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South Dakota v. Bourland: The Court Replaces the Cavalry

Lisa Baird

SOUTH DAKOTA V. BOURLAND: THE COURT REPLACES THE CAVALRY

I. INTRODUCTION

In *South Dakota v. Bourland*[1] the Supreme Court determined that the Cheyenne River Sioux could not regulate hunting and fishing on lands owned by the federal government within the tribe's reservation. Initially, the majority decision by Justice Thomas seems remarkable only for its blandness; it is ironic that such dry prose threatens a 150-year-old principle of federal Indian[2] law—that Native American tribes possess inherent sovereign powers over reservation lands.[3]

This sovereign power status resulted in rules of law that require courts to defer to tribal rights when interpreting federal treaties and statutes.[4] Although Congress has broad power to abrogate tribal

1. 113 S. Ct. 2309, 2321 (1993).

2. The term "Indian" is used in this Note in keeping with the consistent use of the term in this area of the law. The Author does so, however, while fully aware of the inaccuracies and inadequacies of the term.

3. Chief Justice Marshall laid the foundation of federal Indian law in the Cherokee cases: Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and particularly in Worcester v. Georgia, 31 U.S (6 Pet.) 515 (1832). In *Worcester* he noted that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection." *Worcester*, 31 U.S. at 560-61.

Over the years, the Court has recognized some limitations on Chief Justice Marshall's broad formulation of tribal sovereignty, primarily when essential tribal rights were not involved and the rights of Indians would not be jeopardized. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983); Williams v. Lee, 358 U.S. 217, 219 (1959). However, *Worcester*'s core principle has retained its force, and it has been said that "factors of personality, history, pragmatism, and philosophy have locked together to make *Worcester* an enduring artifice, almost a physical presence. The case is continually cited in the modern Indian law decisions. Indeed, regardless of subject matter, *Worcester* is one of the Supreme Court's most lasting statements . . . ." CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 30 (1987) (citation omitted).

4. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) ("The Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read."); *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 37-38 (1942) (explaining traditional rules of treaty interpretation).

treaty rights,[5] it must clearly express its intent to do so.[6] In the *Bourland* decision the Supreme Court wrongly turned its back on this history and precedent. The Court, rather than requiring express congressional intent to abrogate treaty rights, inferred an intent that Congress almost certainly did not have. The Court has, moreover, made a more fundamental change in federal Indian law: In a footnote, the Court offhandedly discarded the principle of tribal inherent sovereignty over nonmembers on reservation lands.[7] This latter part of the decision is the main focus of this Note.[8]

In Part II this Note reviews the historical legal framework within which *Bourland* was decided and the traditional rules of law underpinning tribal sovereignty and treaty interpretation. Part III details the conflict which led to the suit and the lower courts' decisions. Part IV reviews the Supreme Court's decision, and Part V criticizes both the decision's abandonment of inherent sovereignty and its revision of treaty interpretation principles.

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5. "[I]t is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan*, 411 U.S. at 172 n.7.

Furthermore,

> "presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress . . . ."

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977) (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903)).

6. " '[P]roper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.' " Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)); *see also* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683, 686-91 (1992) (discussing example of unmistakable and clear intent of Congress to permit state taxation of Indian lands); United States v. Dion, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (deciding that act expressly terminating tribal jurisdiction in favor of state jurisdiction over "Indian Country" within state borders did not implicitly terminate any other right or privilege granted by treaty).

7. South Dakota v. Bourland, 113 S. Ct. 2309, 2320 n.15 (1993).

8. Two recent articles examined the *Bourland* case but focused on different aspects of the decision. One examined the Court's application of recent precedent relating to treaty abrogation, Chad W. Swensen, Note, South Dakota v. Bourland*: Drowning Cheyenne River Sioux Tribal Sovereignty in a Flood of Broken Promises*, 39 S.D. L. REV. 181 (1994). The other generally approved of the decision as an attempt to strike the appropriate balance between Indians and non-Indians living on reservation lands. Veronica L. Bowen, *The Extent of Indian Regulatory Authority over Non-Indians:* South Dakota v. Bourland, 27 CREIGHTON L. REV. 605 (1994).

II. HISTORICAL FRAMEWORK

A. *Indian Tribes as Sovereign Powers*

1. The concept of sovereignty

Sovereignty denotes autonomy and the powers of self-governance. Accordingly, the judicial classification of tribes as inherently sovereign has had a real-world impact on who governs reservation lands. To understand the departure from tradition encompassed by Justice Thomas's majority decision in *South Dakota v. Bourland*,[9] it is essential to first understand what tribal sovereignty has meant in the historical legal framework of federal Indian law.

The courts have repeatedly recognized that Indian tribes possess the " 'inherent powers of a limited sovereignty which [have] never been extinguished,' "[10] even after conquest. In his watershed treatise, Felix Cohen summarized the resulting foundational precepts of federal Indian law:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[11]

Chief Justice Marshall provided the initial framework for understanding tribal sovereignty. He reasoned in *Cherokee Nation v. Geor-*

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9. 113 S. Ct. 2309 (1993).

10. United States v. Wheeler, 435 U.S. 313, 322 (1978) (emphasis omitted) (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)). Unless limited by treaty or act of Congress, "a tribe has the power to determine tribe membership, to regulate domestic relations among tribe members, and to prescribe rules for the inheritance of property." *Id.* at 322 n.18 (citations omitted). Sovereignty also includes "the power of the tribe to determine and define its own form of government," COHEN, *supra* note 4, at 126, and to "regulate the use and disposition of individual property among its members," *id.* at 143.

11. COHEN, *supra* note 4, at 123.

gia[12] and *Worcester v. Georgia*[13] that a tribe's sovereignty stemmed from its independent control of a geographic area.[14] Nevertheless, the tribe's autonomy often creates regulatory and jurisdictional tension between the tribe and the state in which it is located because each wishes to control both behavior and property on the reservation.[15]

The Cherokee cases themselves are early examples of the power struggle between states and tribes; Georgia wanted jurisdiction over reservation lands, but the Court determined that inherent tribal sovereignty meant that

> [t]he Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[16]

To reach the conclusion that Georgia law was preempted because of the relationship between the two sovereignties of the United States and the Cherokee tribe, "Chief Justice [Marshall] had to rebuff arguments that the tribe had lost its sovereignty, either through the legally operative effects of discovery and conquest or by ceding it in a treaty, and had therefore become legally indistinct from other residents of Georgia."[17]

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12. 30 U.S. (5 Pet.) 1 (1831).

13. 31 U.S. (6 Pet.) 515 (1832).

14. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 3-4 (1993) (providing excellent, comprehensive analysis of import of Court's shift from geographically-based to membership-based sovereignty); *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) ("The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty . . . .").

15. The courts have developed separate tests for determining whether the tribe or the state may exercise jurisdiction on the reservation. *See* COHEN, *supra* note 4, at 117. A finding that a tribe does not have jurisdiction does *not* mean automatically that the state does. *See* South Dakota v. Bourland, 113 S. Ct. 2309, 2318 n.12 (1993).

16. *Worcester*, 31 U.S. at 561.

17. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393-94 (1993).

Courts are still often faced with the temptation to acknowledge the perceived "reality" that tribes have lost much of their sovereignty through conquest and subsequent events. But this is not a legitimate position under the legal precepts developed by Justice Marshall:

> By definition [the tribes] held complete power before contact with European nations—there were no competitors save other tribes. If that original status is legitimized and is accepted as continuing until adjusted by the United States—and *Worcester* clearly accorded it that legitimacy—then the courts must turn away from modern realities as a setting and toward an almost mechanical, linear analy-

Recently, however, the Court has clearly moved toward "a view of sovereignty that bases a tribe's authority over people and activities on the tribe's reservation on the membership of individual Indians in a political entity, the tribe."[18] These recent cases explain that "Indian tribes are unique aggregations possessing ' "attributes of sovereignty over both their members and their territory." ' "[19]

As a result of this shift in definition, the Court has been able, from time to time, to cut back on even the powers of local self-governance. Whereas in Justice Marshall's time, the Cherokee nation had complete jurisdiction over all people and property on its reservation, now membership-based sovereignty has allowed the Court to restrict a tribe's exercise of criminal jurisdiction over nonmembers,[20] and has lead to recent cases that also limit civil jurisdiction over nonmembers on reservation lands.[21]

In short, the Court is increasingly willing "to abandon its historic role as protector of tribal sovereignty" and now has "to some extent *replaced* the cavalry as the chief threat to tribal sovereignty."[22]

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sis of whether relevant aspects of pre-Columbian status have been abridged by the United States.

WILKINSON, *supra* note 3, at 29-30 (citation omitted).

18. Dussias, *supra* note 14, at 4.

19. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975))).

20. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978), removed tribal criminal jurisdiction over non-Indians on reservation land absent specific congressional authorization. The Court recognized that usually Indian tribes are prohibited from exercising those powers of autonomous states (1) expressly terminated by Congress, or (2) not consistent with their status as sovereigns dependent on the federal government. The *Oliphant* Court, however, still found that limitations on tribal sovereignty no longer needed to be expressly imposed by Congress. *Id. Oliphant* thus opened the door to the possibility for later courts to discover other limitations on tribal sovereignty by requiring Congress to expressly delegate that power, rather than presuming that such power exists absent express abrogation. Dennis W. Arrow, *State Jurisdiction over Fee Lands in Indian Country, in* SOVEREIGNTY SYMPOSIUM V 448, 452-53 (Okla. Supreme Court, Okla. Indian Affairs Comm'n, & Sovereignty Symposium, Inc. sponsors, 1992).

In Duro v. Reina, 495 U.S. 676, 693-94 (1990), the Court expanded *Oliphant* and held that a tribe could not assert criminal jurisdiction over an Indian who was not a member of that tribe. *Duro* was overturned when Congress passed an amendment to the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1988 & Supp. V 1993), expressly recognizing and reaffirming tribal criminal jurisdiction over all "Indians" on reservations the following year. Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 767 (1993).

21. *See, e.g.*, Montana v. United States, 450 U.S. 544, 564 (1981); discussion *infra* part II.A.2.

22. Dussias, *supra* note 14, at 5-6.

2. Recent developments

Moving toward the view that a tribe's sovereignty is limited to its membership and not its geographic boundaries has provided a means for the Court to limit tribal civil jurisdiction over non-Indians within reservation boundaries.[23] During the years prior to *Bourland*, however, the Court chose an irregular path—rejecting a tribe's jurisdiction by weakening principles of inherent sovereignty in one case, and then affirming another tribe's jurisdiction over something else because of inherent sovereignty in the next case.

In *Montana v. United States*,[24] the Court broke new ground in the erosion of tribal sovereignty as manifested in civil jurisdiction. *Montana* holds that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so *cannot survive without express congressional delegation*."[25] This proposition is far different than the traditional view that

> [t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers.* In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[26]

As the dissent in *Bourland* accurately characterized, "this passage in *Montana* is contrary to 150 years of Indian-law jurisprudence and is not supported by the cases on which it relied."[27]

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23. *See supra* part II.A.1.

24. 450 U.S. 544 (1981).

25. *Id.* at 564 (emphasis added). The legal foundations underpinning this newly stated rule for a tribe's exercise of civil jurisdiction were shaky at best. Justice Blackmun noted that *Montana* relied on cases that addressed when a state could exercise jurisdiction over non-Indians on a reservation—an issue wholly separate from, and irrelevant to, the issue of a tribe's exercise of jurisdiction based on inherent tribal sovereignty. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 455-56 (1989) (Blackmun, J., concurring and dissenting).

26. United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis added) (citations omitted).

27. *Bourland*, 113 S. Ct. at 2322 n.2 (Blackmun, J., dissenting); *see also Brendale*, 492 U.S. at 450 (Blackmun, J., concurring and dissenting) ("*Montana* is simply one, and not even the most recent, of a long line of our decisions discussing the nature of inherent tribal sovereignty. These cases, landmarks in 150 years of Indian-law jurisprudence, establish a very different 'general principle' governing inherent tribal sovereignty—a principle according to which tribes *retain* their sovereign powers over non-Indians on reservation lands

In dicta the *Montana* Court proposed only two exceptions to its newly announced rule that Congress must delegate regulatory power to Indian tribes.[28] First, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members."[29] Second, a "tribe may also 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."[30]

The validity of *Montana*'s view that inherent tribal authority over non-Indians does not survive absent express congressional delegation was further called into doubt when it played no part in three subsequent decisions. In *New Mexico v. Mescalero Apache Tribe*,[31] the Court stated that even in *Montana* it "specifically recognized that tribes in general retain [the] authority" to regulate use of their resources.[32] In *National Farmers Union Insurance Cos. v. Crow Tribe*,[33] the Court affirmed tribal court jurisdiction over a tort claim against a political subdivision of the State without reference to *Montana*'s new rule and exceptions. And in *Iowa Mutual Insurance Co. v. LaPlante*,[34] the Court also affirmed tribal court civil jurisdiction without regard to *Montana*.[35]

In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[36] however, the Court returned to *Montana* in a discussion of inherent sovereignty. The Court attempted to clarify the second *Montana* exception as to when a tribe may assert civil jurisdiction in the name of tribal preservation if such jurisdiction was not otherwise expressly delegated by Congress.[37] *Brendale* was a badly divided plurality decision that failed miserably in its attempt at clarity.[38] The Court

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unless the exercise of that sovereignty would be 'inconsistent with the overriding interests of the National Government.' ").

28. *Montana*, 450 U.S. at 565-66.

29. *Id.* at 565.

30. *Id.* at 566.

31. 462 U.S. 324 (1983).

32. *Id.* at 337.

33. 471 U.S. 845 (1985).

34. 480 U.S. 9 (1987).

35. In fact, the Court stated that "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." *Id.* at 15.

36. 492 U.S. 408 (1989) (4-2-3 decision).

37. *Id.* at 428-32 (plurality opinion).

38. Two commentators, assessing the practical impact of *Montana* and *Brendale* before the Court rendered its decision in *Bourland*, noted that "[a]fter *Brendale*, it is not at all

did, however, limit the ability of the Yakima Tribe to pass zoning ordinances applicable to reservation lands owned in fee by non-Indians because it found that the zoning jurisdiction did not sufficiently implicate health and welfare such that tribal preservation was jeopardized.[39]

Most significantly, the opinion reaffirmed what Justice White termed the basic principle of *Montana*: A tribe's inherent sovereignty is divested "to the extent it involves a tribe's 'external relations,' "[40] and thus there must be an express delegation of power to the tribe over nonmembers from Congress in order for the tribe's "inherent" sovereignty to be revested.[41]

Justice Blackmun disagreed with the majority's reasoning in *Brendale* as he had in *Bourland*.[42] Although he objected to Justice White's narrow interpretation of the second *Montana* exception,[43] he more fundamentally objected to the change the Court imposed on the definition of tribal sovereignty.[44] The Court's "approach to inherent tribal sovereignty remained essentially constant in all critical respects" for a century and a half: While Congress retained the authority to abrogate tribal sovereignty as it saw fit, tribal sovereignty over inter-

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clear who has regulatory jurisdiction over nonmembers' land and natural resources located within the exterior boundaries of Indian reservations." Timothy R. Malone & Bradley B. Furber, *Regulatory Jurisdiction over Nonmembers' Land within Indian Reservations*, 7 NAT. RESOURCES & ENV'T 14, 16 (1993). They predicted that *Bourland* provided "the opportunity to resolve that debate and to provide the guidance so sorely lacking after *Brendale*." *Id.* at 55.

39. Justice White's plurality opinion implicitly found that zoning " 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' " but declined to apply the exception. *Brendale*, 492 U.S. at 429 (plurality opinion) (quoting *Montana*, 450 U.S. at 566). Because the *Montana* Court only provided that if the exception applied, a tribe "may" retain inherent power, the Court had room to find that even a threat to tribal preservation did not necessarily require a finding that the tribe retained jurisdiction. *Id.* at 428-29 (plurality opinion).

40. *Id.* at 426 (plurality opinion). According to *Brendale*, external relations are those that involve the tribe and any nonmember of the tribe. *Id.* (plurality opinion). This definition sharply contrasts with the traditional view that the "external powers" that tribes were divested of were those such as the power to enter treaties with foreign nations. COHEN, *supra* note 4, at 123.

41. *Brendale*, 492 U.S. at 425-27 (plurality opinion).

42. *Id.* at 448 (Blackmun, J., concurring and dissenting).

43. Reading the *Montana* decision "in the full context of the Court's other relevant decisions" results in an understanding that "*Montana* must be read to recognize the inherent authority of tribes to exercise civil jurisdiction over non-Indian activities on tribal reservations where those activities . . . implicate a significant tribal interest." *Id.* at 449-50 (Blackmun, J., concurring and dissenting).

44. *Id.* at 451-59 (Blackmun, J., concurring and dissenting).

nal affairs was not implicitly divested.[45] Thus, while Justice Blackmun "recognize[d] that *Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands," he also believed that "the plain language of *Montana* itself expressly preserve[d] substantial tribal authority over non-Indian activity on reservations."[46]

The backdrop against which *Bourland* was decided begins with the concept that a tribe's jurisdiction is limited only by the reservation boundaries.[47] The Court had begun to redefine sovereignty to justify cutting back on tribal jurisdiction over nonmembers.[48] At the time *Bourland* was decided, though, the law was far from settled. The *Montana* case had gone farthest in redefining sovereignty so that tribal civil jurisdiction could be restricted.[49] Yet until *Bourland* its perspective was either not applied in other cases, such as *Mescalero Apache Tribe*,[50] *National Farmers Union Insurance*,[51] and *Iowa Mutual*,[52] or when applied, it did not receive a strong mandate from the Court, as in *Brendale*.[53]

B. Treaty Interpretation

In addition to the presumption in favor of tribal jurisdiction provided by inherent sovereignty, several long-established principles of treaty interpretation protected tribal authority. These principles were developed to counteract the imbalances in positions between the parties during the time treaties were drafted. Inherent tribal sovereignty is still relevant in this area because "it provides a backdrop against which the applicable treaties and federal statutes must be read."[54]

First, "[a] cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians."[55] Second,

45. *Id.* at 451-52 (Blackmun, J., concurring and dissenting).
46. *Id.* at 456 (Blackmun, J., concurring and dissenting).
47. *See supra* part II.A.1.
48. *See Brendale*, 492 U.S. at 408 (plurality opinion); *Montana*, 450 U.S. at 544.
49. *Montana*, 450 U.S. at 544.
50. 462 U.S. 324 (1983).
51. 471 U.S. 845 (1985).
52. 480 U.S. 9 (1987).
53. 492 U.S. at 408.
54. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).
55. COHEN, *supra* note 4, at 37; *see also* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) ("Treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *McClanahan*, 411 U.S. at 174-75 (stating that doubtful expressions in treaties are to be resolved in favor of Indians); Winters v. United States, 207 U.S. 564, 576 (1908) (stating that ambiguities in treaties will be resolved "from the standpoint of the Indians"); Worcester v. Georgia, 31 U.S. (6 Pet.) 515,

"since the wording in treaties was designed to be understood by the Indians, who often could not read and were not learned in the technical language, doubtful clauses are resolved in a nontechnical way as the Indians would have understood the language."[56] Third, it is long established that a "treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[57]

As a result, "Indian treaties are not mere historical curiosities or formalities without present relevance."[58] In fact "[t]he reciprocal obligations assumed by the Federal Government and by the Indian tribes during a period of almost a hundred years constitute a chief source of present-day Indian law."[59]

> In most cases a crucial issue—seldom mentioned in the opinions but implicitly a weighty presence to the parties and judges—is how an old treaty, statute, or court decision should be applied in times bearing little resemblance to the era in which the words of law were originally written.
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> . . . .
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> The Court, presented repeatedly with the option of honoring the old laws or of respecting the force of the changed circumstances, mostly has chosen to enforce the promises.[60]

In short, "[f]ederal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored."[61]

Under these rules of treaty interpretation, the Court historically required an express showing that Congress intended to abrogate a

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552-57 (1832) (discussing appropriate interpretation of treaty terms given Cherokee Nation's expectations and tribe's reasonable understanding of these terms).

56. COHEN, *supra* note 4, at 37; *see also* Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979) (reaffirming that, in interpreting treaties, courts should not permit United States superior negotiating position and familiarity with English language during treaty formation to be used to Indians' disadvantage); Oliphant v. Suquamish Tribe, 435 U.S. 191, 206 (1978) (stating that treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them"); Fleming v, McCurtain, 215 U.S. 56, 61 (1909) ("[I]n case of any well-founded doubt as to the construction of the treaty, it is to be construed most favorably toward the Choctaws."); Jones v. Meehan, 175 U.S. 1, 11 (1899) (holding that treaties should not be construed "according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians").

57. United States v. Winans, 198 U.S. 371, 381 (1905).

58. Charles F. Wilkinson, *A Summary of the Law of American Indian Treaties*, *in* MANUAL OF INDIAN LAW at J-1 (The American Indian Lawyer Training Program, Inc. ed., 1976).

59. COHEN, *supra* note 4, at 33.

60. WILKINSON, *supra* note 3, at 4-5.

61. COHEN, *supra* note 4, at xxvii.

right.[62] Requiring express congressional intent provided an important safeguard. Given the age of Indian treaties and the volume of federal legislation passed without considering the possible effects on tribal sovereignty, implied abrogation would likely erode many rights memorialized by long-standing treaties.[63]

As discussed later, *Bourland* is surprising in its application of these doctrines of treaty interpretation:[64] Rather than requiring express congressional intent to abrogate a treaty right, the majority concluded that the right in question had been abrogated without even a "scrap of evidence" that Congress ever considered the consequence of its actions.[65]

III. CASE BACKGROUND

A. The Conflict

The controversy that developed into the *Bourland* case began along the banks of the Missouri River, which forms the eastern border of the Cheyenne River Reservation in South Dakota.[66] Originally, the Fort Laramie Treaty of 1868 established the Great Sioux Reservation for the "undisturbed use and occupation" of Sioux Tribes.[67] The Treaty "confirmed the Tribe's sovereignty over the land in question in the most sweeping terms."[68] Yet because the sovereignty of Indian tribes is inherent, the Treaty memorialized, but did not create, the

62. *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (" '[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " (quoting Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934))).

63. One commentator has noted that

> [q]uestions of implied repeal arise disproportionately often in Indian law. This is due in part to the comparatively ancient recognition of tribal prerogatives in the treaties and treaty substitutes. Congress has had generations to pass general laws on related subjects .... [And] the age and scope of many Indian laws make them especially likely to come within the facial coverage of general regulatory laws that do not explicitly refer to Indians.

WILKINSON, *supra* note 3, at 46.

For example, in *Menominee*, the Court was called upon to interpret whether an act terminating federal recognition of an Indian tribe implicitly destroyed the members' hunting and fishing rights that had been affirmed by treaty. 391 U.S. 404. The Court stated, "[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty," and denied that such rights had been abrogated by implication. *Id.* at 413.

64. *See infra* part V.B.

65. *Bourland*, 113 S. Ct. at 2322 (Blackmun, J., dissenting).

66. *Id.* at 2313.

67. 15 Stat. 635, 636 (1869).

68. *Bourland*, 113 S. Ct. at 2322 (Blackmun, J., dissenting).

tribes' authority, jurisdiction, and rights.[69] It also documented what rights the tribes expressly gave up.

Despite the Treaty, expansionist pressures soon proved too great. By the Act of March 2, 1889, Congress expressly abrogated treaty rights, took some of the Great Sioux Reservation land, and divided the remainder into six smaller reservations, one of which was the Cheyenne River Reservation.[70] This Act provided for the preservation of the other tribal rights affirmed in the Fort Laramie Treaty, and noted that the land on the Cheyenne River Reservation was to be held in trust for Cheyenne River Sioux by the United States.[71]

Congress subsequently decided that the Oahe Dam and Reservoir Project would be built on reservation lands for flood control in the Missouri River basin.[72] The Flood Control Act of 1944[73] "authorized the establishment of a comprehensive flood control plan along the Missouri River, which serves as the eastern border of the Cheyenne River Reservation."[74] To carry out the Flood Control Act, the Cheyenne River Act[75] provided $10,544,014 for the purchase of 104,420 acres of reservation lands to build the Oahe Dam and Reservoir Project.[76] Though no longer owned by the tribe,[77] these lands remained within the tribe's reservation boundaries.[78]

During the seventies, non-Indians living on and near reservations began to organize out of "fear of having any aspect of their lives or property regulated or controlled by Indian governments, which, by definition, were not responsive to or controlled by non-Indians."[79] During this time, the tribal government of the Cheyenne River Sioux Reservation increasingly exercised and expanded its powers.[80] As a

69. *Id.* at 2321-22 (Blackmun, J., dissenting).

70. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888.

71. South Dakota v. Bourland, 949 F.2d 984, 987 (8th Cir. 1991), *cert. granted*, 113 S. Ct. 51 (1992).

72. *Bourland*, 113 S. Ct. at 2313.

73. Ch. 665, 58 Stat. 887.

74. *Bourland*, 113 S. Ct. at 2313.

75. Act of Sept. 3, 1954, ch. 1260, 68 Stat. 1191, 1191.

76. *Id.* at 1191-92.

77. The Court "assumes the United States acquired these lands in fee." *Bourland*, 113 S. Ct. at 2314 n.4.

78. *Id.* at 2313.

79. U.S. COMM'N ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 7 (1981). Underlying many disputes over the exercise of tribal jurisdiction is the reality that non-Indians on reservation lands object to the exercise of tribal jurisdiction, presumably in a way they would not object to an exercise of state jurisdiction, because of this fear. *Id.*

80. *Id.* at 8.

result of this expansion and events on other reservations, tensions were high in South Dakota between Indians and those non-Indians organizing to prohibit the exercise of tribal jurisdiction over nonmembers.[81]

Nevertheless, until a disagreement erupted over deer-hunting season in 1988, "both the Tribe and the State of South Dakota enforced their respective game and fish regulations in the taken area. The Tribe enforced its regulations against all violators; the State limited its enforcement to non-Indians."[82] When the tribe stopped recognizing state-issued hunting licenses and began imposing civil fines on violators in tribal court,[83] South Dakota filed suit "to enjoin the Tribe from excluding non-Indians from hunting on non-trust lands within the reservation. In the alternative, the State sought a declaration that the federal takings of tribal lands for the Oahe Dam and Reservoir had reduced the Tribe's authority by withdrawing these lands from the reservation."[84]

B. The Decision of the District Court

The district court began by finding that the government's purchase of lands under the Cheyenne River Act " 'did not disestablish the Missouri River boundary of the Cheyenne River Reservation.' "[85] However, as the district court opinion was written in the aftermath of the *Montana* and *Brendale* decisions, the district court enjoined the tribe from regulating hunting and fishing by nontribal members on reservation lands.[86] The district court found that in the Cheyenne River Act, Congress had "clearly abrogated" the tribe's right to exclusive use and possession of the purchased lands.[87] The court also determined that Congress had not delegated the right to regulate hunting and fishing to the tribe.[88]

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81. *Id.* at 8-10.

82. *Bourland*, 113 S. Ct. at 2314.

83. *Id.*

84. *Id.*

85. South Dakota v. Bourland, 113 S. Ct. 2309, 2314 (1993) (quoting unpublished district court opinion). Even though the land was no longer owned by the tribe, it no more meant that it lost its reservation status than would the sale of state-owned land diminish the borders of the state. Only when Congress expressly manifests the intent to diminish reservation boundaries does a tribe lose general jurisdiction over that land to the state. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586, 630 (1977).

86. *Bourland*, 113 S. Ct. at 2315.

87. *Id.* at 2314.

88. *Id.* at 2315.

C. The Decision of the Eighth Circuit Court of Appeals

The Court of Appeals for the Eighth Circuit reversed in part.[89] The Eighth Circuit, like the district court, viewed the case as involving only a treaty rights issue: Did the Cheyenne River Act or Flood Control Act abrogate the tribe's treaty rights, and if they did, which rights were affected?

The Eighth Circuit looked to the *Montana* and *Brendale* decisions. Understandably, the court tried to read *Montana* and *Brendale* in a manner consistent with longstanding precedent which required a court to find express congressional intent to abrogate treaty rights.[90] In *Montana*, the land at issue had been held in fee by non-Indians after being taken from the tribe pursuant to a policy in which destroying Indian sovereignty was an explicit goal.[91] Because of this overarching policy, the Eighth Circuit believed that Congress also meant to expressly abrogate the lesser right of the tribe to regulate non-Indian hunting and fishing on fee land acquired by non-Indians.[92]

The Eighth Circuit examined the legislative history of the Cheyenne River Act and found that "the Act reveals no clear intent to eliminate tribal regulatory rights."[93] The court held:

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89. South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991), *cert. granted*, 113 S. Ct. 51 (1992).

90. *Id.* at 991.

91. Montana v. United States, 450 U.S. 544, 559 & n.9 (1981).

The late 1800s and the early 1900s are sometimes known as the Allotment Era. The General Allotment (Dawes) Act of 1887, 24 Stat. 388, and the Act of May 29, 1908, ch. 218, 35 Stat. 460-61, divided reservation lands previously held in trust by the United States for the entire tribe, parceled out tracts to individual Indians, and then allowed the government to sell off "surplus" lands to non-Indians. This policy resulted in huge decreases in the amount of reservation lands held in trust by the United States. For example, the land held in trust for the Cheyenne River Sioux now amounts to "slightly less than half" of what it had. *Bourland*, 949 F.2d at 987. However, terminating a tribal government required special legislation, and allotment of reservation lands alone did not disestablish reservation boundaries. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 470 (1984); Mattz v. Arnett, 412 U.S. 481, 504 (1973). The Allotment Era ended in 1934 with the passage of the Indian Reorganization Act, ch. 576, § 1, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461 (1988)).

The *Montana* court was confronted with the issue of whether Congress intended to abrogate the tribe's treaty rights to regulate hunting and fishing when it passed an Allotment Era bill. "[A]n avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Montana*, 450 U.S. at 560 n.9. Given this blunt purpose, even the requirement that there be express legislative intent to abrogate treaty rights was satisfied. *Id.* However, finding congressional *intent to divest* a tribe of a right did not support the *Montana* Court's statement that therefore any "exercise of tribal power . . . cannot survive without express congressional *delegation*." *Id.* at 564.

92. *Bourland*, 949 F.2d at 990.

93. *Id.* at 994.

> The correct analysis, the one counselled by the Supreme Court, is to look to the purpose of the [Cheyenne River] Act and to decide a jurisdictional issue left unresolved by the language of the Act in light of that purpose. As the purpose of the Act was simply to enable the United States to acquire the land needed for the construction of the Oahe Dam and Reservoir, and to do so with as little disruption as possible to the life of the Tribe, the Tribe must be given the benefit of the doubt. We do not have here the essential "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 that conflict by abrogating the treaty."[94]

Lands taken through the Act that had previously been owned by non-Indians had to be analyzed separately. The Eighth Circuit interpreted *Montana* to require an affirmative grant of jurisdiction from Congress only over these types of lands.[95] Because "Congress has not affirmatively granted to the Tribe regulatory authority over such land,"[96] the case was remanded to the district court for a determination of whether one of the *Montana* exceptions would allow the tribe to regulate these lands as well.[97] The Supreme Court granted certiorari[98] and reversed the Court of Appeals.[99]

IV. Reasoning of the Supreme Court

Justice Thomas, writing for the majority, took a two-pronged approach in his assault on tribal rights. First, much of his opinion consists of the Court's construction of the Cheyenne River and Flood Control Acts to infer congressional intent to abrogate the treaty rights of the Cheyenne River Sioux. In doing so, Justice Thomas abandoned the canons of treaty interpretation.[100] Second, the opinion barely deals with whether the tribe has rights arising from inherent sovereignty. Dismissing so lightly this foundational principle of federal In-

94. *Id.* (quoting United States v. Dion, 476 U.S. 734, 740 (1986)).

95. *Id.* at 995.

96. *Id.*

97. *Id.* For a discussion of the *Montana* exceptions, see *supra* text accompanying notes 28-30.

98. South Dakota v. Bourland, 113 S. Ct. 51 (1992) (granting certiorari).

99. South Dakota v. Bourland, 113 S. Ct. 2309, 2310 (1993).

100. *See supra* part II.B.

dian law has the potential to disrupt the balance of power between tribes, the federal government, and the states.[101]

A. Laying the Groundwork

The *Bourland* majority first briefly summarized the entire history of treaty interpretation precedent: "Congress has the power to abrogate Indians' treaty rights, though we *usually* insist that Congress clearly express its intent to do so."[102] The Court, without acknowledging inherent tribal sovereignty as a potential source of rights, assumed that the Cheyenne River Sioux Tribe's authority to regulate hunting and fishing was entirely treaty-based,[103] and that the statutes related to the Oahe Dam and Reservoir Project abrogated those regulatory rights.[104]

Justice Thomas then construed the *Montana* decision to require that when land alienation broadly opens reservation lands to non-Indians, preexisting Indian rights to regulatory control are destroyed, regardless of Congress's intent in opening that land.[105] Under this broad reading of *Montana*, if a tribe conveys reservation lands to non-Indians pursuant to an act of Congress, the Court will not engage in a traditional treaty interpretation analysis to determine if Congress had the specific intent to abrogate treaty rights. Rather, the Court will assume all treaty rights have been abrogated unless Congress took the time to explicitly preserve them—something Congress was unlikely to have done given the "usual" requirement that they expressly indicate their intent to abrogate Indian rights.

B. Applying the Test

Once the issue was framed in this manner, all the Court needed to do was note that the Cheyenne River and Flood Control Acts required the tribe to convey lands to the United States in a manner that broadly opened those lands to use by non-Indians and all treaty rights relating to that land evaporate. Thus, the Court observed that the Flood Control Act provided that the Oahe Dam and Reservoir Project should be "open to public use generally" for "recreational pur-

101. *See supra* part II.A.

102. *Bourland*, 113 S. Ct. at 2315-16 (citations omitted) (emphasis added).

103. *Id.* at 2316 ("[P]ursuant to its original [Fort Laramie] treaty with the United States, the Cheyenne River Tribe possessed both the greater power to exclude non-Indians from, and arguably the lesser-included, incidental power to regulate non-Indian use of, the lands later taken for the Oahe Dam and Reservoir Project.").

104. *Id.*

105. *Id.* at 2316, 2318.

poses."[106] The Court then concluded that as "the area at issue here has been broadly opened to the public,"[107] and "[b]ecause hunting and fishing are 'recreational purposes,' the Flood Control Act affirmatively allows non-Indians to hunt and fish on such lands, subject to federal regulation."[108] Furthermore, the Cheyenne River Act affirmatively reserved the tribe's right to hunt and fish on the taken lands. Consequently, if "Congress had intended by this provision to grant the Tribe the additional right to regulate hunting and fishing, it would have done so by a similarly explicit statutory command."[109]

Justice Thomas concluded that "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."[110]

C. *The Court's Review of the Eighth Circuit's Analysis*

The Court faulted the Eighth Circuit for not applying its reading of *Montana* to all the taken lands, regardless of prior ownership status: "Whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control."[111]

The Court's analysis nullifies the legislative intent behind passing a bill allowing reservation lands to be purchased by non-Indians.[112] Congress must affirmatively grant a tribe regulatory authority over such lands, or one of the *Montana* exceptions—preserving the tribe or consent given by non-Indians—would have to justify tribal regulatory control.[113]

Though the Cheyenne River Act preserved some land-use rights —mineral, grazing, timber, hunting, and fishing—for the tribe, the Court disputed the Eighth Circuit's conclusion that the sale did not amount to a "simple conveyance of land and all attendant inter-

106. *Id.* at 2317 (quoting § 4, 58 Stat. 889-90 (codified as amended at 16 U.S.C. § 460d (1988))).
107. *Id.* at 2316 n.9.
108. *Id.* at 2317.
109. *Id.*
110. *Id.* at 2316-17.
111. *Id.* at 2318.
112. *Id.* at 2318 n.13.
113. *Id.* at 2320.

ests."[114] The Court decided that "Congress' explicit reservation of certain rights in the taken area does not operate as an implicit reservation of all former rights,"[115] because "[w]hen 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."[116]

D. What Ever Happened to Inherent Sovereignty?

The Court addressed the fundamental issue of inherent sovereignty in one brief paragraph and a footnote.[117] The Court quoted and reaffirmed the unprecedented language in *Montana* that tribal authority " 'cannot survive without express congressional delegation.' "[118] In fact, the Court in *Bourland* acknowledged the judicial inventiveness of *Montana* even as the Court applied that case.[119]

Not surprisingly, the Court found "no evidence in the relevant treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty."[120] What is surprising is the willingness of the Court to cast off over 150 years of precedent with the blithe and unsupported comment that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore *not* inherent."[121]

E. Other Potential Sources of Tribal Jurisdiction

The Court also analyzed the exceptions to *Montana*'s general proposition that a tribe does not have authority over nonmembers of the tribe. The exceptions arise when the nonmember has consensual contractual or commercial relationships with the tribe or its members, or if regulation of nonmembers is essential to the survival of the tribe.[122] The Court noted that the district court "made extensive find-

114. South Dakota v. Bourland, 949 F.2d 984, 993 (8th Cir. 1991), *cert. granted*, 113 S. Ct. 51 (1992).

115. *Bourland*, 113 S. Ct. at 2318.

116. *Id.* at 2319. *But see supra* text accompanying note 57.

117. *Bourland*, 113 S. Ct. at 2319-20 & n.15.

118. *Id.* at 2319 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

119. *Id.* at 2320 n.15 ("*Montana* . . . announced 'the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' " (quoting *Montana*, 450 U.S. at 565)).

120. *Id.* at 2319-20.

121. *Id.* at 2320 n.15 (citation omitted) (quoting *Montana*, 450 U.S. at 564).

122. *Id.* at 2320.

ings that neither of these exceptions applies,"[123] but because the court of appeals did not comment on this finding as to the taken land as a whole, the Court left the issue to be resolved upon remand.[124]

Because the Cheyenne River Act gave the taken lands to the Army Corps of Engineers to regulate in a manner " 'not inconsistent with . . . treaties and Federal laws and regulations' concerning 'the rights of Indian Nations,' "[125] the tribe argued that this "*affirmatively establish[ed]* the primacy of tribal treaty rights over both public use rights and state and federal regulatory interests."[126] The Court dismissed this argument as undeveloped.[127]

V. ANALYSIS

A. The Abandonment of Inherent Sovereignty

There are several flawed assumptions in the majority's reasoning. First, the Court "supposes that the Tribe's right to regulate non-Indian hunting and fishing is incidental to and dependent on its treaty right to exclusive use of the area and that the Tribe's right to regulate was therefore lost when its right to exclusive use was abrogated."[128] As Justice Blackmun, joined by Justice Souter, pointed out in his vehement dissent,

> the majority's myopic focus on the [Fort Laramie] Treaty ignores the fact that this Treaty merely confirmed the Tribe's pre-existing sovereignty over the reservation land. Even on the assumption that the Tribe's treaty-based right to regulate hunting and fishing by non-Indians was lost with the Tribe's power to exclude non-Indians, its *inherent* authority to regulate such hunting and fishing continued.[129]

The dissent in *Bourland* is rightly concerned with the Court's casual disposal—in a footnote—of the concept of inherent tribal sovereignty. Because for so long the Court has held that the regulatory authority of Indian tribes exists over their members *and territory*,[130] regulatory jurisdiction over nonmembers within that territory has

123. *Id.*
124. *Id.*
125. *Id.* (quoting 36 C.F.R. § 327.1(f) (1992)).
126. *Id.* (quoting Brief for Respondents at 33).
127. *Id.* at 2321.
128. *Id.* at 2323 (Blackmun, J., dissenting).
129. *Id.* (Blackmun, J., dissenting).
130. *Id.* at 2321 (Blackmun, J., dissenting) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975))).

been the logical result.[131] The longstanding exception had been that Congress may withdraw the existing sovereign power, but "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute or by implication as a *necessary* result of their dependent status."[132] The implicit removal of sovereign power had been found by the Court only in situations where tribal sovereignty conflicted with the interests of the federal government, such as when tribes had sought to establish relations with foreign governments, or prosecuted non-Indians in tribal courts where full Bill of Rights protections did not exist.[133]

Furthermore, just as the Court's reading of *Montana* was contrary to extensive precedent, the *Bourland* majority never explained how such a reading was viable in light of post-*Montana* decisions that reaffirmed inherent tribal civil jurisdiction over non-Indians on reservation lands.[134] For example, *Merrion v. Jicarilla Apache Tribe*[135] determined that a tribe had inherent authority to tax non-Indian mining on its reservation, and *Iowa Mutual Insurance Co. v. LaPlante*[136] allowed that tribal authority over non-Indians on reservation lands was essential to tribal sovereignty, and thus civil jurisdiction presumptively remained with the tribe unless specifically limited by Congress.

This determination by the *Bourland* Court that tribal sovereignty is not inherent[137] represented no less than an overthrow of the principles underlying federal Indian law. If the sovereignty of a tribe is not inherent, and must be expressly delegated by Congress, the Cheyenne River Sioux are no longer sovereign as to their reservation lands.

The *Bourland* majority did not address whether South Dakota had jurisdiction to regulate hunting and fishing in the taken area because the state did not present the issue in its action.[138] However, the

131. *Id.* (Blackmun, J., dissenting).

132. *Id.* at 2321-22 (Blackmun, J., dissenting) (quoting *Wheeler*, 435 U.S. at 323).

133. *Id.* at 2322 (Blackmun, J., dissenting); *see also* Washington v. Confederated Tribes of the Colville Indian Reservations, 447 U.S. 134, 153-54 (1980) (stating that tribal sovereignty is subject to overriding federal interests).

134. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 453-56 (1989) (Blackmun, J., concurring and dissenting).

135. 455 U.S. 130, 141 (1982).

136. 480 U.S. 9, 18 (1987); *see also* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (requiring exhaustion of tribal court remedies before district court had jurisdiction to hear civil claim); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (prohibiting state from concurrently regulating nonmember hunting and fishing on reservation).

137. *Bourland*, 113 S. Ct. at 2320 n.15.

138. *Id.* at 2318 n.12.

Court took the time to state that primary regulatory authority was given to the Army Corps of Engineers with the provision that " '[a]ll Federal, state and *local* laws governing these activities apply on project lands and waters as regulated by authorized enforcement officials.' "[139] Since the majority also went out of its way to exclude "tribal laws" from the definition of "local laws,"[140] there is little doubt that subsequent determinations will find that such activities fall within the traditional police powers of the state.

B. Congressional Intent Is Key in Treaty Interpretation

In addition to abandoning the principle of inherent sovereignty for Indian tribes, the Court also did not follow precedent when it decided that later congressional acts abrogated the Fort Laramie Treaty.

As principles of treaty interpretation favor Indians, "the majority [was] right to proceed on the assumption that authority to control hunting and fishing is included in the Fort Laramie Treaty."[141] However, Justice Blackmun's dissent pointed out that in analyzing whether this Treaty was later abrogated by the Flood Control and Cheyenne River Acts, "[t]he United States did not take this land with the purpose of destroying tribal government or even with the purpose of limiting tribal authority. It simply wished to build a dam."[142] In addition, it is implausible that the tribe would have thought that the Cheyenne River and Flood Control Acts meant that "every right subsumed in the Fort Laramie Treaty's sweeping language [would] be defeated the moment they lost the right to exclusive use of their land."[143]

Justice Thomas also relied on language in the Cheyenne River Act stating that the payment designated for the tribe was in " 'final and complete settlement of all claims' "[144] to justify his break from the trust duties traditionally imposed on Congress. He proclaims that "we will not conclude that the [Cheyenne River] Act reserved to the Tribe the right to regulate hunting and fishing simply because the legislative history does not include an itemized amount for the Tribe's loss of revenue from licensing those activities."[145] But the Cheyenne Act's "final and complete settlement of all claims" language "simply makes

139. *Id.* at 2320 (quoting 36 C.F.R. § 327.8 (1992)).
140. *Id.* at 2321 n.16.
141. *Id.* at 2322 (Blackmun, J., dissenting).
142. *Id.* at 2321 (Blackmun, J., dissenting).
143. *Id.* at 2323 (Blackmun, J., dissenting).
144. *Id.* at 2319 (quoting Act of Sept. 3, 1954, § 2, 68 Stat. 1191, 1191).
145. *Id.*

clear that Congress intended no further compensation for the rights it took from the Tribe. It does not address the question of *which* rights Congress intended to take or, more specifically, whether Congress intended to take the Tribe's right to regulate hunting and fishing . . . ."[146]

In addition, opening up the land for "recreational purposes" does not automatically determine that the tribe therefore cannot regulate those activities. Even if the tribe is under a mandate to allow non-Indians to engage in hunting and fishing, regulation through issuing licenses and imposing civil fines would remain within its purview.[147]

The potential impact of this aspect of the *Bourland* decision, like that relating to inherent sovereignty, is also quite astonishing. The tension between tribes and states over jurisdiction has existed since the Cherokee nation and Georgia first did battle.[148] Congress has plenary power over tribes,[149] but it will not be surprising if it rarely exercises its power over what are essentially local matters to affirmatively delegate authority to a tribe. On the other hand, many years have passed since treaties were last ratified, years in which Congress has passed many laws without contemplating the possibility that such laws might conflict with tribal jurisdiction.[150] Until recently there was no need to worry about these facial conflicts because tribal jurisdiction would not have been implicitly abrogated as in *Bourland* but would instead have required express deprivation by Congress.

VI. CONCLUSION

Congress has plenary power over tribes and at times has adopted policies, like those during the Allotment Era,[151] that have stripped Indian tribes of land and resources. Throughout the history of this country, states have clashed with tribes over jurisdiction. In the conflicts, the state's sovereign police power has always threatened to swallow up that of the smaller independent sovereigns within their boundaries. Traditionally, the Court has acknowledged that tribes have inherent sovereignty that predated conquest.[152] Accordingly, all tribal rights not conceded by treaty remained vested in the tribe.

146. *Id.* at 2324 (Blackmun, J., dissenting).
147. *Id.* at 2323 (Blackmun, J., dissenting).
148. *See supra* notes 11-15 and accompanying text.
149. *See supra* notes 5-6 and accompanying text.
150. WILKINSON, *supra* note 3, at 46.
151. *See supra* note 91.
152. *See supra* note 3 and accompanying text.

The Court also recognized that, as a result of this inherent sovereignty and the superior bargaining power the federal government has relative to tribes in drawing up treaties and passing subsequent legislation, congressional intent to abrogate rights should not be lightly imputed. Express congressional intent was required to abrogate a right, whether affirmed in a treaty or derived from inherent sovereignty.

Abandoning these principles allows courts, in effect, to construe the dozens of laws, which facially implicate tribal authority, passed by Congress since treaties were last ratified to abrogate tribal jurisdiction. This new principle requires a court to construe such acts of Congress without regard to congressional intent in passing that act, even if there is evidence that Congress never considered the possibility that the act might implicate tribal sovereignty. The only hope the Court leaves in place for Indian tribes to retain their authority over nonmember activities on reservation lands is if Congress takes the time to affirmatively delegate jurisdiction to the tribes—something unlikely to have occurred because Congress has passed laws with the knowledge that tribes would retain jurisdictional authority unless it expressly deprived them of that authority.

Conquest failed to deprive indigenous cultures of their preexisting status as sovereigns. Congress has abandoned the Allotment Era policy of seeking destruction of tribal sovereignty and total assimilation of its members in favor of preserving cultural diversity. It seems odd that the Court now, despite the unquestioned plenary power of Congress to pass laws and set policy for Indian tribes, has undertaken a groundbreaking position that will erode a tribe's authority over its own reservation. The Court will have done what conquest could not—destroy Indian sovereignty.

*Lisa Baird**

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