Tulsa Law Review

Volume 43
Number 1 *Indian Tribes and Statehood: A Symposium in Recognition of Oklahoma's Centennial*

Fall 2007

Symposium Foreword

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INDIAN TRIBES AND STATEHOOD: A SYMPOSIUM IN RECOGNITION OF OKLAHOMA'S CENTENNIAL

SYMPOSIUM FOREWORD

Judith V. Royster*

Oklahoma was proclaimed a state and admitted to the Union on November 16, 1907. The Indian Territory and the Oklahoma Territory, itself part of the Indian Territory prior to 1890, were combined into the forty-sixth state. It was a dark time for the nearly forty Indian nations that inhabited the two territories.

> Statehood was the bitter culmination of decades of conflict and self-righteous programs to transform Indian Territory into a white commonwealth and make the American Indian into a red farmer. Few whites ever understood the depth of the Indians' agony at the passing of their nationhood.[1]

And yet the Indian nations of Oklahoma survived, as did the tribes of every other state. A century after the myth that statehood swept away the Indian tribes,[2] Oklahoma's tribes are robust communities, cultures, and governments.

> Whatever the future brings, there is no longer the question of survival, no longer the danger that the strong winds of Oklahoma's spring will blow away the sustaining vision of the bright autumn of Oklahoma's Indian nationhood.[3]
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> The Oklahoma Indian has learned the lesson of building and rebuilding a civilization, of adapting, of changing, and yet of remaining true to certain basic values regardless of the nature of that change.[4]

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1. Rennard Strickland, *The Indians in Oklahoma* 54 (U. Oklahoma Press 1980).

2. The mythology of what Oklahoma statehood meant for the Indian tribes and nations of those territories has been examined and dissected elsewhere. *See e.g.* Kirke Kickingbird, *"Way down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!" from "Oklahoma Hills" by Woody Guthrie*, 29 Tulsa L.J. 303 (1993); F. Browning Pipestem & G. William Rice, *The Mythology of the Oklahoma Indians: A Survey of the Legal Status of Indian Tribes in Oklahoma*, 6 Am. Indian L. Rev. 259 (1978).

3. Strickland, *supra* n. 1, at 83.

4. *Id.* at 121.

Oklahoma's centennial was the inspiration for the topic of this year's Indian law symposium issue of *Tulsa Law Review*. In this issue, however, the articles focus not just on Oklahoma, but more generally on the relationship between statehood and Indian tribes and Indian law. In recognition of 100 years of statehood in Oklahoma, the articles presented here examine aspects of what statehood has meant for Indian tribes.

The first article, by Professor Stacy Leeds, examines a moment in history when Congress, at the urging of leaders of the Five Tribes and the voters of their territories, considered creating the State of Sequoyah.[5] The proposal would have created the State of Oklahoma from the Oklahoma Territory, and transformed the Indian Territory, home to the Five Tribes and the seven small reservations of the northeast corner, into a separate state. In *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, Professor Leeds considers what the Five Tribes and their governments would be today if they had been incorporated into the State of Sequoyah. She ultimately concludes that what seemed at the time to be a defeat for tribal interests, in fact had the unintended consequence of preserving those governments and paving the way for their modern strength.

Professor Robert Anderson moves us from Oklahoma to Alaska, the forty-ninth state. In *Alaska Native Rights, Statehood, and Unfinished Business*, Professor Anderson traces the status of Alaska Native peoples and lands from the American acquisition of the territory from Russia, through the pre-statehood period, to Alaska's admission to the Union in 1959.[6] He discusses the increasing imposition of non-Native governance and "the inevitable collision" between statehood and Native claims to lands. The article then turns to Congress's solution to the competing interests: The Alaska Native Claims Settlement Act (ANCSA) of 1971. Professor Anderson examines the impact of ANCSA, and its interpretation by the U.S. Supreme Court, on Alaska Natives. ANCSA may have preserved a substantial land base for Alaska Natives, but the Court has ruled that the lands are not Indian country.[7] Without Indian country, the territorial reach of Alaska Native governments is at issue. Professor Anderson concludes that ANCSA was a land settlement, and was not intended to impact Native sovereignty or Native hunting, fishing, and gathering rights. Ensuring and protecting those governmental and subsistence rights remains the "unfinished business" of Alaska.

In *The Philosophy of Colonization underlying Taxation Imposed upon Tribal Nations within the United States*, Professor Angelique EagleWoman focuses primarily on state taxation.[8] She traces the various lines of U.S. Supreme Court cases addressing state taxes on Indians and Indian tribes, Indian lands and properties, and transactions within Indian country. She argues that the Court's approach to state taxation furthers the colonial underpinnings of the federal-tribal relationship. While the Court has continued to recognize vestiges of the historical tribal sovereign immunity from state taxation, it

5. Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 Tulsa L. Rev. 5 (2007).

6. Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 Tulsa L. Rev. 17 (2007).

7. *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

8. Angelique A. EagleWoman, *The Philosophy of Colonization underlying Taxation Imposed upon Tribal Nations within the United States*, 43 Tulsa L. Rev. 43 (2007).

has increasingly limited tax exemptions to trust lands and to tribes and tribal members acting on trust lands. Professor EagleWoman contends that this increased state taxation transfers tribal wealth to states, adversely impacts tribal economic development, and depletes the means for tribes to take care of their people. She likens the tax situation to tribute exacted by a colonizing power.

Finally, in a provocative essay, Professor Matthew Fletcher questions the continuing validity of the foundation principle that states have no role in Indian affairs.[9] In *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, he takes on the classic model of tribes and states as existing in perpetual conflict. Professor Fletcher examines the origins of the basic principle—that states have no authority in Indian affairs without the express consent of Congress—within the historical and political context of the 18th and 19th centuries, and explains how the reasoning behind that principle is no longer valid in light of today's political realities. Professor Fletcher does not argue that states have a right unilaterally to extend their laws into Indian country. Instead, he advocates that tribes and states should be able to freely enter into cooperative intergovernmental agreements with one another without the consent of Congress and without running afoul of federal law.

In addition to the symposium articles, this issue of *Tulsa Law Review* includes three student pieces on topics of Indian law. University of Tulsa second-year student Melissa Taylor addresses an aspect of state-tribal relations under the Indian Gaming Regulatory Act (IGRA).[10] IGRA authorizes tribes and states to enter into negotiated compacts for Class III gaming activities, so long as the state "permits such gaming" by any one for any purpose.[11] Federal courts are divided over the proper interpretation of the statutory phrase: Most take a game-specific approach, requiring the state to permit the exact game that the tribe wishes to offer. In *Categorical vs. Game-Specific: Adopting the Categorical Approach to Interpreting "Permits Such Gaming"*, Ms. Taylor advocates the adoption of the other, categorical approach: That states need only permit the type of gaming that the tribe wishes to offer. She argues that the categorical approach is consistent with the plain meaning of the statute, is more attuned to the legislative intent of permitting only a limited role for the states in Indian gaming, gives effect to the canon of construction that ambiguities in Indian legislation should be resolved in the tribes' favor, and promotes the goal of IGRA to strengthen tribal economies and governments.

University of Tulsa second-year student Sarah Goss explores issues of tribal membership.[12] Building on recent news reports that some Indian groups not recognized by the federal government were selling tribal "memberships" to unauthorized aliens with the assurance that the memberships would permit the aliens to remain in the United States legally, Ms. Goss addresses the question of whether an Indian tribe can extend

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9. Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 Tulsa L. Rev. 73 (2007).

10. Melissa S. Taylor, Student Author, *Categorical vs. Game-Specific: Adopting the Categorical Approach to Interpreting "Permits Such Gaming"*, 43 Tulsa L. Rev. 89 (2007).

11. 25 U.S.C. § 2710(d)(1)(B) (2000).

12. Sarah L. Goss, Student Author, *Pulling the "Plenary Authority" Card: The United States' "Get Out of Jail Free Card" in Membership Disagreements with Indian Tribes*, 43 Tulsa L. Rev. 119 (2007).

tribal membership to unauthorized aliens. In *Pulling the "Plenary Authority" Card: The United States' "Get out of Jail Free Card" in Membership Disagreements with Indian Tribes*, she concludes that, because the determination of tribal membership is within the authority of the tribes, a tribe may extend tribal membership to unauthorized aliens, but that the tribal membership would have no effect on the aliens' status vis-à-vis the United States. She argues, however, that any tribal attempt to extend membership to unauthorized aliens would invite the federal government to assert its plenary power over Indian affairs and take control of tribal membership decisions.

Finally, Hamline University School of Law third-year student Ann Murray Haag looks at federal government policies toward Indian families.[13] In *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, she begins with an examination of the shameful assimilation-era use of boarding schools as a tool to remove Indian children from their families and cultures and acculturate them into American life, discussing the effects of the boarding school program on the children, their families, their tribes, and their languages. Ms. Haag then considers two more recent analogues: The widespread mid-20th century practice of social workers removing Indian children from their families, based largely on cultural misunderstandings of parenting practices, and the federal Temporary Assistance to Needy Families (TANF) program, which has been significantly less successful in Native American communities than among other population groups. In conclusion, she notes two potential solutions that are grounded in greater awareness of tribal culture: The Indian Child Welfare Act of 1978, and the congressional authorization for Indian tribes to develop tribal TANF programs.

13. Ann Murray Haag, Student Author, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 Tulsa L. Rev. 149 (2007).