

TURNER::

Hello, and welcome back to the Wisconsin Law in Action Podcast where we discuss new and forthcoming scholarship with the University of Wisconsin Law School professors. I'm your host, Kris Turner. My guest today is Professor Richard Monette. Professor Monette is here today to discuss a series of initiatives that he is involved with including a recent \$1 million grant to Menominee Nation.

TURNER::

We'll also be talking about a series of working papers I used working on that focus on property law and privatization on tribal lands and the possibility, as Professor Monette would say, necessity of reclaiming sovereignty for tribal governments. Thank you for joining me today, Professor Monette.

PROF. MONETTE::

Thank you, Kris. Nice to be here. Thank you for inviting me.

TURNER::

Oh absolutely. Thanks for joining us on the podcast. Before we jump into your current work, let's find out a little bit more about your background specifically your research and scholarly writing interests.

PROF. MONETTE::

Well, my primary research in writing is in the field of federal Indian law, it normally gets called. I actually named my class Federal Law and the Indian Tribes using the phrase that is in the Commerce Clause, Native American law, American-Indian law, generally though, it's American law and people forget that, but it's not why we're not doing Ho-Chunk law. We're not doing what sometimes gets labeled tribal law which, I think, is an unfortunate term frankly, but it gets labeled at.

PROF. MONETTE::

I have taught a course or two on tribal law, but for the most part, we do this every year and that's what I research and study and think most about, but I also teach water rights. I do my best to stay on top of that. I get invited to actually consult or participate on a water law dispute on occasion. I teach conflict of laws which has frankly a good amount of overlap at least in theory and just thinking with the federal Indian law. And then, I teach Wisconsin Constitution and government which doesn't have a natural overlap, but it does for me because a lot of what I do and probably some of what we'll talk about today is in drafting tribe's constitutions. It's just really is sort of an exercise in comparison and just really constitutionalism sort of work.

TURNER::

This is part of why I'm so glad to have you on the podcast because it's such a wide swath of great topics that you focus on here that I'm interested here about.

PROF. MONETTE::

Yeah. Well, thankfully, our law school for the most part, not always, takes account of that because other people specialize in something, corporations or contracts or property, and then they teach two or three classes. And largely, it's the same idea, oftentimes, the same cases. And mine are not at all. Maybe two or three cases overlap between water law and federal Indian law, let's say, but for the most part, they are pretty disparate which, it takes time.

TURNER::

Yes. I'm again fighting the time to do this. I was like, "We're going to do our best to find the time to talk about this." Thanks again for joining us. Let's jump into your current work. The first reason we asked you to join the podcast today is to highlight your work with the Menominee nation securing a grant which create a healthy eating initiative for the tribe. What issues underlie the need for this healthy eating for the Menominee Tribe and for other tribes in general?

PROF. MONETTE::

Oh sure. Well, the most obvious one is, of course, reinvigorating, revitalizing the tribe's own food ecosystems and their own cultural cosmology regarding plants and foods and medicines, et cetera. And it's been a difficult history between America and all the tribes including Menominee. The diet has gotten unhealthy. The opportunities for a healthy diet have been harmed, basically obliterated with the federal commodity food programs and food stamps and these kinds of things. Really, that's the primary purpose of this, and this is the tribe's primary purpose.

PROF. MONETTE::

Your question though asking about some of the underlying things or what mostly interests me, of course, we are able to, let's say, look at some of today's foods in America with Americans generally not realizing, not knowing that a lot of those foods are derivative of indigenous foods, the obvious ones, corn and potatoes and tomatoes and things like that. From a law perspective, interestingly enough, you can look at some of today's American foods and trace the sort of chain of title back, and you can see where maybe a company got its patent for a certain kind of corn and potatoes and things by capturing the uniqueness of the product from the Indian tribes. Oftentimes, the Indian tribes, of course, getting no value from that.

PROF. MONETTE::

Part of that will be part of this exercise, and, hopefully, we'll learn a lot about that in the process.

PROF. MONETTE::

Another underlying thing is, of course, we get a lot of university researchers that always research the tribes. Quite often, I'm going to say more often than not from my own personal experience, the tribes, they walk away feeling like they've just been a subject of study basically feeling like lab rats, and they don't really quite know what happened or how useful it is for them. And then quite often, they see on the other side of the fence somebody getting a PhD or getting a grant or getting a raise, getting tenure based on these studies, and let's put a sour taste in their mouths over the last 50 to 100 years or more.

PROF. MONETTE::

Part of the exercise is to say, "Okay. Now, this is one reason, so let's really direct this grant to Menominee and make them the governors of this grant." And part of the underlying thing is let's make sure that tribal, culturally centered tribe's life ways centered evaluations and measurements and maybe even university acceptable metrics are evolved along the way and, in fact, applied to what's happening here so that we're going to write a report, and this is America and it's an American university so we're going to have to show conventional American sort of metrics and benchmarks are met but we want a shadow exercise and what were the tribes here? What were their objectives and goals and how do they measure them and make it an integral part of the analysis and the reporting at the end?

PROF. MONETTE::

Just that alone, I think, is going to teach us a lot and hopefully something that'll teach other researchers as well, if they want to learn, that is. Yeah.

TURNER::

I hope they do. Instead of the tribes being more of a passive research subject, they're taking more of an active role in this and have more of a stake, I guess, in the ongoing [crosstalk 00:07:41].

PROF. MONETTE::

Yeah. Absolutely. Yeah. They've always had a stake. Unfortunately, they weren't in control of it, but-

TURNER::

More control, more agency here.

PROF. MONETTE::

Absolutely. If we can get this to work, some people think this would hinder research. I think it will help research tremendously. You could see some initial hindering largely because then some of the tribe's stake in the matter might have to be reduced to writing when people got a run these by lawyers and look carefully at the wording and et cetera, but in the end, I think this will facilitate real research with all the parties walking away feeling like they got something out of it.

TURNER::

Well, that's great. That's like goal beyond a goal here to have... they're getting the grant for the food and for the improving of the diets, but now to encourage better research down the line is another wonderful thing that could come out of this.

PROF. MONETTE::

Right. The Menominee Tribe is nicely situated. They are truly indigenous to this region. They have a college which is a focal point for just sort of centering some communication and even some of the research et cetera, but they certainly have some capacity at the college. Right now, they have an acting president who's spent some time around the university here working on the very conception of the tribe reinvigorating its own cosmology into literal measurements and analysis and metrics for these kinds of projects.

PROF. MONETTE::

That timing was more serendipitous than planned, but it's coming together perfectly.

TURNER::

Like an argument serendipity is working in your favor or something.

PROF. MONETTE::

[crosstalk 00:09:37] It doesn't always happen. When it does, it's very nice.

TURNER::

Yeah. We'll take that along [crosstalk 00:09:41]. There's another initiative that you've been working on as well involving access to tribal law. How do most tribes or legal researchers even currently locate tribal law?

PROF. MONETTE::

Yeah. Well, we'll probably come back again to the constitution thing at some point which I said earlier, but to be clear, the constitution work has always had this as one of its main goals too including making the constitution yours, tribes, taking ownership and control of it and not least among those dynamics are then people starting to know what's in it. In fact, having an active hand and putting in what's in it. That will come back to that, I think, but again, that's always sort of one of the subtexts here running throughout these kinds of discussions.

PROF. MONETTE::

This one in particular is about when the tribe's legislative processes such as they are, legislatures such as they are, have enacted laws and oftentimes through varying administrations and leadership in the tribe, through varying amounts of money from the US Department of Justice or from the tribe or from the Bureau of Indian Affairs and the Department of Interior, all of which leads to the point that they are rather chaotic. You can look at some of the tribe's sort of laws and that should be next to the definition of Helter-Skelter in the dictionary. And as I said, not entirely their fault, but if they don't get their arms around it now and start to recognize what they're trying to do in this juncture in American history and law, it will be their fault, I think. And I don't mind. As a former tribal leader, I don't mind saying that out loud.

PROF. MONETTE::

This particular exercise is to try to get them to buy into the open law library system, frankly, a non-profit sort of well-meaning system to have a real uniform process of codifying sort of numbering the laws and in today's age meaning making them more accessible, more findable for at least their own public, if not the public in general. That's just the cornerstone of due process. You can't expect somebody live by law if they don't know it and especially if they have no reason to know it, let alone expecting them to live by a law if they really have had no opportunity to be involved in making that law which is one of the more essential cornerstones of due process, but at the very least, being able to know what it is, and that's the point here.

PROF. MONETTE::

A lot of my role has been more just what it is a lot of times I'm trying to herd together stakeholders, interest holders. And so part of this was the UW Law Library, the Open Law Library finding a tribe that was willing to pay its own money to be the pilot project here which we did and so that tribe put its laws on the Open Law Library. It's got accessible link for anybody. They didn't limit it to the tribes publicly. They did it for anybody, so you and I can jump online and find it in-

TURNER::

In favor of that as a librarian for access to this kind of stuff.

PROF. MONETTE::

Yeah, I bet. Yeah. [crosstalk 00:13:14] Well, you and the people who have to live under the laws especially people who on occasion lose their property or their liberty or maybe their lives under the law, and it's nice to be able to find out what it is in a hurry.

TURNER::

Yeah. What did I do that caused me to lose my property or liberty of what have you. I'd like to know about that [crosstalk 00:13:32]. We're going to pivot a little bit here to a paper that you're currently working on. It revolves around the concept of tribal property rights. Can you give me some background on the current discussion of privately held property rights and publicly held government property on tribal lands?

PROF. MONETTE::

Well, that's a lot.

TURNER::

Yeah. It was a mouthful there for you.

PROF. MONETTE::

We have this canard that natives, Indians didn't believe in private property, and that is just patently false, but it has been used against tribes. It's pretty easy to justify taking somebody's territory and/or property or whatever you're going to call it if you've convinced yourselves that they don't believe in such a thing. It becomes particularly easy if you've convinced them that they don't believe in such a thing.

PROF. MONETTE::

Now, that said, certainly, the beliefs are different and just those differences may have facilitated, justified maybe, some of that exact taking so not to dispense with the idea entirely, but make sure we're getting toward the right focal point in the discussion. That's been an unfortunate thing. The fact of the matter is nobody believes in private property the exact same way. Florida doesn't. Brazil doesn't. California doesn't the same as Arkansas. Spain doesn't the same as Russia. Everybody use it differently, so I'm quite certain that the Ojibwe tribes see it differently from the Lakota tribes, let's say even, even tribes that are right next door to each other perhaps especially today.

PROF. MONETTE::

More, it's about recognizing, okay, let's see. Well, how do I start this? Here's how. Central, if there's any sort of Pan-native philosophy in worldview, it's probably the ideas of finding a balance and finding harmony and living that way with the people and the world around you, plants, animals, sky, air, water, rocks, I mean you name it. That idea gets romanticized to the point of ridicule which is fair enough, but it's also an idea because it's real because it's almost any tribe where I've gone back and tried to look at somebody else's rendition of what their worldview is or their own if they've taken the opportunity has this kind of idea in it.

PROF. MONETTE::

I think it's fair to say it's real. The point is that the relationship between a peoples or collective peoples and their territory is important central to the ideas of sovereignty, and the international plain sovereignty is territorial integrity and distinct peoples and recognition by other sovereigns. That

relationship between those things is critical, but you quickly get to not just the relationship between the collective peoples and the territory, but the collective peoples and the subsets in that territory which may or may not be real property, so the relationship between the collective and the property.

PROF. MONETTE::

But then, it quickly becomes the relationship between the collective and the individual who may or may not own that property. And then, it becomes the relationship between that individual and that property, as I said, that may or may not own it, and depending on how you view that. We can't really have a discussion of understanding where we've been with our sovereignty, where we are now and where we intend to go without flushing this stuff out, and most importantly, where the balance is.

PROF. MONETTE::

You could just do a quick sort of illustration. We could say Oregon with its robust public trust doctrine where people can access public resources, the beaches, the mountains there, the national parks, et cetera, the rivers sort of in disregard of any private property. [inaudible 00:18:12] people walk along the beach, and if your house is on the beach, tough. They may even walk through your property to get to the beach even more so than other coastal polities.

PROF. MONETTE::

In other words, Oregon has their bundle of rights like we teach law school. If this property has bundle of rights and we make all the strands in the bundle sort of the same size, but the fact of the matter is my point is they're not all the same size. Let's say the right to exclusion in Oregon is a little smaller because of that public trust idea. On the other hand, you can go the other end of the continuum, the Oklahoma's or Texas's, and you generally get the idea. You walk through somebody's property. We shoot first and ask questions later.

PROF. MONETTE::

But all that means is that Texas has found the balance between collective and individual that works for Texas. Make no mistake. That's part of their culture. They may or may not like that culture, but they are in control of finding where that balance is. Oregon, also the public trust doctrine in that limited with right to exclude is part of their culture. They found where they think the balance is appropriate between the collective's peoples of the state and the individual and property for them. Presumably, they like where that is.

PROF. MONETTE::

And if they don't, they're in control. Ironically, all of that fits nicely into the cosmology of Native world view even though it's been skewed because we're told we don't believe in the thing at all, and it becomes a sexy thing for people to say as they use natives as the tip of their revolutionary anti-establishment spear. It gets all convoluted. The fact of the matter is the Sioux tribes, the Cherokee tribes, and Navajo tribes, the Chippewa tribes, they should be able to decide for themselves where the balance is between collective and individual. Prior to contact an imposition of this property system from outside, they did that. And it was just like Oregon and Texas. It was not in the same place.

PROF. MONETTE::

And the point is that they have to do that again today, and they have to realize that you have private property. You always have. You didn't go walk into Sitting Bull's lodge and use the restroom. I'm quite

certain, you had something to say about that. That sounds trivial, but, frankly, the private property and some of the tribes can get rather intellectual and abstract. You can read their stories and hear how certain families were the keeper of the lodge and the tribe, another family was the keeper of the stories.

PROF. MONETTE::

Well, it's kind of property. And, sometimes, you read about the tribes taking actions to remove that from a tribe or maybe even hold the whole inherited chieftainship from that family. Those were values in the tribe that today would be calling intellectual property. It wasn't all as simple as Sitting Bull's lodge. There's some rather abstract notions too, and they had every bit of that in their societies as much as we have today.

PROF. MONETTE::

It's important for us to recognize that. What we have now is the Bureau of Indian Affairs, and the United States American Law has superimposed the private property system that is evolving on every single Indian Reservation in this country whether they like it or not, or whether they think they believe in it or not, or whether they wanted to or not. It's what's happening. Classically, with the allotments, not every tribe is subject to the allotments, but there's all kinds of other things where they all have Housing and Urban Development monies, for example. They build homes, some of the laws about who takes a home when the "owner dies." Sometimes, the tribe takes it back. Sometimes, it goes to a child or they'll take it back only if there is no child. All those rules are a private property system.

PROF. MONETTE::

All those rules are marker of tenures, of ownership and property. It's time for us to just stop this childish level although we didn't believe in private property and start to think about what we're doing. And that too comes back to the constitutions because a lot of my reasons for wanting to think this through and be able to articulate it is to talk with tribes about it's time to put in your constitutions that you are starting a private property system, perhaps acknowledging that you always had one, but you're going to start to govern it, and you can use their words, the concepts.

PROF. MONETTE::

The thing is that we always get an Indian country that, well, how this is sounding just like the white guys and American. It might be, but the problem with that is it gives the white guys and the Americans too much credit. They didn't think of all these ideas by the way. They don't all belong to them, but if you want to think about the tribe needing a marker a document to represent ownership like a deed or these things that we call them, fair enough. You want to register them somewhere, have a registry of deeds or just put it in the file cabinet or something, but it's time to start doing that.

PROF. MONETTE::

Make no mistake. We have people on reservations who fight over homes and cars and some paying for the transmission that you got the other guy to put in and you didn't pay for. All of that has property ramifications. If somebody doesn't take control of that, it's social chaos.

PROF. MONETTE::

Now, the fact of the matter is most of the tribes have taken control of it, but my goodness, don't call that property. Well, that's exactly what it is.

TURNER::

I see.

PROF. MONETTE::

And it's time to get that.

TURNER::

One thing as a white guy from America, one thing I always was fighting with against kind of my older view point is to kind of lump all tribes into one distinct thing. You had mentioned this a little bit, say, the Lakota and the Sioux and the Cheyenne all have different views of the property and things like that. And I think that's one thing I've always had to go back and check myself on and say, "Well, each of these sovereigns have a different viewpoint of property or different cultures or what-have-you." And I just want to emphasize that to me is something I've had to untangle myself as I dive further into the federal Indian law on all this.

PROF. MONETTE::

Good.

TURNER::

I'm working on it.

PROF. MONETTE::

Well, hopefully. I mean part of the reason I teach other courses is because then I say, "So, let's look at this happening in Indian country and now understand why Texas and Oregon also identify a different sort of balance fulcrum tipping point between collective and individual and their societies," and that largely determines their cultures too. And it helps us understand that we have different cultures from polity to polity. Even in America, they might not be vastly different although some are way more different than others, but it helps you to understand that they do. And then, it comes down to so now how does Texas build its own constitution and laws and its relationship with the United States, its relationship with neighboring states? How does Oregon do that so that they are in control of deciding their culture, deciding where that balance is?

PROF. MONETTE::

And that's the same thing with the tribes. Take control of your constitution. Take control of your laws. Use them as tools and/or weapons to help your relationship with the Bureau of Indian Affairs, the United States, the states around you so that you are maintaining control of where the balance is between collective and individual because that's where your culture resides.

TURNER::

And so one of the things that's laying on top of all this is the relationship with the federal government and with the states around the, you just mentioned with the sovereigns. Let's surround the tribe, the different tribes, and how the federal government especially affects both state sovereigns and tribal sovereigns. One of the concepts that you talked about in some of your working papers and your previous papers are trust relationships and trust responsibilities. Can you help me untangle these two concepts a little bit, how they interplay with the different sovereign?

PROF. MONETTE::

Yeah. Well, of course, the bigger concept is sort of like a citizenship and/or a member and/or subject citizen member or subject concept, but the trust idea is one of the bridges that helps to understand it. For better or worse, perhaps, I should write this, we are lacking clarity in the scholarship and in the case law and in any codified law about those terms. We throw around the words trust relationship and trust responsibility as though they are interchangeable. They are not. If they are, it's in a very thin sort of scale.

PROF. MONETTE::

For the most part, to cut to the chase and to segue from the property thing, if you're talking about a trust responsibility, obviously, the term itself invokes sort of a common-law trustee idea. You're going to have a trust corpus. You're going to have a beneficiary. You're going to have a trustee. You probably have the... First, I should have looked at the terminology before I came because now, I'm forgetting the person who sets up the trust, the [inaudible 00:28:07], I think it's called. You're going to have those sort of factors that play.

PROF. MONETTE::

To the extent that idea comports with invokes a bit of American law, you can see where a fiduciary duty arises over the property and over its value and how it's used, and if it's dispensed with, discarded, changed medium, et cetera, the kinds of things we deal with them, we're talking about a corpus of property as trust and that the analogies are easy then. In fact, they're helpful because we have these allotments on Indian reservations and even the way the native pro-native scholarship if I can call it. Pro-native scholarship probably a better word than that, but they talk about, well, the Bureau of Indian Affairs gave allotments or that sort of thing, but nobody gave my family an allotment. That was my family's land and maybe even a little more than that.

PROF. MONETTE::

If it was not my family's land, it was my tribe's land which is more important. If somebody is the [inaudible 00:29:18] of my allotment, it's not the Bureau of Indian Affairs. It's me or my tribe, and that's more helpful for determining a whole bunch of things including who's going to govern it, that sort of thing determining its value in relation to your tribal neighbors, the back to the whole collective versus individual balancing. That's important. The trust responsibility is a property concept just flat out. The trust relationship is a political concept. It's more tied to that political relationship we talked about. That is the cornerstone of sustaining this relationship.

PROF. MONETTE::

We argue as we're having to in the Indian Child Welfare Act cases today, these are not race-based statutes. This is not a race-based relationship. This is a politically based relationship. That's what the trust relationship refers to. Unfortunately, we have things that fall underneath. We had some treaties that required 25 years of payments, let's say, annuities, maybe farm equipment things like that. It seemed like they were more like a trust responsibility property thing.

PROF. MONETTE::

For the most part, those provisions have all reached their sunset term. Nonetheless, there are some moral obligations and maybe even some legal regarding now the federal government providing money for housing or health or education, and we get people that call that the trust responsibility, but that's

not property, and you're never going to sue as though that is property or win as though there's a fiduciary obligation with property, and that's not going to happen. That's more about the political relationship.

PROF. MONETTE::

That distinction is important, and I've tried to say in various groups. I've not written about that either as I should. There's a property-based concept of the trust responsibility, a political-based concept of the trust relationship, and it would behoove us to ferret out that distinction and to use it because it can cut both ways, but it can definitely be used in our favor where there seems to be some confusion.

TURNER::

Hopefully, this podcast will reach a few people. And in lieu of writing about it as you may [crosstalk 00:31:39] get the word out a little bit about this very important distinction between relationship and responsibility or trust.

PROF. MONETTE::

If we might, from that trust relationship then segue, as I said, trust responsibility segueing from property, the trust relationship and segueing into more political relationship, and we seem to have gotten the lexicon, the wording down about government-to-government relationships and sovereign to sovereign, that kind of thing, but we have gotten thoroughly confused by conflating several concepts and confounding a couple of other concepts and confusing a few concepts. It's going to be increasingly important for us to figure this out that this political relationship is not just between your public institutions, these governments, the tribal government and the federal government has taken.

PROF. MONETTE::

It's also between your people, and that has to be a political relationship. In the international law sense, a territorial integrity, a distinct peoples, so in deciding the identity and status of the peoples in this political relationship, you have to calculate in territory. There has to be some legal significance to this territory called reservation boundaries, et cetera, or we're not going to advance the identity and thus the culture as far as we might or protected as well as we might. That's hugely important.

PROF. MONETTE::

Then, that dovetails with the distinct polity, distinct people's idea. If the territorial boundaries mean nothing and natives and non-natives are able to just cross willy-nilly not just physically across reservation boundaries where the tribes laws apply and where they don't apply or arguably where the state's laws apply and where they don't apply, if they're just able to cross without any ramifications beyond that physicality, but in the more abstract political identity sense, we're going to lose that political identity. We're going to lose that prong of the international law requirement of a distinct peoples, and we don't seem to be getting that.

PROF. MONETTE::

Now, the first thing I often hear when I say that is, "Wait. Dual citizenship." Well, you can call it dual citizenship or federal citizenship if you want. Wisconsinites think they have sort of a federal citizenship with America. They're Americans and they're Wisconsinites. Frankly, some of the people in Texas because of that Lone Star State treaty relationship that they still have with the United States, sometimes, they think of themselves less as federal citizens and dual citizens.

TURNER::

Right. Texans first [crosstalk 00:34:43].

PROF. MONETTE::

Texan first, then an American second. Thomas Jefferson said that, by the way, about being a Virginian. I'm a Virginian first then an American second of all people. That's important to think about in the native context. Sure. You can be a dual or a federative citizen with America if you want, but that's not the problem. The problem is when you get to the next plane of sovereignty, are you a Navajo citizen or an Arizona citizen? Are you a Turtle Mountain citizen or a North Dakota citizen, because that's more like asking are you a North Dakota citizen or a Montana citizen? That's not that federal identity that all Americans share in one way or another. This is more the unitary state, that sovereign with inherent sovereignty, Texas, California, New Jersey, Mississippi.

PROF. MONETTE::

It's that. Which do you identify with tribes because if this union were dissolved, God forbid, but it's not like we didn't have almost somebody on the Supreme Court at one point who made that a cornerstone a part of his legal thinking, if this union were dissolved, well, there wouldn't be a union. There wouldn't be a question about dual citizenship with the union. It would be when the union is gone and there's just Montana and North Dakota and Wyoming, will those states recognize your tribes the way that this federal structure has been built to recognize them.

TURNER::

Right, or will they be subsumed into [crosstalk 00:36:23].

PROF. MONETTE::

That's right. That's right. Nothing will make that subsuming into the state. That's subsumption into the state easier than having a 20, 30, 40-year argument that, well, we're citizens of the state anyway, so we get to vote in your elections and all that. I go back to that something I said earlier, the question of where the tribe's laws in giving territorial integrity, legal significance to the territory where the tribes laws apply and where they don't apply, and then I added or where the state's laws apply and where they don't apply.

PROF. MONETTE::

We want to argue that the state's laws don't apply on the reservations, but if that union is gone and you've argued yourselves successfully, you tribes have argued yourself successfully, there's no distinction between your political peoples and their political peoples. Your people are citizens of the state and should be able to vote for those laws and those leaders. Well, then those laws are going to apply to you. If and when that happens, you've lost. There are no gray area there.

PROF. MONETTE::

I'm happy to listen to people's arguments, but I'm not quite sure how that'll change anything for me. [crosstalk 00:37:33].

TURNER::

crosstalk 00:37:33].

PROF. MONETTE::

Sorry to sound that way, but if that occurrence [inaudible 00:37:40], the tribes have lost. And I'm not sure that their own advocates scholarly in otherwise I'm not sure that their own advocates in the courtroom are telling them this as clearly as they need to hear it. In fact, I'm not even sure if some of them understand it. We have one of a couple of the most illustrious organizations for them, the National Congress of American Indians, the Native American Rights Fund. And they have these push to vote. Again, tribes are Federative Americans just like Wisconsinites are. Wisconsinites should vote in a federal election, and Menominee tribal members should vote in the federal election. No problem there. That's that Federative. But then Wisconsinites vote in Wisconsin's election. Menomineeites vote in Menominee's election, but should they be crossing over there?

PROF. MONETTE::

It's going to become quite clearly Illustrated soon and probably because of the force that the National Congress of American Indians or the Native American Rights fund bring to these matters. They get Native American Rights Fund to bring actual cases arguing that tribal members on the reservations in North Dakota have to be able to vote North Dakota's elections.

PROF. MONETTE::

I say yes and no. You're half right. Why? Because the constitution says North Dakota runs the election for federal officers so our people need to go vote at North Dakota's elections for the federative officers, for the US senators, but they quite frankly had better be careful, but I think about have some robust discussions. And in my opinion, it's quite clear should not be voting for state leaders there.

PROF. MONETTE::

We get the Native American Rights Fund that brings a case, and it doesn't quite make this distinction as well as it might have. Now, it seemed that the first time I saw what they had written, they had actually blurred it and made it worse. Then, some of the second and third things I saw, they had backed off a bit and left room for the argument that we're just talking about the federal election here, not the state election. Okay. Fair enough, but make sure you're explaining to everybody then why we're not certain here and let the tribal leaders and tribal people be fully informed and then decide if this is what they want.

PROF. MONETTE::

Now, there's a settlement between tribes in the state to "settlement," kind of a settlement of one of those cases, but among other things, it says, "So now, the state is going to go and be obligated and/or at least will of its own accord help the tribes establish physical addresses in the reservations." Now, my grandpas are rolling over in their graves hearing that. You keep your state out of our reservation. We'll make our own addresses. That doesn't require any genius, and you certainly don't have any more genius than we do in doing that. We'll do that, but here, we were begging that we want your state IDs in the face of this data technology revolution of who's holding the information as king. We're going to give you our information, get your state IDs so we can vote. Now, we want your state addresses, and we want it in your system. Talk about just inviting colonialization, just inviting victimhood.

TURNER::

It sounds like a lot of blurring and a lot of dilution that could come through this where the state is, here's our addresses, here are our IDs on the reservation.

PROF. MONETTE::

Yes. Some ways, this talk makes me the bad guy because a lot of tribal leaders will listen to their favorite scholars and attorneys. [inaudible 00:41:42] I'm okay with that. Tribal leaders are tribal leaders. I do think that if they were properly informed and had a robust discussion, they would come to the correct conclusion, mine, or they would come to theirs, and I'd be far more okay with it because they're the tribal leaders as I once was, so I'm okay with that.

PROF. MONETTE::

But I also become the stepchild for the professoriate for example in this field even though I'm probably one or one of the very few who actually grew up in an Indian Reservation whose grandparents and his dad were on the Tribal Council, and I lived and breathed this stuff my whole life. And so, I talk this way. Well, they don't always want to hear that. I find that fascinating.

TURNER::

You find yourself about a home sometimes [crosstalk 00:42:38] between a rock and a hard place.

PROF. MONETTE::

Yeah. Absolutely. Yea. Then, some of them acknowledge it. You go back. You're not supposed to immediately look at your tenure file, the review letters from people, but over time, they let you. I was very surprised. I think I had five of them, I think, but a couple of them were very clear on that point that Richard's in a good place but also a bad place because he is able to say things because of his background that the rest of us can't say. To me, that's a huge admission in some ways of their own constraints that they feel they have to cheerlead for tribes or they will be blackballed as this anti-Indian sort of law professor who does Indian law and they can't have that.

PROF. MONETTE::

I care. I'm human. I care about whether people like me or not. Most people would say, "I don't care," and they'd be largely right because [inaudible 00:43:35]. I got a house on the reservation. I've had it my whole life, and I go back there five, six, seven times a year. My son lives there. My brothers and sisters live there and thousands, literally, thousands of relatives or 10 siblings in my dad's family and eight in my mother's, and they all had children, and quite literally, hundreds of relatives. That's where I'm from, and so I'm okay with that. I hope that at some point they will all come around to consider that and to maybe listen a little bit, but so far, not so much. It's pretty interesting.

TURNER::

It is. You mostly answered this question, but I'm going to ask it more directly is what do you want researchers especially to take away from your work?

PROF. MONETTE::

I want them to take away that everything he does, if you look hard enough, is classic sovereignist. He wants you to think about trust relationship and trust responsibility, citizenship, territory, all the stuff. He wants you to think about it in a way that can be reduced to practicalities in the tribe's constitutions and laws and in their own cultures in a way that protects their sovereignty, preserves it, advances it, makes it informed, makes it theirs. That's what he wants. To me, all societies want to determine who they are collectively and individually, identity.

PROF. MONETTE::

At some point in that conversation, you can say, "So, they want to determine their own culture." That's what it comes down to really, and especially if then that culture is the balance between that collective identity and that individual identity with property or citizenship or whatever it is. They want to do that, but I'm going to buy into what American law says quite a bit on that, not entirely, but for purpose of discussion. This is America.

PROF. MONETTE::

We're talking about American law for better or worse, and you don't get there unless you have a high degree of autonomy, and you don't get that degree of autonomy without that cultural autonomy, and you don't get the cultural autonomy without a high degree of political autonomy, and you don't get the political autonomy unless you have a territory, some territorial autonomy. You don't get that unless you get people buy-in or unless you can force them to buy in, meaning you get that sort of civic popular economy, people-based economy.

PROF. MONETTE::

If you get that and the people buy in, and/or voluntarily or involuntarily and they become part of the system and become part of determining where that balances, you've come around the full circle of sovereignty, and it works. I think all peoples in the world did that or wanted to do that, and they succeeded to various degrees. The Indian tribes are no different than that. And if they are different, some people say, "Well, because of the history of the world, they may be even more illustrative of that today." Sovereignty, they want them to govern themselves.

PROF. MONETTE::

All societies made laws or they wouldn't be here. All societies and force laws or they wouldn't be here. All societies made up of human beings had disputes, and they had to resolve those disputes or they wouldn't be here. And the tribes hit every one of those prongs or they wouldn't be here, but they're here. And so we know that they did that stuff, and we know that they did it for purposes of determining for themselves who they are collectively and individually.

PROF. MONETTE::

And our thing today is this is the modern world. How do you work that into a constitutive polity? A written constitution, maybe an unwritten constitution, not so likely today. People always say, "Well, England has one." They answered, "Well, England's an island." So, there is that. But when the boundaries are more fluid, these things are more-

TURNER::

Territorial or autonomy's a little bit easier when [crosstalk 00:48:02].

PROF. MONETTE::

Yeah, exactly.

TURNER::

[crosstalk 00:48:04] another sovereignty.

PROF. MONETTE::

Exactly. That's what I want them to take away. That was the target for everything I said or wrote, and so they can disagree with me, "Well, we'll see who wins that in the end. Part of the way you got to cut the argument is that you think they're wrong. I don't want to win. I don't want to win it that way. You're wrong, and what's going to happen? He's going to prove you're wrong. I don't want to win it that way, but unfortunately, that's one of the dynamics on the table with a lot of things we teach by the way, this discovery stuff.

PROF. MONETTE::

How do you discover the lands where somebody lived? Well, okay, that's a fair sentiment that helps get the discussion started, but the fact of the matter is that's not anywhere near what the discovery doctrine means as a matter of law, and it's important to understand that, and rather than taking that negative position which [inaudible 00:49:08] and become central to the analysis, we make it real, discard it, because very clearly, the discovery doctrine applied to the Christian sovereigns from Europe, that decided to abide by it .

PROF. MONETTE::

It wasn't that the natives couldn't sell. It was that those five or six sovereigns couldn't buy or couldn't acquire without the approval of the others. It was an agreement among them and the wording in those Marshall Trilogy cases is perfectly clear on that. Now, granted there's a gray area as life as there often is, the one area where Marshall just simply says, "And so, if all the six buyers agreed with that and said if any other sovereign not one of these six tries to acquire from the Indian tribes, number one, that's an act of war, and we'll take you out." Portugal, right?

PROF. MONETTE::

Number two, if we all agree among us six and everybody else agrees because they don't go to war, well that, then in effect by necessary implication means the tribes are stuck a little bit with that. At least to that extent, they've lost their full sovereignty to decide who they want to sell to. He says that very clearly in a case. It's a gray area. Nonetheless, he articulates it very clearly. That's what the discovery doctrine is.

PROF. MONETTE::

People just want to use the natives as the tip of again their revolutionary anti-establishment spear. This discovery is inhumane. Well, that's not what it says, and it doesn't help us to inflate the wrong analysis and just to make a point. We got this thing going on with the plenary power and plenary authority right now that you cut to the chase. We have cases that make it clear that the states and their people in the Commerce Clause gave the federal government plenary power or authority over the states and the people to deal with international law.

PROF. MONETTE::

We have in the constitution the states and their people gave to the federal government in the Commerce Clause the plenary power or authority over the states and the people to deal with interstate commerce. So international commerce, interstate commerce. Well, in that same Commerce Clause is the Indian tribes, but we just don't say that that way. Let me say it. Okay. The states and their people gave to the federal government in the Commerce Clause the plenary power and authority over the

states and the people to deal with the Indian tribes. And it's important to recognize that that is America's constitutionalism read consistently, and it is in fact accurate. It's as accurate as can be.

PROF. MONETTE::

In the Indian Child Welfare Act, the federal government invoked the Commerce Clause and its plenary power over the states and their people to impose on them some requirements including notifying tribes and maybe transferring jurisdiction over children to the Indian tribes. That was not plenary power or authority over the Indian tribes. It was plenary power over the states and the people who gave it that plenary power. Good old-fashioned democracy and consent, right?

TURNER::

Often, that little ellipses about the Indian tribes in the Commerce Clause where people can read the international and between the states, then you miss that little Indian tribe [crosstalk 00:52:53].

PROF. MONETTE::

Exactly. [crosstalk 00:52:54] Other examples are the treatment as a state provisions and environmental laws that the EPA, the federal statute has the authority to treat tribes of states for setting water quality or air quality standards. And in some cases, those standards have extraterritorial impact outside the reservations. In other words, infringing on the people in the states. People in the states don't like that. People while have plenary power over the tribes, that's not plenary power over the tribes. The states and the people gave the federal government through the Commerce Clause the plenary power over the states and the people to deal with the tribes in a way that might infringe on the states and the people when they're dealing with environmental matters. That's what happened there.

PROF. MONETTE::

It's that important to read just something as simple as that that we don't. I employ you. Read a hundred Indian law, a lot of review articles that talk about plenary power or what the old Indian folks say plenty power and the Congress has plenty power. Well, it does that. The plenary idea itself then when you tie it to the flip side. Have we had instances where the United States Congress had just flat-out super-imposed its power on the Indian tribes? Of course, we have. I don't call that plenary power. That constitutionalizes it and almost justifies it a bit.

PROF. MONETTE::

That's just an exercise of raw, unabridged, unmitigated, unconsented to immoral, unethical, unchristian like power. That's what that is. That doesn't have anything to do with authority at all.

TURNER::

[crosstalk 00:54:30] plenary power [crosstalk 00:54:33] power.

PROF. MONETTE::

Power. Yeah. You have nuclear bombs, and we don't, so you tell us you're going to enter into a compact to get the state's agreement for gaming and that's just the way it is. Any plenary power, that's power, and it'll go down in history as power. I don't want to hear any arguments back from any non-Indian professors on that. I don't want to hear it. Save it for St. Pete at the pearly gates, you're going to need it because that's just pure power. [crosstalk 00:54:59] going off on a podcast.

TURNER::

It's okay. Where can people find more of your work? Where can they find what you have written, what you've talked about out there in the wide world?

PROF. MONETTE::

Well, this is my problem. I got tenure, and I think I wrote eight articles before tenure, but I got here to do service, and it was a good agreement with this law school to do that because I got hired in the midst of the ugly treaty fishing wars, and so I got here and them saying, "Will you start a center? Will you form relationships with the tribes to get some students down?" Some of our students working up there, a lot of the stuff that we've have done.

PROF. MONETTE::

Nonetheless, I had to, I think, still sort of meet the research and writing part of the tenure file, so I did, but then afterwards tried to turn to, okay, let's get this service stuff going. Let's start drafting constitutions and laws for the tribes. We've had students assist me normally in assisting a tribal attorney, in drafting entire constitutions for tribes or an amendment or two or seven or eight for tribes. Students have always helped with those.

PROF. MONETTE::

We have at least 13, I would say. Totally new constitutions have been adopted that we've participated in. We've also had four or five others drafted that failed for a variety of reasons, a whole interesting discussion in and of itself about the role that the Bureau of Indian Affairs plays or the role that people who don't live in the reservation play when again, they're not the ones really living by this constitution, interesting dynamics. At least one tribe, if not two, had that effect going for it.

PROF. MONETTE::

We also had drafted about probably seven or eight out there that are sitting on shelves that, okay, we're done or close to done. Now, we want to think about it for a while, and they haven't had election either way up or down. We've had a couple of them drafted that were either not voted on or one voted down and then the tribe borrowed from it liberally to make their laws. One tribe didn't have a judiciary is one of the reasons for having the constitution discussion. We draft up pretty good. The people of the tribe did. I'm just drafting. I'm just the technician. People of the tribe put together a pretty decent judiciary, and it failed.

PROF. MONETTE::

That was because, in my opinion, one of the BIA's meddling and off-reservation population both coming together there. The tribe took that entire provision and, by law, created an independent judiciary and almost word for word, for example. You can call that a failure.

TURNER::

[crosstalk 00:58:07] success.

PROF. MONETTE::

Yeah. If nothing else, a great learning experience and it's just the spice of life. Of course, now you could in a couple two or three tribes have adopted constitutions that didn't ask me at all. I used to get asked

almost every time, believe it or not, as far as I could. I mean I get calls from around the country which I'm not bragging about. Sometimes, I'm complaining about it, but I was always okay with it, but then, they were three or four that got adopted out there. The first one I was told about, I said, "Well, let me send it to me." It's interesting. I just want to study them. Well, it was almost word-for-word what we'd written for another tribe.

PROF. MONETTE::

I hope those lawyers didn't charge that tribe too much [crosstalk 00:58:50].

TURNER::

[crosstalk 00:58:50] in the bloodstream [crosstalk 00:58:53].

PROF. MONETTE::

Well, the sad part about that is it almost falls into the boilerplate sort of thing we accused the BIA of. Probably, those lawyers either had a very compliant committee or they went into a back room because I'll admit in the 13 or the more that I've drafted, things start to look alike, but there's only so many ways you can say lawmaking, law enforcing, and resolving disputes and all this and that.

TURNER::

[crosstalk 00:59:19] say it, and it's the right way to say it while you're fixing what's not broken.

PROF. MONETTE::

Right. Yeah. And the people, the committee, if they're there in a genuine meaningful capacity, they change the wording a bit always. When it comes out to be almost word-for-word, okay, this is the exact kind of thing that we accused the BIA of doing, and I really hope the lawyer didn't charge the tribe too much [crosstalk 00:59:39] that. That's been an excellent exercise and learning experience for a lot of students.

PROF. MONETTE::

Right now, I get working on three with the lawyers of three tribes, one of them having a terribly difficult enrollment matter. They were using the unfortunate term terminated and had their relationship with the US terminated and then restored. In that process, for better or worse, the US needs to play a more granular role and things like enrollment, and it didn't. Here they are, however much later from that restoration of termination and they have a mess, and also have a tribe that is having a mess regarding their relationship between their government and their business, one of their main money-making businesses.

PROF. MONETTE::

And they're finding themselves in state court and being asked questions about the tribe's law, really no reason for it to be in state court. They've called and I said, "Yeah. You can use this constitution as an opportunity to set the table for your site. Use it as a tool or weapon." It's not going to win the day. Don't get crazy with it the way we're sort of seeing with some people who are going around convincing the tribes to do this rights of nature stuff. It's not going to do that as they're all learning the hard way, but, nonetheless, you should use it.

PROF. MONETTE::

We have another tribe that said they have a difficult issue. Their tribe is in an association of tribes, and the balance of powers is getting blurred. There are a lot of interesting fascinating legal issues that come up. Yeah.

TURNER::

Well, thanks for bringing it up because that's the form of writing that it often fought. It doesn't show up like in your scholars like you were talking about. This is stuff that's more you're out there doing, as you mentioned, the practical stuff. This is important stuff that you're not reading in a law review article or what-have-you. This is stuff that's being actually done for the tribes on the reservations with tribal leaders and councils. That's really nice to hear about all that. Of course, we just got what you have written for law reviews and whatnot up on SSRN as well recently with some of your older publications as well.

TURNER::

For you to find all your stuff on SSRN, they can search your name and find what you've written for more formal scholarly stuff as well, right?

PROF. MONETTE::

Right.

TURNER::

That's great. Is there anything else you'd like to cover?

PROF. MONETTE::

Unless you have something, I teach this field, and I give hour-long, day-long, and two-day-long workshops so I could talk for ever on it. I won't, but I really appreciate your inviting me to give me an opportunity to do this. We'll see how it plays out. If it works well, perhaps we should do this more often.

TURNER::

I agree. I think that I'd like to have you back on the podcast. We can continue to delve in. Believe it or not, we just scratched the surface on a lot of these topics. There's a lot more we can talk about. We didn't talk about something like PL 280 or other things where sovereignty interplay [crosstalk 01:03:01].

PROF. MONETTE::

The current hemp and cannabis issues and the way they're kind of turning PL 280 on its head.

TURNER::

You mentioned gaming laws very, very briefly. That's a whole different section that we could discuss as well. But for now, we'll say thank you very much for joining us today, Professor Monette. As always, you can find Professor Monette's scholarship on our podcast page. We'll link to both his SSRN page and to his faculty scholarship page in the University of Wisconsin Law School Digital Repository.

TURNER::

In addition, we'll link out to some of those constitutions that Professor Monette mentioned that he has helped author or create. You can find out more about the Menominee Nation Healthy Eating Initiative on the UW School of Medicine and public health page links along with this podcast. Thanks to everyone for your support of this podcast. This is our ninth podcast, and I hope that you've learned more about the work of the UW Law School Faculty and found out about the great articles they're producing.

TURNER::

You can find all these articles in all these podcasts at our website at [wilawinaction.law.wisc.edu](http://wilawinaction.law.wisc.edu). I hope that by now you're subscribed to our Wisconsin Law In Action podcast, but if you aren't, you can find us at the Apple iTunes Store, Stitcher or Google Play or listen to our full archive again at [wilawindaction.law.wisc.edu](http://wilawindaction.law.wisc.edu). Thank you for listening. Join us next time as we return to the world of criminal law, discuss recidivism rates, and sentencing with Professor Cecelia Klingele. See you then, and happy researching.