

Bizindan Miinawa (Listen Again)

Matthew L.M. Fletcher*

Listen one more time.¹

Waabanong — The East — Vision — Infancy

Are any United States Supreme Court cases real?

*Johnson v. McIntosh*² was fake as John Wayne's teeth.³ That one was a property dispute, remember? Two wealthy, privileged, and powerful white people squared off over thousands of acres of land acquired from Indigenous nations who called the vast valley of Eagle River home.⁴ On one side, you had a former United States Supreme Court justice; on the other, you had a wealthy political benefactor/beneficiary — imagine if a case called *Stephen Breyer v. Harlan Crow* about Indian land ownership was pending in the Roberts Court's 2023 Term. No tribal nations or Indigenous peoples to be seen or heard from, or in more modern practice were not allowed to participate.⁵ Both attorneys were secretly paid for by the same company⁶ — imagine

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¹ Cf. Matthew L.M. Fletcher, Listen, 3 Mich. J. Race & L. 523 (1998).

² 21 U.S. 543 (1823).

³ Joanna Hearn, John Wayne's Teeth: Speech, Sound and Representation in "Smoke Signals" and "Imagining Indians", 64:3/4 Western Folklore 189, 197 (2005).

⁴ Or Ohi:yo, or Pelewa Thiipi, or whatever Thomas Jefferson thought — we could call it American Empire River, but then what would we call the Mississippi or Colorado or Missouri or Rio Grande?

⁵ Cf. *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1823 (2023) (Gorsuch, J., dissenting) (noting the Nation was denied leave to intervene in the key water rights case that affected their interests).

⁶ Lindsay G. Robertson, Conquest By Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands 53-58 (2005) (detailing aspects of the collusion between the parties in *Johnson v. McIntosh*).

if Stephen Breyer's attorney (say, Neal Kaytal) was secretly retained by the Trammel Crow Company (or even better, by Club For Growth, his political action committee) to oppose Harlan Crow's attorney, who would probably be Paul Clement or Ty Cobb. And of course, the property claims at issue barely overlapped, if at all, thanks to stipulations of the parties at the trial level that formed the basis of the factual dispute. It was a sham case.⁷

When I was a law student, I read *Johnson v. McIntosh* for my Property class in January 1995. I didn't understand any of it. The instructor asserted, in my recollection, that the case represented the original basis for all real estate in the United States. No one disagreed with him, I took him at his word. Our discussion of *Johnson* was no discussion at all — everyone in the room knew nothing about Indians would ever appear on the final exam in that class or any other class in law school (presumably except the Indian law class), and years later we would learn it would not appear on the bar exam, either. Why talk about something irrelevant? It was a relief to me, the instructor, and probably everyone else in the class when we jumped to the case about the fox;⁸ but then again, who hunts foxes anymore? Weird.

We didn't talk much about Indians in law school at all. I didn't take the Indian law class offered by the law school, either, so I wasn't exposed to much formal Indian law instruction. At the time, I thought I might become a capital defender or a refugee and asylum attorney or even, to the chagrin of every tribal leader around, an environmental lawyer. I was a non-conformist. All of the rest of the law students who thought they knew me assumed I would just become an Indian lawyer. I hate it when people make assumptions about me. I knew Indian law was there for me if I wanted it. Guess it was a nice feeling, but I didn't want Indian law at first. I also

⁷ Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. S. Ct. Hist. 379, 382 (2013).

⁸ *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805). See also Bethany R. Berger, *It's Not about the Fox: The Untold History of Pierson v. Post*, 55 Duke L.J. 1089 (2005).

internalized my privilege, a privilege that most Native law students don't possess, the privilege of not needing to immediately get a job and make money to support my extended family (Miigwetch to Richard, Junior, and the Michigan Indian Tuition Waiver!). I did join the *Michigan Journal of Race & Law*, working as the only tribal member on the board (and, as far as I can tell, the entire law school). I began drafting a note on an Indian tribe in New Mexico, whose chairman was attempting to extort the federal government by entertaining proposals to allow low-level radioactive waste to be permanently stored on their reservation.⁹ Years later, Sam Deloria would confirm for me that what I was reading in 1996 wasn't "radioactive colonialism,"¹⁰ but an aggressive ploy by a powerful tribal leader to force the federal government to allocate more resources to his tribal nation. In other words, a sham. It was badass, but it was a sham.¹¹ I guess it was my first direct evidence that what legal scholars read and write about on paper usually is worlds apart from the lived reality of Indian people.

I didn't see much Indian law in law school until the very end of my third year, when some of my friends insisted I go to one of the public scholarly talks at the law school. It was about *Johnson v. McIntosh*! Kinda! It was in a big classroom in Hutchins Hall where I had criminal procedure and secured transactions classes (but not property). There were maybe five or six people in the room, sitting up close, near the speaker. I'm old as shit now and memory fades,

⁹ And why? There were already at least *three* law review articles that trawled the same story. See Nancy B. Collins And Andrea Hall, Nuclear Waste in Indian Country: A Paradoxical Trade, 12 Law & Ineq. 267 (1994); Jon D. Erickson, Duane Chapman, and Hon. Ron Eagleye Johnny, Monitored Retrievable Storage of Spent Nuclear Fuel in Indian Country: Liability, Sovereignty, and Socioeconomics, 19 Am. Indian L. Rev. 73 (1994); Ronald E. Johnny Noah Sacks, The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics, 36 Nat. Resources J. 641 (1996).

¹⁰ Winona LaDuke and Ward Churchill, Native America: The Political Economy of Radioactive Colonialism, 13:3 J. Ethnic Stud. 107 (1985).

¹¹ By the way, I'm super glad I never published that paper. I had never even figured out how to use the footnotes function of Word. I was handwriting footnotes into the draft.

but I'm pretty sure it was a workshop for a law and economics paper that explained why colonialism was efficient, or something like that.¹² I don't remember much about the talk, except that an audience member said something about casinos. I think someone said something about smallpox, too, that the whole smallpox blankets thing was a lie, but maybe I'm falsely remembering that (that smallpox cannot be transmitted through blankets is an increasingly common claim of scholars, mostly those who claim to have a friend who is a doctor, but funny how no one volunteers to prove it by smearing bloody scabs on their person). I came away from that talk, which me and my friends left before it was over (I know I wanted *not* to be recognized by any of the faculty present), thinking that Indian law held little solemnity for legal scholars (except the guy who was presenting the paper). The lack of attendance. The casual racism. Legal scholarship as a smallpox blanket.¹³ Oof.

Zhaawanong — The South — Time — Childhood

For a while I represented an Indian tribe that was in a dispute with a non-Indian lady who owned property on the tribe's reservation, known colloquially as the Hoopa Square.¹⁴ The story goes like this — the white lady bought Hoopa reservation land, asserting that she wanted to use the land to build herself a retirement home. This was an allotment, a kind of property interest common in Indian law. At one time, the land was aboriginal title, or Indian title, or original title,

¹² Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065 (2000). "M'Intosh" is just wrong. Brian Kalt explained to me years later that the apostrophe in "M'Intosh" is supposed to be a very small "C" in some typography used by an ancient press and somehow became canonized as an apostrophe in legal circles.

¹³ Cf. Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. Pa. J. Const. L. 405 (2002).

¹⁴ See generally Fletcher, *Ghost Road*, *supra* note __, at 137-43; Jennifer Gingrich, *Bugenig v. Hoopa Valley Tribe: The Power Source of a Tribe Seeking to Achieve World Renewal and the Protection of Its Natural and Cultural Resources*, 33 *Envtl. L.* 215 (2003).

or whatever the hell you want to call it. When the colonizers came (Spain was probably the first in that region of the country) they claimed it as their's. We know from *Johnson v. McIntosh* that the colonizers asserted discoverer's title, or sovereign title. What's that? Not much, if you think about it. It basically means Spain had a superior claim to act as a colonizer over all other possible European colonizers. Hupa people at the time of this legal maneuver would not have even known about their new "masters," perhaps for years, decades, even centuries. Spain and its religious partners colonized much of what is now California for a very long time, but barely reached the northern forests where the Hupa people resided. Eventually, the Americans kicked out the other colonizers and stepped in their shoes, claiming sovereign title. But the Americans went further and claimed more than just an exclusive right to colonize. They claimed total ownership.

Roberta Bugenig acted like a spiritual successor to the colonizer. The tribe had enacted rules, with federal, state, and local government support and acquiescence, on land use within the Hoopa Square in order to protect sacred sites. Bugenig refused to respect those rules. My recollection of the voluminous record showed she wanted to clearcut a portion of her land, both to raise money by selling the timber to build a retirement home and to make space for that home. At least, that was her claim, and it served as the factual underpinning of the case when it reached tribal and federal courts. As is the case with so many Indian law cases as they reach the upper appellate levels, those facts were not the whole story. Bugenig, I was told by several Hoopa people, clearcut the entire plot of her land, all 40 acres (or maybe it was some other large amount of acreage).¹⁵ A prominent conservative advocacy organization called the Pacific Legal Foundation chose to represent Bugenig. PLF is just like the United States Department of Justice

¹⁵ A few years later, Bugenig would be accused of animal abuse when 41 dogs were found dead or dying of neglect, though no criminal charges were filed. Top Ten Stories of 2006, North Coast Journal, Dec. 21, 2006, <https://www.northcoastjournal.com/122106/cover1221.html>. Sounds like she was a fun lady.

when the United States decides to oppose tribal interests — unlimited resources and receptive ears in the federal judiciary. PLF-type entities are even worse than the DOJ in that they possess an unlimited willingness to make up facts. She had it good.

No, I didn't get to argue the Bugenig case at any stage of the proceedings, but it was exactly the kind of case I wanted to lead, the reason I went to law school. As in-house counsel, a recent graduate of law school, and a newbie to the Hoopa tribal nation, the case wasn't in my portfolio. Even though most of the time I worked for Hoopa I was the tribe's lead attorney, outside counsel barely even talked to me about it. By the time I began work at Hoopa, the case was years old, actually nearing completion it turns out. Ultimately, after I left Hoopa to work elsewhere, the tribe prevailed.¹⁶

Roberta Bugenig died in 2021.¹⁷ She was 80. Her family asked that mourners plant a tree in her name. Man. You just can't make this shit up.

Ningaabii'an — The West — Knowledge — Adulthood

Remember I wanted to be the guy who represented a tribe, took a case to the Supreme Court, and won that case in dramatic fashion. I was definitely okay with dispensing with the drama if necessary, but I was definitely okay with drama, too. I even had a tribe in mind, the Gun Lake Tribe (formally, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians). Hey, Sylvester Yellow Calf in James Welch's *Indian Lawyer* got a high profile treaty rights case and he wasn't even a very good lawyer. I could be that guy.

¹⁶ Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001), cert. denied, 535 U.S. 927 (2002).

¹⁷ Roberta C. Bugenig, Tribute Archive, <https://www.tributearchive.com/obituaries/22674070/roberta-c-bugenig>.

Gun Lake Tribe was located in Bradley, near Wayland, Michigan, the place I grew up. In the 1990s, they were working toward federal recognition. My mother June was sitting on the tribal council. For a decade or so, right there on the Bradley exit of U.S. 131, there was a wooden sign demanding a Gun Lake “CasiNow.” There were competing signs insisting on “CasiNo.” I remember that, long before that time, there was a little adventure park for kids there, a few rides, some elephant ears, and a little kiddie train I could ride. We drove by that parcel somewhat regularly, on our way to Aunt Gladys and Uncle Lou’s place or Cousin Fran’s place in Hopkins. I examined that parcel every time we passed, seeing the empty field, empty of everything except the narrow grade train tracks.

The feds acknowledged Gun Lake in 1999,¹⁸ but it took another bunch of years for the Department of the Interior to acquire land in trust for the tribe’s gaming purposes.¹⁹ Once that happened, the “CasiNo” people materialized as a sham non-profit called Michigan Gambling Opposition, or MichGo. This entity, represented by the same crew of lawyers that represented similar anti-Michigan Potawatomi gaming interests (Taxpayers of Michigan Against Casinos, or TOMAC,²⁰ and Citizens Exposing Truth About Casinos, or CETAC²¹), brought a cookie-cutter complaint against the trust land acquisition. Who was paying for all these fancy lawyers? In any event, they lost.²² The Secretary took title to the trust land for Gun Lake. CasiNow, amirite? Yes, sorta. The tribe broke ground and started gaming.

Meanwhile, the Supreme Court issued an opinion in *Carciere v. Salazar* that created a new legal theory for the anti-gaming people to use arising from the definition of “Indian” in the

¹⁸ 63 Fed.Reg. 56936 (1998).

¹⁹ 70 Fed.Reg. 25596 (2005).

²⁰ *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852 (D.C.Cir. 2006).

²¹ *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007).

²² *Michigan Gambling Opposition v. Norton*, 525 F.3d 23 (D.C. Cir. 2008).

Indian Reorganization Act of 1934.²³ Snooze. It was too late for MichGo to use that theory — they lost on other grounds, equally boring and esoteric. But right before the Secretary formally took title to Gun Lake’s trust lands, David Patchak, a dude claiming to be a MichGo “member” (or was he a “citizen”?) sued under that theory (same lawyers as before), just barely getting in under the deadline. What deadline, you ask? You see, the Department of the Interior gave people 30 days from the time of the decision to acquire land in trust to challenge the decision,²⁴ the deadline within which MichGo sued. Once the 30 days passed and all the lawsuits were concluded, the Secretary would take the land into trust and, under the Quiet Title Act, the federal government’s immunity from suit was raised and barred any other challenges.²⁵ Years had passed since the Secretary decided to take Gun Lake’s land into trust, so Patchak’s suit was ostensibly dead on arrival. The Secretary took title and everyone filed motions to dismiss Patchak’s late lawsuit.

Most Indian lawyers love trust land. The notion of trust land kinda sorta comes from the same thinking that gave us *Johnson v. McIntosh*. Ouch, right? Under the theory of the Doctrine of Discovery, one sovereign and only one sovereign can serve as the colonizer. That’s why the First Congress enacted the Non-Intercourse Act in 1790.²⁶ The Non-Intercourse Act prohibits anyone from buying or selling restricted Indian lands without the colonizer’s approval. That used to be really bad, since it deprived tribal nations of access to the land market (and enabled the incredibly illegal land speculation that dominated the early decades of the United States’ economy and politics²⁷). Now tribal nations expend enormous effort and resources to buy land

²³ 555 U.S. 379 (2009).

²⁴ 25 CFR § 151.12(b) (2011), cited in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 213 (2012).

²⁵ 28 U.S.C. § 2409a(a).

²⁶ 25 U.S.C. § 177.

²⁷ Riley, *supra* note ___, at 371.

back, only to turn ownership over to the federal government. Why? Because trust land is reservation land, the “homeland” of tribal sovereignty, where state regulation and taxing authority all but ends.²⁸ Trust land is a modern day version of a real tribal homeland. But trust land comes with baggage, most notably federal environmental regulations and the inability to collateralize that land.²⁹ A bunch of economically-minded tribal leaders and Indian lawyers complain a lot about federal superintendency over trust lands, but who really would want to turn their homeland into a coal mine or a casino? Wouldn’t we much rather do those things *outside* of the homeland?

In the end, it wasn’t me that guided the Gun Lake Tribe into the Supreme Court, it was my brother Zeke Fletcher. But the tribe lost. Gun Lake ran into a buzzsaw at the Court, where half of the justices were hostile to tribal interests generally and the other half were hostile to sovereign immunity in general. As a consequence of that buzzsaw, in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak* the Court held that the Quiet Title Act’s federal sovereign immunity bar was irrelevant in light of the Administrative Procedures Act, which gave *six years* to people like Patchak to challenge a federal agency’s final decision, in that case, the Interior Department’s acquisition of trust lands for Indians and tribes.³⁰ Oof. Gun Lake already waited years for federal acknowledgement, more years for the trust land decision, and more years for the courts to confirm the decision. After *Patchak*, tribes like Gun Lake might have to wait an even longer period of time to finally complete the trust acquisition process.

²⁸ See generally Restatement of the Law of American Indians § 3, comments b and f.

²⁹ E.g., Randall Akee, Checkers and Coase, 52 J. L. Econ. 395, 398-99 (2009) (detailing obstacles to tribal economic activity on trust lands). Later on, Professor Akee wrote that trust land was no worse than fee land for economic development purposes. Randall Akee and Miriam Jorgensen, Property Institutions and Business Investment on American Indian Reservations, 46 Regional Science and Urban Economics 116, 123 (2014).

³⁰ 567 U.S. 209 (2012).

Very frustrating in my mind was the Court's elevation of David Patchak to a party with Article III standing. Patchak complained that the "aesthetic" of his community would change with the introduction of an Indian casino,³¹ which is just a nice way of saying he hated Indians and didn't want to notice that Indians were running around and operating successful businesses nearby.³² He wanted Indians to be quiet, subservient, and basically invisible. In most instances, the federal judiciary doesn't take annoyance with "aesthetics" as a cognizable legal harm. But when Indians get all uppity, the Court gets receptive to people like Patchak, and now those people have standing to take legal action. Imagine Indian people complaining about aesthetics to a federal court that non-Indians who were strip mining lands with a federal permit: Motion to dismiss GRANTED.

Gun Lake Tribe didn't stand still after losing. Zeke drafted a short bill to confirm the Secretary's trust land acquisition and to strip the federal courts of jurisdiction to review the decision. Zeke and Gun Lake leaders quietly lobbied key members of Congress. Congress actually passed it.³³ Patchak, with new lawyers this time (again, who was paying for all these lawyers?), challenged the constitutionality of the new law. Once again, Gun Lake Tribe was dragged to the Supreme Court. This time, the buzzsaw (a much duller one, I guess) went in favor of the tribe. On one hand, there were a couple justices who actually favored tribal interests, and on the other hand, there were a couple justices who also favored the power of Congress to strip federal courts of jurisdiction in some types of cases.³⁴ They didn't coalesce into a full majority opinion, but the majority of the Court went in favor of the tribe in *Patchak v. Zinke*.³⁵

³¹ Id. at 224-25.

³² Now, I guess we can say hating Indians give one legal standing.

³³ Gun Lake Trust Land Reaffirmation Act, Pub.L. 113-179, 128 Stat. 1913.

³⁴ It's super disturbing to consider about why these judges think it's a good thing Congress can strip federal courts of the power to decide certain cases, so don't do it when you're thinking of *Patchak II*.

³⁵ 138 S. Ct. 897 (2018).

My brother didn't argue those cases (Patricia Millett, now a D.C. Circuit judge, and Pratik Shah did, respectively), but he effectively masterminded them, especially the second.³⁶ So the 1997 law student version of Matthew can live vicariously through his brother Zeke. Not bad. Not bad at all.

Patchak died in 2020 and his family, like Roberta Bugenig's family, wanted people to plant a tree in his name.³⁷

Kewadin — The North — Movement — Old Age

Once in a while, now that I am a law professor with a reputation as someone willing to offer an opinion on just about anything, people ask me if it means anything that the Pope repudiated the Doctrine of Discovery.³⁸ After all, these people point out, some of the Supreme Court judges are Catholic. It doesn't mean anything. If it meant anything, then there would be riots in the streets of America, because then they'd have to give the land back to the Indians. So no. It doesn't mean anything.

But in a lot of very ways, the Doctrine of Discovery itself doesn't matter, either.

Johnson v. McIntosh, I have come to understand, is a bit of a rite of passage for Indian lawyers. You get the case in undergrad (if you take a class taught by David Wilkins or Keith Richotte), then the Pre-Law Summer Institute (if you go), then Property class in 1L year (usually, but less and less often as law teachers move away from using the class and some law schools no longer require Property in the first year curriculum), and then you get it again in Federal Indian

³⁶ Zeke told me later that it was definitely awkward to hear Supreme Court judges closely examine and even criticize the text of a law that he wrote.

³⁷ David Patchak, Grand Rapids Cremation Services, <https://www.tributearchive.com/obituaries/18877177/david-patchak/wall>.

³⁸ Elisabetta Povoleno, Vatican Repudiates 'Doctrine of Discovery,' Used as Justification for Colonization, N.Y. Times, Mar. 30, 2023.

Law. Then when you become a law teacher, you're virtually obligated to write something about it. I know I did.³⁹ I guess it's important legal history, needed to contextualize the Non-Intercourse Act, federal supremacy in Indian affairs, and different types of property interests important to Indian law. Thanks to the work of Rob Williams, we know also that the Doctrine of Discovery is a text about religion — its impact on Indian law and policy and America itself.⁴⁰

Still, virtually all the aboriginal title is gone. All of the land has been processed through the property machine of the United States: original Indian title extinguished by American purchase,⁴¹ then converted into federal public lands or Indian country, which includes at minimum the reservation lands owned or controlled by tribes or individual Indians and the federal trust lands held for the benefit of tribes or Indians. The last big original title case was *Tee-Hit-Ton Indians v. United States*⁴² — and even that was one was just about the valuation of Indian title in Alaska.⁴³ There are still some aboriginal title cases in the lower courts,⁴⁴ but those aren't really about land ownership. They're about establishing rights to use or access lands, in other words, the right of occupancy.⁴⁵ Litigators rarely cite *Johnson v. McIntosh* or litigate the issues addressed in that case. It's all well settled law.

³⁹ Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. Rev. 627, 630-39 (2004).

⁴⁰ See generally Robert A. Williams, Jr., *The American Indian in Western Legal Thought: Discourses of Conquest* (1990) (surveying the historical and religious basis for the Doctrine of Discovery and *Johnson v. McIntosh*).

⁴¹ Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 35 (1957).

⁴² 348 U.S. 272 (1955).

⁴³ The Court held it was zero, Congress said it was \$990 Million plus many millions more in land exchanges. Mitchell Forbes, *Beyond Indian Country: The Sovereign Powers of Alaska Tribes Without Reservations*, 40 Alaska L. Rev. 171, 172 (2023). Take that Justice Reed. Kent McNeil, *How the New Deal Became a Raw Deal for Indian Nations: Justice Stanley Reed and the Tee-Hit-Ton Decision on Indian Title*, 44 Am. Indian L. Rev. 1 (2019).

⁴⁴ E.g., *Pueblo of Jemez v. United States*, 63 F.4th 881, 896 (10th Cir. 2023) (“[T]he Jemez Pueblo continues to hold aboriginal title to Banco Bonito.”).

⁴⁵ E.g., *id.* at 1164 (referencing “longstanding Supreme Court precedent that the grant passed subject to the Indian’s right of occupancy absent express extinguishment”).

Most of American Indian law and policy work in the 21st century is just what Rennard Strickland said it was going to be, the bureaucracy of the administration of self-determination.⁴⁶ Tribal nations negotiate with federal, state, and local governments — and, crucially, with their own tribal citizens — for the right to self-govern their lands. And they’re getting pretty good at it, many of them. This is all good.

What about undoing the damage that *Johnson v. McIntosh* did? What about getting the land back?

There are methods that tribal nations utilize to restore their homelands, none of which are all that satisfying or dramatic. Until recent years, tribal nations had no real opportunity to get land back. This is all kind of the Fifth Amendment’s fault because it established that the government can confiscate your property so long as the government paid “just compensation.”⁴⁷ There’s no land back in the Fifth Amendment. If you think about it, it’s pretty odd that the white, male, Indian killing and slave owning property owners that wrote the Fifth Amendment were okay with the American government — the successor to the English colonizer they supposedly hated — taking their lands without their consent, so long as they got paid. I guess the Wu-Tang was right about cash?⁴⁸

⁴⁶ Rennard Strickland, *Indian Law and Policy: The Historian’s Viewpoint*, 54 Wash. L. Rev. 475, 477 (1979).

⁴⁷ Const. amend. V. Think a little more about the Fifth Amendment, which reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. There are a *lot* of individual rights in there, all in one sentence. No one was teaching code drafting back in those days, it seems.

⁴⁸ Wu-Tang Clan, *C.R.E.A.M. (Cash Rules Everything About Me)*, on *Enter the Wu-Tang (36 Chambers)* (1993).

But that thinking really damns the efforts of tribal nations and individual Indians to get their land back. Think on the Black Hills controversy where the tribal nations refused the money to compensate them for the government's confiscation of land.⁴⁹ The Black Hills land claim was initially brought under the Indian Claims Commission and under their rules tribal nations were entitled to money damages only, no land.⁵⁰ In important respects, it's the same thinking that permeated *Johnson v. McIntosh*'s ratification of the Doctrine of Discovery.

Land ownership by non-whites (and non-males) was anathema to the Founding Generation. When a colonizer acquired land from a tribal nation, that transaction usually involved a cash sale or, at most, an exchange for land somewhere else the colonizer didn't care much about. Land ownership was a one-way street. The colonizer never wanted Indigenous land holdings to increase. The colonizer didn't really provide for Indigenous land acquisition until it enacted Section 5 of the Indian Reorganization Act allowing the Secretary of the Interior to acquire land for Indians or tribes in 1934.⁵¹ And even then, the government owns the land.⁵² And for most of the rest of the century, the Secretary didn't really acquire much land in trust for Indians and tribes. Now, however, depending on the political party in charge of the Executive branch of the federal government, federal acquisition of trust land for Indians and tribes⁵³ has improved. No one says it's enough, but it's a lot better. It's still a trickle compared to the mass dispossession of lands from Indigenous ownership to the colonizer's sticky fingers that happened from the Founding to the mid-20th century.

⁴⁹ *United States v. Sioux Nation*, 448 U.S. 371 (1980).

⁵⁰ David Wilkins, *Hollow Justice: A History of Indigenous Claims in the United States* 75-76 (2013).

⁵¹ 25 U.S.C. § 5108.

⁵² Yes, I know I praised trust land earlier in this narrative. I know what I'm doing.

⁵³ Well, really just tribes because what Indian has the resources to satisfy Uncle Sam's demands when it comes to trust land acquisitions?

Land back as a practical matter could be relatively easy. The United States owns a lot of land in the west. It's called federal public land.⁵⁴ Congress has plenary power over federal property.⁵⁵ Get what I'm saying about land back?⁵⁶

I once suggested years ago to a federal official who was concerned about whether Congress would appropriate the billion dollars to fund the numerous federal reserved water rights settlements in the west that the federal government could return the Black Hills. There was about \$1.3 Billion in cash held by the United States as a result of the land claim that the tribes refuse to accept.⁵⁷ The official didn't take me seriously because we both knew it would never happen. Congress eventually got around to funding the water rights settlements, ending the pressure.

All this begs the question of why the United States won't return the Black Hills. To me the obvious answer is that the colonizer cannot conceive of undoing colonization in a meaningful way. The very idea that America would give up its colonized endowment is inconceivable.

It takes some magical thinking.

Below – Anishinaabewaki (The Land)

Johnson v. McIntosh is a primer for American political philosophy. The opinion contains pretty much everything you need to know about the reasons that American government is the way it is, with its emphasis on hierarchy and destruction. Over the years, I've narrowed my focus

⁵⁴ The government used to call Indian lands “public” lands, too. Pbbbt.

⁵⁵ Const. art. IV, § 3, cl. 2.

⁵⁶ Give The Land Back?, Flash Forward podcast (Nov. 10, 2020).

⁵⁷ PBS NewsHour, Why the Sioux are Refusing \$1.3 Billion, Aug. 24, 2011, https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23.

to how the opinion characterizes Indigenous peoples as the polar opposite of American society. *Johnson* is really lousy genre fiction.

In the telling of Chief Justice Marshall, Indians are “fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest.”⁵⁸ *Johnson* also described Indigenous lands as “vacant.”⁵⁹ The *Johnson* Court worried that to leave the country in the possession of the Indigenous peoples was to “leave the country a wilderness.”⁶⁰ Huh. Anishinaabe people⁶¹ had large gardens, farms really, and relied on the Three Sisters: mandaamin (corn), mashkodesimin (bean), okosimaan (squash). Anishinaabe people also cultivated vast manoomin (wild rice) beds and processed iskgamizigan (maple sugar and syrup). Anishinaabe people also fished widely, on lakes, rivers, and streams. We also hunted and trapped in the forests (and elsewhere). Anishinaabewaki was not vacant land.

Moreover, it’s really difficult to perform all those tasks *and* engage in war all the time. If any nation was chiefly engaged in war, it was the United States. By the time of *Johnson*, American had been at war with at least one other nation in 37 out of 48 calendar years between 1775 and 1823. Yeah, some of those wars had been with tribal nations,⁶² but mostly the United States was fighting Britain, Canada, Morocco, Turkey, Algeria, Spain, and France. When Anishinaabe tribal nations fought wars, we fought (you guessed it) America.⁶³

Johnson is about American property acquisition from Indigenous peoples, but it is also a reflection of constitutes American property. In *Johnson*, the wilderness of the western lands, that

⁵⁸ *Johnson*, 21 U.S. at 590.

⁵⁹ *Id.* at 595, 596.

⁶⁰ *Johnson*, 21 U.S. at 590.

⁶¹ I’m including the tribal nations at issue in *Johnson*, Algonkian communities that were our relatives.

⁶² The United States invaded the Ohio River Valley (Little Turtle’s War, or the Northwest Indian War), Spanish Florida (the First Seminole War), and Creek territory (the Creek War, or the Red Stick War).

⁶³ Yeah, the ‘Shinobs *did* join Tecumseh in starting some shit in 1810.

is, the agriculture, hunting, and fishing territories of the Indigenous peoples, was not property. Dominion through destruction, on the hand, is American property. Deforestation. Industrialization. Wasteful and unsustainable agriculture.

I once heard that long ago a squirrel could travel from the east coast to the Mississippi River without touching the ground. Not so much anymore.

Above – Manidowaki (The Spirit World)

When Nanaboozhoo was a tiny baby who lived with his grandmother, a giant came to Anishinaabewaki.⁶⁴ The giant killed all the Anishinaabek and ate their hearts. Nokomis saved Nanaboozhoo by hiding him under a tent peg. Inspired by a dream, Nanaboozhoo and Nokomis began a long term plan to hopefully rescue the Anishinaabek or at least avenge them. Nanaboozhoo grew up, getting stronger and training for war. He and Nokomis painstakingly prepared for the Nanaboozhoo's adventure. They built a jiiman (canoe) and filled it with tools and supplies gifted by the doodemag (clans). Mukwa (bear) name (sturgeon) fat to oil the jiiman. Mukwa stomachs as storage sacks. Waawashkeski (deer) antlers for weapons. Baasiminaan (dried berries) and semaa (tobacco) for food and medicine.

When Nanaboozhoo was ready, he went on an adventure that rivaled that of the Hobbits, Harry Potter, and Ahsoka. He had to fight, outwit, and evade all of the same doodemaag that helped him at the beginning, not because of that whole crab-in-a-bucket thing, but maybe because the Anishinaabek are not supposed to exercise dominion over Anishinaabewaki. Maybe our role is to seek harmony, not revenge or death. Maybe because the doodem exist, in part, to

⁶⁴ More Adventures of Manabazoo, in Beatrice Blackwood, *Tales of the Chippewa Indians*, 40: 4 Folklore 316, 329–332 (1929).

check each other. You can't have a hero without a villain, right? Or maybe Nanaboozhoo just had to work for it.

Anyway, Nanaboozhoo killed the giant and all the Anishinaabek came back. Happy ending?

Modern tribal nations fight giants to this day. The first giant was disease, killing millions of Indigenous peoples,⁶⁵ many of them dying before ever seeing the colonizers who carried the disease. I think a lot of Indigenous people that consume dystopian literature and shows about a post-apocalyptic world are thinking about their ancestors who survived, brutalized, traumatized, and scarred by the apocalyptic pandemics brought by the colonizers. I know I do. Ever thought about what would have happened if the roles were reversed, like in *War of the Worlds*, where the invaders are the ones that die off from disease? It's inconceivable for the very few people who have thought about it. Those diseases were inevitable, they say. Tragic, but inevitable — and if you think about it, they continue, efficient. Colonizer supremacy is built in to those notions, making the counterfactual inconceivable.

Martin Cruz Smith, who is of Pueblo descent, conceived of it in the novel, *The Indians Won*, published in 1970. Smith imagined that the tribal nations left after the colonizers controlled the east and west coasts united into a massive confederacy, defeating the U.S. Army. In the story, America then becomes a donut, with the tribal nations assuming complete control over the interior of the United States. Interestingly, for a century, those tribal nations close off the borders. Indian country becomes a black box, with no American having any idea what is going on in there. Finally, in the latter half of the 20th century, tribal diplomats appear and assert that the tribal nations possess The Bomb. No one really knows if tribes are telling the truth, which is

⁶⁵ Ned Blackhawk, *The Rediscovery of American* 14 (2023).

a brilliant play by Martin Cruz Smith, driving an interesting narrative. I love the idea of the tribal nations in *The Indians Won* claiming to be nuclear powers and keeping their claim ambiguous. It mirrors the claims to sovereignty made by nations all around the world who claim to possess The Bomb. Smith's tribal nations are simply reflecting what they observe, that the world's nations who want to protect their own sovereignty and perhaps extend their sovereignty to other nations' territories acquire The Bomb to do so.

I was intrigued as a law student about the notion attributed to legal realists that property is a bundle of sticks, with each stick serving as an aspect of property. Property owners can pull out one stick from the bundle, such as the right to access a portion of their land, and rent it for a time. Or property owners can sell the whole thing. I like to remind students that the bundle of property rights sticks that Indigenous peoples possessed under the theory of the Doctrine of Discovery was substantial. It was everything any other property owner possessed except one narrow thing, the power to alienate the land to any colonizer they wished. *Johnson* stands for the proposition that tribal nations could only alienate Indian title to one colonizer and one colonizer only.

In fact, what tribal nations possessed was more than merely a bundle of sticks minus one stick. Sovereignty and property are linked, aren't they? Under American political philosophies, every person is sovereign. In the original position,⁶⁶ individuals possess a bundle of sticks that every sovereign possesses, for example, the power to exclude or the power to raise a standing army. Government cannot exist unless individuals give up sticks from that bundle, probably *most* of the sticks in a sovereign's bundle. What remains, I suppose, is property and certain negative rights (we tend to call them individual rights), that sort of thing. American citizens have given up

⁶⁶ I borrow Rawls' phrasing here but I do not mean what he means.

most of their sovereignty to a leviathan in exchange for . . . what? Rule of law. Security. Property rights. We read the United States Constitution and our state constitutions to understand what we have left. *Johnson v. McIntosh* recognized that tribal nations had given up some sticks in their bundles of sovereignty, but not nearly as many as individual American citizens gave up. This is why tribes can say they are sovereign in the 21st century!

But American political philosophy is bullshit. No one actually consents to giving up their individual sovereignty to the United States, not even when we vote or sit on juries.⁶⁷ And we can't take back our so-called consent, either — there is no real right to exit. No one can simply disagree with the government and decide to no longer pay taxes, for example, without suffering serious legal penalties that ultimately can include imprisonment. We're stuck here. There's no consent.

American political philosophy is bullshit for another reason. Humans are inherently, innately cooperative. We want to help each other, we need to help each other. American political philosophy, at bottom, demands us to accept the notion that without a sovereign there can be no law, no security, no property. If that were true, then there never would have been any civilization, anywhere, any time. If humans are not amoral, violent, and selfish, then we Americans should be asking why we “consent” to the sovereignty of the federal and state governments. Hell, why sovereignty at all?

I have my theory. American sovereignty is a cover for a series of hierarchies — racial, gender, sexual orientation, religious, economic, and so on. We accept these hierarchies — and even rage against them! — because we cannot conceive that the sovereignty that enforces those hierarchies is unnecessary. Sovereignty not only unnecessary, it's horrifically damaging.

⁶⁷ Unlike that lady in the first episode of *Jury Duty* who is excused by the judge when she says jury duty is “not for me,” I am ready to be a juror. Put me in, Coach!

Center – All Living Things

Since I first tried to read *Johnson v. McIntosh* in 1995, I've tried to learn exactly why that decision is bad. It's not like the tribal nations involved were directly injured. There weren't even any Indian people or tribal nations that were parties to the case.

I've learned that in our Aadizookaan humans were created last, not because we were the most important things in Anishinaabewaki, but because we were basically the least important things. We have a role. We have super powers. We're supposed to be the glue, to ensure that there's bizzante (harmony) and bangan (peace). We have the power to dream, the power of free will. But to say people are supreme is a laughable pretension – even the mighty United States Army is powerless against a simple thunderstorm.

Dominion and destruction may be the necessary requirements to create property under American law, but dominion and destruction are anathema to Indigenous peoples like the Anishinaabe. American political philosophy, built upon selfishness and unaccountability to Anishinaabewaki, inevitably leads to a tragedy of the commons.⁶⁸ Anishinaabe political philosophy is designed to prevent that tragedy.

I am convinced that American political philosophy and all the law designed to make that philosophy manifest is a slow-motion suicide pact.⁶⁹ Sometimes when I describe Anishinaabe political philosophy to a non-Indigenous audience, I say that we're here to save the world. Look around. Pretty much all the bad things going on in America and in the larger world can be traced to the political philosophies that most Americans fetishize. Climate change and polluted air,

⁶⁸ See generally Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243, 1244-45 (1968) (arguing that individual self-interest leads to resource over-exploitation).

⁶⁹ Let's leave aside Oppenheimer's little toy for now, see Sting, *Russians, on The Dream of the Blue Turtles* (1985), which is a much quicker suicide machine.

water, and earth is a consequence of the tragedy of the commons. Toxic politics and violent, racist policing is a consequence of the existence of a sovereign governmental head. Polluters, police unions, and others know how to exploit a hierarchy. It's simple, really. Capture the head. It doesn't even matter which political party is in power. Entire state governments can be in the pocket of the natural resources extraction industry (looking at you, Oklahoma and Alaska) or religious entities and others that want to whitewash history (Texas and Florida), for example. That doesn't happen in tribal governments.

The best part of traditional Anishinaabe political theory is the lack of a hierarchy. A tribal leader captured by outsiders for the purpose of taking action antithetical to Mino-Bimaadiziwin quickly would have become irrelevant; Anishinaabe people would simply stop listening to that leader. There's no monopoly on violence requiring submission to the disgraceful leadership. Anishinaabe people weaponized the adage (thanks Carol Gillian!) that the first thing that follows the creation of a hierarchy is an underground.

* * *

When I wrote *Listen* 25 years ago, I believed stories don't have endings. Never thought I'd come back to think about *Listen* again. Maybe I'll come back in 25 more years.

Miigwetch.

