Episode 009: McGirt v. Oklahoma: Revealing and Concealing Domination

[Peter] (0:03 - 0:48)
Good morning again, Steve.

[Steve] Good morning, how are you?

[Peter] Doing well, yourself?

[Steve] I'm well, thank you.

[Peter] Good. So this morning, we're going to look at the McGirt case, McGirt v. Oklahoma, that was decided just a very couple of years ago, and the opinion by Gorsuch we're going to look at. And I think that there's some bigger issues to get here, such as what is visible and what is invisible, and what it takes to see the doctrine of Christian discovery and the power of the claim of a right of domination that's both on the surface and buried in the case. In any case, that's my thought about what you and I had said we would talk about today.

[Steve] (0:49 - 3:24)
Yeah, I think that's a lead-in to probably a number of other things as well, perhaps, but we'll see where it goes. The McGirt decision, McGirt v. Oklahoma, was handed down by the U.S. Supreme Court in July of 2020. And when you look at the syllabus of the case, it references the Major Crimes Act that was adopted by Congress in 1885. And the background to that was the Lakota Chief Crow Dog, who was sentenced to death by the first judicial decord of Dakota, the Dakota Territory, for the murder of Spotted Tail. And Crow Dog brought suit for release on the grounds that the federal court had no jurisdiction over crimes committed in the Indian country by one Indian against another.

So that's from the syllabus of the case. And the Supreme Court upheld his petition and released Crow Dog. So people got up in arms about that because the traditional way in which the people handle their own matters of such an occurrence was unsatisfactory to a lot of people.

So there was a lot of public outcry, I guess. And then that resulted in the Major Crimes Act being adopted by Congress, which provides that within Indian country, any Indian who commits certain types of offenses shall be subject to the same law and penalties as all other persons committing any of those offenses within the exclusive jurisdiction of the United States. So then you have to go to Indian country, in that case, which includes all land within the limits of any Indian reservation under the jurisdiction of the United States government.

That's the actual definition, federal definition, of Indian country. So Jimson McGirt, who was convicted of serious sexual offenses, he argued that he should not have been tried by the state because he was on a reservation and he sought a new trial. And that was unsuccessful, but it went up to the Supreme Court.

And so what do you have to say from there?

[Peter] (3:25 - 5:42)
Well, I think, first of all, just to clarify, when you say that the Lakota response to Crow Dog and Spotted Tail to that murder was unacceptable to many people, it was unacceptable to non-Lakotas who thought that it was uncivilized. And so the outrage, quote-unquote, was because the people who thought that the Indians need to be civilized said, well, we've got to impose federal jurisdiction to civilize them because they don't know how to treat a case of murder. And so with that in the background, so Jimson McGirt says, well, the principle that's behind this, that it's federal jurisdiction here, a crime between two Indians in Indian country, means that Oklahoma had no jurisdiction and therefore his Oklahoma conviction should be overturned.

That's what ultimately went up to the Supreme Court. And the bottom line that came out of that, in Gorsuch's opinion, was he's right. Oklahoma had no jurisdiction.

It was federal jurisdiction. And I think that for me, I know what we're going to dive into is what was buried in Gorsuch's opinion. But for me, one of the things that is most startling is the non-recognition of what was right on the surface of that case.

I mean, NARF came out with a big thing, great win for Indian country and many other publications, New York Times, Gorsuch, what a hero for the Indians. And so you think, well, wait a minute, what the decision said is that the federal government is going to have charge of this. It didn't say that the Creek Nation or Cherokee or any other native nation was going to have charge over Jim Seymour Gert and his sexual crimes, but it was going to be federal control.

So how did that get to be a celebration? I think that people were seduced by Gorsuch's prose in his opening line, at the end of the Trail of Tears, there was a promise that makes people's heart go pitter-patter. Oh yes, the promise to the Indians.

Well, what was the promise? The promise apparently is the federal government's going to take control of you and that's not changed.

[Steve] (5:43 - 6:26)
I think the thing that was surprising to people is that the Creek Reservation was understood to still exist. Yes. And it had been long assumed that it no longer existed because of the end result of the Allotment Act and the allotting of the lands and giving out these so-called surplus lands to non-native settlers, a euphemism for invaders.

But in any case, it was thought that the Creek Reservation no longer existed. So they were very surprised that that was upheld because it had a lot of implications in terms of the outcome of that.

[Peter] (6:26 - 8:47)
You have pointed out numerous times the definition of genocide that exists in international law and that it's the the actions that are taken to destroy impartial and holy people. And one of the varied parts of this case was the United States brief that was filed saying that the U.S. brief said that Oklahoma, of course, had power. Well, why did the U.S. brief said that?

These are just some quotes from the U.S. brief. The United States argued that Congress undertook the so-called transformation of the Indian Territory between 1890 and 1907, and that this was to dismantle the Creek Nation historic territory. These are direct quotes from the brief, abolishing the tribal organization, allotting the land in severalty, overthrowing the communal system of land ownership, extinguishing tribal titles, eliminating the Creek Nation tribal courts, dissolving the tribal government, and divesting tribal property.

So that's pretty intense. I call that a confession of attempted genocide. Now, the U.S. said it wasn't attempted, that it was complete. And of course, they didn't call it genocide. They called it extinguishment, dissolution, and some other sorts of things. And that position of the U.S. ought to be very clear evidence to people of what is the so-called trust doctrine all about? What is the implication of the U.S. claim to land title? What is plenary power? And even though Gorsuch and the majority concluded that, well, Congress didn't go all the way, Congress didn't really take the last final step, nevertheless, this is where the parts of the opinion become hidden, is that Gorsuch says, it could still be done.

Congress does have this power. And so, the difference between the majority and the dissent in the McGurk case was only that the difference of opinion as to whether Congress had finally committed the genocide or not. There were the majority who said, well, they haven't finished it yet, they could do it at any time.

And the dissent said, oh, no, they finished it long ago, it's all over.

[Steve] (8:48 - 11:15)
Well, I think that raises a very crucial point about genocide, because Raphael Lemkin, the attorney who coined that term, he defined genocide as the intent to destroy in whole or in part an entire people, an entire nation or people. And so, it's that intention that's exhibited through all of those actions and policies that you're referencing. And it's fully admitted by the United States, which is really interesting.

And it's also admitted to by the Supreme Court, as I recall, in reading the decision. And the thing is that people have been conditioned to think that if there isn't blood on the ground, if people are not being outright killed, that genocide is not occurring. But that's not the case.

And in terms of conformity with Lemkin's definition. So I think that's very, very important to stay focused upon. And you're right.

They hadn't taken that final step. So therefore, the reservation still exists. And what the implications or outcome of that line of reasoning would be, for some people, it was cause for celebration, others cause for alarm.

But I'd like to also transition back to the term jurisdiction in the definition of Indian country, because that's, of course, to speak the law. That's one definition. It's the idea of a power of judgment to review something of that sort, such as the McGirt case, and make a decision with regard to the outcome of it and so forth.

But interestingly, when I was going through a number of different books on etymology, one of the terms that I came across was jurisdiction. And it was related to danger and dungeon.

Because if you're under the jurisdiction of someone else or some other entity, you're in danger of being put in the dungeon or prison of that other person or entity.

And so it's a synonym for domination, as I see it. And that's an important point as well.

[Peter] (11:16 - 11:38)
Yeah, I think that's exactly the point. Because the question in the case, ultimately, is who has jurisdiction over this crime between one Native person and another within Indian country. And the decision itself said it's not Oklahoma.

And what they said it is federal. And so what we're going to go ahead.

[Steve] (11:38 - 11:59)
Yeah, well, I would just want to say that one thing that's not in the mix whatsoever, and anything that we've set up to this point is the original free existence of the Native nations and peoples. So where is that original free existence in the mix of this kind of a conversation? And notice how easily it can be just not even acknowledged or brought into the picture.

[Peter] (12:00 - 13:02)
Exactly. And that's what I'm glad you sharpened that point. Because that's what's amazing about all the media coverage.

And not just media, but organizations like Native American Rights Fund, that they have original free existence is nowhere in their minds. It's nowhere in the picture. There's no saying that, wait a minute, there's something else that ought to be happening here.

How come that it's federal jurisdiction? How come that it's not Creek jurisdiction? If we want to use that word jurisdiction, who's in charge of dealing with this crime?

Nobody raised that issue. They were also taken by the idea, oh, you mean that the Creek Nation still is hanging on by a thread after this century of attempt to destroy it? Oh, isn't that amazing?

But then what is the current situation? Current situation is federal domination. And there are two points at which Gorsuch relies on that federal domination, but he does not spell it out.

Should we talk about that for a moment?

[Steve] (13:02 - 14:34)
When I went through the case, and I know you must have noticed it as well, but I came across one passage. I'll just read through some of it. The federal government issued its own land patents to many homesteaders throughout the West.

These patents transferred legal title and are the basis for much of the private land ownership in a number of states today. But no one thinks any of this diminished the United States claim to sovereignty over any land. To accomplish that would require an active session, the transfer of a sovereign claim from one nation to another, and then referencing,

not in a footnote, just in the text, three, the number three, E period, so first name starting with an E, Washburn, American law of real property, 521 to 524, and that's it.

And there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over the land, even if they no longer own it communally. And so, when I saw this, I noted when I saw the reference to sovereignty, I thought that that was something really important, but you are the one that took that and ran with it, and maybe you can explain to folks what the idea was.

[Peter] (14:34 - 16:08)
This is what, this is an example, a clear example of the effort of Gorsuch to hide this doctrine of Christian discovery, which he's using. He's asserting that there's a federal power to pass the Major Crimes Act, and that that is a jurisdiction which should try Jim C. McGirt, and the only way he can justify that is referring to these ancient doctrines, but he doesn't like that.

I think this is the first sense that I had that Gorsuch was getting increasingly uneasy and embarrassed by the principles that he was having to use in so-called federal Indian law. So, when I saw the reference to Washburn, E Washburn, I had the same curiosity you did, what is that all about? Well, it took me a little bit of digging to find the treatise, the 1868 treatise, and the version that Gorsuch was referring to, and the quote in that 1868 treatise that Gorsuch does not quote, but obviously is relying on, is, quote, the Christian nations that planted colonies recognize no season, that's an old word for ownership, recognize no ownership of lands on the part of the Indian dwellers. So, right there, Gorsuch is saying, in this opinion, everybody's celebrating how great it is for tribal winds. Gorsuch is reaffirming that old doctrine of Christian discovery that says that native peoples don't actually own their land, that that's the principle that is going to be followed here, but as I said, he's embarrassed to say that.

[Steve] (16:09 - 18:09)
Right, well, the provisions or the sections of that book that you uncovered begins with this. How much does this sound like Johnson versus McIntosh? Upon the discovery and settlement of this country by Europeans, there was a kind of ownership of the territory recognized in the native tribes, though there seems to have been no well-defined idea of individual property and lands on the part of the natives beyond perhaps the spot under immediate occupation.

So, they narrow it down to a mere spot, and that's a term of diminishment, obviously. Nor has any title beyond the right of occupation been recognized in the native tribes by any of the European governments or their successors, the colonies, the states, or the United States. The law in this respects to have been uniform with all the Christian nations that planted colonies here.

They recognized no season of lands on the part of the Indian dwellers upon it, and the Indian's deed was simply regarded as an extinguishment of his claim and not as passing the soil or freehold. And then they reference William Penn and the English patents. So, it's clear that this is using the doctrine of Christian discovery and domination.

And then finally, the sovereignty and general property. Those are both terms of domination of the soil and the territory of the original English colonies were claimed by and conceded to

Great Britain by right of discovery. And then I added in my little reference to it an acclaimed right of domination.

And then footnote number two, cites to the Johnson versus McIntosh ruling. So, this is what Gorsuch has very cleverly buried within the McGirt decision. It's quite astounding to me.

[Peter] (18:09 - 20:55)
Yes, it is. I think that it's a way in which a lawyer, a judge slash lawyer, can communicate the basis of a decision without putting it into plain language and plain English that anybody can see. Now, that's a change.

It is. As a matter of fact, the only other citation that Gorsuch gives in this regard is to the Lone Wolf decision, 1903. And there again, he just names it just like he named Washburn.

He names Lone Wolf. He does not quote from it. He doesn't discuss it.

But if you read the Lone Wolf case, you see that it directly links to Johnson v. McIntosh. And it is the case, the Supreme Court case, Lone Wolf v.

Hitchcock, that coined the phrase plenary power, took the Johnson case of discovery title, quote unquote, and turned it into plenary power. So, Gorsuch is relying on these doctrines that go back to Johnson v. McIntosh, back through Johnson to the claim of the English crown, back through the English crown to the claims of the pope of the Roman Catholic Church.

That long tradition is maintained all the way right up through and into the opinion in McGirt, with absolutely no way for anybody who hasn't thought about this to get any foothold. Anybody that's not a lawyer, not familiar with this is going to have no clue. And even the lawyers who are familiar with it are probably not familiar with Washburn's 1868 treatise, even if they are familiar with Lone Wolf v.

Hitchcock. All of that just flew right under the radar. So this case is, this great case in favor of the Creek Nation turns out to be same old, same old, except for the fact that there's a court has said, well, we haven't finished getting rid of them yet.

But Gorsuch makes it clear that Congress has the power to do this. He says at one point, see if I can find that. Let's see.

Ah, here it is. Gorsuch wrote, of course, Congress remains free to take action. Now, take action, what a mealy-mouthed word meaning to extinguish, to take action about the lands in question at any time.

It has no shortage of tools at its disposal. So having hidden the Christian discovery basis of the decision, having hidden the claim of a right of domination and said, OK, the domination hasn't been completely exercised here. He adds a little note.

Of course, the power of the domination is still present and it can be exercised at any time. So.

[Steve] (20:55 - 21:04)

And interesting that he used the word disposal too, because that's their use of, oh, they're going to dispose of the Indian land, right? Yeah.

[Peter] (21:04 - 24:44)
Like a disposal on the sink. Throw the stuff down there. Well, I want to, we can go deep again more if we want into the McGirt case, but I want to bring it back into a kind of a concern with how little understanding there is and how little willingness to engage with this thinking that there is on the part of those who supposedly are watching out, the Federal Indian Bar and the big kind of the media, the New York Times, et cetera, Native American Rights Fund that missed everything that we're talking about. And so I'm thinking, let's throw into the mix the recent dissent in the Veneno case we talked about a couple of weeks ago, where Gorsuch and Thomas joined to say that the Kagima case should be overturned.

Well, as we talked about then, the Kagima case is where the Supreme Court said that the Major Crimes Act was okay. So in McGirt, we have Gorsuch using the Major Crimes Act as the basis to oust Oklahoma from Creek lands. The result of the case is that Oklahoma doesn't have jurisdiction of Native crimes within the Creek Nation, only the federal government does.

And as we've talked about, he seems uneasy about this, but if we put that together with the dissent, I was speculating about it. What if we say that Gorsuch was getting so increasingly uncomfortable over the last few years that he begins looking for a way to make an impact to change some of this law of claim of a right of domination? And so if you think about that, there's a strategic goal, get rid of outside interference with the original free existence, although he's not necessarily using that phrasing.

Then what are his tactics? Well, the one tactic in McGirt was let's first get rid of the state claim of right of domination, the state claim of jurisdiction. Then he has a chance in the Veneno case to say, actually, let's also get rid of the Major Crimes Act.

Let's get rid of the federal claim of a right of domination. And if we did that, I'm thinking this is his plan. Then if we did that, then that would leave so-called tribal jurisdiction without any outside interference by state or by federal government.

And so I'm thinking Gorsuch may have a plan like that in mind. And he and Thomas together, both thinking this whole doctrine of plenary power is nonsensical. It has no basis in the Constitution.

They're trying to find a way to make that into a Supreme Court decision and say, from now on, only native courts can try native people against native people crimes. So what do you think of that, that there's an agenda somewhere running? And it seems completely under the radar of anybody who's watching this because even while the McGirt decision was celebrated, the Thomas Gorsuch dissent was ignored.

To this day, Native American Rights Fund has made no comment about that. New York Times has made no comment about that. So if you think if these people were actually thinking about how do we resurrect or protect or rehabilitate the original free existence, they would be all over this.

They would be saying, wait a minute, this is the opportunity we've been looking for.

[Steve] (24:46 - 25:49)
Yeah. Well, I'm sure there is some kind of a strategic thought process on the part of both of those judges on the Supreme Court, Gorsuch and Thomas. I think we ought to be aware of the fact that they're probably not thinking of it in terms of domination.

That's our term, and that's a term more from the shore looking out of the ship, rather than being on the ship coming to shore, the descendants of those who were on the ships coming to the shore. But nonetheless, I think that it's a weird contradiction, isn't it, to see him upholding this type of thought process here in this reference to the American property, excuse me, American law of real property, 1868, and that old thought process of Johnson versus McIntosh, and fully comfortable with it, evidently, because he's citing it.

[Peter] (25:49 - 25:57)
But he doesn't. He cites it, but it's a bare citation, it's called. There's no quotation.

[Steve] (25:57 - 26:23)
So when I said he's comfortable with it, I don't necessarily mean he's agreeing with it. The comfort is also discomfort. I mean, it's just a contradiction in there somehow, right?

Because he's compelled to somehow or other use this old way of thinking, but he doesn't seem to be fully accepting of it. So it's weird. It's strange.

[Peter] (26:24 - 27:44)
Well, I think that it's the same strangeness that goes through all of the practice of federal Indian law, quote unquote, what we call federal anti-Indian law. And the silence of these people who are supposed to be the leaders there, the professors and practitioners, Native American Rights Fund, National Congress of American Indians, their silence about all of this, when it comes down to we actually have to think about what is plenary power all about, they seem to have embraced plenary power. And I think that there's a strange combination of viewpoints that are all mixed up and need to be clarified, is what actually is the desired relationship between Native peoples and the U.S. government? And at this point, it seems that the complete bar that is doing the practice says, oh, we want the plenary power. We want Congress. That's what happened in the Brackeen, the child welfare case.

We want the federal power to come in and dominate the situation. They don't use the word domination, but it seems as if they're totally comfortable living in that context of what, as you pointed out, is diminished sovereignty. Even though they talk about tribal sovereignty, it's actually technically, legally, as they know, diminished sovereignty.

[Steve] (27:45 - 29:15)
Well, it says it right in the Cohen Handbook. I mean, any of them, you go and look and you'll see that very clearly laid out. I think that people don't necessarily have an other way of thinking about a lot of these things.

There's a way in which the conditioning process in the law schools creates a type of habitual thought process that people are very comfortable with because it's automatic. You don't

really have to think too deeply about it. You simply replicate the same patterns over and over again.

And to see the number of instances where attorneys, federal Indian law attorneys, have gone into court and said, well, of course, Congress has plenary power and they're conceding that point almost from the get-go, it strikes me as very strange. Why make the government's argument for it as an advocate for a nation or people? That's just strange to me.

Obviously, there's some kind of a way in which people perhaps have not thought all these things through in a more comprehensive way. How many people have bothered to go and dig up this Emery Washburn volume and figured out that three means volume three of a series of books, right? And I assume that's correct, am I right?

[Peter] (29:16 - 32:30)
Yeah, so I'm hearing what you're saying about something strange and I'm thinking that what's strange is that the starting point of original free existence is absent in the thinking of the people who are being trained in the law schools. That's not their starting point. Their starting point is what does the statute say?

What does the decision say? They are wholly within the view from the ship. And they say the view from the ship is dominant and they're not going to be going to take the next step and say it's a claim of a right of domination.

They're simply going to say it is the dominant law. It is what is the, they won't even use the word dominant, they'll call it controlling law. The controlling law, that's the starting point.

And they could be studying any subject at all. They could be studying bankruptcy and they're going to have the same method. They're going to be very unlikely they're going to get into a philosophical historical discussion about when did bankruptcy law start and how did it develop and what are the competing tensions that there may be a brief reference to that and for 30 seconds to a minute in some class, that's about it.

And so within the teaching of what's called federal Indian law, the same thing happens. And the fact that the material is so contradictory, they recognize all that. They recognize, oh, this is a very conflicted field over and over again.

You'll see that kind of commentary. Federal Indian law is a very complex, contradictory field. But rather than trying to disentangle the contradictions to see what lies behind them, they simply say you have to learn which way to tilt in regards to which one of these tangles that you happen to be caught up with in some particular case of yours.

And what we're talking about is standing in a completely different place, standing from the perspective of the original free existence in which the whole contradictory ball of yarn is out there. We don't start inside the mess. We start outside the mess.

And I think I would add to that, that in addition to this being a law school teaching problem, it's also a current contemporary tribal council mindset. The tribal councils are not original

governments. They are maybe rooted in the biological existence of the native peoples, but they are impositions of a federal framework.

And of the 400 and some so-called recognized tribes that exist today, they all have basically a same cookie-cutter government that was put together in the Indian Reorganization Act. So in that kind of framework, if a person gets a job, whether they have a law degree or not, they get a job inside something called tribal council government, their minds are also trying to grapple. I know this is all a contradictory mess.

I just have to figure out which way to play these contradictions. Very rarely do you find anybody, unless they're a deeply rooted traditional person, saying the whole system needs to be, we need to stand apart from that whole system and look at it.

[Steve] (32:31 - 32:39)
Well, I think that there's, by the way, there's roughly, I think, 576 federally recognized tribes.

[Peter] (32:40 - 32:41)
Whatever that number is, yeah.

[Steve] (32:41 - 34:58)
Yeah, yeah, yeah. But the average person on a quote-unquote tribal council probably has very little or very basic understanding of any of these kinds of issues. And so, attorneys who happen to be in the mix as advisors on contract or whatever it might be, that relationship is very influential.

And people rely on the attorneys to a tremendous extent. And so, if the attorneys are not inclined to do much of this deeper inquiry work and to ask more fundamental questions, because it's, in their view, safer to not go there or more comfortable to not go there, then the council is very much influenced by that. And there's a sense of caution.

I mean, attorneys are notorious for being very cautious. And so, I think that's part of it. I think the opportunity for the average everyday person who is elected to a Native government to have been able to delve into a lot of this would be unusual.

So, I think it's more usual for the person to be from the just everyday folks and live in their life. And suddenly, they're in that position. And now, they're faced with a lot of complexity, a lot of, I mean, just a tremendous array of challenges and issues that they have to get up to speed on.

And so, it's very daunting and very challenging that way. And so, the way in which the original free existence is not even an inkling of a thought is perhaps not to be, I mean, it's not unexpected, you know, on my part anyway. Because it's just, and unfortunately, it's not the orientation of very many people any longer.

[Peter] (34:59 - 35:03)
Yeah. Well, it's not the orientation of people on the ground. Is that what you mean?

[Steve] (35:03 - 36:20)
Yeah. Well, yeah. I think that there's a way, and this is true just also for me until fairly recently within the last, I don't know, 15 years or so, where I would always start right in the

mix of the federal Indian law and all of that and the doctrine of discovery and domination and so forth.

But I didn't reference the original free existence first. And that's why I came up with that technique or methodology, whatever you want to call it, approach of setting the context to say we have to acknowledge our original free and independent existence extending back to the beginning of time through our oral histories and oral traditions and contrast that free existence with the system of domination that was brought by ship across the ocean. And then that gives you the view from the shore of our ancestors and the view from the ship of colonizers coming towards shore.

And once we have set that context is a completely different conversation that is possible as a result of having done so. That's what you're not going to get on any, you know, in the mix of any Native nation and their council or whatever.

[Peter] (36:20 - 38:54)
And I think for me, my stepping outside of it was when I left active practice, although I continued to practice, I represented Mashpee Wampanoag in a fishing case and I worked with other actual cases, but when I stepped into university teaching, it was possible for me to say to the students and to bring curriculum together that said, I'm not here to teach you how to practice this. I'm not here to teach you how to memorize this and learn how to use it. I'm here to, let's look at it and see what sense it makes.

Does it make any sense? So standing outside that, and when you and I first met, however many decades ago that was, we were both looking at Johnson versus McIntosh saying there's a, there's a linchpin here that we have found and let's look at it. And in contrast, the case is hardly mentioned other than in passing is like, oh, it all begins with Johnson v.

McIntosh. That's said over and over again, but what did Johnson v. McIntosh decide?

And what sense or nonsense does it make is not something that anybody goes into a lot of thought about. And it goes back to what you said about precedent is that the whole function of the system of precedent is to make it so you don't have to go back to the beginning. You just take what has been said by the highest court most recently, that's the controlling law.

And you don't try to follow that thread back through all its twists and turns and say, does this make any sense or what's really underlying here? So the incentives are just to continue doing, working within this, the same framework. It's kind of like you imagine you have a house that has over the years developed lots of cracks and there's places where the wind gets in and the rain gets in.

And at some point you might say, well, the whole structure is a problem here, but there's little incentive to do that as long as you have some duct tape and a little bit of shingle to nail on somewhere, you keep patching it together. And along comes an opportunity to say, well, wait a minute, maybe we should look at the whole thing. And at that point, it's like, oh, I don't want to do that.

That doesn't even fit with what I feel like I'm capable of doing. Maybe I wouldn't even have a house if I started really thinking about it. Just making an analogy, I think, why is there so much willingness to just accept plenary power as a given and unquestioned and not to be questioned?

[Steve] (38:55 - 40:12)
Well, I think there's a psychological comfort zone or lack of comfort zone of asking fundamental questions. There's a tendency. I remember going to years and years ago, back around the exact time that you and I first met over the telephone around 1989, and a federal Indian law expert was speaking in New York City.

And so I went there and raised some questions at the end of the talk about Johnson v. McIntosh and the Christian-heathen distinction. And this expert said, well, I think we have to be careful because once you start tinkering with the foundation of the system, you run the risk of opening up Pandora's box.

And so I thought that was strange, but that's kind of where it ended right there. And then this elder came up to me afterwards and said, you know, it's too late. And I said, what's too late?

And she said, it's too late to go back and question those old decisions. I said, well, if you believe that, then for you, that's true, but I don't accept that for one second. And I think that's the difference in orientation that some people have toward the entire mess of federal Indian law and policy.

[Peter] (40:13 - 43:08)
Yeah. I want to say, it feels like maybe we're moving to a conclusion of this session, but to point out what we've pointed out before is that this is not the issues we're talking about and the type of questioning we're suggesting applies to everybody in all kinds of situations. So for example, you mentioned expert and the expert said, oh, be careful, you might open up Pandora's box.

We now live in a world which has been dominated by claims of expert domination that whether they're people in white coats or black suits or whatever it is, they claim to be experts and they are in positions of bureaucratic power. And the claim is being made that that's rightful and that we should just keep our mouths closed and follow orders. And no lower a person than a member of the Supreme Court now, Justice Jackson, has just recently said, I think two days ago in an argument in a case about whether or not the president can fire heads of bureaucratic agencies, is that the government really should be a government of experts to protect the people.

I mean, that's an idea that has gone, it has its own roots. I'm sure back in medieval earlier times, the idea that there's a noble class, there are those who have the knowledge and the other people, the peasants just have to follow orders. There's an echo of that, maybe more than an echo, an expertism that is really running roughshod.

And we saw it a lot during the lockdown phase when it was prohibited to have discussions. What do you know? The guys in the white coats have told us, well, a lot of that is now being revealed as lies.

But when it comes down to what is the paradigm which is being followed there, the paradigm is more or less the same thing, that there's an expertism, the common ordinary person without the, quote, expertise is not supposed to even talk about this stuff. And so if I make one more, just off the wall, perhaps references back to the notion of the arcana imperia, the idea of the secrets of rule of an empire, and the James I in England and Elizabeth I, both, they were very clear about this to the nobles and lords and the star chamber is that we don't want anybody inquiring about how the kingdom is ruled. This is our secret, essentially.

I think that the remnants of that, maybe even more than remnants, maybe huge portions of that, are still alive. And we are able, through looking at federal Indian law, to bring it to sharp focus. But it actually could be brought to sharp focus in other contexts.

[Steve] (43:08 - 43:58)
Yeah. And I think that the idea that everyone should be under the control of, quote, unquote, experts, and the regulations that are promulgated on the basis of expert consensus attitudes and conclusions is very dangerous. Because the, well, we see what has happened as a result of the COVID policies and the mandates and so forth, and the harm that has caused to so many people, even death.

The FDA has now admitted the death of 10 children as a result of the shots.

[Peter] (43:58 - 44:01)
That was 10 out of 96 that they studied, by the way.

[Steve] (44:02 - 45:50)
Yes. And so that's a low number. They're low-balling it, I'm sure.

But the point is allowing the inquiry to go forward, allowing the conversation and discussion to go forward, to have a free range of inquiry and not to be trying to tamp down on information that people need to make informed decisions. And I think that's so crucial. And I think that's part of what we're doing with regard to federal Indian law as well.

It makes a big difference if you know that Gorsuch has buried that particular range of information, in a sense buried it, just by using the heading, but making no explanation of what's actually contained in that book by Emory Washburn. It's there in the background, but it's not in the foreground until somebody like yourself, an industrious researcher, goes and pulls that up and looks at it and, oh my gosh, here's the reference to the Christian nations. Well, what's the contrast to that?

The heathen nations, right? Or the heathen, pagan, infidel, savage, all those projections that they have used. It's a very difficult thing to go into all of this detail and gain all this understanding and be able to converse about it.

It's not an easy task as you and I know. And so I'm just very fortunate to have somebody like yourself to be able to bounce ideas off of and to work with and work through the ideas and the information. And that needs to be true for all kinds of areas, not just this one particular area.

[Peter] (45:51 - 47:05)
Yeah, well, I feel equally grateful. I feel like your reference to discussion, open discussion, there is nothing that should be off limits in terms of discussion. And the opposite of the claim of a right of domination is the right of discussion.

And that's called the right of free speech. And what we see in, I mean, England is unbelievable right now, what's happening. I think Germany also, from what I've been able to see, tremendous clamp down on discussion.

People can go to jail for posting words in a social media statement. And it's outrageous. There's an overwhelming claim of a right of domination over speech, and just fill in the blank about what you're supposed to talk about or not supposed to talk about, and what ideas you're supposed to be speaking, and what ideas you're not supposed to be speaking.

And it could be about the original free existence of native peoples, or it could be about Palestine or Israel, or it could be about COVID, or it could be about, fill in the blank. And we see the pattern across the board here. And it's that pattern that is so extremely troubling.

Maybe, well, I'm just thinking, it feels like we've made the point today.

[Steve] (47:06 - 47:13)
That sounds good. And I'm looking forward to our next session. And I thank everyone for tuning in.

[Peter] (47:13 - 47:16)
Yes, same here. Thanks, everyone. Bye for now.