Montana Law Review

Volume 60
Issue 1 *Winter 1999*

Article 2

1-1999

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Erik M. Jensen
David L. Brennan Professor of Law, Case Western Reserve University

THE END (OF THIS DISCUSSION) OF TRIBAL SOVEREIGNTY

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This has been an interesting exchange, and I have learned a lot from it.

Lest there be any confusion, let me come out strongly in favor of logic. I like logic, some of my best friends are logical, and logic is very, very important to thinking in general and to the law in particular.

That said, we should recognize logic's limits in understanding the law. In particular, we should not expect any complex body of law to form a totally coherent package. As first-year law students outlining their courses soon come to realize, such coherence does not exist. It probably cannot exist in a democratic society.

To try to push two hundred years of American Indian law into a completely logical structure, as Mr. Poore would have us do, might be a useful thought experiment. But it does not reflect the law as it is or as it is likely to be.

The law is sometimes an ass, and it does not cease to be the law for that reason. Maybe tax law is illogical, as Mr. Poore (tongue-in-cheek, I think) suggests,[1] but I would not advise going to Tax Court to contest a statutory notice of deficiency with an argument in the form "This Code provision is not logical and therefore should not have been enacted."

American Indian law has far more than its share of anomalies. They are real, and we have to recognize them. Yes, we should use logic to make the existing structure as coherent as we can—indeed, courts are obligated to read competing legal authority in a consistent way, if that is at all possible—but we cannot simply read arguably illogical statutes and cases out of the canon.

Logic is not everything; it does not mandate a particular analytical starting point. Mr. Poore's provocative position

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[1] *See* James A. Poore III, *The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen*, 60 MONT. L. REV. 17, 17 (1999).

appears stronger than it is because he chooses the premises from which his argument proceeds. Emphasize the cases and statutes that call tribal sovereignty into question and downplay the authority that does not, and you necessarily appear to have logic on your side.[2]

I have already made my points about citizenship's unimportance in understanding most constitutional issues. I note only that Mr. Poore's quotation from *Dunn v. Blumstein*,[3] which is presented as a showstopper, is taken out of context. The quoted passage cannot mean that a citizen of the United States who is also a citizen of the state of Georgia is entitled to vote in Tennessee elections, just like a Tennessee citizen, simply because he is residing in Tennessee at election time. Similarly, a non-Indian does not become a tribal "citizen"—that is, a tribal member—entitled to vote in tribal elections simply because he is an American citizen who resides within Indian country.[4]

One final point. If the reason for accepting the Poore thesis is supposed to be its impeccable logic, we should test that logic on its own terms. Mr. Poore writes that, once Congress granted citizenship to American Indians (whether they wanted it or not), "Congress was obligated to provide Constitutional protections for those citizens vis-à-vis their tribes."[5] But if the granting of citizenship really had such extraordinary effects on tribal sovereignty, one might ask what the continuing *constitutional* role for Indian tribes is. If the tribes are nothing but groups of American citizens, legally indistinguishable from other American citizens, why do tribes and tribal courts exist at all? By what authority can Congress authorize tribal courts? Could Congress establish other racially or ethnically defined courts?

We generally do not ask those questions—indeed, Mr. Poore

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[2] An aside: *Marbury v. Madison* is a peculiar example to use in defense of the propositions that logic is everything and that logic leads to a single, indisputable conclusion. *See* Poore, *supra* note 1, at 18. Yes, *Marbury* is not *il*logical. But con law teachers spend a lot of time on *Marbury* precisely because there are so many propositions in *Marbury* that go beyond constitutional text and arguably go beyond what the Constitution requires. The conclusion in the case does not follow self-evidently from Chief Justice Marshall's premises.

[3] 405 U.S. 330, 336 (1972), *quoted in* Poore, *supra* note 1, at 32.

[4] *Dunn v. Blumstein* involved a narrow issue, and we should not read more into the case than the facts justify. The issue was whether a Tennessee durational residence requirement could be used to bar a new Vanderbilt University professor, who had in fact moved to Tennessee in June 1970, from voting in November 1970 elections. *See Dunn*, 405 U.S. at 331-32, 334. In short, the case asked whether someone *who had become or was becoming a citizen of Tennessee* could be barred from voting in Tennessee elections.

[5] Poore, *supra* note 1, at 25.

himself did not ask those questions—because we take for granted the continued existence of tribes and tribal courts. And we do that, I suggest, because Mr. Poore's logic is not the law of the land.