Honoring Indian Law and Treaties, Part One

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Artist: Asdzáá Tl'ógí, "Weaver Woman" (Juanita Paltito), Navajo, 1845-1910
Image credit: Catalog number E16494-0, Smithsonian Institution
National Museum of Natural History, Department of Anthropology.
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This attempt by a Navajo weaver to weave together an image of the US flag with an image of indigenous textiles symbolizes efforts to find connections between the sovereign peoples of the Native Nations and the American people, while representing the tenuous threads that have connected separate nations.

Randy Kritkausky: Greetings, or may I say Bozho in Potawatomi, to those joining us for today's Indigenous Perspectives show. I'm Randy Kritkausky, an enrolled Potawatomi tribal member, and the host of Indigenous Perspectives. Our program today is the first in a two part series: Honoring Indian Law and Treaties.

Indigenous Perspectives originates from Vermont in the United States. Vermont is located on lands that the Abenaki people call N'dakinna. It's the unceded traditional territory of the Abenaki people, who for thousands of years have been, and continue to be, stewards of the lands found here and across the border in Québec province in Canada.

Carolyn Schmidt: And I'm Carolyn Schmidt, Randy's co-host. We begin by acknowledging where we come from, both culturally and geographically, as this program, Indigenous Perspectives, focuses on understanding our roots in Mother Earth and our connections with our ancestors.

We have two guests today, both deeply committed to exploring the puzzling and troubling history of relations between Native American Indian tribal nations and the United States and Canada.

Steve Schwartzberg is a former Director of Undergraduate Studies for International Studies at Yale University, and he is writing a book titled "Arguments over Genocide: The War of Words over Cherokee Removal in the Congress and the Supreme Court. " So, welcome, Steve.

And Peter d'Errico is a member of the New Mexico Bar Association and a former staff attorney at Navajo Legal Services, where he litigated indigenous land and fishing rights, and also Native spiritual freedom rights in prisons. *[Carolyn mis-spoke here; the land, fishing and spiritual freedom cases were separate from Peter's Navajo work. He has litigated on behalf of Wampanoag on the land issues, Western Shoshone on fishing issues, and a variety of tribal members, enrolled and non-enrolled alike, on their freedom to practice indigenous spiritual traditions in prison.]* Peter is a Professor Emeritus of Legal Studies at the University of Massachusetts at Amherst. Welcome Peter.

Peter d'Errico: Thank you.

Carolyn: I'll be moderating today's discussion. Randy will frame the discussion and provide an indigenous perspective. So welcome again Peter and Steve, and Randy, over to you,

Randy: The metaphor we want to use today to help our listeners get a handle on this is the image of a puzzle - a puzzle without the box image on the top to give clues to the person assembling the pieces as to what the final image might be. In other words, it's a challenge to figure out what the big picture is until some of the parts are connected. Only then does an image of 500 years of Indian law and treaty history begin to emerge. Each of our program

guests, and we the hosts, have different puzzle pieces. So join us in our exploration of how things fit together.

Carolyn: So let's start with the basics, the border pieces of the puzzle, so to say. There's often confusion about the legal status of Indians and Indian Reservations in the United States (in Canada, they use the terms First Nations and Reserves). We know that tribal members on reservations have their own governments, choose their own leaders and make their own laws, but they are also under Federal Government Indian law, made by Congress in the US and Parliament in Canada. So, Peter, can you explain what Federal Government Indian Law is, and how it's different from laws made by the Indians themselves?

Peter d'Errico: Yes. Actually I want to thank Randy for that great image of the puzzle with no picture to know what is the puzzle about. Because the picture of law related to indigenous peoples and nation-states is an incredible mess, around the world. And the mess of the pieces of the puzzle is worsened by the fact that there are layers of the puzzle. It's - the box doesn't just have one puzzle in it. It has more than one puzzle. And as the developments over time have occurred, it turns out that some of the pieces that are necessary to understand a given piece or layer of the puzzle have been lost, or thrown away, or forgotten. And it turns out sometimes that additional pieces, from completely different puzzles, have been tossed into the box.

So now that sounds - that's the image, and maybe it sounds a little abstract. So let me, let me try to talk about the layers very quickly. There is - as, Carolyn, you said - there is the whole domain of what we could call tribal law or tribal laws - I think they're really ways of life. They're not like a state legal system with police and the rest of it. So you could have Navajo law or Apache law or Wampanoag law, to use that word law. And that exists everywhere Native peoples exist, on Turtle Island and around the world.

And then there is the layer that is the law of the nation-states. And I think it's really important to understand that the common way of talking about Native peoples exacerbates the problem. It mixes up the level.

So sometimes people will say, "oh, the Apache in Arizona." Well, actually the Apache can't be in Arizona because the Apache were there long before Arizona existed. So if you actually wanted to say it accurately, you'd say "Arizona in Apacheland" and get the thing right! At least, get the layers right. And the same with Canada and the US: there's a line, an imaginary line we're so used to thinking about, because we think about maps. It's a state border;

that state border came after all of the indigenous peoples that already existed in what we now say on one side of the border or the other side of the border. The situation is really exemplified by the Mohawk, who have areas that straddle that border. And there are other peoples as well, but that one made the news some years ago, so I focus on that.

So that - in a nutshell, tribal law - if we want to use that phrase "law" - tribal law is what indigenous peoples create out of their own culture for themselves, for governing their lives. Philip Deer referred to it; he said we had a workable government; it was workable for us for thousands of years.

Then there is the newcomer governments, the various nation-states - Canada and the US, for example, in our part of the world - that come in and invade that preexisting situation and then claim dominance over it and say, "we're now the bosses of all of you."

Carolyn: So this is fabulous Peter, and really clear. So where does the Federal Indian Law come in?

Peter: Federal - it's, that's an interesting phrase. I have a book coming out, sometime in 2022, it's currently scheduled. And I - the title of the book, is "Federal Anti-Indian Law". And that title basically says it all for me.

The common phrase is Federal Indian Law in the United States. It's a scheme of government, including statutes, court decisions, agency regulations, all of them premised on the claim that the United States is superior to the Native nations and that the originating case - it actually came from a specific case, the foundation, , we can talk about in more detail later - but it's in 1823, the name of the case Johnson versus McIntosh *[M'Intosh],* and it's really a property case. So Federal Indian law is really growing out of property law.

And the key property law, so called, is the decision in that case, Supreme Court of the United States saying that the United States owns all of the lands of the continent. And that the Native peoples who are already here don't own it, that they are like tenants. They are occupants, that's the way the court put it, that they - they are occupants on the land. They do not have title to the land. So from that property decision grew the system of law we call Federal Indian law, which is the US's attempt to say, now that we have declared, we, US, have declared that we own your land, how are we going to handle you, the people -

Carolyn: Randy has a comment.

Randy: So yes, I'm going to draw Steven in at this point because this is the perfect moment. You're referring to territory and most listeners are going to say, "Well, don't we have treaties with Indians? Doesn't that define who has territory and who has authority on that territory?" Steven, jump - jump in. Cause I know this is -

Steve Schwartzberg: I would say that the answer is yes, treaties do define this according to the Constitution. But no, treaties don't define this, according to Federal Indian law. And I'll explain what I mean by that in a moment. But I want to first thank you for this image of a puzzle. And to suggest that if we go back in time, as Peter has started to do, to the late 18th and early 19th centuries, we get some sense of an outline of the puzzle that has been lost to us, that has been effaced with time.

And so I want to take us back to two comments from people who are involved on the invader state side in the early days. One is James Wilson, who's my favorite among the framers of the Constitution, who told the Continental Congress in 1776, that "we have no right over the Indians, whether within or *[without]* the real or pretended limits of any colony…. grants made 3000 miles to the eastward, have no validity with the Indians."

And that's a position that I think the United States has to come back to. And I'll talk about what I mean by that in a bit. The other quote I want to bring up - I can't give it to you from memory - from Benjamin Franklin writing in 1783, where he says, "Savages we call them because their manners differ from ours, which we consider the height of civility. They say they feel the same way about theirs." And then Franklin goes on to talk about the great order and decency with which the Indians hold public meetings. And he goes on to talk about the role of women in these public meetings, as being the records of the tribunals of the Native nations. And he says, "When we compare their memories, after a hundred years with our written records, their memories of the stipulations of treaties are exact." He says that *[among the Indians]* "it is a great indecency to interrupt another while the other person is speaking."

And so here's Franklin praising the civility of the native nations, indeed showing that in some ways that civility is greater than that of the American people. And in particular praising their knowledge of treaties. And I want to contrast that knowledge of treaties with the lack of knowledge of treaties in the United States.

And this is the segue back to your earlier point about the Constitution and about what treaties mean in the Constitution as against what they mean in

Federal Indian Law. So in the Constitution treaties are described as the supreme law of the land. *[But]* in the practice of Federal Indian law, it said - this is as a result of what I call a 'bad faith' interpretive stance toward the treaties that the United States has signed - it said that any treaty that is signed with a Native nation is not really binding upon the United States because the United States is the sovereign and therefore it can get out from under any treaty it wants by appealing to its sovereignty.

And its sovereignty, to come back to Peter's point, rests on this claim in Johnson v. McIntosh that there were some Christians who first laid eyes on the land, or set foot on the land, and as a result of that, they acquired an "ultimate dominion" over the land. So they acquired not only a title as they called it to the land, but an authority, a right as Marshall put it, to a degree of sovereignty over the native nations.

Carolyn: Okay, Steve, I'm going to stop because you're coming into something really important, the Doctrine of Discovery. This is something that our listeners may or may not be familiar with, but it's really important. We need to discuss what it is and then why it's resonated down even till today, despite its rather dubious ancestry. Who wants to start with the Doctrine of Discovery?

Steve: I'll defer to Peter.

Peter: Thanks, I would - I think the simplest way *[to explain this]* because it is such a strange comment - Most people have heard of the so-called Discovery Doctrine, or not most people, but many people have heard about the Discovery Doctrine. But Discovery is short for Christian Discovery. And the way we understand that is going back to that foundation case Johnson against McIntosh, where Chief Justice John Marshall - who by the way is celebrated by so many historians and political scientists and jurists for this great man - he wrote the opinion in which he was very clear about the basis that he was saying that the US owned the continent. And the basis, he said, came from the practice of the English monarch. And I would add here, it was not just the English. It was the Spanish actually before the English, and it was the Portuguese before the Spanish, who relied on the Papal doctrine that Christianity was supreme in the world.

So Henry VII followed that tradition in 1496 - and all of this is discussed by John Marshall in the case - in 1496, Henry - King Henry - commissioned John Cabot, and this is a direct quote from the commission: "Discover countries, unknown to Christian people and take possession of them, notwithstanding

the occupancy of the natives who are heathens". So right there at the beginning of this whole theory or doctrine is an explicit statement that Christian people are superior to heathens, and the natives are heathens. And Marshall concluded that case by saying that "Cabot's discovery is the foundation of our title", "our" meaning the US, based on the Christian colonizers' what he called "right of acquisition."

So that's the Doctrine of Christian Discovery. It underlies all of Federal Indian Law to this day. And we can talk about some examples of that in a moment, but that's the origin. It's a 500 year old doctrine that came out of the Catholic – a time when actually Europe didn't exist, it was called Christendom. It was the Christian world, the Christian empire. And when the Christian world began to fragment, it fragmented right at this time when the different Christian monarchs decided that they were in competition with each other, for this so-called New World.

Randy: So I would imagine that some of our listeners, maybe most of our listeners, including a lot of indigenous people are saying, "Doctrine of Discovery, that sounds like sort of an outdated, crazy idea. It certainly can't be relevant now. I understand that, you know, Marshall in 1823 might have cited it, but gosh, is it still relevant today?"

And when I, when I first discovered it, you know, I was in shock. I still am in shock. And I mentioned it to a retired federal judge. And, you know, first of all, he had no knowledge of it whatsoever. And secondly, when I explained what it was, he said, "Oh, can't, can't possibly be relevant. You know, that - that just - that's just not possible!" So how - to back up and re-explain - again, because I think people need to hear this more than once - how is it that something that was declared by a Pope in 1493 still shapes the thinking, not just of our courts, but of our whole society more than 500 years later?

Peter: That's a profound question, Randy, if I could say something about that, because I think it's profound because it asks a question about a fairly long period of history and how does history persist? How does - you know, it's the history of the present. The history is not the past, *[it's]* how a foundation persists, no matter how much gets built on top of it. And it's also profound because it illuminates the way that law forms what you might call just ordinary opinion. People become used to what has been enforced.

And I want to, before I, you know, shut up and let Steve come in here, I want to give you two quick examples of recent cases - also these cases show that this

is not a liberal versus conservative issue. This is simply a straight out legal doctrine issue.

In 2005, there was a case where the Oneida Nation was in a dispute with the city of Sherrill, New York, about who owned the land. And when the case finally got to the Supreme Court, Justice Ruth Bader Ginsburg cited the Doctrine of Discovery. And she said it, she quoted exactly, the Doctrine of Discovery "gave fee title to the lands occupied by the Indians, to the discovering nation and then to the United States." And she denied Indian Oneida land ownership.

And in 2020, just a year ago, Justice Gorsuch said in the famous - now famous - McGirt case in Oklahoma, that Congress can breach treaties whenever it wants because of the power of Christian Discovery, but it hadn't done it *[there]* yet, that that's why the Creek nation still existed.

Randy: So, I think this is going to return us to a concept that we've uttered a few times here, and we need to start in the next segment with it, which is - let's go back to this notion that our Constitution recognized that Indian peoples were sovereign nations with whom we respectfully negotiated. And I'd like to start the second segment by giving Steven an opportunity to revisit that and explain what he says is basically 'bad faith' in terms of negotiating with those sovereign nations. Because we have to keep coming back to that theme before the legal apparatus and superstructure really becomes clear. So let's take a break and we'll be back.

Carolyn: So thank you, Peter d'Errico and Steven Schwartzberg, we'll see you in a bit.

Segment Two

Carolyn: Welcome back to Indigenous Perspectives. We're talking today with our guests, Peter d'Errico and Steven Schwartzberg, on the whole issue of the puzzle of Indian treaties. So Steven, you're going to pick it up talking about 'good faith' and' bad faith' treaties and the way this whole confusing mess was worked through in the 19th century.

Randy: And explain to us again, because we need to hear this more than once, what sovereignty has to do with this whole debate.

Steve : Okay. So I started off at the discussion last section with a quote from James Wilson: "We have no right over the Indians." That is to say, we have no

sovereignty over the Indians, we have no authority over the Indians. They are sovereign, they have authority. But let me back up a little bit into the 15th century, if I might, to go back to the Doctrine of Discovery to set some of the basis for understanding the difference between those times and the early revolutionary period in the United States.

In1452, Pope Nicholas V gave a monopoly on the African slave trade to Alfonzo V of Portugal. And in doing so he claimed that the Portuguese had the right to enslave and take the properties and dominions of "Saracens, pagans and other enemies of Christ." And that set the tone for Europe as a whole to start to view peoples outside of Europe as inferior, as subject to being enslaved, as not Christian and not really - not Christian, but anti-Christian in the eyes of the Christian.

So the Christians are going to go be aggressive, and they're going to go blame the people they're being aggressive towards as though they were aggressive toward them. That's the psychological mechanism that starts to define Europe in relation to the rest of the world. Now that got to be embarrassing in the course of the Enlightenment. And we can talk about the Enlightenment and the role of the indigenous critique of Western culture in bringing about the Enlightenment in a later episode.

But what I want to emphasize is this embarrassment over the idea that you could acquire territory, you could acquire title, simply by looking at the land or setting foot on the land, when there were peoples who were already there, who obviously it was their land and is their land. So in the course of the hundreds of years from the 1490s into the 1770s, you get some people who want to try and make deals with the Native nations to purchase land.

Now, this isn't real purchase; it's nothing like what land is worth. It's a violation of Native laws that say you can't own the quote unquote "right of the soil" to begin with. But put all of that aside for the moment and draw a distinction between someone like James Wilson and someone like John Marshall. For James Wilson, a big land speculator, he wants to be able to have private citizens buy land directly from the Native nations. For John Marshall, another big land speculator, he wants to have the land title come from some Christians looking at the land. So his properties in Kentucky, especially, and his family's properties, even though they've never approached the nations who live there to try and buy this land, somehow he owns title to it. So there is essentially enough 'bad faith' to go around in this, but there's a distinction between, I think at least, Wilson's position that there is no authority that the

colonists, the invading state, has over the Native nations and Marshall's position that the Native nations are under the sovereignty of the United States.

Carolyn: So am I correct in understanding the whole idea of the 'bad faith treaties' comes out of the idea that the US government and states don't have to honor any agreements they might happen to make with Native peoples, because they can always just pull this "Christian discovery, we own it anyway" out of their hats?

Steve: Yes. I think that's exactly right. Peter talks about this in his work as "the exception". So instead of any kind of normal set of rules or understanding of how things ought to be in practice among peoples who respect one another, there's always this card you can plunk on the table that says, oh, I don't need to respect you because I'm sovereign.

Peter: Yes.

Steve: Peter, you want to talk about the -

Peter: You've been so clear, that's really, really good. It seems to me that when we understand the origin of this as an assertion, an aggressive religious-based assertion, of ownership of the world, essentially, because that's what they were all after, the Christians were after, still some Christians think of this as they're after the world. That's what was brought here to this continent.

And then the petty - in comparison to that these are petty disputes, but of course they're not really petty, they're struggles for land grabs across the continent, George Washington involved in it, and as you said, John Marshall, and Wilson, whether they were on one side or another of any political party, or they were in the government or out of the government, there was a class - really economy - that would be aristocratic class of the nation after they had gotten rid of the king.

Randy: So, not to introduce a downer, but just to remind listeners of what we're talking about. You know, as Steven documents in great detail in his work, what this comes up to as an end result for the Cherokee is being forcibly marched out of their homelands across the country, into Oklahoma in the winter where the famous Trail of Tears results in uncountable numbers, many, many hundreds, perhaps thousands of people dying. From my tribe, in the Chicago area, it's the Trail of Death where many hundreds of people are marched out of the woodlands into the prairies. And, you know, the same story is told throughout the 19th century.

In our second program, which we'll get to - this is a bit of a spoiler alert - what we'll find is that Natives in US and Canada are still being removed from their territories to put in oil pipelines, to dig it up to find oil, to make hydroelectric dams, so what we're talking about here is not dead, ancient, irrelevant history. It's the foundations of, and I hate to say it, I can't even put it in quotes, you know, legal precedents that become uncriticized and accepted so that mainstream society and greedy people can take the lands of indigenous people and use them as they darn well please.

Peter: Yes, absolutely.

Steve: Let me jump in here and pick up on a thread that you mentioned, Randy, which is the numbers of the dead on the Trail of Tears. I think it's important to put this in proportional population terms. There are about 80,000 people who are extirpated from their land in the Trail of Tears, and about 20,000 died, at least. And we have to think about what that means in relation I would say first to the population at the time, and second, what it would mean if it had happened to the American people today. So in relation to the population at the time, the United States at the time was about 13 million people. And you're talking about "removing" - that was the term they used- 80,000 people from that territory, that is to say the east of the Mississippi. That would amount in today's terms, relative to the sizes of the populations involved, removing about 2 million people from a nation of 328 million and seeing 400,000 of them die. If you talk about it, in terms of the American people, if they were to go through what the Native nations went through in the 1830s, you're talking about more than 60 million deaths.

Randy: And all of this is in the context of an earlier atrocity, whereby indigenous people were already previously removed from 90% of the land that they occupied when the settlers showed up. And after 90% of their population has been exterminated through military conquest, disease and starvation. So, you know, this is just another example of, again, a trend line. And I - I don't say that to horrify listeners. We have to keep putting this back into the perspective of the longer term trend of what's going on here.

Carolyn: So this puzzle is definitely getting - has taken an upsetting and distressing turn. Stay tuned; we'll be back in a minute with our next segment to see how we can build on it from here. Thank you, Peter and Steve. See you in a minute.

Segment Three

Randy: So, welcome back to Indigenous Perspectives. And today, you know, we are examining this very puzzling issue of Indian law and treaties. And once again, we need to back up, take a breath, and explain how it is that this concept of sovereignty both works against *[Indians]* but is using - Indians are using it as a lever back against the Doctrine of Discovery to assert their rights. That, you know, this is by no means a resolved conflict; it's an open ended kind of thing. Who would like to address how this sovereignty issue is the double edged sword cutting both ways currently?

Steve: I'll go into this. I would say that there is one term that has at least two radically different meanings within American law and three legal orders on this continent. The term is tribal sovereignty. And within the context of Native law, tribal sovereignty means the original free and independent existence that the Native nations had before the European invaders arrived.

Within the context of the manufactured law that the Supreme Court has fabricated, tribal sovereignty means whatever the government leaves the Native nations in the way of self-government. And then there's the Constitution of the United States, as it was originally intended by people like James Wilson, who although he was a large land speculator at least had the decency to say the United States has no right over the Native nations, meaning a treaty with a Native nation is binding. And as the Constitution says, is part of the supreme law of the land.

So if we look at the case of Cherokee Nation v. Georgia in 1831, where the Cherokee Nation is trying to prevent the Trail of Tears, is going to the Supreme Court and saying, "We have a treaty with you that says you guarantee this land to us forever. What, what is, what does this mean? Are you, or are you not going to keep your word?"

And there are two Supreme Court justices who dissent from John Marshall's position. John Marshall's position is that the Native nations are completely under the sovereignty and dominion of the United States. Therefore they don't count; treaties with them aren't binding, at least they've got no way into court in order to try and argue on behalf of their rights under these treaties. That's John Marshall's position.

Smith Thompson and Joseph Story say, wait a minute, treaties are the supreme law of the land, these treaties are binding. As a result of these

treaties we should intervene with an injunction on behalf of the national rights of the Cherokee Nation vis-à-vis the state of Georgia.

So you have different positions with regard to tribal sovereignty, three major positions. I argue that the intention behind the Constitution's position, properly understood, is respect for tribal sovereignty in the way it is understood within Native law. That's what the best understanding of the Constitution is. And that's the understanding that the Supreme Court should return to, rather than this fabricated understanding that's created out of whole cloth, that because of the Doctrine of Christian Discovery, the United States can pull out the sovereignty piece of the puzzle, the sovereignty card, whenever it wants, and trump any treaty.

Peter: Yes, if I can add to that - that's so clear - that the struggle for the understanding of sovereignty as between Native peoples and the United States was going on right from the start, and it's there in the cases, it's there in the documents. I think if we broaden out this, using Randy's puzzle notion, we begin to understand that the concept of sovereignty itself implies struggle. So sovereignty likes to pretend - the sovereign, the sovereign, I'm the boss, I'm the king, I'm the leader - but that's - underneath that claim is a struggle.

So we see it, even in the very beginning of Christian discovery doctrine, when Portugal got the Pope to say, Portugal has basically a sovereign position vis-à-vis the African trade in slaves and whatever else Portugal wanted to trade in. And that was because Portugal and Spain were in competition for this. So when it happened to be that the Spanish were the ones who sponsored Christopher Columbus, and then they say, wait a minute, okay, Portugal, you can have Africa. We've got the New World. They went to the Pope. Because the Pope was considered by both Portugal and Spain as being the sovereign of Christendom, the Supreme Pontiff was – is - a title that still sometimes used.

And from that point forward, Christian Discovery begins to be used by all the rest of the Christian kings, France, England, Spain, Portugal, all in competition with each other, for who is going to get the so-called sovereignty over the New World. So it's just the - what we could think of as the accidents of history - that finally boiled down to the English on this part of the continent, what we call America today, the English, and then the English being ousted by the colonial people themselves, the colonizers, to have a so-called revolution. And all along the way, the claim of sovereignty and the struggle for sovereignty are being passed along, with one group after another group claiming they have the sovereignty.

So then we bump into the indigenous peoples who are already here. Who - as Steve points out - there were many people like Wilson and others, Franklin, who understood, well, these are obviously the sovereigns here. Now that would - that recognition was not - did not please other people like Marshall and George Washington. So they said, no, no, no, that's not sovereignty; we have the sovereignty, we the US. And that struggle persists to today.

And what Federal Indian Law has done is to package that struggle and try to contain the sovereignty movements of Native nations within the framework of Federal Indian law, and prevent them - the Native peoples - from arguing outside that framework. That's the power that is being exercised by courts today. The court says, we will declare the law. And then that's where the Native nations are being told, you have to play in our ballpark and you have to use our puzzle. You can't use your puzzle.

Randy: So, correct me if I'm wrong; I'm - I'm trying to cut through a layer of complexity. Initially the moral justification, if you want to call it that, for the Doctrine of Discovery and dominating indigenous people, was they weren't Christians. Of course, the irony now is that 70% of the people who are having their rights challenged are Christians. So the original moral justification has long since evaporated, but what remains unchallenged, because it has, through precedent and repetition, remained, is the notion of, well, we don't really justify it any longer. We just do it. We just take it. Because we can. Are we looking at a case of right makes might or right makes might? Instead of trying to wrap it in some moral justification, has it become that crude?

Steve: I think so.

Peter: I would just say yes, we can talk about it in the next section a little bit, but yes. Simple answer is yes. It's an assertion. Mike, go ahead, Steve. Sorry!

Steve: I would say yes, but I would qualify it by saying that it's not only vis-à-vis the Native peoples, that this claim is made. It's vis-à-vis other European nations and that part of it, I want to get to in the next segment.

Carolyn: Okay. We'll do that in just a minute. Stay tuned everyone. And thanks again, Peter and Steve, see you in a bit.

Segment Four

Carolyn: Welcome back to Indigenous Perspectives for our final segment. We're talking today with Peter d'Errico and Steven Schwartzberg on the

whole issue of Indian treaties. And we're going to pick up where we left off, with Steve talking about how other nations, all the European nations, were getting into the struggles for land and territory and justifications. So, Steve?

Steve: Thanks. Yes. I wanted to make a point in relation to Randy's point in our last segment about these rights, that the Native nations could claim now, many of them being Christian. This was true in the 1820s with many of the Cherokee leaders being Christian. And what I want to talk about is John Marshall saying that the Doctrine of Christian Discovery was an agreement among European nations to protect their interests. And he specifically excludes the Native nations from the common good, from the global common. good.

And I want to contrast that with a wonderful book that's just come out by David Graeber and David Wengrow, called "The Dawn of Everything," which is a new history of humanity in which they stress the indigenous critique of Western culture. So they're talking about Jesuit missionaries coming over and encountering *[indigenous]* people in their dialogues, while they're trying to convince them as missionaries, of arguments against the missionaries' position that are eloquent and persuasive to the missionaries. And that they've *[the missionaries]* got to warn people about back home, 'cause they're going to come over and they're not going to know how to cope with these arguments.

So one of the arguments that gets made in this context is that the missionaries note that the Native peoples are very generous with one another, that there's no one who goes hungry within their communities, that there no beggars within their communities. And when these peoples find out that there are lots of beggars in France, they hold it to be a lack of charity on the part of the Europeans, and they condemn us for this roundly.

You have other missionaries who come in and who say that they *[Native peoples]* they behave without any subordination to order and to hierarchy, that they're all free, that their chiefs only have authority in as far as they're eloquent, that no one will do anything when ordered to do so unless they find it pleasing to them.

This contrast between European hierarchy and domination and European selfishness and greed, and the way of life of the Native peoples, was profoundly impactful in Western culture; it's one of the major streams flowing into the Enlightenment. And I like to think that for the future, as the struggle that goes back for centuries continues, the European peoples, the Euro-

Christian peoples as *[Rev. Dr. George]* "Tink" Tinker calls them, may become more respectful of the indigenous critique, more willing to listen and take in the indigenous critique and to change their approach to the world.

Peter: I think that helps people to understand that when the current ongoing struggles that are articulated by indigenous peoples as sovereignty struggles - and as we said earlier, sovereignty is always a question of struggle, it's always a claim and there's always counterclaims - and that what we see going on now among indigenous peoples in this struggle is a struggle for a way of life, if I can put it that way. It's not just a simple jurisdiction thing. You know, there could be a struggle between the state of Massachusetts and the state of Connecticut about who controls some particular, you know, stream of revenue, and they would say, well, the sovereignty of this state and the sovereignty of that state, those are technical questions. That's not the level that we're talking about when we're talking about indigenous sovereignty struggles.

And I think the best current example is what's happening in White Earth right now, the Ojibwe, the litigation that's being conducted in the name of wild rice. And, and just think about that for a minute. Wild rice is understood as a living entity, which of course it is. And as a living entity, as having legal rights. And as a legal right holding entity, it can litigate to protect itself, protect the water it needs, et cetera. So the White Earth case of the Manoomin, as it's said, the wild rice, is a struggle for a way of life, a different way of thinking about who are human beings in this world anyway? What is our relationship to everything else that exists? That's a very different conception from the European Christian conception of life in which the world is resources for development, and that's basically what life is - resources for development to make humans richer in wealth.

So the struggle is a very deep philosophical one at the same time that it's a legal jurisdictional one. And I think that the nations that are conducting these struggles understand that. I don't know that their adversaries understand it, but I also know that a lot of onlookers, perhaps a lot of people listening to this broadcast, understand it. They are seeing that indigenous peoples around the world are offering an ancient, but still viable, way of existence, way of being human. And that the struggles that are going on in courts are struggles to assert that, against the claims that are being made by the nation-states including the United States and Canada and so on.

That's the level at which the sovereignty struggle is playing out. It still is like the mixed up puzzles in the box that we started off with earlier. Randy's image

of mixed up struggles in the box, but one layer of that, or maybe all of the layers boiling up underneath them, is the power and energy and persistence of indigenous peoples, who are still here, have been here since time immemorial and are saying today, we are still here.

That's what I think the sovereignty struggles are really all about.

Randy: I love the fact that two marvelous gentlemen, who are not by blood indigenous, are delivering the most eloquent moral justification for reassertion of Native sovereignty that I have heard. It's flipping the whole notion of the Doctrine of Discovery on its head. And as Steven pointed out, you know, this Enlightenment *[Note: Randy should more accurately have said "indigenous"]* critique of European culture, I think is boiling to the surface. You know, I - you guys know it, we're all seeing it in the newspapers. You know, there's - there's a sense of moral bankruptcy in our culture. People are talking about the Anthropocene and the end of our, you know, economic and political system; people can get very, very negative. But then they turn to indigenous people and they sense intuitively that there's something there, there's inspiration there – a regrounding in Mother Earth in the very territory that was taken away.

And ironically, after trying to strip these people of their culture and force them to assimilate to European culture, we're having this belated aha moment of maybe we need to rescue them. And maybe we need to rescue our ourselves by giving, not just voice back to indigenous people, but as we can discuss in the next program, actually beginning to rematriate and give back territory directly to indigenous people. And in many cases, buying up land and putting it in trust and then making indigenous people stewards of that land, knowing that they will take better care of it than the people who were grabbing the lands and removing the Cherokee.

So, in our next program, I think we're going to run with some of these ideas. We'll come back to the question of why it is so important that Manoomin is taking the state of Minnesota to court.

And I think we can give both mainstream listeners and indigenous listeners reason for hope as we go forward, that we can break through this puzzling and troubling past.

So we want to close by saying, you know, Migwetch - thank you - to the listeners. I want to thank again Steven Schwartzberg and Peter d'Errico, who

joined us; they're our guests today, and they will be back for our next program.

I am so pleased that you are listening. I hope this broadcast has given you time and space to reconnect with your roots in Mother Earth, and with your ancestral roots. Before your busy day distracts you from this moment, I encourage you to take a few minutes to reach out and feel the presence of living flora and fauna, and perhaps even that of your ancestors. Allow yourself to touch their presence, capture that moment and hold onto it.

And also, if you will, write to me and let me know about your experience. I can be reached at randykritkausky@hushmail.com, or through my website, randykritkausky.com, where you can also find transcripts and supplemental materials for shows like today's. That will have your ability also to give us perhaps questions for our next show. Thank you so much for tuning in.

"Indigenous Perspectives" monthly podcast is hosted by Randy Kritkausky, and broadcast on the fourth Thursday of each month, 12 noon Eastern Time (US & Canada), on HealthyLife.net.