



## The Battle for the American West

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**[00:00:00] Tanaya Tauber:** Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, senior director of Town Hall Programs. In honor of Native American Heritage Month, the National Constitution Center convened a panel of historians to provide an overview of US westward expansion, Manifest Destiny and the impact on Native peoples and tribes. Our guests were H.W. Brands, author of *The Last Campaign: Sherman, Geronimo and the War for America*, Lori Dagggar, author of *Cultivating Empire: Capitalism, Philanthropy and the Negotiation of American Imperialism in Indian Country*, and Lindsay Robertson, author of *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*. Jeffrey Rosen, president and CEO of the National Constitution

**[00:01:00] Tanaya Tauber:** Center moderates. This conversation was streamed live on November 10th, 2022. Enjoy the show.

**[00:01:07] Jeffrey Rosen:** Hello, friends. Welcome to the National Constitution Center and to today's convening of America's town hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Welcome. H.W. Brands, Lori Dagggar and Lindsay Robertson. It is an honor to convene all of you and Bill Brands, let's begin with you, your riveting new book, *The Last Campaign: Sherman, Geronimo and the War for America* uses the story of Sherman and Geronimo to illuminate the battle for the American West which began in many ways, as you suggest, with the policy led by Andrew Jackson and others, to repeople Native Americans to the West, to remove them from their lands and expatriate them to the unsettled territory. Tell us about that policy and how the story of Sherman and Geronimo illuminates,

**[00:02:00] Jeffrey Rosen:** the war for the American West.

**[00:02:01] H.W. Brands:** Well, thanks, Jeff. I actually cast the story a bit broader than that, I'd say considerably broader than that. Well, I call the war for America began at least hundreds of years before the period that I focused on, at least with the arrival of Europeans following Columbus' arrival in the West Indies. But I would contend that it goes farther back than that. And what I mean by the war for America was the contest to see who would exercise control over the land that became the United States of America. And so, the title of my book is *The Last Campaign* and it's the last campaign in this long-running war.

**[00:02:34] H.W. Brands:** And what I'm focusing on is the period from 1865 to the mid-1880s. And I focused on two individuals, William Sherman, who had command of the US Army in the West and then eventually commanded the entire US Army during most of that period, and Geronimo, the Apache war leader, who was the last one to surrender and with the surrender of Geronimo, as I contend, the war for America ends in the following technical sense that at that

**[00:03:00] H.W. Brands:** point, there is no longer any dispute as to who controls the lands of the American West. There had been continuous dispute before then.

**[00:03:08] H.W. Brands:** So what I do in my books, I tried to bring together sort of the grand to the big history of this contest for control that had been going on for thousands of years and the little history of the individuals who fought it out in the end. I focused on Sherman, he's the protagonist on the side of the US Army and the US government. Geronimo was by no means a spokesperson or a leader of all of the Native American peoples of the Earth, but he is a symbol, and he was the last one out. So this is the story of that last 20 years of a very long-running contest.

**[00:03:42] Jeffrey Rosen:** Thank you so much for that. Lori Daggar, in your important new book, you tell an unfamiliar story which is the collaboration of the federal government with missionaries from various denominations to, as some of them put it, civilize the

**[00:04:00] Jeffrey Rosen:** Native Americans and to spread American control and American values. Tell us about that surprising collaboration, which I would have thought today we view as violating the religion guarantees of the Constitution to have Congress actually subsidizing, this sort of work and how it very much affected, what you described as a cultivating empire.

**[00:04:24] Lori Daggar:** Sure. So in many ways, the US federal government was building upon centuries of precedent on the continent the French Empire, Spanish Empire, all worked with missionaries to try to convert Native peoples to Christianity, to have them labor in mission spaces on North America. So the US partnering with missionaries wasn't new in North America, they were just another empire that did that, and yet they did it in some, as you say, surprising and novel ways.

**[00:05:00] Lori Daggar:** So the US federal government did provide funds to missionary societies to go and "civilize" the Native peoples. And what that means is they were trying to teach, according to Euro-American standards, how to farm their lands.

**[00:05:17] Lori Daggar:** Now Native peoples have been farming for millennia. They actually knew quite well how to practice agriculture, but the US federal government really wanted to encourage them to farm in order to encourage the commodification of their lands. So Native people would use fewer of their lands and then indigenous lands would be available for settlers for the purchase. And what's interesting about this is the mission spaces themselves actually facilitated the growth of the United States, its territory, its economy in order to teach Native peoples to farm. Missionaries needed access to things like axes, and hoes

**[00:06:00] Lori Dagggar:** and plows, all these manufacturers that would be shipped from urban spaces like Philadelphia or Baltimore into the rural interior of the continent, and would also encourage Native peoples' consumerism as well as the purchase of these goods more generally.

**[00:06:19] Lori Dagggar:** So in those ways, these mission projects were not just religion-based as they were in previous centuries but were actually much more focused on this agricultural education. And that's, I think, how they got away with skirting that question of religion in the state. In 1819, the federal government does set aside \$10,000 for the civilization funds, as it was known to fund these farming schools and manual labor schools, but they were not allowed to use the money for biblical tracks, and things like that; it had to be for infrastructure. So building,

**[00:07:00] Lori Dagggar:** school houses, things like this. So that I think is how the federal government tried to get around to that question of religion in the state.

**[00:07:09] Jeffrey Rosen:** That's fascinating. And that limitation on the use of funds for nonreligious purposes might indeed cast interesting light on the modern meaning of the Establishment Clause. Let's turn now to the battle over Supreme Court cases. And Lindsay Robertson, in your book *Conquest by Law*, you talk about the *M'Intosh* case where Chief Justice Marshall created what's called the discovery doctrine. You wrote about this because you found documents about the case at the Pennsylvania Historical Society that had never been unearthed before which just gave us a whole new insight into the meaning of this crucial case for our law. Tell us about the *M'intosh* case and what you learned about it from these documents.

**[00:07:51] Lindsay Robertson:** Sure, I'm happy to. The *Johnson-M'Intosh* case is an 1823 Supreme Court decision. It's the foundational Native land

**[00:08:00] Lindsay Robertson:** rights decision, not only in the United States, but because it's been picked up by other former English colonies. It's a foundational decision in Canada and Australia and out here to New Zealand and elsewhere. It's a decision which as you mentioned Jeff, the Supreme Court adopted a version of, what has come to be called the "discovery doctrine," which in *Johnson*, was formulated to mean that upon discovery of the New World, all Native peoples and discovered lands by Europeans, lost automatically by operation of law the ownership of those lands.

**[00:08:41] Lindsay Robertson:** The underlying title to those lands became the property of the discovering European sovereign and they retained, according to *Johnson-M'Intosh*, a right to occupy those lands, an occupancy right, which could be sold or otherwise alienated, but only to the same discovering

**[00:09:00] Lindsay Robertson:** sovereign. So they lost their land rights, and they lost the capacity to deal in a property market sense with their lands with whomever they wished. The documents which were an extraordinary thing to discover, which had been protected for generations by the Brenton family, who deserve an enormous amount of credit for caretaking those documents, revealed that the case was collusive, that it raised questions, frankly largely

unrelated to the discovery doctrine, and the doctrine itself was a creation of the court, particularly Chief Justice Marshall, to solve a totally unrelated problem and then which had to do with land titles in Western Kentucky, but then took on a life of its own when it was seized upon by Georgia as providing a rationale for Indian removal and by the Jackson administration.

**[00:09:56] Lindsay Robertson:** So it becomes the trigger case, the case that makes

**[00:10:00] Lindsay Robertson:** possible the forced relocation of the Southeastern tribes and all sorts of other things, in the various countries that I mentioned and the generations that followed.

**[00:10:09] Jeffrey Rosen:** So interesting and really striking to learn from you how openly political Marshall's calculations were in trying to appease Virginia, given the complexities of the forces that were operating on the court and in establishing a doctrine that he'd later have to walk away from to some degree in the famous Cherokee Indian case, which, I'll ask you about in a moment. Bill Brands, you so vividly paint Geronimo and Sherman as people, describing Geronimo's determination for vengeance, for revenge after Mexican forces slaughtered his wife and children and also Sherman named after Tecumseh in his having just come out of the battle in Atlanta during the Civil War, entering into what you call The Last Campaign. So situate both of those men at the beginning of The Last

**[00:11:00] Jeffrey Rosen:** Campaign after Atlanta and tell us how it progressed.

**[00:11:03] H.W. Brands:** Geronimo had been engaged in his almost a personal war against Mexico and Mexican authorities because of the incident you mentioned. The Apaches had pretty much ignored any international boundary between the United States and Mexico because that boundary cut across their traditional ancestral lands. And so they would go back and forth, and they paid little attention to whether on the US side or on the Mexican side. And then in fact, they worked that boundary, that division, to their favor. So at least initially, when they were being chased by US troops, they were crossing to Mexico. And at least at the beginning of this campaign, the US troops would stop at the border, and they would have refuge in Mexico and then they would raid in Mexico and the Mexican troops would come after them. And then they'd slip back over to the US side and the Mexican troops would stop.

**[00:11:53] H.W. Brands:** Eventually, the US commander and Mexican commander agreed that they could engage in hot pursuit.

**[00:12:00] H.W. Brands:** But for Geronimo, the war against, well call them the Americans, the US forces, was almost sort of the last round of his fighting because he'd been fighting against the Mexicans for much longer. And at the end of the Civil War, in fact, it was really only during the Civil War that the Apaches came up against US forces in any meaningful way because that was the last part of the West that US settlers or US forces arrived in. And in fact, at the beginning of my story, Sherman thinks that the US government ought to evacuate all American settlers out of Arizona. So this is a waste of time, they're gonna get us into trouble and it's gonna increase

hostilities against the Apaches and other Indians in the area and it's just not worth it to the United States.

**[00:12:49] H.W. Brands:** So Sherman through all of this is very ambivalent about this whole enterprise. He recognizes, again and again, that it's the

**[00:13:00] H.W. Brands:** settlers who are aggregating tensions on the frontier. Sometimes it's for the narrow purpose. In fact, there's one instance where Sherman goes out on a tour of Eastern Colorado and he encountered some farmers there who had been making money, making a lot of money during the Civil War, provisioning US troops. And when the war ends, and it looks like they're not gonna have to provision troops anymore and there's gonna be peace on the frontier, they're quite alarmed. And then they go about deliberately trying to antagonize relations with the Indians.

**[00:13:35] H.W. Brands:** And Sherman recognizes this, and he says, "You know, the reason they're doing this is because they want the business of providing for our troops. So we really ought not to let them do this." But Sherman recognized that he didn't have any control over us because the settlers had the ear of Congress and Congress is the one who gave him and his orders. So one of the striking things about this

**[00:14:00] H.W. Brands:** story is it's unclear at times who is making policy regarding the Native peoples in the West. Another good example is the discovery of gold in the Black Hills. And those were, it was Sherman's idea originally to give the Lakota, the Sioux, a reservation around there, so to leave those forever to the Sioux, to the Lakotas.

**[00:14:22] H.W. Brands:** And then there were rumors that there was gold in the Black Hills. And the rumors were fanned by townspeople who lived—these are folks in towns around the edge of the Black Hills—and what they wanted was a gold rush to the Black Hills because the gold rush would bring in settlers and business and all the other stuff. So Ulysses Grant, by this time president, grudgingly agrees to send out a scientific expedition. They're just gonna disprove the rumors of gold in the Black Hills. And it largely does, so they find a little bit of gold but initially not enough of paying quantity, except that The Frontier Press,

**[00:15:00] H.W. Brands:** the Press have in the West, they fanned again into this gold boom.

**[00:15:03] H.W. Brands:** And so Sherman is tasked with trying to prevent settlers from coming into the Black Hills. There's simply too many of them and he doesn't have the support of Congress. So if there's one overall lesson from all of this, it's that like much of history, it's an exceedingly complicated story.

**[00:15:20] Jeffrey Rosen:** Complicated and in your masterful account, just riveting that account of Sherman putting a flake in his mouth and finding a few acid of his saliva increased the luster and therefore it probably was gold is really memorable. Lori Daggar, you tell us about this surprising plan by Henry Knox and Secretary of State Timothy Pickering called The US

Civilization Plan. And the premise of this was that, by working with religious denominations like the Quakers, the US could save Native American peoples from extinction by civilizing them in White people's agricultural techniques. Tell us more about the

**[00:16:00] Jeffrey Rosen:** philosophy, the ideology behind these plans, and how groups like the Quakers implemented it.

**[00:16:04] Jeffrey Rosen:** The Quakers, of course, were famous abolitionists and they used their religious doctrine to oppose slavery. Did Quakers and other religious doctrine also champion the cause of Native Americans or was it mostly used in what you call this form of cultural imperialism?

**[00:16:20] Lori Dagggar:** So the philosophy behind the Civilization Plan is kind of twofold. First off, there is this idea of Euro-American superiority and that they have ability to give the gift of civilization, in quotes of course, to Native people and that, by giving this gift, Native people will be able to stave off extinction, right? And they used the word extinction in their messages to one another—the US officials. And by just settling down and learning to farm, it will be much better for Native people in the long run. This is built on the idea that

**[00:17:00] Lori Dagggar:** all Native peoples are just wandering and hunting, and really false claims. The Quakers, in particular, coming at this with a few different perspectives on the issue, some are very much thinking that they're doing a good job, that this is the way to go, that this is how they can best help Native peoples.

**[00:17:21] Lori Dagggar:** But even that drive to help is grounded in a sense of paternalism, right? That they know how best to help Native people and they know what Native peoples need. On the other hand, some Quakers, and it's always a tricky thing to get an individual's motivations, right? I want to just kind of put that out there. Some seem to do it because they want to elevate their own reputation for benevolence, for philanthropy. One of the Quakers in particular becomes president of the Baltimore and Ohio Railroad. So he is certainly involved in profit seeking schemes. And, you know, it's no coincidence that his

**[00:18:00] Lori Dagggar:** railroad needs to go through the lands that his Society of Friends are working on this Civilization Plan with, in what's now Ohio and Indiana.

**[00:18:08] Lori Dagggar:** In terms of the mechanics of how these Quaker missionaries are actually supporting this program, the first is with some private funds. So the Society of Friends are excellent at fundraising, right? And they would complement federal dollars with their own private dollars for some of their missionary work. And that was also true of other missionary denominations, Baptists, the ABCFM and others, so public and private funds there. But they would also travel out to the lands of what's now Ohio and Indiana to do the farming education, right? To actually set up model farms to model for Native peoples how they should farm their lands.

**[00:18:50] Lori Dagggar:** And what's interesting about that is that as they're journeying out to these lands, they're noting in their diaries how much corn they see that, of course, Native women are

**[00:19:00] Lori Dagggar:** producing, right? So there's a little bit of a disjunction there between what they're seeing and what their goals are in the West. And the last thing I'll say is on this question of motivations and trying to get out what people are thinking when they're doing programs like the Civilization Program and engaging in these efforts to assimilate Native peoples. It is really hard to get at what are individual's interior motivations. And so what I really tried to do in the book is say, "Okay, they probably have a vast array of different motivations, but here are the consequences of their work."

**[00:19:35] Lori Dagggar:** We know very well what the consequences of the Civilization Plan were, and they were often devastating to indigenous communities, even as some Native communities were also able to use missionaries and their labor to their advantage to invest in their lands, etcetera. So there's a few different outcomes that happen, so I'll borrow Brands' take that it's very complicated, right, as

**[00:20:00] Lori Dagggar:** history often is.

**[00:20:00] Jeffrey Rosen:** It is indeed and the power of the book, as you say, is by focusing on consequences, irrespective of motivations, you help us understand what the broader impact of this US policy of so-called the Civilization Plan was. Let's now talk about the consequences of the *Johnson* decision. You say Lindsay Robertson, that *Johnson* was a tragic mistake which Chief Justice Marshall himself tried to correct in his famous decision *Worcester v. Georgia*. You say that establishment of the discovery doctrine was used to justify the Indian Removal Act of 1830 and that Marshall reversed his view and decided that discovery only supported the first rights of people to buy the land of willing Native Americans, who are willing to sell and that Marshall's decision in *Worcester* reversed his decision on the discovery doctrine, but it was overpowered by President Andrew Jackson. So tell us about that story of the progress

**[00:21:00] Jeffrey Rosen:** from the *Johnson* case to *Worcester*.

**[00:21:02] Lindsay Robertson:** So the state of Georgia borders a number of tribes at the time of the American Revolution. The Muscogee Creek Nation agreed to move West at a certain point, but the Cherokee Nation was still there in the 1820s in Northwestern Georgia. And back to the gold theme, of course, gold was discovered in Northwestern Georgia during this period and the Cherokee Nation had made clear to everybody that they had no interest in leaving Georgia, negotiated a deal in 1802 with the federal government, that the federal government would make its best efforts to persuade the Cherokees to enter into a treaty agreeing to leave the lands of Georgia, but the feds hadn't really followed through on that.

**[00:21:46] Lindsay Robertson:** And then the *Johnson* decision came down and someone in the government in Georgia discovered the discovery doctrine and reasoned from it that if the discovering European sovereign owned the title to

**[00:22:00] Lindsay Robertson:** Native lands, then that would have been England for the Cherokees. And when Georgia declared independence and won it, Georgia would have acquired England's land ownership interest. That made Georgia the landlord for the Cherokee Nation. And as a landlord, they were empowered to change the lease terms. And so immediately, they passed a statute in the late 1820s saying that "From now on, Cherokee governments abolished, Cherokees, are subject to Georgia state law. We're going to attach the lands of the Cherokee Nation to a number of Georgia counties. They're welcome to stay as long as they want, but those are going to be the new terms."

**[00:22:41] Lindsay Robertson:** And in his first annual address to Congress, President Jackson said, "What Georgia did is perfectly correct legally, and I would like you folks in Congress please to pass a statute providing in the event that the Cherokees decide they no longer want to remain

**[00:23:00] Lindsay Robertson:** in Georgia under these conditions for, they're swapping with us for federal lands out West, in what would become the state of Oklahoma, and at the time was borderlands with Mexico. The Cherokee resistance was immediate and followed conventional litigation path, rather than declaring war on Georgia or the United States. They hired a lawyer, William Wirt, who proceeded to file lawsuits, a pair of them in 1831, the case of *Cherokee Nation v. Georgia*, and when that was dismissed for lack of jurisdiction in 1832, the case that you mentioned of *Worcester v. Georgia*, John Marshall, his correspondence reveals, was horrified that he had given the state the doctrine to use to oust the Cherokees.

**[00:23:54] Lindsay Robertson:** And by the way, it's picked up by other states too. Tennessee and Alabama will both

**[00:24:00] Lindsay Robertson:** pass laws that do essentially the same thing for the Native peoples in those states. So he sets about in *Worcester* to rewrite the discovery doctrine, the sort of rationale for it, without overtly reversing himself. So it's something that John Marshall never did, I think for institutional political reasons. He didn't want to confess that they had screwed up a few years earlier, for fear that that would undermine the authority of the Court. So he simply rewrote the discovery doctrine opinion to provide now that there was a restriction on purchase rights, not a restriction on sale, and Native peoples retained ownership of the underlying title to their lands which sort of mooted the legal theory that Georgia had relied upon to justify its imposition of laws and that eliminated any incentive that the Cherokees might have to accept the US deal in exchange to their lands.

**[00:24:58] Lindsay Robertson:** It didn't

**[00:25:00] Lindsay Robertson:** last, so as you said, frankly, because the president, chose to ignore it. This is the decision that prompted the probably apocryphal line from Andrew Jackson, "Well, Marshall is made his opinion. Now let him enforce it," and he started negotiating treaties with various of the Southeastern tribes. The Cherokees resisted the longest, but eventually people die, people left the court, and the majority of the justices became Jackson, or one was a Van Buren, appointees, but they were the new majority and we've seen how new majorities can make a difference in Supreme Court case law was supportive of this theory and in a series of a half a dozen opinions between 1835 and 1842,

**[00:25:48] Lindsay Robertson:** they restored the original *Johnson* formulation of the discovery doctrine and that's what we've inherited. For tribes, it meant that they really did, or portions of the

**[00:26:00] Lindsay Robertson:** tribes felt they really did, have to move if they were going to hang on to their identity, culture and self-governance rights. So we have the various trails of tears.

**[00:26:10] Jeffrey Rosen:** Thank you so much for that, and for helping us understand the connection between those two crucial cases. Bill Brands, as you began by reminding us, you begin the book by saying that the war for America commenced early in the human history of the Americas, not with the Indian removal policy that I mentioned. But I was struck by how consistent the Indian removal policy was. As you say, it began with President Washington; President Jackson embraced it, as did President Monroe. And I wonder if you could tell us about the influence of that on the course of the battle for the West and could things have gone differently if there'd been a different policy? You know at one point that if the Indians had been allowed to gather in Florida, on the Seminole territory, it might have been more geographically contiguous and

**[00:27:00] Jeffrey Rosen:** less dispersed. And I wonder if you could reflect about the influence of the relationship between federal policy and the peopling of America.

**[00:27:08] H.W. Brands:** I think it's not at all a coincidence that the evolution of policy toward the Indian tribes coincided with the emergence of democracy in the United States. And to imagine a different outcome would have required essentially, the American people, not simply, "This president," or, "That Congress," but the American people to say, "We are going to declare," let's say, "Florida," as you proposed, "off limits to White settlers. We are going to declare the Indian territory," Arkansas and Oklahoma originally, "We're going to, we're going to declare the Black Hills off limits to White settlers." And that lasted only as long as White settlers who ultimately ran the US government, excuse me, White people, voters, who ultimately made the decision to the government, those reservations, those

**[00:28:00] H.W. Brands:** reserved areas, were reserved only as long as the people who voted in the American government decided they didn't want them.

**[00:28:08] H.W. Brands:** And as soon as they became appealing. So Florida, there are lots of Florida that nobody wanted when this was first envisioned as a refuge for the Seminole. So gradually, as the cotton culture expanded in the early 19th century, then Florida became a good place to grow cotton. The same was true for the tribes of Georgia and the other South, the old Southwest. Initially, Mississippi territory could be largely left to the Indians who lived there for a long time. But as soon as somebody figured out—that is some White folks—figured out how to make money in that area, then they would importune their members of Congress, they would vote for a president who will let them in. And they would come up with various rationales for doing this.

**[00:28:53] H.W. Brands:** But the fundamental decider in all of this was the fact that the population of

**[00:29:00] H.W. Brands:** US Americans was growing rapidly during this period and the population of Native Americans was declining, initially, dramatically and drastically had been slowed down, but was still declining, so that at the beginning of my story, when it really kicks in in 1865 or something, like 30 million citizens of the United States and there were less than half a million Native Americans in the western half of the United States. And against those numbers, there's really, to me, almost no way to imagine a different outcome. The only question was, "How long would it take and what form that takes?" Because the decision left for the peoples of every Indian nation was ultimately, "Do we continue to resist, or do we acknowledge that the old way of life is gone?"

**[00:29:48] H.W. Brands:** And it happened in various tribes at various times, so among the Cherokees. There were some who heard Andrew Jackson's explanation of the need for

**[00:30:00] H.W. Brands:** Indian removal and said, "You know, there's no way we're going to be able to stay in Georgia. There's simply too many of those White people imposing our territory, so let's cut the best deal we can." And the Indian Removal Act split the Cherokee Nation in two, and it was a division that lasted for decades. And the same was true in many of the other tribes. So a striking thing about the part of the story that I tell in detail is, in the case of Geronimo, in the case of Crazy Horse, in the case of Sitting Bull, all of these war leaders, they eventually surrender and they typically are taken into custody, not by US troops, but by either Indian scouts, members of their own tribe who had decided that, "We can no longer continue to resist, and therefore, wisdom and the future of our people, in particular, our women and children, depends on accommodating ourselves as best we can to this tragically unsatisfactory situation we find ourselves in."

**[00:30:58] Jeffrey Rosen:** So interesting, and that

**[00:31:00] Jeffrey Rosen:** the reality of that numerical difference of the much larger number of White people than Native Americans, as you say, was decisive and you so, in such an illuminating way, show the intersection of the constitutional historical and military concerns and you note that the so called civilized tribes insisted on retaining their tribal governments, proclaiming themselves sovereign nation in the states where they resided, but this was a problem

for the states, I'm reading from your book, because it prevented enforcement of state laws within the boundaries claimed by the tribes.

**[00:31:33] Jeffrey Rosen:** And the Constitution says, "No new state shall be formed within the jurisdiction of any other state," and Jackson said that the assertions of the tribes contradicted the Constitution on this point. So it's important that the National Constitution Center to emphasize this contribution you make to the constitutional story and it's extremely interesting to think about. Lori Daggar, you have a powerful concept

**[00:32:00] Jeffrey Rosen:** in the book where you talked about the effect of this policy of working with religious groups, and in particular, the idea of philanthropy in it's double-edged sense. And, and there's a phrase that you call "speculative philanthropy." Tell us about that and how it's important to your story.

**[00:32:20] Lori Daggar:** Sure, so I argued that speculative philanthropy is essentially a combination of a desire, whether it's performative, or as I mentioned earlier, a sense of paternalism, a desire to help others, to promote the welfare of others. But it's also coupled with a desire to make profit, right? Either economic profits, acquire territory, or pursue this idea of moral capital, which there's a great historian Christopher Leslie Brown who writes about abolitionism and moral capital. And that's

**[00:33:00] Lori Daggar:** being essentially a drive to acquire social standing, a good reputation in society, etcetera. And some of like the Quakers and other missionaries that I follow in this story are certainly trying to acquire moral capital.

**[00:33:14] Lori Daggar:** There's one individual who's memorialized, in print, as you know, a wonderful philanthropist in the city of Baltimore. So in that sense, again, I'm trying to think about philanthropy and its consequences, right? We can have these ideas of pursuing projects that promote the welfare of others, but there's often, as you said, this double-edged sword. There's this dark underbelly, sometimes to philanthropic projects. And the term is really trying to get at those both sides, right? What are people trying to do, but also what are their many projects that are colliding with their philanthropic work? And what is

**[00:34:00] Lori Daggar:** sometimes the harm that comes with philanthropy, particularly when it's grounded in ideas of White supremacy or racial superiority, right? In this case, Euro-American, White Euro Americans asserting that they know how to live best, that they have the keys to civilization and that Native people need to get out of the way.

**[00:34:22] Lori Daggar:** And there's a particularly powerful example that I came across. It's an 1830 memorial, a petition that Indiana settlers sent to the federal government asking the federal government to remove Miami peoples from the bounds of what's now Indiana, and they use all kinds of language of humanitarianism, philanthropy, but then they closed their petition with, and I'm paraphrasing, "By the way, could you really remove them from these lands or in the path of this Wabash and Erie Canal," right? "We really want those lands."

**[00:35:00] Lori Dagggar:** So in that way, rhetoric of philanthropy, could be mobilized in order to secure very profitable lands, in this case canal lands that were worth a great deal of money, and that Indiana settlers wanted for themselves. So that's that darker underbelly side of language of philanthropy, in this case, that rhetoric of humanitarianism. It could very much be wedded with a desire to make profit.

**[00:35:28] Jeffrey Rosen:** You very powerfully described that double-edged sword and that 1830 Act is a really strong example. Lindsay Robertson, just yesterday, the Supreme Court heard an important case about the Indian Child Welfare Act and this is a 1978 law that regulates the adoption of Native American children. And it says that when Native American children are taken from their homes, they should be placed with extended family members or other Native families, even if the families aren't relatives. And the question

**[00:36:00] Jeffrey Rosen:** is whether this exceeds Congress's power, violates state's rights, and imposes unconstitutional race-based classifications, so big implications also for the affirmative action case that the court is hearing at the same time.

**[00:36:12] Jeffrey Rosen:** And Justice Neil Gorsuch, who is among the strongest defenders of Native American rights, as well as Justice Kagan said this isn't a race-based classification at all. It's a political classification because the tribe has a relationship with the US government that's regulated by Congress. Tell us about the case and what are the constitutional stakes.

**[00:36:31] Lindsay Robertson:** They're very large. I'll tell you about the case then if I may, I want to make sort of a broader point about the role of the Supreme Court in the various topics that we're talking about. The cases, the Brackeen case, it came up through the Fifth Circuit. It's a challenge, among other things, to the facial constitutionality of a statute called the Indian Child Welfare Act, which Congress passed in 1978, to stem an outflow of Native children who were being taken

**[00:37:00] Lindsay Robertson:** from Indian country, from Native families, and placed for adoption with non-Indian families in an unbelievably alarming rate. Some communities were being almost completely gutted, Congress found, when it was looking across the map, their children being taken out with rationales relating to, "Oh, this community's poor. The child would be better off with us," etcetera.

**[00:37:23] Lindsay Robertson:** And so the statute was passed to provide tribes, federally recognized tribes, in which there are almost 600 at this point, a role to play when their children are subject to child placement, foster care, or adoptive placement proceedings in state courts. It's a complicated statute as my co-panelists have mentioned, there are complications related to the substance of the statute as well, but the most, I think, from an, from an Indian law perspective, the most important

**[00:38:00] Lindsay Robertson:** argument being made is the one that you mentioned, Jeff, which is the Equal Protection claim, that the designation Indian is a racial designation because as some

of you viewers will know, that would raise the level of review under the Equal Protection Clause for potentially all statutes related to Indians from a rational basis to strict scrutiny and would result potentially in the gutting of much of federal statutory Indian law.

**[00:38:27] Lindsay Robertson:** The Supreme Court in the '70s decided that, as you mentioned, Justice Sotomayor and others mentioned, the designation Indian is a political classification, because we're talking about citizens of federally recognized Indian tribes and not people who are genetically Native Americans. They are different categories of people. There's some overlap but not an entire overlap. And this, if I may, works as a segue to a larger point that I'd like to make, which is so that folks who are watching understand,

**[00:39:00] Lindsay Robertson:** and I may sort of riff off something that Professor Brands mentioned in his opening comments, and I think this is a common understanding, at the end of the 19th century, the Indian wars of the late 19th century marked the end of Native America and the end of the battle for the West.

**[00:39:17] Lindsay Robertson:** And I think neither is true. I think it was the end of the military phase of the conquest of the West, but the legislative and judicial phase is ongoing. And the *Brackeen* case is a good illustration of that, as is the case that was decided a few months ago called *Castro-Huerta*, also involving perhaps ironically as *Brackeen* does, the Worcester and Cherokee Nation, the Cherokee Nation, which seems to be a major player in these cases, from the beginning and continuing. Tribes under US laws recognized since the founding of the Republic by the Supreme Court are extraconstitutional political bodies. That means they aren't

**[00:40:00] Lindsay Robertson:** creatures of Congress, they aren't creatures of the state. They exist outside the constitutional framework. They just happen to share land with the United States.

**[00:40:09] Lindsay Robertson:** The power that they exercise as sovereigns is inherent to them. It's power that they exercised as sovereigns before Europeans even arrived and so the relationship between the United States and the tribes is akin to the relationship that the United States has with France or Chile or Bolivia. They're, they're foreign countries, in a sense, again, with the qualifier that they share land with the United States. And because of this land-sharing problem, there have been ongoing judicial questions relating to who has jurisdiction over whom in that shared space, and in some limited instances outside that shared space. And often the combatants are tribes and states,

**[00:41:00] Lindsay Robertson:** And this is occurring in Oklahoma right now in the *Castro-Huerta* case, an illustration of this as the state and the tribes battle for jurisdiction.

**[00:41:10] Lindsay Robertson:** I think it's important to appreciate both of those points, that this is ongoing, and that tribes are separate sovereigns because it means that this is something that citizens should not only be aware of, but feel free to study and participate in. This isn't old timey stuff that kids learn about in school. These are ongoing and in a large sense, human rights issues and they're not confined to the United States. These are wars that are being waged by indigenous

peoples across the planet. The UN adopted relatively recently a Declaration on the Rights of Indigenous Peoples, the first comprehensive global rights international instrument relating to the rights of indigenous peoples, and this has sort of provided a framework for reassessing the rights that

**[00:42:00] Lindsay Robertson:** indigenous peoples have within what are now called settler colonial states.

**[00:42:04] Lindsay Robertson:** The last thing I want to say and this is again also riffing off, I'm stealing from Professor Brands, but to riff off something that he said about democracy and conquest, I think that's dead right and it's a perfect characterization at least for the late 19th century and most of the 19th century, but I would caution that the federal government has sort of changed its mind about this at various junctures. In 1934, Congress passed something called the Indian Reorganization Act that was dedicated to putting the brakes on that to sort of allow tribes, a means of reacquiring territory through what's called the land-into-trust provision where they can expand again and restore lands lost to allotment in the late 19th and early 20th century. And then this policy reinforced in the late 1970s by something called the Indian Reorganization and Education Assistance Act and then

**[00:43:00] Lindsay Robertson:** all of the statutes that followed including the Indian Gaming Regulatory Act and the Indian Child Welfare Act.

**[00:43:05] Lindsay Robertson:** And so we're still in a period where Congress has evidenced a commitment to again put the brakes on that demographic expansion of non-Native peoples into Indian country and give tribes some breathing space and recognition as sort of co-sovereigns sharing the lands of the United States.

**[00:43:24] Jeffrey Rosen:** Absolutely fascinating. Such a great overview of the important question, as you put it, "Who has jurisdiction over whom?" which has such important implications for Native American sovereignty. Joyce Frey asks in the chat, "What do you see the future holds for the approximately 474 recognized tribes in the US for reconciliation and regaining their sovereignty as nations within the context of the US?" and you gave us such a helpful framework for thinking about the complex interrelation of congressional, UN, and tribal policy in resolving those crucial questions of

**[00:44:00] Jeffrey Rosen:** jurisdiction.

**[00:44:01] Jeffrey Rosen:** I think this will be our final intervention. So bring all these strands together as you think best, but Bill Brands, among other things, perhaps you could tell us the last part of the story you used, begin in the old warrior's dissection of your book. After the battle ended, you talked about how most of the war ending treaties committed the Indians to try to live as White people, the efforts to nudge the Indians toward farming, which Lori Dagggar describes failed, but the government pushes further. You talked about the policy of Henry Dawes of Massachusetts through the Dawes Act, which gave each head of an Indian family 160 acres. So

after the war ended, what happened and what does that riveting history that you talk about teach us about Native American sovereignty today?

**[00:44:49] H.W. Brands:** Well, Jeff, and I'll pick out a theme that you initially laid down and that is the nature of constitutionalism in this territory, and in one sense, what I've described this as war for America

**[00:45:00] H.W. Brands:** is a struggle to determine how far the US Constitution extends, and who lives under it and who does not, who is exempted from it. At the end of what I call, the end of this last campaign, you mentioned the Dawes Act. Well, it was the vision of the people who wrote the Dawes Act, Henry Dawes and people who supported it that, in essence, the Indian tribes would go out of business as separate entities. And this was, and as Lori Daggar has suggested, there were mixed motives behind all of these things.

**[00:45:34] H.W. Brands:** And in the case of the Dawes Act, there were two strings that came together. One was people who really did have what they thought to be the best interests of the Indians at heart, and they looked at the failure of the Indians to be able to defend their way of life when acting as in separate entities. And so whether this was a good thing or a bad thing, this book, they're gonna have to assimilate. They're going to have to adopt White ways. And the only way they can be

**[00:46:00] H.W. Brands:** encouraged to do this, compelled to do this, is to shrink their land holdings enough, so they have no choice but become farmers like the White neighbors nearby.

**[00:46:09] H.W. Brands:** And I'm not in a position where I'm going to doubt the sincerity of that group of people. There was a separate group of people who said, "Well, if we do the arithmetic, we shrink their lands. And there's a whole lot more for us," but the idea was, and to pick up on what Lindsay Robertson was just saying, the question was, "What's gonna be the constitutionalism of all of this?" And there were individuals, some that I wrote about, actually one, Eli Parker, who was, I'll call him an assimilated, he would have been called the Christianized Seneca, who had basically said, "We're not gonna live our old traditional," and he became very successful in the US political system. In fact, he eventually rose to head the Bureau of Indian Affairs.

**[00:46:52] H.W. Brands:** Quannah, Parker was the last war chief of the Comanches and he fought until he decided, "We can't fight anymore," and then he basically

**[00:47:00] H.W. Brands:** adopted [inaudible 00:47:00]. And so for those people who saw, "What's the future of this?" "The futures in the 1880 seem to be they're going to have to become like the rest of us. And then we can move forward from there." It didn't work out though, and in fact, some of the legislation Professor Robertson cited, then there was backtracking on that. And there was a greater appreciation in the 20th century for what sovereignty for the Indian nations meant to them. And so it became once again viable.

**[00:47:30] H.W. Brands:** But I will end, this will sound pretty cynical, but sometimes you have to adopt a certain cynicism when you interpret this stuff, it was only after the Indian tribes were clearly no threat to anybody but themselves that people could adopt this, "Now, let's try to be nice to Indians." It was a striking thing through this whole period that the people in the 1820s 1830s, who were most in favor of being nice to the Indians, were the ones who lived farthest from the Indians. So you could find folks in Massachusetts

**[00:48:00] H.W. Brands:** who were all in favor of Indian reform. You could hardly find any out on the frontier. And so once the Indian problem was safely settled in terms of, "We have what we wanted to take from them and now we'll sort of be nice with the rest of it, that's sort of the story of the 20th century, as disheartening as it might be regarding the meaning of this.

**[00:48:20] Jeffrey Rosen:** Disheartening indeed and there's something very poignant, you have a picture of Eli Parker next to General Grant and the idea of what would follow that is poignant indeed. Lori Dagggar, what are your thoughts about the lessons of the riveting story you tell about this speculative philanthropy and the outreach of Quakers and others with Native Americans? What does that story tell us about struggles over sovereignty and Native American status today?

**[00:48:53] Lori Dagggar:** So I think primarily two things. The first is that what we now know of as the United States and all of

**[00:49:00] Lori Dagggar:** its territories, made a lot of money off of dispossessing Native peoples. Indian removal, particularly beginning in the early years, could involve some nice profit for both White settlers who wanted to lands in order to build canals through these lands and for US officials, right? Some of whom also had lands that they wanted to build canals through too like John Johnston, who I read about in the book. I think their second key lesson, and this goes back to Lindsay Robertson's point, is that the battle is ongoing, right? Not, you know, it's in the courts today, but it's also we can see it in events like 2016's Standing Rock Uprising, the protests there.

**[00:49:47] Lori Dagggar:** Native people are still trying to resist US colonial efforts to harvest profit from their lands. And that is an ongoing story and it's a through line from the age of European

**[00:50:00] Lori Dagggar:** empires in North America, through the age of the American empire in North America, right? Native peoples are resisting. They're claiming their sovereignty, they're defending their sovereignty, and they are making a stand to protect their lands and their peoples. You know, one thing that strikes me too is that Native peoples take on a lot of different approaches to navigating this confrontation with the United States, the settlers, and the government. Some choose to fight, some choose war, other folks choose to stay in as neighbors, right? Not necessarily just to assimilate, not necessarily because they see Euro-American culture as the future, but because it's a tactic for survival, for remaining on their lands, for hiding in plain sight, right?

**[00:50:51] Lori Daggar:** And in that way, they're able to actually preserve some of their culture and their kin networks around them, right?

**[00:51:00] Lori Daggar:** So in some ways, Native peoples are navigating this continuously today in many different ways and I think that's another key lesson. There's a scholar who terms this "survivance," thriving and continuing to be present, an active sense of presence. And many Native people are continuing to be very actively present.

**[00:51:22] Jeffrey Rosen:** Beautifully put. Thank you for that. Lindsay Robertson, last word in this great discussion to you. What should we be looking for in the fissures about Native American law and sovereignty at the Supreme Court? The *McGirt* case, which the court decided in 2020, was five to four with an unexpected grouping. The more liberal justices joined Justice Gorsuch in holding that the Major Crimes Act did not apply for land reserved for the Creek Nation because that remained Indian country. And the dissenters were the more conservative justices. And yet these issues often don't break down along predictable

**[00:52:00] Jeffrey Rosen:** lines as we saw in the oral argument yesterday. So what are the broad areas of agreement and disagreement about the status of Native Americans at the Supreme Court.

**[00:52:08] Lindsay Robertson:** Well, we're still in sort of a wait and see mode. I think Justice Gorsuch has a better handle on federal Indian law than any Supreme Court justice in American history. I think Justice Sotomayor and Justice Kagan are both also very adept and not to dismiss the awareness of any of the others, but Justice Gorsuch comes from the 10th circuit, which is where Oklahoma is, and so I think he has more hands on experience with all this. Justice Barrett, we don't know quite yet where she is on Indian law. She's still the great unknown, although she has sided with what might be characterized as the Kavanaugh wing. And we're not entirely sure where the Chief Justice is going to come out in some of these cases. There's a lot of back street projection on *Brackeen* that it might be four-four and the chief might sort of fall

**[00:53:00] Lindsay Robertson:** somewhere in the middle.

**[00:53:01] Lindsay Robertson:** But again, we truly don't know and so it's a challenging period to try and be a tealeaf reader on the Supreme Court in Indian law areas. The *McGirt* case was a fantastic decision, a great win for tribal sovereignty, and then it almost immediately got flipped, and the dissenters suddenly become the majority when Justice Ginsburg is replaced by Justice Barrett in the couple of following cases. So, it's a great question, it's an open question. If I can sort of toss in two final thoughts of mine based on stuff that Lori just said and then really two points about in a broader sense about my thoughts on all of these issues. One is a cautionary observation. It has to do with a dichotomy that I think we as historians have, in a sense invented traditional versus assimilated, that either you're Indian or you're not.

**[00:54:00] Lindsay Robertson:** And I think that discounts and this is a point that Lori made, the right and capacity of communities to make decisions about how they want live from one day to the next. If I start eating Indian food exclusively, that doesn't mean that I'm an assimilated,

subcontinent Indian. It just means that I want try it out and it's pretty good. And some, a lot of tribal communities today will have adopted methods like university educations, not because they are selling out to another culture, but because they've made a decision that this makes sense for them. And of course, cultural interchange works both ways.

**[00:54:38] Lindsay Robertson:** The point about tribal identity is that they are political communities, and they have the right as any political community, to decide what their future will be and what their culture will look like. Their identity doesn't depend on their hanging to a sort of modern anthropological understanding of how traditional tribes worked and this is part

**[00:55:00] Lindsay Robertson:** of bringing the whole problem into the present. The other and last thing I'll say is it's easy and natural to focus on, and it's the National Constitution Center it makes sense on what's happening in the US, but I really would encourage people to look at what's happening globally, I'm much more optimistic when I look beyond the borders of the US. I have some optimism in the US, but when you look beyond the borders, what you're seeing is the formation of a global indigenous community that never existed during the periods of colonization in 19th century because of technological deficiencies.

**[00:55:36] Lindsay Robertson:** But with the internet, communication, Twitter, WhatsApp, etcetera, you have groups that are regularly meeting on Zoom sessions like this from Southeast Asia, from Australia, Canada, the US. I'm involved in a number of sort of global indigenous rights organizations now. There are various fora including the UN, the organization of American states

**[00:56:00] Lindsay Robertson:** and others in which they're making their voices heard. And if you are watching and you're interested in Native rights, I'd strongly encourage you to look for, discover some of these organizations and become involved. Different countries have different situations and maybe it's time to be working for indigenous rights in Paraguay, you know? Maybe the ground is more fertile there than it is than it feels in the US now and that's perfectly fine.

**[00:56:27] Lindsay Robertson:** Because it's a large planet, there are lots of indigenous peoples. They share legal issues and histories to a greater extent than I think many people realize. And we now have the tools to make a difference in that space.

**[00:56:42] Jeffrey Rosen:** Thank you for that wonderful note of optimism to end on. You're so right that the convening technologies of the internet can indeed introduce a global perspective that can really illuminate this debate struggle over indigenous rights. And thank you so much

**[00:57:00] Jeffrey Rosen:** H.W. Brands, Lori Daggar and Lindsay Robertson for a wonderful discussion of the battle for the West and Native Americans and the Constitution. Thank you for taking an hour out in the middle of your day to learn and grow together and to dig into this deeply important and complicated topic, which can teach us so much about our history and the

Constitution. Bill Brands, Lori Daggar, Lindsay Robertson, thank you for joining and thanks to all. See you soon.

**[00:57:32] Tanaya Tauber:** Today's show was produced by John Guerra, Lana Ulrich, Sam Desai, Melody Rowell and me. It was engineered by Dave Stotz of the NCC's wonderful AV team. Research was provided by Emily Campbell, Kelsang Dolma, Sophia Gardell and Liam Kerr. For a list of resources mentioned throughout this episode, visit [constitutioncenter.org/debate](https://constitutioncenter.org/debate). While you're there, check out our upcoming shows and register to join us

**[00:58:00] Tanaya Tauber:** virtually. You can join us via Zoom, watch our live YouTube stream or watch the videos later in our media library at [constitutioncenter.org/medialibrary](https://constitutioncenter.org/medialibrary). If you like the show, please help us out by rating and reviewing us on Apple Podcasts or by following us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.