

E005 - Does the Future of Indians Include Eminent Domain?

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SPEAKERS

Steven T. Newcomb, Peter d'Errico

Peter d'Errico 00:00

Okay, good morning, Steve, how are you good doing? All right, so this is our time here for a podcast to kind of think about, where are we in terms of our future podcast, what's on our mind? And one of the things that you and I had recently talked about is what's the current state of of scholarship in this field, called federal Indian law. And you said you referred to a 1975 article by Vine Deloria Jr, that struck me very much along the focus that you were talking about. It struck me about what's happened to me recently as I realized that the state of federal Indian scholarship is kind of bizarre, basically looked at from the point of view of the view from the shore and the standpoint the context of original, free existence. Yeah, so yeah, and I'll say more about that, but go ahead, yeah.

Steven T. Newcomb 01:01

And that reminds me too, just real quickly for people that may tune into this particular podcast and watch it, not having watched any of our others, let me just real quickly set the context for our conversation. And the way I always think about that context is in terms of the original, free and independent existence of our native nations and peoples extending back to the beginning of time through our oral histories and oral traditions. And the contrast between that free existence and the system of domination that was brought by ship across the ocean and imposed on everyone and everything here on Turtle Island, as we call, quote, unquote, North America. And once we have that contrast, then we have the contrast between the perspective of our ancestors looking from the shore out of any of those ships sailing toward them, and also the view from the deck of the ship coming toward our ancestors with the intention of establishing their world, their system, without which I call the system of domination on the already existing nations and peoples in that place, right? So once we have that, then we can begin to look at all of the writing, writings that the people on those ships engaged in prior to and after they came here and and that's the scholarship that we're referring to, is a retrospective on all of that history, that textual history of the writings of all those intellects that that engaged in an examination of whatever the heck it was, and the way in which the legal profession eventually came to terms with all of that, as far as they were examining the record, but also using the ideas and arguments of the past, to project into the into the future, and to take into account whatever issues they had to deal with in any given case. So Vine Deloria Junior's article that he published in Akwesasne notes in 1975 was titled on the future of Indians, and in that article, he identifies the phrase because the Indians were not Christians. And he's talking about, why is the native title, or Indian title of occupancy? How is that rationalized? Why is it created in that manner by the United States government? And he boils it down, distills it down to the argument, because they were not Christians. And I thought that was really cool when I first read it back in 1975 when I was in college, and because I

had that understanding. And I think that the in looking at that now, obviously, the way in which we talk about these issues is that claim of a right of domination. And I think that's the more central focus, yeah, okay, they have a right of domination against anybody who's not Christian, but, but more, more accurately stated, it's they have a right of domination, in their view, a God given right of domination, because the people are not yet under domination, and it's God's will that they one day be under domination. So they're carrying out God's Will by extending their system. But they don't call it domination. That's too kind of glaring and negative. They don't want to talk about themselves in negative terms. So they say we're spreading the faith. We're bringing civilization to the savages who are uncivilized. And they use euphemistic terminology to create a gloss or cover. I'm not even sure that they. They comprehend themselves as engaging in Domination. That's a kind of a whole other conversation, but that's the way in which Deloria was examining many of these issues, as far as trying to distill it down. And one thing I want to point out, I forget exactly when Deloria was born, with what year he was born, but 1975 he was very young. And I think that's an important point, because each and every one of us started out as a young person attempting to come to grips with this massive amount of data, this massive amount of information, and you might even say it seems like an ocean of information that we have to somehow get through and comprehend and make sense of if we're going to engage in the scholarship. And I think that's a massive, not only a massive undertaking, but a massive task in terms of how skillfully people are able to do that, and what a difficulty it is. You know so

Peter d'Errico 05:59

well. Thanks. You know, 1975 is about when I first met vine. I was also young. I was just embarking on my teaching career at the University, and Vine came to visit, and we had some good talks, and neither one of us was using that word domination at the time, and especially as a kind of a term of art that you develop it into. But it was very important for me to get the sense that my hunches that I had developed while I was working with the Navajo as a lawyer were worth exploring. And among those hunches was the sense that I got that federal Indian law was not actually for the Navajo. Was over the Navajo. It was defining the Navajo. I remember using the phrase cannibalize. I had the sense that the federal rules, which supposedly were in favor of the Navajo, are actually cannibalizing Navajo ways and reformulate. So you have the concept of a tribal council, which is now everywhere. It's endemic. It was imposed more or less, by a 1934 Reorganization Act, which was again supposedly a very positive thing for for native peoples, but it meant that the very form, in fact, the name reorganization, the very form of government that Native nations had, was being reorganized and basically put into a single form of a corporate business model. And so as I began to tease these things apart and using vines thinking as well, and getting a sense that there's something to be done here to figure it out, I guess I felt like, what is really going how am I going to answer it? And I followed the course that you laid out, which is, dig deep into the text dig deep into the materials that are available. And that's when I came to understand Johnson V Macintosh, the origin of this whole federal Indian law thing, so called Indian title, and the the overarching claim of power that the United States was asserting over the whole continent and all the peoples and so for me, it seemed like the work was to try to unravel all this stuff that was getting in the way of Indigenous People's free existence. If that were possible, that's what I sort of took it on. And to the extent that I was involved in practical litigation, I knew well, the framework is this. You work within this framework, but always looking, I kept where's the way out of this thing? So at that point, I was still kind of figuring my way out of the paper bag. Well, you know, as years went by, I realized, why am I working inside the paper bag? Why don't we stand outside? And in your view, from the shore, is a perfect metaphor for doing that. It's like stand outside that system of domination. And one of the things that becomes obvious, actually, we this is a topic for a future podcast, is that the domination didn't just occur when the ships came here. It was already a system of domination. That's what it was. It was a system that was based in a certain view of a religious view of a God of domination, the God of the Old Testament, which the the Catholic Church had adopted when Constantine, the emperor, turned it into a state church. And so domination was the name of the game, so to speak. So when you said, Did the people who came over here to those thinkers, were they thinking about, we're going to do this

domination? And I think that the answer is that they were they, they was like fish and water. I don't I think they just simply took it for granted. Of course, there's a king, well, we can look. At a king, we say, Isn't that an odd, pathetic kind of notion, that there's somebody who's the King who claims to have power from God, the soul, power, soul, despotic power. That's an odd notion. But I don't see that they were questioning. There are obviously people in what we call Europe now who were questioning that they were fighting over what's the true Christ and the true belief and so on and so forth. But that was a fully developed system of domination. This is what I'm saying, which got brought over here, and they were looking They claimed they had a right to impose that system anywhere that they went in the world. And they happened to come to this continent, they said, Now we're going to impose it here. So as I say, those are all topics for their own podcast. But what as as you were looking back this 50 year old article looking at the future, well, we're in that future. That's a half century. If you go back a half century before 1975 you're before the Indian Reorganization Act. You're in 1925 you're back before there had been this kind of attempt to homogenize the whole thing under federal regulation, so that 50 years is significant. So where are we now? So I mentioned a law review article I read recently, and it was a very, a real shocker to me. It made me back up like, well, what's left for me to do? It's a 2025, article, and it proposes that tribal councils have eminent domain power, that they should have eminent domain power. And working within that notion of that they're not really sovereign, even though the article says, Oh, they're sovereign nations, they want Congress to give this power. So what shocked me is that eminent domain, if this is what they're talking about, this is simply adopting a domination system for their own governments. Because eminent domain means the power to take property by the entity that calls itself the government, and to take it from people who say no, that you can't have it, well, we're going to take it anyway, and we'll give you a little money to compensate you. So if eminent domain is what is now considered to be like, well, this is the frontier of tribal powers, then I realized, well, if that had been the case back in when I was in law school, I would not have been attracted to go do anything with so called federal Indian law. I might as well have gone to Wall Street and made a lot more money working on the same issues about eminent domain ultimate dominion, because eminent domain and ultimate dominion and and the same phrases that we're using, the papal bulls, these are, it's all one concept, really, that there is a high power which owns everything and can take what it wants and can give a little compensation if it wants. And that's even in federal Indian law. Even that has been denied. The Supreme Court said that if the federal government doesn't recognize that these Indians are here on this land, if it hasn't accepted that fact officially, then it can take that power, that land without any has the power to take the land without any compensation at all. That's the TIA Tom case. So I was just blown away by this, like, if this is the forefront of scholarship to incorporate more domination, and actually the highest form of domination, eminent domain, that's what it means, the highest domain, the highest dominion, the highest domination. Playing with this the Latin roots of these words, then what's there left to do? And so your mention of vine's article, future of Indians, I'm saying, Well, maybe that future what has been left maybe, maybe the boarding schools have finally succeeded. Maybe Henry Pratt is applauding from somewhere in the beyond, saying, I finally did it. I got rid of the Indians, and I saved the men. You remember that kill the Indian sale. So I was in this, as I said, a kind of a state of shock, of thinking, Well, what, what I'm really interested in is following out the domination trail that we've been talking about, and realizing that the domination trail is now global, and that the targets are not just so called indigenous peoples, that that the system of domination is the dominant system, and it pretty much goes without question. There's people have debates, if they have elections. Well, here's the guy I want to be the top Dominator. Oh no, we want another guy to be the top. Oh, it should be a woman who's the top dominant. Oh, it should be a different skin color who's the top Dominator. And who is stopping to say, why are we looking for a top Dominator? What kind of desire do we really looking for, and for me to work with native peoples has. Always been about that. It's been since I realized, as soon as I got to Navajo land, I'm in a non western society here, I realized this is a window, a window outside the overall framework, dominating framework. It's a view that looks out from that and then allows you, if you're in that view, to step outside that system domination and see it as a whole. Yeah, it interested me. I think that's what interests both of us. And one more thing is that all this, there's

so many people now that are talking about Christian discovery and heathens and satellite, all that negative language. We saw that a couple of podcasts ago. There's court judges on courts who are saying, oh, all this racist language, all this language of supremacy, etc. This is really unacceptable, but that does not lead them to question the actual implementation of the domination, they just don't like that word. And so what we have today, just one more loop through that law review article about eminent domain, is that there's a sense in which, as long as we don't use that nasty sounding language about heathens, let's talk about self determination. Let's talk about tribal sovereignty, and all those are terms of art in federal Indian law. So one of the things that blind talked about in 1983 he was asked a question about, what about this whole self determination act that President Nixon enacted? Has that been a good thing? He said, Well, it has strengthened tribal governments, but it has transformed them into essentially, in just a normal municipality, there's nothing particularly Indian left anymore, and to the extent that there are Indian people, they've mostly been assimilated. That was vine's view, maybe answering his own question in the future. So now, in 83 a few years later, he's able to give a kind of an update on it, saying, This looks like the trajectory that it's going in. So the people who are saying, Oh, that nasty language, and they they read your book or my book, or they follow us on in our writings or in these podcasts, and they say, oh, yeah, we're right with you. That was all nasty. How horrible these colonial dominations, etc, and they don't seem to be able to take the next step to say, well, it's that deep structure is what we're what's problematic, not the language that was used. If the language is taken away, like the judge on the ninth circuit and the judge in the Washington State Supreme Court, they seem to be satisfied to, let's get rid of that nasty sounding language, but and then we got a wonderful system. It's like somebody said recently in another article, we don't there's we don't use plenary power anymore. Well, I'm thinking, what really, I mean, the biggest case in recent history, Holland V Brackeen, the Child Welfare Act, and McGirt V Oklahoma. These are big Supreme Court Indian law cases. They rest on plenary power. Some in Holland, they actually explicit about that. In the McGirt case, they hide it, but they refer to the precedents that set it up. So I think, well, this is like Alice in Wonderland. I'm not interested in it anymore. I'm not interested in pretending that the real problem is that there were these Christian heathen distinctions. No, the real problem is that the domination that was being justified by Christian heathen distinctions. And if we erase those distinctions, it does not mean that we've erased the domination system, right?

Steven T. Newcomb 18:42

Well, I want to jump in for a second, yeah, because I think that when we're using we should very, be very emphatic about recognizing that when we use a term such as domination, we're using that from the shore looking out of those ships. Yeah, and that's not a term that that the people are going to ascribe to themselves on the ship or any part of that system, because domination is a very negative term, and they're not going to ascribe negativity to themselves. They want to see themselves in the best possible light. So that's one part of it, and the other part of it is that the people on the ship, or the descendants of the people on the ship, which is the descendants of today, have no comprehension or awareness of that overall system of domination by use of that terminology. That's what makes our effort so unique in terms of the overall contribution or way in which we're discussing any of this stuff. And so the idea that they have a claim of a right of domination would never dawn on them. It just wouldn't, because. They're not going to see, oh, here going the king is telling the cab is going get us the the jurisdiction and the dominium title. Who's going to realize that that's domination? They're going to look up the word jurisdiction, perhaps, or the word title, and they might try to get into a bit of the nuance, but somehow or other, they're unlikely to really put those dots together in the man the manner that we are. That's number one. Since they don't have that awareness of an overall framework or structure or claim of a right of domination anywhere within their analytical framework, they're not going to be discussing it, either verbally or in writing, and they are going to go at eminent domain is in the examples that you're citing, and say, Hey, this would be really great if quote, unquote, tribes had this power of eminent domain. And then to the you know, to what extent do they even understand what that is, and to what extent do they connect that to the overall system that we're talking about, that larger framework. And

taking it back to Pablo bulls and royal Charters of England and the Johnson versus Macintosh ruling, and the understanding that the word property means domination, despotic dominion, as as William Blackstone referred to it in his commentaries on the common law, you have to be able to not only memorize so many of these data points and put them all together and have them readily available to utilize utilize, but you have to be able To keep track of all that as you're moving forward into other scholarship and go, Oh, there it is. There it is, there it is. The people that don't have that understanding, or those that set of skills are not going to be able to do that, and they don't know that they're lacking anything. They believe that they're moving forward in this very skilled and they are, in their own way, moving forward in this very skilled manner of speaking and writing and legalese and all that, and so, by all appearances, well, this is top notch scholarship. So they don't even recognize what their scholarship is lacking. Yes, that is what, what I think is so problematic about the future of Indians. We're in that future, and somehow we, we don't have it together yet in terms of a larger movement and effort, you know?

Peter d'Errico 22:29

Yeah, and I think what you're saying is borne out by the law review article the eminent domain is that it doesn't. It doesn't start out by saying, oh, tribes should have a power of domination. What it starts out with saying, Oh, what if a tribe wants to develop a Green energy project? Oh, what's that's one of the latest things to put you know, it's the bandwagon green energy. Oh, the tribe's going to have green energy. We're going to have to build a dig, a mine, we're going to have to put a solar plant up. We're going to have to put transmission lines. And there's a lot of people who don't want that, and some of them are members of the tribe. And so we want power to say we're going to do it anyway. So they're not focusing on Well, in a way, they are. We want that power, but that's not really what they're saying. Is we want, we have a good thing we want to do with that power. So you're supposed to get all involved. Well, is green energy good? Is that power line? Good? Yes, yeah. Let's talk about that. And the question about the nature of the power that's being exerted is really off on the side somewhere, if it's visible at all. Yeah, exactly. So, so there's handy ways to let's talk about something else, rather than the power structure. And it's backing up just a second to you talked about the original free existence, etcetera. Well, I'm always struck when I remember Philip Deere, Muskogee, medicine man, and somebody was saying something about the Indian way of life that he was taught. He was talking about original, free existence of his people, and he said, Well, it's not really an Indian way of life. It's a human being way of life. We're we're human beings, and it's a human being way of life. And I think that that was always, for me, the great promise is, can we figure out what it means to be a human being? And I don't believe that being a human being requires a system of domination. You have already pointed out in an earlier podcast that the Court that said that there were only barbarians in California when the Spanish came, you said, Well, how did they get to be human beings in a technical, legal, social sense, they got to be human beings, once they were dominated, once they've been converted, once they had been put inside the mission system, and so on and so forth, then they got to be human beings. And for me, it's always been the promise has been there to say we can get a view about what does it mean to be a human being, and we can be assisted in our understanding. Ing of that by looking at original, free existence of peoples that were known to the so called colonial powers, and who said these people have to be rubbed out, really, what was being said there, whether it was called because they were Christian or heathen, they were uncivilized. Uncivilized. Mean they hadn't been lined up and enumerated. So this was the problem. Here is the original free existence was actually the problem for the dominant,

Steven T. Newcomb 25:32

yeah, very definitely, very definitely, and, and the the thing that we ought to keep into, keeping consideration is the fact that we're using this English language to try to make sense of any of this. Yeah, and that poses its own set of problems. Yeah? So when Philip dere is speaking that way, he's speaking that way in English because he's trying to make sense of things in English. But if he were speaking in his own Creek language, he wouldn't be saying human being, because that phrase doesn't

exist in Creek. He would, he would be using some other term, whether it's the real people or creek or whatever, whatever the identifier is, the whatever, whatever way in which the people identify themselves, to be a good Creek person, to be, you know, whatever the term might be, but that's in their language and in their context, as a result of their language, culture, spiritual traditions, their whole spiritual way of life. And so we're trying to take that comprehension in that language, and then make that understandable in this language, English. And as a result of that, there's certain confusions that arise and ambiguities that arise that we never quite resolve. Yes, once I understood that, that my gosh, okay, if these people are not considered human, but there's a way in which they can become human and then we go through those steps of domination. Okay, they have to go through all these steps of domination now they're going to be human because they went through all these steps of domination. That should change our comprehension of that word human,

Peter d'Errico 27:17

yes, and Philip in the same conversation that I just quoted from, he used the metaphor of the drum to talk about the original phrases. Every people had their drum. And he said, most people, many people I don't remember. He said, most, or many, have lost their drum. He said, but we still have our drum. So if you use that image, then you don't have to get caught so much into the language or the definition of being human, because drum is pretty clearly a phenomenon that's understandable to anybody in the world. What is it drum? Yeah. Is it drum? Mean, yeah, then you get into the question of, What is a people and what is, what does it mean to be a people, to have a drum is some kind of a heart centered thing of some sort. And these are my words, not Phillips words. So, so when we're talking about all of this, I'm, I'm thinking that again, we're talking in English. We dive into the sewage of the domination system and teasing an apartment like archeologists, like, Oh, I found another artifact out. It was, this was in a papal bull, or this was in a charter, or this was in a royal grant, or whatever it is. And we're, we're coming out with all this stinking material. And there are some people who see that, they hear that, and it's always not horrible, that's all really bad stuff. But what they're not seeing is the trajectory that we're on is that we're exploring the roots of this phenomenon, which is ongoing today, but wears very different disguises and wears disguises of we're doing this for your own good, which is, of course, what they told all the native people. This is for your good John Collier, who bemoaned the loss of a deep connection to the natural world and natural life. He was the architect of this thing, the reorganization act. He thought, this will save these people. Well, what turned out, it didn't save them, it encapsulated them. And today, out of the hundreds, four or 500 different original peoples that have been continue to be recognized, they essentially have all one form of government. What happened to their drum? They've all been the drums been taken away. The Rome drums been taken away, sometimes literally, when their ceremonies were prohibited, and the reorganization act said, Oh, now you get to have your ceremonies, but your ceremony of group existence, if you want to call it that, we are going to say you should have our system of group existence. You should have our council system and our laws

Steven T. Newcomb 29:58

well and going back to. That article on eminent domain, going back to the theme of scholarship, the the article is not about how to restore the original free existence. And he liberated from that initial claim of a right of domination that's still ongoing today. It's like, oh, how can we apply within our limited context, some exercise of domination? They don't see it as that. They call it something else. But that's really what it is. And there's not even the slightest notion of how do we restore our original, free way of life? That's not even part of the scholarship. And I think that's the biggest gap, the biggest lack inadequacy within the overall scholarship.

Peter d'Errico 30:47

And we're going to look at that. I think we've had a conversation really recently about other law review articles talking about the use of so called artificial intelligence to somehow try to remedy this problem, which is the most bizarre thing. I don't want to get into it now, but I want to show you if I can just share my screen for a second. Let me get to this. Is that tribal amateur domain article, and so you say he's not aware of it as domination. It's for sure he does understand it. He says eminent domain is a foundational sovereign power, the sovereign Now, where did any original people's free existence have a sovereign? So the sovereign undergirds the ownership of private property. There's your your despotic dominion, and at its core, it's when the government assumes a property interest without the consent of the owner, and notice he's got footnotes. And one traces it to the development of the state in the 18th and 19th century, and another one traces it. I don't know where the footnote is, traces it to Rome. Oh, here it is, ancient Roman law. So the guy who's writing this, he's actually he does know he's talking about something called sovereignty and domination, but without using the word domination, right, taking, etc, against the interest of somebody. So he's describing domination without using the word domination. And so it's even sharpens your point that it's an adoption of a system of domination, knowing that it is a system of power over but not calling it domination, and trying to tie it together with something like so called green energy. So, oh, this is a good power. Let's don't look at the nature of the power. Let's just look at what it's doing.

Steven T. Newcomb 32:47

Yeah, it's adopting a system of domination with that without ever calling it that. Yeah, yeah. And that's what's so extraordinary, because all of those terms are some form of euphemism or synonym for domination and no awareness, evidently, on the part of the writer, that that is the case, or if there is an awareness of that, not bothering to put it in there. There's an article I just recently looked at, and I don't even remember the I just glanced at it. We should discuss it at another time. But it had to do with the doctrine, and it was written right after the Vatican issued a statement about the Doctrine of Discovery on March, 30 of 2023, and somewhere within the overall mix, the author mentions Christian domination. They use that phrase, okay, but that's the only time it appears, and it doesn't appear any other time. So what that is weird that if you've acknowledged it once, how is it that you're not starting with that, or somehow leading up to that and using that as your overall framework? It's just kind of, it's your thing about the phenomena of now you see it, now you don't. But just this case is now you don't see it now you do.

Peter d'Errico 34:11

And so, you know, I'm glad you brought that up, because it's so easy for people to think Christian domination is a phenomenon. So if we get rid of Christian, the domination falls down with it. Yeah, we take out Christian, we've got no problem left anymore. Whereas what you and I are saying and seeing over and over again is that you can call it self determination, you can call it tribal sovereignty. You can call it Indian title. You can have a lot of words that people don't really hesitate about because it sounds like, Oh, it's a technical term and it doesn't necessarily mean something bad. They don't understand that the domination is just put on some new clothing, clothing that's appropriate to another time. It's not. It's. Not the 18th century anymore. It's not the 19th century. It's not even the 20th century, 21st Century. Oh, we've got no problem now, because we're talking about something else, only talking about the surface level of things and and it seems to me that there's too much attention to surface level thinking.

Steven T. Newcomb 35:18

Anyway, yeah, that's called Water beetle scholarship. I

Peter d'Errico 35:23

love that. That's good. Well, Steve, there's so many more things that we're going to be talking about. I'm wondering, are we at a place? I think so. Yeah, that's just to say good things that are roiling our

minds and our imaginations, and we'll be chewing on them in more details specifically in other podcasts,

Steven T. Newcomb 35:43

perfect. Thanks so much. You're too Steve, until next time, Yes, you.