

e018-mark-savage-natural-rights-unravelling-the-questions

INTRO

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Welcome to the Domination Chronicles podcast. I'm your co-host, Peter P. d'Errico.

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And I'm your co-host, Steven Newcomb. Together, Peter and I have 90 years of experience researching,

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discussing, and writing about indigenous people's issues. Here, we explore themes such as the

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original free existence of Native nations and peoples, colonization as a claim of a right of

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domination, and civilization as a process and system of domination. Be sure to like and subscribe to our

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Now let's get into it.

[Peter] (0:02 - 0:10)

So good morning, Steve, and good morning, Mark. Mark Savage, welcome to our conversation on Domination Chronicles. We've been looking forward to this.

[Mark] (0:11 - 0:13)

Good morning, Peter. Good morning, Steve. Good morning.

[Peter] (0:14 - 0:15)

Thanks for being here with us.

[Mark] (0:15 - 0:16)

Yeah, absolutely.

[Peter] (0:16 - 0:52)

Well, for those of you who don't know, you're going to find out Mark was the author of a couple of really important, in fact, seminal law review articles back in the early 90s, clarifying the lack of a constitutional foundation for the U.S. claim of plenary power, total power over the original inhabitants of the country. He's practicing other kinds of law now, and in the meantime, has done various things. So I'm thinking the best thing, Mark, is if you just told a little bit of your story, like the journey.

[Mark] (0:53 - 14:52)

And maybe like most stories, mine nearly started with a wrong turn. I graduated from University of California, Berkeley, taking all different kinds of courses, trying to figure out what I wanted to do, decided I wanted to teach philosophy. And I was talking to the graduate school of philosophy there, and they said the best and the brightest are driving taxi cabs.

And I had no guarantee I was going to be in the best of the brightest either. So their recommendation to teach philosophy was to go to a law school, which was a three-

year degree instead of a seven-year PhD. And the turnover in teaching positions was a lot faster because the teachers were leaving to take high-paying jobs at law firms.

And the advice was, get into the best law school you can get into. And I happened to get into Stanford Law School, going from Cal to Stanford, and thinking, going to get ready to teach philosophy. And in my very first year there, first semester, I had Derrick Bell as my constitutional law professor.

He's the one who wrote all about race and racism. The book *Let Us Now Not Be Saved*. And that totally changed me.

So I'll tell a little bit more about law school, but I became a civil rights litigator by training. That opened my eyes in ways that I'm embarrassed to say had not been opened yet. They should have been and they weren't.

And it got me making choices about paths to take that were heading in a quite different direction. That class that Derrick taught was pretty upsetting because most of the students there were upset that he wasn't teaching black letter law. He was teaching the fact that who is in the seat, who is in the office of Supreme Court justice, may matter more than the office of Supreme Court justice.

And we see that in some of the decisions that come out of the court, right? It's not what the rule of law is, it's who's deciding what the rule of law is. Some classes I had there that sort of shaped me.

I had a class in socialist law taught by a woman, an expert in Soviet law and Chinese law, and wrote about abortion and women's rights in the Soviet Union and China. It got me thinking long and hard about the internal point of view. And I think that's relevant to much of what I read in the history of indigenous people's history and colonial history.

It's the internal point of the person recording and telling the history that seems to capture what it is. But I keep struggling to find what is the indigenous people's internal point of view about what was happening. And I think we get treaties.

We read them in the English, and we read them as written down by the people who were for the United States or the states who were recording them. I want to know what the indigenous people thought they were doing and were not doing. So that class, thinking about what's the internal point of view of a woman in the Soviet Union, what's the internal point of view of a woman in the People's Republic of China for what they think are their rights as women in those countries, that kind of thinking has followed me all the way through.

And I had a class in federal Indian law. That was the title of the class. Logan Slagle taught it.

I was starting to get wise that you have to not take things for granted. You have to start poking around at what's given out as received wisdom. So we're reading cases that say plenary power, citing the Indian Commerce Clause, and

I'm reading the Indian Commerce Clause, and I'm saying, where's the plenary power?

Because it's certainly not in the words. When I was in law school, the first summer I worked in Mendenhall, Mississippi, a little town of 2,500 people. I worked in the quarters.

That was the short version for the slave quarter on the other side of the railroad track, working on segregation issues. Next year, I went to South Africa during the state of emergency in 1987 to try to help people who were being detained without charge, without conviction, worse prison conditions, working in different places. Brought all of this back and started as a law fellow at Public Advocates, which was challenging the systemic causes and effects of poverty and discrimination, primarily in California.

But it was a great way for me to start as a lawyer, first of all, because I was thrown into the fire. There was so much need and not enough people, but also thinking systemically. It is really important to have legal aid folks who are representing individuals that have individual problems, like employment termination or getting kicked out of their house, things like that.

But at the same time, it is important to have people trying to work on it as a systemic issue so that those cases don't walk through the door of legal aid hour after hour after hour. It is teamwork. You need those different perspectives.

I embarked on the systemic thinking, the systemic litigation side of things. As this was going on, I was writing the first article, Native Americans and the Constitution, the Original Understanding. I had started that in the law school class, but there was so much to unpack.

And it is one thing to write a seminal article. It is one thing to just say, these words don't say what people say they say. You have to go deeper.

I did then what I am actually doing now, and I will get to that. I went back and looked at the history. There are notes.

James Madison took notes of the deliberations in the Federal Convention to frame the Constitution. But I also looked for the unstated, perhaps unstated understandings that might have been there that weren't recorded in the notes. I looked at discussions of sovereignty, because Johnson versus McIntosh talks about the doctrine of discovery, the principle of discovery, talks about sovereignty.

The principle of discovery, doctrine of discovery is nowhere mentioned in the Constitution, but they are clearly thinking about it. There were debates, as I mentioned, but there were treaties. Was there some sort of understanding that was a penumbra around the Constitution that wasn't stated?

I hadn't done any of that in law school. As I was clerking for a judge in Vermont after law school, I started driving to Albany every weekend to do this sort of deep historical

research, books in the 1700s, the 1800s, sometimes earlier, and ended up writing this article. The American Indian Law Review published it in, I forget if it was 91 or 92.

I was at Public Advocates then, and I was pushing to ask them to let me do more work on Native American, on Indigenous sovereignty issues. They could see my passion, but they needed me to be doing the other things, so they figured they needed to say yes, because I would continue to do the other things. That led me to, for example, Raymond Yowell of the Western Shoshone Nation asked me to come and give a keynote address in 1992 at the Healing Global Wounds Conference.

I think that was the 250th anniversary. It was really good to be sitting down with people and hearing their perspective on one of the questions I closed my article with, what then shall we do? Because I don't purport to know, to be nearly the person to answer that question.

It's Indigenous peoples themselves that need to be leading the answers to those questions. As I've hinted in my closing to that article, it is not an easy discussion, I don't think, because the abuse, the harm that has been done for so long, it is unfathomable to figure out what does it mean to try to solve that? I don't even know if that's the right question, but what then shall we do?

It was very good for me to go and listen to people saying what then they thought we should be doing. I was still trying to think about how to capture minds, how to capture hearts. There was a conference at New York University,

hosted by the Review of Law and Social Change, on checkerboard sovereignty.

I don't know if it was intentionally this way, but it sure fits the General Allotment Act of 1887, dividing everything up into very, very small pieces and just letting it blow away in the wind. I prepared an address there, which became the second article that you mentioned, where I had the audacity to rewrite a U.S. Supreme Court decision that had just come out, the County of Yakima case, but to rewrite it as it should have been written with the original understanding in mind that no, Congress didn't have the power and the states didn't have the power. I am so glad that they asked you, Steve, to contribute your article on all the work that you have been doing, because that was Christian nationalism, knowing what those roots are, coming back from the papal bulls.

Actually, earlier, in 1493, which has actually been taking a lot of my time now. We can get into that. Steve wrote an article for that edition.

I wrote an article for that edition. Then I was just so busy, I became president and managed attorney at Public Advocates. We had children.

My wife was working part-time for part of the time, and then I worked part-time so that she could work full-time. Went to Washington, D.C. I was not doing much of anything on indigenous sovereignty. During the Keystone Pipeline, though, an elder called me, really broke my heart, wanted me to come up there to try to help.

I couldn't because I was leading a team and I was already overextended. I came back to UC San Francisco, worked there until 2021. I'm now consulting, doing a little bit of paid work, but it has finally presented me with the opportunity to return to this passion for indigenous sovereignty and trying to figure out any way that I can be helpful to try to help with what is so, so wrong.

I started, and you may want to unpack this a little bit more, but just to summarize, I started actually looking at some of those potentially unstated understandings around Johnson versus McIntosh. That decision nowhere cites any constitutional authority, any legal authority. It just says doctrine of discovery.

I thought maybe there was something in the plaintiff's or the defendant's brief that said something that they were relying on, but they didn't say. I poked around, and it turns out that briefs weren't required until 1821. I had an assumption that they would always be required.

I ended up finding, nobody knew that I can tell, knew that there was a brief, but I did find the plaintiff's brief, and that's going to be published shortly to share in case that's helpful to anybody. It didn't find any help on those unstated understandings, and I'm just still reading, trying to figure out what I can do to be helpful. Let me pause there and ask whatever questions you think might be useful, but I'm glad I made the right turn at the beginning instead of the wrong turn.

[Peter] (14:52 - 14:53)

Absolutely, absolutely.

[Steve] (14:54 - 15:21)

I think it's really interesting, Peter, that, Mark, that you have that orientation toward philosophy, because Peter was also, he studied philosophy as an undergraduate, and I always had a philosophical orientation, and I think that's kind of crucial to this type of work. I hadn't really thought of it in that way. It's almost a prerequisite, in a sense, of having that orientation, right?

[Mark] (15:22 - 15:23)

Right, yeah, right.

[Peter] (15:26 - 16:15)

Well, I wanted to say, yes, that I think a philosophical mind or sense of inquiry is really crucial, because it's the only thing that gets you in the framework of the questions you're asking, like what's behind the questions that they were asking, right? And otherwise, you just get stuck at a fairly superficial level, and I'm certainly not saying that all the philosophy, there's schools of philosophy which are, in my point of view, very superficial. It's why I didn't go on into philosophy.

It's like I had no interest in this kind of mindless mechanical type of philosophy that seemed to be the dominant form at the time, so I did the same sort of half-step into law school.

[Mark] (16:16 - 17:32)

I think in philosophy, it's often talked about a sort of very big-picture view, principles and consequences. You start with the principle, it leads you, because you've defined the principle in a particular way, it leads you down to certain implied consequences. We learn the same thing in law school.

You learn that you can pretty much tell from the first paragraph of a Supreme Court decision, the way they ask the question gives you a pretty good clue on how they're going to answer the question because of the way they ask the question. And sort of that way of thinking is helpful, because then when you're trying to understand what just happened, it helps you to go to back up, to sort of reverse engineer. Where are we now?

How did we get there? For me, changing things for real people in the present is the most important thing, but it's still worth the time to me to try to go backwards and understand the details of what happened in order to better understand what's going on today and how I can be a member of a team in trying to change it because of what was put in place a while ago.

[Peter] (17:33 - 20:28)

Yeah. And I think that when the alternative to asking those questions, the alternative is saying, why are they asking this question? Why is that the question they're posing?

If you're not doing that, then I think Steve just said a moment ago, we're falling into a, well, basically, federal Indian law, quote, unquote. They've fallen into the trap of

just saying, oh, well, this is the question. This is what the court says.

Steve and I were at a conference a few years back at the Carnegie Institute and looking at some of these issues. And a lawyer, an academic lawyer, but one with some practice, when one of us brought up something about Johnson v. McIntosh and the questioning of it, he says, oh, well, the Supreme Court doesn't want to hear that.

And I was so startled. I said, well, that's not really what is relevant here. It's not that they want to hear it.

It's that it has to be asked and it has to be inquired into. And that's the job of an advocate. And I think that what we see now, I'm just going to leap into the present moment where just a few months ago, we had two Supreme Court justices, more or less out of the blue, not really.

If you look at Justice Thomas, you realize he's been chewing at this plenary power thing for a while. Gorsuch was somewhat out of the blue, although you get a sense like he thinks about what's good for Indians, quote, unquote. But the two of them team up to challenge the plenary power doctrine, the doctrine that the US has this total control, which, as you say, they just sort of wave their hands and say what comes out of the Indian Commerce Clause.

And this is what you were saying. How many decades ago now, 90, 10 years, 20 years, 30 years ago, you laid this all out in great detail and greater detail than they did in their opinion, saying they were dissenting from the courts not

taking up a case which would allow them to look at this.
How did this come about?

And what is most startling, I think, in the wake of that, which just happened a few months ago, is that there's been deafening silence. The Federal Indian Bar, so-called, is not interested in doing the inquiry that you have just been talking about, this necessary inquiry. They don't want the opportunity.

Let's look at these fundamental questions, these fundamental principles, quote, unquote. And I don't know whether you have a sense about why that's happening. It seems to me that there's a kind of a routine.

It's kind of an easy ride. If you get into the federal Indian law thing, you've got a few rules, plenary power, trust doctrine, more things made up, thin air. And it's very easy to play that game.

You get paid. And there's no heavy lifting involved. And there's no opprobrium of saying how dare they challenge these fundamental doctrines.

[Mark] (20:29 - 20:44)

Right. Well, a couple of thoughts. One is, and sort of starting with the big picture, it's perhaps a miracle that we do have two Supreme Court justices even saying this in the first place.

[Peter] (20:44 - 20:44)

Yeah.

[Mark] (20:44 - 25:59)

So yes, there is. Yes, there is silence from a lot of people. But I'm not aware of anybody ever saying no plenary power before these articles came out.

So finding the way, sort of thinking long term, long roots, big picture, planting seeds, seeing what happens. It may not be fruitful always, but it can be fruitful. I don't know how these branches started to grow, but there's a conversation happening now.

So I think big picture, that's a useful thing to keep in mind that some people are talking about it and people that we weren't expecting. The second point in my mind is though, why are they talking about it? I know that I went back a couple of days ago and reread the dissent just so that I'd have it fresher in my mind.

I noticed as often happens, they're long on saying what's wrong. They're very short on saying how to fix it. I don't really know what they would have done with their statement in order to change the case that was before them.

And this is really important. Even in my line of work, civil rights litigators will write a long complaint about all the things that are wrong with this particular system or that particular system without asking what order can they get the court to sign that will fix it. Because courts have jurisdiction and then they have things that are outside their jurisdiction.

Neither Gorsuch nor Thomas really said here what they would have written instead. And I worry about that because I've looked at other recent decisions from them. And I'm looking at the article that I wrote a cover article with the Johnson and Graham, let's see, the Macintosh brief that's coming out where I quoted some of their statements in other recent dissents.

So Gorsuch is saying our founding document, the constitution does not include a plenary federal authority over tribes. But then in a dissent, he also says in cases like that, the constitution provides federal law must prevail. This creates a hydraulic relationship between federal and tribal authority.

The more the former federal authority expands, the more the latter tribal authority shrinks. So he's criticizing plenary authority, but he's not disagreeing with the principle. He's got something else in mind.

And Thomas does the same thing in another dissent in the Lara case. He says, due to their unique situation, tribes cannot exercise the full measure of their sovereign powers. So one possibility is they're saying no federal plenary power, but the states have plenary power.

That would be consistent with other things that they've done. I don't know. But I am cautious, I'm wary of what to take from their dissents until we hear from them more about what it is that they are intending to do.

That does not explain the point about the silence. It is an opportunity. One should be jumping on the fact that this is now a discussion that's happening at the highest levels.

It affirms what we've always known, that that is a legitimate conversation, that that's a legitimate issue, finally being named by more parties than just the ones who were adversely affected. It may be that people don't have less sense of what to do with that opportunity. In my experience, what I do in a situation like that is I begin what I call multicultural coalition building.

I start bringing together leaders who know and talking about it and trying to frame an agenda and then pulling together some perhaps a straw proposal just to help the conversation. I don't know if that's happening. I would hope that it's happening.

That's the kind of thing I would love to be listening to, participating in if people wanted to have me, about trying to figure out how to build, to deepen this conversation, to make it have a power that cannot be resisted. For the silence, I don't have an answer.

[Peter] (26:00 - 28:02)

I think what you just said is clearly what needs to be happening, what ought to be happening, is a conversation rather than avoiding the conversation. Avoiding the conversation deepens the problem. It's not necessary that, in my mind, that we hear an immediate kind of statement from the justices who are questioning plenary powers to what they would do, because as you said a moment ago,

talking about the seeds that got down there, I think Gorsuch and Thomas have been paying close attention to the things that we're writing and the things that we're talking about.

The Yakima nation amicus brief in the Cougar Den case is a good example. The nation wasn't even a party. They filed an amicus brief, and the major part of the brief was an attack on the doctrine of Christian discovery.

The second part of the brief was affirming their treaty language. The US actually came down against them with its own amicus, which is interesting in terms of people who think there's a trust relationship. The point I want to make is that when the decision came out in favor of the Yakima business, the Cougar Den trucking company, they referred to three times the Yakima nation amicus brief, but without engaging with the Christian discovery.

I have a feeling, my sense is, that the justices and their clerks saw this very clear attack on Christian discovery, presented side by side with the treaty assertion, and they were aware of like, this is going to be very tricky, because we've now been called out. If we go down, if we don't go with the treaty, the reasoning that we are going to have to use, because it's the reasoning built into federal so-called Indian law, has already been savaged, so to speak, using your name, but it's already been taken apart in great detail.

[Mark] (28:02 - 28:03)

That's a first.

[Peter] (28:05 - 29:48)

I have a sense that the Yakima business won the case, in large part, because the court saw before they've been presented with a fork in the road here. You can go down this fork, in which case, we have already destroyed everything that you think you're going to stand on as firm law, or you can get on this one, which turns out to be comparatively easy, because you can just say, there's a treaty. And Gorsuch, in fact, I think it was even in the dissent, the part that I found encouraging in the Gorsuch-Thomas thing was talking about that the US is out of practice making treaties.

And so I thought, well, that's a very powerful statement. That doesn't leave any room open for states coming in. It says, there's a basic relationship here, which is between equals that have the power to treat with each other.

And again, I can't predict any more than you can about where anybody would go with this on the court. But it's the conversation that allows all of those ideas to come out. The attack on Johnson v.

McIntosh and Christian discovery, the clarification of what it really means to have a treaty, the clarification of what that commerce clause language really means, all of that has to be brought out clearly into the open. Because without it, right now, the thing I find most distressing, even knowing people who are very favorable about our conversations in these podcasts, is that there's an awful lot of superficial thinking that just says, oh, the Indians are good. So yeah, they've been really wrong.

But how have they been wronged? And in what specific ways? And where do we go from here?

Oh, those questions are too hard. I just know that the Indians must be right here. And we'll go ahead.

[Mark] (29:48 - 30:02)

I'm wondering if you have thoughts on at least the public silence. There may be a lot of discussion going on that's not public, and I wouldn't necessarily know about it. But I'm interested in your thoughts.

[Steve] (30:04 - 32:06)

Well, I think that the general, as far as I know, there's much that I don't know about what's going on within certain circles within the quote, unquote, federal Indian law establishment community, or the people that work in that area of the law that I have no knowledge of. But the areas that I do know about and things that I look at in terms of publications or conferences or ways in which a number of things are being dealt with, not just these topics, but say the UN Declaration on the Rights of Indigenous Peoples and so forth, there seems to be a strange tendency to take as a given the accuracy or truthfulness or merit of, or just kind of a *fait accompli* of the plenary power doctrine.

And you'll see people go into court and actually that's their opening salvo is to acknowledge that the United States government has some kind of supremacy over Indian tribes. It's bizarre. So, I think that the general atmosphere of the field itself is, there's a fundamental flaw in the way

that people seem to be incapable of asking these very foundational questions.

And maybe it's an unwillingness, maybe it's an incapacity, I don't know. But I don't see the kind of cutting edge work, such as your amazing law review articles. And I think that's just very sad, actually.

The other thing is, well, I wanted to ask you, do you have any sense that Gorsuch or Thomas or anyone else on the Supreme Court has actually read either of your articles or both of them?

[Mark] (32:06 - 32:49)

I do not know. I know that people that they cite have read the article, but they haven't cited either of my two articles. I basically have the apparent coincidence that writing those articles in the early 1990s, then other articles started talking more and more about it.

Some citing my articles, some not. And now we're at the point two, three decades later, where Supreme Court justice is sort of percolating up, right? So, I can only speculate.

[Steve] (32:50 - 33:17)

Let me ask a question to both of you guys. And I'm sorry that my memory is not as good as it used to be. I'm trying to remember, is it the Dartmouth case or what is that early ruling where Marshall's talking about anything that is, well, the government can only operate on the basis of the constitution and anything outside of that is basically no.

I mean, I'm very badly paraphrasing, but what is that decision?

[Peter] (33:20 - 33:22)

I think you're saying Marbury versus Madison.

[Steve] (33:22 - 33:24)

There you go. Thank you.

[Peter] (33:24 - 33:24)

Okay.

[Steve] (33:24 - 33:56)

So, like I said, my memory. So, when you take that Marbury versus Madison framework that he lays out, I think pretty clearly that Marshall does, how does that relate to what we're discussing here in terms of, you've said there's basically nothing within the constitution that lends itself to any of these kind of arguments that the United States has made, but also built upon over such a long period of time. So, how do those get reconciled?

[Mark] (33:57 - 35:47)

Well, thank you for bringing the sort of the enumerated powers, the idea of enumerated powers, that it's only what's laid out in the constitution. It's an important principle, perhaps honored in the breach sometimes. But I think that's one of the things, one of the reasons that I worry a little bit about what Gorsuch and Thomas might do with this, because the 10th amendment reserves powers to the states and the people, and it'd be a little bit like whack-

a-mole to say, okay, the federal government doesn't have it, but surprise, we're going to say that the state governments have this role, and we just picked the wrong forum, and you're going to have to answer to the state's plenary power now. They haven't said that.

I'm not saying that they will, but that sort of thinking offensively and defensively, like where could somebody take something? This is what I'm trained to do in the cases that I bring. I have to think about what happens if I win at the trial court?

What happens if I lose at the trial court? What happens if there's an appeal? How long is this going to take?

What's the fastest way to do this? How much can I get the court to order? What's the level of judicial discretion?

That enumerated powers thing is an important piece, but I wonder what Gorsuch and Thomas would do with it. If we ask it, it's a good thing for us to be able to answer it, too, and tell them what the answer needs to be.

[Steve] (35:48 - 36:40)

I think that's why setting up the context in advance is so crucial, because that original free existence of every single original nation and people of the continent is crucial, because otherwise you don't have a correct starting point that offsets that type of a potential for an argument of states' rights or federal rights. Well, how in the hell did they get any of that without the free consent, uncoerced consent of the original nations and peoples that have that birthright

of an original free existence? It's in that contrast between that free existence and the assertion of a right of domination that comes out of those crazy documents from centuries ago.

That's the nexus of the whole issue, so far as I can tell.

[Mark] (36:40 - 37:27)

Yeah. Do you mind if I read a footnote in that dissent? Not at all.

So, this is Gorsuch's dissent. It says, if discovering, quote-unquote, a land is enough to secure certain rights over it, one might wonder why Native Americans hadn't obtained those rights over their lands long before Europeans arrived. So, I'm not saying that because he said those words, he's got it all, he's coming from the right place, because I don't know.

But that's the free and independent existence. It was there before anybody came across the Atlantic.

[Steve] (37:28 - 37:32)

And that's the context. Yeah. You were going to say something, Peter?

[Peter] (37:32 - 38:22)

Yeah, because this is also, just to quote from that same thing, this is in the main text of the dissent. He was referring to bilateral relations. And he said, if the tribes and the government decide, so he's already defining that there are only two parties to this conversation.

It's not a third party, the state. If the tribes and the government decide that a degree of federal involvement is beneficial, the Constitution affords a lawful way to achieve that end by treaty, Article 2, Section 2, Clause 2, the government may be out of practice using that tool. So, again, it's only by our conversation, focusing on the details of this, the footnotes and the text and the words and parsing these sentences, that's the only way that this is going to be useful.

Ignoring it is not always useful.

[Mark] (38:23 - 38:32)

And so- Which is why your podcast is so important, to keep having and putting this conversation out there. So appreciative.

[Peter] (38:33 - 42:46)

Well, Mark, I mean, just to return the compliment, we're so grateful that you're engaged in this work again, after the hiatus where you're out doing all kinds of other law work. And welcome back into this. I want to go back to your starting point about what's behind the Johnson decision, and you were looking for the plaintiff's brief, etc.

The feeling I have, the sense that I have is that it's actually very straightforward. It was an effort to create, by essentially feudal thinking, great landowners, because these were speculators involved. These were not settled.

Everybody today talks, oh, how can you disrupt the settlers? We're not talking about that. The Johnson v.

McIntosh was not to protect a bunch of settlers, quote, unquote. It was to protect a specific group of large land speculators who were looking to create fiefdoms, basically. Now, they needed settlers, quote, unquote, because they either were going to make money off of selling off some of the land that they speculated and got, or they needed people to come and farm it and pay them rent in a kind of feudal situation.

So I think if you think about what was in Marshall's mind, or any of the other so-called founders, what else could they have in their mind except what they had experienced as a feudalistic system that was teetering on the edge of turning into a market system, but it was still essentially feudal. That's what the thinking they brought over. And I don't know if you're familiar with Kent McNeil's work, Common Law Aboriginal Title, a common law scholar from, I was going to say Vancouver, but I think he's out in the East part, an academic, some years ago, did a really detailed look at common law, which is, has always been sort of an arcane, but fascinating field, you know, the seas of novel this season, and, you know, all of that kind of stuff. And what he analyzes within the framework of common law, what does a royal grant mean? So when James I gives to John Cabot this charter, within the common law framework, that was a grant of lordship and a feudal structure, it was not a grant of ownership of the land.

Within the common law, the people on the land in possession, were in a position that could not be ousted simply by the king saying, I'm throwing you out, because the lordship did not have that power of ownership of the land. Now, without going into all the nuts and bolts of that, it seems to me, Marshall's trying to bring this feudal structure over, but he knows, okay, feudalism is kind of gone now, we're in a market system. And so he actually misapplies crown doctrine, makes it as a blanket statement, oh, the crown, of course, owned all this land.

No, that's not true at all in the first place. And secondly, it was useful only to him as a kind of a starting point to make this claim of title, right? And even if we were, if the argument against plenary power was successful, we'd still have the argument to deal with about ownership of the land, title to the land.

And that all is a ball, a tangled ball of yarn and doctrines, that if the US said, if the Kagame case were overturned, as Gorsuch and Thomas wanted to say, there's no major Federal Crimes Act, you have tribes have control over their own criminal law system, that was the technical issue in the case. And there was nothing in there about anybody else having any jurisdiction, it was either tribe or state, unlike McGirt, which had the pretense that there was some kind of tribal involvement, but it was really state versus federal. So we're very close.

If we were able to get the conversation going to put a lot of these pieces together, and we'd be able to say, okay, there's a whole different context now than what is presumed under

conventional thinking. And that context is what we've just been talking about. The treaty relationships, the original free existence, foundational principles, you know, the inapplicability of feudal doctrines, all of that sort of stuff.

[Steve] (42:46 - 44:15)

Well, but there's also the factor of the artistic use of language. So the use of metaphors and such. So when Marshall, as an example, he has to get rid of that original free existence, how does he do it?

He just makes a blanket statement, their rights to complete sovereignty as independent nations were necessarily diminished by the original fundamental principle that discovery gave title to those who made it. Well, there you go. Bingo.

It's gone. Why? Because he made some pronouncement.

And it's that kind of detail that I think I prefer to go after and say, well, on what basis is he doing that? And then we can go into Story and his commentaries on the constitution and notice in one of the footnotes that he's actually quoting the Latin from one of the papal bulls, and *Ac Barbarai Nazionis Deprimuntur*, that barbarous nations be subjugated or suppressed or reduced or what have you, however you translate that. But they were conscious of the application of those types of ideas and the Latin and so forth is in the superstructure that they were creating.

And I think that that kind of detail doesn't get addressed adequately for the most part within the overall profession.

And then bringing that up to the supreme, how do they justify that in this day and age? And I think that's the conversation we need to be having as well.

[Mark] (44:17 - 47:01)

In some of the reading that I've been doing and I haven't really, I haven't sort of sorted everything out yet. So these aren't conclusions. I'm just reporting sort of whatever.

There's also a deep thread about natural rights and you have that thread manifesting in some ways with the Declaration of Independence. And who has those natural rights? Well, there are people who are saying that indigenous people had natural rights, natural rights to sell their land if they chose to sell it.

I'm not sure that there was actually a sale, but it was recorded as a sale. Johnson, the case and Chief Justice Marshall don't get into that tension. And the courts does make all of these pronouncements that you're talking about, Steve.

And they are the ones that so much power today. But the conclusion that the court reaches is we're not going to recognize title. We're only going to recognize the title of the United States in this court.

And this quote just boggles my mind from Johnson, however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear. If the principle has been asserted in the first instance and afterwards sustained, if the country has been

acquired and held under it, if the property of the great mass of the community originates it, meaning the people coming across from the Atlantic, it becomes the law of the land and cannot be questioned. And so too, with respect to the Indian inhabitants are to be considered merely as occupants to be protected indeed, while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.

However, this restriction may be opposed to natural right and to the usages of civilized nations. Yet, if it'd be indispensable to that system under which the country has been settled and be adapted to the actual condition of the two people, it may perhaps be supported by reason and certainly cannot be rejected by courts of justice. In some ways, I read this as an admission that they know that this whole thing is foolish, but they're just doing it anyway.

But what then shall we do?

[Steve] (47:01 - 49:03)

Well, exactly, and I'm so glad that you've read that, because the pretension of converting the discovery of an inhabited country into conquest translates in my domination translator as converting the discovery of an inhabited country into a claim of a right of domination is the way in which I interpret that word conquest, meaning a victory. But it's only if we delve into it and inquire into it and challenge it and question it and so forth that we can get anywhere in terms of the apparent impermeability of the whole superstructure, right? And I think that's why I was kicked out of the Supreme Court at one time when I went

there and asked to interview one of the justices about Johnson v.

McIntosh. And it was the clerk of the court, and she said, well, which one? And I said, it could be any of them.

And I said, I want to ask about the Johnson v. McIntosh ruling which held that the first Christian people to discover lands inhabited by natives who are heathens have the right of ultimate dominion over the land. And she said, no one can speak beyond the law.

And I said, what? As a native person, I can't come in here? And I repeated the whole thing again.

And she said, no one can speak beyond the law. Are you going to leave, or shall I have you removed? Now imagine that.

Just because I'm asking a question about the madness, the insanity of this passage that you've just read, that suddenly there's a nervousness. There's a, oh my God, what's going on here? And let's get this guy out of the building.

Which the security guard came and told me I had to leave, which was funny because he was an African-American gentleman. And I repeated the whole same thing again to him too. And he said, are you going to leave or shall I have, he said, you know you have to leave.

And I said, I know, I'm just taking my time.

[Peter] (49:04 - 49:13)

Well, you've now revealed why it is the federal Indian law bar is so silent there. You have been told they can't speak above the law and they're going to be escorted out if they do.

[Steve] (49:13 - 49:13)

Yeah, yeah.

[Peter] (49:14 - 52:30)

There are two other words, the word conversion. I mean, conversion is a crime in the common law. It's a form of theft.

And so you think, oh, wait a minute, conversion. But of course it was also a religious doctrine. So what is all that about?

A whole long history, a thousand or more years of a duty to convert. Christendom didn't just have a command to, you know, this is your land, but it's a duty to spread this domination everywhere. The Pope makes it clear as vice regent of God on earth.

So another word, just to touch on it again, the word title itself. So you said, what were the native peoples thinking about when they were having treaty negotiations? Well, since the word title is this arcane thing in common law, I mean, it's unbelievable.

You know that if you look at any little bit of common law, you know, the common law of property of title of

possession is absolutely mind boggling. And this was all part of the feudal apparatus. All right.

And dispossession, and you could have title by dispossession, and then you could get titled by the dispossessing of a dispossessor. And there were all forms of actions to combat all of that. Just a mind boggling abstract world.

And yet underneath it was the very non-abstract physical earth itself. All right. So, and that was the battle within the common laws that developed.

Well, you bring that over here and you talk to people who are not thinking abstractly about the land at all. They're thinking about the water, the plants, the animals, their own beings, their own lives. And the idea that somehow anybody could say, well, I own that thing over there.

It's on the other side of the mountain, but I have title to it. I don't live there. I don't have any relationship to the land itself, but I have an abstract concept that I own.

And I mean, that is like a person from Mars would be, you know, more understandable. So I think that it's, it's, that again, goes back to what do we mean by original free existence? And it's not just a past thing.

Our free existence as humans on the planet is like the free existence of animals, of trees, of all being, and we're here. And to what extent are we aware that we're here or to what

extent do we live in our heads? And that our whole life goes in that, in that head realm, that abstract realm.

And I think for most people, it seems to me, people have been so used to, they go to a job, they're in an office, they're at desk. They're not, their world is an abstract world. And it's been enhanced.

The lockdown made it pretty much a universal thing for people. You live in a virtual world. That's, that was, that's part of the message.

So I think what we're, what we're talking about is not just some small corner of the universe. So what about the original peoples of Turtle Island, etc. But it's from looking at that as the microcosm of the whole global situation.

What is the situation of humans on the planet in relation to the planet itself and to all life? And it's present now, whether we are aware of it or not, if we're not aware of it, it's to our detriment that we're not aware of it.

[Mark] (52:31 - 53:44)

But yes, that word title sort of has its own internal point of view, right? It's, it says you can draw a line on, on the earth and say that one person owns something on one side of it, that line, and another person owns on the other side of that line. That's not the only, that's not the only internal point of view.

And the, the relationship, our family goes up to the, to the Salmon River in Northern California every, every summer,

and so grateful for the work to take down the dam so that the salmon can, can, can go spawn up upstream. And the work of the various indigenous nations up there to, to try to create that and to be stewards of the land. And they're not drawing lines, you know, in, in the river or so forth.

It's, it's more the relationship with the land and the way of thinking about, about being with the, with the land. And I don't purport to, to know all of, all of that, but I'm, I'm liking what I'm seeing. It's feeling far more right to me to, to think in terms of relationships with the land.

And I, and I want to learn more about that.

[Steve] (53:45 - 55:03)

You know, going back to that word convert, Peter, remember recently, I read from that Vatican papal bull from 1455 that quotes the one from 1452, and the Pope, Nicholas V, is saying that he's naming off all these different types of principalities and kingdoms and dukedoms and you name it, and to convert them. So he's talking about converting the land and converting all of those entities or whatever you call that, those categories. And what that means is to unlawfully or wrongfully appropriate that which belongs to another.

So in the following paragraph, he declares it to be just and lawful. So there's an acknowledgement that they know what they're doing is technically wrong. I mean, they're just taking over other people's stuff and appropriating it for themselves, but because he's the Pope and the vicar of

Christ, he can just go ahead and declare it to be just and lawful.

It's the same kind of art, artistry, and the use of language and the abstractions that you're talking about, Peter, that, that creates all of these kind of fant, fantasies, as they call them legal fictions. But, you know, here we are. So we're still trying to grapple with all that, all this.

[Mark] (55:03 - 55:08)

Don't they also, don't they also talk about converting people to Christianity?

[Steve] (55:08 - 55:12)

Well, certainly. Yeah, that's the double entendre, right? The double meaning.

[Peter] (55:12 - 55:14)

Yeah, I think that's exactly it.

[Steve] (55:15 - 55:17)

And that's interesting. I hadn't thought of it that way.

[Peter] (55:18 - 58:05)

I intended to include that a few minutes ago when I was saying, talking about conversion as a crime. So how do we get our heads around the fact that there's a religion which is devoted to committing a crime? I mean, and so you can say, well, that religion is a religion of domination.

We know that. I mean, I have talked about that, Steve, you've talked about it, that we have a God of domination.

And there's, I'm part of, and when I wrote my book about federal anti-Indian law, I quoted from the, there's the famous covenant with Abraham, where God says, I'm giving you this land, here are the people that live on it now, but you get to have it.

That's the covenant. And we have the current situation in the Middle East where that drama is still playing out. But the Bible also makes it clear that God is really pissed if they don't follow this, if they don't carry out this covenant.

It was not just like a gift, I'm going to give you a new car, and you decide, I don't really want that car, I leave it parked. God comes in and says, I gave you that car. And if you don't use it, I'm going to wipe you out.

Because the angel of the Lord comes and says, you came to this area where the Canaanites live, and God told you that it was your land, but you're getting along with them. You are working and living amongst them and with them, and God is pissed. I'm paraphrasing a little bit the religious doctrines, but the angel- It's called the doctrine of being pissed.

Yeah. The message that the angel of the Lord delivers, I think this is in Judges, the book of Judges, is that if you don't carry out the work that you were assigned with this covenant of wiping out their altars and destroying them and killing their pigs and whatever, all their animals, destroying the cross, if you don't do that, God's going to destroy you. So there's a clear God of domination theme.

How old is that? Is that 3,000, that's 6,000 years? How long has that God of domination existed that then was incorporated under Constantine by some bishops in Rome and became the church, and then became the imperial church, the ruler of the world, until what, Westphalia, when they finally had so many conflicts among the different Christian monarchs, and some of them were thinking kind of Protestant, and others were thinking, you know, I'm still Catholic, and some like Henry VIII, I'm still Catholic, but I don't like the Pope. So they resolved that by coming up with the notion of there's states, individual states.

Well, what were those? Steve likes to say states of domination. Yes, they were.

They had a template, the God of domination through Christendom down to Christian monarchs and so forth, and that was all in John Marshall's mind.

[Mark] (58:05 - 58:25)

You know, Peter, one of the factors for Henry and the English crown was to try to figure out a way to get out from underneath the papal bull in the division between Spain and Portugal. So they just said, we're going to be a different church, and we can carve our own domination.

[Peter] (58:25 - 58:35)

Yes, but he was still Catholic. He still insisted that he was not a heretic. He was still Catholic, but he was not going to have allegiance to the Pope.

[Mark] (58:36 - 58:39)

Because if he was a heretic, then somebody could have come and taken England, right?

[Peter] (58:39 - 59:45)

Yeah. Well, in fact, that was the threat. If the Pope excommunicated him, it would relieve all of his subjects from their feudal obligations to him.

And so the tangle between, you know, church doctrines, conversion, domination, state doctrines, that whole thing, then the colonial aspects, which were not really called colonial, they were religious conversion expeditions, all of that. So complete picture when it has all these little tangled pieces to it, and what we're doing is sort of pulling at threads. And I'm convinced, going back to the beginning of our discussion here, what you said, Mark, about conversation, about discussion, about looking what's behind all of this, that if we pull at these, you know, diligently and carefully, I'm not talking about going in and ripping the ball of yarn apart.

I'm just saying, let's unravel this tangled scheme and see where it leads. And maybe in the end, we have a pile of yarn on the floor, and we're not sure what are we going to weave out of it next, but we have at least sorted the thing out.

[Mark] (59:46 - 1:00:00)

And we have helped to organize the people who need to have the long-term organization and conversation, right? That's sort of building that community that brings together the collective wisdom.

[Steve] (1:00:01 - 1:00:08)

Yeah. I think you said that you made an association between James I and the Cabbages. It was Henry VII.

[Peter] (1:00:08 - 1:00:30)

Henry VII, you're right. You're right. James I was the 1609.

Who did he? I can't remember which one. But anyway, James I was...

Jamestown or I don't know. They're all the same. Yeah, they are.

But Johnson v. McIntosh starts with the 1609 James I grant. That's when...

[Steve] (1:00:30 - 1:00:41)

But he also, in going through, when the first time he uses the term Christian, the phrase Christian people, he's referencing the John Cabot Charter.

[Peter] (1:00:41 - 1:01:16)

Yes. But what I'm saying is that the conflict between the parties, which we know that's another... The fake dispute between the speculators trying to force the court to make a rule.

Just tell us what the rule is. Do we pay these people or do we pay these people, okay? And that dispute between them was about land allegedly that they were conflicted about within the 1609 grant.

That's how the syllabus of the case opens up. In May 1609 or whatever it is, James I gave to Lord whoever, etc.

[Steve] (1:01:16 - 1:02:02)

Isn't it amazing? It's amazing that beneath all of that history and narrative that you just recounted, Peter, very succinctly is behind the Johnson v. McIntosh ruling.

And that's what's so bizarre. On the surface, it's just a Supreme Court ruling. You see a title to a decision, and you see a date, and there's a citation, and so forth.

But behind all of that is this extraordinary way in which they're putting, quote unquote, reality together, but nobody inquires into that. And you don't ever have to revisit all that reasoning, because you just cite the title and the citation, and that's good enough.

[Mark] (1:02:03 - 1:02:15)

So I think it's wild. Those opening facts in the Johnson case are actually from the agreed statement by the two parties below.

[Steve] (1:02:16 - 1:02:16)

Stipulations, yes.

[Mark] (1:02:16 - 1:03:04)

So it's not even the court reporter's syllabus. That's what the plaintiff's brief brings to light. And they agreed on those facts.

And because it's agreed facts, the court takes them as given. Instead of no jury, there was a jury originally assigned, one person dropped out. They used that as an opportunity to say, let us present an agreed statement of facts.

Both parties agree on them. So the court doesn't do any fact finding, doesn't do any weighing of credibility or anything, just takes it. And that's what the cases the two parties collectively wanted to present, the way they decided they wanted to describe the facts, that's what gets into the opinion.

[Steve] (1:03:05 - 1:03:06)

Yeah, exactly.

[Mark] (1:03:06 - 1:03:07)

Astonishing.

[Steve] (1:03:07 - 1:03:44)

I think they left one question remaining, which was the significance of the royal proclamation, if I recall that. I think Lindsay Robertson or someone mentioned all that. They said that that was the one question that Marshall really had to address, or the court, the entire court had to address.

And so that's how he went about addressing it with the decision itself. There was one other thing I wanted to ask you, but now I've forgotten. But that Treaty of Westphalia, that's 1648, isn't it?

Yeah.

[Peter] (1:03:44 - 1:05:25)

And it doesn't actually, the treaty does not use the word sovereignty. Every political scientist will tell you that state sovereignty was originally conceived in the Treaty of Westphalia. It does not say anything about state sovereignty.

It's just a division of, it's the rule that whatever religion the monarch decreed, that was the religion of the country. It was an agreement to dismantle the notion that there was a unified Christendom with one set of doctrines. And so you can see the kind of the glimmer of something that would later be called state sovereignty, but it wasn't, the term was not actually used there.

You know, we're coming up to the hour of, I'd like to keep talking for three or four more hours. And I'm thinking maybe we have Mark again, but how about if we do, we could focus on another, a parallel to the plenary power, which is the so-called trust doctrine, which is used over and over again. It has yet to win a single case in decades that it's been used.

And the deep irony that it was conceived out of the same martial court as a way of demoting the Cherokee from being a nation. And so here again, we find that the conventional thinking is, yes, we love the domination and oh, yes, we please use that other doctrine that says that we're not really nations, please use that against us. Would you do that?

So I don't know whether we want to wade into that in another conversation or not, but I feel like you have opened up from this philosophical start, a window that lets so much fresh air in that we could pretty much start with any one of the cases and gain insight.

[Mark] (1:05:26 - 1:05:32)

Such a pleasure and honor to be able to chat about these things with the two of you. I'm grateful. Thank you.

[Steve] (1:05:33 - 1:06:03)

Well, thank you so much for your work. And I wish that there had been more interest expressed from the federal Indian law community, as I guess we could call it, but the people within that profession. And I guess that would be my last question for you before we sign off here.

Did you have any people that really reached out to you and expressed interest in the extraordinary findings that you had written about in such an amazing way?

[Mark] (1:06:03 - 1:06:47)

Over the years, I have had some people. I've also reached out to some people and had varying degrees of receptivity. I don't know that they really knew what I had done and so perhaps didn't have time to return the phone call, but I tried anyway.

There's opportunity. I thought that the 200th anniversary of the Johnson decision could be an opportunity for getting that conversation going. And there were plenty of conferences about that.

Next year, we have a 250th anniversary.

[Steve] (1:06:48 - 1:06:49)

You mean this July, huh?

[Mark] (1:06:49 - 1:07:34)

Yes. So why not? It's maybe a little too soon to be able to organize something, but you could use that as an opportunity to say, we want a full conversation, not just a self-serving conversation about what it means.

And you could bring people together and actually fill that silence with different invited comments. It could be both public and then it could be people getting together outside of a conference and talking about, as leaders, what should we do? What are the next steps that we should take in order to further the agenda?

[Steve] (1:07:35 - 1:08:17)

Well, we had a good conference out there in Syracuse and Phil Arnold and his wife, Sandy Bigtree and the American Indian Law Alliance. And so those folks had a pretty terrific conference that Joday Gowdy and I were able to attend. And Peter was able to be there by Zoom.

And I think we did a pretty good job and I think they've done a really excellent job of creating a lot of content and so forth. So it is ongoing. I think that we've had successes along the way.

And I'm just glad that you're back in the mix. It's really a great honor to be with you in this format.

[Mark] (1:08:18 - 1:08:18)

It's a marathon.

[Peter] (1:08:19 - 1:08:51)

I want to mention Raymond Yowell again, because we've all interacted with Raymond. I've just had a phone call, the last few weeks we've been talking occasionally. He's still active.

He's still looking for ways to get, how do we get to the point where we challenge this? And so there are Native leaders like him that are not in the brand of the MBA carrying types who are just worried about how to make sure the federal contracts work. But how do we think about this big picture?

[Mark] (1:08:52 - 1:08:56)

I am so glad to be here with you and happy to help in any way I can.

[Peter] (1:08:57 - 1:08:59)

All right. Well, we'll be back in touch, I'm sure.

[Mark] (1:09:00 - 1:09:03)

Excellent. Thank you so much, Steve. Thank you so much, Peter and Mark.

[Peter] (1:09:04 - 1:09:04)

Likewise.

[Mark] (1:09:04 - 1:09:05)

Bye.

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