Native Americans and the Supreme Court

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[00:00:04.8] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, the senior Director of Town Hall programs. In celebration of Native American Heritage Month, we convened a town hall conversation about Native American history and law through the stories of landmark Supreme Court cases. Keith Richotte Jr. Author of *The Worst Trickster Story Ever Told, Native America, the Supreme Court and the US Constitution*. And Matthew LM Fletcher of the University of Michigan joined Jeffrey Rosen, president and CEO of the National Constitution Center. Here's Jeff to get the conversation started.

[00:00:51.0] Jeffrey Rossen: Thank you so much for joining, Matthew Fletcher and Keith Richotte. Keith, why don't we start with you 'cause your book is forthcoming. It's an amazing tale that you tell in this important book, and you describe how what's called the plenary powers with regard to Native American tribes, which started out as a doctrine rooted in racism and stereotypes came to be rooted by the US Supreme Court in the Constitution. Give us an overview of that incredibly important story.

[00:01:24.5] Keith Richotte Jr.: Well, sure. Thank you. And first of all, I I very much appreciate being here on what is clearly the most important political event in the United States this week. And so, okay, I guess I'm not funny today. That's okay. That's fine. The book is, as you say, Jeffrey, about plenary power, right? And there's a doctrine in federal Indian law called Plenary Power, which is essentially the federal government asserting authority over Native America, and essentially a limitless authority over Native America. And when this doctrine was first articulated, and the version that I'm most interested in was first articulated in the 1880s. It was announced in a case called US v Kagama, in which the court had to wrestle with the scope of the authority, the US Authority over Native America. And in that case, the court could not find any source, any constitutional source for authority over Native America, but essentially said, we have to have it because somebody has to have authority over these wild and crazy Indians.

[00:02:28.0] Keith Richotte Jr.: So then you fast forward to a case from 2004 US v Lara, which was similar, a somewhat similar fact pattern. And in that case, the Supreme Court said, "Well, we have traditionally found our plenary power authority over Native America in the Commerce Clause." 2004 wasn't the first time that the court said this, right? So for a number of years, I have been very, very curious. When did plenary power become constitutional? When did it shift from our 1880s version where the court says, well, we can't find any authority in the Constitution, but somebody has to have it, so better us than the states to the early 21st century, we're saying, no,

it's definitely within the Constitution. And so, then the scope of the book is about trying to find that particular moment, or trying to find when this conversion happened, and what that means then for Native America.

[00:03:28.2] Keith Richotte Jr.: In addition, what I came to discover is looking through that story and that history from an indigenous perspective. It started to remind me of a trickster story, right? And so, then tricksters are interesting and unique figures, not only in Native American culture, but really in cultures all around the world. And to be brief about it, tricksters change things, right? They're a conduit between the supernatural world and the world in which we live in, right? And they change both of those spaces. So, tricksters are the reason why animals have certain markings why birds fly the way they do, so on and so forth, right? So, ultimately, these tricksters are creators, right? They create and change different things. And what we have here then is a story of plenary power that gets changed or rearranged in this new manner, right? So, then it all of a sudden becomes constitutional. But it is the worst trick or story ever told, because it is not changing or creating, or making something new for the purposes of explaining the natural world in which we live. But it is a story that is cementing the colonial legacy in which authority over native peoples, that stems from these racist understandings and backgrounds, becomes cemented and protected by the Constitution. So, that's really what the book is about.

[00:04:57.9] Jeffrey Rossen: That's so powerful, and you argue so well with the trickster analogy that the Indian Commerce Clause, which is the central text in your story, is gonna play a big role in the mystery, and you tell readers to keep it in mind going forward. I'll just quote it because it's so important. This is article one, section eight, clause three, which says, "Congress shall have the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes." And your incredible story is how this clause, which the Supreme Court, as you said, originally rejected as a source of plenary power came to be embraced as its cornerstone. Well, let's now talk about the fascinating statutory story. And Matthew Fletcher, in your really great article, Muskrat Textualism, you identify a new strain of textualism that's more honest to textual principles and favorable to Indian tribes than its alternative at which you call Canary Textualism. And the Canary Textualism is exemplified by Justice Scalia in a case called Oliphant in 1978. And Muskrat Textualism is exemplified by Justice Gorsuch in a case called McGirt in 2022. It's an amazing story of clashing visions of Textualism and of Native American rights. Tell us about the difference between Muskrat and Canary Textualism.

[00:06:25.2] Matthew L.M. Fletcher: Happy to do so. I got the idea to call the kind of textualism that you see in jurisprudence that you see in a case like Oliphant, which predates Scalia a little bit. This was a Justice Rehnquist opinion from the metaphor of the canary in a coal mine, which really Felix Cohen, who was sort of the grandfather of federal Indian law, wrote about in the 1940s and '50s, and he described Indian tribes as like a canary in a coal mine of American democracy. So, if Indians are the canary and they start to wither and die, that's not a good sign for the future of American democracy, and it was a very effective metaphor at the time.

[00:07:11.9] Matthew L.M. Fletcher: The problem of course, is that it's a canary. A canary inside of a cage. It has no agency, it has no power, no independent thought of its own. And if you look at some of the older Supreme Court cases, and even still today, some in the last few years,

even that suggest that Indian tribes are just, they're not important. They don't make their own decisions. They're not competent to make their own decisions. Keith talks a lot about his book and the story of the guardian ward relationship that served as a metaphor for the longest time in federal Indian law, how the federal government treated Indian tribes and the Supreme Court treated tribes as wards, as a, metaphorically speaking, but often literal, and that a ward doesn't have the power, for example, to sue its own guardian It doesn't have the right to go to court. It's legally incompetent under the law.

[00:08:03.4] Matthew L.M. Fletcher: I like the metaphor more of the muskrat. The muskrat is also a Nanabozho story. And that the story kind of goes along the lines of Nanabozho, the trickster who can do good and bad things, sort of causes the end of the world. And a giant flood engulfs all of what we call Anishinaabe-kwe, the world of the Anishinaabe people. And Nanabozho is clinging to a log along with some other animals and comes up with this idea because he, Nanabozho is magical, that if he just gets a couple of grains of sand or dirt, he can recreate an island, say, we'll call it Turtle Island. And he just needs somebody to go down deep into the water and bring up some dirt. And all the different divers go in, birds, different kinds of floating animals like ducks. And they come up, they all come up gasping for air saying, it's too far down. We'll never get to ground again.

[00:08:52.4] Matthew L.M. Fletcher: And the tiniest weakest creature, the muskrat says, I'll give it a shot. And everybody laughs at the muskrat and says, you don't have a chance. You're just gonna die. And the muskrat goes down, naturally comes back with a dying, gasping breath, in the hands, some dirt to Nanabozho who then recreates the world, Turtle Island, or some people call it Mackinac Island here in Michigan. And the idea of the muskrat, unfortunately, the muskrat dies in the story. I don't like that part, but the muskrat has agency and can make decisions for their own and a kind of power and influence that often is ignored at first, but then sort of becomes influential. And one of the interesting things that's been happening in the last 50 years or so with Indian affairs is that tribes have actually been self-determining for quite a while, enabled in part by Congress, but really doing their own work to develop what their governments should look like. They have some more resources. They've been very creative in how local and bigger larger regional governments can actually do things to help their citizenry to work on environmental issues, to work on economic development issues.

[00:09:58.8] Matthew L.M. Fletcher: And tribes are sort of this interesting disruptive force in the American polity and just in really, really in this century. They're like the muskrat. They're very much like a government that mostly is overlooked and often treated as sort of second or third rate, but they're doing some really amazing things with restorative justice and environmental protection. And it would be nice, and I think the McGirt case from, which is really a case about reservation boundaries and sort of old treaty rights from tribes in Oklahoma, the McGirt decision really is. Really embraces the idea that tribes are real governing entities.

[00:10:37.8] Matthew L.M. Fletcher: And one of the interesting things that happened in that case is it really is a clash between the state of Oklahoma and the tribes in Oklahoma. And Oklahoma in some respects as a state government has sort of been under governing much of the rural territory areas that were historically reservation lands of Indian tribes. And the tribes in the past several decades have stepped in the shoes of what Oklahoma was doing before, reopening

rural hospitals and creating regional economic growth activities. Usually, tribes are the largest regional employer in a lot of rural areas of the United States. And that's the kind of thing that I think we're heading toward in terms of our Indian law jurisprudence, at least I hope it is.

[00:11:22.4] Jeffrey Rossen: Thank you so much for that. What's so fascinating about the interplay between both of your work is that you're exploring this story both from a constitutional and textualist perspective, and seeing how in both cases, the law evolved into one that after having long sacrifice, the rights of Native Americans in the name of pragmatism or non-textualist consideration is under Justice Gorsuch as leadership, moving in a different direction. Keith, you begin your great book with two cases, the Crow Dog case, and then the case that we've been discussing, the Kagama case. They're both murder cases. Tell us about what was going on in those cases and how they established during the era that you call it the allotment era, which lasted from 1871 to 1934, allowed the federal government to assert the plenary power over Indian tribes based on racist assumptions.

[00:12:26.4] Keith Richotte Jr.: Certainly. So the crux of the issue in Ex parte Crow Dog, which is the first case that helped start the path to this version of plenary power that's at the center of the book, was that there was a murder on tribal lands, right? The tribal lands, which was, again, in the 1880s. The United States doesn't look like how it looks today, right? And so these are tribal lands. There was an inter-tribal dispute. One tribal member, Crow Dog, kills another tribal member with a spotted tail. And the community managed the situation to their satisfaction, right? They brought the families together. There was a negotiation. The family of Crow Dog gave the family a spotted tail, $600, eight horses in a blanket, which, if you're looking at it just from an outside perspective might seem like buying off justice or someone escaping punishment, but that is misunderstanding the purpose of justice for these tribal communities, which was much more about restoring a sense of balance within the community than it was about punishing the offender. So, the idea was to heal those who had been harmed, rather than make the person who did the harm feel some sort of equivalent amount of pain.

[00:13:49.5] Keith Richotte Jr.: And so, the community handled the situation, but the federal government, as it was engaging even further into what I call the allotment era at well, which people before me called the allotment era, and then which I am borrowing through their generosity. In that era, it was defined by the federal government essentially trying to destroy tribal nations of tribalism. And so, this is the era where you have things like boarding schools. You have the allotment act, which breaks up tribal lands, right? That you have all of these efforts that are trying to divest native peoples of their heritage, of their culture, of their language, of their families in this effort to turn them into more like a European model and also to acquire their land. So, in this moment, while this was happening in this allotment era, the federal government was, in addition to many other things, trying to acquire criminal jurisdiction over tribal lands or make it understood that they had criminal jurisdiction over tribal lands. And so then the Crow Dog case becomes this test case that makes its way all the way up to the Supreme Court. And it was, again, a killing of one tribal member of another tribal member on tribal land. You would think that the United States wouldn't necessarily have any interest in that.

[00:15:14.0] Keith Richotte Jr.: So, in this case, what the Supreme Court ultimately says is, well, we don't see anywhere where the federal government has authority or justification to

exercise criminal jurisdiction in this particular matter. However, if there was something, we might have to reconsider. So essentially, at the end of the opinion, the court handed Congress an engraved invitation to do something about this. So a couple of years later, Ex parte Crow Dog was 1881, if I'm not mistaken, a couple years later in 1883. It's all in the 1880s. Let's just leave it at that. Okay? All in the 1880s. A couple of years later, Congress passed the Major Crimes Act, which I believe is 1885, okay. And so, in the Major Crimes Act, the federal government says, we actually do have jurisdiction over at that time, seven major crimes. And they're ones that you can imagine, right? Murder, so on and so forth.

[00:16:20.0] Keith Richotte Jr.: So then, Congress passes this act, the United States tries, starts enforcing the act on tribal lands, right? Major Crimes Act. We have jurisdiction over these major crimes on tribal lands over tribal peoples. So then we get to US v Kagama. And I say Kagama, I've heard people say Kagama. That's the way I learned it. That's the way I'm going with it, right? Okay. So, what happens in Kagama is essentially another test case. And the question in Kagama boils down to the constitutionality of the Major Crimes Act. Where does the federal government get its authority to pass this Major Crimes Act? And so then that gets us to the first part of the story that I rambled through in the first question that you asked me, which was just simply the court said in US v Kagama that we can't find any constitutional source of authority. And it's very interesting as you alluded to, Jeffrey, the lawyers for the United States had a real dilemma on their hands, right? Where in the constitution do you point to? Because tribal nations are really only mentioned well, more or less three times now, but basically twice, right? For apportionment, and then also in the Commerce clause, which you mentioned earlier.

[00:17:36.1] Keith Richotte Jr.: So, the lawyers for the federal government pointed to the Commerce clause and said, well, this has to work, right? And in their brief, they essentially argued that the United States has to have this authority over Native America, because if we let all these wild and crazy Indians kill each other, there'll be less people to engage in commerce with, right? And thus, the Commerce Clause is the hook that we get to use for this criminal law statute, and the court just doesn't buy it. The court explicitly rejects the Commerce Clause as the source of federal authority, but then does not point to anywhere else in the Constitution to say that it does have the authority, right? And when I teach the case, I make a big dramatic scene out of it, right? When we get to the point where the court says, well, we can't use the commerce clause, I slam my case book shut, and I go, oh, woo, thank goodness. Class is over. We get to get out early, right? And then the students look at me like I'm an idiot because they know that the case continues.

[00:18:34.5] Keith Richotte Jr.: And so, then we go through the rest of the case, and the court again essentially says, look, somebody has to have the authority of these wild and crazy Indians, right? And it's either us or the states, right? It's either us or the state. There's no acknowledgement that the tribal nation handled the situation for themselves to their own satisfaction. The only options according to the court are the federal government and the states. And so then the court says, well, it may as well be the federal government because the states are the "deadliest" enemies of tribes, and there's just too much conflict between them. And we're the ones who can handle this. And we're the ones who can take care of these poor Indians who are destitute and are not well off, and kind of, sort of, 'cause they're engaged with us, but we still have to protect them. And so, then ultimately, the source of authority for this plenary power

coming out of US v Kagama is not the Constitution, right? It is this sense of superiority that the federal government has to take on these poor destitute people who are in this unfortunate situation. And thus, the Major Crimes Act, which is still law today, ultimately is ruled as constitutional, despite not having a rooting in the Constitution itself.

[00:19:57.4] Jeffrey Rossen: Thank you so much for that and for telling the story so vividly. Matthew, in your article, you described the approach to legal interpretation exemplified by the Kagama line of cases, culminating in the Oliphant decision in 1978 as a form of Canary Textualism. You say it is exemplified by Justice Scalia and you have a smoking gun. You talk about his memo to Justice Brennan in a case called Duro, where he says that although he's usually describes himself as an originalist and a textualist here, he is willing to sacrifice those principles because our opinions in the field have not posited an original state of affairs, but have rather sought to discern what the current state of affairs ought to be by taking pragmatic considerations into account. Just tell this amazing story. How is it that Justice Scalia, supposedly the great textualist and originalist became the pragmatist in chief in Native American law? And where did that leave us in the cases that fall?

[00:21:08.0] Matthew L.M. Fletcher: Yeah, I can try to do that. It's really fascinating. I mean, justice Scalia was self-described as the faint hearted textualist. So, in the event that he was confronted with an overwhelming slate of authority precedence going back over sometimes centuries, he would back down and say, look, I guess we're not originalists or textualists in this area, because the court has never been that way. And I think he usually would make a joke along the lines of he believed in stare decisis, unlike Justice Thomas. And we could talk about Justice Thomas too, 'cause he has got a very interesting strand of separate opinions that nobody has ever joined that sort of suggests that we should just start over with Indian law. But let's talk about Justice Scalia for a moment. He came onto the court in the early '80s and at a time when the Supreme Court was coming off of Oliphant, in another case called Montana versus United States.

[00:22:08.9] Matthew L.M. Fletcher: And what's really, I think happening, and Keith brings all this out in his great book, is that the Supreme Court has long looked for the Constitution in Indian law and not really found it. A few years after the plenary power cases that Keith was talking about, you get a case called Talton versus Mayes out of the Cherokee Nation, and it's a death penalty case where the Cherokees sentenced somebody to die. And the Supreme Court says, we don't have jurisdiction over this. There's nothing in the Constitution that limits tribal governmental power. There just isn't. I mean, the court says they recognize the power of Congress to delineate or modify even abrogate tribal powers, tribal treaty rights. But in most contexts, Congress has not. The most relevant federal statute vis-a-vis tribal powers, just as a general matter, is the Indian Civil Rights Act in 1968 which basically what it does is Congress says, "If tribes are gonna exercise power over persons, any persons Indian or non-Indian, they have to follow more or less what Congress thought the Bill of Rights said in 1968."

[00:23:16.9] Matthew L.M. Fletcher: So you've got free speech in there, you've got freedom of religion, you've got fourth Amendment type stuff, due process, equal protection, all that good stuff is in there for the most part. And by the time of Oliphant Montana, the Supreme Court had a statutory roadmap to follow, and they just chose not to do it. So in Oliphant, they say, "Notwithstanding the fact that the Indian Civil Rights Act implies that tribes have power over all

persons within their territories, we're going to say that it's unconstitutional for tribes to prosecute non-Indians. And there's no constitutional text to point to, there's no statutory text to point to.

[00:23:55.1] Matthew L.M. Fletcher: It's just a simple judicial fiat." And a couple years later in Montana versus US in 1981, they say that general rule kind of extends to tribal civil jurisdiction over non-Indians as well. And by the time you get to Duro versus Reina, they're trying to, the court seems to be sort of putting itself in a position of let's, the tribes keep doing things. And so Duro is a case about criminal jurisdiction over non-member Indians. So, an Indian person who is on, say, a different reservation, it's prosecuted by that tribe. The Supreme Court says, well, they're not a member of that tribe, so there's no consent of the government, so to speak. And Congress quickly overruled that. And that led to the case that Keith talks about *US v. Lara*. But Justice Scalia, and he really does do this several places, basically says, look, we can just do what we want in Indian law.

[00:24:45.7] Matthew L.M. Fletcher: I mean, we are federal common law makers. This is judge made law. Oliphant's judge made law, Kagama's judge made law. All these big cases are all judge made laws. So in Duro Congress hasn't said one way or the other, "Can tribes prosecute non-member Indians?" And the Supreme Court says, "We don't think they should be able to, as a matter of public policy." That opinion isn't a Scalia opinion, it's a Justice Kennedy opinion. It waxes nostalgic on the consent of the governor, the Declaration of Independence, all that good stuff that we like to believe in in terms of our American democracy. But it's not rooted in the text of the Constitution at all. And you know, so they're just sort of making it up as they go. And it becomes a little bit frustrating when you're, when tribes are actually doing things in some respects that are designed to comply with the Indian Civil Rights Act, designed to comply with principles of constitutional law that don't really apply to them.

[00:25:42.1] Matthew L.M. Fletcher: And they're trying to do all this good work. The Supreme Court says it's not good enough. And you know, that's sort of the Scalian way of looking at it. It's completely up to the discretion of the court. And if Congress doesn't step in and override what the court has decided, such as what it did in the so-called Duro Fix then it just sits there. And it's, the nice thing about the last 10, 15 years or so is that Congress actually has begun to ratchet back some of these Supreme Court cases. And tribes have been very effective at advocating in front of Congress, starting with the Duro fix. Tribes now have criminal jurisdiction if they choose over non-Indians who commit certain crimes like sexual assault, date rape, assaulting a police officer, child abuse. And there's sort of a small but growing number of crimes that tribes can now prosecute that you could say, a sort of a partial Oliphant fix.

[00:26:39.2] Matthew L.M. Fletcher: And to me, this is all, is Congress really behaving in a way that is enabling tribes sort of in the muskrat jurisprudence framework. Those statutes where Congress has done this other than the Duro fix have not really come before the Supreme Court. And we're certainly hoping that the kind of thinking that the court engaged in at least the majority of the court engaged in the McGirt case and Haaland versus Brackeen from just two terms ago, that's the kind of thing we think is really the law. And if they go down that route, you should get some pretty decent outcomes for Indian country.

[00:27:17.6] Jeffrey Rossen: What a powerful way of putting it, Congress behaving in the muskrat kind of way to actually legislate on behalf of the tribes in the way that it was supposed to. And you also so powerfully and clearly say the Supreme Court just made it up for much of its history. And Keith, the power of your book, as you described, very specifically how the court made it up in ways that track the broader attitudes toward native Americans of the time. And you say how in the allotment era the Supreme Court essentially just tried to eradicate tribal ways of life and recognized the ability to do that in this plenary power trilogy of Indian law cases, Kagama, Lone Wolf and US v. Sandoval. And then you say that there was this self, this termination era from '53 to the mid '60s where once again, the federal government tries to destroy tribes and tribalism.

[00:28:18.1] Jeffrey Rossen: And then there's this self-determination era and the Johnson and Nixon era, as you say it's the civil rights era, and the court is just embarrassed by the sort of pragmatic and unconvincing basis for plenary power. And therefore invokes the Constitution as authority, even though it wasn't intended to be so invoked. So, tell that story, better than I just summarized your excellent argument and what it says about the court and originalism. Is it just tracking public opinion and coming up with justifications retrospectively, or what should we make of this remarkable journey you chart?

[00:29:00.6] Keith Richotte Jr.: Well so, to start with again, the termination era mid 20th century, right? Again, we're the metaphor that gets used, again, this came before me, but I'm grateful for having it, is that the policy in federal Indian policy swings like a pendulum between these eras, where if federal government is trying to assimilate native peoples one way or the other, either through things like allotment boarding schools or what have you or on the other side of the fence, is trying to engage in a certain level of distance with Native America. So in the allotment eras, again, all about destroying tribes and tribal nations in our self-determination era Now, as Matthew explained, it's more about trying to build tribal nations up and allowing that space for tribal nations to grow. And so, then in the termination era, we get this another, we see federal policy swing again in the immediate wake of the Cold War, in which the notion or idea that tribal peoples have this extensive authority hanging over them is wrong and inappropriate, and that the federal government needs to get out of the Indian business as it were.

[00:30:22.5] Keith Richotte Jr.: And so, then we see legislation pass towards the idea of terminating Native Nations or just eliminating the political relationship between the tribe and the federal government. And when that becomes disastrous, and when we see the growing civil rights movement of the mid 20th century take hold more greatly in public life all these efforts become more and more embarrassing. And then the court's language as it regards native peoples becomes more and more embarrassing. And so, then something has to change, right? We cannot rely on the same old wardship language that was used to describe Native peoples anymore. There needs to be something. And so, then the court, as Matthew noted, starts looking around, it needs to find something. And so, then it reaches back and grabs hold of the one thing that actually is in the Constitution, which is the Commerce Clause.

[00:31:18.5] Keith Richotte Jr.: And so, then I imagine your audience is fairly well versed in how the Commerce Clause becomes a really big deal in this period of American history as well too. And so then it was only natural that the court use it to justify federal plenary authority in

Native America as well too. And so then that's what we have is, it's in this era, in this period, we don't have a seminal moment. This is a real spoiler alert. I still hope you buy the book, right? But we don't have a real seminal moment in which we can say the change happened like we do with say Brown versus Board of Education, where we see a distinct break in the law. But we see this gradual evolution and where the court starts distancing itself from past language and realizes that it needs to hold onto the Constitution as well too.

[00:32:06.9] Keith Richotte Jr.: So, then by the time you get to US v. Lara in 2004, the court has itself convinced, or is at least willing to say that we have traditionally found plenary power plenary authority in the Constitution itself. But that's why it's a trickster story, right? Something has changed and tricksters are agents of change. That's the one thing that, I hope people take out of, well, it's one of many things I hope people take out of the book is that the reason why this is the worst trickster story ever told is because tricksters do create change and we see this monumental change. And so, then the court is operating in this way trying to convince us and perhaps even itself that no, no, actually there is this foundational fundamental constitutional basis for this plenary power authority, which is by the way, incredibly expansive and allows for more to happen than what we would imagine that can happen to your average non-native American citizen.

[00:33:15.6] Jeffrey Rossen: So powerful. And you say that there's no single seminal moment in the shift, but you dramatically contrast the opinion. You just mentioned the Lara opinion in 2002 by Justice Breyer which exemplifies the pragmatic understanding of the Indian Commerce Clause with the McGirt opinion by Justice Gorsuch, which exemplifies what Matthew calls Muskrat Textualism. I should say that both Justice Gorsuch and Justice Breyer are the honorary co-chairs of the Constitutional center. So this debate very well exemplifies the difference in their pragmatic versus textualist constitutional approach. But Matthew is McGirt as close to a seminal moment as we're gonna get. Why did Justice Gorsuch suddenly articulate what you call Muskrat Constitutionalism? Why do you think that this textualist approach is the correct one and are other justices buying it?

[00:34:19.0] Matthew L.M. Fletcher: Well, one of the things about the lack of many constitutional texts in Indian Affairs is that the court is put in a position way back in the day prior to the plenary power era of treating Indian affairs as sort of like foreign affairs. I mean, through Article II, there's executive power in there, but it's not fully fleshed out. It's really up to Congress to flesh out much of the foreign affairs type things that the United States is going to do. And they did the same in Indian Affairs, but they didn't completely dominate or govern everything. And that puts the court in a position of being forced to look at a lot of gaps. And early on, they adopted what I've been calling lately, the default interpretive rules of federal Indian law. Typically, these are the canons of construction or interpretation of Indian treaties and federal Indian affairs statutes.

[00:35:11.3] Matthew L.M. Fletcher: There are also statutes that are kind of rooted in the separation of powers between Congress and the Supreme Court that have to do with the fact that congress, that Indian Affairs is federalized and Congress really is the one with plenary power and really exclusive power vis-a-vis the states and other branches of government. And so, the Supreme Court has typically adopted a hands-off approach on Indian affairs that doesn't quite

make it, isn't quite rise to, does not quite rise to the level of being, say, a political question, but pretty close to it. So most of the time in the 19th, well into the 20th century, if a tribe or an Indian person went to the Supreme Court and made a plausible argument as to why the law should be a different than the way the court was gonna go, the Supreme Court would say, we have to defer to Congress in all these things.

[00:35:55.9] Matthew L.M. Fletcher: And that's Lone Wolf v. Hitchcock, which is another part of Keith's story. And if you wanna change it, go ahead, but you have to do it through an act of Congress. That separation of power story led the Supreme Court repeatedly and actually an Ex parte Crow Dog. The last paragraph is a really important one, which says, if Congress does wanna change, say the powers of Indian tribes or to modify treaty rights, it has the power to do so, and that's a problem. But if it is going to do so, it has to be expressed in its intent to do so. So we typically call this a clear statement rule or a clear expression rule. And it's done a lot of good things over the years to sort of hedge and push back on the Supreme Court's willingness to intervene in Indian affairs as a matter of policy.

[00:36:43.4] Matthew L.M. Fletcher: But they have not been terribly disciplined and recognize the clear expression rule that was originally articulated in Ex parte Crow Dog, they get a little bit too canary textualist to Scalian and like, maybe we should intervene in this case. It doesn't seem right. The tribes should be able to do this for some reason, whatever that policy position is. The nice thing that McGirt did and Justice Gorsuch wrote an opinion that really was a straight up Textualist. Congress, the case and McGirt involved the governing of what is like about 10% of Oklahoma the Creek reservation. But there are, so there's five tribes in Oklahoma that were removed or forcibly migrated from, the southeast, Cherokee, Creek, Choctaw Chickasaw and Seminole. Speaking of being Seminole, those five tribes had treaty rights that were recognized at the, upon removal and had never technically been violated, or not violated, but abrogated by Congress or by agreement of the tribe.

[00:37:44.7] Matthew L.M. Fletcher: And Oklahoma statehood came in and the United States just sort of vacated the field and let Oklahoma as a new state, sort of assume jurisdiction over Indian country in Oklahoma. And the Supreme, or not the Supreme Court, but Congress sort of gutted the ability to try to govern themselves and push back on Oklahoma's assertion of authority. That was the state of affairs for a century. And it turns out that those tribal reservations remained extant. They still retain treaty rights to govern their own territories. And I mean, ultimately the history was very strongly favoring Oklahoma's continuing jurisdiction over those five reservations. But, the reality is the letter of the law did not authorize Oklahoma to do so.

[00:38:30.0] Matthew L.M. Fletcher: Worcester v. Georgia from way back in the day says states do not have, state law has no force in Indian country absent an act of Congress authorizing exactly that, and it never happened in Oklahoma. So, that's what textualism is, to go back and actually look at the text of the statute, and that's the Gorsuch majority opinion. The dissenting opinion looks at all the same statutes and finds termination of tribal rights and termination of reservations, even though you'd have to imply from the language and from the history, maybe not even the legislative history of what was going on at that time, and just the fact that Oklahoma had asserted jurisdiction for so long, that's not the law. And if you look at the, Justice Gorsuch

writes in McGirt, there's the rule of law, and then there's the rule of power, the rule of the strong against the weak, and that's not what this country is about, that's not what textualism is about.

[00:39:22.9] Matthew L.M. Fletcher: So, but just a couple years after that, and sort of a weird little sequel to McGirt, Oklahoma versus Castro-Huerta, Justice Gorsuch in dissent this time, the Supreme Court says, "Ah, but Oklahoma can prosecute some cases inside of Indian country, and we just always have recognized the ability of Oklahoma to do that." And we're right back to Canary Textualism, where tribes have no say, it's really up to whoever has the most votes on the Supreme Court, and it's disturbing. And just as a little side note, one of the things that has always bothered me, and my students, when we talk about this, these kinds of cases is, the Supreme Court says, well, tribes can't prosecute non-Indians, or states can tax non-Indian, tax Indian country, or something like that.

[00:40:10.5] Matthew L.M. Fletcher: In the absence of an act of Congress or a treaty right that changes the law, you're basically asking the Supreme Court, when exactly did this happen? Keith is asking, when did plenary power become a thing? I wanna know, what was the date that tribes lost the power to prosecute non-Indians? Was it before the United States? Was it 1955? I'm just making up numbers here. Nobody really knows, and the court doesn't care, because they have the one case in front of them, they're gonna decide it, and they don't have to answer those questions, and you don't really have to when you have five votes. And that's very frustrating for my students in particular.

[00:40:44.8] Jeffrey Rossen: Thank you very much for that. Keith, in your chapter, the resolution, you identify three elements for a solution for a more principled approach to Native American law. The first is recognizing consent as the essential element in upending plenary power. The second is correctly interpreting the US Constitution and not invoking it on behalf of pragmatic considerations. And the third is a re-articulation of the relationship between the United States and Native American, which involves an acknowledgement that the US has an obligation to Native America. Tell us about those three elements for a solution, and whether you think they might be embraced or not.

[00:41:29.6] Keith Richotte Jr.: Well, so when we think about the theory of government in the United States, and this is, again, I recognize a bit of a 10th grade civics class explanation of what's going on here, but it's all founded on this notion or idea of consent, right? That we as autonomous individuals cede some of our autonomy to a government to protect us and our rights and our property and so on and so forth. So everything is based on this notion or idea of consent. The Constitution is founded on this basic understanding of what the relationship between a government and its citizenry should be. And so, the problem with plenary power is there's no connection to consent whatsoever, right? That there's just nothing that connects this massive federal authority, which is above and beyond what we understand the Constitution authorizing the federal government to do to its citizenry or to act as it concerns its citizenry.

[00:42:37.0] Keith Richotte Jr.: So there's just nothing there, right? It's just this big thing that's not connected to the Constitution, not really, when you actually look at the history. And so, one of the things that you need if we're going to, one of the things that we need if we're going to rebalance this relationship is to center this idea of consent in the same way that it is centered in

our general theory of governance in the United States. So, that's one thing that needs to happen. We just have to put that at the forefront and quit letting us think that this plenary power is just a thing that the United States should have over Native peoples. The second thing is some sort of connection to the Constitution, because I don't think you're going to convince any justice of the Supreme Court, right? That the relationship should not in some way be tied to the Constitution. And so, there are folks who argue international law principles should maybe rule how this relationship is.

[00:43:36.6] Keith Richotte Jr.: And I don't think that they're necessarily wrong. I just think they're gonna have a real tough time convincing people who figured out how to get onto the Supreme Court that the Constitution doesn't need to be at the center of what this relationship is. And so then we have to find a source in the Constitution that allows for the expression of consent that helps to rebalance this relationship. And in the book, I talk about the treaty power and how we might think about how that works in this context, and thinking about how if we allow the treaty power to allow for this expression of consent, we will be much closer to where we wanna be in terms of actually having a constitutional source and having a scope of authority that makes a little bit more sense. But in order to do that, we need this third element, which is an understanding that the United States has taken on an obligation to Native America. And so, we have this thing in federal Indian law called the trust responsibility.

[00:44:37.8] Keith Richotte Jr.: And under this trust responsibility, the federal government has obligated itself to act on the, to the betterment of Native America, how they go about doing that, and under the circumstances under which they can be held to that obligation is a whole thing unto itself and takes up its two days in federal Indian law class, right? But there is this sense that particularly through treaty relationships and other means, the United States has obligated itself, and tribal nations have also obligated themselves to a relationship where both parties are going to work to the betterment of each other. And so, by placing that in a less hierarchical structure, and more like an older brother, younger brother type of, or older sibling, younger sibling type of system, we can perhaps better frame how we ought to think about what this relationship really should look like.

[00:45:36.9] Keith Richotte Jr.: And so, then if we have those elements, if we have a consent at the center of our analysis, and if we have a rooting in the Constitution that makes much more sense than the Commerce Clause, and if we approach this from the notion or idea that there is an obligation that the United States has taken on to do the right thing for Native America, then perhaps we can rebalance this relationship in a much more appropriate and reasonable way, other than to say the federal government has this massive plenary power, and that's just it, because it's connected to the Commerce Clause. Which, by the way, is serving Native America now, is for the most part doing a good thing in the self-determination era. But as we talked about, the pendulum switches, right? That it's going to shift. And when it does shift, what are we going to have then if plenary power is still at the center of the analysis? So, it is critical, in my view, to rethink how this relationship ought to exist.

[00:46:41.0] Keith Richotte Jr.: And as to how, if it can work or not, I don't have a crystal ball, right? I can't say for sure, right? If I did have a crystal ball, maybe I'd finally find out if my Vikings would ever win a Super Bowl, and all this time I've invested in would be worth it. But I

do think that it is worth the effort to make the argument, because I do think that the Supreme Court recognizes that the story it's telling is not true, that it is not accurate, that it does not align with whatever principles any justice might have, and how to read the Constitution. So, that if there is a pathway to think about how to rebalance this relationship in a way that makes sense to a Supreme Court justice and to other justices and other lawyers and people operating in the field, we might actually have the opportunity to rid ourselves of the plague that is plenary power.

[00:47:43.4] Jeffrey Rossen: Thank you so much for that. Matthew, I wanna ask you two questions, actually, about your 2020 book, The Ghost Road: Anishinaabe Responses to Indian Hating, and then we'll have closing thoughts in this great discussion. You begin the book with notes on the Anishinaabe philosophy, and they include teachings to a modern audience in the '70s, to cherish knowledge is to love wisdom, to know love is to know peace, to honor all the creation is to have respect, bravery is to face the foe with integrity, honesty is facing a situation, is to be brave and humility is to know yourself as a sacred part of the creation, truth to know all these things. So fascinating. It's a big question, but are there similarities and important differences between this philosophy and the classical writers on virtue who inspired the founders' understanding of the pursuit of happiness as self-mastery?

[00:48:42.7] Jeffrey Rossen: I know it's a large question, but I'm wondering about the influences of Anishinaabe and other native thinking and philosophy of virtue on the founders. And then I have to ask, I know this is too much for the end, but we've got to have closing statements after. You begin your book on the framers of the Second Amendment, and you note the poor originalism of the Heller case that refuses to acknowledge, you say, Indians in the Heller opinion are conspicuously absent and that the court doesn't recognize that it was a desire to harm Native Americans and Black people that animated the Second Amendment. Tell us what you think what Scalia refused to discuss was that Americans primarily needed guns to keep down slaves and to kill Indians, a strong statement. How would recognizing that reality change an originalist understanding of the Second Amendment?

[00:49:50.0] Matthew L.M. Fletcher: We don't need to keep Indians down. We don't have slaves anymore. So I think that fundamentally, the world has changed and there are provisions of the Constitution that we absolutely don't pay attention to anymore. Things like the third, isn't the Third Amendment, the one about quartering of the King's soldiers? I don't know, if King Charles shows up on our shores pretty soon, that's certainly gonna be a useful constitutional provision, but it really isn't useful now. So, I mean on a very basic level, a superficial level, I wanted to make that point. But really, the book is about Indian hating, and the Second Amendment is in large respects about Indian hating. So there are, there's tons of litigation on the Second Amendment, just ongoing after Heller, and almost every major amicus brief and long, lengthy decision on some aspect of the right to have guns now will have some quote in there that says, and this is why, I don't know, Virginia and New Hampshire had a gun right, was because they needed to fight off Indians. So, I think we've moved on.

[00:51:00.0] Matthew L.M. Fletcher: And part of the story of the United States that is sort of undertold is really the source of a lot of the constitutional theory, theory of democracy that we hold dear. A lot of that appears in the Declaration of Independence and sort of the preamble to the Constitution. And I didn't wear my shirt today, but Indians are mentioned in the Declaration

as merciless Indian savages. And really what the founders were saying, or the people who wrote the Declaration, the rebels, were saying is that they did not like the fact that the King of England had prohibited them from engaging in any kind of trade intercourse with Indians. And I can understand the anger and the assertion of national control over basically just local relations and property rights, but that phrase, the merciless Indian savages tied in with the gun right, is something we should certainly contextualize and keep into consideration.

[00:52:04.7] Matthew L.M. Fletcher: You started asking me about what we usually typically call the seven grandfather teachings or the seven sacred teachings of Anishinaabe people. And I've written other papers where I try to persuade contemporary tribal leaders that they're, especially in Anishinaabe communities, their councils are effectively the clans. And each of those seven teachings is closely associated with a clan or two, and that's our traditional social structure and our traditional governmental structure. So, I'm Mukwa Dodem, that's the bear clan, and that's sort of the part of the government that has a seat at the table along with six others that are all equal, independent parts of sort of like political parties. And we each have our own views and obligations. And the seven teachings are teachings that remind us of our obligation to each other, that our governments are formed on a sort of a theory of relational accountability. And that's not something you see a lot sometimes, something that gets lost in the American constitution which is very individualistic.

[00:53:12.6] Matthew L.M. Fletcher: We have a lot of things like immunities, sovereign immunity, official immunity that prevent people from getting justice in the courts, including tribal nations, but others as well. And our teachings are the opposite of that. Everybody's accountable in a lot of respects. And I'll end, and I know we're running out of time, but I love the idea, we name our clans after animals. Those are higher creatures than we are. And then above them are things like the Thunderers and the Underwater Panther, the Machu Picchu. Those are creatures that exist in the universe. They're like thunderstorms and tornadoes and earthquakes. And we don't have power over those things. Humans are sort of lower down in the hierarchy of the universe. And American law culture kind of teaches us humans are supposed to exercise dominion over all things. And that creates a lot of imbalance. So fundamentally, our philosophies differ, but there is enough overlap that I think you can continue to use American structures, governmental structures, tribal governmental structures in a really effective way.

[00:54:17.6] Jeffrey Rossen: Thank you so much for that. Well, we are nearly out of time, but why don't we end with just very brief final thoughts from each of you in this superb discussion on such an urgently important topic. And I'm so grateful to both of you for casting so much light. In just a few sentences, Keith, how would you summarize the central lesson of your great new book about what we can learn from how the Supreme Court has interpreted Native American rights under the Constitution throughout history?

[00:54:49.7] Keith Richotte Jr.: That if you employ Indigenous methodologies, you can see plenary power for what it is. And once you see plenary power for what it is, you recognize how and why it needs to change.

[00:55:03.9] Jeffrey Rossen: Thank you so much for that. Matthew, same question and similar conclusion. What can we learn from how the Supreme Court's interpreted Native rights over time?

[00:55:16.1] Matthew L.M. Fletcher: I don't know. I'm trying to keep my tongue. The law is always dynamic. It changes over time. It shifts. Persuasion, knowledge, information is really incredibly effective at persuading the court. And I'll say this in the last 15 years, maybe even just 10 years, tribes have actually done fairly well in the Supreme Court. And it's because of two big things. One is that tribes are actually really getting outstanding at governing. And some of that's because of our culture and our traditions, but some of it is just because we know our lands and we know how to manage those lands. And secondly, the tribal interests are able to be reasonably successful in the court lately because of their incredible ability to educate the justices on all of this stuff, on what's going on in Indian country. And I think we've moved past sort of the language of Oliphant, which is, from the court's perspective, we never even heard of tribes ever prosecuting non-Indians. It must not have existed, therefore it can't. And the reality is it's been going on for since time immemorial. So that kind of information is helpful moving forward. I don't know how concise that was, but that's all in.

[00:56:29.7] Jeffrey Rossen: Well, it was extremely illuminating, as were both of your contributions. We have an appreciative comment from Russ Larson, absolutely excellent and fascinating discussion and background on tribal relations with the US And he looks forward to both books, and I strongly recommend both of them to our great audience. Thank you so much, Keith Richotte and Matthew Fletcher for a wonderful discussion of this important topic. Thanks to all of you, dear We the People and NCC friends, for taking an hour out of your days to learn about this crucial issue involving the Constitution and American history. Look forward to reconvening soon. Thanks to all.

[00:57:11.8] Tanaya Tauber: This episode was produced by Lana Ulrich, Samson Mostashari, Bill Pollock, and me, Tanaya Tauber. It was engineered by Greg Scheckler and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, Gyuha Lee, Matthew Spero, and Yara Daraiseh. Check out our full lineup of exciting programs at constitutioncenter.org/townhall. There you can register to join us in person or online. As always, we'll publish these programs on the podcast, so stay tuned here as well, or watch the videos. They're available in our media library at constitutioncenter.org/media library. Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcasts or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.