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THE DOMINANT SOCIETY'S JUDICIAL RELUCTANCE TO ALLOW TRIBAL CIVIL LAW TO APPLY TO NON-INDIANS: RESERVATION DIMINISHMENT, MODERN DEMOGRAPHY AND THE INDIAN CIVIL RIGHTS ACT

Robert Laurence*

INTRODUCTION

Begin at the beginning: there was a time, not so long ago as such things are reckoned—say, about half as long as there has been a country called Hungary—during which only American Indians lived in and around what is now the Commonwealth of Virginia. A time when Europeans, Africans and Asians were entirely occupied with managing the affairs of Europe, Africa and Asia, to mixed effect. A time when the subject of this article was entirely theoretical; when the question of applying tribal law to non-Indians was answered neither "yes" or "no" but simply did not arise, putting aside the welcome, or not, given the odd Scandinavian.¹

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1. Distinguish from this issue of the application of Native American law to non-Native Americans, the issue of whether the law of one tribe applies to members of another tribe, or Indians who are members of no tribe. The latter jurisdiction has existed, the mind of man runneth not to the contrary, at least not since the Bering Strait froze over, say for the last 10,000 years, give or take a few thousand. This distinction, understandable, one would think, by the average eighth grader, was not fully appreciated by the United States Supreme Court in its famous cases limiting the reach of tribal criminal jurisdiction. See Duro v. Reina, 495 U.S. 676 (1990) (a tribe has no criminal jurisdiction over Indians who are not members of the prosecuting
Now, of course, the tables have turned; there are no federally recognized Indian tribes that have land within Virginia.² So the subject of this article is theoretical here, though still practical west of here.³

It is, and always has been, a principle of American federal law that federally recognized tribes are governments, engaged in the various and diverse acts of self-government, and are not merely private, voluntary organizations.⁴ True enough, this dominant-society commitment to tribal sovereignty has ebbed and flowed over the years,⁵ and each time that, during the ebb, the commitment loses force, it never quite regains all that was lost, during the flow. Now, the tribes as governments are mere shadows of their pre-Columbian selves. Although there may be few Native Americans,⁶ they are about to enter the twenty-first century with something that no other minority group in this country has, and which few minority groups in the world have: "[T]he right . . . to make their own laws and be ruled by them."⁷ As Justice Thurgood Marshall wrote for the unanimous

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² This is far from saying that there are no Indians in Virginia. Some of them are members of tribes from the West; one of those is a United States Senator. Others are members of tribes not recognized by either the state or federal government. There are also two small state recognized reservations—the Mattaponi and Pamunkey reservations—not far from Richmond, but this article will not be discussing the law as it applies to non-federally recognized tribes.

³ Not so far west, in the case of the Cherokees, Seminoles and other remnants of tribes that were "removed" to Oklahoma and the West in the mid-1800s. Federally recognized reservations remain in North Carolina, Florida, Alabama and Mississippi. Likewise, a few Indians stayed behind north and east of here, and there are federally recognized reservations in New York, Connecticut, Rhode Island and Maine.


⁶ A couple of million is the usual estimate; that is to say somewhat less than 1% of the country's population. See id. at 13. Of course, it depends on how you count, which is an active issue in Indian law. See P.S. Deloria & Robert Laurence, What's an Indian?: A Conversation about Law School Admissions, Indian Tribal Sovereignty and Affirmative Action, 44 ARK. L. REV. 1107 (1991).

Court in 1973, “It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.” The question, then, becomes whether the “right to make their own laws and be ruled by them” includes the right to make laws and enforce them against all those who visit their lands, including non-Indians, or “non-citizens,” if you will, given the “nationhood” to which Justice Marshall referred.

The analogous question is easily answered when the nations referred to are foreign states; the laws of a foreign state apply to non-citizen residents and visitors. The question is just as easily answered when the “self-governing” entity is a private, voluntary organization; the laws and bylaws of the Rotary Club, for example, apply only to Rotarians.

With respect to states of the federal Union, the answer is only marginally more complex; the laws of Virginia apply to a non-Virginian visitor, except to the extent that they are overridden by the Full Faith and Credit Clause, the Privileges and Immunities Clause, the Fourteenth Amendment or other such pre-eminent principles of federal law, including federal statutes or treaties entitled to supremacy. Pursuant to the Fourteenth Amendment, I am a citizen of the United States and of Arkansas, but when I visit Virginia, I am treated more or less as if I were a Virginian.

With respect to Indian tribes, there are three additional layers of complexity concerning the application of their own laws to non-member residents and visitors. First is the question of whether the tribe seeks to apply its own law to non-Indians. Some tribes disclaim such power under their own constitutions, statutes or common law, others might have the theoretical

9. I am a citizen of the United States by virtue of the fact that I was born here, and of Arkansas by virtue of the fact that I reside there. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV, § 1.

Interestingly enough, while I was born in Newport News, Virginia, I know of no legal benefit from the Commonwealth of Virginia that derives from that fact.

power but never exercise it. Other tribes are in the opposite position. Generalities are dangerous; as P.S. Deloria says, there is more variation among the laws, customs and practices of North American Indian tribes than there is among the various nations of Europe. I will leave aside for the remainder of this essay the difficult question of what the law of any particular tribe is, and will concentrate on the situation where a tribe seeks to exercise its jurisdiction to the full extent allowed by both tribal and federal law.

The second layer of complexity relates to the fact that there is a substantial connection between the extent of a tribe's power and the extent of the tribe's lands. The extent of the tribe's lands, in turn, is subject to the will of Congress and the Administration. Reservations are subject to defeasance by the United States acting alone, and with the loss of land goes the loss of tribal power over the land. A tribe might still retain power over residents and visitors to its land, but the land base can be made smaller at any time by the federal government.

Hence, any inquiry regarding tribal power over non-Indians involves the question whether the tribe is attempting to exercise jurisdiction over a reservation controversy. There is, of course, a geographical component to the reach of every nation's


12. This observation is truly Sam Delorian: important, novel, insightful, profound and, when one thinks of it, nearly self-evident. "Of course. Why didn't I think of that?" I regularly use it, often without attribution, see, e.g., Robert Laurence, The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgments Across Indian Reservation Boundaries, 27 CONN. L. REV. 979, 987 (1995). I appreciate the opportunity in this footnote to set the record straight.

But, of course, it is not the kind of statement that is susceptible to quantification and proof, except for this: visit Palm Springs, California and Mission, South Dakota, then visit Paris, France, and Oslo, Norway, and let me know what you think of the comparisons.

And, of course, differences and similarities are in the eye of the beholder. See S'pore and Utah society have much in common: BG Yeo, THE (SINGAPORE) STRAITS TIMES, April 6, 1996, at p.3, col. 1 ("Much like Utah, Singapore sustained itself because it worried every day about the breakdown of the family and crime.")

13. United States v. Sioux Nation of Indians, 448 U.S. 371, 423-24 (1980) (holding that the United States may be liable before its own court of claims for such abrogations, but the case did not question the existence of the power in the United States to abrogate its treaty with the Sioux).
power, Indian or not. This is not to say, however, that any nation is strictly limited to its own land in the exercise of its power. For example, civil long-arm statutes allow a sovereign to reach beyond its boundaries in order to enter judgments against defendants who are no longer on the sovereign's land. The same should be true of the long-arm reach of tribal power. However, practical enforcement of these legitimate judgments may be problematic. Tribal judgments, if valid, may or may not have off-reservation force under a variety of Full Faith and Credit theories. But underlying either of these extra-territorial applications of tribal force is the question of whether the tribe properly may apply its law to the merits of the underlying controversy, which in turn implicates the question of whether that controversy was on-reservation or off-reservation.

The third complexity to the application of tribal law to non-Indian residents of and visitors to the reservation flows from the fact that all aspects of tribal power, including the narrow question of the applicability of tribal law to non-Indians, are susceptible to unilateral diminishment by the federal government and to voluntary surrender by the tribes themselves. Beginning with the notorious—or venerable, depending on one's perspective—Oliphant v. Suquamish Indian Tribe, it became a further requirement that the exercise of tribal power not be "inconsistent with [the tribe's dependent] status" under federal common law.

Oliphant dealt an apparently fatal blow to the exercise of tribal criminal power over non-Indians, but on the civil regulatory and adjudicatory side, the question rapidly became less clear cut, to the advantage of the tribes. For example, in Kerr-McGee Corp. v. Navajo Tribe of Indians, the Court held that

15. This usually occurs through statutes.
16. This usually occurs through treaties.
18. Id. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1007-09 (9th Cir. 1976)).
tribes have the power to tax non-Indians doing business on the reservation. This was true even in the face of a contract that firmly set the non-tax payments owed the tribe and even in the absence of the approval of the tax by the United States.

Thus, a knotty problem is presented by the question of whether and in what circumstances an Indian tribe may apply its own laws to non-Indians. In this essay, I will assume away the first complexity. Suppose a tribe wishes to exercise civil-side jurisdiction over non-Indians, and suppose further that it is permitted to do so under its own laws, as interpreted by its own courts. And so, we may turn our attention to the other two complications, that is, to the extent of the tribe's reservation and the extent of the tribe's power. I will find these two inquiries related.

One final, introductory observation before I begin: While I will be exploring the farthest reaches of tribal power over non-Indians, I do so as a law professor whose ancestors are from Europe. I do not live in, nor practice law in, Indian country, except in the most capacious sense of that term. My ideas, then, are moderated neither by the tribal leader's personal appreciation of the off-reservation political ramifications of far-reaching tribal jurisdiction, nor by the notion that the reach I am proposing will affect my own day-to-day, off-reservation, non-Indian life. I have tried to anticipate these sensibilities, and my proposals are, in fact, pretty moderate, but not, I admit, because I live the rules I propose. I begin with the issue of legislative diminishment of the size of a reservation by statute.

BARTLETT20 AND HAGEN21

In 1979, John Bartlett, a member of the Cheyenne River Sioux Tribe, was charged by the State of South Dakota with attempted rape. He pleaded guilty and was sentenced to state prison. While incarcerated, he sought federal habeas corpus against Herman Solem, his warden. The district court granted

the petition; the Eighth Circuit affirmed; and the Supreme Court granted certiorari.\(^22\)

The only issue in the case was whether the crime was committed on the Cheyenne River Sioux Reservation. If it was, then federal criminal jurisdiction would attach and would preempt state criminal jurisdiction, resulting in the granting of the petition.\(^23\) If the crime occurred off-reservation, then there would be no federal jurisdiction (and therefore, no federal preemption) and the state prosecution would have been proper; in which case Bartlett would remain in the state jail.

The question of whether the crime occurred on- or off-reservation, in turn, depended on where the boundaries of the Cheyenne River Sioux Reservation were at the time of the crime. If the boundaries were as originally established in 1868 and 1889, then the crime was a federal offense by virtue of being committed on-reservation, and Bartlett would go free from state detention. However, in 1908, Congress statutorily opened the reservation for white settlement, and the question became whether Congress had thereby reduced the size of the reservation, making the crime committed seventy-one years later off-reservation.

In 1989, Robert Hagen, who is apparently an Indian,\(^24\) was charged by the State of Utah with the distribution of a controlled substance. He pleaded guilty, but later challenged the state court's jurisdiction. Hagen argued that his alleged crime was committed on the Uintah Indian Reservation; hence, federal jurisdiction would be exclusive over that of the state. The Utah state trial court denied the challenge, and the intermediate appellate court reversed. The Utah Supreme Court reversed again, holding that the crime had not occurred on the reservation. The United States Supreme Court granted certiorari.\(^25\)

\(^{22}\) Bartlett, 465 U.S. at 465-66.


\(^{24}\) The state trial court had initially determined that Robert Hagen was not an Indian, but that determination was reversed by the state intermediate appellate court and was not before the Supreme Court. See Hagen, 114 S. Ct. at 964.

\(^{25}\) Id.
Again, the jurisdictional question turned on the location of the reservation boundary. The crime had been committed within the boundary of the reservation as originally established in 1861, but various acts of the executive branch and Congress in the early 1900s made it unclear whether the original boundary was still in place. If the original boundary was not in place, then Hagen's crime, committed more than eighty years after the reservation was opened for white settlement, was a state offense, rather than a federal one.

It is plain from these statements of Bartlett and Hagen that the issue in both cases (and their predecessors) was one of the construction of statutes and executive orders: the Act of May 29, 1908, in the case of the Cheyenne River Sioux Reservation in South Dakota, and a more complicated set of enactments and orders in the case of the Uintah Reservation in Utah. Justice O'Connor, speaking for a divided Court in Hagen, and relying on Justice Thurgood Marshall's opinion for the unanimous Court in Bartlett, stated the appropriate statutory construction analysis this way:

In determining whether a reservation has been diminished, "[o]ur precedents in the area have established a fairly clean analytical structure," directing us to look to three factors. The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.

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26. Id. at 966-68.
28. Hagen, 114 S.Ct. at 965 (citations omitted). Both of Justice O'Connor's quo-
Much might be written about this analytical scheme, especially on the questions of whether the first element—the inspection of the statutory language—changes the old rules of the construction of statutes diminishing Indians’ rights, and whether the new rules, if there are new rules, conform to the other new rules the Court is formulating regarding statutory construction. I will not be adding to that discussion in this essay. Nor will I be looking at the second element of Justice O’Connor’s analytical scheme—the role played by contemporaneous history in the interpretation of statutes. My interest lies in the interplay between the third element—the role of present demography in determining the meaning of the statute—and how it relates to the fourth element—the oft-stated reluctance of the Court to find a reservation to be diminished in size.

DEMOGRAPHICS AND STATUTORY CONSTRUCTION

The logical relationship between the question of what Congress meant when it legislated many years ago and the ethnicity of the people who now live on or near the reservation has always been attenuated, at best. Justice Thurgood Marshall’s Bartlett decision is brimming with self-consciousness over the very suggestion of a link between the two:

On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant. . . . In addition to the obvious practical advantages of acquiescing to the de facto diminishment, we look to the subsequent demographic history of opened lands as one
additional clue as to what Congress expected would happen. . . . Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation . . . [but] the technique is a necessary expedient . . . "There are, of course, limits to how far we will go. . . ."

Oddly enough, in the face of all of this apprehension about using present demography as a tool in statutory construction, in the end it is about the only thing that the Court found “clear” in Bartlett, on its way to finding that the Cheyenne River Sioux Reservation had not been diminished. 31 And, the conclusion in Hagen that the Uintah Reservation had been diminished was, at least, “not controverted” by present demography. 32 In fact, as pointed out most recently by Professor Frank Pommersheim of the University of South Dakota, present demography is about the only consistent bit of analysis discernible to a student of the diminishment cases. 33 If the land in controversy is owned today primarily by Indians—as was true in Seymour v. Superintendent, 34 Mattz v. Arnett 35 and Bartlett—the reservation was not diminished years ago by statute, while, if the land is owned today primarily by whites—as was true in DeCoteau v. District County Court, 36 Rosebud Sioux Tribe v. Kneip 37 and Hagen—the reservation was diminished years ago by statute. As Justice O’Connor thought it relevant to note in Hagen: “[W]e found it significant in [Bartlett] that the seat of tribal govern-

31. Id. at 479-80. Tassie Hanna and I concluded in an earlier article that the unique clarity of demography will not be unlikely in these cases, given the vagaries of the other elements in the Bartlett test—how “clear,” for example, will the “contemporaneous history” ever be? See Tassie Hanna & Robert Laurence, Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation, 40 ARK. L. REV. 797, 815 (1987).
32. See Hagen, 114 S. Ct. at 970.
33. “[I]f you want an accurate predictor about the results in 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.” Diminishment, supra note 29, at 421-22 (remarks of Professor Pommersheim).
34. 368 U.S. 351 (1962).
ment was located on opened lands.\textsuperscript{38} In contrast are the present demographics of the land at issue in \textit{Hagen}:

The current population of the area is approximately 85 percent non-Indian. . . . The population of the largest city in the area—Roosevelt City, named for the President who opened the Reservation for [white] settlement—is about 93 percent non-Indian [and the] seat of Ute tribal government is in Fort Duchesne, which is situated on Indian trust lands.\textsuperscript{39}

Consistent with its self-consciousness in \textit{Bartlett}, the majority in \textit{Hagen} made but little attempt to find a principled, as opposed to a practical, relationship between present demographics and the construction of old statutes. Justice O'Connor began her discussion with a quote from \textit{Bartlett} that emphasizes what the Court sees as the practicalities involved: “We have recognized that ‘\textit{w}hen an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments.’”\textsuperscript{40} And she ended the discussion on the same practical bent: “[T]he current population situation in the Uintah Valley demonstrates a practical acknowledgement that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area.”\textsuperscript{41}

This last sentence shows how law and grammar can become intertwined, for one is tempted to ask, “A ‘practical acknowledgement' by whom?” It is very difficult to find a “practical acknowledgment” by Congress, either early in this century or more recently, which would seem to take the inquiry immediately out of the realm of statutory construction, where it

\textsuperscript{38} \textit{Hagen}, 114 S. Ct. 970 (citing \textit{Bartlett}, 465 U.S. at 480).
\textsuperscript{39} \textit{Id.} (citing 1990 Census of Population and Housing Summary Population and Housing Characteristics: Utah, 1990 CPH-1-46, Table 17 at 73 and Table 3 at 13). I have added the word “white” to the quotation; perhaps the Court thought it went without saying. But, I am willing to be generous toward Justice O'Connor's lapse and assume that she is not suggesting that, in 1903, the Indians were not “settled” on the land.
\textsuperscript{40} \textit{Id.} (quoting \textit{Bartlett}, 465 U.S. at 471-72, n.12 (emphasis added)).
\textsuperscript{41} \textit{Id.} at 970 (emphasis added).
belongs. Any importance of a “practical acknowledgement” by the state of Utah in the face of a conflicting federal determination is contrary to the notions of pre-emption and supremacy. A “practical acknowledgement” by the white persons who live on the land would seem both theoretically irrelevant and contrary to the undoubted “practical acknowledgement” in the other direction by the tribe itself and its members, the latter being demonstrated pretty clearly by the current litigation.

We are left, then, with the Supreme Court itself being the missing prepositional object in the sentence. The Court, apparently, has made its own “practical acknowledgement” that the reservation was diminished because “a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area.”42 What “expectations,” and why are they “justifiable”? The “expectations” of the whites apparently are that, as off-reservation residents, they are not subject to tribal authority. And, as I will discuss below, the Court might be reluctant to allow tribal law to apply to non-Indians, and this reluctance translates into what the Court sees as the justifiability of the white expectations. Hence, the Court is reluctant to cause such a disruption on its own. But, if it is a statute that is being construed, then it is Congress, with due deliberation, that caused whatever disruption ensues.

Justice Marshall, in Bartlett, labeled modern demography only one “clue” to the underlying meaning of a statute and, self-consciously, listed it as the last element in the analysis.43 So we are cautioned not to equate statutory construction with census gathering. But—mixing metaphors here—the clue threatens to become the trump card when the Court uses its own reluctance to disrupt the demographic status quo to interpret a decades-old statute. And as Professor Pommersheim notes,44 when modern demography becomes the only reliable predictor of the different constructions given to similar statutes, then the trump card has been played and the hand taken.

42. Id.
44. See Diminishment, supra note 29, at 421-22.
In the end, I need give no appraisal of modern demography as an aid to statutory construction beyond Justice Marshall’s appraisal—“unorthodox and potentially unreliable.” Some might go further, perhaps to “irrelevant and potentially illogical.” Professor Pommersheim said “totally irrational [and] I’m hard put to see how that could ever be a principled decision.” Professor Skibine was equally harsh: “Any test that starts by saying that it is looking for ‘clear’ indications of congressional intent and then lists, as a factor in determining [that], the present day demographics of the reservation cannot legitimately talk in terms of clear indications of congressional intent.” But, for my purposes here, “unorthodox and potentially unreliable” will do, for that is enough to make one puzzle about why the “unorthodox” has become a standard tool of statutory construction and why the “potentially unreliable” is the most reliable predictor of results.

The explanation, I think, is found in judicial reluctance.

JUDICIAL RELUCTANCE AND STATUTORY CONSTRUCTION

There are certain supposed canons of statutory construction in cases involving Indians, a complete discussion of which is both beyond the scope of this article and untimely. Rather, I will focus on one of the canons, stated most forthrightly in Bartlett:

Diminishment [of Indian reservations] will not be lightly inferred. . . . When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to

46. See Diminishment, supra note 29, at 422.
47. Id. at 417.
rule that diminishment did not take place and that the old reservation boundaries survived the opening. 49

And again in the holding of the case: "The presumption that Congress did not intend to diminish the Reservation therefore stands, and the judgment of the Eighth Circuit is affirmed." 50 This "traditional solicitude" for the tribes, this "presumption" against diminishment, this "no light inference" rule all may be combined to form a certain judicial reluctance to find that Congress had diminished the size of a reservation, which reluctance can only be overcome by a precise enough congressional enactment.

Justice O'Conor, in Hagen, agreed that such judicial reluctance is appropriate: "Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." 51 But for this proposition, she cited two cases that were hardly monuments to the reluctance of the Court to limit the reach of tribal power: South Dakota v. Bourland, 52 which restricted tribal power on the Cheyenne River Sioux Reservation, and County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 53 which held that the County of Yakima, Washington, could tax certain on-reservation lands.

The two cited cases "talked the talk" of judicial reluctance to cut back on tribal power. For instance, the Court stated in County of Yakima: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 54 But "walking the reluctant walk" is another matter, and the problem is that Justice O'Conor's opinion for the Hagen majority does not feel very reluctant. The opinion mentions this reluctance once and then leaves it be. Compare this to Bartlett, in which the Court began and ended its opinion with expressions of acted-upon reluctance. Hagen begins its

50. Id. at 481 (emphasis added).
52. 113 S. Ct. 2309 (1993); see infra Part VI.
54. Id. at 693 (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)).
analysis: "[I]t is settled law that some surplus land Acts diminished reservations . . . ," ends with the diminishment and buries reluctance along the way.\textsuperscript{55}

Justice Blackmun, in his \textit{Hagen} dissent, and similarly in his dissents in \textit{Yakima County} and \textit{Bourland}, accused the majorities of paying mere lip service to the canons of reluctance to diminish reservations and willingness to resolve ambiguities in favor of the tribes. Taken to its logical extreme, Justice Blackmun's observation might require the majority to reformulate the canons themselves, to the eventual detriment of the tribes. I generally dislike the extreme, and will not be doing that reformulation. For the moment at least, it is unnecessary; the Court continues to state the reluctant canon as a guidepost to Indian law.

\textbf{DEMOGRAPHICS AND JUDICIAL RELUCTANCE}

So, when \textit{Hagen} and \textit{Bartlett} are viewed side-by-side, they present an odd, and for many, discouraging tableau of American Indian law. Together, they set forth a largely nonsensical role for modern demography to play in the construction of decades-old statutes. Together, they exhibit an on-again, off-again canon of judicial reluctance to diminish the size of Indian reservations without fairly precise congressional guidance. But, the ludicrous and lukewarm become understandable when read together; judicial reluctance to diminish is a function of modern demography. The modern demography of the land on or near the reservation—precisely, the race of those who live there—seems to function for the Court as a judicial rheostat, which varies the potency of the reluctance to diminish. I shall return to this thought below.

\textbf{BARTLETT AND BOURLAND}

But first reconsider \textit{Bartlett}, this time side-by-side with \textit{South Dakota v. Bourland}.\textsuperscript{56} \textit{Bourland}, like \textit{Bartlett}, involved the ju-
risdictional rules on the Cheyenne River Sioux Reservation, which reservation Bartlett had unanimously held not to be diminished in the Hagen sense. That is to say, the Supreme Court in Bartlett had answered the question of whether Congress had, by opening the reservation to white settlement in 1908, diminished the size of the reservation down to the Indian allotments, and the answer had been against diminishment. Hence, the reservation retained its 1908 boundary.

In 1954, pursuant to the Cheyenne River Act, the United States purchased more than 100,000 acres of reservation land to construct the Oahe Dam and Reservoir, paying more than $10,000,000. At an early stage of the Bourland litigation, the state of South Dakota argued that, notwithstanding Bartlett, this 1954 Act had diminished the reservation in the Hagen sense. The federal district court's holding against the state was not appealed, that holding, then, became the law of the case.

As South Dakota pursued its injunctive and declaratory action against the Cheyenne River Sioux Tribe's regulation of, and in some cases exclusion of, non-Indian hunters and fishermen from the Oahe Reservoir, it was working against two unchallengeable holdings that the Reservoir was on the undiminished Cheyenne River Sioux Reservation. The state argued, and prevailed before the Supreme Court, that notwithstanding the reservation status of the Reservoir, the tribe's power did not reach the non-Indians recreating there.

Thus, while the Hagen and Bartlett decisions together reveal the rules of reservation diminishment, Bourland and Bartlett together reveal the rules governing tribal power over non-Indians on undiminished reservations. Those rules come largely from the case of Montana v. United States.

Montana was a case that grudgingly accepted the power of Indian tribes over non-Indians. As paraphrased by Justice Thomas for the majority in Bourland:

57. See id. at 2321 n.1 (Blackmun, J., dissenting).
58. Id. at 2314.
Montana discussed two exceptions to the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. First, a tribe may license or otherwise regulate activities of nonmembers who enter consensual relationships with the tribe or its members through contracts, leases, or other commercial dealings. Second, a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.60

Justice Thomas indulged in the now-customary characterization of the Montana test as a presumption against tribal inherent power, with two exceptions. The test could just as easily be seen as two potentially huge domains of tribal inherent power, with a prohibition for power applied outside those domains. Consider, for example, the following statement from a recent law review article by Phillip Lear and Blake Miller, who discuss the powers of a tribe which owns the surface, but not the mineral estate, of reservation land:

On the other hand, the tribe does not own the mineral estate. The tribe derives no economic benefit from development of the minerals, other than possible surface access fees when lessees are required to cross adjacent Indian lands to gain access to the inholdings... The only real interest the tribe has is to ensure that the political integrity, economic security, health or welfare of the tribe will not be affected adversely [by the development of the minerals].61

The only real interest? Why the discounting words? A tribe's—or for that matter, any government's—interest in "political integrity, economic security, health and welfare" is strong and broad. What does a government do that is not connected to those four items, broadly read? Taxation? Garbage collection?

60. Bourland, 113 S. Ct. at 2320 (citations omitted).
Land-use regulation? Environmental protection? Compulsory school attendance? Conservation of reservation resources? Gun control? Drug prohibition? Road building? Regulation of the sale of alcohol? In fact, since those four elements are a fair characterization of what most governments do most of the time, the presumption of the *Montana* test could easily be formulated in exactly the opposite way, in favor of, not opposition to, tribal power.

However, Justice Thomas, in *Bourland*, was emphatic that the presumption of *Montana* is against tribal civil jurisdiction over non-Indians. In fact, he was overly emphatic. Consider footnote sixteen, a rather petulant marginal note:

> 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 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 nonmembers "cannot survive without express congressional delegation," and is therefore not inherent.62

But Justice Thomas's own quotation from *Montana*, which immediately follows this footnote in the text of *Bourland*, shows that tribal sovereignty over non-Indians is inherent, and does not need express congressional delegation: "[A] tribe may retain inherent power to exercise civil authority over the conduct of non-Indians."63 So, in the text tribal power is inherent, and in the footnote it is not, with Justice Thomas emphasizing that it is not inherent. Given the general primacy of text over footnote, and the unseemliness of the anti-collegial jousting within the footnote, I will follow the text, notwithstanding the emphasis, until instructed otherwise.64

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62. *Bourland*, 113 S. Ct. at 2320 n.15 (citations omitted) (emphasis in the original).
63. Id. at 2320.
64. *See Contrarians, NAT. RESOURCES & THE ENV'T, WINTER 1993*, at 52 (an ex-
At another place in the *Bourland* majority opinion, a footnote again contradicts the text as Justice Thomas takes a surly swipe at the dissenters. Consider footnote ten:

The dissent apparently finds ambiguity in this provision, 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.65

But now read the sentence to which that footnote 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.”66 And, as Justice Thomas wrote at the end of the opinion: “The Cheyenne River Act reserved some of the Tribe’s original treaty rights in the former trust lands (including the right to hunt and fish) but not the right to exert regulatory control.”67

To summarize, the text of *Bourland* twice recognizes that the Cheyenne River Act specifically destroyed some, but not all, of the tribe’s inherent sovereignty over the Reservoir. Recall, both *Bartlett* and the law of the case require that the Reservoir be *reservation* land and water. Footnotes ten and sixteen to the contrary notwithstanding, the issue then became whether the tribe’s inherent sovereignty over the land, which includes, under *Montana*, the power to regulate the affairs of non-Indians, survived the Cheyenne River Act, legislation that did *not* remove the Oahe Reservoir from the Cheyenne River Sioux Reservation.

The Eighth Circuit below held that *Montana’s* restriction on tribal civil power over non-Indians applied only to the relatively

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65. *Bourland*, 113 S. Ct. at 2317 n.10 (citations omitted) (emphasis in the original).
66. *Id.* at 2317.
67. *Id.* at 2321.
few acres that had been fee land before the appropriation by the Cheyenne River Act. The bulk of the appropriated land, however, had been held in trust by the United States for the tribe, so that the appropriation had only changed the government from trustee to fee owner, while leaving the land within the boundary of the reservation. The Eighth Circuit thought that Montana applied only to fee land, a fair reading of the case, as noted in Justice Thomas's own quotation: "a 'tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct . . . affect[s],'' etc. The Supreme Court disagreed in Bourland and extended the reach of Montana to the trust lands acquired by the government in the Cheyenne River Act but left on the reservation.

The importance of Bartlett (supplemented by the law of the case) and Bourland is to clarify that the Montana restrictions on the reach of tribal power apply even on a reservation undiminished in the Hagen sense. This leads one to speculate on the meaning of Hagen and Bourland together.

**HAGEN AND BOURLAND**

Interpreting a federal statute, Hagen held that Congress had reduced the size of the Uintah Reservation so that Mr. Hagen's crime was committed off the reservation and state criminal jurisdiction attached. Thus, the land on which the crime was committed was not within the reach of tribal jurisdiction.

Interpreting similar statutes, Bartlett held that the Cheyenne River Sioux Reservation had not been reduced in size, leaving the land on the reservation. Thus, the prosecution by the state was improper.

With the Cheyenne River Sioux Reservation boundary intact via Bartlett, Bourland could not deprive the tribe of jurisdiction via Hagen-style diminishment. Therefore, the court returned the case to the Eighth Circuit to apply the Montana common law test for the reach of tribal jurisdiction. I call this Bourland-

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68. Id. at 2320 (emphasis added).
style "judicial diminishment," as contrasted with the more respectable Hagen-style legislative diminishment. Both Bartlett-Hagen and Montana-Bourland reduce the reach of tribal power over non-Indians. Thus, in a real sense, both "diminish" the reservation. Hagen is the more respectable diminishment because it was, ultimately, a congressional diminishment. Bourland is the less respectable diminishment because the Court accomplished, under common law, a result practically indistinguishable from the one that Congress could have accomplished, but chose not to, under the Bartlett holding.

At a recent, wide-ranging symposium, Professor Pommersheim took issue with my North Dakota attempt to link Hagen and Bourland (please note in advance that what follows is a transcription of Professor Pommersheim's casual oral remarks, which explains the departure from his always-precise writing style):

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.

My colleague is certainly correct in two ways. First, he is right in saying that I want to be talking about "jurisdictional diminishment." But, as I said at the outset of this paper, I see two ways for a court to find that the jurisdiction of a tribe has been diminished: either by removing the land from the reservation under Bartlett-Hagen or by denying the full reach of tribal

69. See Laurence, supra note 29.
71. Diminishment, supra note 29 at 424 (remarks of Professor Pommersheim).
jurisdiction over reservation land under Montana-Bourland. Second, Professor Pommersheim is right in finding this to be an unusual way of linking cases; the word “diminishment” is used by most to mean actual, physical reduction in the size of the reservation via Bartlett and Hagen. But, it is the perhaps novel link between Hagen and Bourland (by calling them both “diminish-ishment” cases) that shows the weakness of Bourland. In construing the applicable statute, it is not enough under Hagen, and never has been under its predecessors, for Congress to have “opened” the land to white settlement. “The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.”

Yet Bourland’s common law rules seem to turn on that very kind of “openness”:

The District Court found that the taken area is not a “closed” or pristine area, and the Court of Appeals did not disturb that finding. We agree that the area at issue here has been broadly opened to the public. Thus, we need not reach the issue of a tribe’s regulatory authority in other contexts.

Hence, on one important level, Hagen and Bourland are inconsistent. Hagen showed appropriate respect for congressional legislation, but Bourland destroyed tribal power in the face of a congressional determination not to reduce the size of the reservation. Congress could have removed the land in question from the Cheyenne River Sioux Reservation, thereby achieving the Bourland result, but chose not to in both 1908 and 1954. More broadly, under Hagen and its predecessors, Congress can always restrict the reach of tribal power by reducing the size of the reservation down to the lands owned and occupied by Indians or the tribe itself. I call Montana and Bourland “diminishment” cases because in a very real though intangible way, they reduce the “size” of the reservation by reducing the length of the tribe’s jurisdictional reach. This is judicial diminishment because it pre-empts legislative prerogative. In other words,

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73. South Dakota v. Bourland, 113 S. Ct. 2309, 2316 n.9 (emphasis added) (citations omitted).
Bourland did not show enough deference to the Court’s own analysis in Hagen or, more precisely, in Bartlett. Congress did not reduce the “size” of the Cheyenne River Sioux Reservation, so the Court went ahead and did it on its own.

**JUDICIAL RELUCTANCE AND MODERN DEMOGRAPHY**

But there is another level on which Bourland, Hagen and Bartlett are all consistent: judicial reluctance to allow tribal law to apply to non-Indians is a function of modern demography. The Bourland Court seems to be saying that Bartlett was correct, insofar as the lands opened for homesteading in 1908 are still mainly Indian, notwithstanding the homesteading. On the other hand, most of those recreating on the Oahe Reservoir are non-Indians, and the Court was reluctant to allow tribal law to reach these non-Indians. Therefore, when the issue in Bourland became the ability of the tribe to license or exclude non-members from the Reservoir, modern demography elevated judicial reluctance and the injunction issued.

As little as modern demography has to do with acceptable principles of construction of statutes passed when the demographics were different, there is a modicum of sense to the relationship between demography and judicial reluctance. Different rules govern on the opposite sides of reservation boundaries; whether the difference is a greater respect for the status of elders,\(^74\) or a lesser devotion to Miranda warnings;\(^75\) a greater deference to the rights of surface owners over the owners of the mineral estate, or a lesser respect for the social utility of trade unions.\(^6\) Tribes do things differently from the rest of us; if that were not the case, then all the fuss about tribal sovereignty would be over nothing. In fact, almost all of what we know about American Indian law is about difference.

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74. See Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969). This was the very first reported ICRA federal court case, wherein a legal services lawyer was expelled from the Navajo reservation for laughing during a Tribal Council meeting. Here, the district court held that expelling a lawyer for laughing abridged free speech. *Id.* at 320.

75. See United States v. Ant, 882 F.2d 1389 (9th Cir. 1989).

Tribes have the right “to make their own laws and be ruled by them.” If those rules are the same as the dominant society’s rules, then there are few problems in their application. If those rules are applicable only to tribal members, then, likewise, most of the problems disappear, or at least can be handled internally. New problems arise when the tribe has different ways of doing things and wishes to apply those different ways against the interests of non-members.

Many of those “problems” are illusory, perceived by people looking at tribal law through lenses distorted by stereotype, racism or xenophobia. Many of the differences between tribal ways and dominant-society ways are minor or benign; few are draconian; fewer are malignant. The problems of cross-boundary differences are often exaggerated, sometimes intentionally. Saying that there is a “modicum” of sense to judicial reluctance to allow tribal rules to apply to non-Indians is not to say that there is a surfeit of sense, or to say that the modicum justifies the abandonment by the federal courts of the notion that tribal law might apply to non-members. Montana, even as advanced by Bourland, did not take reluctance quite to the extreme. Theoretically, at least, and putting aside Justice Thomas’s unwarranted overstatement of the Montana result, the two Montana exceptions could still be read broadly.

But will courts read the exceptions broadly? Probably not, if I am right about judicial reluctance being a function of modern demographics. Montana pinches at exactly the place where judicial reluctance is at its greatest—the application of tribal law to non-Indians. But the Montana exceptions must be read broadly, or the tribes are left with laws that apply only to themselves. This is not true self-determination, anymore than it would be true self-determination for Virginia if its laws applied only to Virginians and not to tourists. Or that it would be true self-determination for Singapore if its laws applied only to Singaporeans. They don’t; ask Michael Faye.

Thus, with Bourland, we approach the critical point with respect to tribal self-governance. Governments apply their laws to non-citizens, even when those laws are substantially different from what the visitors are used to at home. So Bourland threatens the very core of self-governance. Yet, the judicial
reluctance to allow that application is sensible, at least to some extent, and at least where tribal laws are different from important dominant-society norms.

Thus, as pointed out so effectively some time ago by Professor Judith Resnik, with Indian law, as with federalism itself, the question always becomes the extent that the society at large will tolerate deviations of its own closely held norms.77 There is a tension between the forces of diversity and the forces of uniformity, between the desire to let a portion of the population go about its unique ways and the desire that, to some extent at least, we are all in this enterprise together. The question always becomes whether or not, and how if at all, the center will govern the provinces.

This dilemma is solved, perhaps, by the Indian Civil Rights Act.78

THE INDIAN CIVIL RIGHTS ACT

The Indian Civil Rights Act (ICRA) was passed by Congress in 1968, a very delayed reaction to the case of Talton v. Mayes,79 which held that the U.S. Constitution does not work to bind tribal activity. The ICRA imposes on the tribes Constitution-like restrictions, largely protective of the individual rights that the dominant society holds dear. Its protections are available to all against whom tribal power is exerted, Indian and non-Indian alike.

But, in the decade after its passage, most of the cases decided by the federal courts were brought by Indians against their own tribes. In 1978, in the famous case of Santa Clara Pueblo v. Martinez,80 the Supreme Court found that the ICRA did not create a civil cause of action for suit in federal court, and effectively limited its federal court application to habeas corpus

79. 163 U.S. 376 (1896).
cases. Federal court ICRA cases have been few since *Martinez*; they remain more common in tribal court.

The ICRA is the kind of statute that is needed to give an outlet to the judicial reluctance to allow the application of tribal law to non-Indians. *Montana*, reacting (and *Bourland*, over-reacting) to this reluctance, attacked the very *existence* of tribal power over non-Indians; the ICRA controls the *exercise* of that power. With an effective, civil-side ICRA to ensure what the dominant-society’s judge sees as the fundamental fairness of the exercise of tribal civil process, judges should be less reluctant to allow the power to apply—*differently*, but still *fairly*—to non-Indians.

Two things are required of a statute that can save tribal power over non-Indians, yet recognize the legitimacy of the judicial reluctance to allow tribal power to reach non-Indians. First, the statute must embody the rules that are of fundamental importance to the dominant society.

Of course, there is “importance” and there is “importance.” The Salman Rushdie affair showed that the idea of Iran’s extra-territorial use of the death penalty to punish blasphemy was fundamentally abhorrent to our dominant society. Few other deviations from our own norms rise to that level, however, and the dominant society has shown itself of various minds lately regarding, for example, the caning of Michael Faye, the double prosecution of Rodney King’s tormentors, and the forced integration of The Citadel. The statute that we are contemplating to control the exercise of tribal power over non-Indians, then, must pick carefully the matters that are important enough to the dominant society to justify the imposition of its younger ways on the older tribal society. The matters may not necessarily be so important, perhaps, as to justify the armed invasion of Iraq, but sufficiently important for Congress to act under its plenary power with respect to the Indian tribes which are within the United States’ jurisdiction.

81. Id. at 61. The explicit habeas corpus provision of the ICRA is found at 25 U.S.C. § 1303 (1994).
Second, and of equal consequence, the statute must accept and honor the propriety of tribal differences from dominant society ways. A statute that does not tolerate differences destroys self-governance as effectively as Bourland. "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." 82 And these purposes must be advanced simultaneously. The statute must tolerate differences at the same time that it defines similarities. Without such a balance, the compromise will not work. Tribal self-governance must be retained, but judicial reluctance to allow tribal law to apply to non-Indians will find some outlet, and if it is not through this statute, then it will be through Bourland's untimely destruction of tribal power itself.

The ICRA, as presently written and as construed by the federal courts between 1968 and 1978, is a decent statute to accomplish these two purposes. The statute embodies most of the Bill of Rights and the Fourteenth Amendment, which seems a suitable list of the dominant society's most basic and widely held beliefs. On the other hand, most pre-Martinez courts agreed that the ICRA did not impose on the tribes a full measure of constitutional due process or the full weight of other constitutional provisions. 83 It could be amended to be more precise regarding where it deviates from constitutional norms, or Congress could start from scratch, but I am inclined to think otherwise. 84 As construed by sensible, albeit dominant-society, judges, the ICRA could serve the purposes of legitimatizing, yet re-directing, the judicial reluctance that we saw misdirected to-

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83. The best evidence of this proposition is seen in the two lower Martinez opinions in which the courts reached the merits, but neither required under the ICRA what the Constitution would require in terms of gender neutrality. See Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975), rev'd, 540 F.2d 1039 (10th Cir. 1976), rev'd 436 U.S. 49 (1978).
84. I am more an admirer of the common law, as applied by sensible, fair judges, than I am of hyper-precise statutes. 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).
ward the destruction of the tribal land base in *Hagen*, and toward the destruction of tribal power itself in *Bourland*.

If the ICRA is the antidote to the dominant society's overly energetic judicial reluctance to allow tribal law to apply to non-Indians, then it would appear that the statute would have only limited relevance to the question in which the ICRA was most often raised pre-*Martinez*; that is, where the tribe is applying its own laws to its own members. Does the *Indian* Civil Rights Act, as offered in this essay, actually give more protection to *non-Indians* than it does to Indians? The ICRA is little-enough respected by some tribal advocates as it is; sample Professor Robert A. Williams, Jr.'s stunning characterization: "a highly efficient process of *legal auto-genocide*, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expression of difference that diverge from the white man's own hierarchic, universalized world view." Legal auto-genocide? How can it even be suggested in a principled way that such a statute can be used at all, let alone used more by non-Indians than by tribal members?

In the first place, note that I have already suggested such a use for the ICRA in previous articles about the problem of the cross-boundary enforcement of state and tribal judgments. The analytical model I have proposed for that problem—the so-called "asymmetric" model—assigns a role to the ICRA in the enforcement of a tribal judgment in state court, almost always against a non-Indian defendant. But this model removes that role when a state court judgment is enforced in tribal court, almost always against an Indian defendant.

The present proposal continues that asymmetry. When Indians find themselves subject to state or federal court jurisdiction, their civil rights are protected not by the ICRA, but by more general federal civil rights laws, by their American citizenship and by the Fourteenth Amendment "personhood" of


Indians. Are these protections sufficient to guarantee in practical, real-world fact, a shipshape, non-discriminatory off-reservation environment for Indians? No. Read the newspapers. Visit Gallup, New Mexico or Rapid City, South Dakota. But, the difficulties that Indians face in the fair administration of off-reservation justice are fundamentally different from the difficulties faced by non-Indians in tribal court. An asymmetric solution to the two sets of difficulties is appropriate.

When non-Indians are in tribal court, the protection of citizenship disappears, as the non-Indians are not, and in most cases cannot become, members of the tribe. Also, the protection of the Fourteenth Amendment disappears under the sensible holding of *Talton v. Mayes.* However, the non-Indian has ICRA "personhood" to protect him, her, or it against abuses of tribal civil justice, "abuses" defined from a largely dominant-society perspective. It is the thesis of this article that with the ICRA in place to give protection in federal court to congressionally mandated civil rights, the dominant society's courts should be less reluctant to allow tribal law to reach non-Indians. And, since it is this judicial reluctance that has caused the widespread deterioration of tribal land and tribal power, an active civil-side ICRA should result in a greater recognition of tribal power in the dominant society's courts.

But then, how should the ICRA be interpreted when it is an Indian plaintiff complaining about the application of tribal law to him, her or it? Here there is less dominant-society judicial reluctance to cut back on the reach of tribal power, although, as *Martinez* always reminds us, some tribal actions, even toward members, are beyond—or at least close to—the pale. And, if an active ICRA is premised on its being an antidote to judicial reluctance to acknowledge tribal power, does that mean that in the absence of such reluctance the statute gives less protection?

Yes, it should mean that, and as a practical matter, that means in turn that the application of the ICRA will be asymmetric as to Indians and non-Indians. Again, though, the asym-

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87. See supra note 79 and accompanying text.
metry is not unprincipled; the ICRA should be interpreted with a political question doctrine more aggressive than that used by the federal courts under the United States Constitution.

Before the Supreme Court in Martinez removed the ICRA from federal courtrooms, most of the cases were brought by Indian plaintiffs suing their own tribes over what might legitimately be called political questions: controversies involving membership requirements, voting eligibility, reservation districting and other election matters, tribal governance and the like. Martinez, itself, involved the most intimate questions of what it means to be Santa Claran and implicated complicated matters of tribal history, custom and tradition. Closely held tribal beliefs and long-standing tribal ways were before the federal judges, as much as the meaning of the federal statute.

From the perspective of nearly twenty years since Martinez, the Supreme Court was largely correct in removing such issues from the federal courtroom, in the absence of a very precise command by the Congress that these cases be taken. However, the same federal judicial laissez faire result could have been reached under an active ICRA political question doctrine. Recall how close the Supreme Court came to declaring legislative reapportionment to be beyond the competence of judicial determination. By instituting a serious judicial reluctance to tamper with matters of internal tribal government under ICRA, the Court could retain most of the good of Martinez. But, when the tribe applies its power to non-Indians, more than literally self-

88. See, e.g., Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971).
89. See, e.g., Two Hawk v. Rosebud Sioux Tribe, 534 F.2d 101 (8th Cir. 1976).
90. See, e.g., White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).
91. See, e.g., Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973).
93. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court took 29 pages of the U.S. Reports to dispense with the political question issue. Id. at 208-37. (These pages include a discussion of the Indian cases at 215-17). Justice Douglas added nine more pages in his concurring opinion. Id. at 241-50. Justice Clark added two more. Id. at 251-53. Justice Frankfurter offered 64 pages in a wide-ranging dissent. Id. at 266-330. Justice Harlan, also in dissent, added ten pages, mostly on the merits of the case. Id. at 330-40.
determination is involved. The political question doctrine loses a large part of its force, and the ICRA comes into play. Of course, also coming into play under this approach, is tribal power over non-Indians, which emphatically exists, though subject to federal court ICRA review.

Thus can be seen the essential proposition of the present essay: the reluctance of the dominant society’s courts that we have seen in this area of Indian law, while over-stated and mis-directed, is sensible. Given the presence on this continent of both new immigrant and ancient American governments, differences will be inherent in tribal law-making. It is too much to ask the dominant society to ignore these differences, or pretend they do not matter, especially when the laws are being applied to non-Indians. The ICRA could well serve as a check on any perceived unfairness in the application of tribal law to non-members. Differences between the ICRA’s rules, the dominant society’s usual rules and tribal rules are under the control of Congress, as is, ultimately, the size and existence of the tribe’s reservation itself. With a careful ICRA regime in place, the reluctance of the courts should then be re-directed away from the reluctance to apply tribal law to non-members and toward a reluctance to insert the ICRA intrusively into the internal self-governing mechanisms of the tribe. We end with an internally consistent, though asymmetric, scheme of analysis of what it means for a tribe to make its own laws and be ruled by them.

CONCLUSION

Clea to Darley: “I think, my dear, you have a mania for exactitude and an impatience with partial knowledge which is . . . well, unfair to knowledge itself. How can it be anything but imperfect?”94 Clea’s wisdom, in this and other matters, is

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94. LAWRENCE DURRELL, CLEA 119 (1961) (ellipsis in the original); see also JAMES GLEICK, GENIUS: THE LIFE AND SCIENCE OF RICHARD FEYNMAN (1992): [Feynman] believed in the primacy of doubt, not as a blemish upon our ability to know but as the essence of knowing. The alternative to uncertainty is authority, against which science had fought for centuries. “Great value of a satisfactory philosophy of ignorance,” he jotted on a sheet of notepaper one day. “. . . teach how doubt is not to be feared but welcomed.”
disregarded at one’s peril, and I have conformed to it in this short article. There is much left to be done before there is anything like a “perfect” theory of the legitimacy of the application of tribal law to non-Indians, even assuming that Clea is wrong and that there is such a thing as a “perfect” theory. The two tidy solutions—(1) that the power exists in tribes to control the civil-side lives of non-Indian residents of and visitors to the reservation and that this is the business of the dominant society only in a theoretical sense or (2) that such power does not exist, and “self-government” means solely the power to govern oneself—are not satisfactory, except to those who equate “satisfactory” with “simple” and “profound” with “concise.” The first of those tidy solutions turns the San Juan Pueblo into the jurisdictional equivalent of Singapore; the second turns it into the San Juan Indian Club. The first is unrealistic; the second is destructive. The first is science fiction; the second is disreputable history.

What I have proposed here is forthrightly somewhere in between, hence unattractive to proponents of either of the tidy solutions. Some may call it unprincipled, compromised, or imperfect. Outspoken protectors of tribal sovereignty, distrustful of my principles or motives, may call it racist; outspoken detractors of tribal sovereignty, distrustful in the other direction, may

\[\text{Id. at 371-72 (ellipsis in the original). Gleick also quotes Quine: “I think that for scientific and philosophical purposes the best we can do is give up the notion of knowledge as a bad job. . . .” Id. at 371 (quoting W.V. QUINE, QUIDDITIES: AN INTERMITTENTLY PHILOSOPHICAL DICTIONARY 109 (1987)).}\\]

\[\text{See generally JOHN DEWEY, THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION 227-28 (1929):}\\]

\[\text{The concrete pathologies of belief, its failures and perversions, whether of defect or excess, spring from failure to observe and adhere to the principle that knowledge is completed resolution of the inherently indeterminate or doubtful. The commonest fallacy is to suppose that since the state of doubt is accompanied by a feeling of uncertainty, knowledge arises when this feeling gives way to one of assurance. . . . A disciplined mind takes delight in the problematic, and cherishes it until a way out is found that approves itself upon examination. The questionable becomes an active questioning, a search; desire for the emotion of certitude gives place to quest for the objects by which the obscure and unsettled may be developed into the stable and clear. The scientific attitude may almost be defined as that which is capable of enjoying the doubtful; scientific method is, in one aspect, a technique for making a productive use of doubt by converting it into operations of definite inquiry.}\]
call it affirmative action. But Clea might call it just imperfect enough to be fair to knowledge itself, which is enough for me.

95. See Phillip Wm. Lear and Blake D. Miller, Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action, 71 N.D. L. Rev. 277 (1995). Rarely has the term "affirmative action" been used so forthrightly to describe the federal rules of tribal jurisdiction and, of course, the authors mean the term in its worst, not its best, sense. One could as easily say that the substantial deference that the federal courts show to state process, see, e.g., Younger v. Harris, 401 U.S. 37 (1971), is "affirmative action" for state courts, or, on an international level, that the partition by the United Nations of Palestine was "affirmative action" for Jews. In my view, the use of the term does not advance the discussion at all.