Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts

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DEMOCRACY, CITIZENSHIP, AND INDIAN LAW LITERACY: SOME INITIAL THOUGHTS

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As Professor Cichon indicated, the title of my remarks in this late afternoon speech is Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts. Yet, as I was waiting for my chance to speak, I thought I might retitle my presentation to something like Is There Any Light Left At the End of the Day? I do not usually speak last and several speakers have quoted from my scholarship and alluded to much of what I was going to say, but there remains a core set of themes that I would like to address.

The first theme is simply that of "contact." As suggested by the historian, Francis Jennings: "Columbus did not discover a new world; he established contact between two worlds, both already old." The word 'contact' properly suggests the reciprocity of discovery that followed upon European initiatives of exploration; as surely as Europeans discovered Indians, Indians discovered Europeans.

This threshold contact of the 18th and early 19th centuries brought together two groups of people—Europeans and Native Americans—who arguably knew nothing about each other prior to their unexpected meeting on the eastern shores of this continent. This political and cultural interaction raised significant questions of all kinds, but for my purposes as an Indian law scholar, I want to focus on aspects of the legal characterization of this distinct—however inadvertent—coming together of quite different peoples.

As an imaginative proposition, the possibilities were wide-ranging, if not infinite. Yet, history transforms possibilities into what happens and disposes of most of the rest. The trajectory of Indian law from the beginning to the current twilight of the 20th century has been beset by the recurring paradox of seeking to discern and to establish an enduring legal description between these two groups of people. The possibilities have ranged considerably from a kind of treaty federalism through allotments and assimilation, Indian reorganization, termination, and the current phase of self-determination.

This often unpredictable development of Indian law is neverthe-

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less rooted in the cornerstone cases described as the Marshall trilogy. These cases, while establishing some fundamental Indian law propositions, are themselves subject to many interpretations. I want to briefly describe the two most significant views as a means of setting up the principal themes of my talk: democracy, citizenship, and Indian law literacy.

However, I do not want to repeat Professor Prygoski’s in-depth discussion of those cases. One of the ways to think about the Marshall trilogy, since everyone now has a sense of these cases, is that there are two different models for describing what the Marshall trilogy actually represents. I think what model you subscribe to, or what model the United States Supreme Court subscribes to, will, in many ways, determine the way we think about past and future cases as Professor Prygoski has suggested.

One notion is that you can just regard the Marshall trilogy as an example of colonialism. You know, kind of dressed up slightly, or maybe not dressed up at all. In Western society, we are committed to the rule of law so we have to cloak colonialism and say that there is some justification for it. One can read the Marshall trilogy as doing just that. Indian people are “savages” and “inferior” and that justifies colonialism, the ongoing denial of the right to complete self-government.

I prefer another way of looking at the cases, and I think there is evidence to support such a view. I think one of the ways of reading and thinking about the Marshall trilogy is as suggesting a compact theory. Such a theory suggests that there is a meaningful and almost equal, perhaps even equal, relationship between the federal government and Indian tribes. One of the themes I think you find in treaties is that they represent a compact between two sovereign groups of peoples, even if not equal in terms of power. An essential part of that compact was the recognition of mutual sovereignty. There really are two sovereigns standing on each side of the manifold set of treaties made between Indian tribes and the federal government. In the Marshall trilogy—and this is where I think the crux of Indian law is

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today—there is a critical reading of Cherokee Nation and Worcester that describes a compact between the tribes and the federal government.

One critical element of the compact was to keep the states at bay; to keep the states away from Indian country and from having any authority there. When you think of most of the critical issues in Indian law today that is what the issues turn on. What is the extent of state power in Indian country? What is the role of non-Indians in Indian country? I think that if we can resuscitate the notion of this compact theory, it can provide a doctrinal grounding for suggesting why state power should continue to be kept out of or minimized in Indian country.

One of the things that is absent in the Marshall trilogy is any discussion of what I would call “civic themes.” This is so because implicit in the Marshall trilogy is the notion that the federal government and tribes, Indians and non-Indians, will always be separate. One of the things that is set out in the Marshall trilogy is the understanding that Indian tribes were outside the national polity. That is, the tribes did not participate meaningfully in any kind of a national or state political system. There is no discussion in these early cases about what role Indians or tribes would have inside the national system. They were described and recognized as essentially being outside the system or on the borders of the emerging republic and not part of the republic. So, there is no discussion of civic themes; there is no discussion of citizenship, or the role of Native Americans or tribes in a constitutional democracy.

Yet, American history is not static; it continues to move. And it moves, at least in one way of thinking, westward. What happens when American history begins to move westward? We have this notion, that some of the speakers spoke about earlier today, where—initially it is posited this way—Indians and non-Indians are always to be kept separate. So, one of the initial moves is to take Indians from the East whenever you could and move them to the West. There was an understanding that there would always be a place known as Indian country, which would be primarily set aside for Indian people, and Indians would have a minimal amount of contact with non-Indians. Maybe from both sides that might be seen as okay; to basically keep both sides separate. But the West was not infinite,
and at some point, there just would not be enough territory to keep Indians and non-Indians separate from each other. This westward movement comes to be ideologically associated with the idea of Manifest Destiny.

What is actually happening when American history and American people start to move westward and settle the West in great numbers? For the first time, you do not have a real physical and legal separation between the United States and Indian country. Rather, for the first time, you begin to have Indian country surrounded by non-Indians and by non-Indian country.

Then with the allotment policy in the latter part of the 19th century, you have a substantial penetration of Indian country itself by non-Indians. The most dramatic and drastic thing for Indian law in the latter part of the 20th century is the residue and remainder of the allotment policy which brought a significant number of non-Indian people into Indian country as permanent residents. If you think about that, if it never happened, if you could look out on the reservations in this country today and there were only a minimum number of non-Indians living in Indian country, I would venture to say that the field of Indian law could be considerably less volatile and doctrinally tortuous. For the most part, and there are always exceptions, the federal government and the courts only get seriously concerned about what tribal governments are doing when tribal governments are doing something concerning non-Indians or their property. Traditionally, the federal government has been most tolerant of what tribal governments do when it involves only their own members.

One of the ironies in Indian law is that when you point out the strongest cases about tribal sovereignty, whether you are talking about Ex parte Crow Dog or Santa Clara Pueblo v. Martinez, it is notable to me that those cases only involve Indians. There might be a racial aspect to that. Specifically, the Supreme Court appears to be less concerned about what tribal governments do to their own members, but the Court has a much more heightened sense of scrutiny when a tribal government purports to exercise authority over non-Indians. Again, if non-Indians were not in Indian country as permanent residents—as significant landholders—I think a good number of the issues that we face today in Indian law would not exist.

As Professors Prygoski and Kickingbird mentioned, I, too, want

to consider the plenary power doctrine. However, I want to suggest another angle of vision about why the plenary power doctrine emerged as it did early in the 20th century. One of the things that happened with the movement and settlement in the western part of the country is that you have this amazing process of absorption that is never constitutionally or statutorily authorized by Congress. That is, Indian tribes that were originally posited in the Marshall trilogy as largely being outside the national polity were being absorbed into the republic in two ways. First, the tribes were literally being physically surrounded and absorbed into the national republic without any real legal recognition that this was actually happening. Second, it raised serious legal questions. For example, what was going to be the legal doctrine available to the federal government when Indian people were no longer on the borders of the republic but were directly incorporated into the republic?

The basic premise of the Constitution is the Lockean notion of the consent of the governed and limited powers for limited sovereigns. But when you put that overlay on what happened to Indian people and Indian tribes, it does not fit. It does not work. Tribes never consented to be absorbed into the republic. They never consented to be governed directly by the federal government. This historic reality created a very serious problem of constitutional doctrine.

How could we say that we governed people who never consented to be part of the national polity? How could we say that we had a power to govern tribes who never entered into agreements to be governed by the federal government and become part of the national republic? Although the Supreme Court did not specifically address these matters, they were the critical issues in *Lone Wolf v. Hitchcock.* What doctrine was going to be available to the federal government to support its power over tribes and individual Indian people who were no longer outside and on the borders of the national republic?

As Professors Prygoski and Kickingbird have indicated, there is nothing in the text of the Constitution that would provide the federal

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10. 187 U.S. at 553.
government with that much power. The Indian Commerce Clause\^{11} does not stretch that far as the Court itself acknowledged in *United States v. Kagama*.\^{12} Ultimately, the Court had to resort to the extra-constitutional notion of plenary power. According to the Court, it exists because it has to. Ninety-five years later it still suggests an incredible jurisprudential sleight of hand. There were these titanic changes that were happening in the landscape—both the political landscape and the physical landscape—and there was no way that the Republic could constitutionally come to grips with that. What would have been needed and appropriate at that time would have been some type of constitutional amendment or constitutional referendum about the Republic absorbing tribes into the United States both physically and politically. That notion was never even entertained. And that is why we have the plenary power doctrine.

One problem with the plenary power doctrine is the impact it has on democracy. It has very serious implications for democracy, particularly in how we think about democracy working in the context of Indian country. It becomes an incredibly destabilizing force. The plenary power allows Congress to do anything that it wants in Indian affairs, and Congress does not have to worry about the democratic ramifications of its actions. For example, it allows Congress to unilaterally reduce the size of reservations.\^{13} It allows Congress to terminate tribes. That is probably the most exorbitant exercise of power by the United States Congress: to pass legislation to say to Indian tribes, “you no longer exist,” and it is completely at odds with any democratic ethos that respects the right to self-government.

In addition to the absence of civic themes relative to democracy and a lack of discussion about what the relationship of tribes is to the federal government, there are also issues of the relationship of individual Indian people to the national polity and to the state polity.

This raises the issue of citizenship. How do we, how can we, how ought we think about the citizenship that Indian people possess? The conventional wisdom, which is accurate, is that Indians have three kinds of citizenship. They are tribal citizens, state citizens, and federal citizens. They are tribal citizens in accordance with tribal membership and tribal law. They are federal citizens; many Indian

\[\text{\footnotesize\textsuperscript{11}}\text{U.S. CONST. art. I, § 8, cl. 3 (Congress may “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes”).}\]

\[\text{\footnotesize\textsuperscript{12}}\text{118 U.S. 375 (1886).}\]

\[\text{\footnotesize\textsuperscript{13}}\text{See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).}\]
people were made federal citizens through different kinds of allotment acts. Indian people who served in World War I were made federal citizens. Then in 1924, there was finally a national statute passed, making all Indian people United States’ citizens.14

What about the issue of Indian people as state citizens? This question is more bedeviling and complex. There never was a constitutional amendment, or any federal statute that made or recognized Indian people as state citizens. In fact, there was a substantial amount of litigation up through the 1960s about whether Indian people residing on reservations were state citizens. Although the United States Supreme Court never squarely addressed the issue, ultimately all the state and lower federal courts uniformly held in the affirmative. In most cases, Indian people never consented to becoming state citizens. Why was the issue not raised about whether Indian people on reservations wanted to be state citizens?15 Was it just a given that the state or the federal government had the authority in Indian country to make Indian people state citizens, even if it might be against their will or against the will of the tribe itself?

Part of the answer, I believe, lies in the inability of Indian law to acknowledge and to confront history as it happens, rather than after, often way after, the fact. When non-Indians (and more importantly the state itself) penetrated Indian country (to some degree) in the latter part of the 19th and early part of the 20th century as a result of the allotment process, the issue of state citizenship for reservation Indians was joined. Yet, like so much in Indian law, the issue was unacknowledged and routinely ignored. Eventually, it was too late to do anything but confirm state citizenship for Indians on the reservation because to do otherwise would likely trench on the Fourteenth Amendment guarantee of equal protection and the essential notions of basic fairness. This current legal reality—while undoubtedly “necessary”—tends to hide from view the issue of democratic consent and tribal sovereignty.

This also raises the collateral issue about how tribes think about tribal citizenship. Although some tribes are beginning to rethink this issue, at least for discussion purposes, most tribes have simply

15. Given that states have (some) authority on the reservations, state citizenship for Indians is absolutely necessary. My point is, however, slightly different. If state authority on reservations is itself questionable in the first instance (as I believe it is), then too is that part of it related to citizenship.
conceived of tribal membership as being equivalent to being a tribal citizen. A number of tribes are beginning to rethink this paradigm. I have had some discussions with Professor Richard Monette who teaches at the University of Wisconsin Law School about this issue. A number of tribes he works with are beginning to ask themselves, can or should they make a distinction between being a tribal member on one hand, and being a tribal citizen on the other? Is this a valuable way for tribes to rethink what they are trying to accomplish on the reservation? How do they want to think about people who are tribal members? Of course, many tribes make distinctions between tribal members who live on the reservation and those who do not in terms of the right to vote and to run for tribal office, but these distinctions have turned on the concept of residency rather than citizenship per se.

More interestingly—and perhaps this is the most provocative aspect—is how tribes might think about tribal citizenship in the context of whether it might be possible for nonmembers, whether they are Indian or in some cases non-Indian, to be considered tribal citizens for some limited purposes. It is certainly within the purview of tribal sovereignty for a tribe to define what being a tribal citizen means. This raises an important question of values. That is, how does any tribe conceive of what it is to be a tribal citizen? What values is a tribe seeking to realize when it talks about what it takes to be a tribal citizen? And given those values, is it appropriate in some situations for nonmember Indians or even non-Indians to be considered tribal citizens? Is this just a bad idea, or is it an idea with some potential merit?

This is the kind of question that potentially raises the issue of the role of tradition and custom in contemporary tribal life. More and more tribal courts and tribal councils look to tradition and custom as a basis for common law and tribal legislative enactments. Tribes view tradition and custom as important and vital sources of both law and values in the latter part of this century. It might therefore be worth doubling back and asking the question in terms of any tribe’s tradition and custom: How did any given tribe treat outsiders? Did they remain eternally outsiders who had no role in the tribe? Were they at some time likely to have limited roles in the tribe? How did a tribe historically think about adopting nonmembers? How did tribes traditionally think about intermarriage? More broadly, how did tribes define individuals who were not part of the tribe at birth but later entered into tribal life in some intimate way as spouses, adoptees, or even captured enemies? What role, if any, can such people, posited
originally as outsiders, have in the contemporary life of a particular tribe?

For example, a tribe might consider that in order to serve on a tribal administrative board or administrative agency one would have to be a tribal citizen. Then it could determine for purposes of being on the administrative board who are the kind of individuals eligible for that kind of tribal citizenship. Tribal citizen in this context might include such things as residency, subject matter knowledge, and cultural awareness. Additionally, one could think about it in the context of jury duty. Most tribes, although not all tribes, limit jury service to people who are tribal members. Does it make sense for any tribe in this context to say, “For this kind of case, jury eligibility is open to nonmember Indians as well or, alternatively, it is open to non-Indians who can, in that limited role, serve as a tribal citizen for purposes of some kind of jury duty?” What are the tribal values that suggest an affirmative or negative response to these possibilities?

In the context of tribal citizenship, how does a tribe think about the issue of intermarriage? When a tribal member marries a nonmember Indian or marries a non-Indian, would that nonmember Indian spouse or that non-Indian spouse have any opportunity to participate as a tribal citizen? Do tribal tradition and custom provide insight about the possibilities?

All of this can be easily distinguished from being a tribal member, because being a tribal member usually involves quite different rights in terms of the eligibility for per capita money payments and services and benefits that come directly to the tribe for its members. But when we think about citizenship, we can at least put this on a somewhat different plane in terms of how a tribe wants to think about the values that it is trying to inculcate and to think about these other people who are on the reservation and what roles, if any, they might play in such a process. Whether the tribe actually wants them there or not is a different question, but recognizing that many tribes have significant numbers of nonmember Indians and non-Indians living on their reservation as permanent residents, it makes sense for tribes at least to think about whether there is any kind of role for those individuals in the civic life of the tribe. The answer might be yes, the answer might be no, but I think it is a very important question. It is important from a cultural perspective, and it is important from a civic perspective as to how the tribal government views the potential of such individuals.

It is also true from a political perspective. One of the issues that
continually comes up, and it was talked about this morning in the context of *Strate v. A-1 Contractors*, 16 is the area of civil jurisdiction. How much authority are tribes going to have over non-Indians on the reservation? One might argue or at least suggest that the opportunity or the likelihood for success to assert certain kinds of authority over non-Indians might be advanced by the notion that at least some kinds of non-Indians for certain purposes do participate in the political life of the tribe. I know this is a controversial issue, but I believe it does have a certain political framework. Given the current Supreme Court (unfortunately), I would not be totally surprised if, at some point, the Court just said tribes do not have any authority over non-Indian residents on the reservation. Non-Indians do not participate in the political life of the tribe, it is unfair to allow tribes to have authority over those individuals. That is not my opinion nor the weight of the history of Indian law, but I think the possibility of this Court making that kind of decision is not totally beyond comprehension. I think, just in a practical political framework, it behooves tribes to think about some of these possibilities as some tribes already are.

Are there risks in some of these considerations? Absolutely yes. One of the dangers might be, of course, that if a tribe allows non-Indians to have significant civic participation in the life of its tribe, it may imply to some that there is nothing any longer unique about tribal government. Since they are allowing non-Indians to have a significant role, why do we not just fold the tribal government into the local county and state government. Full assimilation/termination will have arrived. There are definitely risks, and there is no doubt about it, but trying to think through in terms of what the tribe thinks is best for itself is at the heart of sovereignty. It is this kind of difficult conversation about sovereignty that is a necessary predicate to advance tribal values and aspirations; because if sovereignty means anything, it means the ability of tribes to talk about very serious issues and to choose from the array of choices which are available.

One of the positive ways of exercising sovereignty is for tribes, and again this is responsive to and resonant with what Professor Prygoski was saying, to control the discourse, not simply before the courts, but also politically. What are the issues? If tribes can lead the discourse and say this is an important issue, this is how this tribe, and tribes in general, think about the issue, this will be a significant

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accomplishment. If you are there first, you can set the basic terms for the discourse. If the other side—if we think about it in a “sides” way—the states or the federal government get there first, and they determine what the terms of the discussion are, tribes will be on the defensive of coming into a conversation that they did not initiate. It will be very difficult to participate as an equal. If tribes determine what the conversation is, and what the important terms of a conversation are, tribes will be in the best possible position. Is this a conversation we want to initiate? Again, that is what tribal sovereignty is about—to think politically, socially, and culturally whether this is a conversation that we want to initiate within the civic life of this tribe and, more broadly, throughout Indian country.

In some cases, however, the answer might be no. This might not be a particular issue that tribes want to talk about because they do not think it is significant, resonant, or ripe for where they are today. At least they will have considered it and have a considered response about why they do not want to talk about it instead of being potentially blindsided by someone else on the other side generating that conversation. The issue of citizenship is ripe for (re)consideration, even if it does not lead to groundbreaking initiatives.

Ultimately, this leads me to the final theme that I want to talk about, and that is the notion of democracy and Indian law literacy. One of the notable features in the political life of this country is the way that we value democracy. We almost commodify it—as something that we sell around the world. Regardless of any such ballyhoo, it is a system that I deeply believe in. Yet what is oftentimes left out of discussions about democracy is noting that its open way to solve problems is premised on literacy. That is, democracy works because we have informed citizens, for we believe informed citizens who have the right to express themselves will eventually come up with the best way to solve society’s problems. As a general proposition, I believe this to be quite true. However, in the context of Indian law, this underlying literacy is completely absent. That is why at this point, I do not have much confidence in democracy to solve problems of Indian law in Indian country—because we do not have citizens literate in Indian law. So when you pose any of the issues that have been discussed today to most citizens, including most people in Congress, most state judges, most federal judges, and most state legislators, they are illiterate. How can we have confidence in them, racism aside, to help us solve these problems when they are not literate themselves about these
issues?

Unfortunately, Indian law issues have always been on the periphery. They have always been on the margins of the dominant legal system. Legal doctrines from tribal sovereignty itself to Congress’s plenary power in Indian affairs have always been outside mainstream legal understanding. For example, take an ordinary course in constitutional law. It does not provide any guidance for thinking about what happens in the context of constitutional law relevant to Indian law issues. Law students are not going to hear anything about the existence of three sovereigns within the national republic or the plenary power doctrine in an ordinary course in constitutional law.

In order to have any kind of long term confidence, in terms of solving issues in Indian law and in Indian country, there is a basic need to address and increase Indian law literacy. Notably, for a time recently the Supreme Court did have basic Indian law literacy. Indian law literacy does not mean the tribes always win, but it does mean that there is an informed discourse about any particular issue. Justices Marshall, Brennan, and Blackmun were literate in Indian law matters. Therefore, in most cases, the tribes were at least going to get a fair hearing before the Supreme Court. Today, I am not sure that we can identify a single Supreme Court Justice that has a similar Indian law literacy.

Another complementary thing that is missing is cultural literacy. That is, there is no cultural understanding or sensitivity within the Supreme Court today where it is trying to fully understand the history or the cultural context of what tribes are seeking to accomplish in general or what a particular tribe is seeking to do in any given case. One needs only to read A-I Contractors to discern this lack of sensitivity and engagement. I was there for the oral argument, and I saw that there was very little interest or concern about the cultural context of the case. There were two non-Indian parties. The plaintiff, who was a non-Indian woman, was married to an Indian man who was a tribal member, and she was a long time resident of the reservation. Their (adult) children were tribal members. Nevertheless, the Court really could not conceive of her as being part of the Indian community, as being “Indian” for purposes of this garden variety civil lawsuit. She was a non-Indian pure and simple. Despite learning of her family connections on the reservation, the Court still was not interested in her cultural situation in the slightest. If there is not basic doctrinal literacy about Indian law and any kind of cultural understanding of context or any sense of cultural empathy,
it is difficult to have much hope that these cases can actually be adequately or fairly resolved. The democratic impulse will be continually thwarted in such circumstances.

Part of this democratic failure is not unexpected. Indian law is a relatively new area of discrete study within most law school curriculums, and even within such curriculums, it is marginal and outside the mainstream of study. As a result, we have a significant number of people out there in the practicing bar, including judges and legislators, who themselves were never exposed to Indian law when they were students. Many of them are sort of frightened of the field and ill at ease because they do not know much about it. In addition, few, if any, state bar associations—particularly in the West—provide any real leadership on Indian law issues because they are not confident or conversant enough with the basic issues. They are not comfortable with their level of literacy or understanding.

Here is a small example of what we might do to improve Indian law literacy. Practically speaking, it would be to include an Indian law question on state bar examinations—particularly in the West. Light bulbs go off! Students would flock to Indian law, not because of a renewed concern for justice, rather because they want to pass the bar exam. I do not think there is any state that includes an Indian law question on its bar exam. And I think that this would be a real step forward. So again, we need to reduce Indian law illiteracy, and if we do, we can really provide an opportunity for the democratic impulse to flourish in Indian law.

I also want to question the notion, which several speakers addressed today, that things are really bad in Indian law. To me, this is a yes and no proposition, and I want to offer a mild corrective. On one hand, it is true, things are bad in Indian law. On the other hand, it is an unbelievably exciting and positive time in Indian law. Tribes are doing more today then they ever have in the 20th century. This is cause for rejoicing. Tribal courts have come into their own as forums of fairness and integrity, and tribal legislative bodies are enacting all kinds of important, complex legislation for their tribes. There is a real sense of moving forward on the economic front with Indian gaming and other commercial endeavors even though problems out there are very real.

All of this engenders a recurring paradox in Indian law. When things are really happening in an exciting way, and when tribes are really moving forward and exercising tribal sovereignty, it makes everybody else nervous. It makes the state nervous. It makes the
federal government nervous. The result is that when tribal sovereignty flourishes, it tends to make everybody else ill at ease. When you make the states and the federal government nervous, they may react negatively and without reflection or understanding. They have great power, and that power may be used to challenge and clamp down on tribes. That is the risk. That is the paradox. A paradox that is at least partially grounded in the Indian law literacy issue already discussed. Even though there is a lot to worry about in Indian law, and many of us worry, and properly so about what the Supreme Court is going to do, about what Congress is going to do, and about what any state legislature is going to do, our worry and concern is at least partially offset by the exciting and gritty exercise of tribal sovereignty.

Nevertheless, tribes believe, and rightly so, that they are moving forward and in a responsible way. Tribes are going to try to do things that really advance life on the reservation. This is the whole point of tribal sovereignty. It is not some naked exercise of political power, but using power to realize values. To me, that is what sovereignty is about—tribes thinking through the kind of values they want to realize in their political and social life, and how the tribes can exercise power to realize these values and allow their cultures to flourish. Too often, the discourse has been that the culture is over here and sovereignty is over there. I do not believe there is or ought to be that kind of disjunction. A culture can only flourish when it is permeated by the authority and the power to do the things that are necessary to allow those values to be realized in the first instance.

I think the struggle today is for tribes to continue to go forward in the responsible way, which they are currently doing. Part-and-parcel of what they and their supporters do, and ought to do, is to try and make the other side—the two other sides, the state on one hand and the federal government on the other hand—have a better understanding about what are the literacy and cultural elements in the field of Indian law. If others are literate and sensitive, then they can see at least sometimes that what tribes might be doing is a basis not for disagreement or fear, but a basis for cooperation—a basis for mutual collaboration. We can only achieve this level of awareness and understanding when we raise the floor of Indian law literacy. Without this basic advance of literacy, insecurity and fear will always surface when tribes go forward, and they will continue to plague the field of Indian law endeavors.

Tribes are busy doing what they do every single day. It ought not to be their job to engage in these kind of Indian law literacy
projects. It is really a project for non-Indians and for non-Indian institutions, including the organized bar and the legal education community. If the legal education community and the organized bar fail to do anything about Indian law literacy, it may never improve. I challenge those of us who are in legal education and members of the organized bar to address this issue whenever and wherever possible.

There is a wonderful, poignant line by the poet John Balaban that forcefully illustrates a related point. He was talking in a completely different context, but his line goes like this, and it sounds an awful lot like Indian law: "It makes no sense; it only happens." Things happen every day in Indian country and Indian law. The question is whether they have any fruitful and enduring meaning, or are they only happening? For tribes, what they do not only happens, it makes sense. Yet much of what the federal and state governments do also happens, but seems to make decreasing doctrinal and cultural sense. Therefore, a primary challenge within the field is to greatly reduce the perception that things simply happen and increase the potential that they might make a mutual, shared, progressive sense.

I want to conclude with a well-known quote from Felix Cohen, who is perhaps the scholar whose work most demonstrates the possibility of Indian law literacy: "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." I think this is a very potent quote to think about and reflect upon. What exactly is the balance in our national legal and political discourse between fresh air and poison gas? And as part of this inventory, each one of us ought to ask in what small ways are we adding to the fresh air of discourse or are we, even by our passivity or ignorance, adding to the poison gas in our democratic process?

Thank you.

17. JOHN BALABAN, For My Sister in Warminster General Hospital, in LOCUSTS AT THE EDGE OF SUMMER 91, 92 (1997).