the reservation.