

# E002 - Say Something, See Something

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## SUMMARY KEYWORDS

Johnson v. McIntosh, Ninth Circuit, sovereign immunity, Indian law, land management, discovery, ultimate dominion, Christian nations, treaties, reservations, allotment act, tribal sovereignty, genocide, plenary power.

## SPEAKERS

Steven T. Newcomb, Peter d'Errico

**Peter d'Errico** 00:00

Good morning. Steve, good morning. Peter, how are you good we had a great conversation yesterday, one of many, and I'm hoping that we get started today. We haven't talked ourselves out completely. Well.

**Steven T. Newcomb** 00:14

I think we usually find things to elaborate upon. Yeah, not too much difficulty, yeah.

**Peter d'Errico** 00:23

So we talked about, we might start this conversation with that case, that Ninth Circuit case that week or so ago, cited Johnson B Macintosh. You want to do that

**Steven T. Newcomb** 00:37

sure that could work? All right,

**Peter d'Errico** 00:42

we talked about, when we were going to do this podcast that we would focus on a Ninth Circuit case that I think it was August 21 it just very recent case. It started out the opinion in the case, and we'll talk about the case in a second. But it started out with a citation to Johnson versus McIntosh, and before I even read the case, I was struck by the fact that this is a way in which we have evidence that the Johnson V McIntosh case is still active. Sometimes, when we talk to people, they say, Oh, that old case. You mean back in 1823 why is that still relevant? And then we might talk about lone wolf or Kiaton or even Ruth Bader Ginsburg's opinion in city of Cheryl 2005 but the fact is that, as you and I know it's in operation, the Johnson V McIntosh Christian discovery and domination decision is still active throughout the entirety of what's called federal Indian law. And this is just a kind of a handy piece of evidence. And if I can just share the screen for a second here, right there. Can you see that I certainly can. Yes. Okay, so this is United States Courts of Appeal, Friday, August, 2120 25 so what are we talking two weeks ago? Two weeks ago, the Ninth Circuit in three judge court, unanimous decision. It was a technical thing. Was about whether or not the person who was suing the estate of a person who died while his cases, it's almost like Kafka. He's trying to get the BIA to do what the BIA promised to do, which was to use its authority to clear up some land that had been bestowed on so many people. None of them could really use it, so the BIA agreed with the people. Yep, we'll partition that land so we kind of get some clarity. This is your acres. This is their acres. And then the BIA didn't fulfill it completely, and so he was suing the BIA to get him go ahead fulfill the agreement that we all had together. And the case was dismissed on the grounds, as you see from the heading here, sovereign

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immunity. The court decided you can't sue the United States to make it do something that it agreed to do, because the United States hasn't been, hasn't agreed to be sued by you for that. So that's in a nutshell what the facts of the case were. But what struck me, oh, and by the way, of the three judges, they all agreed on this decision that the guy couldn't sue, but there was a one of the three, as you see here, that this judge concurrent, but he declined to use the term Indian to refer you refer to indigenous people. So he agreed that you're out, out in the cold. You can't sue the United States, but we should at least make sure we're not calling you an Indian. So we'll dig into that a little bit later. The way in which people focus on the most superficial aspects and think they're doing something really significant. So here we go. This is it the very beginning national policy. Notice what they call it governing management of Indian land. What does that mean? National Policy, governing management of Indian land. How that that in itself, is a kind of a conundrum, isn't it? How does the national they mean? United States, governing management of Indian and how does the United States get to govern Indian land at all. And then they say, well, it's vacillated. Well, we'll get to the vacillations. But the question of, how did they get to manage it? That's answered in the very next sentence, the United States asserted title to these lands. And then they see, see Johnson V Macintosh, and have a quote, the absolute ultimate. Title of Indian land has been considered as acquired by the United States by discovery, subject only the Indian title of occupancy. In other words, the Indians are on the land. They live there. So they call that a title of occupancy. Kind of sleight of mouth, making it sound like that, being a tenant in somebody else's land is any kind of title at all. But I'm wondering if you want to riff a little bit about that ultimate title, because you talk about ultimate dominion. I just want to point out that the case opens up with an open acknowledgement, which is fairly rare, that Johnson V McIntosh governs all of this. And even a quote saying that what Johnson decided was that the United States has titled by discovery. So you've talked about, how does discovery give anything you want to just kind of dive in here.

### **Steven T. Newcomb 05:56**

Yeah, the on the screen, there are number of things going on in my mind at the moment, looking at this, first of all, it's a property case, right? It has to do with land, and so right away, it falls within the category of property. And the cornerstone, as has been pointed out many times, of the property law system of the United States, is this decision in Johnson versus McIntosh. And then also notice that the absolute that look at these words, absolute and ultimate, ultimate isn't even enough. It's absolute, okay, and so once they have asserted that within that framework, the only thing remaining for the native peoples, even though they preceded the United States and and the time frame and so forth, within the confines and contours of this conceptual system that's been developed by very bright minds is the so called right of occupancy. So you have the right to continue to be in the mix to the extent that you're there. They acknowledge you. But in terms of having any leverage within a property law argument, you have none at all, and and I think that. But then what's not noticed here and will not be noticed here, except for by people that have read this decision and gone into it and considerable detail they will not see in these words that the foundational underpinnings of this thought process here goes back to this idea that the first Christian people, which Marshall put italics on Christian people, in one instance, Is the they are the ones that have the right to assert the ultimate dominion, to be in themselves, meaning the monarch, okay, and then the native people, which Marshall referred to as the occupancy of the natives, who were heathens. So that Christian people and heathens tells you that there's a religious meaning, biblical orientation, to this entire framework that is out of focus here. And no one, just by looking at this, would have any understanding of that whatsoever.

### **Peter d'Errico 08:34**

Yeah, so Exactly, and this is absolutely the pattern that's been established for now many decades is to not to talk about the religious aspects at all, not to mention Christians and not to mention heathens. And the only thing that is mentioned is the word discovery. And people read across that, they sort of, they kind of understand, oh, yeah, discovery. But what does discovery mean? How does, how did this? How

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did somebody acquire something by discovery isn't that kind of like saying, you know, finders keepers or something. But how do you find something that isn't really lost? I mean, if, if, well, go ahead,

### **Steven T. Newcomb 09:17**

yeah, but you keep in mind that the people that are claiming to have discovered something meaning identified the geographical location of lands that they previously had no awareness of, that that is what they mean by a discovery is new to them. Yes, the fact that it's not new to the people already living there is irrelevant, because the only thing that matters is what they see or what they don't see, and the fact that they by having an awareness, it comes into their knowledge, their system of knowledge, because, oh, look at we can see that land over there. There. Let's go check it out. And so then they make landfall and get a toehold. And once they have that toe hold, and then they create ceremonies of possession, which are euphemisms for domination. Then the whole ball gets rolling in terms of the application of a language system of domination that they have preceding their voyages, and they have documents of quote, unquote authorization that enables them to go forward with a sense of righteous purpose and divine purpose and so forth. So there's so much involved in all this, lastly, that the there's the book called creation of rights of sovereignty through symbolic acts, published in 1939 by some students of international law at Columbia University. And three students and their mentors were two of the eminent figures in international law at that time and so, and I believe one of them was Charles Cheney Hyde, who for a time was in the State Department as perhaps the solicitor of the State Department, but he was fully aware of all This. And the other thing is, with regard to the Christian heathen, eventually, that guy set that got secularized right around that same time frame, in the 1930s probably by the time of the Cohen handbook, 1941 somewhere in there, the transition to a secular terminology came into focus. In other words, they began to use non religious terminology. So it was lands not previously understood or known to Europeans that they had newly identified. So they inserted that word European instead of the Christian use of the word Christian.

### **Peter d'Errico 12:07**

Yeah, and look at the phrase here has been considered as acquired. What that kind of passive voice here has been considered Well, exactly who considered it? Well, the ones who considered it were, this is Marshall's words here, John Chief Justice, John Marshall, has been considered it. It means at least that he considered it and he looks around and he, did you consider it that way? Joe's story, yeah, I considered it that way. Well, let's see. What about did Washington consider? Oh yeah, Washington considered that is any of us didn't consider Oh no, we all agreed we considered it. Well, did the Wampanoag, the date? No, they probably didn't consider it. What about the Shawnee? No, they probably didn't consider it either. So has been considered as acquired. That has the implicit in there has been considered by us as acquired. So it's a clear statement that what is called law here, this is, this is law. Now, what is law is what we and we is a specific group of people, Christian Europeans, what we consider is what is the law? And what we consider is that we acquired ownership of this land, and we consider that we acquired this ownership simply by arriving here having never been here before. And if we look closely at our charters, we find out that there were other Christian Europeans who agreed with us and considered it, and the only thing we agreed on with each other is that whoever got here first is the one that had acquired the title. That's what we all considered so the sometimes people talk about the international law of the time of the Age of Discovery, and what we need to remember is that so called International Law was a set of agreements among the Christian monarchs who were considering all this. So they called it international law simply because they were of different nations, England, France, Portugal, Spain, and so they said, Well, we Christian monarchs have agreed with each other that whoever finds something new meaning that it's new to any of us. We now own it. It doesn't be new in the world. It's not like a new continent emerged from the ocean that nobody had ever seen before, but no Christians ever saw it.

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### **Steven T. Newcomb 14:52**

So this is such a key point that you're making, as far as the look at. The word asserted title. Mm, hmm, so they considered it was considered by somebody unidentified. It just kind of implied as acquired by discovery, meaning the new knowledge of this place that we had no awareness of previously, and then asserted a title, which is simply saying they claimed a title. But then, if you look at all of these words that you've got highlighted here, and you ask somebody would when you read this, do you see some sense of domination in here? Is there a way you can pinpoint a pattern of domination in the use of these particular words, I would be curious to see what they might say, because you have to go deep enough into the meaning of the word title or absolute ultimate title those types of terms to be able to go into the definitions of term, terms such as title and or absolute and ultimate, and be able to realize, oh, okay, this goes back to a term of dominion. So the one who has the title also has the Dominion. And it's once you hit that word dominion. Now you're in the Domination framework, but you notice, even though so they could have said the absolute ultimate dominion, but instead he's this particular quote is absolute ultimate title. So it's one remove from the domination framework by the use of this more euphemistic language.

### **Peter d'Errico 16:43**

And when you see the end of that, the sentence subject to, well, you've mentioned Indian title of occupancy. But, and we can say little bit more about that, but subject to means that it's over, that it's a when you talk about something being in subjection, then you must have the other side of the equation is something is dominant. Yeah, dominance is implied by the subject. The word subject there, well, go ahead,

### **Steven T. Newcomb 17:14**

and this is such a key point you're making, because if you reverse this and you say, okay, the Indian title of occupancy is subject to the old, the absolute ultimate title. You reverse the order, then it's saying this, this Indian title of occupancy is subject to the domination, the claim of a right of domination on the part of United States, but you would never get that simply by reading so and if you say by reading subject only to the end of title of occupancy in the way that it's set up here, you wouldn't get that sense of meaning. And the other thing is that if you have an absolute ultimate title, it's ridiculous to that say that it's subject to any anything like an Indian title of occupancy. It's kind of a weird it's making it seem as if it has some strength when it has none whatsoever.

### **Peter d'Errico 18:13**

Yes, and we got to keep in mind that the rest of the case of Johnson V Macintosh is not available here. But as we know and we've talked about in other venues, Marshall goes on to say that the Indian title of occupancy can be extinguished by the holder of the absolute ultimate title. And we see that so called extinguishment in a number of different forms in the history of the last couple of 100 years, meaning they can be wiped out. So we have a situation in which there's a land in which people are living, there's some other people outside arrive on that land to them, they say, Oh, we discovered this. Our theory tells us that we now own it. Now. We are now the Lords of this land. We are the dominators of this land, and lords of land sometimes have tenants. And we look, oh, we already have tenants here. Isn't that wonderful? We've already got people that are going to work this land for us if we want them, and if they don't want to work, we're going to extinguish their right to stay here. So when they try to live here, we're going to just say, No, you don't have any right to live here anymore. Your occupancy is right of occupancy has been ended by us all. That whole framework emerges out of the Johnson V McIntyre McIntosh case, and as you said a few moments ago, General, this is all out of sight. So what makes this particular Ninth Circuit case from two weeks ago. Interesting is that they bring this up right here. It's in the very first paragraph. It's well, that a court, you know is is, in my experience, in today's time, this is embarrassing stuff. It's clearly what they call. The law. And the case that, as we saw in the beginning,

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they they dismissed this guy's case, saying, you can't serve sue the sovereign. What does sovereign mean? Sovereign is another word for the one that holds absolute, ultimate dominion. So you can't sue the dominator.

### **Steven T. Newcomb 20:18**

And so the dominator, that's the good synonym for sovereign, right, Dominator,

### **Peter d'Errico 20:25**

right? So you can't sue the dominator and we're going to dismiss the suit. And in explaining why they're going to start to lead up to why they dismiss this suit, they open up right at the top by reminding you, saying you have to remember that this is what the US is the dominator.

### **Steven T. Newcomb 20:45**

Well, what's interesting is the way in which the clean, euphemistic language masks what's actually going on here. So the use of the word asserted. So if we were to go into the Johnson decision itself, and look for the word asserted, where would we find that? And then if we look for the phrase subject to the Indian right of occupancy, where would we find that phrase? Okay, so, and I have the exact passage from Johnson versus Mackintosh in the the draft document that we were working on yesterday that you kindly helped at it, while the different nations of Europe respected the right of the natives as occupants, they asserted The ultimate dominion to be in themselves. There you go, that domination framework right there and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees subject only to the Indian right of occupancy. Yeah, isn't that something? So you have the word asserted and the subject only to the Indian right of occupancy, nearly identical to what's what the recent decision, right? Yeah. No, no, go ahead. No,

### **Peter d'Errico 22:23**

go ahead. Okay, well, I just want to point out the very first sentence. If you want to talk about how all of this is submerged, it's much more frequent to have a court completely eliminate any reference to John Johnson, V Macintosh, and just say national policy governing management of Indian land has vacillated throughout history. Well, it's there's a lot packed in that, because you say national policy, that means US policy, US policy governing management of Indian land. Well, wait a minute, how does the US get to manage Indian land. I thought that was Indian land. This is, I'm talking about a kind of a common person on the street view, and has vastly so most people read over that, and they don't really understand. They know they're a little bit puzzled by it, but they just read past it, and then they would, since usually you're not going to get Johnson B McIntosh. So the next sentence would be in the 19th century, through treaties, the federal government sought to confine tribes to reservations, all right, so that that's your typical person on the street. Shallow understanding of what's going on. It's like, Oh yeah, yeah, there's been the US, yeah, the Indians, yeah. Oh treaties, oh yeah. Reservations, without any context, no detail, no understanding of what's going on, certainly, unless the person is actually attuned to what you call your domination translator, they're not even going to have a toehold here. You talk about a toehold. Yeah, you don't have the word if you don't understand the word policy, governing management is a synonym for domination. You're not going to see it. Yeah, you don't have confined to reservations as a synonym for domination. You're not going to see it. So it's you're reading words that you understand. You think you understand. You think you know what a treaty is. You know what management is. You think you know what Indian land is, but you don't really have any grasp at all of what's going on. So when you and I read this, we're able to unpack it. We're able to dig through the words that are used here to actually expand them and say this is what they actually mean. And then suddenly, by saying it in a different way, I've been thinking about this phrase, you and I talked about yesterday back a few years when I remember it was in New York on the subways, you know, crime on

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the subway. So they had signs. And see something, say something. So it was encouraging. I'm riding on the subway and I see somebody being molested. I'm I see that I'm supposed to say something. Say something. Man, I was supposed to call 911, okay, see something. Say something. When we talk, I get the sense that we've reversed, that we have now said, say something. See something. So what? The court says national policy governing management Indian land, that kind of puts people to sleep. We thought, Oh yeah, okay, we're talking about something here about, oh, the BIA. That's probably the BIA. Okay. They're asleep. If you say national policy governing domination of the original occupants of the continent has vacillated before even get to vascular. You say, Wait a minute. Wait a minute. What are you talking about domination? So now they see the domination, because we have said that policy, governing, management, is equivalent to domination, and that then I think by our working with opening up the language. We're enabling people to see what's really being said.

### **Steven T. Newcomb 26:07**

Well, Richard Harvey Brown in his book, a poetic for sociology, a book that I just find so extraordinary and amazing, which I've been reading for a couple decades, but he literally and ever since Chet Bowers recommended the book to me, what he has a statement where, by he says, the thing, the thing itself, whatever that thing might be, becomes emergent, meaning it emerges in awareness as a result of being named. So once it's named, then suddenly you know, if we start talking about oranges, oh, we said the word orange. So in our minds, we have this image of an orange, and we have that conversation, but we in just that quick we could switch to apples, and oranges are out of focus, and now apples are in focus, and it's so lightning fast, but until we actually use the word domination, then it will not come into focus. Even though you can see a word such as dominion, the average person will not look at that word for whatever reason, I don't know what that reason is, and say, Oh, yes, domination, it's not going to happen. And there's something within the English language that is able to use domination and yet have it be completely out of focus. Yeah. So, so now this makes me curious this judge is reading the Johnson ruling. I assume the judge is not going to simply cite a case that that person has never read before. So it would be curious to know how they look at any of this kind of language in the Johnson ruling itself. But notice how this judge said, asserted the title, even though, in the ruling it's talking about, asserted the ultimate dominion to be in themselves. So he could have easily said or asserted the ultimate dominion, or absolute, absolute ultimate dominion, the word is ultimate. So that also matches what this judge wrote, because, because Marshall is using the term ultimate dominion. So it seems to me that this judge is aware of all this kind of detail, maybe not aware of a domination framework in the way that we're using it, but just going on the most surface level understanding of this terminology, there were decisions that were being made in the drafting of what you know how that first paragraph appears, and so I don't know. It's just interesting. And then to think the power to grant the soil while yet in possession of the natives, they're acknowledging a form of possession which ordinarily would be a form of property, but yet, the form of property that they have is not a form of property, because it's occupancy to make sure they don't have a form of property in the mix, and it's someone else who has the authority to grant the land away, even though they're living there, yeah, and this is the amazing if that's not a domination. You know, being subject to the external will of arbitrary, external will of someone else is a definition of domination. So they're just arbitrarily going to grant the land that you live on to someone else. Those Spanish land grants and many other land grants from other monarchies are examples of all that, right,

### **Peter d'Errico 29:50**

yeah, you know, you made an important point that I want to come back to, which is that the this paragraph had was a considered paragraph. Uh. Um, and the fact that there were three judges means that it definitely got talked about. The when an opinion is going to be signed by more than one judge, and in this case, there were three of them. They have to talk about it. And there, we don't know, maybe the first draft of this opinion had more in here from Johnson V McIntosh talking about dominion and what, you know, etc, and maybe one or both of the other judges says, No, I don't want to go into that.

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That opens up a can of worms. It's also possible that there wasn't Johnson in here, and that there was just this national policy governing management of Indian land. And one of the one or the two of the other judges said, Now wait a minute. You got to explain that. How did, how did the government get the power to manage Indian land this? Oh, yeah, let's put Johnson in. So the point is, I'm just expanding what you said. This is considered. This language has been discussed and edited and put together in such a way that at least these three judges agree, yes, we'll all sign that we all agree with that. So this is not an accident. It's not just off the top of somebody's head. It's been something that had to be discussed and thought about.

### **Steven T. Newcomb 31:17**

Yeah, well, the fact that they don't use the word Dominion in that opening paragraph and avoid that term, even though that's such an important concept within the Johnson ruling. And I don't know how many I've never actually counted, how many times he uses the word dominion? Have you ever done a search on that? No Marshall, so that would be interesting in itself. Okay, I'm sure it's more than 10 times I would venture to say that. But in any case, when you look at that word dominion, how is someone supposed to interpret that word? Yeah, so what does that actually mean? And then you have scholars who have delved into that, who have gone into Latin dictionaries and looked at Latin scholars that have traced that word in English Dominion back to the Latin word dominium. And one of the scholars to investigate investigate that. His name is William Brandon, and he's made a very important statement after, after providing a lot of background detail based on other scholars, he came up with this concluding statement that political power grown from property dominium was in effect domination. So you've got property, which means domination, you've got dominion, which means domination. And you've got the idea of political power, which is all about who has the who's going to be on top right. And so that's such a key point. Was in effect, domination. So then we once we have that identification between those two, the linkage between those two terms. Now every time we see dominion, we know that is accurate to interpret that as being domination. Yeah, that goes with the definition of property, several of them, but one in particular, by it's a legal textbook by Lance Liebman and Charles Monroe har published in 1987 the textbook is called property and law, and they look at William Blackstone's commentaries On the common law from 1765 where Blackstone, based on Genesis 128 defines property as despotic dominion, and then Liebman and haar have a sentence at the opening of their textbook, basically defining property is the first establishment of socially approved physical domination over some part of the natural world. And Lance Liebman told me over the phone that that was based upon William Blackstone's commentaries on the common law.

### **Peter d'Errico 34:15**

Well, okay, all of this stuff that you're pointing to that comes from past decades and even past centuries, is washed out of contemporary language. For the most part. It doesn't mean that it's been washed out of the reality. It's just washed out. It's not it's not openly talked about the way it once was. And a good example of that in more recent times is 1955 the TIA ton decision, Tia Tom versus the United States, which also relied on Johnson V McIntosh to say that the TIA people did not own their own land because of Christian discovery. Now, when I was writing about that, it occurred to me, let's see, how did this how. Did this opinion get worked on? This is like we've just talked about, opinion of the Supreme Court is going to be drafted and redrafted, and there's going to be discussion about it. And it turns out that on the very last day before the opinion was released, that Justice Stanley Reed, who is the author of the majority opinion, circulated a memo to the rest of the judges, in which he was saying, we're going to change the final sentence here, and the sentence that he's going to change says that the it's basically quoting Johnson V Macintosh that it the upon discovery by Christians and then he says, we're going to get rid of the word Christian. And I so I finally found the papers, just as reads papers, I think it's University of Kentucky they're at. Anyway, it turns out that multiple drafts of this opinion are available in his papers, and you can see not just the changes were made, but you see handwritten little scribbles in the margins where one judge or another, like around the Christian one,

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one scribbled says, yes, the US is a Christian nation, and another handwriting has scribbled, what do you think this? You can just say this and get away with it, or words to that effect. So obviously, they were all arguing with each other on the court about whether they were going to use the word Christian, even though the word Christian is in Johnson, Reed, McIntosh, multiple times. Were they going to acknowledge that in 1955 and ultimately Reed decided, no, we're not going to acknowledge it. Now that, in itself, demonstrates the way in which the deeper knowledge that you were talking about, the deeper understanding of what do these words mean, gets erased. It gets masked. They didn't say Johnson was wrong. They just said, we're not going to talk about what Johnson really said, because we don't want to get rid of Johnson because that's the basis of our power of domination, and we're just not going to admit how it was justified at that time. And so what I found out when I did some statistical research is that the TIA Tom case, Justice Reed and that little memo, they actually did a little bit of a laundromat job on Johnson V McIntosh, because it was getting increasingly embarrassing to cite that case when you actually had to say what it decided. And so Tia Tan says you don't have to say what it actually decided, so we're not going to say it. And from that time on, Johnson V Macintosh has actually been cited much more frequently since 1955 than it was in the 100 and some years between 1823 and 1955 they gave new life to Johnson V McIntosh by masking the what the case actually decided, and that masking maybe we can go past this, this first page here, but the masking, we've already talked about, how it's masked in the quote from Johnson, but that first line management of Indian lands that's masking the whole thing right there. It's a deep masking of what's going on. And do you want to say something more about that? Because I want to go wonder, yeah,

### **Steven T. Newcomb 38:23**

well, I want, I want to reverse the or reframe that statement that you may made about name something or say something and see something. Don't name something and don't see something. Yeah, so that's what's going on here, you have to be careful of what you name because if you do name it, then suddenly it becomes a focus of attention. So if you want to avoid that, you just leave it out. So you take out the word Christian and call it good, yeah. And it's also interesting that 1955 is the year I was born, and so that's, that's kind of just a funny detail, but Marshall was born in 1755 so that gives you some sense of time frame in terms of two centuries. Tell, you know, a number of us that got into this kind of investigation, like Glen Morrison, oh gosh, Robert Williams and a few others were born that same year in 1955 and just kind of a trivial point there. But it is interesting also that those of us that got into all of this to begin to investigate these types of terms and this type of language that it took that long for Native people to become deeply immersed in English and at a level of scholarship that would enable us to investigate this stuff. And I think that's significant in itself as well.

### **Peter d'Errico 40:00**

That's why I would not say it's a trivial factor. It's a very good, interesting marker that 200 years went by before this became possible to openly critique by people who were dominated by it, and I think, and even as on the court in Teton by the dominators themselves, to say, we need to be careful now, because too many people are beginning to see what's really going on here. We don't want to help them any further. They're already too far. It's like, you the slave owners didn't want slaves to learn to read. Yeah. So it's like, there, there's a danger here. When people start thinking that's the real thing. That's what in the during the whole lockdown, what was one of the major features of the lockdown was censorship. Oh, even people who were highly respected, like like Malone, who basically was one of the inventors of the gene technology, he's criticizing what they're doing. He gets de platform. You're not allowed to talk. Censorship is crucial to authoritarianism, and so what we're seeing here, this is censorship that itself is censored. Nobody is saying that the phrase national policy, governing management of Indian land has vacillated, etc. Nobody is going to see that as censorship, but it is censorship. It's not speaking the truth, right? That's what we're talking about. And so to not speak the truth means to you to obfuscate, to you, to not name, to give misleading names, to use words that people don't associate with their deep meanings. Most people are not doing etymology. They're not

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looking at the word property and saying, Well, what does property really mean? I better go look at the Latin I better go read Blackstone. People. Very few people do that. That's what you're saying. That's what's so rare. Is how many people, how few people do that, yeah. And when any of those of us who have done that see this and we start talking about it, we're we're stirring up trouble from the other side. The other side is not happy about this. The other side being the powers of domination that don't want domination to be challenged. And that's why I linked it to the lockdown, is that when too many people see what's going on, those people must be shut up. Those people cannot be allowed to talk. Because if they're allowed to talk, the naming that they are doing illuminates what's happening to many other people who have just been listening and watching. And so when we're talking about this. We're illuminating this. This is why we see something, the say something, see something happens. And what we're pointing out is that don't say it, don't see it,

### **Steven T. Newcomb 42:50**

yeah, well, and I'm reminded of a line in a movie that I saw long ago that said we don't want them thinking. We want them buying, yeah, exactly. So they want us buying into all this kind of language that not thinking about what

### **Peter d'Errico 43:08**

I'm going to just if we can, if we can, move the word when it says vacillated vacillate means, it means it's gone back and forth, at least bat something's vacillating. It's moving. If it's vacillating, it means the policy is going back and forth. It's changing from one thing to another. So it's this, we're going to see in a minute. Why I come to the conclusion this vacillated is a way of covering up the truth, which is actually the policy has been consistent. The case is actually saying we're going to apply the law that was laid down at the foundation. It says at our founding we're applying the founding rule to this case. Where's the vacillation? They're saying we're going to do the very same thing, but don't get too upset, because we're actually doing something different. No, wait a minute, how can you be doing the same thing and doing something different at the same time. So if you're reading this thing, you vacillate the right issue, you start to get a warm feeling in your heart, oh, yeah, I know that things have gotten better, cuz that's how that's going to be translated. That's they're not it's not going to be translated, oh, it's gotten worse the typical it's like the times in cases where the judges say, Oh, we have compassion for the poor Indians. Well, what kind of compassion? Even Tia ton said that we have compassion. We're going to treat them well, because they've been injured. Well, who'd they get injured by? Oh, by us. So vastly. So then we're going to move up here. They're starting up. We start with the 19th century, absolute dominion. Then what happened through treaties? Treaties means we agree. That's supposedly what treaties mean. The federal government sought to confine tribes to reservations. Well, now there's a lot packed there. A treaty is supposed to be something between equals. So the treaty in this. Case, they're saying the treaty is one side trying to confine the other one. That means domination. The treaty is a mechanism of domination. It doesn't say that, but that's what the words mean. And so then it uses the word tribes. It doesn't say the people, the peoples who are already living on the land when the dominators got here. So if you read that sentence and translate it in an accurate way, knowing what words mean, we say that through treaties, meaning it's that's already a misnomer. If treaties are supposed to be agreements among equals that the government sought to confine to dominate the tribes. It's already given them a name. It doesn't say that these were that the newcomers, who are claiming they own everything are going to squeeze the people already here on the reservation. It doesn't say that, but that's what it means when you translate it. So they say that's the beginning. So near the end of the century, they passed the Indian Allotment Act to extinguish tribal sovereignty. Well, is that a change? Was that a vacillation? No, it sounds like that. They doubled down. And because, why did they double down? Because the tribes were not willing to be confined. They weren't willing to be done. Okay, we're just going to get rid of you all together. There aren't any tribes anymore. We're going to extinguish you all right? Oh, wow. So then he's got some other cases and the general lot. And what was it? One goal was to assimilate Indians into Anglo American culture. And notice mcgurvey,

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Oklahoma. He's got a 2020, case there. So now 200 years of supposedly vacillating policy, which is actually never changed. And McGirt is again cited open Indian lands to white settlement. So what this is, what blows my mind is that he can list, I would call this a litany of crimes. He's listening the crimes of domination, and they're very consistent, one with the other. There's been no change. So how does that get to be called vacillation? Why doesn't the opening paragraph say the national policy for dominating the original peoples has never changed? That's actually what he's his real his, I say his is actually three judges. What they're actually saying. We're going to we're going to quote the original case, Johnson V McIntosh, and we're not going to deviate from that. There's no vaccination, no.

### **Steven T. Newcomb 47:31**

It's interesting to go back up to the word founding and notice the capital F, yes, yes. Confounding, yeah. So there's a significance to why he put a capital or the three judges put a capital F on there. And then also, what's weird is Johnson versus McIntosh was issued 35 years. 3536 years after the founding of the United States, if you want to, if you want to consider, I mean, depends on how you look at the time frame, but if you just go with the adoption of the current constitution, which will be 1789 but was drafted in 1787 so how is something that came 35 years later? Right? Three and a half decades later, part of the founding isn't that interesting, yes, yeah. So they're playing fast and loose with history and with detail, and it's, it's just all a big obfuscation, you know? Yes,

### **Peter d'Errico 48:36**

in fact, talking about founding in Johnson, it took 35 years before this mad scramble for land speculation, which was what the whole in colonial invasion was all about, the land grants, the charters, all of the rest of that was all about acquiring land to dominate, to become like feudal lords in this new land and that. Say, if you say, Well, that was the founding. There were a lot of loose ends left over after they made the Constitution among themselves. There were still loose ends. One of the major loose ends was, what about the land? What about this thing called Title? We have people here. In fact, in the Johnson case, the particular people to Bianca Shaw, they're out in the middle of the continent. So then you say, Well, wait a minute, the colonies don't have control over that. Do they? How could they have control over that? They never even been there. So you say, well, we don't have to have been there. We don't really need to worry about that, because we have a principle here. The principle is we already own it. We own it because we touch the shore of the continent, as the first Christians to touch the shore of the continent. And so the it was a major loose thread left over after they said, Well, here's the here's what a state is, here's what the judiciary is, here's what the executive. And they got that all written out in the Constitution, and the only thing that referred to the so called Indians was, well, if there's commerce, it gets to be the federal government that gets to control that. The states don't get to control that. Now that is that is it in the Constitution, it doesn't say anything about title of land. The major piece only got resolved in 1823, in a in a case that we're talking about now, Johnson B Macintosh. And as far as the commerce business goes, we don't not going to go into it today. We can go into it at another point, perhaps. But that commerce, commerce with to regulate commerce with that for the last few decades has been treated by the courts, and actually by a whole lot of lawyers and legal scholars who just sort of fall in with the program here, they say, Oh yeah, that's what gives the plenary power. That's what gives the ultimate dominion of the United States its constitutional basis. Now, that's a distortion of plain English. We want to talk about language and the meaning of words. To say, regulate power, sorry, to regulate commerce with how does that convert to have plenary power over two different sets of words, two completely different concepts, and that goes by as if, oh, geez, I don't know. Don't ask me that hard question.

### **Steven T. Newcomb 51:27**

Let's go to the first footnote in the article,

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**Peter d'Errico** 51:32

in the case here,

**Steven T. Newcomb** 51:33

yeah, yeah. Just go to the top so people can see that. Yeah. Okay. Indian footnote one, right?

**Peter d'Errico** 51:44

Subtitle, yes.

**Steven T. Newcomb** 51:45

Okay, so then go down to footnote one. We kind of already touched on this, but I just think it's fascinating. Now that we've discussed this, this massive framework of domination, they're worried about a particular preference of of a terminology that maybe Indian is disrespectful within a completely disrespectful system of dominance,

**Peter d'Errico** 52:09

exactly. And what's absurd, I'm going to zoom. We're going to come back to that, but I'm going to zoom to the the guy who concurs, oh, he's concurrent. He's agreeing. He says, I agree with their well reasoned legal analysis. Well, you and I have already torn apart the well reasoned legal analysis, and he joins it nearly in full. Now, what does he disagree with? I respectfully decline to use the term Indian. So he's saying, Yeah, we got, I got no problem with claiming that we have ultimate dominion. We own the land, and we got it by discovery, and we sought to confine them, and we've just made, tried to assemble. We've extinguished. I got no problem with any of that, but geez, guys, can't you be more polite, which also, you know, it's mind blowing. How much of the political world, social media world, popular thinking, is all concerned with that superficiality, that total superficiality. And I'm thinking, you so it's it's disapproved of. Now, if you use the word Indian, of course, a lot of so called, you know Native Americans that call themselves Indians. You know that? I know that where it's a very common thing, right? But, yeah, you so called polite discourse. White people, at least, are not supposed to say that. Alright, they're supposed to say Native American, as if that phrase is the most crucial thing in the world, not the domination status. Just what are you calling the dominated group? So I was thinking, it's prohibited. Well, put it the other way, it's required to use native american in polite society in America, but federal Indian law our How is it? It's probably impossible to change the name of that field of law to say federal Native American law, because as soon as you do that, you're saying, wait a minute, federal Native American law. Does that even compute? Can you make sense of that? That there's a whole body of law that has to do with Native Americans, it's different from how are they different? And as soon as you start asking how they're different, you're going to start unraveling the puzzle, saying, wait a minute, they're different because they were here first. But then, if they were here first, how did they get dominated? And if you start pulling apart that, pretty soon, you're going to have the whole thing is just going to be a pile of tangled yarn on the floor because it's not going to hold together. It's not going to make sense. You say, Well, if they were Native Americans, how could they be Americans? Before America was even named, they were being called Indians by these explorers, so called these invaders. How did they get to be Native Americans when there wasn't any America? It so the whole thing would fall apart if you tried to make that change at its most crucial place, which is in the law of domination. So you can have a polite conversation in which you're not supposed to say Indian, but if you want to have a technical legal conversation, you have to use the word Indian.

**Steven T. Newcomb** 55:20

Yeah, before we we're coming up on the top of the hour, okay, but I wanted to make one additional key point, if you go up to the top, yeah, everything that we've discussed so far, one of the things that we have not put into focus by not naming it is the original free existence of these people being called

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Indians of the nations and peoples, and that's what I find so astounding, is that when you jump into this morass of what's called federal Indian law and all the concepts and ideas and words and all these things, the what they're attempting to do is avoid an acknowledgement of the original free existence of the native nations, and the contrast between that free existence and the system of domination being brought in through the use of language and lethal behavior and all the rest of it to establish a system of domination, to strip those native nations and peoples of their original free existence, and then call the outcome justice.

### **Peter d'Errico 56:30**

Wow, that's amazing. That is so concise. And just to stay, we're going to have to come to a close here. But just to, I want to just kind of riff on what you just is, how, what if it says national policy for dominating the originally free peoples and their lands? You say, What? Wait a minute. What are we saying here? The United States asserted title to these lands of the originally free people, and that the originally free people, they get to stay here. They have the occupancy but, but they don't own it anymore. And then, if we follow the policy, we're going to try to confine the original people to reservations, and we're going to try to extinguish the legal existence, the political existence, whatever you want to call it, of these

### **Steven T. Newcomb 57:26**

what? That's where the free existence is extinguished tribal sovereignty, that's the closest they come to acknowledging the original free existence of those peoples. And what does Marshall say 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. So how in the heck does a thing called discovery, which is not a human being, doesn't have any any body, human body, or anything by me, by means of which it could hand off or give something to someone. It is illogical on its face, but nobody tends to go into it in that so

### **Peter d'Errico 58:11**

extinguish tribal sovereignty, given what you just said, means to extinguish the free existence. Yes, that's actually what it is to extinguish the free existence and assimilate the originally free people into the Anglo American culture. And you can say in parentheses, of domination.

### **Steven T. Newcomb 58:30**

And lastly, the intention to destroy an entire people in whole or in part, is the definition of genocide. So this is actually an implicit acknowledgement of the genocidal process to strip a people of their free existence and assimilate the individuals within those societies into the larger society of domination.

### **Peter d'Errico 58:53**

And one last thing I want to say McGirt case, which is mentioned here in 2020 the court in McGurk V Oklahoma goes through the whole survey of what the United States government is arguing in that case, and the United States government openly acknowledges the number of times that it tried to extinguish the Creek Nation, and that is like A confession of attempted genocide.

### **Steven T. Newcomb 59:20**

Well, let's go a little bit over so that you can explain if you, if you're willing to do it, to explain how you followed up on that one reference decision to sovereignty of United States.

### **Peter d'Errico 59:34**

Okay, that'll be a good place to end, because it demonstrates the McGirt case demonstrates and the opinion was written by Gorsuch, who is supposedly a friend of the Indians. And so he's obviously

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embarrassed. He knows that the cat is getting out of the bag, so to speak, and He can definitely not he's he's got to talk about the Johnson principle. Somehow. How is he going to do this? So he cites a different case, lone wolf. Lone wolf is the case that translated Johnson's ultimate domain into the phrase plenary power. So now he doesn't have to talk about Christian discovery. He talks about plenary power, but he cites lone wolf. And the only way lone wolf makes sense is through its link to Johnson V Macintosh. But McGirt hides that by not mentioning it, doesn't even quote lone wolf. It doesn't acknowledge that lone wolf quote Johnson. So then he says, In addition, and he mentions what he called a treatise, a legal treatise, all he does is mention it and give the name of it. He doesn't quote from it either. So I got curious. I'm saying, well, he mentions lone lone wolf, but doesn't quote it. What is the what is he not quoting in this treatise? So I dig through it. I have to find a particular edition that he was referring to, which, luckily, with the amount of material that's in archives online, I find it and I find it. It's a statement that says when the Christians arrive, they got title. So McGirt relies on this fundamental doctrine of domination and does its best to totally cover it up. Well, let's

### **Steven T. Newcomb 1:01:15**

make that more specific by saying that Justice Gorsuch did that because he's the one doing the drafting, right, yeah, okay. And, and as I recall the exact language from that treatise from about 1864 or something, whatever it was, the phrase was the Christian nations of Europe, yeah. That goes right back to this older, antiquated, some people might consider it antiquated terminology of Christian nations. But here, Gorsuch must have read it if he's referencing it, and yet he's obfuscating it by not naming it, because if you name it, you'll see it, you

### **Peter d'Errico 1:01:59**

know. So here it is. I can just give it to you. I'm Emery Washburn, 1868 treatise on the American law of real property. Real property means property. There you go, land. Okay? And what he did not quote, he just mentioned that book. In that book, it says, The Christian nations that planted colonies recognize no season. That's an old common law word for Title ownership of lands, recognize No Season of lands on the part of Indian. Dwellers, wow. Dwellers, well, not they're not even occupants. Occupants, yeah. So that's all in there. So it seems to me that the jig is close to being up. We already know that Justice Thomas, Clarence Thomas, has already said twice, in in opinions, in cases, that there's no basis for the US claiming plenary power. And people want don't want to listen to that because they Oh, Clarence Thomas, he's a conservative. We as, but he's the only judge who's ever said completely without any ambiguity. There is no basis for plenary power. All right, so whatever else he may say, because he says, I don't really know what Indian sovereignty means, and we should investigate that. Gorsuch has not questioned plenary power in McGirt. He's relied on it, and yet everybody applauds that clients, because, oh, he's liberal. He made that wonderful opening statement at the end of the Trail of Tears, tears, there was a promise. Well, what was the promise? The promise was, we're never going to give up trying to extinguish you. I mean, that's really what the promise is. And so he's to say, Oh, we're not trying to extinguish you anymore. But the only reason we have any power at all, in this case, is because of our ultimate dominion.

### **Steven T. Newcomb 1:03:55**

Maybe a place to leave it for. Now, leave it there. Steve, what a great conversation.

### **Peter d'Errico 1:04:00**

I'll see how this comes out, and, you know, we'll see it, and if it goes up as a post, I'm going to attach this so people can actually read this whole

### **Steven T. Newcomb 1:04:10**

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Oh, yeah, it's great. This is what a terrific way to focus on on the big picture, by using this ruling so recently as a portal into that, yeah, into that investigation. So, all right. Thanks so much. You.