"Introduction to the 200 Years of Johnson v. M'Intosh: Law, Religion, and Native American Lands Series" by Philip P. Arnold, Sandra L. Bigtree, and Adam DJ Brett

canopyforum.org/2023/03/10/introduction-to-the-200-years-of-johnson-v-mintosh-law-religion-and-native-american-lands-series

March 10, 2023

Introduction to 200 Years of *Johnson v. M'Intosh*: Law, Religion, and Native American Lands

Philip P. Arnold, Sandra L. Bigtree, and Adam DJ Brett

Introduction

As historians of religions, we are interested in myths, history, and creation narratives. The U.S. Supreme Court's landmark ruling in *Johnson v. M'Intosh* (1823) includes all these elements. The *Johnson* decision illustrates one of the powerful ways in which Christianity

has played a hegemonic role within American law and culture at the expense of Mother Earth and all living beings, especially Indigenous peoples.

The Doctrine of Discovery — or, more aptly, the Doctrine of Christian Discovery — is a theological and legal framework of domination developed in the 15th century by the Roman Catholic Church and European monarchs. First articulated in a series of papal bulls, *Inter Caetera* (1493), the Doctrine of Discovery asserted the supposed right of European powers to "discover" and claim ownership of lands inhabited by non-Christian peoples. As Shawnee and Lenape legal scholar Steven T. Newcomb explains, the Doctrine of Discovery was (and is) a theological and legal attempt to justify the unjustifiable: enslavement, exploitation, dispossession, and extraction.

In 1823, Chief Justice John Marshall based the supposed right of colonizing forces to dominate and take ownership of the land on what he viewed as the natural order of conquest. To justify this "pretension," he wove together theological and legal justifications for land theft. Marshall's creation would go on to shape not only U.S. property law but also international property law, as Tonya Gonnella Frichner and Robert J Miller underscore. The Doctrine of Discovery, and the 15th-century Papal Bulls that influenced Marshall remain relevant today. Justice Ruth Bader Ginsburg famously cited the Doctrine of Discovery in a footnote to her 2005 majority opinion in the *City of Sherrill, New York v. Oneida Indian Nation*. As Joseph J. Heath and Dana Lloyd explain, *Sherrill* continues to have a massive impact on Indigenous sovereignty. It is a significant factor in multinational corporations' extractive enterprises on Indigenous lands. As Steven Newcomb's contribution to this series highlights, the framework of domination on which the Doctrine of Christian Discovery is built serves the goals of settler colonial conquest and its attendant racism and xenophobia. We invite religious and legal scholars to reflect upon this framework.

The combination of the 200th anniversary of *Johnson* and the rising scholarly attention being given to white Christian supremacy by scholars like Anthea Butler and Robert P. Jones has led scholars to converge on the question of how to dismantle frameworks of domination. Learning from Haudenosaunee values of nurturing the roots of peacemaking, we realize that the Doctrine of Christian Discovery and Domination metaphorically represents a clear-cutting machine unleashed onto the web of life. This destructive ideology prohibits any kind of regenerative intersectionality, leaving us with the *kyriarchies* of ecocide, racism, sexism, classism, heterosexism, etc. We are thankful to *Canopy Forum* for hosting this public conversation about this important legal case.

Methodology

Abolishing something as pernicious as the Doctrine of Christian Discovery requires collaboration between settler-colonial and Indigenous Peoples. As guest editors of this series and members of the Indigenous Values Initiative at Syracuse University, we are guided by Haudenosaunee practices of peace (*Skä·noñh*), described in Betty Lyons' article. *Skä·noñh*

is attained only when human beings have a proper relationship with the natural world. The Haudenosaunee “Great Binding Peace” is the basis for their understanding of freedom and democracy. This pre-colonial matrilineal clan system of governance has been practiced for thousands of years, throughout periods of warfare, colonization, forced removal, and environmental destruction, which were often conducted under a banner of Christian hegemony. In the 18th century, the Haudenosaunee Confederacy’s non-monarchical system of government was a source of great inspiration to the Founding Fathers. By the 19th century, their matrilineal clan system had influenced the Women’s Rights Movement.

“We were planting corn and they were planting crosses.” ~ Faithkeeper Oren Lyons. (Photo by Phillip P. Arnold from the Skä•noñh Great Law of Peace Center.)

The Haudenosaunee Confederacy maintains its sovereignty and its ancient ceremonial Longhouse practices according to “The Great Law of Peace.” Of the 574 federally recognized Native Nations, only three retain their pre-colonial clan structure and do not operate under the Bureau of Indian Affairs-imposed elective system of government. All three are Haudenosaunee. Through the values of the Haudenosaunee, we hope to re-establish proper relationships with the natural world and free ourselves from the chains of domination shaped by the Doctrine of Discovery.

In 1923 Cayuga Hoyane (Men of the Good Mind) Deskaheh traveled to Geneva on a Haudenosaunee passport to address the League of Nations. While there, he reminded the European nations of their obligations under the *Two Row Wampum* treaty of 1613 and asked for their assistance in helping the Haudenosaunee Confederacy stand up against Canada’s

genocidal policies of assimilation and cultural destruction. Haudenosaunee leaders John Mohawk, Hoyane Irving Powless, Jr., Faithkeeper Oren Lyons, Clan Mother Audrey Shenandoah, Tadodaho Leon Shenandoah, Faithkeeper Oren Lyons, Tadodaho Sidney Hill, and so many more continue doing this work. Our friend and colleague Betty Lyons (Onondaga Nation Snipe Clan), Executive Director of the American Indian Law Alliance, continues the work started by her late Aunt Tonya Gonnella Frichner in fighting to dismantle the Doctrine of Discovery at the level of the United Nations.

The Two Row Wampum Treaty of 1613 is an agreement made between the Haudenosaunee and the first European colonists, the Dutch, who settled in what is today Albany, NY. It is a cohabitation agreement between the Haudenosaunee and Euro-American colonists, who agreed not to interfere with one another and to live respectfully as they traveled side by side down the river of life. The “silver covenant chain” used during the negotiations represented the intercultural understanding that required effort and attention by both sides to keep the silver polished. The Two-Row Wampum is more than a treaty. It is a living covenant that provides a theory and a method for how the values of the Haudenosaunee Confederacy can inform and enhance inter-Indigenous collaborations and deep and abiding solidarity with and from settler-colonial peoples as we all work to attain Skä·noñh.

Collection Overview

This special issue contains a remarkable collection of articles that contribute to our understanding of Chief Justice Marshall’s legacy and the broader impact of *Johnson v. M’Intosh*. Betty Lyons describes the Haudenosaunee (Iroquois) perspective; this is the theoretical touchstone of the issue. Steve Newcomb is well known for organizing and illuminating many of us on the religious nature of U.S. law. His contribution highlights the disastrous consequences of Marshall’s decisions by examining *Tee-Hit-Ton Indians v. United States* (1954). Alexandra Fay outlines the destructive power of the Marshall trilogy. Kerry Malloy discusses why property law, which *Johnson* codified around the Doctrine of Discovery, has devastatingly impacted the environment. Environmental concerns are also approached from a different angle by Andrew Little’s framing of *Johnson*. The urgency of re-examining our legal precedents has affected social justice issues and disrupted Mother Earth’s natural cycles. If we are to survive, we have to re-evaluate our proper relationship. Fay, Malloy, and Little help illustrate why *Johnson* matters to us all. Tina Ngata helps us to understand a Māori perspective on *Johnson* and how U.S. settler-colonial laws justified the voyages of Captain Cook and his seizure of Pacific territories. Mark Tremblay gives us a sense of what *Johnson* means for First Nations Peoples of Canada. Robert Miller’s ten distinct elements of the Doctrine of Discovery is an extremely helpful shorthand for students. Matthew Cavedon’s article focuses on the religious questions that the Doctrine raises: was it the Vatican or the monarchies, particularly England’s Henry VII, who initiated colonialism under the British Empire? We start, however, with an excerpt from Peter d’Errico’s

remarkable new book *Federal Anti-Indian Law: The Legal Entrapment of Indigenous Peoples*, which makes the point that legal formulations since *Johnson* have not been in the service of the State rather than Native Americans.

Conclusion

200 years after its ruling, there is an urgent need to revisit *Johnson v. M'Intosh*. The authors illuminate what Chief Justice John Marshall set in motion and how it still negatively impacts our world today. Religion, particularly Christianity, has been used as a weapon against Indigenous Peoples worldwide. As Lindsay Robertson has shown us, Marshall, in effect, fabricated the entirety of the Doctrine of Discovery by injecting it into US property law, thereby creating a mythic framework of domination and white supremacy. Christians who have repudiated the Doctrine of Discovery can ally with lawyers and Indigenous Peoples to reverse the harm of this disastrous legacy. Our common survival on Mother Earth requires us to find the origin of this destructive spirit that has completely overtaken all our lives.

Skä·noñh ♦

If you'd like to check out other articles in our "200 Years of Johnson v. M'Intosh: Law, Religion and Native American Lands" series, click here.

About the Authors

Philip P. Arnold is an Associate Professor in the Department of Religion at Syracuse University, principal investigator for the Henry Luce Grant "200 Years of Johnson v. M'Intosh," the founding director of the Skä·noñh—Great Law of Peace Center, and president of the Indigenous Values Initiative.

Sandra Bigtree is a citizen of the Mohawk Nation at Akwesasne, a member of the Skä·noñh—Great Law of Peace Center Academic Collaborative, and a founding board member of the Indigenous Values Initiative.

Adam DJ Brett is the grant and event coordinator for the Doctrine of Discovery Project, funded by the Henry Luce Grant "200 Years of *Johnson v. M'Intosh*" and supported by the Indigenous Values Initiative and Syracuse University. He is also an International Research Associate with the American Indian Law Alliance and an adjunct professor of religion at Syracuse University.

Recommended Citation

Arnold, Philip P., Bigtree, Sandra L., and Brett, Adam DJ. "Introduction to the 200 Years of Johnson v. M'Intosh: Law, Religion, and Native American Lands Series." March 10, 2023. https://canopyforum.org/2023/03/10/introduction-to-the-200-years-of-johnson-v-mintosh-law-religion-and-native-american-lands-series/