TRANSCRIPT

Presentation on Fundamentals of Federal Indian Law
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Corey Hinton, Attorney, member of Passamaquoddy Tribe at Sipayik:
Thank you for the opportunity to be here and it's my great pleasure to introduce you all to professor Matthew Fletcher of Michigan State University. I would consider Professor Fletcher to be one of, if not the top expert in federal Indian law in the United States. He manages Michigan State University's Indigenous law and policy program where they are training the next generation of Native American lawyers. He also runs the most well respected Indian law blog in the country, called *Turtle Talk,* where Indian issues are regularly being discussed. And he moderates that as well. He's also a travel court judge. I think I heard him say earlier about 12 to 15 courts.

Professor Fletcher, he is very well respected around Indian Country and he speaks in these settings from time to time. This is a unique speaking event for him and I'm deeply grateful for the opportunity to welcome Professor Fletcher. Also, a citizen of the Grand Traverse band of Ottawa Indians, thank you again.

Matthew Fletcher :

Thank you very much. My understanding is you want a presentation on the fundamentals of federal Indian law and application to the great state of Maine. I'm happy to do that. When I do Indian law 101, I like to start with a few principles. Sort of basic principles that are always true on a level of generality to pretty much every Indian law problem and any Indian law situation. There are five of them so we'll go down the list.

First one is that federal Indian law, so federal law is supreme in Indian affairs. Second principle, which is more or less the opposite side of the same coin, is that state governments do not have authority in Indian affairs unless Congress grants a state that authority. The third is that tribal sovereignty, powers of Indian tribes are inherent. They do not derive from the federal government. They do not derive from state governments. They come from within. Tribes do predate the Constitution as sovereigns.

The fourth and fifth principles are sort of concomitant to the first three. The fourth principle I would say is the federal government has a trust duty to all Indian tribes and all Indian people that are members of federally recognized tribes. And the fifth principle which is a little bit esoteric and I'll get to how it's relevant later is something that I like to call the clear statement rule that if Congress wants to legislate in the area of Indian affairs, and strip tribes or Indian people of rights, treaty rights, reservation boundaries, whatever it might be, Congress does have that power but they have to come right out and say it explicitly. There are no implicit or backhanded divestitures of tribal powers or treaty rights or Indian rights generally.
Those are the five principles and I'll go into some detail about each one of those.

We'll start with the first one, federal power is plenary in Indian affairs. The Constitution grants Congress the power to regulate commerce with Indian tribes. The commerce clause itself is actually a listing of three different types of sovereigns that exist in the United States. The federal government is obviously one of those sovereigns but there are three others. There are state governments. So, Congress has the power to regulate commerce with states, that's one, we all know that. State of Maine is sovereign. The second one listed in the commerce clause is the foreign nations commerce clause. Foreign nations like Mexico, Canada. Congress has power to regulate commerce with those types of sovereigns and Indian tribes are the third sovereign listed in the commerce clause.

From the inception of the United States Constitution from the creation of the United States in 1776, Indian tribes were always considered to be a type of sovereign. More likely in the early days, akin to a foreign nation and probably more likely in the current era, akin to a state government than anything. But still a separate sovereign. What the Supreme Court has on occasion referred to as a domestic sovereign. They're not foreign nations and they're not states. They're just something else, they're Indian tribes.

What's relevant about that is that when Congress is explicitly granted a power in the Constitution, or any branch of the federal government is explicitly granted a power in the Constitution, our constitutional theory teaches us that that power is vested exclusively in the federal government. Sometimes we call it plenary power, whatever you want to call it, it is all the power that the United States government, the federal government needs to implement or effectuate a purpose in a particular area of law. So, interstate commerce, federal power. Commerce with foreign nations, federal power. Commerce with Indian tribes, relationships with Indian tribes, federal power.

Concomitance law, that is, the treaty power. United States also has the power to enter into treaties with sovereigns. The United States does not enter into treaties with the state governments but it does enter into treaty with foreign nations and it did, at least until 1871, enter into treaties with Indian tribes. So, a treaty is, as you probably know, a document, an arms length transaction, negotiated between sovereigns. The President or the executive branch negotiates the thing and then the Senate ratifies it and confirms it as federal law and the

President declares it. And so, tribes have entered into approximately 400 treaties that have been ratified by the Senate. Have entered into 400 treaties with the United States.
That is sort of our baseline rule of federal Indian law, is that when it comes to Indian affairs, they are akin in some ways to affairs with foreign nations or foreign affairs effectively. The second principle relating to states is that the states do not have power to interfere with Indian affairs programs that come out of the federal government. Indian affairs, principles, policies, whatever it might be.

So, the Tenth Amendment teaches us that if a power is not explicitly provided for in the Constitution, then the states have that power reserved to them. As we know, Indian affairs or Indian commerce anyway, or commerce with Indian tribes is explicitly delegated to the federal government. We also know from something called the Supremacy clause of the Constitution, that whenever Congress passes a law, in accordance with its powers, and a state law, any state law, even a state constitutional law or a state Supreme Court decision, any state law that conflicts with a federal enactment, an act of Congress, a treaty, even a regulation enacted or promulgated by a federal agency, that state law must give way to the federal law. It's called the, we often call it the preemption doctrine. Federal government has the power, when it is exercising its explicit power, to defeat, effectively defeat state laws.

If a state passes a law that is in conflict a treaty term relating to an Indian tribe or an act of Congress relating to an Indian tribe, or Indian tribes or Indian affairs generally, that state law must give way. In some of the earliest decisions of the United States Supreme Court in Indian affairs, which we call the Marshall Trilogy, the Supreme Court actually stated that state law has no force in Indian country. And we now know that Congress can because of its plenary powers in Indian affairs, can delegate or grant powers to states in accordance with this plenary power. Congress has done that around the country in lots of different ways. I'll get to this later, when Congress does that, they have to be very careful and specific about what they are doing or the courts will not enforce that law.

Third principle, you have to start the fact that tribes have inherent powers. Start with an acknowledgment in the US Constitution and then also the 400 treaties, that the United States acknowledges the sovereignty of Indian tribes. Sovereignty is a principle I guess that comes from sort of Anglo-American legal and political theory that every sovereign possesses all the powers in its inception that any sovereign possesses. That's where we start with Indian tribes. Indian tribes are always treated until really I guess 1871, as effectively foreign nations. They had all of the powers that any foreign nation possessed. Those powers include things like the power to declare war, the power to enter into treaties. I suppose the power to govern their own people, criminal jurisdiction, criminal prosecutions, things like sovereign immunity. Power to enact marriage laws or probate laws, divorce laws, land use regulations. Everything that a government could possibly do, Indian tribes in their original instance possessed.

Now, virtually every Indian tribe that is federally recognized including the tribes in Maine, have agreed to come under the protection of the United States government. And usually they

have done so, although not always, usually they have done so by entering into a treaty that explicitly states something along the lines of, the United States takes this tribe under its protection. Or, the tribe agrees to come under the protection of the United States. This duty of protection, this notion of protection, a lot of Indian people will tell you, it sounds a lot like when the mob shows up and says, "If you pay us money, we'll take you in our protection." Way too many times that is how federal tribal affairs has played out. But under international law, the duty of protection is actually an accepted doctrine under customary international law where a larger sovereign, sometimes referred to as a superior sovereign agrees to protect a smaller or inferior sovereign.

Think of the Vatican. The Vatican isn't a foreign nation but it is within, located within the nation of Italy. It's under the protection of Italy. It's under the protection of Switzerland. It's under to protection really of western Europe. It's a small sovereign that has agreed to give up much of its external sovereignty in exchange for that protection. Again, these are the, the duty of protection is a part of an arms length transaction really. A contract.

So when tribes agree to come under the protection of the United States, they gave up, for the most part, their ability to declare war on anybody they see fit or to enter into international economic agreements for example, that conflict with, that might conflict with federal prerogatives. We couldn't enter into great big deals with American enemies. I guess Russia or Cuba or somebody like that, Syria or something like that.

Certain kinds of external sovereign powers that tribes otherwise would have possessed, tribes agreed to give up when they came under the protection of the United States. Internally however, tribes retained all of those powers. This is consistent with the Supreme Court saying things like, state law has no force in Indian country. The reason the Supreme Court said that in 1832 was because the Tribe, in that case the Cherokee Nation of Georgia, had entered into a treaty in which United States took the Tribe under its protection. The Tribe gave up its external sovereignty or large portions of that and in exchange, the United States through its treaty terms, agreed to protect the Tribe's ability to govern itself. The internal sovereignty of the Tribe.

So, the Cherokee Nation in the 1830s, 1820s and 1830s, effectively functioned as a state within a state. It really owned and controlled the northwest quarter of the state of Georgia. The state of Georgia of course, at that time, was not terribly happy with that situation and unfortunately for the Cherokee Nation, that led to the Trail of Tears. But our legal and political theory, our Constitutional theory of Indian affairs, allows for the United States and a tribe to carve out state jurisdiction. To carve out state lands, lands that otherwise would have been part of the state and reserve them and protect them for the benefit of Indian tribes and Indian people.

Congress does have plenary power to interfere, I guess you could say, or restrict aspects of tribal sovereignty. It has done so on lots of occasions. Many Indian tribes have had their reservations undergone something like allotment where the United States carves up the

reservations, distributes individual parcels of the lands to tribal members, sells the rest of it off to non-members, non-Indians and undermines the intent of the tribe and originally to intent of the United States to create that reservation. That has happened. Congress has regulated the powers of tribal sovereignty through the Indian civil rights act. So, tribes must now follow effectively, since 1968, most aspect of the US Constitution's Bill of Rights. Free speech, fourth amendment type, search and seizure type protections, all that good stuff is contained within the Indian civil rights act. Congress imposed that on tribes. Congress could, if it sees fit, abrogate or provide for the limited waiver of tribal sovereign immunity. To allow for tribes to be sued in federal or state courts. In some instances, tribes have, or the federal government has authorized states to exercise criminal jurisdiction in Indian country that otherwise the states would not have possessed.

All of that is possible. All those restrictions on tribal sovereignty are possible under federal Indian law principles so long as Congress is exercising its federal plenary power.

Moving forward to the fourth principle, the federal trust responsibility. Again, this derives from the duty of protection. Indian tribes agree to come under the protection of the United States. It also derives from the fact that Indian tribes entered into an arrangement with the United States. An arms length negotiation, usually through treaties, but not always. Sometimes it's an other form of agreement where the United States agrees to protect tribal lands, tribal sovereignty, any kind of resources, assets, individual Indian protections. All sort of statutes. All of that, anything that you see in federal statutory law which Congress has enacted a statute relating to Indian affairs, affecting tribal powers, affecting states vis a vis tribes, affecting individual Indians and tribal members, all that comes from the duty of protection.

Yes Congress has the power to regulate tribal commerce, Indian commerce, absolutely. But a much broader power comes from this duty of protection. Inherently, when Congress agreed to take tribes under their protection, which it can do under its treaty power, which it can do under the commerce clause and other forms of power, Congress agreed and effectively was authorized by these treaties to enact greater, really omnibus federal statutes governing federal Indian affairs.

So, our modern incarnation, our modern understanding of this duty of protection, in the 21st century really is encapsulated by what we would call the general trust responsibility which is what sometimes people will refer to as Congress' power to deal with Indian affairs. The executive branch also has been delegated the obligation to, of this general trust responsibility. Our modern incarnation and understanding of the trust responsibility is really encapsulated in one phrase, Indian self determination. Since the 1970s, Congress has authorized, actually required agencies of the federal government to enter into contracts, government contracts with Indian tribes to run reservation, federal government reservation programs.

Before the 1970s, if an Indian tribe was operating a tribal government, which they did, the federal government would be there alongside. The Bureau of Indian affairs would send Indian agents, superintendents, to help an Indian tribe govern itself. When a tribe made a decision to

enroll a child into the tribe, that was actually a federal government, federal activity before the 1970s. The federal government was largely taking that action. The federal government was funding the tribal membership office. The federal government was controlling reservation politics.

Since the 1970s, Congress finally came into sort of a modern understanding of what Indian affairs should look like and basically adopted a theory of localism. That tribes should actually be able to govern themselves and that local governments, the tribal governments, should be the ones making local decisions about on reservation activities.

And so, that's why we have this fairly unique scenario, situation, where the United States requires its own agencies to enter into annual contracts, funding agreements with Indian tribes where they decide how much money the federal government is going to send to the tribe and then on a loose basis, the tribe itself decides how best to spend that money.

When I say localism, I say that the baseline rules in the United States in relation to federal tribal and state relationship is localism. The local governments, the first responders for example, when there's a 911 call, tend to be tribal governments in the 21st century. That's not always the case. Every tribe can negotiate with the federal government and its own self. Some tribes have very few resources and don't really have a lot of authority or capacity. I'm not talking about Maine, I'm talking mostly about Alaska.

But the baseline rule in the United States right now is that tribes run their own governments. And that's the way it's been for a good half century. And I'm here to tell you, it's really the first national Indian affairs policy that has shown any signs of being successful. Now the exceptions to those rules tend to be in places like Maine where for whatever reason, you have a federal statute that the Settlement Act in this context, that ostensibly extends greater state authority into Indian country, competing with the Tribe, the Tribes in Maine, their greater capacity, growing capacity to govern themselves. Those things are in conflict and I don't know the specific details of any of the Tribes here and frankly I didn't read the Maine Settlement Act in any detail until a couple of days ago. My sense is that the reason we're here, all of you are here, is because the Tribes' capacity and the state's capacity are kind of going north and south. The state ability as a central government, to govern reservation activities, is not on a structural level, the same as the rising Tribe's capacity to govern themselves. I'll set that aside for a moment.

The last final thing is the fifth principle, the clear statement rule effectively. The way the courts interpret Indian affairs is that when Congress passes a law, as a general matter, the courts interpret ambiguous statutes and treaty rights and treaty terms to the benefit of Indian tribes. So, if you have a for example, the whole notion of tribal sovereignty really is sort of implied. There aren't very many treaties that actually come right out and say, "Indian tribe has the full panoply of governmental rights." They didn't say that because they didn't have to. It was assumed, implied in the very relationship between the federal government and an Indian

tribe. That they were coming together on paper as equal sovereigns and then they were splitting up sovereignty so to speak in that negotiation.

This the fifth principle, has to do with how the judiciary interprets the language of those treaties, the language of federal statutes that delineate relationships between the three main sovereigns in the US: state, federal and tribal governments. As a general matter, when Congress does legislate into a particular Indian tribe or a particular treaty, it must, if its going to strip a tribe of sovereignty or strip Indians of rights, it's got to come right out and say so. We call that the clear statement rule.

The judiciary is not going to imply a divestiture of tribal power. It's not going to imply a divestiture of tribal or Indian interests. And if it did, it would be very dangerous thing for the federal judiciary to do. For example, if a tribe had the right to a reservation, of let's say a 100 acre reservation, or it had the right to hunting and fishing off reservation, for whatever, for subsistence purposes, and Congress passed laws saying, "Nope that's gone." Congress could do that under its plenary power but then what happens is Congress subjects the United States to when it does so, and if the judiciary allowed that to happen, as a takings claim under the Fifth Amendment.

The Fifth Amendment of the Constitution says that state or federal court, federal governments cannot take vested property interests from anybody or any entity in the United States without due process and just compensation. And on occasion, Congress has passed a law which seems to be stripping a tribe say of its treaty rights and goes to the Supreme Court and the Supreme Court says, "That can't possibly be the case because then the treaty right which are a vested property interest, you can give a monetary value to treaty rights, as a vested property interest, if you strip the tribe of that property right, you subject the United States to a takings claim by the tribe."

As we know, treaty rights do not terminate on their own accord. There are some tribes that, treaties that have language in them that say, "This treaty will continue until, as the grass and the water flows," or something flowery like that. But what they mean is that the treaty exists indefinitely. Let's say if a treaty right that's valued at even a $1,000 a year, what's a $1,000 times indefinitely? That's your takings claim. So, lots of money in other words. This is just one example why the judiciaries generally, federal and state, very careful about importing or implying the divestiture of tribal powers and certainly a limitation on tribal property rights.

So, I've spoken long enough. I hope that was helpful fundamentals type discussion and I'm happy and hopeful to answer any questions that you might have.

Chief Kirk Francis, Penobscot Nation: Professor Fletcher, it's an honor to have you here. It's great to finally meet you, and certainly heard a lot about you. One of the discussions we've been having really around the table is economic disparities that exist between the tribal communities and the greater parts of Maine. Just in your experience and conversations and

studies and all that you do, when self governance is hindered on the reservation, how does that hinder economic prosperity?

Matthew Fletcher: There are lots of barriers to tribal economic activity around the country and one that is very structural, very fixable is the lack of clarity over jurisdiction. When I was in private practice, I worked in house for Indian tribes around the country and there was a commonality in the tribe, these tribes were trying to do business with regular old business vendors. Anybody they're trying to do business with, and we had to negotiate the clarity of the law in every single negotiation. And a lot of non-Indian businesses would not even talk to the tribe because they didn't know anything about how, what the law would be in case of dispute between the tribe. They didn't know what the regulatory bodies were going to be in charge of land use, zoning, environmental activity, anything. Any of that stuff.

All of that was subject to negotiation, but also to a lack of clarity in the judiciary about what would happen. The state and federal courts have not resolved every single Indian affairs type claim out there. So, just not knowing what the law is, is a huge problem in terms of tribal economic development. These things can all be resolved in advance by negotiation that the state and local level with Indian tribes. And the federal level as well. My sense is that this is going to be a state and local government and tribal government type negotiation.

But it seems to me that there are lots of good examples out there of particular tribes who have negotiated really a whole panoply of types of situations with state and local government to help resolve a lot of this stuff. A lot of these conflicts, a lot of these complexities. I'd urge you to take a look at the negotiations between the Saginaw Chippewa Indian Tribe and state of Michigan that was ratified by consent decree in the late 2000s. I think it's Oneida Nation of New York entered into a whole round of agreements with local governments and the state of New York about, shortly after that. A few years after that, maybe five, 10 years ago. These are just examples of how a tribe, any tribes can reach a settlement agreement or negotiated agreement that resolves a lot of these issues.

On a much broader level, what we see with Indian Country and the disparities on income level is that you see a lot of structural problems. What I mean by that is, tribes have, are really the government that is located on the reservation, almost by definition. When I mentioned localism before, what I meant, this is a theory of national government, of local government that came really out of 60s and 70s, 50s, 60s and 70s, really sort of a more conservative, even Republican party type plank which was that local governments should be the ones making decisions about local people.

What's always incorrect in Indian country when you have disparities in income, disparities in jurisdiction, disparities in government authority, where a centralized government is making decisions for on reservation activities, sort of the local government, you always see problems. Probably the classic example is Maine. Maine is one of the most centralized state governments in the country. Everything goes through the state government in Alaska. Did I say Maine? I meant Alaska.

You have 229 federally recognized tribes in Alaska, many of which are so far away from both the state government that to be almost not really be a part of the state of Alaska. The state government is the one that has plenary power over these small villages in Alaska and those village is in the worst possible shape. Really of any tribes in the United States. The more power, the more governmental power and capacity that tribal governments have themselves to govern themselves, the better off economically every tribal government is. The tribe will have its own police force, public safety, have its own court system, have its own child welfare system. It will be the first responders for any kind of infrastructure type problem that comes up. The tribe will send the construction crew to plow the roads, to fix the roads, to fix the bridges, to clean the river, to biologically, to monitor to biology of the environment on and near the reservation. And when you have a state that, or local governments even, off the reservation that tend to be the primary responders because the tribe is either, doesn't have the capacity or is restricted from that authority because of the law or whatever, the tribe almost always is in a worse position.
Hope that was a helpful answer.
Senator Michael Carpenter, Senate Chair: Thank you. Yes sir. And thank you very much for coming. Prior to coming here, had you taken a look at the structure of Maine? 701 acts and all that?

Matthew Fletcher: A little bit, yes.

Sen. Carpenter: How would you fix the ongoing problems? 25 words or less.

Matthew Fletcher: 25 words or less? I think that the Tribes would be better off with, in Maine, the way that the Tribes are in Michigan. They have authority to enter into agreements with the federal government to monitor, to enact, to have treatment as state status for example under the Clean Water Act, Clean Air Act. Tribes have the ability to acquire land, take that land into trust. The interior secretary process, the Department of Interiors process. All of those things are negotiable with state and local governments. The federal government does not act, engage in its trust responsibility without engaging state and local governments when it does those things. What that means is that a lot of tribes don't want the states at that table but the reality is that when you, the more governments you have with a stake in the way that the tribal government is proceeding, what you get is you get more, if they have a stake in it and they sort of ratify it or at least are aware of it, then the state and local and government and the tribal government will actually begin cooperating and communicating with each other.

Let me give you an example. In the 1960s and 70s in the state of Michigan, there were fewer federally recognized tribes and really the only thing the tribes had going for themselves was they were bringing lawsuits against the state on treaty fishing stuff. Off reservation treaty fishing, mostly in the Great Lakes. There were fights. There were attacks, gun battles. People

were shooting at tribal fishers out on the lakes. They were, the state was confiscating fishing equipment, arresting tribal fishers. It was ugly. It was brutal.

And the state conservation agencies were doing everything they could to undermine tribal treaty rights , tribes were even fighting amongst themselves. The federal government had no idea what to do with these disputes and really was doing everything it could to stay out of it. But ultimately what happened is that, because of the federal court lawsuits, because federal judges forces the tribes and the states and the federal government to go to the table and reach a consent decree in 1985. Nobody liked this consent decree. They still complain about it. But what it did, is it forced a complete, first a complete culture change in how the state and the tribes engaged with each other.

Now every single year, every single month, the tribes meet, they talk with the state, with the state DNR, whatever it is. I think it's called EAGLE now is the acronym. They talk about the habitat. They talk about how to protect the habitat. People who worked for the state now moved over to the tribes and the tribes, people that worked for the tribes, tribal members even, went and worked for the state. You have non-Indian organizations that used to be considered sort of like hate criminals, who would shoot at tribes, property rights owners, anti-treaty rights organizations, individual people who used to fight against the tribes and organizations like conservation organizations that were litigating against the tribes, are now on the side really of the tribes. They began negotiating, they began talking, communicating with each other and over the course and it took decades, but over the course of decades, now we're practically best friends.

We're on the same side of trying to protect the habitat, the greater habitat, the Great Lakes, the inland waters, the air, everything is designed to protect and to maintain the sustainability of those. Of the watershed of all the game, the fish, et cetera. You talk to people who are alive who are a part of the violence going on in the 60s and 70s are flabbergasted that this ever could have occurred.

Now we have tribal members in the governor's office in Michigan that are represent the governor in negotiations and ongoing cooperative arrangements with the tribes. They don't always agree on everything. That's never going to be the case but it's a dramatic step forward and it can happen really anywhere so long as you have, initially sometimes there is a bruising fight. Sometimes there's a bloodletting, not literally, I mean metaphorically, political bloodletting over this but you have to, it's almost like you need to be forced to the negotiating table. Reach some sort of arrangement, work with it for a while, amend it over time, fix it up. And in some ways, that's what the Maine Settlement Act is, it's really just here's what a microcosm of Indian affairs was in Maine in what was it? 1980 something. Maybe that's what Maine Indian affairs was in 1980 or at least a written down representation of that but even that agreement underscores the notion that at some point, you go back and renegotiate, given the changed circumstances, right?.

Tribes in Maine are they're part of the, my understanding is they can enter into self government 638 contracts. These federal contracts with self determination. Under the self determination act and the Tribes in Maine are growing in their capacity to govern themselves. That's perfect reason to come to the negotiating table and redo this arrangement.

Senator Michael Carpenter, Senate Chair: You said that consenting agreement between the tribes in Michigan was in 1985.

Matthew Fletcher: Yep.

Senator Carpenter: Prior to that, was Michigan a settlement act state?

Matthew Fletcher.: No, it was not.

Sen. Carpenter: Or wide open?

Matthew Fletcher: It was not, no.
Michigan was, there have been settlement acts in Michigan that are related to just pooled pots of money, not really about jurisdiction. Michigan Indian land claim settlement act for example which really didn't involve the state government. What we have in Michigan that I think are somewhat parallel to but are useful negotiating things, we have gaming compacts. After the 1985 consent decree and United States versus Michigan, the fishing case, is when the Indian gaming regulatory act came out in 1988. The tribes and the state under that law, were actually forced to negotiate with each other.

That was not a pretty negotiation either. But it did, they did hammer out an agreement. It took several years and this is another area in which the tribes and state were forced to talk to each other. They have some authority over us but we have some authority over gaming. We just continue to keep talking. All the tribes in Michigan have a gaming compact and those are ongoing negotiations that led to an arrangement between the judiciaries and the state. The tribal judiciaries, all 12 of them, came together with the state Supreme Court and negotiated what we call a reciprocal comedy statute so that when our judge, when tribal judgments go to the state for enforcement, the state will follow this procedure to decide whether or not to enforce it and generally they do. It's reciprocal so that the tribes do the same.

And that I think led to the tax agreement negotiations between the state and the tribes and we began talking about judiciaries. How do we enforce a tax agreement with tribal members who refuse to go to state boards to negotiate or to litigate their tax disputes with the state? State of Michigan actually agreed to go to tribal court to enforce the tax agreement against tribal members and that does happen. I think that's probably the far end of state, in this context. I don't know of any other state that has agreed to go to tribal court.

That all came out of really was, at the beginning was a really terrible relationship with the fishing stuff that started to evolve over time and now we negotiate over everything. I mean, there's still litigation. There's still disputes but it's a much more government to government type situation.

Senator Carpenter: Is there another state that jumps out at you where the relationship is A reciprocal and B relatively good?

Matthew Fletcher: Are you talking about a federally ratified settlement act?

Sen. Carpenter: That's what we have to work from here. So if you have an example there. My sense is that there are not a lot of good ongoing relationships that have sprung from settlement acts.

Matthew Fletcher: I think that's right. Most of these land claim settlement acts were really just about pots of money. They didn't really settle any of the jurisdictional disputes.
I think there's a couple of things going on in Indian country that are really interesting. I have not mentioned Public Law 280. But there is a federal statute from 1953 that I think applies to about 70% of all reservations in the US. It sounds like a lot but that's all of Alaska and California and that's about 375 reservations.
What that means, Public Law 280 extended state jurisdictions. A federal statute that extended state jurisdiction into Indian country. In places like not Alaska but California a little bit and especially in Washington state, there's authority for the states to retrocede that jurisdiction back to the tribes. There are tribes that are perfectly capable of governing themselves without the state government being in place. They've begun the process of negotiating and I actually have gone through some tribes, some reservations have actually gone through the process of retrocession where the state turns over that power back to the tribe and to the federal government.

The federal government too, is trending in this direction toward localism. The Tribal Law and Order Act if 2010 makes it easier for the United States to help that retrocession process go from the state having plenary authority or primary authority to the tribe having primary authority. Again with the federal government reasserting supervisory authority over that reservation.
The trending nationally is definitely towards more tribal control of the reservations. I think those are really good examples. But I would really look to the negotiated agreements between tribes and states that have actually come out of litigation. I think the Saginaw Chippewa and the Seneca are the, there's a Seneca one, there's Oneida, both from New York state that really where they fought over, in court for a while and then they just went off to the side and maybe took a year or two to negotiate. That's what we do in Michigan. In USP Michigan, there's multiple aspect of United States versus Michigan. The consent decree is only a 15 year thing, so

every 15 years we go back and renegotiate that. We have an inland consent decree from, that's different than the original gill netting case that involves not the Great Lakes inland waters. That came out in 2007. That took three years to negotiate.
That's all negotiated settlements that come out of initially litigation. Where the tribes and the states and sometimes the federal government are at loggerheads.

Sen. Carpenter: Thank you Professor.

Representative Donna Bailey, House Chair: You mentioned again in Michigan that now you negotiate over everything I think is what you said, is that mandated negotiation? Or is that voluntary? How does that happen that you negotiate over everything? I'm not holding you to that comment, but how does that work...?

Matthew Fletcher: It depends on the area. The negotiation under say the Indian Child Welfare Act or the Indian Gaming Regulatory Act is mandated. So,if you're going to do an arrangement, you can actually do that under those statutes and Congress says this is how to do it. But for the kinds of things we're talking about here, it tends to be voluntary. What I mean by that is, it doesn't, the tribes may call up the state and say, "Hey let's negotiate over this thing." That's what happened with the tax agreement. The tribes and the states had been litigating little things around the state. Different tribes are litigating different taxes. The state decided that there were six taxes at issue with all the tribes and the tribes promised the state that each tribe would negotiate each of those six taxes separately and the state realized they would have 72 separate pieces of litigation and decided to negotiate.

That's voluntary, but also sort of coerced. So, a lot of this has to do with bargaining power. A tribe may call the state up and say, "We want to litigate or we want to negotiate our reservation boundaries, jurisdiction over certain things." And the state or the county says, "No." So then the tribe brings a lawsuit. Almost every lawsuit brought in the state of Michigan between the state and the tribes is not designed to reach an ultimate outcome in the state or federal Supreme Court. It's designed to reach a point where the parties will come to the negotiating table.
And what's helpful, weirdly enough, of having litigation first, is that the federal court, when you do reach a settlement, will ratify that settlement and make it the law. We don't have to go back to Congress or even sometimes the state legislature to get ratification of that agreement. It's voluntary-ish and it really amounts to a fight over bargaining power sometimes.