TURNER:

Hello and welcome back to Wisconsin Law in Action, a podcast where we discuss new and forthcoming scholarship with the University of Wisconsin Law School professors. I'm your host, Kris Turner, and my guest today is Professor of Law and Director of the Great Lakes Indian Law Center, Richard Monette. Professor Monette is a nationally-recognized expert on federal Indian law and tribal law, and teaches torts and water law here at the University of Wisconsin Law School.

Today, Professor Monette is here to discuss the Supreme Court case, Brackeen v. Haaland, which was argued in November of 2022 and will have an issued opinion very soon later this year. The case, according to SCOTUSblog, is focused on the Indian Child Welfare Act or ICWA, and whether it's placement preferences, which currently disfavor non-Indian, adoptive families in child placement proceedings involving an Indian child, and thereby, disadvantage those children.

Discriminate on the basis of race in violation of the US Constitution. Secondly, whether ICWA's placement preferences exceed Congress's Article 1 authority by invading the arena of child placement, the virtually exclusive province of the states, in otherwise commandeering state courts and state agencies to carry out a federal child placement program. Thank you for returning to the podcast today, Professor Monette.

PROF. MONETTE:

Thank you for having me on your podcast, Kris. I appreciate it.

TURNER:

Sure. I was happy to have you on all the way back in March of 2020, and I'm happy to have you back now to discuss this important case.

PROF. MONETTE:

Time flies.

TURNER:

Yes, it does. Well, let's start our discussion today by reminding our listeners about your background. What is your professional experience and why come on the podcast to talk about Brackeen today?

PROF. MONETTE:

Well, I grew up on the reservation. My family, mom and dad are both tribal members. All four of my grandparents were, so all of the tribal life and federal Indian law on the ground, in the dirt, has been part of my life since the beginning. My tribe was subjected almost to a removal. It was certainly attempted to be subjected to termination. It was subjected to allotment. Both of my parents attended Indian boarding schools.

My mother, in fact, was taken from home when she was five years old, and really didn't come home till she was 11 or so, including summers and as far as we can tell, and holidays. Of course, those were poor times, boarding schools were a ways away. It was costly to get back and forth, but nonetheless, all of those some of the more ugly happenings and policies in our historical relationship between the United States and tribes, my tribe experienced and my family experienced directly.

Again, I'm not talking about my grandparents or great-grandparents, I'm talking about my mother and my dad. A lot of that stuff is very close to home, so that's why I went to law school. I wanted to continue

to do this work. Of course, I wanted to teach. I first went to a teacher's college and got a teaching certificate. Licensed from the state to teach high school, English and history, so it's always been there. Then when I graduated from law school, I ended up out in Washington, D.C. working for the Senate Committee on Indian Affairs.

Subsequent off-roads in my life, I also served as the director of legislation in the Bureau of Indian Affairs. I also served as chairman of my tribe, Turtle Mountain Band of Chippewa, I was elected twice to serve as chair. There are a lot of stories involving those things, which maybe we could have another podcast at some point, but those won't be the point of what we're talking about today. But that's some of my background, that's why I'm so into this. That's why it matters to me.

I still have family on the reservation, brothers, sisters, nieces and nephews, lots of them children, a son, at least one of them living on the reservation. This stuff is really close to home. It gets really important for me to want to think it through in the right way, and to try to help other people consider what might be some the right way, or other ways of looking at the stuff that might be helpful. I'm happy to do a podcast on the Brackeen case, very important.

TURNER:

Right. As I mentioned, the Brackeen case was argued in November of last year. What, in your opinion, are the most immediate and lasting implications of this oral argument itself?

PROF. MONETTE:

Yeah. Well, of the argument itself, I would say it illustrated for us that in the last couple, three decades, we have taken all these doctrines, moving parts in federal Indian law, and tucked them into each their own silo. Over the years, you can just go through and look at federal Indian law, and see articles on plenary power or preemption, or trust responsibility. This showed, number one, that we've done that probably to a fault.

It showed that it's probably time to go back and look more holistically at all of these doctrines, all of these moving parts, and try to wend them back together to show their interrelationships, show the logic of the interrelationships. Show why the relationship between these doctrines matter, and show why sometimes the way the silo approach has actually made them not logical and not work well.

As I listened to the Brackeen oral arguments, I just couldn't get away from that thought as you were getting this, "Well, what about plenary power? What about the tribe?" "Well, yeah, no, yeah, we're thoroughly confused." If you don't mind, I'll take a little attempt to wend those together among other things as we talk here?

TURNER:

No, please do. I'm very interested because I agree with you, these concepts can seem very isolated, siloed as you said. We'll try to take them out, take a look at them and then see how they all wend together, again, in your words.

PROF. MONETTE:

Yeah, very good.

TURNER:

Let's start with preemption. Can you tell me about that concept and then tell us where that place is in this hierarchy of all these different concepts as well?

PROF. MONETTE:

Yeah. Well, and let me be clear, so I said preemption, and plenary and trust, and those three clearly were raised a lot in the Brackeen opinion. Yeah. It's probably fair to say that the issues that apparently are being more squarely addressed by the court, involve also related doctrine, including one related that's about the state's commandeering of state government.

You just think out loud upfront, think about, "Well, if there's an act of preemption and it's an assertion of plenary power over a state, the state feels like its being is being commandeered." To the extent that gets confused with the tribes, I want to make sure we're seeing there certainly a commandeering of tribal government is an issue as well, right?

Then of course, the other issue that got more to the heart of what most of apparently the tribes and Native federal Indian law thinkers were concerned with, and that was the racial, political distinction. As I've written before, and we talked about I think a bit last time we did your podcast, was the holistic, at least to that extent in the American system, view of federalism. It is the relationship in our minds between the federal government and the states.

But how it affects the relationship between the federal government and the tribes, and the states and the tribes, and to try to get that figured out in a way that makes sense and is workable. I've presented a couple of writings, I've published a couple of things trying to get at that. They have taken a bit in some circles and in some cases even, but I think we are just not there yet. Of course, like everybody, I think I'm right. Hopefully, people would listen to this, read those again.

I will get an opportunity to publish a larger book on it soon, and we'll all get an opportunity to think it through again. I think it's very important. But right now, they started preemption, well, that's important I suppose, one, because it teases out this pop culture thing about discovery. It's important to recognize that pop culture part of it. How do you discover something where somebody's already living and all that? Some great, fun conversations and justify a parade in Chicago or Denver, or something here and there.

But what that means in the law, is a little bit different and very important to understand if we're going to protect sovereignty. It's important to protect our identity and the identity that gets built by the external world. Thus, the parades in a Chicago or Denver, and thus, wanting to say we were not discovered, that's important too. I don't mean to suggest that that's not, but the identity of the tribes in the context of federal Indian law in my mind is paramount.

I think most people concerned with the field agree with that, so I think we need to look at this this way. Let's just think about the trajectory of preemption. First, it was in the discovery doctrine and it's so important to hear that doctrine right. But in the end what it was, was the discoverer preempting others from discovering. It's important to say that out loud. Again, that pop culture thing off the table, the relationship there was not the Euros and the Natives.

We're discovering the Natives or we're discovering your land, it was really between themselves. I'm just thinking well, if we get to talk about this, there's an easy quote to find in Johnson v. McIntosh and in Worcester v. Georgia. In one of them, in Johnson v. McIntosh, Justice Marshall writes, "But as they were all in pursuit." They all, the European countries, Christian, European countries, were all in pursuit of nearly the same object.

"It was necessary in order to avoid conflicting settlements between them, and consequent war with each other." It's not in regard to the Natives, to establish a principle that's the doctrine of discovery. "To

establish a principle, which all should acknowledge as the law by which the right of acquisition, acquiring the Natives land that way at that point, which they all asserted should be regulated as between themselves." One more sentence out of that particular quip.

"This principle was that discovery gave title to the government by whose authority it was made, against all other European governments, which title might be consummated by possession." Very clearly in the law, forget pop culture for a minute at this stage. In the law, we have to recognize that the doctrine of discovery is largely an exercise in preemption. One of the first clear exercises in that at the birth of this nation, and at the birth of this field of federal Indian law. In fact, if you don't mind, you jump ahead.

This was another 15 plus years or so after that case, Marshall writing in Worcester v. Georgia, the idea comes up again. He says, "They were well understood, these discovery charters that the kings were issuing, to convey the title, which according to the common law of European sovereigns respecting America, they might rightfully convey and no more. This was the exclusive right of purchasing such lands, as the Natives were willing to sell."

"The crown could not be understood to grant what the crown did not affect the claim, nor was it so understood." See, it's just so important to see that that doctrine's primary effect was internal to the European Christian nations, as an implied and at some point, express agreement amongst themselves so that they wouldn't be committing acts of war against each other, in their future attempts to acquire territory in the Americas. That is very clearly a concept and exercise of preemption.

That's important to get because when we then fast-forward through the history of it and we get to King George's proclamation of 1763, an act of preemption too. The one that declared that territories beyond the Appalachian, various ranges and subranges declared that those territories were off limits to settlers and reserved to the tribes. Of course, the king saying, "Unless I decide to get it." You can call it an act of selfishness, an act of greed and whatever you want to call it, an act of monopolization.

In the law, that's an act of preemption, especially if you can couch it in terms of some validity in the law. You can fast-forward to the Northwest Ordinance of 1787 under the Articles of Confederation. The colonies had declared their independence as free and independent states. They put together these articles, they signed on and they made that an exercise of preemption. Unfortunately for that one, it was a flawed preemption, because the Articles of Confederation gave the new confederacy, the new Union.

Not yet the current Union, but the new Union, the authority to deal with the Indian tribes, including to acquire their lands. In other words, the king's right of discovery was now descended to, according to them and their assertions of independence, to these new, free and independent states. They were going to say, "Well, we are going to delegate as successors to that discovery, we're going to delegate it to this new confederation we're creating," and so they did.

Again, almost an act of preemption and preempting who were preempting what? Well, that's where the problem was. It had this fatal, lethal ambiguity in it where those original states in the confederation said, I don't have it in front of me, but basically, "However, this is true as long as it doesn't conflict with the legislation of the individual states." You got a legislation of the Union to acquire territory, and legislation of the states to acquire territory. Of course, they were going to conflict.

Of course, history bears that out as Virginia and North Carolina, et cetera, Georgia claimed to have no Western boundaries. They of course, in other words, were asserting the right to acquire there. The Union was going to assert the same thing. It was a plane crash waiting to happen. But make no mistake, it was an attempt at preemption, maybe by both to preempt the other and it didn't work. It's important to see that and to see this line of thinking going through the historical developments of this field.

Then that's why that 1787 right before the 1789 birth of the current, the new Constitution at that time, 1787 was the last gasp there trying to make that work. Well, it didn't, but it was in the Northwest Ordinance of 1787. Then we could get to the current Constitution. Well, it's got the Commerce Clause and of course, the Supremacy Clause, and all the clauses read together as they're supposed to be. The Commerce Clause gives Congress the express power to deal with the Indian tribes and like the rest of the Commerce Clause, only to Congress.

It doesn't say anything about the states. It doesn't have that article's provision saying, "As long as it doesn't conflict with assertions of state power," it didn't have that. In conjunction with the Supremacy Clause then you can say that this grant to Congress in the Commerce Clause, is in disregard of state legislation. It is clearly an exercise of preemption, and so we got to think of preemption that way. There's a lot more, but now you get the idea and we can talk about later then how that all comes together in Brackeen.

TURNER:

Right. That really does help establish for me where preemption lies in this puzzle of federal Indian law. Let's lay another puzzle piece down, plenary power. How does that relate to preemption and the Brackeen case generally later on?

PROF. MONETTE:

Well, first but utmost clarity, an exercise of that power of preemption is an exercise of plenary power. Maybe with some of the added nuances so that the Congress is acting in conjunction with the Supremacy Clause to the disregard of the states. You can put all that together to get to that more understood idea of plenary. That sometimes it seems to mean absolute. In my mind and the indigeneity mind, it has more to do with relations, as everything does when we try to think about it in our thinking.

This has more to do with the relationship that Congress has with all of the states. It's in this plenary position and no one state can do it. They are preempted and Congress instead will exercise this sort of plenary power. That's what we find in the Commerce Clause. As far as I know, y'all young people can find this in a heartbeat. I can't, I actually have to read cases still. You find the word plenary, I think the first place in any related context, that is where the Supreme Court used the word plenary, was in Gibbons v. Ogden, and it was construing the Commerce Clause.

I believe it then cited Gibbons in a couple other cases, including reciting the word plenary in, I think, it was Pollard v. Hagan, or the Perschmann case, or Goodtitle case, some of those cases that followed along the same lines. It's very important to see the relationship between preemption and plenary, and what they actually mean there and know that they actually use the word, Gibbons v. Ogden. This isn't a word that's just in Indian law.

There's no reason that the word should mean something different when we're talking about international commerce or interstate commerce, just because we're talking about Indian commerce. It's the same Commerce Clause, it's the same word. Plenary is the same word as a word of construction. It's important to, like we always should do, to the extent that we leave in democracy and Republican democracy, to read it against that logical context.

If we do that, for example, let's say we read it this way, Gibbons v. Ogden, in the Commerce Clause, the states and their people. It's important to say that because the 10th Amendment reserved it to the states or their people, but they didn't give. It was important to say in the Commerce Clause, the states and their people, gave the Union the plenary power over the states and the people, to deal with interstate commerce. That's steeped in Republican democracy. Those basic ideas of government by the governed.

You don't give the government power over somebody else. You give the government power over you. That's the sovereignty, the source of sovereignty, the full organic body of sovereignty, so that's the way to say that. The Commerce Clause, the states and the people gave to the Union, the plenary authority over the states and the people to deal with interstate commerce. Well, then you can go to Pollard v. Hagan, and others and say, "Well, the states and the people, and the Commerce Clause gave to the Union the plenary power over the states and the people to deal with international commerce."

See, when you say it that way, there doesn't seem to be an issue with it. We generally accept that after 200 years. Yeah, okay. Well, Indian laws got this twist in it. Again, I think part of that is because of the siloization of these doctrines, but we should be saying the same thing. In the Commerce Clause, the states and their people gave to the Union, the plenary power over the states and the people to deal with the Indian tribes. To say that completely, consistently, them being the same Commerce Clause and the same plenary words.

That would help us understand if we would just say, repeat those things, repeat after me, and start thinking about then commandeering. Well, we'll jump ahead a bit, we'll come back. But if the Union and the Congress is invoking the Commerce Clause to commandeer the states, it might be because the discovery doctrine and all the proclamations, and Northwest Ordinance, they all bundled together. The Commerce Clause recognizes that the states and their people gave Congress the power to do that. Now did they give it all in its entirety?

Well, no. They have appropriate arguments about what the scope of that is. But make no mistake, Congress's power came from the states and the people. Democracy requires that it be exercised over the states and the people, and that that's the way we have to understand it. Obviously, the reason that's so important is because today with this again, siloing of these doctrines, we get plenary power over Indian tribes. Then of course, people tear their hair out over, "Well, where does that come from?"

It's extra constitutional, it's not justified. Well, yeah, because it wasn't the tribes and their people giving to the Union plenary power over the tribes and their people. It was presumably the states, in the source of that constitution. Well, back to that point that Marshall made in the case about the king could only give what the king had. Well, the same applies to the democratic sovereigns to the people. People can only give what they have, so they can't give the people of the states.

The states and their people can't give plenary power over the tribes and the people. That defies any of the democratic logic that this country had a revolution over to be born, and goes around the world still fighting wars over that idea. We have to read that right. Not only do I have to understand the logic of it, we have to figure out how to keep reading these things together. Even if we just repeat after me, those plenary power things, I think that helps us get there.

TURNER:

Yeah. That helps me just to hear it phrased that way where it's actually coming out of the silos and being discussed together. But let's continue to pull items out of silos.

The next one I'm going to ask about is the concept of trust, trust responsibility, trust doctrine. This seemed to be a really confusing aspect in the question and answers of the oral arguments, so I want to take the time to unpack that as well.

PROF. MONETTE:

Yeah. Well, okay. I think it was Justice Kagan, I'm not sure, or maybe it was Sotomayor, I think it was, asking one of the attorneys, the non-Native, anti-Native. We call them that, attorneys in this context, which this is one of the things that actually jogged me to think this way, said, "Well, what about when

Congress exercises this power over tribes?" She was asking like, "Well, why don't you have a problem with that?" She was spot on, but she didn't explain her logic for getting there.

That's what I'm trying to do to have us all let's go back and figure out how the logic of this even leads her to ask a question that way. I don't know if she thought it through either, but a lot of intuition that can lead you there obviously then. If you feel that way about the states, why not the tribes? The answer was, "Well, that's just an exercise of the trust responsibility." Just like that, we turned from preemption, to plenary to ask a question about the tribe, "Oh, that's the trust responsibility."

He did also say, "Well, Congress had plenary power over tribes, but really that's just an exercise of this trust responsibility," a total deflection. Let me throw another piece of spaghetti out there and there's so many moving parts, that the argument became a juggling act and they had a difficult time with it. Let's talk about that. This trust idea is best understood by giving it its historical context, and by looking at a necessary bifurcation that occurred through history.

We first hear the word guardian ward relationship in Cherokee Nation v. Georgia. Again, way back, 1831 or something. The court saying that the tribes are not foreign or domestic, they're States, with a capital S, rather they're domestic dependent nations. We generally impute the trust idea first to that statement. I think that's accurate. I think it was an accurate statement of what the court was talking about at the time, that it was talking about that third prong of sovereignty.

There's the territory, the peoples and the recognition. When the court is giving some life to what this relationship looks like, it's talking about the recognition, the political recognition. I think it's appropriate to call that the trust relationship. I think it is only a relationship because in contradiction to the trust responsibility, the only thing at play in the trust relationship, was the relationship.

The United States and the BIA, this didn't exist at the time, was not managing lands or property, territory for the tribes. It was not managing lands for individual Indians. That whole discussion was simply about a relationship. When we tuck those together with preemption and plenary in that way, and then think ahead to this distinction between a racial versus a political identity. Well, and we want to conclude with, well, it's a political identity.

We're talking about not a racial relationship but a political relationship, well, that's what was at stake. That's what was at play in the 1831, in Cherokee Nation v. Georgia, was a political relationship. Yes, trust relationship, but that's different from a trust responsibility. The trust relationship is that political doctrine, political concept. A trust responsibility is a property-based concept.

When the United States indeed started attempting to manage territory, property for the tribes, as we see in the Cook case historically. Certainly, for individual Indians, when there were there as allotments and then they said, "Well, they'll be held in trust for 25 years." The good of that is they couldn't be sold generally, the bad of it was it apparently gave the BIA now being named the trustee or the United States being named the trustee, carte blanche to manage those allotments.

In the context of managing those allotments, the actual, natural part of those allotments, the timber, oil, gas, grazing lands, et cetera, is very much a property-based relationship there. In fact, when they were sold, et cetera, and they were put into individual Indian money accounts, we call them now in the federal government, that too is property. That trust responsibility, that property-based trust responsibility idea, is actually very much like a typical property-based common law trust.

It has a beneficiary, it has a trustee, it has a corpus. We can quibble a bit, but actually this makes the point about who was the set lawyer. If we think about all these concepts together, we can conclude that even though the United States came in with its cookie cutter, it was our cookies or it was our cookie dough. I feel like on my reservation I was the set lawyer, not the United States of America. They came in with these oddball cookie cutters and messed things up, but they were not the set lawyer.

They were not the source of that property that is at play in that trust responsibility, in that property-based trust. My people were the source of that. See, even that helps us, I think, through that kind of thing. Recap, but importantly, trust relationship is a political concept. Trust responsibility is a property-based concept. We can sue till we're blue in the face with the trust relationship, that we attribute things that are not property, not real property, not tangible property, things like healthcare and education.

We say we have treaty rights to them, even though we're hard-pressed to actually find them in a treaty, especially to this day, really that's more about the relationship. Now, if we brought a suit, we'd probably lose. Congress owes us this healthcare. Well, if Congress decided not to fund it, I'm going to be the first one standing in line angry about it. But the argument that there's a legal obligation, is going to be a tough one. That's different from a trust responsibility.

You're dealing with actual, physical, tangible property, managing it, et cetera. Oil, gas, whatever it is, there's a corpus there for real. Those kinds of things have been the source of lawsuits, land lawsuits, right up to the kinds of lawsuits that were at play in Cobell, the Cobell case, and that's different. It's incumbent on us after years and years of articles talking about this trust thing, to make sure that we know we are talking about two almost entirely, at least relatively, but almost entirely distinct.

One political, one property-based, and the political one is the one that helps us best think about the racial versus political distinction. Does that help? Does that make sense?

TURNER:

Yes, yes. The trust relationship is what we want to talk about here, because the next thing we want to talk about is some of the central issues in Brackeen.

Which are about the political status of tribal members, but also of the commandeering of state government power. Can we start to mold all these together into one larger puzzle?

PROF. MONETTE:

Yeah. We know that the tribes are, let's see, federal Indian law actually hinges on their identity, as political entities and not racial entities. If it hinged on a race-based entity, identity, it would invoke strict scrutiny under the Constitution. All these laws that deal with Indians, the Indian Child Welfare Act just being one of them, that is the question, one of the questions in the case.

The Indian Gaming Regulatory Act, Indian Civil Rights Act, three or four books of volumes of the United States Code, and Code of Federal Regulations are all arguably, suddenly subjected to much greater scrutiny. I suppose a good many of them not being able to survive that scrutiny, so that's how important that is. The cornerstone, the livelihood of the field of federal Indian law depends on that distinction.

That's why going through the last things to get to the trust relationship, and understand why that is the third prong of sovereignty at issue, is a way to think about this and being perhaps the most important way to think about it. We have a series of cases that make this distinction between political and racial. I don't want to jump ahead too far, but we are finding ourselves in federal Indian law nicely, culturally wanting to talk less about the territoriality and more about the relational identity of our people.

That's okay, it's good, as long as we don't do it at the expense of territoriality. Because if you put these things on the balance, as we talk about, and find the right relations between territory and peoples as part of this, the third eye recognition, we know that they both have to be there. They both have to be in a proper relationship and proper balance. Sometimes our people will want to swing entirely one way to territory, and another way to the relational at the expense of the other.

We know better than that. If we are going to be arguing that we know and understand indigeneity, then we know better than that. We know that they both are properly in that formula for regulations and balancing them, and that they're both necessary for our sovereignty. I'm sorry if all of a sudden I sound like I'm preaching. That's important to say out loud. Let's just say that if I fast-forward it a bit, what we are doing.

What we're also seeing along with this tilt toward relational sovereignty, is the boundaries of the reservations are starting to lose their legal significance. Even internally, the tribe's electing people who live outside, letting anybody who votes. Used to be that maybe they had to come back and had to identify with some part of the res. Today, it's just all based on blood, all relational.

The exact thing that is putting a case like Brackeen on the table and invoking this American thinking. Well, that sounds race-based, right? We have to understand that that's the way they think. We don't have to argue till we're blue in the face the way we think, because we know how we think. We have to understand how they think and why that matters. It's not just internal to the tribes, it's external. We now have a rash of cases where tribal Indians, reservation Indians want to be of the states.

That was never the case with the old folks. If you're going to be a separate sovereign, well, you're separate. Well, what does separate sovereign mean? Well, what does sovereignty mean? Separate territory, separate peoples, separate recognition. But when your peoples start to overlap with their peoples, you're definitely losing the distinct peoples' prong. It's one thing to lose it if they are outside the territory. We get our peoples that like me, live in Madison, Wisconsin.

It's one thing to lose that for me, it's another thing to lose that for my nieces and nephews who reside inside the reservation, inside another polity, in a way that they're governed by distinct norms and values, and beliefs and principles. That's what makes them a distinct entity under the definition of sovereignty. Not that they have high cheekbones and black hair. It's because they have a distinct, cultural sect and we seem to have forgotten that.

That's why it's important then when I said we got to talk about the state's issue here, the commandeering part too. Now, if we go back through what I said, we can maybe put on the table and then take it off quickly. Well, the feds are going to commandeer the states a bit under the Commerce Clause, because that's what the states and their people told Congress to do about interstate commerce, about international commerce, and commerce with Indian tribes. This is precisely where the states and their people told Congress, "You do it."

Congress is taking that authorization of preemption, and enacting a plenary act and invoking that under the Supremacy Clause. They took it at the expense of the people that authorized it, in some way, nicely, democracy and action.

TURNER:

Law and action even.

PROF. MONETTE:

Yeah, important to read all those things together. Maybe I'm going off too far here now, but back to so what I've written about a few times, is there is this our federalism in America between the Union and the states. But I said there's this, our other federalism too. The states in the Union have this relationship in the Constitution, but we have a similar relationship in these treaties. Not everybody has a treaty, but there's democracy requires treating entities equally. We call it the equal footing doctrine.

Not all the states entered the Union in the same way or at the same time either. But democracy requires, the Constitution doesn't, by the way, democracy requires that they all be treated equally.

That's the equal footing doctrine for the states. If democracy's even just going to be applied consistently, it's going to work that way. Then it gets a little deeper. Well, the Union and the states required this federalism supremacy in the states. I'm sorry, supremacy in the Union, inherency in the state, because that's the way the founders thought, "That's the only way that's going to work."

One of the founder's writing, "We apprehend that to coordinate sovereignties. We apprehend that coordinate sovereignties would be a solecism in politics." I think one of the anti-Federalists wrote that. Governor Morris from Massachusetts wrote something of similar clarity, that you can't have two or more legislatures in one and the same state. I think those are the exact words he used that clearly. They developed their federalism with that in mind. Well, so we can't suggest that the tribes and the United States sovereignties overlap, unless we ask the same questions.

Can you have these two legislatures? Why can't you? Well, how did you fix it over here? Well, one has supremacy and one has inherency. Well, United States has nuclear bombs and we don't, right? Well, the United States has the supremacy, okay, but then the tribes have the vast inherency. That's the way Indian law's actually developed. I always like to point out that the 10th Amendment in the Constitution where it says, "What is not delegated in this Constitution to the Union, or prohibited by the Constitution to the states, shall be reserved to the states or the people."

In other words, the states and the people are the source of it. They gave some, what they didn't give, they reserved to themselves. When the court finally had to address a similar matter in the overlap of these sovereigns, two and potentially three even. The court had to take in the US v. Winans case, take the state's equal footing doctrine off the table. That doesn't apply in this context, because we have an international obligation here, treaty invoking this Supremacy Clause.

Then the court wrote, using beautifully that same logic of democracy and Republican democracy, that treaties are to be construed as a grant of rights from the Indians, not to them, and a reservation of those not granted. If you were told you can't use the same words, but rewrite the 10th Amendment, that's what it would be. All right. It's the same logic steeped in Republican democracy, as a cornerstone of these relationships. But like I said, state's territory creeping into our reservations because of allotments.

We know how bad that was. In some states, we have PL 280 with the state's territorial police powers creeping into our reservations. Then we have the state's people creeping in, but also our people creeping out and wanting to be part of that polity, wanting to be part of both. We are blurring the legal significance of the lines of our territory. We are blurring the legal significance then of the lines in our distinct peoples, and we are undermining our sovereignty by doing so.

A case like Brackeen, if you can take all these otherwise siloized doctrines, and bring them back together and look at the important relationships between them, and run it from the beginning to the end, there's almost no other way to conclude but that. I hope that we'll take the opportunity to run through just some of the ones that you talked about today. I know we don't have a lot of time left. The ones we talked about, the preemption, the plenary, the trust, think about all those exercises of preemption.

Think about plenary, where it came from, who it was deposited to, and therefore, who it is applied over the right way. Then what justifies this action over the US, over the tribes? Well, not that. Does the trust responsibility? No. Does a trust relationship? Well, you might think about what the Natives did in their treaties and having a long-term relationship with the United States and say, "You know what? We did actually authorize some overlap in our sovereignty." As long as the logic allows our sovereignty to continue.

Here's how they did it. No reason why we shouldn't be doing that the same way and keeping all this stuff in mind. I think that will help most. Then of course, understanding the commandeering argument, and for the states to understand that in a lot of ways when they push back on an exercise of federal,

plenary power under a clean water act, or an endangered species act, or some act governing gaming in their states and marijuana or hemp. The tribes do the same thing and for the exact same reasons.

We're the inherent sovereignty here, trying to grow a culture out of our territory and among our distinct peoples. We don't need this outside entity coming in and severing the civic relationships between the polity and the people, between the state and the state citizens, or between the tribe and the tribe citizens. Neither of us want that. It's time to think that through and go forward with that, so we can understand and explain to a court and explain to law students, explain to everybody that these doctrines, they didn't fall from Mars.

They're not unrelated, they don't belong in silos, they all grew up together here. They have to logically connect with each other. They have to logically connect with each other, Chris, because tomorrow morning, my nieces and nephews, and grandnieces and grandnephews, as is increasingly happening, wake up on that reservation, walk out the front door, and their first thought has to be, "What am I doing today? What law will apply to that?" Nobody else has to do it in that way. It's almost inhumane, but that's where we're headed. It's time for us to think this through and to fix that.

TURNER:

That's a powerful conclusion and thank you for that, Professor Monette. That comprehensive review is exactly what my final question was going to be, so I don't even have to ask it. I just wanted to see how these all went together and that really summed up very nicely for me. It makes much more sense about what can be confusing because these are so separate, but not really.

They all work together, as you said, they grew up together. I like the way that you phrased that, and that to take them as a whole is how you can understand these situations. And how on the ground your nieces and nephews feel this every day, that they have to understand in a different way than other folks and other sovereignties do.

PROF. MONETTE:

Very good.

TURNER:

Well, thank you again for joining the podcast today, Professor Monette. We've been discussing the US Supreme Court case, Brackeen v. Haaland.

Again, I truly appreciate you taking the time to discuss this with me, I think it's very important. Watch out for that opinion to be issued later this year. Any final thoughts before we go?

PROF. MONETTE:

No, I really appreciate you giving me the opportunity to do this, Kris. Maybe when the opinion comes out, there'll be something to talk about again. There certainly will be other cases, so I hope we can do this again.

TURNER:

Yes, we have you on the docket already to have you back, I'd say that's safe.

PROF. MONETTE:

Good, okay. Thank you, Kris.

TURNER:

Yes, thank you. By the way, we will link to all Professor Monette's scholarship that he mentioned during our discussion today. Thank you all for listening. For that complete listing of Professor Monette's work, you can visit the University of Wisconsin Law School Repository.

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