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THE LANDS WERE NOT EMPTY

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Gregory Ablavsky's book *Federal Ground: Governing Property and Violence in the First U.S. Territories*[1] tells a complex story about politics, violence, law, property, and sovereignty in an unsettled time just after United States independence from Great Britain. The 1783 Treaty of Paris that ended the war between the new United States and Great Britain and established the United States as a separate nation did not include the many Native nations living within the borders of the new nation. They were not represented at the treaty negotiations, nor did Britain seek any assurance from the United States that their rights and sovereignty would be respected. The United States was under the mistaken impression that it had defeated the tribes that sided with Britain. However, the Native nations did not agree that they were now subjects of the United States, nor had they been defeated militarily. Quite the contrary, they had never surrendered, nor had they sacrificed either sovereignty or ownership of their ancient lands to Britain or to the United States. Nor had they been defeated militarily. Given the huge debts of the infant United States and the military power of the Native nations at that time, the new country quickly reversed course and followed the policies of President Washington and Secretary of War Henry Knox, who both counseled negotiation and treaty making as methods to wrest control of Native lands in the Northwest Territories and the Southwest Territory (Tennessee).

Ablavsky recounts in detail the history of those encounters between Native nations and the United States. Along the way he describes the disputes between the state and federal governments over both sovereignty and property in the territories and the disputes among the territorial inhabitants (Anglo-Americans, French *habitants,* and Native nations) and between those inhabitants and the territorial and federal governments. On

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1 Gregory Ablavsky, Federal Ground: Governing Property and Violence in the First U.S. Territories (2021).

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top of these conflicts over power, sovereignty, and law were myriad disputes over property with many conflicting sources of title contending with each other, from first possession to non-Native settlement to titles derived from state grants, land companies, territorial law, or federal patents.

This rich history deserves close reading, and Ablavsky's prose both delights and intrigues the reader. This is storytelling at its best. While one major theme of the book is the complexities of both sovereignty and property in a time of revolutionary change, a second theme is how every conflict, every issue, every encounter in the period from 1780 to 1800 ultimately led in a single direction—toward the consolidation of powers in the new federal government—which Ablavsky portrays as the most surprising and significant result of that tumultuous time. Disputes over property, he argues, required a "neutral" arbiter, and the only one available was the new federal government. For that reason, everyone—from non-Native territorial inhabitants to Native nations to state governments to land speculators to land companies to Revolutionary War soldiers to the states themselves—appealed to the Congress of the United States to press their claims for title to the disputed western territorial lands. In response to these demands, not only did the United States set up a system to carve up and parcel out property rights in the territories, but the universal demands that Congress resolve these issues also enshrined the federal government as both the ultimate owner of land in the territories and the sovereign singularly empowered to both distribute those lands and set up governments for the new territories.

While this story of slowly emerging federal power is both illuminating and persuasive, *Federal Ground* teaches other lessons of equal importance. First, *Federal Ground* makes it impossible for us to understand the land title system in the territories without paying attention to the fact that they were filled with Native nations who governed and possessed the lands coveted by the citizens of the United States. In retelling the history of the United States, it is remarkably easy for non-Native people to ignore its first inhabitants. Not completely, of course, but enough to structure a story about American expansion across the continent as inevitable, as desirable, as a triumph of republican democracy. My current law students are about the same age as our daughter, and her tenth-grade history textbook contained a map of the Louisiana Purchase of 1803 with a caption that called it "the largest peaceful acquisition of territory in U.S. history."[2] The map shows the Louisiana Purchase as a vast—and empty—area. There is no hint that it was full of people or that it contained the territory of many nations. It is like a map of Europe without the country borders or a map of the United States without the state borders. And as for "peaceful acquisition," the caption ignores the fact that the United States waged many wars with the Sioux tribes.[3]

2 John Mack Faragher et al., Out of Many: A History of the American People 284 (5th ed. 2007).

3 *Sioux Wars*, Encyclopedia of the Great Plains, https://plainshumanities.unl.edu/encyclopedia/doc/egp.war.044 (David J. Wishart, ed.) (last visited Nov. 26, 2021).

The fact is that the Louisiana Purchase was not a "purchase" at all, but a pact among colonial powers with a promise by France not to interfere when the United States sought to establish sovereignty over the area—an arrangement that was often called "title" in the colonial era but was really a claim of the right to conquer the area (and its Native nations) without interference by the French government. This is a small example of the ease with which non-Natives view American history in a manner that renders its Native inhabitants invisible.

Even first-year property law classes tend to marginalize the fact of conquest. Many property casebooks contain the case of *Johnson v. M'Intosh*,[4] which recognized that land titles in the United States originated in transfers from Indian nations to the United States. Most of those books also prominently introduce property law through the case of *Pierson v. Post*,[5] with its message that property originates in first possession or "capture." While *Johnson* and *Pierson* can plausibly be rendered consistent with each other by reference to the norm of first possession, upon further reflection, it is evident that they flatly contradict each other. After all, the transfers in *Johnson* from the Illinois and Piankeshaw Indians to the United States were at the point of a gun and were far from voluntary, mutually advantageous deals. They were more along the lines of "give us your land and we will not kill you."

Johnson shows that the origins of property titles in the United States are in *dispossession* not possession. Yet we recognize the dispossession only to immediately forget about it or marginalize it. We focus, instead, on the principle of first possession, which is intended to justify the origins of land titles in the United States, and which reminds us of hardy settlers going west to conquer a continent, barely giving a glance backward to the hundreds of Native nations whose sovereignty and property were being displaced. In contrast, *Federal Ground* places Native nations at the center of the picture, focusing on their relationship with the new federal government, the territorial governors, foreign nations like Great Britain and Spain, and the non-Native settlers who continuously invaded Native lands. Ablavsky gives Native nations and Native title equal status in history with the colonial claims of the United States and its non-Native inhabitants. Far from being invisible, they are central players in the story.

Second, although political culture in the United States reveres John Locke because of his conception of natural rights and the idea that property rights come from first possession, labor, and occupation, only later to be protected by law, Ablavsky shows that our history is all Thomas Hobbes. Hobbes made the positivist claim that property rights are based on law—not nature—because before the social contract all we have is conflict, violence, and theft. Stable property rights require a sovereign that has a monopoly on

4 Johnson v. M'Intosh, 21 U.S. 543 (1823).

5 Pierson v. Post, 2 Am. Dec. 264 (N.Y. 1805).

legitimate violence and the power to impose its will on contending claimants by using law to divide up and assign property rights in land.

I do not mean to "solve" the debate between natural rights theorists and positivists, but I am pointing out that Ablavsky shows there were multiple and conflicting claims about the legitimate source of title to land in the 1780s and 1790s and that only a central sovereign could end these disputes by making choices among those sources of title to allocate rights in land. Some people claimed rights based on grants from Indian tribes or tribal members; others on grants from state or territorial or foreign governments; others from entry, possession, and occupation without formal title; and others on grants from land companies. Everyone looked to the federal government to adjudicate these conflicting claims, and the United States veered from one source of title to another in a wholly inconsistent manner as politics, need, desire, and power dictated.

Federal Ground exposes in great detail a confusing mélange of multiple, conflicting claims of title, how they were generated over time, how they were pressed in pleas to government officials, and how they persisted and were never fully resolved. The federal government never settled on a single legitimate source of title; it recognized some titles based on occupancy and others based on deeds granted by many different government and private entities. This means that our picture of the settlement of the West as one of disappearing Indians and hardy settlers going to an empty land to build houses and farms and establish property rights by their own labor—with governments following after them to enshrine and protect those hard-earned rights—is a complete fantasy. Instead, we have a mixture of competing sovereigns (territory versus state versus federal government versus Native nations) and competing property claims (grants from many different public and private sources versus occupation whether lawful or unlawful).

Natural rights thinking is useful because it helps us to articulate fundamental norms and values that we want our legal and political systems to further. It allows us to criticize the law in force and to propose reforms; it helps us interpret ambiguities in existing law by reference to common values. But rights analysis does not determine, by logic alone, how to allocate property rights in land. Nor do the legal systems of either Britain or the United States identify simple, clear rules about how to adjudicate conflicts among property rights and claims. Property law is complex, and *Federal Ground* shows that this complexity extends to conflicts about origins of title. Someone has to make choices among competing claims, and as to land in the territories, that turned out to be the federal government. In this respect, we have a Hobbesian land system, not a Lockean one.

Third, while Ablavsky is right to show how the federal government emerged from this chaotic period with its power solidified, he also shows how the exact same process led to the unique American recognition of *tribal sovereignty*. We could, after all, have had a history that wiped out tribal sovereigns and treated Native inhabitants as U.S. citizens or resident aliens. That is what happened almost everywhere else in the world, whether in Latin America or Australia or even, to some extent, in Canada. Instead, the United

States engineered a process of obtaining land from Indian nations by treaties—treaties that were constructed on both the European and the Native political traditions. Before the United States could give secure title to anyone, it had to obtain it from Native nations.

Federal Ground shows that the unique circumstances of the late eighteenth century meant that the United States was militarily weak relative to Native nations but needed their lands to pay the debts of the federal government and to satisfy the demands of its citizens. For those reasons, the new nation followed the approach favored by President Washington and Secretary of War Knox and entered treaty negotiations with Native nations to obtain their lands in a (relatively) peaceful manner. To obtain title from someone, you have to figure out who that someone is, and in this case, it turned out to be the legitimate government leaders of Native nations. That required the United States to do research, to talk to people to get to know them, and to understand who exactly had authority to engage in negotiations with the United States. And that process led to recognizing the sovereign character of Native nations. A combination of federal need and tribal power and landed wealth led to a structure of government-to-government relationships between Native nations and the United States that persists to this day. Although it has suffered reversals of policy many times during U.S. history, with periods when the United States has actively attacked and undermined tribal sovereignty, the recognition of tribal sovereignty is an enduring feature of federal law, and we have now been in the era of self-determination since the 1970s. *Federal Ground*, in other words, shows the surprising and unique circumstances that led to the recognition and tenacity of tribal sovereignty in the United States.

Fourth, *Federal Ground* shows how the process of land acquisition *undermined* both tribal sovereignty and property while simultaneously recognizing and preserving them. After all, the *denouement* of this process was the loss of 98% of Native lands to the United States and the subjection of Native nations to the plenary power of Congress and the vicissitudes of federal law. In a stunning insight, Ablavsky partially reverses the usual view that tribes had a relational theory of treaties while the United States had a transactional view of them. We generally think of the Native property/treaty system as the creation of an ongoing relationship rather than a discrete sale of land that ends the relationship. To Native signers, treaties were the beginning of a relationship rather than the end of one. In that picture, we can see how the treaty partners might have had fundamentally different understandings of what happened. The United States saw each treaty as a sale of land with no retention of any rights by the tribe, either to the land or to future payments by the United States, while the tribes saw each treaty as the creation of an ongoing relationship, with access to land shared rather than unitary and future payments more akin to rental or mortgage obligations that would recognize the enduring quality of Native title than to undeserved gifts or welfare payments.

Ablavsky partially reverses this picture, showing how Native nations thought the treaties were sacred deals—ones they expected the federal government to honor. You take

so much of our land, and you promise, you swear, to leave us the rest. This much and no more. Your own words say so: a transaction that will be honored. A deal is a deal. *But the United States did not see it that way at all.* Far from a concluded transaction, the United States saw the treaties as part of an ongoing process—a process by which the United States would return to the tribes again and again and again and again to demand more of their land and more and more and more and more. It was the United States, Ablavsky teaches, not the Native nations, who saw treaties as the beginning of a relationship rather than as a discrete transaction.

Fifth, *Federal Ground* shows the way that inequality pervades both the U.S. property system and the federal government's relationship to Native sovereigns. When the tribes in the Territories were powerful, the United States needed to deal with them as sovereigns and title holders. But as the U.S. population increased and as the balance of military power between the United States and the tribes shifted, both property and sovereignty took a decidedly oppressive, and unequal, turn. This result was not inevitable; it was the result of policy choices, of conceptions of racial supremacy, and of a hypocritical approach to property rights. Just as the United States failed to extend its theory of natural rights to hundreds of thousands of enslaved persons, it failed to extend its natural-law theory of property rights to Native nations.

On one hand, the United States purported to recognize Native nations as the original possessors of land with a right to it. But on the other hand, it never accepted those rights as fully operable. According to the federal government, the tribes had more land than they needed, and the Anglo-Americans had voracious desires that they saw as needs for the tribal lands they coveted. The United States recognized tribal title only to devalue it; the law affirmed tribal title, but, through a mixture of violence, military power, and politics, tribal title gave way to federal title on its way to non-Native title. Beginning his book with a description of a 1791 report by Secretary of State Thomas Jefferson, Ablavsky comments about a reality that Congress and non-Native people have often denied: "the lands it carved up were not empty." No, they were not.

Sixth, while historians generally want us to understand history on its own terms rather than look at past events as guides to what will happen, or should happen, in the future, lawyers do not have the same disciplinary restraints. The past teaches us lessons, both about what to do and what not to do. What does *Federal Ground* teach us about the future of both property and sovereignty in the United States? One powerful lesson is the importance of understanding the bad, as well as the good, in American history. Current controversies over the supposed teaching of critical race theory in schools may be a made-up problem designed for political purposes, but they reflect a deep underlying tension. We want to look to history to see how American ideals emerged, how our political culture and institutions embody those ideals in practice and help us to maintain them. But we also need to look to history to see the ways that we have betrayed those very ideals, to see where we went wrong, to remember the oppression, the violence, the discrimination,

the domination that were part and parcel of the American story. Failing to do so erases human beings, counts their suffering as nothing, and treats their descendants as invisible. And it makes it too easy, far too easy, for us to ignore the ways we violate those ideals ourselves, today, right now.

Tribal borders do not generally appear on maps of the United States—another infuriating erasure—and many Americans are simply unaware of the existence and persistence of tribal sovereignty under federal law. *Federal Ground* helps to turn our attention to the origins of land titles in the United States in a way that gives Native nations their proper place in history. Ablavsky shows the power—both military and political—of the Native nations in the late eighteenth century and the way that power shaped the early politics of the United States. At the same time, he recounts the ways the balance of power shifted over time and what that meant both for Native sovereignty and Native property rights.

Seventh, and finally, the persistence of tribal sovereignty is both a fact and a challenge. Its persistence is a monumental achievement and a credit to the United States. It is easy to ignore how important—and how unusual—it is for a nation to preserve in the law of the land a measured respect for the continued sovereignty of peoples within its geographic borders. South Africa, for example, has areas of tribal sovereignty within its external borders with constitutional protection for those governments. Embassies around the world comprise little spheres of sovereignty partly inside and partly outside the nations in which they are situated. And while some forms of tribal sovereignty exist in Canada and New Zealand and India, the United States and South Africa are unique in the amount of sovereign power recognized in Native governments within their borders. Native nations in the United States are real governments, with constitutions, legislatures, law codes, courts, police, and regulations governing both civil and criminal matters that extend to their own citizens and to noncitizens who enter their lands.

At the same time, that very fact should cause us to consider more carefully what the current arrangements are in the government-to-government relationship between Native nations and the United States. Are they just? Are they defensible? Do we non-Natives sufficiently appreciate and understand what is at stake today for Native nations? The Supreme Court has interpreted the Constitution to grant Congress plenary power over Native nations, and it has exercised that power to deprive tribes of their lands and to limit their sovereign powers. That process resulted in untold sorrow both in the past and today. We are suffering a tragedy of missing Native women, inadequate law enforcement, and extreme poverty on many Indian reservations. The land was not empty, and the United States caused harm to Native nations and created conditions that are evident today in enduring hardship.

But still, let us recall that hundreds of treaties *remain in effect*. Although some of their terms have been abrogated, others have not. Native nations continue to own about two percent of the land mass of the United States, and they continue to exercise sovereignty over both their own people and non-Natives who enter their territories and lands. While

federal law claims supremacy over Native law and the United States managed to wrest a continent from Native nations, that very process cemented tribal sovereignty as an enduring aspect of federal law.

Conquest happened, but it was not complete. The events that conspired to amass power in the federal government and to divest tribes in the territories of their lands simultaneously led to the recognition of the sovereignty and property rights of Native nations. It is a mistake to deny the oppression and inequality present in the Native-federal relationship, but it is equally a mistake to not recognize the persistence of Native sovereignty and property rights. Contrary to expectations, the Indians did not vanish. They were here and they are still here. While subject to the plenary power of Congress, tribal governments have managed to revive and thrive. But they still have basic needs, and if we learn anything from the history recounted in *Federal Ground*, it is the fact that we—all of us—live on Native ground. We cannot undo conquest, but we can refuse to continue it today. What obligations that places on the United States is a question we need to ask.