

MUSKRAT VS. CANARY: THE FUTURE OF FEDERAL INDIAN LAW


INDIGENOUS PEOPLES DAY



COLOMBUS DAY

COLOS

THE MINER'S CANARY AS THE METAPHOR OF INDIAN LAW



LIKE THE MINER'S CANARY, THE INDIAN MARKS THE SHIFT FROM FRESH AIR TO POISON GAS IN OUR POLITICAL ATMOSPHERE AND OUR TREATMENT OF THE INDIANS, EVEN MORE THAN OUR TREATMENT OF OTHER MINORITIES, REFLECTS THE RISE AND FALL OF OUR DEMOCRATIC FAITH.

FELIX S. COHEN,
1953

CANARY JURISPRUDENCE

OLIPHANT V. SUQUAMISH TRIBE, 1978

into a major test of the balance of power on America's Indian reservations.

These streets police, whose headquarters is a cramped office on the main street of this tiny Puget Sound community, have the authority to arrest non-Indians on the reservation?

And once arrests are made, does the Suquamish tribal court, which is usually convened by turning an office table sideways and clearing away the coffee pot, have the authority to try non-Indians—who have no direct voice in the making of Suquamish law—and sentence them to jail?

Those two questions, presented to the nation's highest court in an era of unprecedented controversy over Indian claims to land and its resources, contain a staggering array of legal implications—"so far reaching," said a Tacoma city official, "that you don't even want to contemplate it."

If the Suquamish are granted criminal jurisdiction over non-Indians, the decision might well

See INDIANS, A4, Col. 1



By Jerry Gay for The Washington Post

Non-Indian Oliphant, Supreme Court petitioner.

construction and policing of streets and highways, the

In terms of policy considerations, it makes no sense to allow 50 to 150 Indians to set up a "tribal court" and assume jurisdiction - whether concurrent or not - over more than 2,800 non-Indians who live within the technical boundary of the reservation, and who own in fee most of the land.

I realize that Indian law is indeed "a law unto itself", and often seems incompatible with broader public interests. I am inclined to accept a large measure of autonomy where the issue of tribal history, culture and the rights of Indians. But this case involves the attempt by a

JUSTICE LEWIS POWELL:
MEMO TO CLERK

Because I think this is a difficult case, I would recommend that you await the dissent before voting. This is a fairly feeble recommendation, however, because my instinctive feeling is that the majority's result is the correct one. And because of the problems that would attend an attempt to say that Congress actually withdrew Indian criminal jurisdiction over non-Indians, I do not think I could write a decent concurrence along those lines. Buzz told me that he read 19th century treaty, in addition to all the legislative history of the 19th century Indian

POWELL CLERK MEMO
TO JUSTICE POWELL

CANARY JURISPRUDENCE



G UARDIANSHIP

S UPREMACY

C ONQUEST

P ATERNALISM

D EPENDENCE

THE ROLE OF THE SUPREME COURT

INTERPRET THE CONSTITUTION

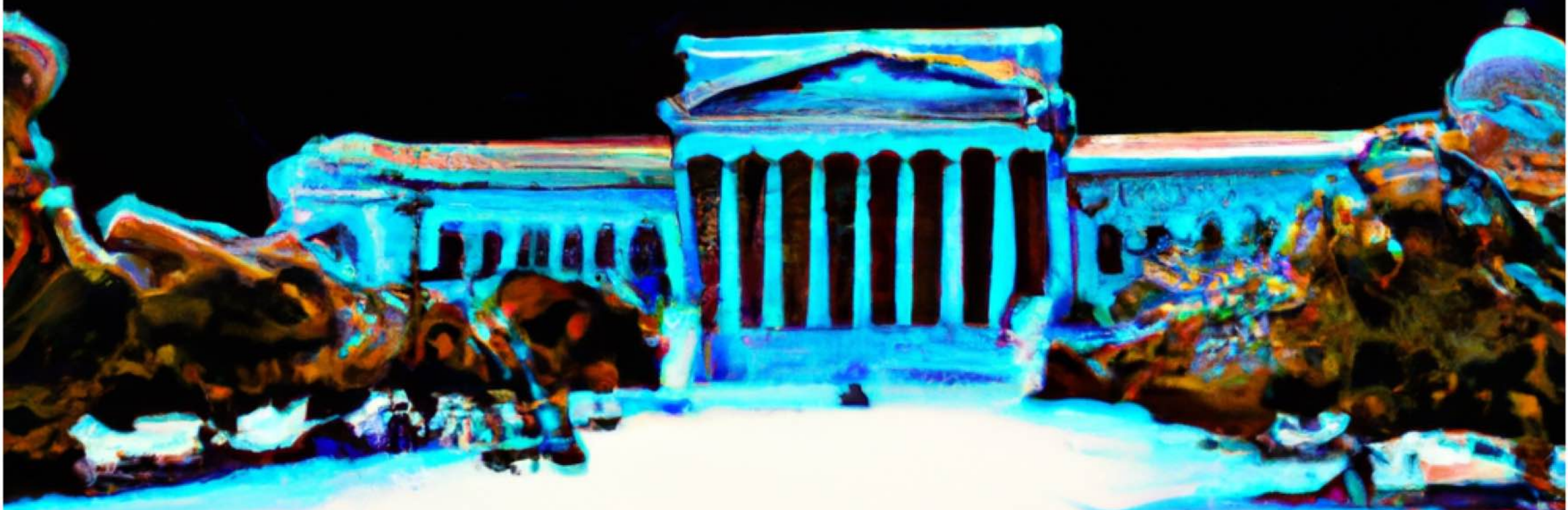
ENFORCE THE CONSTITUTION

THE PURPOSE OF THE CONSTITUTION

PROTECT PROPERTY RIGHTS

PROTECT LIBERTY

ESTABLISH SOCIAL CONTRACT



SLAVERY

INDIAN KILLING AND
DISPOSSESSION

STATES'
RIGHTS

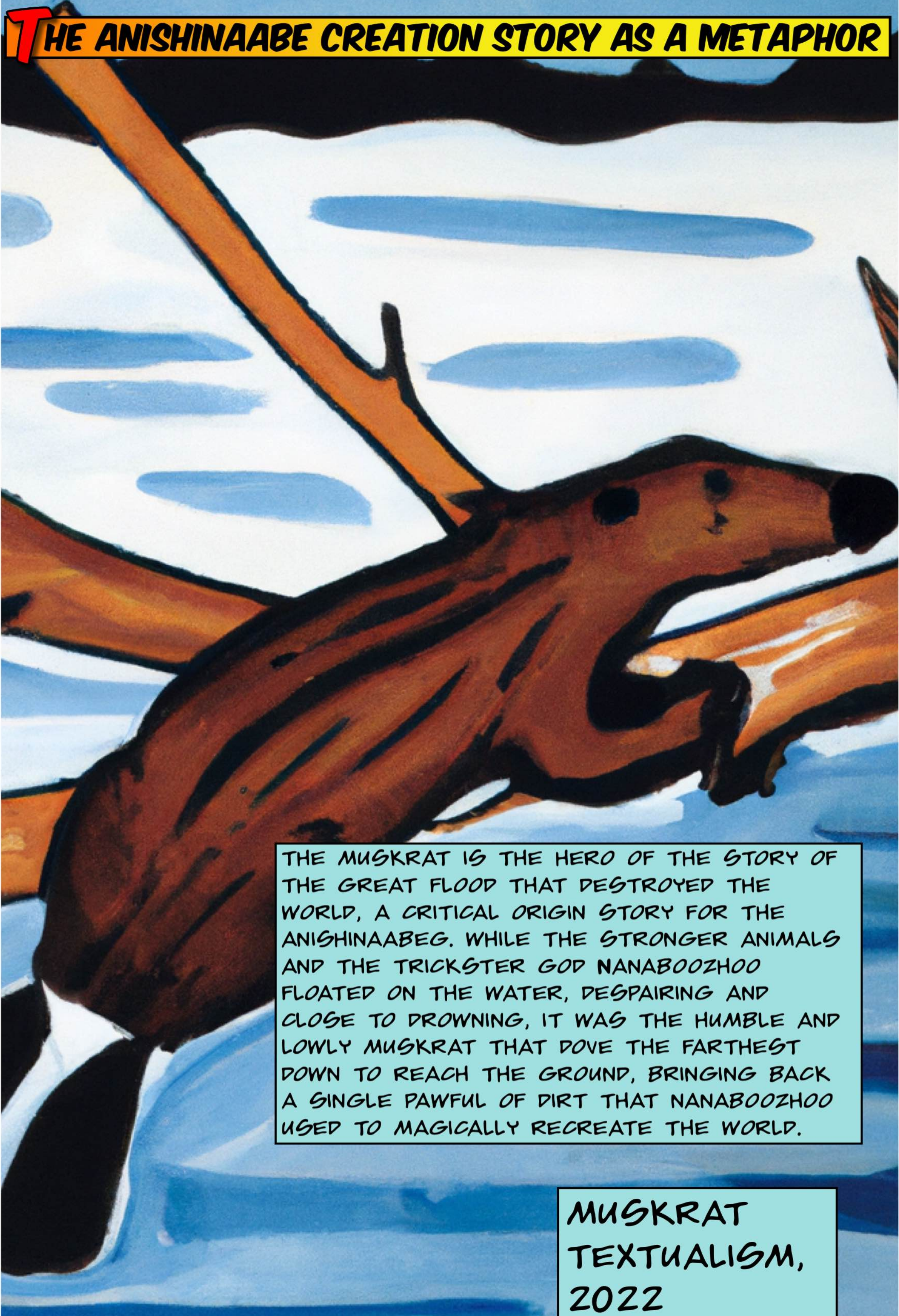
INDIVIDUAL RIGHTS,
NOT HUMAN RIGHTS

ENABLE GOVERNMENT TO
ENFORCE SOCIAL CONTRACT
WITHOUT LIMITS

LIMIT GOVERNMENT POWER
OVER BENEFICIARIES OF
SOCIAL CONTRACT

EXCLUDE WOMEN,
UNPROPERTIED MEN,
INDIANS, AND FOREIGNERS

THE ANISHINAABE CREATION STORY AS A METAPHOR



THE MUSKRAT IS THE HERO OF THE STORY OF THE GREAT FLOOD THAT DESTROYED THE WORLD, A CRITICAL ORIGIN STORY FOR THE ANISHINAABEG. WHILE THE STRONGER ANIMALS AND THE TRICKSTER GOD NANABOOZHOO FLOATED ON THE WATER, DESPAIRING AND CLOSE TO DROWNING, IT WAS THE HUMBLE AND LOWLY MUSKRAT THAT DOVE THE FARTHEST DOWN TO REACH THE GROUND, BRINGING BACK A SINGLE PAWFUL OF DIRT THAT NANABOOZHOO USED TO MAGICALLY RECREATE THE WORLD.

MUSKRAT
TEXTUALISM,
2022

MUSKRAT JURISPRUDENCE

MCGIRT V. OKLAHOMA



JUSTICE GORSUCH delivered the opinion of the Court.

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding “all their land, East of the Mississippi river,” the U. S. government agreed by treaty that “[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians.” Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and “permanent home to the whole Creek nation,” located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.” 1832 Treaty, Art. XIV, 7 Stat. 368.

A painting of a muskrat in a pond at sunset. The muskrat is in the center, looking towards the left. The background is a vibrant sunset with orange, yellow, and blue streaks. The water is dark with a reflection of the muskrat.

MUSKRAT JURISPRUDENCE

SELF-DETERMINATION

COOPERATION

TRIBAL AGENCY

DEFERENCE

INTERDEPENDENCE

THE CORRECT ROLE OF THE SUPREME COURT

SEPARATION OF POWERS

DEFERENCE TO CONGRESS

COMPLIANCE WITH DEFAULT INTERPRETATIVE RULES

AVOID POLITICAL AND POLICY JUDGMENTS

ACCCEPT TRIBAL NATIONS AS CO-EQUAL SOVEREIGNS

ENFORCE THE DUTY OF PROTECTION





MIIGWETCH!!!