

Nation Building for Native Nations:
NNI EdVenture Curriculum

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“Walking the Walk: Intergovernmental Relations as True Sovereigns” (Part I)

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Today I'm going to talk about the issue of intergovernmental relations. A quick background on me, since you told me where you're from. I'm born and raised in a little town called Tucson, Arizona. When I was born here, Speedway wasn't paved past Swan, that's how old I am. I went to Stanford as an undergrad, I'm an economist, from UCLA, I teach at the John F. Kennedy School of Government at Harvard and I'm on sabbatical out here. I'm thrilled to be here, I just talked to my office back east and it's raining cats and dogs back there, so I rubbed it in a little bit when I talked to them. The work I'm going to talk about actually, a lot of it comes out of personal experience. I've more and more in my own work with tribes have been getting involved in this issue of intergovernmental relations. Let me begin with the title that I gave this talk, “Walking the Walk”, you know, “Walk the walk, talk the talk.”

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For me, tribes still, and certainly say ten years ago, much of the fight around intergovernmental relations or the nature of intergovernmental relations was a lot of lawsuits. And if you talk about intergovernmental relations, ten years ago, and many tribes still, intergovernmental relations means go file a lawsuit. Because tribes and their neighboring governments; cities, counties, states, the federal government, constantly are finding themselves in various forms of jurisdictional fights over sovereignty. Who has the right to decide what's taught in the schools? If you're a Navajo, Navajo's been kind of rebelling against, for example the No Child Left Behind and related school legislation, which tries to force the common curriculum on all Arizona students. Navajo says, “Well, the state of Arizona is there, the Navajo nation is here, we're different sovereigns. What are you trying to impose this on us for?” So, you end up in these kinds of conflicts. Probably the most often repeated conflicts arise in two areas between tribes and neighboring governments. One is taxation. So, all over the United States, and this one is still in court, for many many tribes, all over the United States there are conflicts over taxation. For example, in a very famous legal case that went all the way to the U.S. Supreme Court, the Crow tribe of Montana goes to court against the state of Montana. The tribe has rights and it asserts jurisdiction over a big coal deposit, a coalmine on the reservation, actually just off reservation, but still tribal trust. For decades, the state of Montana had been collecting what's called the severance tax. Every time you produced a ton of coal, you had to pay the state of Montana something like 10% of the price that you got, actually 12.5%. So, the Crow tribe of Montana goes to court and says, the United States constitution says, that only the federal government shall regulate the commerce between tribes and with the federal government, the so called commerce clause. The Crow tribe says, “State government, what are you doing here? You're not supposed to be taking our tax monies.” The tribe obviously has an interest in the case, because that's revenue for the tribe they could collect from the coal miner that's on the reservation. Go to court and after years and years of battling, the U.S. Supreme Court eventually decides

in favor of the Crow tribe of Montana. So, the Crow tribe of Montana establishes jurisdiction in the form of taxing authority over the coal resources that it owns. Other tax fights that are going on constantly again and again. I'll go back and tell one more story about Crow in a moment where I've done a lot of work and do a lot of work. But all over the United States, there have fights over various forms of sales taxes. Oil and gas tax, you know how at a gasoline pump you pull up to a pump and there's sign on there, state taxes, 28 cents, whatever it is. Well, reservations often own for example, tribal government might own its own gas station, wait a minute, state, you don't have taxing authority over me. So you're a tribe, you own a gas station, in fact, you own a convenience store and it's got some pumps out there. Particularly if you're close to a metropolitan area and you can get the state taxes taken off, what does that do to your competitiveness in the marketplace? Well suddenly, people are going to come on to the rez to buy your product. How does the state respond to that? Wait a minute, you may be paying taxes to me the state says, but wait a minute now you got my citizens coming and I'm losing tax money, the states still have to maintain the roads. You can see where the conflict comes from. These fights over sales and gasoline taxes, tobacco taxes, you know, these are classic fights that have gone on now for decades where governments are in fights, tribal governments, state, locals, federal governments, are in tussles over who has the jurisdiction. And in some cases, such as the gasoline tax story, who has the economic advantage that might come from being in control of your own taxes?

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I said there were two main areas where there was the most tussling, fighting going on, one is taxation, and the other is in law enforcement. And here, I don't know how much of the law you get. Ian, do you pummel them with some law? Like force-feeding a pillow, I never like to study the law. As you know, there's the federal Major Crimes Act, which seem to give the feds jurisdiction. Increasingly, I'm not a law professor, but as you know, there's been this trend in the U.S. federal courts, which has been restricting the jurisdiction of tribes over non-Indians on the reservations. So you start to have these conflicts then, ok so a white guy and an Indian guy get in a fight on a reservation. Now, who has jurisdiction? Turns out that everybody wants jurisdiction. Governments never seem to want to like to give up authority whether its tribal government, city government, state government. So, you end up with these kinds of conflicts. In a very very famous case over jurisdiction, at Navajo in fact, a case involving Russell Means, famous for the AIM [American Indian Movement] Movement in the 1970's and so forth. Russell Means marries a Navajo woman. Have you guys heard about this case? The quick version of it, marries a Navajo woman, gets arrested by Navajo police on the grounds that he had been beating his wife, I guess. Dennis Means then fights the case and says, "I'm not a citizen of the Navajo nation. I'm Lakota from Pine Ridge. I'm not a citizen of the Navajo nation, you, the Navajo nation don't have jurisdiction over me." You end up then with an attempt by Russell Means to try to get the U.S. federal courts to decide jurisdiction in a matter that started out as an internal affair if you will, of the Navajo Nation. So, taxation, law enforcement, these have been the hot beds, if you will, for jurisdiction. Other major areas where the tensions over jurisdiction and sovereignty arise have been of course, in the area of child welfare. I won't go into detail but there's actually a federal act. Indian Child Welfare Act, ICWA, which provides the framework for handling this. Environmental

regulation, an area where there's often tension between tribes and surrounding governments. You can imagine, if for example, a true story, the Mescalero Apache in New Mexico undertake consideration of the prospect of a nuclear waste storage facility on the reservation. Some of the neighbors don't like this very much. And you end up in a classic tussle over sovereignty as Mescalero Apache gets in a fight with Mark Udall, the Attorney General of New Mexico. Mark Udall says, "Now, wait a minute. Mescalero, you can't have a nuclear waste storage facility, because those trucks are going to come through the state of New Mexico." So, Mark Udall comes in and tries to stop, the state of New Mexico tries to stop Mescalero Apache from exercising sovereign authority. Anybody know the resolution of this case? Well, it's a complicated case, but they actually do not have a waste storage facility, but did in fact, eventually vote to undertake the study of one. Their attitude was very much one of, "We're sovereign." Mescalero said, "We're sovereign. We'll make the decision, just like the state of New Mexico might make that decision and the state of Texas might not like it, one of its neighbors." "So, tough New Mexico," said Mescalero, "We're going to make the decision." Other environmental areas where there have been classic sort of conflicts that have ended in lawsuits, again this one involving Mescalero and White Mountain Apache and now a number of tribes in the southwest; wildlife has been another area, where in fact tribes have been relatively successful in asserting jurisdiction relative to other governments in the wildlife area. In probably the most famous of the wildlife cases, in a case known as Mescalero v. New Mexico, back in the late '70's early '80's, Mescalero Apache looked around and said, "Hmm, the state game and fish department is selling hunting licenses for people to hunt on our reservation." Once again, the commerce clause of the United States constitution and other federal doctrines say that states don't have jurisdiction over us, says Mescalero. Mescalero takes the state of New Mexico to court and essentially says, "Get off the reservation. Get your game and fish people off the reservation." Growing up here in Arizona, when I was a little boy, many, many years ago when I was young, I'd go hunting at San Carlos or White Mountain and you could buy a hunting permit, a kid coming from Tucson go buy a hunting permit for like five bucks or something like that. And you'd pay the state and the tribe would see zero return for this. So, Mescalero fights this and wins in federal court and establishes the principle that in fact the state game and fish departments didn't have direct jurisdiction over the wildlife and importantly over the sale of wildlife; that is the sale of recreational opportunities on Indian reservations. And, funny, immediately, the tribe started to manage the wildlife. This happened at San Carlos, it happened at White Mountain, it happened at a number of reservations. Walapai, a number of places around the country. At Pine Ridge, the Ogallala Sioux tribe for example, they're into pheasant hunting and so forth. The general evidence says, "Geez, tribes manage things better." And now some of these places are known as the premier sport recreation places in the world actually. So, you have Mescalero Apache and San Carlos Apache, White Mountain Apache able to manage their own wildlife for their own purposes. So, the wildlife area has been an area for this kind of tension and fighting. Related environmental areas, water quality. Tribes complaining and filing law suits. Complaining that the Rio Grande river runs through my home here and all the upstream users under the jurisdiction of the state of New Mexico are polluting the water and I, the tribe, want to assert jurisdiction over the quality of that water. So you can imagine the lawsuits, here they come right. So, lots of these kinds of fights. An interesting and

increasing area of tension, intergovernmental tension is in the area of labor law for better or for worse in all candor in a classroom where we're supposed to be candid. Many tribes have been able to use their jurisdiction in a sense to fight off some of the U.S. labor laws including Occupational Safety and Health Administration kinds of regulations. And the consequence of that has been against well maybe some economic advantage because they can hold their costs down by not enforcing the minimum wage laws, not enforcing certain environmental or worker safety laws. The hot area now turns out to be unions as the various versions of the hotel and restaurant workers union or whatever it's called. That's a run through of areas in which you see lots of conflict.

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With that background, now I want to talk about, well what are tribes doing about it? There's all this conflict. Well, one thing you can try to do about it is spend a lot of money on lawyers. But there's a difficulty when you do that, and that is you never seem to fully win the case, either side, you just seem to go on and on and on in these inter-jurisdictional fights between governments. So more and more and what I want to focus on today is not these legal fights but rather the solutions outside of the courtroom to solving the problems of jurisdictional tension, jurisdictional conflicts, sovereignty conflicts between tribes and their neighboring governments. I focus this, I call it walking the walk. I'll put a question to you. Let's imagine, Canada and the United States both assert sovereignty and let's imagine they get in a jurisdictional fight. One says they can control the salmon harvest and the salmon runs up there in the Pacific Northwest. The salmon actually don't care what country they go to, they sometimes flow up Canadian rivers, and sometimes Alaskan rivers and sometimes Washington and Oregon. They get in a fight, so what do governments do? I guess they can have lawsuits, anything else they can do, what do governments do? They might try to negotiate a compromise of some sort, or some kind of a treaty, or some kind of accommodation. And increasingly, and that will be the thrust of what I want to say, so often tribes have had to fight these battles of jurisdiction in the courtroom but increasingly the trend is toward the establishment non-litigation, non-lawsuit forms of intergovernmental relations. And I call it walking the walk, because when you look around the world, what governments do as they mature in particularly and as tribal governments have been maturing this is more and more happening. As you look around the world, what governments do when they're in a conflict is they basically try to negotiate some kind of solution to their problem rather than spending the money either fighting with real arms, war, or fighting in some kind of legal battle. I want to show you a couple of examples like this. I want to tell you a few stories. In Flandreau, in the Dakota's, here's an interesting case. This is actually a joint police department between the city of Flandreau and the tribe where they found themselves in a situation where it starts with sort of simple conflicts. White cop stops Indian teenager for speeding or something and then there's a fight over jurisdiction, then the tribal cops stop the white kid. They're living in a pretty small community; then it turns into a money fight. Ok, we'll agree, we're both sovereign, and if I arrest you, then your government will pay me some money for my costs of putting you in jail overnight and then I'll do the same. You see governments trying to do this. Well here in this particular case, what the tribe and the city did, it's a fascination and very successful story, is they said doing everything by agreement, ok, here's the charge if I put one of your

citizens in my jail, the nightly meal charge is \$2.82 and the overnight charge for the blankets and the pillow are...instead of doing that, instead of doing things like duplicating in a pretty small town area, all of the 911 services and all the high tech stuff that goes now with being a cop and so forth, instead of doing that the tribe and the city of Flandreau created a single police department. It was a revolutionary step in Indian country. There is literally one police department. Some of you may know in the law enforcement area if you've studied this and been around enough, there are actually across the United States scores and scores of law enforcement cooperative agreements, cross-deputization agreements, jail sharing agreements, technology sharing agreements. Under these kinds of agreements, for example, as of two years ago in Oklahoma, if I get the number right, two years ago there were 87 cross-deputization agreements between tribes, cities, counties, and states. Under a cross-deputization agreement the way things work, increasingly it's been the case that particularly compared to local city cops or in poor counties the county sheriff, the tribal police have been better trained than the state police, than the city or county police. The tribal police have had access to federal academies and so forth. And you had a situation in which, like in Flandreau, the cities start to look around and said, "Man, the tribes got much better trained police than we do." Short of what this particular case did, there are scores of these intergovernmental cross-deputization agreements. Under a cross-deputization agreement, I'll give you just one example. At Ft. Hall, Shoshone-Bannock, Shoban as it's called up in Idaho, at Ft. Hall they have an agreement. Tribal cops and the county and they both, both the county cop and the tribal cop drive around, like with speeding tickets and they have two booklets. One for tribal court and one for the county, one for the state court system. And they actually have gone to the point where they give you your choice, "Would you like to go to tribal court or would you like to go to county court?" .What do you think might happen in this kind of situation? You start to see both court systems improve, because they start to compete against each other. You're not looking for the court that lets you off it turns out, you're looking for the court that treats you fair, that's fast, doesn't give you mountains of red tape. So both sides up there at Ft. Hall report, one of the consequences of this, is they're actually sort of competing against each other. And you find apparently, you'll find tribal members up there who say I'm going to go into the state court and you'll find non-Indians who want to go to the tribal court system and they're competing. Well just pause for just a second and think what that might do to the community relations within the community. This is sort of a cool thing now right, this is sort of cool because you're in a situation in which both governments first are recognizing each other's sovereignty, number one, and by the very act of having this kind of, "Would you like a tribal ticket or a county ticket?" But that very act, there is obviously a kind of mutual respect that goes on in that situation, whether under my breath is the non-Indian cop, you know I'm still a racist, I can't tell you, but what you feel as a citizens, what the citizens report, both Indian and non-Indian reporting, "This is sort of cool." Well in this particular case, they've taken it to the extreme; at Ft. Flandreau with there is only a single police department, one budget, one set of officers. Are you giving up your sovereignty, if you're a tribe, are you giving up your sovereignty? What do you think? No one made them do this by the way, this was a voluntary act by the Santee Sioux up there. Are you giving up your sovereignty? I think you are, in my own view, is that you're exercising sovereignty. But I can tell you some attorneys think, "Oh no, you're giving up, your letting these non-

Indian cops arrest.” But then the tribe responds and, “Wait a minute, this isn’t a racial thing, this is a nation, national thing, it has to do with who has jurisdiction.” And just like, for example, the United States and Canada might create a joint management system for managing the return of the salmon. That’s actually an analogy that’s been used. Look, we’re a small town; neither the tribe nor the town has a lot of money. We have one police force and operate under a common set of laws. And their view is, although some attorneys will disagree, their view has been, it’s an act of sovereignty. It’s like Canada agreeing with the United States; let’s create a salmon protection system. Here we’ll create a police department.