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KEYNOTE ADDRESS: "THE NEXT GREAT GENERATION OF AMERICAN INDIAN LAW JUDGES"

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INTRODUCTION

Every American schoolboy knows that government in the United States is a complex and elegant structure designed to accomplish coordination between multiple states and one central government.[1] By high school or college, the student might even know enough to identify the U.S. system as a federalist structure. In school, students are taught to admire the people who debated and developed this system. One would hope that these students learn why some compromises were made along

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1. Pardon the dated terminology, but the reference works better if we use the same terms that Felix Cohen and the Supreme Court have used to explain how simple certain concepts are. Felix S. Cohen, *Original Indian Title,* 32 MINN. L. REV. 28, 34 (1947) ("Every American schoolboy is taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia, and that for all the continental lands so purchased we paid about 50 million dollars out of the Federal Treasury."); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289–90 (1955) ("Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.").

the way, and perhaps, implicitly, that democratic government is ultimately all about compromise.

When these students reach law school, they learn that the basic structure of federalism and many other important constitutional questions are far more complex and somewhat more ambiguous than they previously thought. In law school, the simple and elegant structure that we once admired becomes much more complicated. However, law students learn that there are basic constitutional interpretive approaches and values that can be used to navigate difficult questions. But even today, most school children and law students learn very little about Indian tribes.

By the time students learn about Indian tribes, they have been taught repeatedly about the two sovereigns that exist as part of the constitutional compact in the United States, and they are perhaps inclined to be somewhat skeptical about the existence of a third sovereign. The stated reaction might be like this: "we have been learning about American forms of government since the second grade, so why are we just hearing about tribes now?" We should not be surprised that people are skeptical when first confronted with the longstanding, but not widely taught, doctrine of tribal sovereignty.

Before I go any further, let me first congratulate the organizers of this conference on their poignant timing. Recently, I met with an old mentor, Judge William C. Canby, Jr., of the United States Court of Appeals for the Ninth Circuit. Because all of us here at the conference would think of Judge Canby, for whom I clerked, as one of the leading Indian law judges of the last generation, perhaps the question is, "how do we develop more judges like him?"[2]

Judge Canby's example illustrates the task ahead of us. The central challenge in Indian law is ensuring that Indian law and Indian tribes are not some alien concept, but are a regular part of the cultural and governmental background in the United States. To illuminate this thesis, I will proceed in three ways with my time here today. First, I am going to speak a little about Judge Canby, who has been the greatest of the federal

2. I did not mention this event to Judge Canby because it would have embarrassed him to know that I would mention him in such a context. This kind of humility makes for a great human being, and perhaps an unusual federal judge, but humility is not necessarily correlative with greatness. In Judge Canby, the two qualities are simply a happy coincidence.

judges of the prior generation on Indian law issues.[3] Second, I wish to discuss a particular part of the challenge: we often must wait a while to identify who among lawyers and judges are likely to be most capable at successfully developing federal Indian law. Here, I will discuss the changes seen over time in rulings from judges who have come to be highly regarded in the field of Indian law and explain the path and time it took them to get there. Finally, I am going to discuss how we can speed this process up through education so we do not have to wait so long for successful lawyers and judges familiar with federal Indian law to emerge.

I. JUDGE CANBY AND THE LAST GREAT GENERATION OF AMERICAN INDIAN LAW JUDGES

After thirty years on the federal bench, Judge Canby is about to retire. Although he assumed senior status in 1996, he continues to serve actively, carrying a nearly full load on the court. The level of his service is about to decline precipitously. When Judge Canby's current set of judicial law clerks complete their service in September 2010, he will have no more new clerks joining him. Judge Canby will be moving to a much more limited status and expects to be hearing cases only at the request of the court. Though he is only 78 years old and still as sharp as ever, he tells me that he has seen the debilitating effects of age on others, and he swore long ago that he would not wait until those effects were apparent before he stepped down because by then it would be too late.

Judge Canby's path was unusual. He sought out the study of Indian law on his own simply because he found it interesting and challenging. His first exposure to Indian law occurred when he was serving as a law clerk on the United States Supreme Court for Justice Charles Whitaker. The case was *Williams v. Lee*,[4] the path-breaking case that, as Charles Wilkinson famously argued, ushered in the great Modern Era in American Indian law.[5] In *Williams v. Lee*, the Court held that an Indian on the reservation could be sued by a person doing business on the reservation only in tribal courts.[6] To the

3. Judge Canby served roughly thirty years from 1980 to 2010.

4. 358 U.S. 217 (1959).

5. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 2 (1987).

6. 358 U.S. at 223.

Court, allowing suit in state court would infringe on the inherent sovereign right of Indian tribes to make their own laws and be ruled by them.

A few years later, after a stint in the Peace Corps in Africa, Judge Canby became a law professor at Arizona State University College of Law. Soon thereafter, he argued a First Amendment case on lawyer advertising before the Supreme Court.[7] He also published important law review articles in the area.[8] But in addition to his primary field of constitutional law, he also turned his attention to the field of Indian law.[9] Thus, *Williams v. Lee* not only ushered in a new era, but it ushered in a very important scholar.

In 1980, President Jimmy Carter moved Judge Canby out of academia to the federal bench. Since that time, he has presided over many Indian law cases in front of the Ninth Circuit, and his prior interest and background have made the outcome of these cases more thoughtfully reasoned and drafted.

Judge Canby produces West's Nutshell on American Indian law, now in its fifth edition, which remains the only student study aid of which I am aware that is regularly assigned by law professors as a primary text. He has served as a national resource to judges and others. He also recently undertook a thankless assignment to author a difficult en banc opinion in the latest saga in the historic and ongoing litigation in *United States v. Washington*.[10] The dispute had Indian tribes on both sides of the "v." It is very rare for a senior judge to author an en banc opinion in a circuit court. That he was asked to do so in this historic decision was, I believe, a measure of the esteem in which he is held by his colleagues, as was the fact that the decision was unanimous.

Judge Canby is exceptional, and we have been so lucky to have his work in the field for so many years. During my clerkship, I learned that Judge Canby is careful and cautious. He has always embraced the realization that he is part of a much broader judicial system that must work in sensible fashion. That has made him different from many of his former academic colleagues. In his opinions, and even in public remarks, he has

7. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

8. *E.g.*, William C. Canby, Jr., *Programming in Response to the Community: The Broadcast Consumer and the First Amendment*, 55 TEX. L. REV. 67 (1976); William C. Canby, Jr., *The First Amendment and the State as Editor*, 52 TEX. L. REV. 1123 (1974).

9. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (1981).

10. 593 F.3d 790 (9th Cir. 2010).

spent little time criticizing the doctrine as it has developed. Perhaps it is his humility, but he has rarely criticized other judges overtly. And where there is a poorly reasoned Supreme Court case on point, he nevertheless feels firmly obliged to follow it. He has worked within the system, by and large, and he has followed its rules.

Where Judge Canby has always found room to express his own views has been in the interstices between the cases that have already been decided. Those were the places where he has felt most free to do justice as he saw fit. And in doing so, he frequently forced the hand of the Supreme Court; indeed, the *Arizona State Law Journal* once held an entire symposium on cases in which Judge Canby's opinions were reversed by the Supreme Court.[11]

Because Judge Canby is exceptional, it is a fool's errand to try to produce another like him. While we can hope that we see another judge with his background and interest in Indian law in our lifetime, we cannot count on such a scenario. So let us set aside Judge Canby (or place him up on a pedestal) and proceed in a more realistic fashion. I will next discuss the education of federal judges, as I see it. Most federal judges come to Indian law differently than Judge Canby. It seems more common for federal judges to become introduced to Indian law only after they have taken the bench and to become adept at understanding it and applying it only after many years on the bench.

II. EXPERIENCED JUDGES ARE BEST AT INTERPRETING FEDERAL INDIAN LAW

In deference to the wonderfully optimistic spirit of Professor Wilkinson, let me begin with a very hopeful thesis, and one that, I think, can be defended. My underlying assumption is that the central challenge of Indian law is to ensure that the rule of law is applied with full force in cases involving tribes. If the United States lives up to its historic commitments to Indian tribes in federal treaties, laws, and the common law, Indian tribes will survive and thrive. It is my thesis that federal judges tend to be more even-handed to Indian tribes once they become seasoned in their positions.

11. Catherine Gage O'Grady, Tribute, *Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.*, 33 ARIZ. ST. L.J. 4 (2001).

Perhaps the first judge to exhibit this tendency was Chief Justice John Marshall in his trilogy of decisions, *Johnson v. M'Intosh*,[12] *Cherokee Nation v. Georgia*,[13] and *Worcester v. Georgia*.[14] In *Johnson*, Chief Justice Marshall famously recognized the doctrine of "discovery," as a proper legal fiction, and held that European nations had obtained title to Indian lands in the Americas merely by claiming it.[15] Such a fiction obviously undermined any notion of pre-colonial tribal government. In *Cherokee Nation*, however, Chief Justice Marshall described the Cherokee people as "once numerous, powerful, and truly independent"[16] and indicated that the Cherokee Nation had remained "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[17] Indeed, somewhat contrary to *Johnson*, Chief Justice Marshall recognized their "nationhood," indicating that the Cherokee "have been uniformly treated as a state from the settlement of our country."[18] By the time he decided *Worcester*, Chief Justice Marshall's thinking had evolved so much that he described the Cherokee Nation as "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves."[19] The authority of the federal courts was weaker then, and the citizens of Georgia were not inclined to be law-abiding. In the end, the legal principles provided by Chief Justice Marshall were breached more often than obeyed, but what is remarkable is this: each of Chief Justice Marshall's legal opinions was more respectful toward Indian tribes than the last.[20]

Justice Stevens is a modern example. It is fair to say that the jurisprudence of Justice Stevens grew more favorable to tribes as his tenure on the bench progressed. Early on, he was one of the least respected judges among practitioners in the

12. 21 U.S. (8 Wheat.) 543 (1823).
13. 30 U.S. (5 Pet.) 1 (1831).
14. 31 U.S. (6 Pet.) 515 (1832).
15. 21 U.S. (8 Wheat.) at 572–77.
16. 30 U.S. (5 Pet.) at 15.
17. *Id.* at 16.
18. *Id.*
19. 31 U.S. (6 Pet.) at 561.
20. For a description of the progression of Chief Justice Marshall's Indian law jurisprudence, *see* Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

field.[21] But his almost accidental work in *Montana v. United States* has become a foundation of American Indian law doctrine.[22] In recent years, he has been the single most reliable Justice in seeking to preserve the longstanding, though decreasingly forceful, federal legal norms that favor Indian tribes. Perhaps the greatest illustration of this trajectory is in the *Oneida* cases.[23] In *Oneida County*, Justice Stevens dissented from a decision that saved centuries-old tribal property claims in New York State.[24] *Oneida County* held that there was no federal statute of limitations that would prevent the tribe from raising its historic land claims.[25] Two decades later, the Court adopted a much more adverse approach to tribal claims in *City of Sherrill*.[26] Justice Stevens dissented there too, arguing that the decision departed from what were, by then, bedrock principles of Indian law.[27]

Justice O'Connor also followed this trajectory, at least in broad terms, before her retirement from the bench.[28] Her later opinions, such as her decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, reflect a deep respect toward the federal government's historical commitments to the tribe and were protective of tribal treaty rights.[29]

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21. Robert J. Nordhaus et al., *Revisiting* Merrion v. Jicarilla Apache Tribe*: Robert Nordhaus and Sovereign Indian Control over Natural Resources on Reservations*, 43 NAT. RESOURCES J. 223, 269 (2003) ("Justice Stevens circulated a devastating opinion for the Tribe that rejected its power to tax. Basing any power to tax on the power to exclude non-members from the reservation, Justice Stevens concluded that the Tribe had lost that power by entering the leases with the oil and gas companies. In this analysis, Stevens did not even need to reach the Commerce Clause issue, because the Tribe simply did not have the power to tax and so the severance tax was invalid.").

22. 450 U.S. 544 (1981). *Strate v. A-1 Contractors* called *Montana* the "pathmarking" case for the scope of tribal civil jurisdiction over non-Indians on fee lands within Indian reservations. 520 U.S. 438, 445 (1997).

23. Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985) (Stevens, J., dissenting); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) (Stevens, J., dissenting).

24. 470 U.S. at 255 (Stevens, J., dissenting).

25. *Id.* at 253.

26. 544 U.S. at 222.

27. *Id.* (Stevens, J., dissenting).

28. *See* Bryan H. Wildenthal, *How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—and Has So Far Gotten Away with It*, 2008 MICH. ST. L. REV. 547, 587 (2008) (noting that Justice O'Connor was in the majority in the most favorable recent decisions dealing with the Indian canons of construction).

29. 526 U.S. 172 (1999) (O'Connor, J., majority opinion) (holding that Tribes retained certain hunting, fishing, and gathering rights on ceded lands); *see also* Nevada v. Hicks, 533 U.S. 353, 397–401 (2001) (O'Connor, J., concurring) (stating

Justice Ginsburg is another example. Despite an unfortunate beginning on the Court, the Indian law jurisprudence of Justice Ginsburg has gradually become better, especially in the last few terms. In an insightful article, Professor Carol Goldberg traces Justice Ginsburg's development from *Oklahoma Tax Commission v. Chickasaw Nation*,[30] her first Indian law opinion for the Court, to her more recent positions in concurrences and dissents that are much more understanding of the ramification of the importance of tribal sovereignty.[31]

In *Chickasaw Nation*, the Tribe filed an action to stop Oklahoma from enforcing several state taxes against the Tribe and its members.[32] Justice Ginsburg delivered the opinion of the Court, which held that Oklahoma could not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country; however, the Court explained how Oklahoma could amend its law to shift the legal incidence of the tax so that it would fall on the wholesaler who sold to the Tribe rather than on the Tribe as the retailer.[33] The Court also held that Oklahoma could tax the income of tribal members who work for the Tribe but reside in the state outside Indian country.[34]

Professor Goldberg offers insight on Justice Ginsburg, noting that Ginsburg could have decided the *Chickasaw Nation* case either on fundamental Indian law principles or on fundamental tax law principles.[35] Because Justice Ginsburg subordinated the Indian law principles to the tax law principles, the tribe lost.[36] It is unclear why she prioritized these two fields in this way, but let me offer a hypothesis. By the time Justice Ginsburg decided *Chickasaw Nation*, she had been married for more than 40 years to a renowned expert in tax law.[37] I suspect that she may have learned a lot about tax law over the years, if only during dinner table conversations. Back then, as a relatively new Justice, she likely decided *Chickasaw Nation* based on principles with which she was already comfortable.

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that she did not believe that the Court properly applied Montana v. United States, 450 U.S. 544 (1981), in its decision.).

30. 515 U.S. 450 (1995).

31. Carole Goldberg, *Finding the Way to Indian County: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003 (2009).

32. *See* 515 U.S. at 453.

33. *Id.* at 453, 460.

34. *Id.* at 453.

35. Goldberg, *supra* note 31, at 1018–22.

36. *Id.* at 1022.

37. Gardiner Harris, *M.D. Ginsburg, 78, Dies: Lawyer and Tax Expert*, N.Y. TIMES, June 28, 2010, at B8.

By now, however, she has been on the Court for close to fifteen years and seen her fair share of Indian law cases. Perhaps the basic principles articulated in those cases no longer seem so foreign to her. As she has grown more accustomed to these principles, her opinions have become more favorable to tribes. Indeed, she has recently issued some "[p]romising [d]issents"[38] in *Wagnon v. Prairie Band Potawatomi Nation*[39] and *Plains Commerce Bank v. Long Family Land & Cattle Co.*[40]

One can find similar examples throughout the federal bench. James A. Parker, a federal judge in New Mexico and an appointee of President Reagan, recently ruled in favor of the Ute Mountain Ute Tribe in a tax dispute with the State of New Mexico.[41] The judge, who spent a career in practice in one of the leading oil and gas law firms in the West before taking the bench, had to distinguish the outcome of the Supreme Court's decision in *Cotton Petroleum Corp. v. New Mexico*.[42] After a careful, thorough, and thoughtful analysis of *Cotton Petroleum*, the judge held that state severance taxes were invalid.[43] The decision produced a significant benefit for the tribe. The tribe had drafted its oil and gas contracts in such a way as to ensure that if state taxation was found invalid, then the tribe would capture that tax revenue rather than simply providing a windfall to the oil and gas company.[44] Although the decision could fairly have been decided either way, it is doubtful that anyone would have been surprised if the judge simply had dismissed the tribe's action summarily and cited *Cotton Petroleum*. Instead, the judge carefully read the words of *Cotton Petroleum* and engaged in a very detailed analysis of the facts in the case, ultimately concluding that the *Cotton Petroleum* prohibited taxation on Indian lands when a state was providing absolutely no services on those lands.[45]

Admittedly, the research supporting this thesis is anecdotal. However, it suggests that Indian tribes in litigation would generally prefer experienced federal judges to rookie federal judges. Why is this? I believe that this pattern reflects a

38. Goldberg, *supra* note 31, at 1032.
39. 546 U.S. 95 (2005).
40. 128 S. Ct. 2709 (2008).
41. Ute Mountain Ute Tribe v. Homans, No. CIV 07-772, slip op. at 62 (D. N.M. Oct. 2, 2009).
42. 490 U.S. 163 (1989).
43. *Ute Mountain*, No. CIV 07-772, slip op. at 62.
44. *Id.* at 31.
45. *Id.* at 62.

process that everyone attending a legal symposium must necessarily appreciate: education.[46] While I could provide more and more examples, there are also exceptions. Still, this phenomenon happens often enough that those of us who love the complex field of Indian law ought to seek to hasten the education and Indian law experience of judges and their understanding of Indian tribes.

III. THE IMPORTANCE OF EDUCATION OF NON-INDIANS FOR INDIAN TRIBES

I was once told an old Osage Indian proverb from Oklahoma, which goes "we are all ignorant, just about different things." The necessary education process for federal judges involves unlearning all the untruths or partial truths that most Americans began learning in grade school. If Americans are introduced to Indian tribes very early in their lives, their understanding will be different. As grownups, they will be less likely to spend years being skeptical of the legitimacy of Indian tribes when they first take the state or federal bench or join the halls of state legislatures or Congress. We can improve the rule of law in Indian law cases. Thus, we must work to hasten the development of wisdom in judges and legislators, and indeed in all Americans, by introducing Indian tribes earlier in the educational system.

Even today, many school children may not be learning about what Justice O'Connor has called the "third" sovereigns.[47] We could quibble with her phrasing—in North America, Indian nations were chronologically the *first*[48] sovereigns—but we all should appreciate the fact that Justice O'Connor

46. Admittedly, other theories might explain this phenomenon. One is history. As we grow older, many of us tend to become more appreciative of history. Because many claims of Indian tribes, and the most compelling equitable interests asserted by Indian tribes, are historical in nature, an appreciation of history probably, on balance, serves Indian tribes well. *But see* Russell Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979) (criticizing William Rehnquist's quasi-historical claims).

47. Sandra Day O'Connor, Remark, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

48. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542–43 (1832) ("[Prior to European contact,] America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.")

used the word "sovereign" to convey the notion that tribes are on the same governmental plane occupied by the federal and state governments. Indian tribes can, of course, cite numerous laws and cases that recognize their "sovereign" status, but the status is not fully understood.

The basic problem for Indian tribes is one of timing. Upon learning about tribes, I suspect that many people have the reaction, "well, this is a damned inconvenience." The very existence of tribal governments undermines the elegant structure of federalism that we have learned about since the time we were in the second grade.

Moreover, undermining the aesthetic of the federal structure is only half of the problem. The existence of Indian tribes also undermines the American system's legitimacy in some ways. Some ugly truths lurk within American history and it would be a lot more difficult to infuse our children with patriotism and faith in American government if we led the discussion with our country's worst errors. I am not sure when we should introduce such information, for we should not necessarily seek to undermine the function of the schools to inculcate students with the important American value known as "love of country." But truth is also an important value, and it must be introduced in appropriate ways.

I think that it may take some citizens a long while to get past the initial reaction that tribes are "a damned inconvenience." Some people never get past the idea. The point of my address today is that the task of identifying the next generation of great federal judges in Indian law is challenging because it requires repeatedly confronting a federal judge with the existence of Indian tribal governments and then waiting, over time, to see what happens. Many people never grow beyond the elegant, though fictitious, worldview that developed during their K–12 educations. Many judges, however, eventually develop an understanding of the existence of Indian tribes.[49] It is my experience that, if we give people the time to assimilate this information, we are often pleasantly surprised at their ability to do so. If this is true, the question is how to make that process happen sooner.

In the course of my career, I have seen several enterprising teachers use what might be called "guerilla" tactics to introduce education about Indian tribes. For instance, I recently

49. *See supra* Part II.

met with the executive director of the New Mexico Center for Civic Values, which runs the high school mock trial program in New Mexico. She told me that mock trial teachers and coaches in states that have Indian country within their borders have occasionally used problems involving Indian law in their local and national competitions.[50] This is a way of ensuring that, at a relatively early age, several bright high-school students are exposed to the governmental existence of Indian tribes, or at least to principles of Indian law. Likewise, I have worked with the Center for Civic Education, a federally funded annual program that runs a similar competition called "We the People," in which students participate in mock congressional hearings.[51] I have consulted with this important organization on its high school curricular materials in an effort to introduce the existence of Indian tribes earlier and in a more authoritative manner.[52]

There have also been a variety of indirect efforts to teach Indian Law at the law school level. For example, at the University of New Mexico, the Legal Research and Writing Instructors have routinely constructed the first year appellate problem/moot court curriculum around an Indian law problem.[53] For a long time, this effort has ensured that students who do not take Indian law in law school nevertheless are exposed to at least one substantive issue involving Indian tribes and the law.

Other efforts have been much more direct. There are now three states that test Indian law on the bar exam.[54] Including Indian law on the bar exam is helpful in ensuring that the rule of Indian law is enforced as strongly as the rule of law in contracts or property or torts. However, the bar exam may be too late in the educational process to be very effective in a long-term manner.

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50. Interview with Michelle Geiger, Executive Director, N.M. Ctr. for Civic Values (Fall 2009).

51. Center for Civic Education, We the People: The Citizen and the Constitution: Introduction, http://www.civiced.org/index.php?page=wtp_introduction (last visited Apr. 13, 2010).

52. *See* MARGARET S. BRANSON, ET AL., WE THE PEOPLE: THE CITIZEN AND THE CONSTITUTION, at vi (2009). *See also id.* at 4, 139, 248–49.

53. Barbara P. Blumenfeld, *Integrating Indian Law into a First Year Legal Writing Course*, 37 TULSA L. REV. 503 (1991).

54. Gloria Valencia-Weber, *Indian Law on State Bar Exams: A Situational Report*, 54 FED. LAW., Mar.–Apr. 2007, at 26 (noting that New Mexico, Washington, and South Dakota currently include Indian law questions on their bar exams are.).

CONCLUSION

> *Wisdom too often never comes, and so one ought not to reject it merely because it comes late.*
>
> —Felix Frankfurter[55]

Let us return to federal judges and the broader issue of education. It is a reflection of the complexity and difficulty of the field of Indian law that it takes so long for federal judges to develop an approach that respects tribal governments. Now let me offer the exception that proves the rule. You may be skeptical. There have been federal judges who loved history and who were long on the bench, but who were nevertheless hostile to the legal rights of Indian tribes and who have produced judicial opinions that have not withstood scrutiny very well. I admit that such judges exist. However, I am not surprised at the views of these judges. I attended many of the same schools that they did. They are not evil. I simply think that most of these judges were wedded early in their lives to a constitutional vision of the United States that fundamentally omits the complexities that Indian tribes create. In their defense, they likely developed this misinformed vision through years of education in our public schools.

To put it a different way, if we want great federal judges in this field, we ought to think about how to start building them in second grade. Obviously, what I am suggesting here is that we must lift up the entire country if we hope to develop better federal judges in a consistent manner. My hope is that, if we can change the K–12 educational system to be more accurate, fewer people will become invested in an idealized and unreal vision of government in the United States that actually does not exist. For as theoretically elegant as the United States constitutional structure is, it will never be practically elegant, or practically real, until Indian tribes are honestly and properly accounted for in that system.

This means that we need not necessarily look to lawyers, law schools, or even bar exams as the solution to the problem that we have defined. We must work to support the people who

55. Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

are toiling to improve the curricular standards in K–12 education. In many states, these standards are improving in relation to Indian tribes. At least five states now explicitly require the teaching of tribal sovereignty in some form in the public schools.[56] It is this kind of education, extending far beyond the courts, which will ultimately best serve the field of Indian law. This approach also will best serve the American people by creating understanding between regular Americans and American Indians.

In sum, education is our best hope for creating the next great generation of Indian law judges. We cannot hope for another singularly powerful and talented judge like Judge Canby. Rather, we must work to educate all Americans so that each of them will be more sensitive to the important issues involved in Indian law.

56. CAL. EDUC. CODE § 13040 (West 2010); ME. REV. STAT. ANN. tit. 20-A, § 4706(2) (2009); MONT. ADMIN. R. 10.54.6043(1)(h) (2010); OR. REV. STAT. § 329.007(8) (2009); WIS. STAT. § 121.02(1)(l) (2010).