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## Uncomfortable Truths About Sovereignty and Wealth

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# Uncomfortable Truths About Sovereignty and Wealth

Matthew L.M. Fletcher\*

## INTRODUCTION

In 2007 my brother, Zeke Fletcher, represented the Grand Traverse Band of Ottawa and Chippewa Indians (GTB). He observed a public meeting in Whitewater Township, Grand Traverse County, Michigan.<sup>1</sup> The meeting was concerned with the Department of the Interior's planned acquisition of lands in trust for GTB's benefit in an area where the tribe already owned a casino and a large resort.<sup>2</sup> There was strong opposition primarily from the non-Indian community, as there almost always is when an Indian tribe seeks to expand its economic base.<sup>3</sup>

Of particular note, there was a letter faxed to the township from a non-Indian resident who compared GTB to an octopus.<sup>4</sup> The writer noted that she had observed the tribe a few decades earlier in its infancy as a federally acknowledged tribe, calling the tribe then a "small octopus" and a "frail and harmless creature."<sup>5</sup> In

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1. See generally Acme Township Board Meeting Minutes from April 10, 2007, ACME TWP. ARCHIVES (Apr. 10, 2007, 7:00 PM), <https://acmetownshiparchives.info/Minutes/2007/Board/04-10-07%20Board%20meeting%20minutes.pdf> [<https://perma.cc/GA4X-ZRDL>].

2. *Id.*

3. Elsewhere, I have written about the non-Indian opposition to the efforts by other Michigan tribes like the Little Traverse Bay Bands of Odawa Indians. See generally MATTHEW L.M. FLETCHER, GHOST ROAD: ANISHINAABE RESPONSES TO INDIAN-HATING 95–104 (2020).

4. Letter from Judith Danford Tank, to Whitewater Township, Grand Traverse County, Michigan, (Feb. 27, 2007) (on file with author).

5. *Id.* at 1.

1980, GTB had twelve acres of land and barely enough money to buy coffee for council meetings. Since then, in her view, the baby octopus had grown. By 2007, again in her view, GTB had eight muscled tentacles that it used to bring objects to its jaws and could squirt ink that it could use to hide from its predators. Allowing GTB to acquire more land in trust would be to allow the tribal octopus to grow even further. Ultimately, she alleged that GTB was engaged in a conspiracy with other Indian nations, for example, the Seneca Nation in New York, to restore their lands, to wit, “[i]t is about THE LAND. . . .”<sup>6</sup>

Zeke and I laughed about the metaphor of the octopus. We laughed about GTB conspiring with the Senecas, who historically are a bitter enemy of the Odawas. But we also laughed because the woman was absolutely right—Indian nations are trying with every fiber in their being to restore their lands. What is sad and disheartening about her fear of the tribal octopus is that she seems to think Indian nations and non-Indians cannot coexist, that we live in a zero-sum dichotomy of Indians and non-Indians, and only one can prevail.

It is that non-Indian fear that drives opposition to Indians and tribes. It starts with the political theory embedded in the grains of parchment written by the American Founders. That the wealth of the United States originally derived, for the most part, from the exploitation of Indigenous peoples and the institution of slavery is well known and largely accepted.<sup>7</sup> That the sovereignty of the United States originated in the American Revolution and through the ratification foundational documents like the Constitution is similarly well known and accepted.<sup>8</sup> Despite these generally accepted truths, wealth and sovereignty are differently understood; money and assets are tangible, while sovereignty is merely a theory undergirding the exercise of governmental power.

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6. *Id.* at 4.

7. *See generally* GERALD HORNE, *THE APOCALYPSE OF SETTLER COLONIALISM: THE ROOTS OF SLAVERY, WHITE SUPREMACY, AND CAPITALISM IN 17TH CENTURY NORTH AMERICA AND THE CARIBBEAN* (2017); MEIZHU LUI ET AL., *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* (2006).

8. *See generally* Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 *IOWA L. REV.* 891 (1990).

How wealth and sovereignty interact is both hotly contested and misunderstood. In this writer's view, sovereignty exists to preserve wealth for the already-wealthy. When it comes to Indigenous peoples and Indian nations, federal and state sovereigns have almost always exercised their powers to suppress tribal wealth, even a half-century after Congress turned toward tribal self-determination as guiding national policy. Federal and state sovereignty used in this manner is evidence of systemic racism.

The woman who compared GTB to an octopus wanted her township, her county, her state, and her federal government to exercise their powers and stop the GTB. She got what she wanted, in part. It took another thirteen years for the Secretary of the Interior to acquire that land in trust.<sup>9</sup> It turns out octopi are intelligent and patient.<sup>10</sup> Indian nations are timeless entities. Often, they can wait out their opponents, but not always.

This Article for the Roger Williams University Law Review symposium will hopefully contribute to a greater understanding of how sovereignty and wealth interact. At the symposium, this writer discussed several recent flashpoints in federal-state-tribal relations in the eastern United States.

#### I. SOVEREIGNTY, WEALTH, AND SYSTEMIC RACISM IN INDIAN AFFAIRS

From the viewpoint of this Anishinaabe<sup>11</sup> writer,<sup>12</sup> the political theory that dominates the United States is that of property. Property leads to government; government leads to civilization; civilization leads to more property; more property leads to more government; and so on.

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9. Letter from Tara Sweeney, Assistant Sec'y, Indian Affs., U.S. Dept. of the Interior, to Thurlow "Sam" McClellan, Chairman, Grand Traverse Band of Ottawa and Chippewa Indians, (Mar. 31, 2020), [https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Grand\\_Traverse\\_NOD.pdf](https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Grand_Traverse_NOD.pdf) [https://perma.cc/83X3-BDY8].

10. Rachel Nuwer, *An Octopus Could Be the Next Model Organism*, SCIENTIFIC AM. (Mar. 1, 2021), <https://www.scientificamerican.com/article/an-octopus-could-be-the-next-model-organism/> [https://perma.cc/YXW2-R9Q9].

11. See generally JAMES A. CLIFTON, GEORGE L. CORNELL, & JAMES M. McCLURKEN, *PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI AND OJIBWAY OF MICHIGAN* 12 (1986) (describing the Anishinaabe people).

12. I mean this in the same way as R2-D2 did when he referred to C-3PO as a "mindless philosopher" in Star Wars.

As the famed political philosopher John Locke said, “[i]n the beginning, all the world was America . . . uncivilized.”<sup>13</sup> In the beginning, all of America was full of Indigenous peoples, but Locke labeled them uncivilized. This was an important strategic move. Caricaturing Indigenous people as uncivilized suggested that they were lawless; lawless people do not exercise dominion over property; failure to exercise dominion over property means Indigenous people do not own property.

This simple line of thought is the basis for *Johnson v. McIntosh*,<sup>14</sup> the United States Supreme Court decision that stripped Indigenous people of their property rights, stating, “[Indigenous peoples] remain in a state of nature, and have never been admitted into the general society of nations.”<sup>15</sup> Chief Justice Marshall invoked Locke’s predecessor Hobbes when he insisted Indigenous people lived in a “state of nature,” that is, uncivilized (perhaps animalistic), which foreclosed the entrance of Indigenous people into the “general society of nations,” that is, government and law.<sup>16</sup> One supposes the *McIntosh* Court could have chosen to grant special property rights protections to Indigenous peoples given their supposed weaknesses in the face of the new America. Instead, the Court chose the opposite route. This was, of course, no accident; this was systemic racism writ large.

Working backward from *McIntosh*, we see the property-sovereignty connection made explicit in the Constitution. The Fifth Amendment ensures that the government cannot take private property without first providing due process and just compensation.<sup>17</sup> The Third and Fourth Amendments provide protections for property owners from government intervention.<sup>18</sup> Article I grants

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13. Kathy Squadrito, *Locke and the Dispossession of the American Indian*, in *PHILOSOPHERS ON RACE: CRITICAL ESSAYS* 101, 101 (Julie K. Ward and Tommy L. Lott, eds., 2002).

14. 21 U.S. 543 (1823).

15. *Id.* at 567.

16. Charles Edward Merriam, *Hobbes’s Doctrine of the State of Nature*, 3 *PROC. OF THE AM. POL. SCI. ASS’N* 151, 151 (1906).

17. U.S. CONST. amend. V, cl. 4–5 (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

18. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a

Congress a plethora of powers to manage currency and commerce with foreign nations and Indian tribes.<sup>19</sup> Slavery was normalized in the Constitution.<sup>20</sup> Nowhere to be found, not even in the Bill of Rights, are positive rights like the right to healthcare, education, public safety, and so on. The Reconstruction Amendments reconfirm the protections of property in the Fourteenth Amendment.<sup>21</sup> This is a property rights constitution.

The Constitution's focus on private property sheds light on the political theory that has always animated American law. One need only look at which persons owned nearly all property in the United States. Certainly not women or people of color, many of whom were enslaved and denied political rights.<sup>22</sup> The Constitution protected those who owned property and controlled wealth; it also protected those who later acquired wealth. To this Anishinaabe observer looking at this history with centuries of hindsight, the Constitution was an incredible success in preserving the wealth of the few at the expense of the many. After all, a relatively small percentage of Americans still own most of the wealth.

But the Constitution is also an imperial, acquisitional constitution. The exploitation of the lands and resources of Indigenous peoples bolstered the wealthy in the original thirteen colonies, but the untapped wealth in the western lands and beyond was limitless. The Constitution and the First Congress routed all those resources through the federal government for later distribution to the elite, it turned out. The Constitution assigned plenary and exclusive power

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manner to be prescribed by law."); *id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

19. *Id.* art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."); *id.* cl. 5 ("The Congress shall have Power . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures. . .").

20. Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMANS. 413, 414–17 (2001).

21. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

22. Vine Deloria, Jr., *Minorities and the Social Contract*, 20 GA. L. REV. 917, 917–18 (1986).

over foreign and Indian affairs to Congress and the Executive branch.<sup>23</sup> The Supremacy Clause provided that federal law would control over state law,<sup>24</sup> ensuring that the states would be no competition for the federal government if Congress wanted to act, which Congress did. The First Congress enacted the Trade and Intercourse Act of 1790, which preempted state involvement in Indian affairs.<sup>25</sup>

In relation to the Indigenous people and nations within (and without) its borders, the United States' national policy was geared toward efficiently and completely dispossessing Indian people and tribes of their lands and resources. For the most part, that national policy prevailed, although the efforts were far from efficient and far from complete. The next section surveys the modern-day impacts of dispossession of Indigenous peoples and nations in the eastern United States.

## II. UNCOMFORTABLE TRUTHS ABOUT THE EASTERN TRIBES

I grew up in southwest Michigan on the historic lands of Bodewadmi and Odawa nations. The Department of the Interior had administratively terminated the tribes to which I had the closest connection.<sup>26</sup> I grew up without experiencing reservation life, the trust responsibility, treaty rights, or federal recognition. My teachers never talked about Indians or Indian tribes, at least not in a good way. Books about Indians I brought home from elementary school were full of deep-seated racism (as my mother pointed out repeatedly to the librarians and the school board). It had been so long since the United States acknowledged the tribes that just a few people knew much of anything about our collective history.

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23. U.S. CONST. art. I, § 8, cl. 3 (Indian commerce clause); *id.* § 10, cl. 1 (“No State shall enter into any Treaty . . .”); *id.* art. II, § 2, cl. 2 (Treaty power).

24. *Id.* art. VI, cl. 2 (Supremacy clause).

25. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (regulating trade and intercourse with the Indian tribes). *See also* RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 77 cmt. a (AM. L. INST., Proposed Final Draft 2021) (stating that the Act of 1790 “federalized Indian affairs to the exclusion of all others.”).

26. Matthew L. M. Fletcher, Commentary, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 502–04 (2006).

Systemic racism explains everything that happened (and continues to happen) to the six now federally recognized tribes and at least two or three non-recognized tribes in lower Michigan. The United States purchased lands from the tribes for pennies on the dollar.<sup>27</sup> The government never fulfilled promises to establish and protect a homeland for those treaty tribes.<sup>28</sup> Then the government allowed (and encouraged) non-Indians to deforest the entirety of what is now the State of Michigan, depriving the Michigan Anishinaabeg of their livelihoods.<sup>29</sup> Ironically, the Secretary of the Interior chose to administratively terminate those tribes in order to help them assimilate and thereby acquire the legal capacity to own land.<sup>30</sup> Of course, administrative termination failed miserably to help Anishinaabe people.

The experience of my own tribal nations in Michigan parallels the experiences of eastern Indian tribes. I discuss just a few of those experiences here.

A. *Burying the Wabanaki Nation in A History of Racism*

The first law review article this writer remembers reading all the way through was Professor Joseph Singer's article about the Wabanaki fishing rights case, *State v. Elliott*.<sup>31</sup> Singer's narrative is about a member of a non-federally recognized Indian tribe attempting to exercise aboriginal rights struck home for an Anishinaabe student. I knew just enough about the Michigan Odawa and Ojibwe treaty rights cases of the 1970s and 1980s to know that the Vermont Supreme Court's decision was horribly wrong. In

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27. *United States v. Michigan*, 471 F. Supp. 192, 226 (W.D. Mich. 1979) ("The figure received for the land 12 1/2-13 cents per acre indicates that the Indians were cheated out of their land."); see also Robert H. Keller, *An Economic History of Indian Treaties in the Great Lakes Region*, 4 AM. INDIAN J. 2, 5 (1978).

28. See generally Evan Neustater, *Litigating for the Homeland: An Indian Treaty Framework to Climate Litigation in the Wake of Juliana*, 10 MICH. J. ENV'T & ADMIN. L. 303, 305 (2020).

29. MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* 113 (2012).

30. *Id.* at 156.

31. *State v. Elliott*, 616 A.2d 210 (Vt. 1992); Joseph William Singer, *Well Settled: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994).

*Elliott*, the court reasoned that the “increasing weight of history” was enough to extinguish Indian and tribal claims.<sup>32</sup> If that theory spread to other claims and other jurisdictions, then there would be no Indian law at all, other than the Indian law of oppression.

*Elliott* began with a 1987 fish-in located in Vermont designed to force a test case on whether the Abenaki Nation retained aboriginal fishing rights.<sup>33</sup> As a general matter, only an act of the federal government can extinguish aboriginal rights, which are property rights of Indigenous peoples that predate the arrival of non-Indian governments.<sup>34</sup> The Abenaki Nation members, who were arrested, argued that their aboriginal rights remained intact because no federal action had ever terminated their rights.<sup>35</sup> The Vermont Supreme Court, confronted with a paucity of evidence of termination, concluded, “[e]xtinguishment may be established by the increasing weight of history.”<sup>36</sup> Professor Singer’s methodical rebuttal of the Vermont Supreme Court’s reasoning is inspired legal scholarship. But as the editorial page of the Burlington Free Press opined, there was never any doubt the Abenaki people would lose this case.<sup>37</sup>

Sovereignty and property rights controlled the outcome in *Elliott*, as American political theory required. These acquisitions, even by theft, of indigenous lands, resources, and property rights are the source of American wealth. Sovereignty ensures the protection of that wealth. As Chief Justice Marshall remarked centuries ago, “[c]onquest gives a title which the Courts of the conqueror cannot deny. . . ,”<sup>38</sup> courts have no business transferring wealth from the current possessors to those who have been wronged. Well, maybe they do, but the Vermont Supreme Court was not going to be the first. Like Professor Singer, I wondered where this “increasing weight of history” theory would show up next.

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32. *Elliott*, 616 A.2d at 218.

33. Yvonne Daley, *Vt. Indians Go Fishing for Rights*, BOSTON GLOBE, Oct. 19, 1987, at 17, 48.

34. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345-47 (1941).

35. *Elliott*, 616 A.2d at 214.

36. *Id.* at 218.

37. Editorial, *Wronging a Right*, BURLINGTON FREE PRESS, June 18, 1992, at 10A (“By U.S. law, the Vermont Supreme Court’s only job was determine whether the Abenaki were robbed 200 years ago—and if so, to make sure they stay robbed. They were, and the court did.”).

38. *Johnson v. M’Intosh*, 21 U.S. 543, 588 (1823).

B. *The Dramatic Demise of the Haudenosaunee Land Claims*

In 2005, the Supreme Court weighed in on Indian law with *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*,<sup>39</sup> which was shockingly reminiscent of *Elliott*. After *Sherrill*, it seemed that the weight of history could be enough to eliminate tribal claims nationwide, not just in Vermont. I thought of the ongoing treaty rights litigation I had left behind in Michigan in order to become a law teacher. I wondered if there would be much Indian law for me to teach by the time I would go up for tenure in a few years. Maybe the worst part was that the author of the 8-1 opinion was Ruth Bader Ginsburg, a hero of mine and many others.

*Sherrill* was a tax case.<sup>40</sup> The Oneida Indian Nation had bought back some of the land it had lost two centuries ago at a time when the State of New York was illegally coercing Haudenosaunee Nations to sell their lands.<sup>41</sup> People in Madison and Oneida counties, and local towns like Sherrill, opposed everything that the tribe wanted to do with the land.<sup>42</sup> The counties even posted photos of the landholdings of the tribe and its members on the county websites.<sup>43</sup> Echoing what I had seen at Grand Traverse Band and elsewhere, the local governments imposed property taxes on tribal activities and lands<sup>44</sup> and private citizens promised to fight any fee-to-trust application.<sup>45</sup> In *Sherrill*, the tribe objected to the taxes, arguing for a clever theory that when a tribe acquired reservation lands that had been illegally alienated to non-Indians many years

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39. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

40. *Id.* at 211.

41. *Id.*

42. See generally Meghan Y. McCune, “No Sovereign Nation, No Reservation”: Opposing Haudenosaunee Sovereignty through Land Claim and Fee-To-Trust Discourse (2015) (Ph.D. dissertation, Michigan State University) (on file with Digital Repository Collections, Michigan State University).

43. Michelle Breidenbach & Michael Dupras, *See Every Land Parcel the Oneida Nation Owns in Madison, Oneida Counties (Interactive Map)*, SYRACUSE (Jan. 4, 2019, 5:09 AM), [https://www.syracuse.com/state/2017/01/updated\\_search\\_every\\_acre\\_the\\_oneida\\_nation\\_owns\\_in\\_madison\\_oneida\\_counties\\_map.html](https://www.syracuse.com/state/2017/01/updated_search_every_acre_the_oneida_nation_owns_in_madison_oneida_counties_map.html) [<https://perma.cc/8U2B-J7QL>].

44. *E.g.*, *Oneida Indian Nation v. Madison County*, 665 F.3d 408 (2d Cir. 2011).

45. *E.g.*, *Cent. N.Y. Fair Bus. Ass’n*, 47 IBIA 113 (2008).

ago, the re-acquired lands regained their reservation status.<sup>46</sup> Reservation lands are immune from state and local taxation.<sup>47</sup> The Second Circuit realized that the tribe was correct, only Congress could terminate a reservation.<sup>48</sup> Still, predictably, the Supreme Court reversed, holding that Indian tribes could not unilaterally restore tax immunities.<sup>49</sup> Instead, concluding that tribes must ask the Secretary of the Interior to acquire the land in trust for the tribe.<sup>50</sup> Only with federal assent could the tax immunity be restored.<sup>51</sup> There wasn't a particularly compelling theory that backed up that conclusion, especially since it was clear New York acted illegally all those years ago. Even so, that holding alone would have been fine, if disappointing. The tribe could still pursue the federal remedy.

But the Court went much further, effectively punishing the Oneida Indian Nation and all other tribes for their various and collective efforts to restore their lands. The Court reasoned that to allow Indian tribes to reacquire reservation land and unilaterally restore the reservation status of those lands was too disruptive to non-Indians and non-tribal governments as a matter of law.<sup>52</sup> The Court invented a form of injury to non-Indian parties—"disruption" of their regulatory and police powers by tribes.<sup>53</sup> Under *City of Sherrill*, any tribal claim that led to a remedy that would interfere with state and local taxation and regulation was disruptive. In other words, claims for tax immunity, regulatory immunity, land and treaty rights, sovereign immunity, and tribal court jurisdiction could be barred. Because no party had even briefed this theory before the Court, no party had presented evidence on disruption. Because the tribe lost their claim without any evidence being

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46. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 163 & n.21 (2d Cir. 2003), *rev'd sub nom.* *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

47. *Id.* at 153 (citing *In re N.Y. Indians*, 72 U.S. 761, 771 (1866)).

48. *Id.* at 153–54 (quoting Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 513 (1976)).

49. *City of Sherrill*, 544 U.S. at 219–20.

50. *Id.* at 220.

51. *Id.* at 221.

52. *Id.* at 219–20.

53. *Id.*

presented, it appeared to observers that no evidence was needed. A non-Indian party could simply allege disruption and a court may dismiss a tribe's claims.

This was the theory behind the Second Circuit's summary dismissal of all (but one) of the Haudenosaunee land claims over the next several years.<sup>54</sup> The Haudenosaunee land claims, like those involving tribes in Maine, Connecticut, Rhode Island, and elsewhere, involved lands illegally alienated by the tribes to states and others in violation of the Non-Intercourse Act.<sup>55</sup> Most of those claims had been settled in agreements ratified by Congress.<sup>56</sup> They involved fairly large transfers of cash and lands from the states and the federal government to tribes. The State of New York refused to reach settlements, losing twice to the Oneida Indian Nation in the Supreme Court in the 1970s and 1980s.<sup>57</sup> But the *City of Sherrill* Court gutted those hard-won Supreme Court precedents under the *deus ex machina* that is disruption. Judgments worth hundreds of millions of dollars disappeared. The next question was where *City of Sherrill's* disruption theory would appear next.

### C. *Choking Off the Lifeblood of the Penobscot Nation*

The Penobscot Nation's effort to restore its connection to the river that bears its name is reminiscent of a similar dispute involving the Odawa and Ojibwe nations in northern Michigan. They oppose the continued operation of a pipeline that runs underneath the waters of the Straits of Mackinac.<sup>58</sup> The federal and state governments enabled the pipeline company, Enbridge, to install and operate the pipeline during the 1950s when the United States refused

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54. *E.g.*, *Onondaga Nation v. New York*, 500 F. App'x 87, 89–90 (2d Cir. 2012); *Oneida Indian Nation v. City of Oneida*, 617 F.3d 114, 117 (2d Cir. 2010); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005).

55. *See generally* Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17 (1979).

56. Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 477 & n. 100 (1994).

57. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 253–54 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 682 (1974).

58. *See* John Minode'e Petoskey, *Tribal Opposition to Enbridge Line 5: Rights and Interests*, 20 TRIBAL L.J. 55, 57, 76–77 (2020).

to either acknowledge the tribes or refused to acknowledge the power of the rest to self-govern. The pipeline is aging and dangerous. If it bursts, the scientific consensus is that the spill could be the worst freshwater ecological disaster in human history.<sup>59</sup>

In real ways, the Penobscot Nation has already lived through ecological catastrophes on their lands and waters. The tribe owns dozens of islands in the river, exercising fishing rights in the river itself. For decades, paper mills have illegally dumped toxic waste into the Penobscot River, rendering fish caught by tribal members poisonous, destroying the tribe's fishing rights.<sup>60</sup> In 2012, the Maine Attorney General issued an opinion allowing the state to exclusively regulate fishing rights on the waters around the tribe's islands in the river, reasoning that the Maine Indian Claims Settlement Act never granted the tribe ownership or control of the river.<sup>61</sup> The real reason for the opinion was to preserve state control over polluters, with "state control" meaning state authorization to pollute. Penobscot Nation jurisdiction over the river would complicate the power of the state to enable paper mills to toxify the river.

The Penobscot Nation sued but lost before a deeply divided en banc panel of the First Circuit in *Penobscot Nation v. Frey*.<sup>62</sup> The text and the historical background of the parties' competing claims seemingly took a backseat to the majority's worries about the

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59. See generally NAT'L WILDLIFE FED'N, *THE EDGE OF DISASTER FOR THE GREAT LAKES: NEAR MISSES FROM ENBRIDGE'S AGING AND DEGRADED* (Nov. 20, 2020).

60. William H. Rodgers Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 834-35 (2004); Emma Vannorsdall, *'Do Not Eat the Fish: Environmental Negligence and its Impact on Maine's Indigenous Communities*, ME. CAMPUS (Nov. 15, 2021), <https://mainecampus.com/2021/11/do-not-eat-the-fish-environmental-negligence-and-its-impact-on-maines-indigenous-communities/> [<https://perma.cc/4Q62-TXFN>]; Nina Maheralis, *Old Town Mill Spills 30,000 Gallons of Pulping Chemicals into Penobscot River*, BANGOR DAILY NEWS (Oct. 3, 2020), <https://bangordailynews.com/2020/10/22/news/bangor/old-town-paper-mill-spills-30000-gallons-of-pulping-chemicals-into-penobscot-river/>.

61. Letter from William J. Schneider, Att'y Gen., Me. Off. of the Att'y Gen., to Chandler Woodstock, Comm'r, Dep't of Inland Fisheries & Wildlife, and Colonel Joel T. Wilkinson, Me. Warden Serv. (Aug. 8, 2012) (on file with Maine Office of the Attorney General). See generally Pub. L. 96-420, Oct. 10, 1980, 94 Stat. 1785.

62. *Penobscot Nation v. Frey*, 3 F.4th 484 (1st Cir. 2021) (en banc).

disruption that would occur if the tribe possessed even limited governmental powers over the river. The majority condemned an interpretation of the law that would have meant “an enormous change” to the control over “an important water artery that Maine (and Massachusetts before it) has controlled for centuries.”<sup>63</sup> The majority invoked the tribe’s original complaint, in which the tribe had impliedly asserted ownership of the river, not the second amended complaint or later briefs, where the tribe asserted that the tribe possessed unextinguished aboriginal rights.<sup>64</sup> Assuming that tribal property interests in the river would be exclusive, the majority threw up its figurative hands in shock at the tribe’s audacity—and the dissent’s naivete.<sup>65</sup>

The majority’s difficulty with the Penobscot Nation’s claims is virtually the same as the *City of Sherrill* Court’s difficulties with the Oneida Nation’s claims. They rest on the false assumption that tribal property interests and non-tribal property or governmental interests cannot coexist. However, simply looking anywhere in Indian country where tribes and states and others co-regulate wildlife, share gaming and tax revenue, and cooperate on public safety shows this to be false.<sup>66</sup> Co-regulation of the Penobscot River allows for tribal input into whether the paper mills will continue to dump toxic chemicals into the river. In short, the tribe is a threat to the settled expectations of non-Indian polluters. One does not have to look far geographically to see another instance where a court judgment granted non-tribal interests an enormous economic windfall; the same misfortune befell the Narragansett Tribe.

#### D. *Blocking Narragansett Land Restoration*

Long before I had heard of *City of Sherrill*, I closely followed a case out of Rhode Island that had the potential to devastate the Grand Traverse Band’s future, a case that would be decided in

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63. *Id.* at 501; *see also id.* (criticizing a holding that would work “a massive change in ownership and control over the Main Stem.”).

64. *Id.* at 502; *see also id.* n.19.

65. *Id.* at 502 (“The stakes of reading the definition of Reservation to include the River are far greater than the dissent is willing to acknowledge.”).

66. *See, e.g.,* Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97, 103–07 (2015) (describing the Saginaw Chippewa Indian Tribe settlement with the State of Michigan and several local governments).

2008, *Carcieri v. Salazar*.<sup>67</sup> *Carcieri* was about the power of the federal government to acquire land in trust for Indian tribes. As noted earlier, GTB frequently tried to persuade Interior to take our land into trust.

The Narragansett Tribe, the subject of the *Carcieri* decision, suffered near-extinction at the hands of colonizers long before the United States existed. Like the Penobscot Nation, the Narragansett Tribe is the subject of a land claims settlement act, the Rhode Island Indian Claims Settlement Act.<sup>68</sup> The Act provides that any lands acquired by the tribe using settlement funds are to be governed under state law.<sup>69</sup> *Carcieri v. Salazar* was the result of the Department of the Interior's agreement to acquire land in trust for the Narragansett Tribe in 1998.<sup>70</sup> The tribe had hoped to build public housing for its members on its lands, but the local government objected, insisting the tribe comply with its regulations.<sup>71</sup>

Rhode Island argued that the Secretary of the Interior did not have the power to acquire land in trust because the Narragansett Tribe was not under federal jurisdiction in 1934 when the federal statute that authorized federal trust land acquisitions for Indian tribes came into effect.<sup>72</sup> The Supreme Court agreed, concluding that the Interior Department, which had acquired lands under the statute for dozens, if not hundreds of tribes similarly situated to the Narragansett Tribe, was wrong to do so.<sup>73</sup> The Court concluded that Interior could only acquire land for tribes "under federal jurisdiction" as of 1934, leaving out the Narragansett Tribe.<sup>74</sup> Weirdly, the statute does not define "federal jurisdiction," and the parties had not litigated whether the tribe could have been under federal jurisdiction in 1934. After all, the government removed Indian children from their homes and placed them in boarding schools starting

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67. *Carcieri v. Salazar*, 555 U.S. 379, 381 (2009).

68. Rhode Island Indian Claims Act, Pub. L. No. 95-395, 92 Stat. 813 (1978).

69. *Id.* § 9.

70. *Carcieri*, 555 U.S. at 385.

71. *Id.*

72. *Id.* at 388.

73. *Id.* at 395–96.

74. *Id.*

in at least the 1870s.<sup>75</sup> Presumably, the United States assumed the Narragansett Tribe was under some form of federal jurisdiction if the government acted to take Narragansett children from their homes. However, the Court refused to remand the case to allow Interior or the tribe to present evidence on the question.<sup>76</sup>

The coda is that the Narragansett Tribe has virtually no economic prospects, and the State of Rhode Island continues to be the primary culprit. A tribal effort in 2003 to open a smoke shop ended in a state police raid that left tribal citizens bleeding and broken on the ground.<sup>77</sup> Governor Carcieri's statement after the raid, "I strongly believe that a casino is not the right course for the tribe or the state,"<sup>78</sup> strongly suggested the smoke shop was not the state's main concern. This was about destroying the state's competition for the gaming market. Fifteen years later, Rhode Island now operates a casino under state law that grants the state a monopoly on gaming;<sup>79</sup> the Narragansett Tribe has nothing.

#### CONCLUSION

While I was wrapping up this paper, the *Stanford Law and Policy Review* asked me to participate in a symposium on Dr. Greg Ablavsky's new book, *Federal Ground: Governing Property and Violence in the First U.S. Territories*. The book is a history of the establishment of property rights in the first United States territories,

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75. G. Wayne Miller, 'Away From Home' exhibit tells the story of Native children stripped of their identity, PROVIDENCE J. (Nov. 10, 2021, 5:01 AM), <https://www.providencejournal.com/story/news/local/2021/11/10/away-from-home-exhibit-tells-of-native-children-forcibly-removed-to-american-indian-boarding-schools/6353102001/> [<https://perma.cc/MM9L-X5CV>].

76. Carcieri, 555 U.S. at 396.

77. Erik S. Laakkonen, *Up in Smoke? Narragansett, Hicks, and the Erosion of Tribal Sovereign Immunity*, 11 J. GENDER, RACE, AND JUST. 453, 461–62 (2008); Rick Green, *Where There is Smoke*, HARTFORD COURANT (July 16, 2003), <https://www.courant.com/news/connecticut/hc-xpm-2003-07-16-0307161495-story.html> [<https://perma.cc/7AUX-KD5G>].

78. Green, *supra* note 77.

79. *Mashpee Wampanoag Tribe Reservation Reaffirmation Act: Hearing on H.R. 312 Before the Subcomm. on Indigenous Peoples of the United States*, 116th Cong. 42 (2019) (statement of Claire Richards, Executive Counsel to the Governor, State of Rhode Island).

the Northwest and the Southwest territories.<sup>80</sup> Dr. Ablavsky details the earliest history of the federal program resulting in the dispossession of Indigenous peoples of its lands.<sup>81</sup> The assertion of federal powers in Indian country is the assertion of federal sovereignty. Sovereignty is enforced by violence. Permeating the book are descriptions of violence, usually initiated by non-Indians encouraged to inject themselves into Indigenous territories and economies.<sup>82</sup> The outcome, we know from history, was never in doubt. Americans targeted Indigenous people largely because of their race. Indigenous peoples lost almost everything. *Federal Ground* is a history of systemic racism.

Centuries have passed since the events uncovered and analyzed in Dr. Ablavsky's book. The dispossession of Indigenous peoples of their lands and resources has long been complete. Today, the United States exists in the regime of what many call "settler colonialism." The United States established property rights long ago. The United States and its subdivisions, the states, assert their sovereignties to protect those property rights. Virtually by definition and because they own nearly all of the land and resources, property rights protect non-Indian and non-tribal interests. Indians and tribes have little recourse to restore their homelands and access to the resources they owned and controlled before dispossession. Property rights enforced by government, whether intentionally or not, overwhelmingly benefit non-Indians and non-tribal governments. Whose property rights are enforced is a sovereign choice. Sadly, Indian people have almost no say in the choices of state and federal sovereigns. This, too, is systemic racism.

Fortunately, Indian nations are timeless entities. Consider the story of Nanaboozhoo and the giant.<sup>83</sup> Nanaboozhoo is a trickster god of the Anishinaabe.<sup>84</sup> When Nanaboozhoo was a small child, his village, his nation, of Anishinaabe people, was destroyed by a

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80. GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 2* (2021).

81. Ablavsky describes how the United States chose to assume control over Native lands, funneling all land sales through the United States. *Id.* at 77–78.

82. *See generally id.* at 109–97.

83. Fletcher, *supra* note 3, at vii–ix.

84. John Borrows, *The Trickster: Integral to a Distinctive Culture*, 8 CONST. F. 27, 27 (1997) (Can.).

giant.<sup>85</sup> There was no one left but Nanaboozhoo and his grandmother, Nokomis.<sup>86</sup> The giant left *Anishinaabewaki* (the land of the Anishinaabe) and walked to his compound beyond the great lake.<sup>87</sup> As Nanaboozhoo grew up, he had dreams of the *manid-owaag* (spirits) that told how he would eventually be strong enough to defeat the giant.<sup>88</sup> His grandmother prepared him for his journey as he grew stronger.<sup>89</sup> Nanaboozhoo and Nokomis gathered materials for a long journey over a great lake.<sup>90</sup> It took time and patience. Eventually, Nanaboozhoo, with the help of his grandmother, the hoofed creatures, fish, and birds, and the *manid-owaag*, was strong enough to confront and defeat the giant.<sup>91</sup> His actions restored the Anishinaabeg to their place in *Anishinaabewaki*.<sup>92</sup>

Any Indian law attorney will concede that a big loss in a big case is devastating. Nevertheless, the work continues. The eastern tribes will never stop fighting for what is rightfully theirs. Indian nations and their advocates are relentless in their pursuit. Opponents might caricature Indian nations as octopi, but they are missing the point. The Grand Traverse Band had control over 12 acres of land and zero budget when the United States acknowledged the tribe in 1980. The tribe has come a long way, employing a variety of strategies. Over time, other tribes will follow.

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85. Fletcher, *supra* note 3, at vii.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at viii–ix.

92. *Id.* at ix.