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CONSTITUTIONAL SHADOWS: THE MISSING NARRATIVE IN INDIAN LAW

2005 DISTINGUISHED LECTURER
FRANK POMMERSHEIM

FRANK POMMERSHEIM:¹ Thank you for that kind introduction. It's a delight to be here. I was here ten years ago, and kind of reminiscing with a few people what it was like ten years ago, mainly taking into account the fact that ten years has gone awfully quickly. There's been a tremendous level of development in Indian law, and so I'm excited to be here to talk about a few of those things.

The title of my presentation is called, "Constitutional Shadows, the Missing Narrative in Indian Law." And what I want to develop today, and this part of a larger work in process, is to try to make the case that there really is a constitutional narrative in Indian law. But it's oftentimes very shadowy, but it's important for us to kind of realize that indeed there are some constitutional threads in Indian law. A number of the speakers this morning alluded to the fact that there were or weren't such constitutional threads.

I think it's important to kind of identify and recapture this narrative for three particular purposes, which underlie my talk today. Those three purposes are one, I think it's helpful if I can identify a constitutional narrative, because it will allow us to better communicate with people outside the field of Indian law. Because sometimes I think they feel that Indian law is a little bit too hermetic. It's too inward looking. We have all of these unique special problems. We try to communicate to other scholars in other fields of the law and we never are able, I think, to really successfully communicate because Indian law tends to be too esoteric for people who teach and

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practice outside the field of Indian law. Because my own experience, if you talk to the people at your own law schools where you're a scholar or whether you're a student and ask the people who teach constitutional law, you ask them what they know about Indian law and how Indian law and Indian tribes fit into the constitutional scheme, I would predict they just draw a blank.

If you look at the leading constitutional law textbooks, none of them really talk about Indian law. You look at the leading treatises in constitutional law they don't really saying anything about tribes. I think that's very, very unfortunate. So I want to kind of address this theme for that purpose, and then for two other additional purposes, which perhaps are more important. And one, is that I'm going to suggest that we are entering a new phase in Indian law. That I think we're leaving the period of self-determination behind and we're entering a period which I call *constitutionalizing Indian law*. I think that's what the Supreme Court is going to be about in the future, is constitutionalizing Indian law. And I'll explain in a little more detail what I mean by that, and I think if I'm correct about that, it has very serious implications for tribes in the larger sense, and also in the context of some very important practical issues that I think are going to be facing tribes in the context of this new theme of constitutionalizing Indian law.

To kind of set that up, I want to talk about my own thinking regarding what exactly was the organization of the Constitution at the time it was adopted, vis-a-vis Indian tribes, because I think actually, the Constitution does reflect a certain view of tribes and tribal sovereignty that we have kind of lost sight of. I think it's important and significant to go back to that. After doing that I want to look at three significant historical times in which the Supreme Court, sometimes in a single case, sometimes in a group of cases, kind of examined, sometimes not even knowing that they were examining it. What is the status of the federal sovereign in a constitutional sense? What is the sovereign, what is the notion of states as a sovereign in Indian law from a constitutional perspective? Thirdly what is the view of tribes as sovereigns themselves from a constitutional perspective? And to kind of indicate and share with you my thinking about how the Supreme Court has kind of addressed these issues, very seldom directly, hence the term shadowed, it's right there even though the court doesn't really confront it. Then I want to kind of draw those things together and take, as a primary case, *United States v. Lara*. Because in *United States v. Lara*, at least the part I want to focus on, is really ushering in this new era of constitutionalizing Indian law and kind of testing my thesis out with all of you. So if you're going to criticize it, you know, please be kind. I am a guest

after all. Even though I'm an academic, I have a tender psyche, so just keep those things in mind.

Okay, if we look at the structure of the Constitution as originally adopted, what do we see? We see the conventional things. I think how constitutional law is generally taught under the notion that the Constitution really takes care of two primary functions. It establishes a new central government, a central government of enumerated powers, and parcels out those enumerated powers to the executive branch, the legislative branch, and to the judicial branch. But it also sets up a very significant two-sovereign model dealing with the federal sovereign and state sovereign.

Now what are the elements in the Constitution that really deal with the relationship of the federal sovereign to the state sovereign? Well, I think we have the Interstate Commerce Clause, the Full Faith and Credit Clause, the Supremacy Clause, the Tenth Amendment, and the Eleventh Amendment. I think those are the critical elements in the United States Constitution which really orient the relationship between the federal sovereign and the state sovereign.

I think for most people, that's the quick view of the United States Constitution. But I want to raise the question that I indicated before — where is the tribal sovereign? Is the tribal sovereign actually present at the origin of the Constitution? My argument is that it indeed is.

And where is it? Well, I think it's located primarily in two places. It's located in the Treaty Making Clause and it's located in the Indian Commerce Clause.

Well, why? I think the why is very easy to explain but we seldom kind of think about it, and we seldom, I think, teach this. Step back for a minute and ask yourself what was the major kind of activity between Indian tribes and the thirteen colonies and eventually the United States government? I think they engaged in two major activities which the Constitution responds to. The two major activities that Indian tribes engaged in with the United States government prior to and at the time the Constitution was adopted were commerce and war. And if those are the two primary activities that Indian tribes engaged in with the colonies and with the United States government well, how did the Constitution respond to the notions of commerce and war?

The notion of war slash diplomacy is dealt with through treaty making. The primary way that the United States dealt with the Indian tribes in the context of war was through treaty making.

What about other primary activity that tribes were engaged in with the colonies, with individual non-Indians and eventually with the federal government? Well, it's commerce. One of the things that concerned the

founding fathers was, in the context of commerce, was not that the federal government had the ability to regulate the commerce of tribes. It was basically to array the power to engage in commerce with tribes, because the Indian Commerce Clause talks about the ability to regulate commerce with Indian tribes. The function of the Indian Commerce Clause, from my point of view, was to deal with who was going to have the authority to deal with Indian tribes in the context of commerce, the federal government or the states. That was where competition was. It's one of the issues that the Constitution actually looks at. Because just as it was parceling out the power between the federal sovereign and the state sovereign in the other areas that I mentioned, it also did it in the context of dealing with Indian tribes. That is the function of the Indian Commerce Clause. If you go to the Articles of Confederation, that's actually another issue that's dealt with in the Articles of Confederation.

Article 9 of the Articles of Confederation was another attempt to kind of parcel out who's going to have the ability to deal with tribes. The thinking was it can't be both the federal government and the states to have unchanneled authority to deal with Indian tribes. You just couldn't really hold the republic together if both the federal sovereign and individual states would have unchanneled ability to interact with tribes. So the notion was, although it failed in Article 9 of the Articles of Confederation, because the language in that particular article of the Articles of Confederation seemed on one hand to place that authority in the federal government, but then there's a proviso clause at the end that stated the federal government couldn't interfere with state sovereignty. So that attempt in the Articles of Confederation to deal with the relationship of the federal sovereign to the state sovereign vis-a-vis Indian tribes, kind of failed.

The Indian Commerce Clause is really the response to that, saying that one of the things in the Constitution that has to be parceled out would be the ability not to govern tribes, but to interact with them. My view is that the function of the Indian Commerce Clause was to say that in the two sovereign model in the United States Constitution the primary, if not sole, sovereign that has authority to interact directly with tribes is the federal sovereign and that the states have no authority.

One of the readings in, for example, *Worcester* is basically just what I've identified. Although in *Worcester* the court really doesn't elevate the constitutional elements as much as they should, from my point of view. But I think *Worcester* kind of upholds and proves the thesis that I've identified. So to me it's important to go back to the beginning, or the beginning vis-a-vis the Constitution. Because the Constitution does deal with the relationship of tribes to this new emerging sovereign, in the context of war and

commerce through the treaty making power, and through the Indian Commerce Law.

But recall also, we sometimes lose sight of this, maybe necessity makes us lose sight of this, that tribes or sovereigns were outside of the Constitution. So one of the questions we have to ask ourselves today, and I hope to develop it, is how do Indians get inside of the Constitution when they started outside of the Constitution? Because that's the structure of the Constitution as it was originally adopted.

Now what I want to do is to look, as I've indicated before, at three snapshots of the Supreme Court coming to grips with or not coming to grips with very adequately in a constitutional sense about exactly what was to be the role of the federal sovereign vis-a-vis Indian tribes in a constitutional sense. What was to be the role of the states vis-a-vis tribes in the constitutional sense, and what was to be the role of tribes themselves as a constitutional entity? To talk about the role of the federal sovereign the case, I want to use, probably not surprising to most of you, is *Lone Wolf v. Hitchcock*.

Lone Wolf v. Hitchcock, often aptly described as the *Dread Scott* of Indian law, brought Indian law to an initial crossroads, because, as I indicated, the structure of the Constitution and the reality at the time the Constitution was adopted was that tribes were outside the Constitution. That was okay, as far as I can tell, with everybody, that the federal government didn't want the tribes inside the Constitution and the Tribes didn't want to be inside the Constitution. So actually, I would argue at the time the Constitution was adopted it kind of met the needs of both sides and met their own self-perceptions about where they stood as sovereigns.

But once the Constitution was adopted, history didn't stop. It kept moving along. One of the things that kept moving along was this kind of gradual movement of tribes from outside of the Constitution, outside the landscape of the United States, socially outside the structure of the Constitution, they're becoming more and more absorbed into the zone of federal authority, with no one actually paying that much attention to it. And so one of the questions that eventually comes up in *Lone Wolf*, can Congress unilaterally abrogate treaties? And actually in a sense a little bit more important, could Congress actually pass the General Allotment Act?

As one of the speakers indicated this morning, you have to be able to point to someplace in the Constitution that authorizes the activities of any branch of the federal government, here being Congress. Well, how could you justify the General Allotment Act? How could you justify the Dawes Severalty Act based on the structure of the Constitution and tribes being outside the structure? Could the Indian Commerce Clause do that? And the

answer is no. And the court didn't even try in *Lone Wolf* to say that it could be pulled within the Indian Commerce Clause. So the court developed this notion of plenary power.

Of course the Indian Commerce Clause wouldn't provide ability to unilaterally abrogate treaties. It wouldn't provide the ability to pass the General Allotment Act and take land away from tribes inside of their sovereign territory, and parcel it out to non-Indians who were not citizens, and were not invited by the tribe to come on the reservation.

One of the ways of thinking about *Lone Wolf* is that it's a fork in the road and the fork is the United States going to depart from the Constitution or is the United States going to say no, we're still within the fabric of the Constitution? Therefore, it would have to strike down the General Allotment Act as being beyond the power of Congress to enact such legislation, given the structure of the Constitution. But in *Lone Wolf* the court doesn't even consider that issue. They just kind of leap ahead, and they leap outside of the Constitution.

I think, as most of us in the field know or think, is that *Lone Wolf* marks when the United States leaves the constitutional compact, and creates this doctrine of plenary power. Because I think it's very difficult, if not impossible, to identify a source of plenary power in the text of the Constitution, or in the understanding that all the players brought to the adoption of the Constitution. So *Lone Wolf* for me in the context of this constitutional narrative is when the United States really leaves the Constitution in terms of thinking of how it's going to interact with tribes. And we've never been able to recover from that.

How many times has the Supreme Court struck down anything that Congress had enacted in Indian affairs? Never. I mean, a few isolated situations that deal with individual Indians, but never in the tribal context.

Well, why? Because there's just this ultimate kind of fallback of plenary power that Congress has this kind of untrampled authority. And of course, that violates the basic precept of the Constitution and having a federal government of limited enumerated powers. Because we know, if you look at the enumerated powers, we just have the Indian Commerce Clause [and] we don't have anything beyond that.

The *Kagama* case just prior to *Lone Wolf* rejected the ability of the Indian Commerce Clause to support the Major Crimes Act. There, the court actually realized that there was a constitutional limitation. But instead of saying you can't justify this under the Indian Commerce Clause, therefore it has to be struck down, the court's decision was a precursor to a full leap outside the Constitution. The court in *Lone Wolf* just reached into this notion that the trust relationship somehow justified the Supreme Court in

Kagama in upholding the Major Crimes Act, which can't be justified based on the analysis of enumerated power. So keep that view in mind of how, arguably, the Constitution was left behind in the context of evaluating the federal sovereign's authority vis-a-vis Indian tribes.

What about the state as a sovereign interacting with Indian tribes? In the cases that I want to use to talk about this briefly are *Williams v. Lee* and *McClanahan v. Arizona Tax Commission*.

Those are well-known cases in Indian law, but I think sometimes we don't pay the right attention to them. What's the constitutional justification for *Williams v. Lee*? I mean it's a good decision for tribes but where is it based? Is it based on statute, is it based on the Constitution, or someplace else?

Williams v. Lee is a very short opinion and it really doesn't say anything about being constitutionally based. It just talks about the well-known infringement test.

Those of us who work with and for tribes like the result, but if you look at it, you have to ask yourself what is this really based on? Is that actually a federal common law decision, or is it a hidden constitutional decision? It doesn't cite the Constitution, it doesn't cite any statute.

Well, what about in *McClanahan*? Now *McClanahan* for me is a pivotal case because *McClanahan* comes very close to saying actually that the Arizona State Income Tax should be struck down because it violates the Indian Commerce Clause. But it expressly says it's not going to go that far, God forbid, it would actually take on the Constitution in a context of how much authority that states actually have. As you recall, it just goes off a statute saying that there are federal trading statutes, that actually preempts the ability of the state to enforce its income tax against individual Indian people on the reservation.

But why didn't it go all the way, so to speak, and say that it violates the Indian Commerce Clause? Because it clearly does. I mean, it violates statutes that have their origins in the Indian Commerce Clause. Why not go the extra step and just say states can't do this because it violates the Indian Commerce Clause?

In *McClanahan*, the court expressly states that it's not going to touch the constitutional question. It just goes off on this sort of statutory analysis. And so in some ways, again, we generally regard it as a positive decision, but I would suggest, in the lens of a constitutional view, it doesn't really go far enough. Not only doesn't it go far enough in a constitutional sense, it actually sets up all of the bad stuff that comes next.

Now what is the bad stuff in *McClanahan*? The bad stuff is that if it's a case about limiting state authority or how much the state authority exists

in Indian country, why does it spend a good deal of time saying that tribal sovereignty isn't fixed? That it's subject to change. What does that have to do with the issue in *McClanahan*? It was about the state, not about the tribes. But *McClanahan* has all this language about tribal sovereignty not being fixed. It evolves over time. I think that's totally inapplicable and misdirected except it sets up the future when, indeed, the court reaches the conclusion that tribal sovereignty somehow does decline over time or evolves over time. I guess the more accurate term is it doesn't evolve, it [instead] devolves over time in the context of the way the Supreme Court has looked at it.

If you look at *Williams v. Lee* and *McClanahan* I think that they at least tell us in this notion of a Constitutional narrative that there is something to the Indian Commerce Clause. There ought to be more to it, in really limiting state authority. Because again, my thinking and understanding is that the whole focus of the Indian Commerce Clause was to foreclose the ability of states to interact with tribes.

The function of the Indian Commerce Clause is not to give authority to the federal government to regulate what tribes do. The court routinely says this, but it's the privilege of an academic to say that, the Court is routinely erroneous in stating that the Indian Commerce Clause provides any authority to the federal government and to Congress to regulate the activities of tribes. It is only to regulate commerce with tribes with the specific focus of foreclosing the ability of the states to have any authority in Indian country.

That's sort of a constitutional kind of glimmer in terms of how the Court looked at, or more accurately, almost looked at, how it would think about the ability of a state as a sovereign to have authority in Indian country. It came close to saying it doesn't, it did say actually no in that case, but only based on statutes.

Subsequently in *Bracker* we wind up getting the Wade test, eventually the state does, somehow, get into Indian Country. But just hold that in mind that there was in a sense a constitutional moment in *McClanahan* in which the court came as close as it's ever come in a constitutional sense to foreclose state authority in Indian country.

Okay, moving forward. What about the tribe as a sovereign? When is it that the Supreme Court actually looked at the ability, in a constitutional sense, of tribes to have authority on the reservation? Well, I would say that that started with *Oliphant* and *Montana* and those cases that came afterward. When you read those cases, and all of us have read them, and taught, and wrote about them, one of the things that's interesting is that they never mention the Constitution. In fact, not only do they not mention the

Constitution, they don't mention any statutes. And the interesting thing about those cases is you can read those cases and unless you step back for a minute and say, what is the ability of the Supreme Court to foreclose state authority, without citing the constitutional principle, without citing a statute, just to say that they can't do it inconsistent with their dependent status? Well, that's a lovely phrase, but where does that actually come from? I mean the Supreme Court isn't free, except in Indian law, to actually make up the law as it goes. I think a number of us writing and talking say: well, those are federal common law decisions. I, myself, have said that and written that.

But now, I'm not so sure that we should actually say that they are federal common law decisions, because I would argue it gives them a legitimacy that they're not entitled to. Because if you say they're federal common law decisions you're saying basically they're okay. And I would argue in a constitutional sense those decisions are essentially improper.

I think a more accurate way of saying what the Supreme Court has done from *Oliphant* through *Nevada v. Hicks*, is that it's an example of judicial plenary power. And I think that's true. But I think another phrase, which I like, is to call it the dormant plenary power. Remember, you heard it here for the first time, dormant plenary power. And it's really what I think the court is doing in those cases. Because it completely reversed the presumption.

The presumption prior to *Montana*, of course, was that unless Congress has acted, tribal sovereignty is unimpaired. But all of a sudden in *Montana*, that presumption was reversed 180 degrees. Henceforth, after *Montana*, the presumption was tribes didn't have sovereignty over non-Indians unless you could satisfy the proviso. But it kind of reversed the presumption.

I think in the constitutional sense its interesting to call that dormant plenary power. You have the plenary power from *Lone Wolf v. Hitchcock* which isn't constitutionally justified and in *Oliphant* through *Nevada v. Hicks* I think what we have is dormant plenary power. I think it's a good phrase to be using because when we describe those decisions as federal common law decisions, we, as I've indicated, give them a legitimacy that they're not entitled to. For practitioners, for scholars, for teachers, I think we want to be a little bit careful about giving cases a legitimacy that they're not entitled to. And that's part of the argument that I want to make.

And so I think if you take those three clusters of cases, they give you a sense that there are, and have been, kind of constitutional shadows around the Supreme Court's decision making in dealing with the federal sovereign, in dealing with the state sovereign, and in dealing with the tribal sovereign itself. And I think it's a helpful thing in the climate of putting together that

narrative for the reasons that I outlined at the beginning, but now I want to kind of tie that together.

The thing that makes me want to tie it together is *United States v. Lara*. *U.S. v. Lara*, I think, is really a key decision for the future.

On one hand, it is what people have described it to be. And what is that? It's a victory for the tribe. And there is no doubt about it, and I don't want to underestimate that. It demonstrates the ability of a tribe to fight fire with fire.

Well, what fire did they fight the fire with? Well, they took plenary power to make it a congressional plenary power, and they used it against judicial plenary power.

Isn't that one of the ways of thinking about *Lara*? Isn't that one of the ways of thinking about *Duro v. Reina*, and the *Duro* override? It's sort of competing plenary power.

The tribe was successful on being on the side of Congress's plenary power to restore some of its sovereign authority dealing with non-member Indians. But it's about plenary power.

Now a few things, in Justice Breyer's opinion, there are some disturbing things. One, he is incredibly cavalier about plenary power. He just sees it like an accordion, he's not disturbed about the ability of the other political branches to kind of decide how much sovereignty the tribes actually have. And I'll come back to that at the end. The other thing, he seems to be setting up that if plenary power isn't enough, that is, if the power of the federal government isn't enough by going outside of the Constitution, he's willing to go under the Constitution, or go before the Constitution. I would direct your attention to where he talks about there being something inherent in the aspect of nationality, whatever that means. He uses the phrase that the United States as a nationality would have authority over Indian tribes.

I regard that as wrong and quite dangerous if it ever comes further to the surface as being a premise for Congress's and federal government's notion of nationality, thereby, treating Indian people strictly as colonial objects. And that will be the way that works, if it ever comes to the surface.

But more importantly, I think the future of Indian law is actually presage in Justice Kennedy's concurrence. Justice Kennedy, in his concurrence, goes back to the theme that he developed in *Duro v. Reina*. And that is don't people who come before tribes, who aren't tribal members, don't they have constitutional rights? I think that's going to be [what a] good deal of future litigation is about, what constitutional rights do non-member Indians and non-Indians have. It may come before tribal courts.

He just really set up and invited, in my judgment, cases to come in the future when a non-member Indian is properly hauled before a tribal criminal court, and he doesn't get counsel because the tribe doesn't provide free counsel, he's convicted, does jail time and he's going to challenge it. Exhaust his tribal remedies, and if it's still upheld is going to wind up going to federal court.

And what are federal courts going to do? I mean just think about that, those constitutional repercussions. I think it's likely that this Supreme Court would say that tribes do have criminal jurisdiction over non-member Indians in accordance with the statute. But one of the burdens that comes with that authority is that you have to provide constitutional guaranties to those non-member Indians. And I think that's going to happen. Well, how can tribes really deal with that? I think they need to be thinking about it. And I know some tribes that are and some tribes that aren't.

If you can provide counsel to non-member Indians, I think tribes should do it. But what about if they can't? What if they can't afford it? I think they at least have to consider it. One of the things they could do, even if they can't regularly afford it, would be to establish pro bono panels. They could get licensed attorneys from within the general area to volunteer on a pro bono basis to represent non-member Indians when they are tried in the criminal courts of a particular tribe to try to provide the right to counsel. And I think that's very a valuable thing to do.

Then there's also the notion that perhaps tribes in a more traditional way, say that they were going to deal with non-member Indians in a criminal context in a traditional way, using sentencing circles, that kind of thing, in which the person actually wouldn't be sentenced to jail time. Could tribes do that and avoid having to provide the right to counsel?

There's a case decided by the United States Supreme Court in 1979 called *Scott v. Illinois* where the Supreme Court said that the right to counsel doesn't apply if the person isn't going to get jail time.

So another option for tribes is to take the *Scott v. Illinois* approach saying that when non-member Indians come before tribal criminal court we're not going to sentence them to jail. We might fine them, we might assign them to the community service, but we're not going to send them to jail. Under the rubric of *Scott v. Illinois*, that would be constitutional. I think that tribes can deal with it.

So I think tribes, in the context of the constitutional rights of non-member Indians in criminal cases, they need to be kind of thinking about it because it's going to be coming down the pike. And again, as one of the speakers said this morning, I mean a lot of what actually happens in a case is governed by what happened before the case is actually litigated.

I mean, how much [have] the tribes kind of thought this through? How much have they said okay, we need to be thinking about this, rather than kind of getting, drifting into it, and being kind of, take your metaphor bushwack, stabbed in the back, etc., because you're not prepared to actually deal with the issue? And I think that's going to be very, very significant. And so tribes need to think about that.

One other sort of micro area that I think tribes need to think about ultimately in the context of the criminal case but also in the context of the civil case, and this is one that doesn't involve the issue of resources, because part of the right to counsel is an issue of resource, so tribes need to confront it as a matter of policy, but it's the right to a jury trial. Now, in the context of either on the criminal side or on the civil side, if there is a right to a jury trial where is the jury pool going to be drawn from? Is it just going to be drawn from tribal members? I mean, drawn from non-member Indians as well, and/or including non-Indians?

I think tribes really need to think about this in the context of my thesis about constitutionalizing Indian law. Because one of the elements I would argue of constitutionalizing Indian law, whether you like it or not, is the right to a jury trial. And the obvious question is going to be, what is the makeup, the potential makeup of the jury? What is that jury pool going to look like?

And I know some tribes that do allow non-Indians to be on juries and I know many tribes who don't. But I would suggest, particularly for those tribes who don't, that they at least revisit the issue and say what is, just from the tribes own point of view, what is the tribes own point of view or justification for excluding non-Indians from jury service? Because non-Indians are racist, because non-Indians are bad people, or we just haven't gotten around to thinking very much about them, or there are too many them in the context of some reservations? What would be the justification for excluding non-Indians from jury service?

I think tribes really need to kind of think about it. Some tribes have and some tribes haven't. I think that's very, very significant.

It's also true on the civil side, because when you have a case in which a non-Indian is involved, and you have a civil jury trial does that non-Indian have the right, whether they're the plaintiff or defendant, to ensure at least the possibility that there are non-Indians on the jury? And I think this is a very important question. Because it gets to some very serious things about how one group of people perceives another group of people.

I mean those are questions that kind of rattle how we think about people who aren't us. And I think usually because [of] the power distribution, the shoe has been on the other foot, it's been the states and the

federal governments and non-Indians in general who have had all of the power and are able to say how they have thought historically about Indian people in terms of their right to serve on juries, but in the context of tribal sovereignty part the shoe is now on the other foot where tribes have to think well, how do we think about these other, we are the people, they are the other people, and how do we think about these other people in terms of their ability, their duty, their right, or the lack of all of those to serve on juries in the context of tribal court decision making?

Let me illustrate this notion of jury trial in the context of a particular case. It's a case that comes from *Chimer* (phonetic), which I kind of participated in the decision. But this was a very interesting case, and I just want to pull up a little bit of it.

In this particular case it involved a dispute between a bank and an Indian person, and it involved several thousand acres on the Cheyenne River Sioux Reservation.

The Indian family had lost that two thousand plus acres to the bank. This was fee land, not trust land. They lost this fee land to the bank. Then the bank was kind of renegotiating with one of the sons about the ability of this Indian family to repurchase this fee land on the reservation.

They were negotiating a contract, and at first the bank offered a 20-year way to purchase the land. Then, they got a letter from their attorney saying that that raised serious jurisdictional problems. They withdrew the offer of the 20-year contract and said well, "we're just going to lease the land to you for two years, and at the end of two years you can buy it with a balloon payment."

To make a long story short, eventually the Indian people sued the bank in tribal court around the entire kind of contract. But one of the causes of action brought by the Indian person against the bank was a cause of action for discrimination, saying that the Indian person had been discriminated against, given the letter that had been written by the bank's counsel. So one of their claims was a discrimination claim.

This was a jury trial. The only people on the jury were tribal members, and eventually the jury came back with a verdict for the plaintiff, the Indian person. And it was appealed to Cheyenne River Sioux Tribal Court of Appeals.

One of the issues was, and I actually had the language, but I won't quote it directly, was that in the brief that the bank submitted to Cheyenne River Sioux Tribal Court of Appeals, they accused the plaintiff, and indirectly the tribe, this give you a sense, of playing the race card. That is, that is the exact phrase that was used.

It was the notion that well, here you have an Indian person suing a bank, and having only tribal members on the jury. And obviously a claim of discrimination, this is almost a direct quote, would inflame the jury and so that no fair trial was possible, and that the Indian plaintiff had played the race card.

Well, how could you answer that? I mean, did the Indian actually play the race card? I mean, whoever thinks in those kinds of terms? But I mean sometimes reality kind of outstrips our imagination and we are forced to think about things that we really didn't think existed.

The thing in that case which makes it very interesting is that when they were picking the jury counsel for the bank, they did not challenge a single Indian juror for cause, didn't challenge the panel as a whole of just representing one racial group, and most importantly, and this to illustrate how tribes need to think about this, is that the Cheyenne River Sioux Tribe has a provision in its tribal code that allows the trial judge in the exercise of his or her discretion, if it is a cause of action in which non-Indians are involved, it gives the trial judge authority to impanel non-Indian jurors. When I saw that provision, to me at least, that's the way to think about it. Or a good way to think about it. Not necessarily the way to think about it, but a good way to think about it.

I think tribes again need to think about it if you are going to have substantial authority over non-Indians, civilly or criminally, what rights do these people have? I think the right to a jury trial, both in criminal and civil cases, is a very significant thing for tribes to be thinking about. Because again, it doesn't involve resources, so it's not that tribes can't afford it, because there is no money involved.

I would urge, and some tribes have again, and some tribes haven't, to really think about this notion of exactly how, what the rights are of people who reside on the reservation, whether they're non-Indian, non-member Indian, or tribal members, what are their rights and responsibilities in the context of jury service. Because I think in light of my assertion or claim that we're entering this era of constitutionalizing Indian law, that these are issues that are going to come up. And I think the tribes need to increase their awareness in thinking about these, so they can foreclose risks to their sovereignty by simply not really having attended to a particular issue of important significance. That's what I think is significant.

The note I want to close on is if we are in the process of constitutionalizing Indian law, of course there's an irony here. And the irony that I want to identify is what about constitutionalizing or reconstitutionalizing the status of tribes? Because the thing that's missing in this

kind of drift that I've identified, if I've identified it correctly, is that it's all about individuals. It's about the constitutional rights of individuals.

But it doesn't, or at least no one has been able to identify that it's necessary to drop back one step or several steps and say well, wait a minute, what is the constitutional status of tribes within this republic? It's an issue that I think was addressed when the Constitution was adopted, but the circumstances, for better or for worse, have dramatically changed, and the tribe is a sovereign within the Constitution. But it doesn't have, my argument would be, it doesn't have constitutional status today.

And so ultimately, I think perhaps the long run thing that I would suggest, and this is in a sense of an observation question, is really one of the end points in Indian law is it or will it be or should it be necessary to amend the Constitution, to have an amendment to the United States Constitution, that for the modern era, clearly identifies the constitutional status of tribes, and recognizes in a true, permanent, constitutional sense for the future constitutional status and recognition of tribal sovereignty. I would argue that the answer to that is yes.

Now can we get from here to there in one big leap. I think the answer is obviously no. But I think one of the things that might come up along the way, is that if it turns out to be true, that Congress does begin to enact some statutes to overturn *Montana* and *Oliphant*, if that's possible, one of the things that might be considered in the context of those proposed statutes is that there might begin to appear some language in those statutes, even though they would just be statutes, that recognized the constitutional status of Indian tribes.

And so it might be possible to go from where we are here to a series of statutes that among other things, in addition to returning sovereignty to tribes, recognizes that as a part of a constitutional framework or a constitutional arch or a constitutional trajectory that ultimately would culminate perhaps in an amendment to the Constitution that would recognize tribal, enduring tribal sovereignty for the future.

One could also argue that such an amendment really would be the current embodiment of treaty commitments that other people have written about this, but one of the ways of thinking about it is constitutional amendment is a modern translation of a compact that is reflected in treaties. Because if you think about treaties, I mean one way to think about treaties is that that's a compact between two sovereigns, or two or more sovereigns.

You could look at a constitutional amendment as also being [a] compact. And that's what arguably the Constitution itself is: a compact between the participating sovereigns.

An amendment to the Constitution arguably would be the modern version of the treaty compacts that were enacted in the eighteenth and nineteenth centuries. I think that's kind a significant and hopefully an important thing to do. It's exciting for me to kind of share these observations to see ultimately how people kind of think about them, and whether they're on the right track.

The thing I want to close it's, it's a quote from Justice Thomas in the case of the *Federal Maritime Commission v. the South Carolina Port Authority*. In that case he makes the observation that one of the primary functions of the Eleventh Amendment is to accord, and this is the key word, to accord states the dignity that they deserve in a constitutional framework.

My question is where is the constitutional dignity for tribes in the Constitution? What I would suggest that is necessary is to travel back to the Constitution, and try to bring light to the shadows that currently surround the Constitution in the context of dealing with Indians and Indian tribes. Thank you.