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## 2018 James R. Browning Symposium Keynote

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# KEYNOTE

## THE RESTATEMENT OF THE LAW FOR AMERICAN INDIANS: THE PROCESS AND WHY IT MATTERS

Matthew L.M. Fletcher\*

I'm here to talk about the Restatement of Indian Law or, as it is called currently, the Restatement of the Law of American Indians.<sup>1</sup> My lovely wife, Wenona Singel,<sup>2</sup> and I are co-Reporters along with a good friend of ours named Kaighn Smith.<sup>3</sup> This project has been ongoing since at least 2012, so it's been going on for a long time and we're a few years away from completion—assuming we get that far. I'm going to talk a little bit about what restatements are, what the process is like, and I'm going to do so in a way that I hope is not ridiculously boring. It is an incredibly sober and important activity, so to begin let me tell you my personal favorite story about this process.

Years ago, we had an important piece, a portion of chapter one, formally approved by the Council of the American Law Institute, or ALI.<sup>4</sup> The ALI's Council—I jokingly refer to them as kind of like the Illuminati of the law. They sit in a dark room, just like this one, and there cannot be more than 40 of them. I wish they would come in wearing hoods and holding little candles. Anyway, you know how you feel like when you get off a

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1. Am. Law Inst., *Restatement of the Law: The Law of American Indians*, ALI.ORG, <https://perma.cc/WP9A-92AY>; RESTATEMENT OF THE LAW OF AMERICAN INDIANS (AM. LAW INST., Tentative Draft No. 2, 2018).

2. Associate Professor of Law and Associate Director of the Indigenous Law & Policy Center at Michigan State University College of Law.

3. Attorney at Drummond Woodsum, Portland, Maine.

4. RESTATEMENT OF THE LAW OF AMERICAN INDIANS, INTRO. *ii*. (AM. LAW INST., Tentative Draft No. 1, 2015) [hereinafter RESTATEMENT OF THE LAW OF AMERICAN INDIANS, Draft 2015].

rollercoaster or a bad airplane ride and you're just elated with adrenaline? We felt that way after getting this piece approved.

At a reception afterwards, I was talking to Seth Waxman, who is a former Solicitor General, a member of the ALI Council. He was congratulating me. He introduced me to another Council Member, who worked in the General Counsel's office for the Walt Disney Corporation. I don't know how to behave in those circumstances. I said, "Walt Disney, huh? Look, I've got an eight-year-old who's at home right now wondering why Spider Man's not in the Avengers." And she says, "I'm working on it." And now you know, Spider Man is in the Avengers. Because of her, because of me.

Anyway, a question came up this morning, and it's one that we fought a lot of battles over during the approval process. Someone asked, who is, or what is, an Indian?

The first thing I want to do is point you to the ALI website.<sup>5</sup> You have to be a member of ALI to look at all these documents; you have to get a password or pay money. There is a list of PDFs of all the drafts that we put together over the years.<sup>6</sup> Our first draft, from January 2013, begins with chapter one, section one, "What is an Indian?"<sup>7</sup>

"Indian" is a person who meets a statutory or common-law definition of "Indian."<sup>8</sup> Isn't this kind of circular? Yes, it is.

This was the definition in the first rough draft we presented to the Advisers. The Advisers are the true experts in the field. Earlier I mentioned the ALI Council; they're generalists. There is also the ALI membership, a collective group of about four thousand people, all lawyers. But the Advisers don't actually have to be members of the ALI. They are about three or four dozen people that I help select. About a third of them are supposed to be law professors, another third are supposed to be state or federal judges, and a third are supposed to be just practitioners, loosely speaking. We get these people together—they're obvious people—Judge Canby,<sup>9</sup> Kevin Washburn,<sup>10</sup> Angela Riley<sup>11</sup> from UCLA Law School, people that are willing and interested show up to meetings and read through pages of dense facts and try to make sure that it is all correct. And our first question in response to "Who is an Indian?"—isn't that kind of circular? Well the an-

5. Am. Law Inst., *The American Law Institute*, ALI.ORG, <https://perma.cc/MNE9-LTRL>.

6. Am. Law Inst., *supra* note 1.

7. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 1 cmt. b (AM. LAW INST., Discussion Draft 2013) [hereinafter RESTATEMENT OF THE LAW OF AMERICAN INDIANS, Draft 2013].

8. *Id.* § 1(d).

9. Senior Judge, United States Court of Appeals for the Ninth Circuit (Appointed 1980; Senior Status 1996).

10. Professor of Law and N. William Hines Dean at University of Iowa College of Law.

11. Professor of Law; Director of the Native Nations Law and Policy Center; and Director of J.D./M.A. joint degree program in Law and American Indian Studies at UCLA School of Law.

2019 *RESTATEMENT OF THE LAW FOR AMERICAN INDIANS* 3

swer to that is, of course it is. But how do you define Indian? How do you do so in a way that is useful for the purpose of the Restatement?

The Restatement is supposed to be law so encased in concrete that it cannot be disturbed, so uncontroversial that no one in their right mind would disagree or argue that it is incorrect. It is the consensus of the vast majority, the great weight of the majority. Our first attempt, really, was just trying to determine what the law was. And the definition of Indian was completely circular.

So we tried. As a preliminary matter to help readers understand the process, here is how the ALI is set-up. The body of text that conveys the majority rule for the application of certain laws is called “black letter law.” Underneath the black letter are comments. Comments are descriptions that are helpful, but don’t rise to the level of black letter law. This is where we might observe if there is a conflict in the law. We might say that this definition of an Indian is not universal. The classic Restatement provision is to say, “the majority of states adopt this common rule of law.” Thirty states say yes, twenty states say no; the American Law Institute makes a statement that they choose the majority states’ rule as the federal rule. You get to explain all this in the comments.

Our next attempt at a definition didn’t go over very well. We went too big. It looked too much like a comment and not enough like black letter law. We ratcheted it back considerably. We also tried putting all of the definitions in one section, because in most restatements, according to the ALI Council and to the membership, definitions are easily contained in one section. That is why readers will see “Indians” in the definition section. And that gets us back to where we started.

Our next attempt went back to the circular definition.<sup>12</sup> And we were told we had to do more than that. So we did. And this time we actually got one approved by the Council. The ALI Council said, “Yeah, that’s fine. Just stop.” So we did.

A word on the approval process: First you go through the Advisers—the super intelligent, specialized people who are true experts in the field. And they help you. The discussions you have are just incredible. We worked with government attorneys who could help us figure out the federal government’s position on most of these topics. We had people from the agencies and academics who looked into the historical context and read all the old cases. You have incredible discussions.

Once the Advisers agree, you still have to get two more approvals: The ALI Council and the ALI general membership. Again, the ALI Council, they’re generalists. It is a lot of big names, circuit judges, and law profes-

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12. *RESTATEMENT OF THE LAW OF AMERICAN INDIANS*, Draft 2013, *supra*, note 7, § 1(d).

sors at schools that don't know my name, from places like Pennsylvania and Harvard. The ALI Council gives you some suggestions, some recommendations, cleans it up a little bit and approves it. Once you get past them, then you have to go to the ALI membership. Now, you are in a much bigger room, probably in a hotel in D.C. or San Francisco. Every year the general membership meets and there is upward of a thousand people at any given moment. Depending on the time, you may have several hundred people, depending on the point in the annual meeting's agenda.

It's a formalized process, though anybody can ask you a question. My favorite question of all time was from William Webster<sup>13</sup> of Washington, D.C. He asked a question, he was just curious about a particular revision, and where it came from. I looked him up later. It turns out that Mr. Webster was the director of the CIA.

Through this process we finally ended up with a definition. We started with a circular definition and we ended with something less circular, but we went through virtually every single incarnation of "What is an Indian" that you could possibly think of. We fought, tooth and nail, over what should be included. I don't know how many hours we spent discussing whether to include the word "member" or "citizen." There are people who feel strongly that it can't be "citizen" because Indian tribes are not sovereign nations, and so Indians must be "members." Then there are the people who can't say "member" because Indians are citizens of tribes, states, and nations and no one calls themselves a member of the United States. Ultimately, we just went with "member or citizen." But we assure you there are people in ALI who are never going to be satisfied about that. It should be one or the other, not both. It's frustrating. We did our best.

You probably want to know where the really hot controversies were. Who is an Indian or what is an Indian was not a hot controversy, it was more a search for clarity. But there are hot controversies. I think the one that has possibly frustrated me, personally, the most, is the question of phraseology. Every time we do a draft, I have to go through and cut the phrase "trust obligation" or "trust duty" or "trust responsibility" because many Advisers insist that there is no such thing as a "trust obligation," a "trust duty," or a "trust responsibility" because those three phrases denote enforceability.<sup>14</sup> And the trust relationship cannot be enforced in court against the federal government.<sup>15</sup>

From the Department of Justice's point of view, it can't be enforced, and it will challenge tribes on this issue and does not acknowledge anything

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13. Director of the Central Intelligence Agency, 1987–91.

14. *See, e.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476–79 (2003).

15. *See, e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

2019 *RESTATEMENT OF THE LAW FOR AMERICAN INDIANS* 5

about an enforceable trust responsibility relationship or trust duty, or whatever. So, we use the “trust relationship.”

There are two key sections in the Restatement that deal with trust. One is the general trust relationship, the relationship between the United States and Indian tribes.<sup>16</sup> This originates from the treaties and contains a duty of protection, but it also plays a role in the federal recognition process.<sup>17</sup> The United States agrees to an administrative or legislative recognition process to take the Indian tribes under the United States’ duty of protection, which is a term of art contained in the earliest Indian treaties.<sup>18</sup> This is actually a robust source of congressional plenary power.

The Department of Justice loves to emphasize the sources of congressional power over Indian affairs. The attorneys for the federal government argue against claims attempting to enforce a trust responsibility against the United States. And a common argument for the United States is an appeal to the plenary power as a means of getting around enforcement of some type of trust “obligation.” But if the United States Supreme Court is going to adopt a constitutional argument in which Congress has the power to do something anywhere, it stops all kinds of litigation from moving forward. Because of plenary power, the department can argue that this general trust relationship arises just when Congress chooses it to. Essentially, this renders the trust relationship unenforceable. When Congress chooses to, it has robust power to deal with Indian affairs, to legislate Indian affairs; same with the executive branch.

Now the other part is the albatross on my back. It’s the one that says, “If the United States has a trust duty, can you sue them for money damages?” That’s the one that people will probably be interested in. And you have people like Reid Chambers<sup>19</sup> who have litigated Supreme Court cases;<sup>20</sup> and you have people like Ed Kneedler who have litigated and won Supreme Court cases in which the Supreme Court rejected money damages for Indian tribes.<sup>21</sup> And the kinds of things that the Supreme Court allows tribes to sue for money damages are so indistinguishable from the cases, unless they say so. These types of cases make it difficult to burst out an

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16. *RESTATEMENT OF THE LAW OF AMERICAN INDIANS*, Draft 2015, *supra* note 4, § 4 cmt. a.

17. *Id.*

18. *See, e.g.*, Treaty with the Shawnee, art. 5, Shawnee Nation-U.S., Jan. 31, 1786, 2 *Indian Affairs: Law and Treaties* (Charles J. Kappler, ed., 1904), available at <https://perma.cc/RH8L-K8AS>; Treaty with the Creeks, art. 2, Creek Nation-U.S., Aug. 7, 1790, 2 *Indian Affairs: Law and Treaties* (Charles J. Kappler, ed., 1904) available at <https://perma.cc/ZU59-TFAD>.

19. Associate Solicitor for Indian Affairs of the United States Department of the Interior, the Department’s chief legal officer with responsibility over Indian and Alaska Native matters, 1973–1976.

20. *See, e.g.*, *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003).

21. *See, e.g.*, *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009); *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755–57 (2016).

actual principle that we could put in for that type of law. And about this we've been—fighting is not the correct term—“discussing” in a spirited and polite way. An experience it was for me, but I've given up on Section Ten.<sup>22</sup> At least right now, but we're a few years away, so it could happen.

I've also actually created a subcommittee of people, of about four or five people, and they hash things like this out. Maybe even in six months or so they have the problem solved and they go to the draft, and they argue about a couple of words here and there, and then they agree at six months to meet again and do the thing all over again. And I appreciate that they keep doing it, and I hope they come up with a consensus one day. And they come back to me, and we can take it for every word to the Council and the membership, and get this thing done; we need to get it done because it is true. There are times when Tribes have sued the United States and said, “Hey, give me money damages, it's happening.”<sup>23</sup> But the interests at play are really, really contested. That's just one example of a truly hot topic.

What I would like to do now is—if you are interested, and I hope you are—have you ask me some questions. Anything about process and about substance. I'm happy to discuss as much as I possibly can. It looks like we've got a question from Professor Skibine.<sup>24</sup>

Professor Skibine: What happens when the law changes at the Supreme Court? For instance, if the “trust duty” gives rise to a rare decision, even though I think that so far it has had a substantial, negative set of repercussions on the trust responsibility—would you have to go all the way back down to step one?

Answer: That's a really good question. The fact that we are doing an Indian modern Restatement has actually been sort of an existential crisis for the American Law Institute. The origins of the Restatement projects were to take common law—a law that judges have made and is usually stable, that is unmodified. And the first place, they collected all of the major arguments, put them together and that's about it. And then identify a black letter—what should be the proper rules.

There's that issue with common law here—there isn't really any. It's almost all derived from some statute. Now Indian law tends to be vague and ambiguous. There's plenty of what you could call “common law” that comes out in an interpretation of that. The other thing that is something the ALI has been thrown into within the last decade or so is getting into doing these Restatement projects on laws that come out of statutes. It's like employment law: mostly statutes of law at this point. So long as we can show

22. RESTATEMENT OF THE LAW OF AMERICAN INDIANS, Draft 2015, *supra* note 4, § 10 cmt. a.

23. *E.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983); *United States v. Sioux Nation*, 448 U.S. 371 (1980).

24. Professor of Law, S.J. Quinney College of Law at University of Utah.

2019 *RESTATEMENT OF THE LAW FOR AMERICAN INDIANS* 7

the readers that there are statutes that tend to have lots of opportunity for judicial interpretation, they're fine with it. It looks like common law, maybe not as satisfactory.

Constitutional law has much trickier questions than simple statutes or interpretation because, first of all, there's only one force really that engages in the constitutional analysis that anybody cares about. I mean, federal and state court judge opinions are important and add a few critical flavors in the decisions, but ultimately, it's only one court. There are no splits in authority for the Supreme Court. They honestly just agree with themselves and a split is not possible. You can't announce that even if it's true.

So yes, the law changes. I had a smooth session in the very last draft we put in. I mean, look at ICWA.<sup>25</sup> Read the section on that; it's constitutional. As of yesterday, in Texas anyway, it's not.<sup>26</sup> Alright, so they're not going to approve that section until that litigation is concluded.

The way we get around something more akin to that would be like the *Jicarilla* case.<sup>27</sup> It's a victory for the United States against Indian tribes, for those of you who don't know about the case, but it reaffirmed the existence of the general trust responsibility, or relationship I should say, that Indian tribes have with the United States, but with a little bit of flavor around an enforceability question. There's a rule of thumb that nobody likes to admit when it comes to a Restatement. That rule of thumb is that everything is correct on a certain level of generality. If we say something kind of specific in one of the comments, and then the Supreme Court says that statement will prove them wrong, we can just scuff that off and say there are still principles within the *Jicarilla* itself, which for tribal interests were really quite significant.<sup>28</sup> There's a whole bunch of that stuff in there that's really quite helpful, and it re-affirms that there is a general trust responsibility.

But you know what also makes me irritated by this? When the Supreme Court says: "Trust, trust obligations, trust responsibility, sometimes trust relationships too."<sup>29</sup> But we're not allowed to actually use that phraseology in our Restatement or there will be pitchforks and swords coming out. On a level of generality, that's how we deal with most cases. You'd be surprised how few cases really have to go up to the black letter.

Professor Ablavsky:<sup>30</sup> I was curious from your conversations with the "Illuminati" as compared with the general community. Both of what your

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25. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2012).

26. Order Partially Granting Plaintiffs' Motion for Summary Judgment at 47, *Brackeen v. Zinke*, <https://perma.cc/G7NN-PB4W> (N.D. Tex. Oct. 4, 2018) (No. 4:17-cv-00868-O).

27. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

28. *Id.* at 155–56.

29. *See, e.g., United States v. White Mountain Apache Tribe*, 537 U.S. 465, 471, 477, 485 (2003).

30. Associate Professor of Law, Stanford Law School.

senses of knowledge are of Indian law in the general community, and then perceptions of Indian law by people who are non-Indian?

Answer: That's a great question.

The first is historically you see a white, male group. Over the last couple of decades, not really even that long, they've made a concerted effort to try and diversify; add women, add people of color, add younger people. So that's part of the focus. The fact that they have an Indian law project is part of that, right? They just stuck to "we're just going to do this thing."

Lately, students are really dedicated to projects like ours in the culture of the ALI—always, and I mean always. That sort of translation in that interest within the membership itself is interesting. The ALI Council is somewhat similar. Many of them are people who have read the Supreme Court cases. You know, they send it back to me. It was part of their practice, so they are very close to it. There are others who take the process very seriously, even if they don't know the field. They ask the kind of questions where they're just making sure that this is vigorously vetted by the right people, or that it's good enough for the ALI. There are others who used to ask questions like, "how do you know this?" Very interesting questions.

Yes?

Prof. Johnstone:<sup>31</sup> So, one of the interesting challenges is that this Restatement comes really late, if you think about the Restatement of Torts, the Restatement of Contracts, for example. There wasn't this thing called "law" out there, and then we updated it, and this kind of picks up on Prof. Skibine's observation. The fiction of the Restatement is that it's a snapshot of this ever-lasting black letter law. What's the role of history in these discussions, which plays such an important role in Indian Law, but generally doesn't play as much of a role in the Restatement process itself because it's fiction that it is just the "eternal law."

Answer: Let's talk more about that. I mean that's really critical. There are limited projects, there are restatement projects, there are principles projects. And those are—there are parts of the law that the ALI thinks are way too dynamic to actually be able to set out, maybe too few or not enough judicial council members or international laws. Take international law for example, it is just too up in the air. So, what you do is you hire people like us and secure your borders, but for a principles project, that's more like a legal treatise and you just say what you want. You know, and ALI just likes having a product. The ALI likes to have this discussion and be a part of the development of this law. But the ALI also knows that this is

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31. Professor of Law and Affiliated Professor of Public Administration, Alexander Blewett III School of Law, University of Montana.

2019 *RESTATEMENT OF THE LAW FOR AMERICAN INDIANS* 9

kind of like a principles project, which means that it wouldn't have the same "oomph" that a Restatement would. So at the very beginning, the first comments we received were about whether this should be a principles project or a Restatement project. And as Reporters, we wanted it to be a Restatement because that's really more influential. And in 2012 they made that decision—that this would be a Restatement.

For the first couple of years there was some pushback on that, but now it's becoming clearer that there are some parts of Indian law that are timeless. Because of that, we're going back to those foundational principles. In fact, one of the guiding principles of ALI is that some disagreement of the law is inevitable, but the ALI can say "what the law should be." And in Indian law, since the normative stuff affects the descriptive stuff, we have a little room—not much—to play with the normative stuff. We don't have a ton of leeway to play with it because, as the ALI frequently reminds us, the Supreme Court could come in and change something pretty dramatically. In light of that, since the ALI likes having a project and we like having a Restatement rather than a principles project, we tell them that in 20 years if something changes we'll do another Restatement, and they're happy with that.

Part of this is power politics that just comes with having a Restatement project. That means that there's a group of judges showing up—they don't say a lot because judges have to be careful about what they commit to—but they show up and say, "We desperately need this project." They love that this project exists, and they want to have it. I love those interactions with the judges; they're terrifying, but I love them.

Audience Question: How does the Restatement live in a world where there's already Canby's *Nutshell*<sup>32</sup> and Cohen's *Handbook on Federal Indian Law*?<sup>33</sup>

Answer: Thank you so much for asking that question. At a superficial level, the answer is that we kind of sit in the middle. The big difference for us is that our advisers are people who are advocating for both state and tribal interests. The ALI made an effort, and I agree with them, to get as many state people as possible on board. For example, we've got people like state court judges and solicitor generals. We have their views on all of this stuff. And that's not something that always happens with the other sources. And you'd be surprised how much they coalesce around positions.

Again, I have to emphasize the importance of the judges there. Whether they be more on the progressive side or more on the conservative

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32. WILLIAM CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* (1981).

33. FELIX COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* (1942).

side, their biggest impact is keeping us honest. Those judges are absolutely critical. And that's the difference.

In short, the difference—the big difference—between our project and those treatises is the analysis. It's important to acknowledge that you just can't beat the Cohen Handbook,<sup>34</sup> that's why nearly every major federal Indian law case cites to it. But what it's missing is the analysis. And we have the analysis, and we have judges to help us say whether our analysis is useful.

This is an important and ongoing discussion, and I look forward to hearing more of your comments as we work through the Restatement. As for now, I think people are ready for a break, so thank you very much for having me speak today.

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34. *Id.*