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Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in *United States v. Lara*

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DON'T THINK OF A HIPPOPOTAMUS: AN ESSAY ON FIRST-YEAR CONTRACTS, EARTHQUAKE PREDICTION, GUN CONTROL IN BAGHDAD, THE INDIAN CIVIL RIGHTS ACT, THE CLEAN WATER ACT, AND JUSTICE THOMAS'S SEPARATE OPINION IN *UNITED STATES V. LARA*

Robert Laurence*

I. INTRODUCTION

Last year, one of those annoying e-mail games was going around. “Answer the following questions. Don’t scroll down.” There followed a series of questions that turned out to be mostly distractions: Whose picture is on the \$10 bill?¹ What’s the highest big city east of the Mississippi River?² Who was born first, Mozart or Washington?³ Aristotle or Archimedes?⁴ What’s the square root of 17?⁵ Those kinds of things. At the end, we were commanded: Quickly, think of a color. Now, think of a tool. We were then told that some improbably large proportion of people—was it 92% or 85%—just thought of a red hammer, with most of the rest having thought of a blue screwdriver.

Using sections of the Bankruptcy Code as the distractions, I tried the game out on my Bankruptcy class, who expressed wide-eyed awe at how many of them had fallen within the predicted super-majority. (I concede, as I must, that the awe may have been feigned, the better to keep Laurence away from the cases.) I mentioned to them that I doubted if any of them had thought of a red hammer. I hadn’t; I’ve never seen a red hammer. Rather, we thought of “red” and “hammer.” The lesson was that, the quiz having distracted their attention with the series of difficult questions, and then having forced them quickly to think of a color, their responses, and those of most people, become fairly predictable. If one is distracted from thinking carefully, and forced to name a color, red comes to

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1. Hamilton.
2. Atlanta.
3. Washington.
4. Aristotle.
5. Four and a fraction.

mind. Likewise tools and hammers. Maybe the game was not so annoying after all.

The title of this essay begins with another kind of mind game, the opposite of the red hammer game. That game was a game of distraction; the “don’t-think-of-a-hippopotamus” game is one of concentration, mental focus and control. Who among my readers has the mental dexterity *not* to think of a hippopotamus when told not to? I certainly don’t, and by the time I have understood the command, it is too late, and I have already seen in my mind’s eye the little flapping ears and giant gaping jaws, emerging from an African river.

This essay, then, is about mental distraction and mental dexterity, about thinking of red hammers and of not thinking about hippopotamuses (or -i), and, most importantly, about being able to hold two conflicting, even contradictory, thoughts in one’s mind simultaneously. That will come later. First, it’s mid-September as I write, so I begin with first-year Contracts class.

II. FIRST-YEAR CONTRACTS

The Big Test-taking Surprise of law school is that, having admitted the students largely on the strength of how well they have mastered the task of undergraduate exam-taking, we change the method of examination on them. The typical first-year exam question is not “Discuss the circumstances in which the implied seeking of forbearance can serve as consideration leading to the enforceability of a promise, giving precise examples from the cases of when the theory works and when it doesn’t.” That’s the kind of question they expect and the kind of question they could do well on, without skipping a beat from their undergraduate days. Instead, I give the students a story, with no mention in the question at the end that I want them to discuss the theory of the implied seeking of forbearance as consideration. They spot the issue, or not, and discuss it, or not, and do well, or not. The only prompting of the issue comes from the story itself, not from the question. So, the pedagogic issue relating to this Big Test-taking Surprise is whether to spring it upon the students earlier or later. I choose earlier, and my Contracts students have been working on a quiz, a page-long fact pattern that raises the issue non-explicitly, just so they know what’s coming in December.

The Big Learning Surprise of law school is that the law does not come in rules, but rather in analysis. “Tolerate Ambiguity,” I was told during first-year orientation by Dean Frederick M. Hart. That is the skill required, not necessarily of all lawyers, but of all *contented* ones. The fact pattern on the quiz my students are working on lately is full of facts, some of which suggest that Judy *was* seeking Shirley’s forbearance from suing Max, and some of which suggest that she was not. The students who have not yet made the switch from undergraduate thinking to law-school thinking are still looking for the answer, not the analysis. The *contented* ones have fallen, easily, if not naturally, into the argument-and-counter-argument model: “Judy will argue that she was not seeking Shirley’s forbearance

and, citing *Baehr v. Penn-O-Tex Oil Corp.*,⁶ will make the following points: . . . Shirley, on the other hand, will cite *McDonald Brothers Company v. Koltjes*,⁷ and make these arguments: . . .”

Each argument and counter-argument inspects the facts in the quiz against the backdrop of the cases from class, applying the multi-factor analytical scheme that we derived in class. One factor, for instance, is how close the relationship is between Judy and Max, and of what kind. Another factor is how needful Max is of more time, that is to say, for relief from Shirley's contemplated litigation over his pre-existing debt to her. There are five factors altogether that go into the analysis. No one factor is definitive and each interplays with the others. These are not tidy categories, the students come to see, but hazy areas of inquiry, susceptible to different arguments, over-lapping facts, and conflicting interpretation. “This law . . .,” a student who had been a mathematician said to me once, shaking her head, “It's more like French poetry than it is like calculus.”

Actually, it makes me think of earthquakes.

III. EARTHQUAKE PREDICTION

Some years ago, I attended a talk in the Geology Department on earthquake prediction. I can't remember why. A pair of researchers presented data on this and that circumstance, evaluating the predictive quality of each particular circumstance. For example—I don't know—sunspot activity and volcanoes erupting on the opposite side of the world and the tidal effects of the moon. Whatever. And then they discussed the various interplays of the circumstances: add sunspots to volcanoes and subtract the moon, things like that. It really was a long time ago and I have forgotten all of the details.

Except for this: Near the end of the lecture, one of the researchers said, with a crooked grin and a disarming honesty, “The problem turned out to be rather more complicated than we had anticipated.”

“The problem was more complicated than we had anticipated.” What a classic statement of what first-year Contracts turns out to be. Fred Hart couldn't have said it better. The students, high-achieving undergraduates as they are, are inclined to look through the complications, seeking answers, tidy answers. Such a destination is largely illusory. As then-Justice Rehnquist once wrote, “[o]ur entire profession is trained to attack ‘bright lines’ the way hounds attack foxes.”⁸ Or, as Geena Davis said it a bit more straightforwardly in the movie *Thelma & Louise*, “God, the law is some tricky shit, isn't it?”

But it's my job to complicate the students' lives, not for complication's sake, but for the law's sake, to make them see the truth of the Rehnquist quotation, even if they don't descend to the earthiness of *Thelma's*. The answer to the

6. 104 N.W.2d 661 (Minn. 1960) (a principal case in Charles L. Knapp, Nathan M. Crystal & Harry G. Prince, *Problems in Contract Law: Cases and Materials* 103 (4th ed., Aspen L. & Bus. 1999)).

7. 192 N.W. 109 (Minn. 1923) (cited in *Baehr*, 104 N.W.2d at 666 n. 26).

8. *Robbins v. Cal.*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting).

question of whether Judy was impliedly seeking Shirley's forbearance from suing Max is neither *yes* nor *no*, but involves a complicated analytical scheme. Always, some students fight, seeking tidiness and clarity. The contented ones don't.

As with gun control in Baghdad.

IV. GUN CONTROL IN BAGHDAD

This is supposed to be an essay about American Indian law, not about contract law.

Right.

Naturally, in the Indian Law course this term, the war in Iraq has never been far outside the discussion. I suppose this is true in many Indian Law courses across the country. Why? Not only because we who teach Indian law find our issues everywhere,⁹ but because cross-boundary differences and the imposition by one nation of its ways upon another nation is not far from the essential question of American Indian law.

Perhaps more importantly, Iraq has come into play because early in the term, the question always arises about the legitimacy of the so-called "plenary power" that Congress has, or is said to have, over the Indian nations.¹⁰ Until recently, challenges to the plenary power would usually be explained by a student this way: "The U.S. doesn't have the power to enact a civil rights code for the tribes. They are independent, sovereign nations." These days, however, that observation tends to come out this way: "The U.S. doesn't have the power . . . {pause} . . . doesn't have the power . . . {another pause} . . . oh well, never mind." No, we were never talking about actual, literal, American power over the tribes. Just as the United States has the literal power to occupy Iraq, the younger United States had the literal power to occupy Indian country, at least since the end of the Indian wars and the beginning of the twentieth century. Maybe before.

It's the *legitimacy* of the exercise of this literal power within our domestic constitutional framework that is the issue, isn't it? But the legitimacy of the exercise of the nation's power over the tribes is related to the legitimacy of the nation's exercise of power over Iraq, isn't it? If the Iraq war and occupation were constitutionally legitimate due to the real or perceived threat to our national security, then would the real or perceived threat of Indian raids on white settlements justify the occupation of Indian country? That's a question for discussion in Indian law, 3:40 to 5:40, every Thursday afternoon.

Drop in.

Really.

9. See e.g. Robert Laurence, *Civil Procedure in Low Earth Orbit: Science Fiction, American Indians and Federal Courts*, 24 N.M. L. Rev. 265, 265 (1994); Rennard Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 Me. L. Rev. 213 (1979).

10. *U.S. v. Kagama*, 118 U.S. 375 (1886) (usually cited for the existence, if not for the origins, of plenary power). Justice Thomas thinks specifically that *Kagama* requires that its origins be found elsewhere than in the Indian Commerce Clause. See *infra* n. 74.

So, the student refines the observation again: "It's not so much the question of *power*, now that I think of it, but *right*." The discussion barrels ahead toward a full-blown argument about the rightness of the war in Iraq, until I pull it back. Let's leave the issue framed as you have and, for now we'll recognize that there is one question—an easy one—of literal power, another of the legitimacy of the exercise of that power under our domestic law, a third of the legitimacy of that power under international law, a fourth of the legitimacy of that power under Iraqi law, and a fifth of the rightness of things.

And we will go on, conceding for now that we won't be of one mind here about whether Manifest Destiny was *right*, nor about whether the overthrow of Saddam Hussein was *right*, or about whether Christopher Columbus or the Corps of Discovery or George W. Bush should have just gone home. But back to our Indian law cases: *United States v. Ant*,¹¹ *Santa Clara Pueblo v. Martinez*,¹² *Oliphant v. Suquamish Indian Tribe*,¹³ *Cherokee Nation v. Georgia*,¹⁴ *Worcester v. Georgia*,¹⁵ and so on. Iraq never seems to be far off the table these days in American Indian Law class.

For one thing, there is the concept of sovereignty. *Never* have the students come into Indian law class with sovereignty so much on their minds. Type "handover w/5 sovereignty" into the LEXIS "News" file and your computer will have a stroke. Google "Iraqi sovereignty" and you'll be Web-swamped. The placement of Iraqi sovereignty temporarily in the United States was stated as a given fact by the United States, the United Nations, and the news media, and the return of Iraqi sovereignty to Iraq was considered a major and necessary accomplishment to the progress of the war. "Iraq is sovereign," Condoleezza Rice jotted on Monday, June 28, 2004, to the President, who felt-tipped back, "Let Freedom Reign,"¹⁶ in a document for which there were immediate calls that it be retired to the National Archives.¹⁷

It is interesting that the President linked the reigning of freedom to the restoration of sovereignty, for the linkage seems to admit that limitations on the

11. 882 U.S. 1389 (9th Cir. 1989). I use *Ant* as my first-day-of-class case because it shows an Indian tribe—the Northern Cheyenne tribe in this case—acting as a modern, functioning government, prosecuting Mr. Ant, and doing so in ways contrary to the rules of the dominant society. *Id.* at 1390. On his second prosecution, in federal court, he moved to suppress an uncounselled guilty plea and an un-Mirandized confession, both of which had been admitted in his tribal court prosecution. *Id.* at 1391. A divided panel of the Ninth Circuit reversed Mr. Ant's federal conviction, suppressing the evidence. *Id.* at 1396.

12. 436 U.S. 49 (1978).

13. 435 U.S. 191 (1978).

14. 30 U.S. 1 (1831).

15. 31 U.S. 515 (1832).

16. Oddly enough, this memorandum seems not to be included in the Weekly Compilation of Presidential Documents for June 28, 2004. A facsimile of the document can be seen at http://www.whitehouse.gov/news/releases/2004/06/images/20040628-9_sovereignty062804-515h.html (accessed Oct. 7, 2004). For a press report, see Maura Reynolds, *The Conflict in Iraq: A Brief Note Opens NATO Summit in Istanbul*, L.A. Times A10 (June 29, 2004).

17. Actually, several months after the handover of sovereignty and the scrawling of "Let Freedom Reign," I can find little in the way of calls that the note be retired to the National Archives. I'm sure I heard such calls at the time, though, probably on the radio and not includable in LEXIS.

sovereignty of nations are limitations of the freedom of the citizens of that nation. And so it was during the time when we were in control of Baghdad, when Iraqi sovereignty apparently resided in the United States and we were in the position to make positive law for the governing of Iraq, that, from an Indian law perspective, we did two very interesting things. We abolished the death penalty,¹⁸ and we established a regime of gun control, in particular by severely restricting Iraqi access to assault weapons.¹⁹

These were such interesting events from the perspective of the Indian law course because they raise the central question of when the United States can and should depart from its own strongly held beliefs in imposing its ways in Indian country. Questions concerning gun control and capital punishment are hotly debated in the United States, although in my part of the country opposition to the former and support for the latter are taken pretty much as a political given for Democrats and Republicans alike. It is fair to say that presently the Second Amendment's protection of assault-weapon ownership, and the Eighth Amendment's non-exclusion of the death penalty are strongly held beliefs of many of my neighbors, and of the dominant society in general.²⁰ Yet, when we were temporarily the vessel of Iraqi sovereignty, we regulated assault-weapon ownership and suspended the death penalty in Baghdad.

The most interesting thing about this particular exercise of the sovereignty of another is how confusing the politics are. Proponents of gun control and opponents of the death penalty might enjoy the idea of a weapon-free, execution-free Baghdad, but at the same time might accede to the proposition that such things are really for the Iraqis to decide. And contrariwise, strong Second Amendment advocates and capital punishment supporters might conclude that the principles dear to them are not so universal that they must apply in Baghdad, even when we are making the rules. This can lead one schooled in American Indian law nowhere else than to the Indian Civil Rights Act ("ICRA").²¹

V. THE INDIAN CIVIL RIGHTS ACT

Iraq leads to the ICRA in two ways. In the first place, there is the notion that one of the driving purposes of the war is to bring democracy to Iraq and hence to the Islamic Middle East. In his radio address to the nation on June 5, 2004, the President said, "Naming this new [interim] government [in Iraq] advances our five-step plan to help Iraq achieve democracy and freedom as a

18. Coalition Provisional Authority Order No. 7, § 3(1) (June 9, 2003) (available in English at <http://www.iraqcoalition.org/regulations/#Orders>; or in Arabic at <http://www.iraqcoalition.org/arabic/regulations/index.html>).

19. Coalition Provisional Authority Order No. 3 (Dec. 31, 2003) (revised and amended) (available in English at <http://www.iraqcoalition.org/regulations/#Orders>; or in Arabic at <http://www.iraqcoalition.org/arabic/regulations/index.html>).

20. See Spenser S. Hsu, *House GOP Proposes to Repeal D.C. Gun Bans: Vote May Come as Bush, Kerry Debate Limits*, Wash. Post A1 (Sept. 14, 2004).

21. 25 U.S.C. §§ 1301-1303 (2000).

united and federal nation.”²² If Woodrow Wilson was interested in making the world safe for democracy, George W. Bush is interested in making the world democratic. The author John B. Judis calls this “civil millennialism, . . . the idea that we weren’t involved in spreading Christianity but we were involved in spreading freedom, rights, democracy.”²³

Mr. Judis dates the on set of civil millennialism to the late eighteenth century,²⁴ but from an Indian law perspective the shift from religious to civil millennialism occurred later than that. The case of *Quick Bear v. Leupp*,²⁵ for example, shows the United States using religious missionaries to fulfill its treaty obligations to educate Indian children as late as the twentieth century. Nevertheless, Mr. Judis’s point is well taken in American Indian law, with the shift to civil millennialism coming with the Indian Reorganization Act of 1934²⁶ and the ICRA. The entire thrust of the ICRA is toward the democratization of Indian country along the lines of the dominant society, a process that from Mr. Judis’s internationalist point of view is “folly.”²⁷

However—and here is the second connection between Iraq and the ICRA—when Congress moved to impose Constitution-like guarantees of personal freedom on Indian tribes, as with occupied Iraq, it did not require that tribes follow all of the provisions of the Bill of Rights. The ICRA has no Second Amendment analog, and capital punishment is forbidden to tribes.²⁸ Given the *power*—see the discussion above—the literal *power* to impose upon a conquered people the ways of American dominant society, Congress in 1968 (and Paul Bremer in 2002) decided not impose these two strongly held beliefs.

Why?

Well, in the first place, it is hard not to read the ICRA as a prioritization of American values. It is hard not to reach the conclusion that, while both the protection of the free exercise of religion and the prohibition of an established religion are important, the former is *more* important to the dominant society and to Congress, for it is only the former that found its way into the ICRA.²⁹ Based on

22. George W. Bush, *The President's Radio Address*, 40 Wkly. Comp. Pres. Doc. 1019, 1019 (June 5, 2004).

23. Interview by Robert Siegel, Nat. Pub. Radio, with John B. Judis, *All Things Considered* (Sept. 10, 2004) (available at LEXIS File “News,” search term “John Judis and National Public Radio”). The term “civil millennialism” is explained by Lee Quinby this way:

Technically, the term *millennialism* refers to the belief that Christ will return, either before or after a thousand-year period, but millennialism as a cultural form is less focused on the precision of messianic return than it is on the messianic role of the nation itself. As Nathan Hatch has indicated, the conversion into “civil millennialism” helped galvanize forces on behalf of the American Revolution. And as Paul Boyer and Stephen O’Leary have demonstrated, the appeal to apocalyptic and millennial righteousness is recurrent.

Alex Shishin, *Book Review*, 11 *Utopian Stud.* 199, 199 (January 1, 2000) (quoting Lee Quinby, *Millennial Seduction: A Skeptic Confronts Apocalyptic Culture* 17 (Cornell U. Press 1999)).

24. Interview by Siegel, *supra* n. 23, at 2.

25. 210 U.S. 50 (1908).

26. 25 U.S.C. §§ 461-479 (2000).

27. See generally John B. Judis, *Folly of Empire* (Scribner 2004).

28. 25 U.S.C. § 1302 (2000).

29. See *id.* at § 1302(1).

the choices that Congress made in drafting the ICRA, it is hard not to reach the conclusion that the Fifth Amendment is more important than the Second, that the Fourteenth Amendment is more important than the Nineteenth, that *New York Times Company v. Sullivan*³⁰ is more important than *Gideon v. Wainwright*.³¹

Or maybe the statute is an expression of unexpected humility, with Congress saying that *for us* the principles are of equal importance, but we're not sure they are for you. And if an established religion or heavy-handed gun control is consistent with your understanding of freedom, we won't say "no."

More to the point of the present essay is the Supreme Court's interpretation of the ICRA to be a statute in which Congress intended to advance both the dominant society's well-known obsession with individual rights and, at the same time, the tribal society's interest in self-determination and "the right of reservation Indians to make their own laws and be ruled by them."³² As Justice Thurgood Marshall wrote in *Martinez*:

Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members *vis-à-vis* the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government."³³

One suspects that George W. Bush was expressing the same kind of conflicted interests when he wrote "Let Freedom Reign," an expression, one suspects, of his opinion that freedom was advanced *both* by the taking of sovereignty from Iraq and by its restoration, with or without gun control and capital punishment.

The advancement in one statement or statute of two contradictory policies is one part of the earthquake-like complexity of the law. The question is not whether Congress can advance both tribal sovereignty and the individual rights of persons subject to tribal authority at the same time. The question is *how* Congress has done so. The Supreme Court in *Martinez* thought that Congress had done so by allowing habeas corpus challenges to tribal incarceration, while denying federal court jurisdiction over civil-side disputes.³⁴ Pre-*Martinez*, the lower courts had generally held that challenges on both the criminal and civil sides could be heard, but that the district courts should balance concern for an individual litigant's civil rights against a healthy respect for long-standing tribal customs, traditions and ways.³⁵ This was an alternate way to advance both policies behind the ICRA, even though those policies conflict with each other, with the lower court rule less supportive of tribal self-determination than was the Supreme Court's *Martinez* rule.

②

30. 376 U.S. 254 (1964).

31. 372 U.S. 335 (1963).

32. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

33. 436 U.S. at 62 (citations omitted).

34. *Id.* at 60.

35. See e.g. *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973).

There is nothing unique to American Indian law here; take the Clean Water Act ("CWA").³⁶

VI. THE CLEAN WATER ACT

Many examples might be given of compromises within the CWA. In fact, it might be said that the entire act itself advances two conflicting principles:

- (1) the prevention of the pollution of the water; and
- (2) the maintenance of a vigorous industrial economy in the United States.³⁷

People on both sides of the environmental divide object that the statute makes too many compromises in the other direction, thereby proving that the statute is trying to do both.

Here's a precise example:

Under 33 U.S.C. § 1314(a)(4), the Administrator of the EPA is required to maintain a list of so-called "conventional pollutants." The term is statutory, and is distinguished from non-conventional water pollutants, a non-defined, but very understandable term. The 2004 version of this list is found in 40 C.F.R. § 401.16, and contains five items, including, for example, oil and grease. In terms of what must actually be done to improve water quality in the nation, a distinction is made by the Act between steps to be taken with respect to conventional and non-conventional pollutants. The cleaning up of conventional pollutants "require[s] application of the best conventional pollutant control technology,"³⁸ that is to say, the best technology available for the control of the listed conventional pollutants.³⁹ On the other hand, non-conventional pollutants require a less aggressive remedy: the "application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants."⁴⁰ The negative pregnant is strong: the cleaning up of conventional pollutants, like oil and grease, from the water is to be done by congressional command even if it requires new and non-conventional technology, even if it is economically burdensome for the polluter to do so.

To be more precise, Congress should have punctuated the key term thusly: "best conventional-pollutant control technology." The hyphen would have made it clear that Congress was talking about the best technology to control conventional pollutants, and not merely the best conventional technology to

36. 33 U.S.C. §§ 1251-1376 (2000). The statute commonly referred to as the Clean Water Act was formally titled the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972).

37. Actually, the formal declaration of goals and policies, found in § 101 of the Act, is explicitly focused on environmental, not industrial, policy. *See* 33 U.S.C. § 1251 (2000). Here one must read between the lines to see the compromises: that these are "goals," not "mandates," that the policies speak of meeting the goals "wherever attainable," that the "adequate" control of pollutants is spoken of, that "expeditious" manners be employed in meeting the goals, and so forth. *Id.* at 1251(a).

38. 33 U.S.C. § 1311(b)(2)(E) (2000).

39. *Id.*

40. 33 U.S.C. § 1311(b)(2)(A) (2000).

control pollutants. The lack of a hyphen has confused no court.⁴¹ This is an example of the well known “technology forcing” nature of the CWA,⁴² where Congress is presumed to know what it was doing when it required the application by polluters of technology not economically viable at the date of the requirement.⁴³ This intention might be thought to advance the interests of the environmentalists over those of the industrialists, as the science of pollution control was forced ahead by the statute’s requirements. But such is required only with respect to the designated “conventional pollutants.” Less is required of industries that put non-conventional pollutants into the water. Here the interests of the industrialists seem to prevail, at least to the extent that only “reasonable further progress”⁴⁴ must be maintained toward the desired clean-up goal.⁴⁵

It is no great stretch to find that both the ICRA and the CWA require a court to keep track of two contradictory thoughts simultaneously, whether those thoughts are European-style individual freedoms and American-tribal self-determination, on the one hand, or swimmable, fishable water and grimy industrial vitality, on the other. Sure, a bit of mental dexterity and a reasonable amount of concentration are required to think of advancing both at once, but all-in-all the task is easier than not thinking of a hippopotamus. Past the first year of law school, no one would suggest that either the ICRA or the CWA is invalid or somehow doomed to frustration by this internal tension, even though any particular person might disagree with the precise balance struck between the competing policies. This leaves us in a position to appraise Justice Thomas’s offering in *United States v. Lara*.⁴⁶

VII. JUSTICE THOMAS’S SEPARATE OPINION IN *UNITED STATES V. LARA*

This *Tulsa Law Review* symposium is devoted to *Lara*, so I will presume familiarity with the facts of the case, the legal issue or issues, and the holding of the majority, fully and competently discussed as they are in the other articles in this symposium. Thus I turn directly to Justice Thomas’s separate opinion, styled as one “concurring in the judgment.”⁴⁷

There is much in Justice Thomas’s opinion that I like. He concurs in the result, and I like the result. He thinks that the *Duro* fix was not an improper delegation of federal authority to the tribes, which it clearly was not, neither a delegation nor an improper one. He finds *Duro* and, more importantly, *Oliphant* to be examples of federal common-law-making, which they clearly are. Justice

41. 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, 859 n. 4 (1994).

42. And others, see e.g. *Motor Veh. Mfrs. Assn. of U.S. v. St. Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 49 (1983).

43. See e.g. *Union Electric Co. v. EPA*, 427 U.S. 246, 256-59 (1976).

44. 33 U.S.C. § 1311(b)(2)(A) (2000).

45. *Id.*

46. 124 S. Ct. 1628 (2004).

47. *Id.* at 1641.

Thomas writes:

[I]t does not follow that this Court's federal-common-law decisions limiting tribes' authority to exercise their inherent sovereignty somehow become enshrined as constitutional holdings that the political branches cannot alter. When the political branches demonstrate that a particular exercise of the tribes' sovereign power is in fact consistent with federal policy, the underpinnings of a federal-common-law decision disabling the exercise of that tribal power disappear.⁴⁸

Hence, *Oliphant* and *Duro* are statutorily reversible. This is one of the most commonsensical things written about American Indian law by any Justice in the sad quarter century since *Oliphant* was decided, a quarter century that has seen a continual erosion of tribal sovereign authority, all on the shaky authority of *Oliphant*.⁴⁹

Granted, Justice Thomas expresses some admiration for the *Oliphant* decision, which he calls "careful"⁵⁰ in its examination of congressional and executive branch pronouncements regarding the power of tribes to prosecute non-Indians. *Oliphant*, in fact, was anything but careful. A *careful* Court would not have cited as authority a withdrawn opinion of the Solicitor of the Department of the Interior, leaving the event of withdrawal unexplained in a footnote, as the *Oliphant* Court did.⁵¹ A *careful* Court would not have cited the legislative history of an un-enacted bill, as the *Oliphant* Court did.⁵² A *careful* Court would not have cited a lower court case for its dicta, with no mention of its holding, as the *Oliphant* Court did.⁵³ A careful court would not have cited Felix Cohen's famous *Handbook of Federal Indian Law* for its one mention of that dicta, while failing to mention the centerpiece of the treatise, that tribes are sovereign governments.⁵⁴ The *Oliphant* opinion was not careful. It was clever, too clever by half.

But Justice Thomas is speaking generally as a follower of precedent. There are times when I don't like that, for example, in *Lara* with respect to *Oliphant* and in *Lawrence v. Texas*⁵⁵ with respect to *Bowers v. Hardwick*.⁵⁶ There are times when I do, as in *Lara*, and the respect Justice Thomas shows for *United States v. Wheeler*.⁵⁷ I disagree with Justice Thomas about the care with which *Oliphant* was

48. *Id.* at 1647.

49. See *Nev. v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997); *Duro v. Reina*, 495 U.S. 676 (1990); *Mont. v. U.S.*, 450 U.S. 544 (1981).

50. *Lara*, 124 S. Ct. at 1645.

51. 435 U.S. at 200-01 n. 11. The Court's discussion of the Solicitor's opinion is in the text; the withdrawal of the opinion is found in footnote 11. In *Lara*, Justice Thomas noted the *Oliphant* Court's discussion of an 1834 Attorney General's opinion, but not the discussion of the 1970 withdrawn Solicitor's opinion. 124 S. Ct. at 1645.

52. *Oliphant*, 435 U.S. at 201 (discussing the unpassed Western Territory Bill, H.R. Rpt. 23-474 at 35 (May 20, 1834)).

53. *Id.* at 199-200 (discussing *Ex parte Kenyon*, 14 F. Cas. 353 (W.D. Ark. 1878) (holding that the crime had not been committed in Indian country)).

54. *Id.* at 200 n. 9 (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 148 (Five Rings 1986)).

55. 539 U.S. 558, 586 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).

56. 478 US 186 (1986).

57. 435 U.S. 313 (1978).

written, but we are together on its being a common law decision, reversible by congressional action.

The problem with Justice Thomas's opinion in *Lara*, then, is not that he uses *Oliphant* as his beginning point. The problems are with where he ends up, which is nowhere (about which more later), and how he gets there. How he gets there is through the use of a method of reasoning too direct, too uncomplicated, and too little like earthquake prediction. Thomas's mistaken reasoning is shown in the sentence following the one quoted above:

Although I do not necessarily agree that the tribes have any residual inherent sovereignty or that Congress is the constitutionally appropriate branch to make adjustments to sovereignty, see Part II *supra*, it is important to recognize the logical implications of these assumptions.⁵⁸

The problem lies, see, in Part II of the opinion, for it is here that Justice Thomas struggles with his view that American Indian law is "schizophrenic."⁵⁹ He announces this perceived craziness in his introduction, where he writes the sentence at odds with the premise of the present essay: "In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."⁶⁰

It is my opinion, of course, that it is possible to hold two contradictory thoughts in one's mind at one time, and that the complexity of the law requires it. Of course, American Indian law is schizophrenic. So is the Clean Water Act. So is the common law of contracts. So is the war in Iraq.

And, most emphatically, so is the ICRA, a statute that Justice Thomas turns his attention to this way in his second footnote:

Additionally, the very enactment of ICRA through normal legislation conflicts with the notion that tribes possess inherent sovereignty. Title 25 U.S.C. § 1302, for example, requires tribes "in exercising powers of self-government" to accord individuals most of the protections in the Bill of Rights. I doubt whether Congress could, through ordinary legislation, require States (let alone foreign nations) to use grand juries.⁶¹

In Justice Thomas's view, Congress is as confused about Indian law as the Court is. *Martinez* must be, for him, not a careful case trying to do justice to a congressional statute that attempts to balance and thereby advance two conflicting goals, as it is for me. *Martinez* must be for Justice Thomas a schizophrenic case, an untidy interpretation of a statute, a statute that itself reflects a schizophrenic Congress.⁶² "In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously,"⁶³ and

58. *Lara*, 124 S. Ct. at 1647 (citations omitted).

59. *Id.* at 1644.

60. *Id.* at 1642.

61. *Id.* at 1644 n. 2.

62. But wouldn't Justice Scalia say that a schizophrenic statute should be interpreted schizophrenically?

63. *Id.* at 1642.

we now see—in fact, we've known all along—that many of the statutes in Title 25 are just as “untenable” as are the cases, if Justice Thomas is correct.

He is not correct, not to one who can think two contradictory thoughts simultaneously. Justice Thomas has too much red hammer in his thinking, and not enough hippopotamuslessness. It has been said that all of American Indian law is like a piano, tightly strung with strong conflicting forces, but still able to play in tune.⁶⁴ In fact, I'm the one who said it.⁶⁵ I may not be able to avoid thinking of a hippopotamus when that is commanded, but I *can* hold two conflicting thoughts in my head at the same time. I do it all the time: Riding a horse requires one to advance simultaneously the principles of safety and adventure, else your ride will be either boring or dangerous. Likewise in planning a vacation, one must manage the tensions and balance the principles embodied in both the wish “Have a safe trip,” and the wish “*Bon voyage*.” Pulling these two personal avocations together, at the track the sentiment at post time—not so much from the bettors as from the horsemen—is “Safe trip,” showing that for both horse and jockey there is an interest that countervails victory in the race.

Justice Thomas, who, one suspects, accepts in many other contexts the internal conflicts of life and the law, rejects the legitimacy of the piano metaphor in Indian law, by finding impermissible the very tensions that I find inherent in American Indian law: “I write separately principally because the Court fails to confront these tensions”⁶⁶

But such tensions are found everywhere throughout the law, in the CWA, and almost innumerable other statutes, as well as in the common law. Indeed the Constitution itself embodies such tensions, for it is the essential nature of federalism to balance two largely contradictory notions, that of central control and uniformity, on the one hand, against local autonomy and difference, on the other. Indeed, Justice Thomas recognizes the tensions that lie at the heart of federalism:

After all, States retain sovereignty despite the fact that Congress can regulate States *qua* States in certain limited circumstances. . . . But the States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments and specifically grants Congress authority to legislate with respect to them.⁶⁷

But, if constitutional law can manage the tensions that exist between and among conflicting principles, why not statutory and common law? Why is the ICRA torn apart by the fact that it attempts to advance both national interests and conflicting tribal interests, but the Constitution holds together while it attempts to advance both federal interests and conflicting state interests? Of course, once the

64. See Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 Ariz. L. Rev. 413, 422 (1988).

65. *Id.*

66. *Lara*, 124 S. Ct. at 1642.

67. *Id.* at 1644 (citations omitted).

whole deal *was* torn apart and we fought the Civil War.⁶⁸ The Federal Army won, and the country was patched back together, with the 14th Amendment part of the patch, but the conflicts inherent in federalism were retained. Our minor and rather mundane civil wars are nowadays fought out in the Supreme Court with case names like *Arkansas v. Oklahoma*,⁶⁹ managing, as we must, the conflicts inherent in a system that honors and advances both central control and local autonomy.⁷⁰

Thus I find Justice Thomas's struggles with the schizophrenic nature of Indian law to be surprising and, frankly, a little first-year-student-like. He would benefit from a good half-hour talking about law and ambiguity with Dean Hart, as indeed, which of us wouldn't? Furthermore, I don't think Iraq is enough on his mind, as it is presently on the minds of my Indian law students. For example, how is one to react these days to a statement like this:

I do not see how [the *Wheeler* result] is consistent with the apparently "undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government." The sovereign is, by definition, the entity "in which independent and supreme authority is vested." It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.⁷¹

Again, frankly, it's a little first-year-student-like to quote *Black's*. Beyond that, how exactly does the authority that the United States exercises over the Indian nations differ from the authority it exercises over Iraq? Perhaps Justice Thomas would say that Iraq's death penalty was not removed from it at our "whim," but that the ICRA was enacted to remove tribal death penalties on a "whim"—but that seems to me to split hairs in a most unsatisfying way.⁷² Perhaps he would say that Iraq wasn't, indeed, sovereign and that, under *Black's* definition no nation is sovereign any longer because they all can be disestablished at will by The World's Only Remaining Superpower, in the event that we feel threatened by them. Perhaps he would say that *Black's* needs a new definition. I would agree

68. To those who know Indian law, it is far from insignificant that the rending of the nation was early on threatened by one of our cases. When President Andrew Jackson threatened not to enforce the Supreme Court's mandate in *Worcester*, former President John Quincy Adams's frank appraisal of the situation was that "[t]he Union is in the most imminent danger of dissolution The ship is about to founder." *Memoirs of John Quincy Adams* vol. 8, 263 (Charles F. Adams ed., J.B. Lippincott & Co. 1876).

69. 503 U.S. 91 (1992). The federal government was with Arkansas in this environmental litigation, and their central position prevailed in the Supreme Court, much to the disadvantage of Oklahoma's scenic local rivers. *See id.*

70. The federation known as Russia has been fighting the same battles for at least as long as we have, and its current internal disagreements are rather sharper than are ours. *See e.g.* Steven Lee Myers, *Putin Issues Plan to Tighten Grasp, Citing Terrorism*, N.Y. Times A1 (Sept. 14, 2004).

71. *Lara*, 124 S. Ct. at 1643-44 (quoting *Wheeler*, 435 U.S. at 319 and *Black's Law Dictionary* 1395 (6th ed., West 1990).

72. Professor Prakash of the University of San Diego School of Law would apparently not see this as hair-splitting, but rather a meaningful difference between the two situations based on the immediacy of the war. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1098 (2004) (stating that "[t]he mere existence of a war in the past does not sanction the indefinite existence of wartime powers").

with this last appraisal; the editors of *Black's* don't appear to know much American Indian law, nor do they see its application to the definition of sovereignty. But then, there's only so much analysis that will fit in a dictionary, which is exactly why citing *Black's* is so first-year-student-like. Early on, my students are inclined to give me a dictionary definition, too, when I ask them what "consideration" is.

All of this leads us in the direction that Justice Thomas and many others want to go to find the source of the power that Congress claims to have over the tribes, a claim hitherto backed up rather consistently by the Supreme Court. Justice Thomas is surely suspicious that its source is the Indian Commerce Clause.⁷³ If not there, then where? Return, if you will, to Justice Thomas's second footnote concerning the ICRA, quoted above and here again:

Additionally, the very enactment of ICRA through normal legislation conflicts with the notion that tribes possess inherent sovereignty. Title 25 U.S.C. § 1302, for example, requires tribes "in exercising powers of self-government" to accord individuals most of the protections in the Bill of Rights. I doubt whether Congress could, through ordinary legislation, require States (let alone foreign nations) to use grand juries.⁷⁴

As the remainder of Justice Thomas's opinion makes clear, the reference here to "normal" and "ordinary" legislation is in counter-distinction to treaty-making, which is abnormal and extraordinary legislation. As the Justice suggests here, he apparently sees no way of reaching the ICRA's result of imposing Constitution-like restrictions on a tribe short of making a treaty with the tribe, something that the 41st Congress said it would no longer do in 1871.⁷⁵

Actually, the separate opinion is not that definitive; in fact, I disparagingly wrote above that the opinion went too directly nowhere. The "too direct" part of this appraisal is set out above, in that Justice Thomas is too intolerant of ambiguity, too tone-deaf to the music made by piano strings under opposing forces, too unwilling to accept a measure of schizophrenia in the law, too quick to think of red hammers, too reluctant even to *try* not to think of a hippopotamus. The "nowhere" part of the appraisal relates to the fact that, while Justice Thomas seems ready in his second footnote to designate the treaty-making power as the source of Congress's Indian-lawmaking authority, in the end he equivocates, as I suppose one is entitled to do in a separate opinion:

The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgment might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in

73. *Lara*, 124 S. Ct. at 1647 (citing *Kagama*, 118 U.S. at 378-79).

74. *Id.* at 1644 n. 2.

75. 25 U.S.C. § 71 (2000) (cited in *Lara*, 124 S. Ct. at 1644).

any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.⁷⁶

Here, in the last paragraph of the separate opinion he suggests once again that the ambiguity of American Indian law must be resolved in favor either of “ordinary” congressional legislation or of “meaningful” tribal sovereignty, but not both. This is contrary to the position that I have taken above, and elsewhere. On the other hand, who, including me, is not in favor of a little honesty and rigor in Indian law, in which case *Oliphant* will be the first case to go, as that opinion has neither.

But what is one to make of Justice Thomas’s apparent willingness to locate a plenary power in Congress’s ability to make treaties, in consort with the Executive Branch?⁷⁷ Given that Congress long ago abandoned treaty-making with the tribes, this would be tantamount to saying that there is no plenary power at all. This is a conclusion long urged by certain academics,⁷⁸ and one would expect praise for Justice Thomas coming from the most unexpected academic quarters. However, as I have discussed elsewhere,⁷⁹ a cutting back on the reach of congressional power over the tribes might well be accompanied by a concomitant increase in state power, an increase that Justice Thomas might find positive, though he doesn’t say so in *Lara*. The full-scale application of state law in Indian country would be a disastrous development, and would set the famous *Worcester* decision on its head. In many cases, it is the enactment by Congress of Indian country legislation, or its ability to do so, that works as a barrier under the Supremacy Clause to the application of conflicting state laws.⁸⁰

Nor, as I have discussed still elsewhere,⁸¹ would a return to a treaty-making era be without costs to the tribes, a conclusion that it took a trip to the Southern Hemisphere for me to appreciate. Treaty-making is a very high-profile, politically sensitive kind of law-making, and with Indians representing such a small proportion of America’s population, there are perils to that kind of profile and politics.⁸²

Well, if Congress’s power over the tribes does not come from the Commerce Clause, and if the political branches no longer seem in the mood to structure their relations with five-hundred-odd tribes through the use of treaties, then is there

76. *Lara*, 124 S. Ct. at 1648.

77. *Id.* at 1644.

78. As one of many, many examples, see generally Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 *Ariz. St. L.J.* 113 (2002).

79. See Robert Laurence, *Tremors: Justice Scalia and Professor Clinton Re-Shape the Debate over the Cross-Boundary Enforcement of Tribal and State Judgments*, 34 *N.M. L. Rev.* ____ (forthcoming 2004).

80. The classic case is *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

81. See Robert Laurence, *Antipodean Reflections on American Indian Law*, 20 *Ariz. J. Intl. & Comp. L.* 533 (2003).

82. See *id.* at 555.

any power at all?⁸³ Or must we think of the power as sourceless? Is there any such thing as a sourceless power?

Is there anything here at all to conclude?

VII. CONCLUSION

Notwithstanding my derogation of the going-nowhere-ness of Justice Thomas's opinion in *Lara*, in the end I find that less of a shortcoming than his intolerance of ambiguity. The question is indeed ambiguous and a long debate has raged, and still rages, in the law reviews over the source of America's power over the tribes, a power acknowledged by everyone to exist in literal fact. The debate has been challenging, at times stirring, but to no definitive conclusion. I, most famous for being able to "live with" the plenary power,⁸⁴ am also the one who tried to explain Indian law without bothering to track down the source of the plenary power.⁸⁵ While intellectually, this is roughly equivalent to trying to explain relativity without accounting for gravity,⁸⁶ to me it should remain a nicely academic debate. I am not altogether eager to have that debate undertaken by either the courts or Congress. As with gun control in Baghdad, as with earthquakes, as with oil and grease in our most pristine rivers, it is enough for me that the power exists in the United States to destroy, or not, the tribes and their ancient sovereignty. What is important for the foreseeable future is that this literal power to destroy be exercised so as to preserve tribal sovereignty. A Justice, or for that matter, a law professor, who doesn't see how such inconsistencies and contradictions are tolerable needs to spend a few weeks, once again, in Contracts class.

83. Professor Prakash has some ideas about other sources of power. See Prakash, *supra* n. 72, at 1082-1107.

84. See Laurence, *supra* n. 64, at 413.

85. See Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 Ariz. L. Rev. 861 (2000).

86. See Albert Einstein, *Relativity: The Special and the General Theory* 61 (Robert W. Lawson trans., Crown Publishers 1961) ("Since the introduction of the special principle of relativity has been justified, every intellect which strives after generalisation must feel the temptation to venture the step towards the general principle of relativity.").

