

RECONSTRUCTION

The Civil War and the Wounds of

Racial Politics in New York City

Jazz and the Cultural Canon

Why the Death Penalty Matters

Indigeneity and Hope Franklin

Anti-Semitism, Jewish Racism

The Younger Franklinrazier

On Stanley Crouch

Segregation in Mississippi

Academics in a Down Under Siege In Af

Country's History Reconsidered

Empire and Native Americans

RECONSTRUCTION

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Reconstruction is published quarterly by New Departures, Inc., a non-profit, tax exempt, 501(c)(3) corporation. The *Reconstruction* ISSN number is 1049-1392.

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The Continuing Conquest: American Indian Nations, Property Law, and Gunsmoke

Joseph William Singer

On March 17, 1990, a new episode of the old television series "Gunsmoke" appeared on the ABC television network. It was called "The Last Apache." The description in *TV Guide* went like this:

James Arness rides tall in the saddle again as Matt Dillon, the indomitable U.S. Marshall who cleaned up Dodge City, Kan., on Gunsmoke....

It's 1886, Dillon no longer wears a badge, and he's about to take the law into his own hands. In the Arizona Territory, a renegade Apache named Wolf...abducts the daughter Dillon never knew he had. To trade for her freedom, Dillon and an ornery Army scout...head out into the desert with a couple of bargaining chips: two teenage sons of the Apache chief Geronimo, whom they break out of an Army stockade.

Three elements of this episode strike me as outrageous.

Number one: The producers apparently see American Indians as relics of the past. The story is about the "last Apache." It seems that the producers presumed that no Apaches would be around to watch the show—much less, read *TV Guide*. Or perhaps the producers simply did not care that Apaches might be watching. They made the current Apaches, as well as all American Indians, invisible to the non-Indian world.

Number two: The story plays upon the enduring spectre of dark-skinned men carrying off the wives and daughters of good white men. This fear seems to be deeply embedded in the national white psyche. It is the Willie Horton story all over again.

Number three: There was no public outcry about this show. No editorials, no letters to the editor, no demonstrations, no recriminations, no one fired, no apologies, nothing to make up for. Just an ordinary Saturday night in America.

How is such a thing possible in the last decade of the twentieth century?

The beginnings of an answer are provided in *The American Indian in Western Legal Thought: The Discourse of Conquest*, (Oxford University Press, 1990, \$39.95) by Robert A. Williams, Jr., a professor at the University of Arizona College of Law. Williams' book is an extraordinarily insightful effort at historical recovery, in which he explores the multiple and varying justifications offered by lawyers, scholars, clergy, public officials, kings and queens, politicians, and judges in Portugal, Spain, England, and the United States for the conquest of America. Williams contrasts what happened and what European theorists said happened. There is a pervasive mythology in the United States about what is euphemistically called the European "discovery" of America. Williams' description of the conquest and the reasons given for it contrast sharply with this traditional picture. His recapturing of the reality of conquest brings within our reach a new version of history—one which emphasizes facts left out of the myths that form the common-sense understanding of our history. It is not a pretty picture, but it is true. It therefore teaches lessons which should be known by every person in the United States.

The scope of the book is sweeping. Williams begins his analysis with the Crusades, delineating in detail the justifications offered for attempts to conquer the Holy Land by various popes and by political leaders in Spain and Portugal. Turning to the conquest of America, Williams shows that the justifications for the Crusades were elaborated and reused to justify further conquest, including the Portuguese conquest of the Canary Islands and Brazil and the conquest of much of what Spain called the "New World." Williams then turns his attention to England and the United States, showing that the cycle of conquest repeated itself: the English conquest of Ireland functioned as a test run for the English conquest of America.

These cycles are marked by both surprising consistency and extraordinary diversity. On the one hand, conquerors consistently claimed to recognize and respect the rights of native peoples while simultaneously justifying conquest. On the other hand, a sur-

prisingly diverse set of rationales were proposed to explain why conquest was compatible with respect for native property and sovereignty.

Justifications for conquest have taken many forms. The most popular is self-defense. In the mid-thirteenth century, Pope Innocent IV authorized the effort to conquer the Holy Land by arguing that it had once belonged to Christians, but had been seized by infidels. A just war could be fought to recover what rightfully belonged to Christians. Similarly, Pope Urban II justified the Spanish Crusade against the Moors in the eleventh century as an effort to recover Christian lands from infidels.

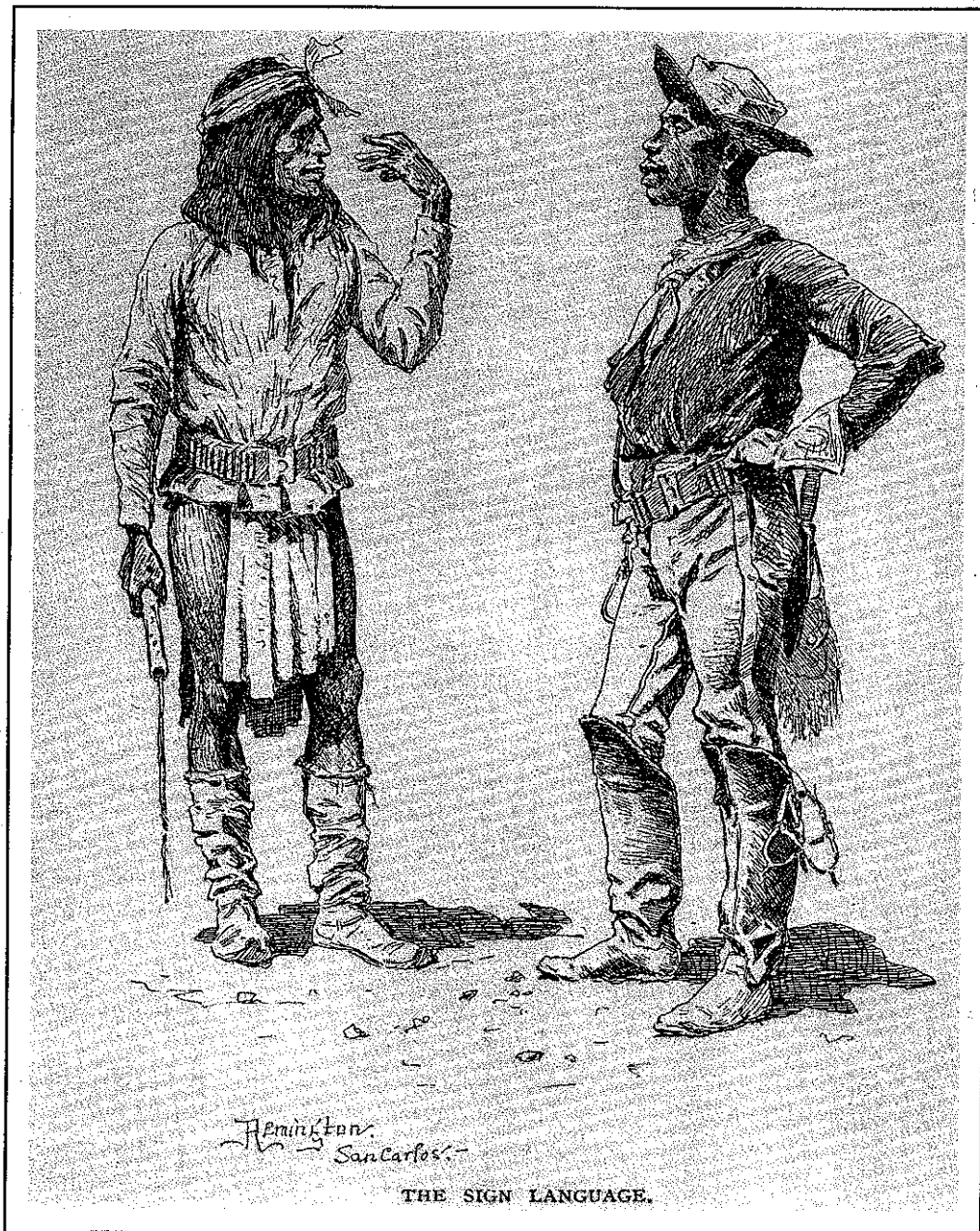
The English also described conquest in terms of

self-defense. In 1622, for example, Edward Waterhouse, defending the English Virginia Company, argued that the English had the right to settle in “waste” lands in the New World. If Indians interfered with those settlements, the English had a right to defend themselves. In this view, waging war against Indians and seizing their property did not constitute an act of aggression. Rather, the English were only defending their property.

A purported duty to spread Christianity constituted a second popular justification for conquest. Pope Innocent IV argued, for example, that the natural law rights of native people were qualified by the Papacy’s obligations to protect the spiritual well-being of all

human souls by spreading the Christian faith. In 1513, thinking along the same lines, King Ferdinand issued the Requirimento, a set of regulations for royal conquest which required the natives of America to accept Christian missionaries in their midst—or else suffer annihilation. Sometimes the justification took the form of a supposed invitation by natives, rather than a threat. Columbus argued, for example, that Spanish conquest of the Indies was justified because the inhabitants there were well-disposed to embrace Christianity.

The desire to help or civilize native peoples has often been advanced as a third justification for conquest. Columbus justified conquering the Caribbean islands on the grounds that the inhabitants were uncivilized. The natives’ “idleness” justified forcing them to work—indeed, enslaving them. The English used a similar rationale. In the same way that the English con-



querors of Ireland claimed that the Irish were "wild, barbaric and in need of being civilized and Christianized," so too did they claim that conquest would prevent natives from "practicing abominable lewdness even with beasts, and [eating] human flesh." Richard Hakluyt argued in 1583 that conquest of America would benefit the Indians by inducing them to "forsake their barbarous and savage living." Similarly, Robert Gray, a Puritan preacher, sermonized in 1609 that the Indians had no right to sovereignty because they were "as wild beasts in the forest; for they range and wander up and down the country without any law or government, being led only by their lusts and sensuality."

A fourth justification for conquest was that American Indians held all things in common, not recognizing property rights. Franciscus de Victoria, one of the progenitors of international law, argued that, since they held all things in common, the Indians could not exclude the Spanish from sharing in their common assets. Robert Gray, the Puritan preacher argued that, "There is no meum and tuum (mine and thine) amongst [the American Indians]. So that if the whole land should be taken from them, there is not a man that can complain of any particular wrong done unto him." In 1632, the English Crown declared that the Indians possessed no rights of private property, "their residences being unsettled and uncertain, and only being in common."

Sometimes this argument took the form of a claim that the natives of America had no right to hoard the "waste" or supposedly unoccupied lands of the New World. George Peckham argued in 1583 that the Indians misused the land. The techniques of English civilization would enable the Indians to use a tenth of their land to sustain themselves, allowing the English to use the surplus. The Englishman Thomas Harriot repeated this argument in 1588. A pamphlet published in 1610 (perhaps by Francis Bacon) argued that there was plenty of land in the New World for the Indians and the English, that the presence of the English would benefit the Indians, and that it was therefore irrational for the Indians to refuse to cede sovereignty over their lands. John Locke similarly argued that "he that encloses land and has a greater plenty of the conveniences of life from ten acres, than he could have from a hundred left to waste, may truly be said, to give ninety acres to mankind." Thomas Jefferson adopted

Locke's view in 1774, arguing that individuals had the right to take over "vacant" lands.

A fifth justification stemmed from notions supposedly embedded in international law. Victoria argued that, although the natives of America had natural rights of dominion over their lands, they could be conquered by

Christian nations if they violated tenets of the universally binding law of nations. The law of nations included the right to travel in foreign lands, the right to engage in commerce, and the right to propagate the Christian faith. Thus, according to Victoria, under international law the Spaniards had a right to "travel in the lands in question and sojourn there, provided

they do no harm to the natives, and the natives may not prevent them." Nor could the "native princes hinder their subjects from carrying on trade with the Spanish."

For at least five hundred years then, European nations recognized native rights to property and sovereignty at the same time that they conquered native peoples. Conquest and its justifications continually changed in form. Yet the conquest did not stop.



Williams extends his analysis only to the middle of the nineteenth century. His detailed descriptions of five hundred years of conquest, however, offer ample resources for analyzing recent developments in federal Indian law. The lesson of his book is a timely one: those who believe today that they are protecting native rights are likely instead to be actually engaged in oppressing Indians.

Consider the recent cases.

In 1955, the Supreme Court held that the federal government may seize Indian land without paying just compensation, as long as the government has not signed a treaty which recognizes tribal occupancy rights. This is still the law in the United States.

In 1980, the Court held that the United States need not pay Indian nations just compensation even when it seizes lands recognized by a treaty, as long as the government uses the proceeds of the sale for what the government considers the benefit of the tribe. In contrast, in the non-Indian context, the just-compensation clause requires the government to pay an owner the fair market value of the property; the owner can then decide what to do with the money. In the Indian con-

Our legal system can draw on five hundred years of experience in coming up with reasons to make conquest of Indians seem like respect for rights.

text, the government may keep the money and determine how it is to be spent.

A 1985 case involved a federal statute which appropriated funds to compensate the Shoshone nation for lands which the government had seized. The Court held that the statute appropriating the money to be deposited in a government trust fund constituted payment to the tribe, even though no money was distributed to the tribe.

In 1988, the Supreme Court held that the federal government may lawfully construct a highway through sacred Indian lands, even though the highway will have the effect of destroying the tribal religion. The court reached this conclusion despite the fact that the first amendment forbids the government from infringing on the free exercise of religion. In authorizing the Forest Service to destroy the tribal religion, Justice O'Connor pleaded that "nothing in our opinion should be read to encourage government insensitivity to the religious needs of any citizen."

The judges who decided these cases are earnest and well-meaning. Their opinions seek to explain these remarkable results as unremarkable. The justifications appear, on the surface, to be powerful; there is no irony in these opinions. After reading Williams' history, we can understand why: our legal system can draw on 500 years of experience in coming up with reasons to make conquest seem like respect for rights.

The subtlety in the reasoning gives a surface plausibility to these opinions. But they are rationalizations nonetheless. To understand how these rationalizations operate, it will be useful to analyze a recent case in detail.

On May 9, 1990, Judge Barbara Crabb of the federal district court in the western district of Wisconsin ruled that the various bands of the Chippewa nation could no longer fully exercise their treaty-guaranteed rights to hunt on public lands. Although the Chippewas had been forced to give up much of their land to the United States, treaties reserved certain lands for them. Treaties also guaranteed in particular their right to hunt on the lands ceded to the United States. However, these treaties also allowed non-Indians to hunt on the lands ceded to the United States.

The question for Judge Crabb was how to allocate property rights in the wild game once limits had to be placed to protect now-scarce wild species. In only what appears to be a Solomonic judgment—and relying on Supreme Court precedent—she divided the pie in half, giving non-Indians and Indians each a right to 50% of the game.

This was fair, Judge Crabb argued, because the treaty gave both Indians and non-Indians the right to hunt on those lands; because neither could exclude the other since the rights were equal; and because the parties who drafted the treaty would have agreed upon this solution had they addressed the question of scarcity.

There is one minor flaw in her argument. The 1837 and 1842 treaties guarantee the Chippewa Nation "that level of hunting, fishing, and gathering...necessary to provide them a moderate living." The evidence clearly demonstrated that even if they had the right to harvest 100% of the game in 1990, the Chippewas would be unable to achieve a "moderate standard of living."

If the federal court followed the traditional rule of federal Indian law that treaties are to be interpreted in the way they would have been understood by the Indian nations with whom they were made, there would be no question that the Chippewas would have intended to reserve as much game as necessary for their living needs. If the game had become so scarce as to not even provide a moderate standard of living, at least they would have the right to whatever was there. This is also the result one would expect if the original owner of land was not an Indian tribe, but consisted of a group of non-Indians. Under traditional doctrines of property law, an ambiguity in a document transferring property is generally interpreted to effectuate the intent of the grantor. The grantor is the seller or prior owner. In this case, the prior owners were the various bands of the Chippewa Nation who ceded those lands to the United States, but reserved to themselves the right to hunt on those lands for their living needs. It is implausible to suggest that the Chippewas would have voluntarily agreed to limits on hunting rights below what they would have needed to survive. This means that the non-Indians' concurrent right to hunt would have been intended to be subordinate to the right of the Chippewas—in case of scarcity, the Chippewas would prevail.

But Judge Crabb did not see it this way. Instead, she concluded that the preconditions underlying the treaty no longer obtained and thus an "equitable" solution—sharing—was required. She did this despite the evidence establishing that the Chippewas rely on hunting partly for living needs, while most non-Indians engage in hunting only for sport. More fundamentally, there can be no question that Judge Crabb's decision fails to represent what the Chippewas would have voluntarily agreed to in 1837 or 1842.

But on one point the federal judge was right: it is

quite likely that this is the arrangement the United States would have forced on the Chippewas if it had thought about the issue. The United States government had the power to impose the terms it understood and preferred—and then have those terms treated as voluntary and consensual on the part of the Chippewas. But the nineteenth-century United States government simply failed to imagine the terms Judge Crabb invented.

Before Judge Crabb's decision, legal precedents had established that the Chippewas had a right to hunt as much as necessary to sustain a moderate standard of living—as much as 100% of the game, if that was what was needed. A prior opinion had held that, although the Chippewas understood that they would be exercising their hunting rights in common with non-Indians who might settle in the territory, "it was the Indians' further understanding that the presence of non-Indian settlers would not require the Chippewa to forego in any degree that level of hunting, fishing and gathering...necessary to provide them a moderate living."

Judge Crabb wrongly interpreted the treaty in a way that reduced the Chippewas' share to 50%. Her decision therefore took from the Chippewa nation half of its property interests at issue in the case. She did so on the grounds that they were needed by non-Indians and that it would be wrong for the Indians not to share what they have. But imagine a group of homeless people suing for 50% of Manhattan on the ground that they need living space, that real property is scarce in New York City—a condition not anticipated by those non-Indians who first possessed land on Manhattan island—that the conditions under which the property was originally acquired no longer obtain, and that the only fair compromise is to share the property fifty-fifty between those who have homes and those who are homeless.

The courts would undoubtedly react as did the Court of Appeals of New York to an attempt by New York City to require single-room occupancy hotels to remain in business. The court held that the ordinance was an unconstitutional taking of property without compensation. Indians, by contrast, are compelled to share what they have when what they have is needed by non-Indians.

The reasoning of the federal court echoes one of the major justifications for conquest detailed by Williams—the idea that American Indians had no right to hoard vast lands they were not "using." Citing Supreme Court precedent, Judge Crabb wrote that an equal division has been "accepted as a fair apportion-

ment of a common asset" since the time of Solomon, and that equal division is the result "one would expect especially between parties who presumptively deal with each other as equals." This argument presumes that the treaties by which the Chippewas ceded most of their territory were voluntary. But nothing could be further from the truth. These lands were wrested from them by force. And if the Chippewas did not voluntarily cede their lands, there is nothing fair about equal division of an asset that the Chippewas need for their livelihood and which the United States promised to respect, unless one assumes that they had no right to keep it to themselves.

Some have argued that the Chippewas in fact have no right to the property rights preserved in treaties because those treaty rights embody an unequal racial preference for Indians in access to essentially public lands. They are said to constitute "reverse" discrimination against non-Indians. On the surface, this argument appears to have some force. Imagine a private donor who chose to grant property to a city for use as a public park on the condition that it be used only by whites; if non-whites were allowed to enter, the property would revert to the grantor or his heirs. Under these circumstances, the city government cannot operate a segregated park; to do so would deprive black citizens of equal protection of the laws. In at least some states, the reverter clause is unenforceable and the park remains open to all. This is the right result. The property should not be returned to private hands simply to prevent it from being integrated. Since the Civil Rights Act of 1964, racial discrimination in some—but not all—public accommodations has been illegal under federal law. The private donor has no right to restrict by race property that is otherwise open to the public.

However, in the context of Indian nations, the reverse discrimination argument is untenable. It is the United States government, and not the Chippewas, that has insisted on a racial definition of who is an "Indian." The Supreme Court held in 1846 that even if a white man were "adopted" by the Cherokee nation and accepted by the Cherokees as a Cherokee, the United States could properly continue to treat him as a non-Indian because he could not change his race. In contrast, American Indian tribes have generally defined tribal members as those who have become integrated into the tribal "family" and follow the tribal way of life. Indian tribes are not voluntary societies which anyone can join, but they are not defined by race. The definition of who a Chippewa is excludes not only non-Indians but other Indians as well. This

means that the preferred access for Chippewas is not based on race at all. There are upwards of five hundred tribes in the United States and a retained right of access for Chippewas does not grant any rights at all to the vast majority of American Indians. Chippewas have a preferred right of access, not because they are Indians, but because they are members of the "family" or nation of Chippewas who have inherited the treaty rights promised to the Chippewa Nation by the United States.*

Another factor distinguishes tribal access from reverse racial discrimination. The law is always making distinctions among persons and among groups. Discrimination *per se* is not objectionable. What is objectionable is wrongful discrimination which has the effect of subordinating one group to another. Excluding blacks from public parks creates and reinforces white supremacy; a property right based on this interest therefore cannot rightly be protected or furthered by law. However, honoring hunting and fishing rights reserved in a treaty does not cause racial subordination of non-Indians by Indians. Rather, it represents an attempt by the United States to do what it has not often done in its history—keep its treaty promises to Indian nations. The Chippewas retain whatever property rights were not given away. Honoring this commitment does not subordinate non-Indians; it grants the Chippewas the same rights to protection of their property as the law grants to non-Indians.

Thus, the equality argument for sharing tribal rights does not hold. It is another, more modern version of the many ways in which the property rights of Indians have long been granted less protection than that accorded to similarly situated non-Indians.

Judge Crabb need not have ruled against the Chippewas. In fact, although the Supreme Court has sometimes required sharing of property interests with non-Indians, it has sometimes done precisely the opposite. In a major case allocating water rights on the Colorado River, the Supreme Court held that in various treaties ceding land in the West, the Indian nations retained the right not only to the amount of water

* Most non-Indians who object to reserved tribal rights on the grounds that they constitute reverse discrimination would probably not object to the practice of allowing children of wealthy parents to inherit their property. Yet the practice of inheritance has a racial cast: it allows whites to pass on their wealth to their descendants, who are likely to be white. Since whites as a class have a disproportionate share of property, the rules of inheritance may have the effect of perpetuating past patterns of racial inequality.

used at the time of the treaties, but also to future increases necessary for tribal purposes.

The contradiction between the theories of these two cases demonstrates that the federal courts have the power and the flexibility to interpret treaties as they would have been understood by the Indian signatories. Sometimes the courts do this, but most of the time they do not. Typically, they strip Indian nations of their property rights, little by little. They need to give reasons to do this. Professor Williams shows us that, for five hundred years, ingenuity in generating new reasons has coexisted with the staying power of the old reasons. The recent cases fit the pattern well.

Through his elaboration of that pattern, Professor Williams teaches us how to understand current federal Indian law. American Indian rights are recognized, but they are often not protected. The property rights of American Indian nations are routinely granted less protection under United States law than that granted to non-Indian property. Tribal lands are often treated as a commons available to non-Indians. The courts justify this unequal treatment by claiming that it represents equality and respect for the rights of all. Williams' book recites the history of conquest and its justifications. But most judges are ignorant of the past he describes and thus are condemned to repeat it. So the conquest continues.

■

Besides illuminating new cases, Professor Williams offers a framework for understanding all property rights—a framework that should sober non-Indians while confirming Indians' perceptions of continuing injustice.

First, property and sovereignty in the United States have a racial basis. The land was taken by force by white people from peoples of color thought by the conquerors to be racially inferior. The close relation of native peoples to the land was held to be no relation at all. To the conquerors, the land was "vacant." Yet it required trickery and force to wrest it from its occupants. This means that the title of every single parcel of property in the United States can be traced to a system of racial violence. For non-Indians to claim an inalienable right to the current distribution of property rights is to claim a right to the benefits of a system of racial supremacy.

In an era in which property claims often involve jobs and benefits as much as land, this understanding of property is especially instructive. Consider the current

controversies over the firing of white teachers in public schools while more recently hired black teachers retain their jobs. Some of the fired teachers assert that their seniority constitutes a property right which they are losing on account of their race. But many employees in previously segregated school systems have jobs partly because they are white. If they had not been white, they would probably not have been hired. To claim the continued benefits of seniority as against those who would have been hired if they had been white is to claim a vested property right in the benefits of being white. Professor Derrick Bell has described this as a claim to a property right in whiteness.

Second, the conquest of American Indian nations continues. Over the last fifteen years or so, the Supreme Court has imposed significant limits on the these of American Indian nations. It has justified rights limitations by some of the techniques recounted in such excruciating detail by Williams. The Court pretends to defer to native rights, yet repeatedly allows them to be trumped by the rights of non-Indians. The rights of American Indian nations are recognized at the same moment they are destroyed.

What does that tell us about the system of property and sovereignty in the United States? It tells us that property is related to power and that power is complicated. On one hand, the rule of law, as exercised in the United States, defines the interests of some as protectable property interests and the interests of others as devoid of rights at all. In so doing, the law protects the property interests of some while it sanctions the expropriation of the property of others. The reasons that can be given for these practices are numerous, and the subtle and intricate ways it can be accomplished make the mind spin.

At the same time, because of these very subtleties—because of these numerous reasons—it may be possible, sometimes, to embarrass the powerful to abide by their promises. It may be possible, sometimes, to force a confrontation between the rhetoric of rights and the reality of conquest.

For example, some Indian nations have been more successful in litigation over water rights than over fishing and hunting rights. Those nations have been accorded the right not only to the amounts of water historically used for irrigation and other purposes by the tribe, but to increased amounts based on reasonably foreseeable future needs. Rather than being relegated to a mere moderate standard of living—or having their historic rights cut in half because of the scarcity of water—Indian nations are treated as equal

to other sovereigns who increase their use of natural resources as they engage in economic development.

Similarly, various Indian nations have recently convinced Congress to settle old land claims by transferring thousands of acres of land to the tribe, along with millions of dollars of payment for illegally seized property. Recent statutes have settled claims of the Passamaquoddy and Penobscot nations in Maine and of the numerous native peoples in Alaska.

Third, it is not the case, as many believe, that property rights emerged as individual frontier families tamed a wild and empty land situated in the state of nature before government arrived. All property in the United States was seized from native peoples by the federal government, which then decided how the property should be distributed. Sometimes the government simply opened lands to settlement, or confirmed titles in whites who had already illegally invaded Indian lands. But these were decisions about how to distribute property—first come, first served, as long as you were not an Indian.

The government seized the land because it felt that the land was needed for settlement by non-Indians. As President James Monroe noted in his first annual address to Congress in 1817: "The earth was given to mankind to support the greatest number of which it is capable, and no tribe or people have a right to withhold from the wants of others more than is necessary for their own support and comfort." All property in the United States is based on a scheme of redistribution motivated by a desire to provide land for those who need it and to take it from those who are thought not to need it.

If we learn these lessons, what do they tell us about who rightfully owns Manhattan Island? ■

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