E006 - Supreme Court Justices Attack “Plenary Power” Over Native Peoples

Sun, Nov 16, 2025 11:12PM • 55:57

SUMMARY KEYWORDS
Supreme Court, plenary power, Native Peoples, Venenio case, domestic violence, Sixth Amendment, COVID lockdown, Major Crimes Act, federal government, trust doctrine, Cherokee Nation, Kagama case, Doctrine of Discovery, sovereignty, legal domination.

SPEAKERS
Steven T. Newcomb, Peter d'Errico

Peter d'Errico 00:02
Good morning. Steve, good morning. Peter, how are you good? It's good to see you face to face, so to speak.

Steven T. Newcomb 00:09
Yeah, likewise and yeah. Well, we have a big, big development to discuss today, huh? Indeed,

Peter d'Errico 00:18
indeed, I have some juicy tidbits to share with you, too. So do you want to start off with? You know, what do we we're looking at a case. Venenio is the guy's name, and it was started out. It's a criminal case, which is key to what the what the part that interests us is all about. But there's also another part of it. I know you're you've already pointed out when we talked about it, about having to do with access to courts and the so called pandemic lockdown, etc. Do you want to just start a

Steven T. Newcomb 00:54
little bit here? Well, I can, I think you actually have a better grasp of of the facts of the case, probably, but as I understand, it was a domestic violence case, and two hickory Apache people and venanio was convicted, but when they went to trial because of the covid lockdowns, the court was empty. They didn't make it a public trial, and some very intelligent attorney realized that he could file a sixth amendment right to a public trial appeal, and so he did that, and and the court had the opportunity to hear the case and on a technicality, perhaps he would be the charges would would not go through as a conviction, but could be overturned, I guess is the right way to say that. But the Court declined to give it certiorari and except for two judges, Justice Thomas and justice Gorsuch, decided to file a dissent and said that this was an opportunity to address the issue of plenary power of Congress over Indian tribes or Indian Affairs, and so that their descent is very monumental, I think actually, because of what it lays out on the table as what needs to be addressed and dealt with. And it referred to a day of reckoning that must come, in their view.

Peter d'Errico 02:38
Just to add a small detail there when you talk about the domestic violence case. So it was a domestic violence case, both the people, hikaria is in Hickory lands and hickory have their own criminal code that punishes this kind of thing, but the federal government came in with the so called Major Crimes Act and charged him with federal crimes, and this set up the possibility of making the challenge, not just to the

the important issue of the courtroom was closed and there was no net sense. Then there was no public trial being given, which the Sixth Amendment guarantees, but it also gave the lawyers a chance to say, Well, why is it? Why are the Feds in here anyway? What are they doing? How are they asserting jurisdiction, and where we can look at the bigger implications of what it means to have locked down people and deny them public trials and so on and so forth, if we, if we want to, later on. But as you said, the crucial piece for us, you and I, you pointed out between us, we have 90 years of work in this field, and our work has consistently focused on the significant overreach, if you want to put it politely, of the federal government over the original nations and peoples of this continent, and going all the way back into the so called doctrine of discovery. And then from that point being sharpened continually until it came to a claim of plenary power, total power, and then also using the term Trust, which was actually in its initial form under the Cherokee Nation, case that Marshall decided Justice Marshall, back in 1831 I believe it was said that the federal government Just could treat their native peoples as wards, and has used that power as if it was really like ordinary trust law, where there's a guardian over somebody who's the beneficiary. But in practice, just as it was in the Cherokee Nation case, it's been used as a power of domination. So we have. All of that has been part of it's been a key of our work, our focusing on that, our deep work that you really set the pace for with, with your pagans in the Promised Land book, showing that the theme of domination has been going on for 500 years, at least in relation to native peoples. And most recently, you and I have been saying, Well, what we're the domination. We're talking about is the domination inherent in a certain concept of government, which was part of the development of Western civilization, that in these earliest days, the Pope was the head, and who could declare even whether or not a king was legitimate. And then when the battles happened about kings resisting powers of the Pope, the Kings took this on, that they were the dominator, they were the sovereign. And then that got adopted into the US law saying the US is now the sovereign, wearing the crown over these original people. So we've we've delved into that, and we've gone into all of the nooks and crannies and crevices of it, of how supposedly it's justified, and we've picked apart every one of those justifications. And as you said for the first time now, we have, in plain view from two justices of the Supreme Court, a critique of what we're what we have. It's an adoption, in a sense, of the our critique. They don't do the deep historical research that we've done. They don't trace it back to papal bulls, that sort of thing, but they do mount a critique, saying that the claim of the federal government to have this total power, plenary power, has no basis in any acceptable law. It has no basis in the Constitution, and there's no way to justify it in a way that's acceptable today. It might have been acceptable earlier, when there was a notion that, oh, these Indians are uncivilized. I need somebody to govern them, and the federal government has to do that. That's what the Kagama case was all about, that that approved the Major Crimes Act when Congress said, Well, these Indians don't know anything about criminal law. We're going to have to provide criminal law for them and and we're going to do it through this, this statute. And when this, when it was challenged, as it was, immediately, the Supreme Court said, well, we don't really know that there's any basis for this. There's certainly the court, the Kagama court, Supreme Court, said there's no basis in the constitution for this, but it just has to exist because these these original peoples. They didn't call them original peoples, these Indians. They're uncivilized. They they're downtrodden. Interestingly enough, the court said, The Kagama court said they're downtrodden, trodden in large part, because of the way the federal government has treated them. It's kind of a weird statement that the federal government has made them be downtrodden, and now, because they're downtrodden, the federal government has to do more and exercise more power. That's the core of the of the case that justices Gorsuch and Thomas has said, We've got to get rid of that precedent. It's time to get rid of it, just like there was a time to get rid of Plessy. This was Ferguson, which upheld separation of black races from white races and and that was gotten rid of in the middle of the 20th century, but in the middle of the 20th century, the power of domination claimed by the US over Native peoples was actually upheld in the Supreme Court in the t hit on case. So that's what makes this momentous, is that you have justices of the court laying out specifically what's unacceptable about this, and that it's unacceptable because it has no foundation in the Constitution, and the federal government is supposedly is a government that's bound by the Constitution. It only has the powers the Constitution

gave it. And in recent years, the kind of establishment, federal Indian law establishment, said, Oh, well, in the Constitution, it has a commerce clause. The Indian commerce clause says that that Congress has power to regulate commerce with the Indians, and somehow, in some distorted, non literal way, and actually almost non rational way. The standard explanation has become that, since the Constitution says there's regulation of commerce with that, somehow that justifies plenary power over and we have criticized that many times, and and now we have these two justices saying, well, that doesn't even make sense. I mean, in plain English, it doesn't make sense. There's nothing there to support plenary power. And it boils down, in the view of the these two dissenters to saying, this is just an ancient it's not even ancient. It's just a an archaic. Um, view of domination that is justified, supposedly, by some kind of racial cultural distinctions that the Indians can't really handle themselves, and so therefore they need to be managed. So I'm, I guess I'm as surprised as you are that that we have this out so clearly that I feel like in times, you and I in the past, we feel like we've been fighting such a lonely battle here to say, Isn't this just plainly obvious? I mean, how can anybody not see this? And the sense that we've had of a non response is has been the silence has been deafening, the non response from the standard established conventional practitioners. And the standard established practitioners have actually not only avoided the critique, but they've doubled down. They said, Oh, plenary power is good because the Indians need this kind of oversight by Congress and and they've they've actually run with this notion that somehow these are people on incapable of regulating themselves, and they need this power and and they've taken that so called trust doctrine, which, as we know, was used by Marshall to to assert a domination over the Cherokee Nation, and say, Well, you're not really a nation. You're just our wards. And they've tried to run with that as if, somehow, oh, because the word Trust sounds good. Well, that's a good thing. The federal government has a trust responsibility. Have to watch out for the Indians. Well, when the watching out means telling them what to do and what they can't do, and exercising control over all sorts of aspects of their life that has nothing to do with trust. Trust trust is just a a misnomer for that. So that's how I see. You know, these are the issues you want to flesh that out anymore before? Well,

Steven T. Newcomb 11:52
I think, I think there are a number of things that are running through my mind as you're explaining those specific details. I think they mention ancient prejudices in their descent and say that that's really the basis for the assertion of plenary power over Indian tribes, quote, unquote. And they talk about the atmosphere of the times. So what pulling it out of thin air, not based on the Constitution, but whatever kinds of notions people had back then and also there, I think the key point, well, they even mentioned the doctrine of discovery, which is quite extraordinary. Why bring that in and of course, Kagama, or Kagama, Kagama, I think, is the way I always pronounce it. Used a territorial argument, and that was akin to what Marshall did in the Cherokee Nation case. Was the Cherokee Nation a foreign state or a foreign nation in order for there to be original jurisdiction on the part of the court and to take the case, which the Court declined to do. But he said that the Indian Territory composes a part of the United States, and the maps and geographical treatises and so forth all understand this, and that's just so much a given that there's no way to contradict that and and so forth. But it also occurs to me that my law review article from 1993 the evidence of Christian nationalism and federal Indian law, would you help me to create that title? The subtitle is, as I recall Johnson versus McIntosh. I said, What is it plenary but anyway, I have plenary power in the subtitle is my point, right? And so the key thing is you have all these elements, the Doctrine of Discovery, so called. You have the notion of power over that, using that up, down, over, under, above, below of the English language. And you also have the just all the massive amount of information that has been produced regarding all of these issues, and now, at long last, you have two members of the Supreme Court that are willing to and very much, I think, eager to take that up and have that be the focus of a Supreme Court ruling that would overturn Kagama. But they don't leave it there. They don't solely focus on Kagama. They hint or imply that there are other cases in in the lineup leading to Kagama that also need to be dealt with, and they use the word incoherent in reference to federal Indian law. Wow. So, I mean, it's, it's quite extraordinary. And I think a lot of the nervousness on the part, well, on the part of at least one commentator that we that you've

noted in your sub stack article. The idea is that if the if the power isn't there, the power is where the protection lies, so that, why do you need the protection? Well, because of the abuses of the federal government and the state governments, and so how are you going to how you going to solve that problem? Are you going to give them more power so that they can abuse you even more? And the whole thing is just really strange. Yeah, you know,

Peter d'Errico 15:43
when you mentioned territories, that's that's actually part of what they took a swipe at in this dissent, is that the their questioning, is there any plenary power over the territories like Guam? I want to come back to Guam in a minute. But so the broad implications of this critique are astounding. The critique in the in the descent, and when you refer to the atmosphere of the times, we're talking about, what's in the atmosphere is all that racism, all that prejudice, all that notion of superiority, all that notion of, oh, we're civilized, and these people are not civilized. All of that that's all in the atmosphere. And so when you say, Well, if that's all that's there, then how can this be valid law? The US, for its part, by the way, in its brief telling the court Please don't look at this case. Don't try to deal with Kagama. The only thing the US can say is stare decisis. Well, that's just an old decision. We shouldn't change old decisions. So you think, Wow, that's a pretty pathetic argument. I mean, that's the same argument that you could use about Plessy v Ferguson or any other old case and say, well, it's just been that that's the law. I mean, how we're going to change the law? Well, anybody that thinks that the law can't be changed. Doesn't understand how law works. And so when it comes up to a high profile case like this one, for the US to have nothing more to say than Oh, well, this is we've got to do this starry decisis. Why it means that, did the decision stands? You know, the Latin for this decision stands, so we shouldn't question it. It's just there. Don't look behind it. Don't look behind the curtain, all the rest of that. That's a pretty pathetic argument. And it appears that the well, it doesn't appear it's clear that there were not four votes you have to the Supreme Court has to have four votes to to grant certiorari, to say, yeah, we'll hear the case. And then you need five out of the nine to be able to make a decision, right? A majority decision. So we have two. If there had been two others who said, you know, this is really serious, we ought to look at this. So it means that it's clear that they had discussions about this. There's no way that they didn't have discussions in the Thomas and Gorsuch rated dissent. They obviously had discussions about this, and it means that the rest of the court is unwilling to touch it. It's like, oh my god, this is like, this is really powerful here. We're not ready to take it on. That's part of it. I think another part of it is that there are judges who actually like the idea of planning power. They've bought into the idea of trust. They have this image in their mind like, oh, the federal government is so helpful to the Indians. And so when you refer to the Cherokee Nation, people like to think, oh, nasty. The state of Georgia was attacking the Cherokee Nation. Well, it was the federal government that organized and carried out the removal. There's, there's, was not the State of the State of Georgia didn't do the state of Georgia was having battles, and the Cherokee were battling back. And the Cherokee went to the US that we have a treaty. You should help us out, because our treaty was you would help us. It's like Treaty of Mutual Defense. And that's when Marshall said, we're not even going to look at that, because you're not a nation. How can we have an agreement with you? You're not a nation. How can you come in here and complain about that? Yeah, so it's been federal actions that have been the dominating actions, including the most egregious one, like the Cherokee removal and the creek and Choctaw removal, etc. Those have been federal actions. So where is how is this trust doctrine supposed to be useful and well, go ahead.

Steven T. Newcomb 19:23
Go ahead. Yeah. Well, the thing is that it dawned on me that the commentator that you were referencing in your substack article used the phrase settled law, yeah, stare decisis, yes. And so, but there's been a little bit of a trend in recent years for the court to actually look at older precedents and and see some flexibility there, right? See some reason for looking back and calling into question in certain quote, unquote, settled notions within the the legal system, what I think is so extra. Areas that in

Marbury versus Madison, I believe, is 1803 Marshall points out that whatever the government does has to be rooted and found rooted in the Constitution itself. Otherwise that, you know, where's the basis for what it's doing in that regard, right? And so isn't that just a standard way of looking at the legal system? Shouldn't it be? And I think that so that whether that is true is is a really fundamental question. And how do you go ahead and apply that standard to federal Indian law and have a hold up in so many regards. You

Peter d'Errico 20:43
know, yeah, exactly. And so what we see going on is that the in fact, it's almost like it's a, it's a, it's a state of inertia has happened in federal Indian law that they have gotten so used to working within this framework of domination, the technical word diminished sovereignty. As you point out that Marshall, their the original people, their sovereignty was diminished that the existing bar, the existing group of lawyers who practice in this field, have just accepted that. And it reminds me of what happened when Thurgood Marshall started his legal campaign, which finally resulted in Brown versus Board of Education and overturning Plessy v Ferguson. There were lawyers even in the National Association of Advancement of Colored People that said, Don't rock the boat. We can live with separate but equal. We can live with this inequality. Don't Don't make things worse. NASA might get mad, kind of argument, and Marshall said, No, we're going to get rid of it. It doesn't have any place in our legal system. And that that seems to have gone right by the people who practice federal Indian law. I don't know whether any of them really have a sense that this is what they're doing, that they have adopted and accepted a principle of diminished status, of dominated status, and just say, well, we can work with this. We'll, we'll, we don't need to try to change anything. And so when you point out how this, you know how this domination works. And when we talk about it, said, Well, this is really not acceptable. The people who are working in the field seem not to have that. You often start off our conversations by reminding people of our context is the original free existence of peoples, yeah. What does it mean to be a people it means to be self aware, self governing, bound, living together in your own way on the earth, etc. That's a starting place that we use so that we get a stance outside this framework of domination, rather than trying to work inside it. And that this is what's missing. I'm thinking that for the most part, the lawyers that are active today are working with what they've been taught in law school. Is it okay? This is it? It's plenary power. They, like Brett, they say, oh, tribal nations are sovereign. But the actual legal principle that they read about, like in Cohen's Handbook of federal Indian law that they study in their classes, it says that the tribal nations are sovereign, except that Congress can change that or eliminate it? Well, how can you, as they decide,

Steven T. Newcomb 23:24
and how are they to do that through their plenary power? Yeah, right,

Peter d'Errico 23:28
exactly. So. So the notion that they're pushing forward, that they being the typical, conventional practitioners tribal sovereignty, is an oxymoron, because they have to admit, even in their own briefs that they file, is that Congress has power over this. Well, that's not really sovereignty, then, is it? So these are the kinds of conundrums that we have wondered about. Why do these continue exist? Why aren't they challenged? What's going on here? I think the What stood out for me, what jumped out at some point, as I was reading through the documents in the case, I'm thinking, well, who, who was the lawyer here? So I look up. I'm going to share my screen for a minute here. Okay, so right here. Well, we might as well start just this is just the petition for certiorari says the time has come to jettison gagama that it had. There has to be constitutional authority, and so on and so forth. And that's, that's what the US was saying. Oh, no, this, this is what, again, this is the lawyer, Alan Moritz, and look at what his he's an appellate lawyer. Means that, you know, there are lawyers who specialize in arguing to appellate courts. He's he's one of them. And and notice where he focused on civil and criminal appeals,

all right? And then here's his appeals, business and commercial insurance related securities litigation. There's nothing here that says that he practices in the field. Go to federal India, and I'm thinking, how did this come about? This is a very interesting thing. It reminds me of years ago, when I first started getting involved with Wampanoag people, that there was a the case. I don't want to go all the details. It involves the the Aquino Wampanoag on on Martha's Vineyard, so called, and Frank James, who was somebody that had been working with he got himself a lawyer to challenge the so called land settlement there that Jackie Kennedy had started, which was going to take away land from the Aquinnah. And this lawyer, he was just a conventional property law lawyer. I think he was actually some member of the Republican committee in Massachusetts or something like that. And when I met him, he was saying, Well, this is pretty clear, you know, and he starts talking about the law of property and so on. I said, Yeah, but you're not talking about the law of property in general. You're talking about the law of property within federal Indian law. And it kind of blew his mind that it that the property issues in federal Indian law were so completely deviant from ordinary property law. And I'm thinking this guy here, he's he's not somebody that's coming at this from within the established federal Indian bar, and he comes bumping into it. He says, How does this exist? And so he raises that challenge. So my Well, since I'm sharing the screen, let me jump to a couple of other things here. I decided to do a quick little search just a few minutes ago. Where are we with the so called news? And I find this case, mine is called, it's a an AI legal research engine that's based in India. That's the real India where Columbus thought he was. And it's considered to be quite reliable, because it's based only on legal cases, legal documents. It's not, you know, sort of picking up newspaper clippings and the rest of that. And so they have, they were, it's the the system regards, this is a big deal. Here's November 11. It's right when the thing has been happening here is that something has, something has been decided, which really deserves thorough look. And they, I'm not going to stop through here, but look at what in addition to analog case, they go through here. Look at Worcester Johnson, yeah, there's nothing missing here. You know, they're saying, this is the long history of this, right? Yeah. And so then what happens? How did the court, how did the dissenters attack it? And they go on, they analyze all of that. And then they're talking about here the complex concept, plenary power, Indian climate change, Doctrine of Discovery, Major Crimes. They're not missing anything here. Well, they're they. It's a machine. It's but it's been programmed. The algorithms are programmed to, let's pick out the significant stuff here. We're not just going to have, is this good? Is this bad? It's like, what was the decision? So I thought, well, that's interesting. There's a lot of coverage then happening from from that end of the world. So then I thought, Well, what else is going on here? Oh, boy, this is I gotta figure out. Here we go. I want to get to here it is. So here Guam Daily Post. This is, this is today. This is from Guam, a territory claimed by the United States. Big issue here they're, they're examining this case. They they go through the whole thing of the opinion. And guess what they are also talking about. They have a person here, Adi. This is this woman who's co director of right to democracy. She immediately connects the dissent to Guam's debate about its demand that it have self government without plenary authority. And in addition, they quote some other guy here that they're going to be. Another guy says, We're, they're going to that's going to reshape legal and political discussions after more than 125 years of unquestioned federal authority. And he says it's worth exploring. And somewhere here, just above it, there, here, local leaders, they're organizing here a panel of experts to meet with community and residents. They're jumping on this. Yeah, that's Guam. So then I said, Well, we'll get to that piece, that the one you referred to as the commentator. So I decided, what is NARF doing? Native American Rights Fund. So I went to the NARF website, and I searched for Veneto. Oh, sorry, no. Results were found. They're a little slow on the uptake. Even a comment. And so what are they talking about? Since they're not talking about that. Well, here's what they filed the day after at November 12. Oh, wow. This is the usual pablum tribal nations are. Sovereign governments with inherent authority. There's no mention of plenary power in the article. Right They say this continues to be recognized by the United States. What they're in some frame of delusion. And of course, immediately, given the kind of woke atmosphere there, they want to worry about what language using, tribal nation, tribal citizen, tribal member, as if this is the most important thing to talk about. And then it goes into the so called conferring of US citizenship in 1924 on

tribal nations. And it says that while this action was an encroachment on tribal sovereignty, well, wait a minute, you start off by saying they're sovereign. And how did you get an encroachment on try on sovereignty? You know, it's like, It's nonsensical, and so immediately pass over that they don't say, this is quite a serious problem. Then, oh, now they tribal citizens, have the civil rights of all US citizens. Okay. Well,

Steven T. Newcomb 30:55
they should have, they should have put plenary encroachment,

Peter d'Errico 30:59
yeah, yeah. So. So the thing that is most startling for me and you, I think both, is the silence. Yeah, silence is deafening. Where are the lawyers? Where are the people who are supposed to be the old phrase back about 20 years ago, the briefcase warriors that Bernard Strickland and Vine Deloria and others said, we're going to have our Indian people go out and get law degrees so we can fight for ourselves. What happened? Their briefcases are either empty or they filled them up with this kind of trash. You know, there's no here. There's no bite

Steven T. Newcomb 31:34
the I mean, it is. It's only been four days. Give them some time to, you know, to form some viewpoints on what has happened. It is kind of curious as to, as to why this, the silence that we seem to notice.

Peter d'Errico 31:55
This is only this is now Okay, everybody is and you know,

Steven T. Newcomb 32:02
just to jump in for a second, isn't it amazing that that Guam and India are so focused on this, because it involve in Guam in particular, because of the insular cases at the end of the American war, right? Exactly.

Peter d'Errico 32:20
So. So for me, this is a, I mean, it's really outrageous, I think, you know, and the, well, let me see if I just go back here. There was another document, not him, right here. So this is, I just want to rehash this a bit about the so called trust relationship, which the NARF piece makes a big US has trust responsibility. Cohen's Handbook itself is supposed to be like the Bible that they study. Says that the concept of trust relationship, untethered from the Constitution, formed the linchpin for the excesses of the late 19th and early 20th century invocations of a nearly absolute and unreachable congressional con plenary power. So it's not as if they don't have materials. Yeah, but to work with right here at the 10th Circuit, by the way, there was the 10th Circuit that said it was okay to close the the courtroom down, that was an important thing to protect people, blah, blah, blah that one of the judges said, I think that there's a problem here with this plenary power precedent. But I liked one. This is sort of a slip, maybe. She says, in the 1880s Supreme Court discovered the basis of plenary power. Discovered like, yeah, he's in the closet somewhere. Is that that was all about?

Steven T. Newcomb 33:45
Well, look at that next sentence. Back to that. You went a bit quick, but sorry,

Peter d'Errico 33:54
let me get back to it here. Yeah, yes,

Steven T. Newcomb 33:58

this is relationship between the United States and the Indian nations is that between a superior and inferior, that's domination, right?

Peter d'Errico 34:07
Yep, the over, under that you talked about, right?

Steven T. Newcomb 34:10
Yeah. And the whole notion of plenary power, let's not lose sight of the fact that that's a claim of a right of domination. It's an assumption that a right of domination existing and in the United States, and they're able to exercise that. It reminds me of a conversation I had many, many, many years ago when I co op called the solicitor in BIA, solicitor in Portland, Oregon, and I asked about the whether there was, he could point me in the direction of the document or trust instrument that established the trust between the United States and Indian nations, and he says, Well, you have to understand it's not a trust in the common. A sense of a private property trust. And you have to go back to early Supreme Court precedents such as Johnson versus McIntosh, and that's where he started with the trust relationship. And he went into a bit of detail on that. And eventually I asked him, well, now in the Johnson versus McIntosh ruling, I noticed that the Supreme Court makes a distinction between Christian people and natives who were heathens. How does that factor into the mix? He got kind of mad, and he said, Hey, you already know a lot about he was thinking I was just naive and didn't have any understanding of anything, but he kind of revealed a lot in that brief conversation that that was, I mean, really, I guess I was leading up to a question about about any of those notions. For example, in the Johnson versus Mackintosh ruling, Marshall says 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, where is that found in the Constitution?

Peter d'Errico 36:14
And this is what the dissent points out, that the Discovery Doctrine is not in the Constitution. And I think this is also where we can begin to open up this discussion much more broadly, which is to say that, well, let's start with the narrow point. What the descent recognizes that Johnson B McIntosh is in play here, and what, as I read it, what they're trying to do is to shrink Johnson down to the question of title, and to say there's absolutely nothing about power over, in the sense of plenary power, or a so called trust relationship that's inherent in the doctrine of discovery, that a documentary discovery is a property principle only, and no power over. And so I think that it's skillful work to avoid the really thorny question, which is, what is property law all about? Because Johnson decision is not just about Native property. It's about property period. It's about claiming that this is what all property law in the United States is based on. Is this royal claim that comes from the grant of lands, from the very from the kings of England, etc, that that's where property comes from. And so that when I say it's, it's a thorny or much thornier, is because all property relies on that. And but once we understand which we I think we talked about the last session, that the power of eminent domain is claimed by the government, and the power of eminent domain is in English, ultimate dominium. And so the claim of the power of a right of domination over property affects everybody. So if you say, well, I own my land, I bought it, I paid for it, and I paid off the mortgage on top of it, then you got to say, Well, then why do I have to pay taxes? And how come, if they want to put a they want to take it for some zoning reason, or they want to put a road through, how come I How come I have to acquiesce to that and take money instead of saying, No, I want my house. That's because that's what the property what law of eminent domain is all about. So the property claim that's in Johnson, about title to the continent, applies to everybody, not just the so called native peoples. And once people see that, then they say, oh, wait a minute. So you mean we live under a system of domination. And it doesn't matter whether we're Indians or not, we still are under domination. And so the difference between us and the Indians is the government claims extra powers called plenary power and trust doctrine. And so if we think about that a little bit further, in light of the

lockdown, you can say, Well, wait a minute. You mean the government's power to tell me that I can't go visit my grandmother, and the power that I can't go have a meal and I go bowling. And you know that whole lockdown thing is that that's a kind of a plenary power, isn't it? And when I protested about it, they said, Oh no, this is for your benefit. It's for everybody's benefit. It's the government watching out for your pub, for health. You know, that sounds an awful lot like an untethered trust doctrine, doesn't it? So I think in a way, everybody has experienced just a little bit of what plenary power and so called trust relationship involves because of the experience of the lockdown. And that's got people thinking about, well, what is the power of the government can Is that really true? You mean that's the kind of power the government can exercise? Well. That's what original peoples have been living with since the get go, is the government can say, Oh, well, you're going to have to go to our boarding schools, and you're going to have to forget your own language and learn our language, and you're going to have to quit putting your hair that way, and you're going to have to wear different clothing. That was all plenary power and trust, all justified, by the way, by the liberals of the day. We're friends of the Indians. That's what it was all about. Henry Pratt was a liberal. We want to kill the Indian and save the man. That was supposed to be good. And so all of that was justified exactly as the lockdown was justified. So there's in which we've all we've experienced it, but it's, it's kind of a still. It's still a, kind of a fragile moment, people saying what actually happened to them, and the questions are starting to cause the system of power to fray at the edges, at least, I'm sorry, go

Steven T. Newcomb 40:53
ahead. Well, and there's an interesting little parallel in terms of settled science and settled law. Yep, right. So why are they locking it down? Because there's subtle science. Oh, well, what is that settled science? Well, don't worry about that. You know, the key thing is this, that and the other. But the whole notion of the state a relation of men dominating men as as Max Weber pointed out, is is indeed a system of domination. So the police powers of the state of domination is saying, this is the doctrine, and we'll back it with lethal force if necessary. And so there's always that that threat in the background regardless of what it is. And of course, if you get deep into it, as we've been doing over so many years, in terms of our research to to sort out these different examples of domination. Oh, here's William Blackstone defining property as despotic dominion. There's an example, and we keep going. And so once we've compiled a whole mass of these different instances of an expression of domination, well, what does that up add up to? And I think that people haven't really had that conversation. You know, we tend, we tend to even use a word such as self governing. But if self governing actually, if governing means dominating, were we actually self dominating, or did we have a method of decision making that was customary for the people based upon a lot of different norms and standards and viewpoints and principles and codes of conduct and so forth, based upon an original, free existence, right? So that's not even a context of domination, yeah? And and then that brings me back to the point with that Gorsuch and Thomas are making in their descent that they're the way they're writing about this is fairly narrow in terms of intra tribal relations. So plenary power over intra Tribal Relations. They're not just opening up this big mass, you know, large perspective, although they are by implication. But in that wording there, that's pretty narrow in scope. Yeah, so how would you respond to that?

Peter d'Errico 43:28
Well, I think you're you're right, and I'm thinking that we we need some simple examples, for example, tracing, since we know we can trace some of this doctrine pretty clearly back to popes in 1493 etc. That was all during the time of Christendom, when the dominant thinking, to use that word, the dominant thinking was that, of course, there has to be a pope. And that structure of Papal authority, which was created when Constantine, the emperor, merged with the church to create a religious state, and a state religion that's was just, unless you want to be a dissenter and risk getting burned at the stake, you kind of went along with it. Of course, you have to have a pope. How would we know what God said? Then when the thing began to fragment, Christendom fragmented into various Christian kingdoms, then it was, oh, well, you have to have a king. I mean, if you don't have a king, you're going to have what are

you going to have? You're going to have nothing. You got to have a king. So ideas that today, we would say, Well, isn't that an archaic, interesting, odd way of thinking about existence, that you have to have a dominator? And then they use the word sovereign. And of course, the king or the Pope was sovereign because nobody had, you know, had the power to tell them anything except God, and God had nobody except God, so God was a dominator. So these were just baked into people's understanding of life. Is that domination is part of it, and it was impossible. And I think the legacy. That is that today, people, they equate domination, without using that word, they equate government with civilization. They equip with somebody's in control. There has to be somebody in control, and they call that the sovereign, or sovereignty, or it's a group. It's like the 100 senators or the 400 representatives, or whatever they are, or the nine justice Supreme Court, the whole system is based on this assumption that there has to be domination. Otherwise. What? Oh, be chaos. Be anarchy. We we couldn't exist. We have to have that to exist. I think that's just you talk about in the atmosphere, out of the thin air, that's just like the fish in the water. It's not subject to even thinking about, let alone questioning, and if you question it, you're a heretic. You're a heretic, just like the heretics that were that said the Pope, we don't need the Pope. So it's,

Steven T. Newcomb 45:54
I think, that the the to complete my thought about settled science and settled all it. There was that reference to unchallenged, but there has been challenge in terms of the scholarship. I mean, that's what we're we are part of the challenge right to these old notions and but then the settled science is actually an oxymoron. Yep, right, because science is contentiousness, so is law. The whole legal profession is how we're going to prevail in this situation, by marshaling the arguments that are needed to win the day, okay, and on behalf of your client and that sort of thing. And so the the idea of settled science being used, I mean, which is a nonsense term to justify locking you down, is we have to look at so many things in terms of even public health. What does that mean? Is that, is that, oh, we're going to get you to take this particular thing that may be actually deleterious, but we don't really know, because we didn't do any long term testing on anything. But you got to get it, you know, because it's mandatory. Well, what does that mean? So all these terms that have that people were thrust into this cauldron of of Topsy turviness, and the whole, your whole life is upended because of this horrific situation, and then come to find out, so much of it was completely orchestrated, yeah, and so there, there's that whole conversation that we could have potentially. But this idea of settled law and settled science. The settled laws is a matter of convention. It's what people have accepted over time, because that's just the way things are. And that's, that's really, that's your, your basis. So the fact that these two, and obviously some people don't trust Thomas and all that there's, there's those concerns that people have. And what happens if, if the trust responsibility, which is our protection, or blanket of protection, if that's called into question, what happens? Then a lot of those concerns, I think, may make people even shy away from the conversation? Yeah, why? Why? But why do that? Why shy away from the conversation? Exactly. Yeah, it seems to me that in the conversation, we're going to be able to sort a lot of things out and and maybe have insights that we didn't have before we because we're in the midst mix of discussing all this, you know, and

Peter d'Errico 48:41
you know, you're reminding talking about the mix of the conversation. What do we mean when we talk about free existence? What does that mean? What do we mean by sovereignty? I'm slow turtle, Wampanoag, medicine man. Somebody would bring up, you know, about sovereignty. And he would touch over his heart, and he said, This is where sovereignty resides. And I'm thinking, well, that actually fits. You're talking about both settled science. It's like every being is a free being, sovereign with the right quote, unquote, to determine what goes into their bodies. And there's the contest between sovereign beings. You'd say, Okay, we're going to get into a, I'm going to get into a fight with this guy about whatever, like, that's my car, not his car, but that. What does that mean? I'm being I'm not being very clear here, but I want to say that the notion of free existence also intertwines with the notion of

what sovereignty means, and that in the free existences that we talk about, about the on Turtle Island, we don't find that there was a sovereign person over the rest of the people. The sovereignty was in the group of people. And one of the things that was noticed again and again by the outsiders was they were dealing with the warriors, and they were saying, Well, every one of these people is. Completely independent, like he won't pay any attention to the chief unless the chief makes sense. And so you say, yeah, they couldn't understand that. But they also couldn't understand that when the Warriors and worked and with the chief or the war leader, or whatever they may be talking about, when they had worked through this and they come to an agreement, they were a completely unified community, and to the outside world, to the European world, it was individual versus community, and that's still a dominant view. I mean, I'm, I know people just like, oh, the individual versus the community. Well, where did that come from? There are no individuals that don't exist in communities. Somehow. There's no There's no isolated single individual, but each single individual is a sovereign being, and that sovereign being is living interwoven with other sovereign beings. And if you want to get group action, then all of them have to take be taken into account. And we saw that over and over again in the traditional ways. That's what government, although it wasn't called government in that same sense. That's what it was all about. It was a way of life that involved everybody as an independent person, linking together with all the other independent persons. And not anybody saying, Well, I'm really the boss, because I talk to God.

Steven T. Newcomb 51:16
Well, I think that the use of the term sovereign is is interesting, because people use it so much. Tribal sovereignty is just ubiquitous, right? It's everywhere and but I think what people are meaning by that they want to take the independence of the monarch, the independence of that power structure, and apply that by analogy to the individual. So I'm a sovereign being, what I'm a free being. But I think people get trapped, in a sense, because the term sovereign becomes the habitual default term to always use instead of free. And so that's where it becomes confusing, because if I look at Jonathan havercroft definition of sovereignty, that's based upon Hannah Arendt, Giorgio, Agamben, Michelle Foucault, Hart and Negri you, and then he says, oh, it's an unjust form of political domination that limits human freedom. Well, that doesn't sound like independence. So there's something else going on. But if people don't have that reference, and they only have their general notion of something that they've gleaned from conversations over a long period of time that that's the cool term to use, sovereign. Food sovereignty. You know, what do you mean? Food domination? No, that it's, they're they're trying to find a space within which they're free, that they have a free expression, a latitude of motion and so forth, a space within which they're free, but that space within which they're free, the context for that space is that larger framework of domination that's out of focus. Yeah, and I think that's the challenge, yeah,

Peter d'Errico 53:15
and I think we're coming near the end of the hour, and we're just barely scratching the surface of what has to be another conversation. But it strikes me that what you're talking about is a situation in which people have lost, or maybe never had a sense of what their own original pre existence was all about. And certainly the people who are doing the legal work they've come out of a law school which has taught them all this stuff we've already talked about and the tribal council people. Well, that tribal council thing was that has its roots in federal domination, right there? Well, you have a council now. It's a business council that was consciously modeled on a corporate business model. Well, that has nothing to do with traditional free existence. And so there's an absence of experience of being free, which would another way of saying it would be an absence of being a sovereign being. There's an absence of an experience of that. What does that even mean? And I like analogizing it to these hundreds of years ago religious disputes. Is that to say that I have my own relationship to to God. You had to use that word God. I suppose I my own reason. Well, that was heresy. I mean the idea. And so if people who said, Well, I experienced, you know, the power of creation, they risk being burned, because that's not prohibited, that's prohibited, that's not permitted, that you're allowed to experience free, dumb. Dumb is another we shouldn't even use that word being free in the cosmos. That was heresy, and so I

think that's where we are right now. What you just finished explaining was the lack of a context at a level of spiritualness and philosophical. Understanding, historical understanding, a lack of a grounding to allow us to have a conversation that would go beyond the law. And I know you have that story about noone can go above the law. You're when you're

Steven T. Newcomb 55:13
no no one can speak beyond the law, exactly so,

Peter d'Errico 55:18
so that's where we are. Can we speak beyond the law or not. And I think that it's this, this descent. I guess the last thing I would say today is this dissent is saying, Yeah, of course, we can speak beyond the law. There's if the law means tagging the case, of course we can speak beyond it. We can speak beyond it, above it, around it, below it, where we speak any way we want to. Yeah.

Steven T. Newcomb 55:39
Yeah. Well, thank you good conversation, and let's look forward to the

Peter d'Errico 55:45
way. There's so many more things that that we've touched on here. All right. Great. Thank you, Steve, thank you. Yeah.