"Johnson v. M'Intosh and the Missing Cover of the Jigsaw Puzzle" by Steven Newcomb

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Steven Newcomb

"A Close Up View of a Puzzle Piece" by Pierre Bamin (Unsplash license).

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The Jig Saw Puzzle

February 28, 2023 marked 200 years since Chief Justice John Marshall delivered a unanimous decision for the U.S. Supreme Court in the case *Johnson & Graham's Lessee* v. *M'Intosh*. This decision enshrined into the system of ideas and arguments called "U.S. law," the assertion that the Christian nations of Europe, and their political successors, had a right of discovery and domination ("ultimate dominion") against the original nations and peoples of this continent. At one point, the Court used the phrase "natives who were heathens," language which is traced to the Bible and to Vatican documents from the fifteenth century.

In the 1980s, during my first decade researching the Supreme Court ruling *Johnson v. M'Intosh*, it occurred to me that I was working on a task analogous to combining the intricate pieces of a jigsaw puzzle. In my case, however, I did not have the benefit of an image on the cover to know what the puzzle would look like when completed. As I continued to work on "the puzzle" of the *Johnson* ruling, I gained a deeper understanding, while at the same time adding additional "pieces" to the mix, increasing the complexity of the puzzle.

Given that this interpretive work involves words and ideas, and not physical puzzle pieces, we as Native scholars face an interesting challenge: How do we take the vast historical record of ideas and arguments developed centuries ago by intellectuals of the Christian, European world, and by intellectuals of the dominating American society, and interpret that record from our own perspective, for the benefit of our nations and peoples? In my view, our challenge is not a matter of gaining a better understanding of "the law." If we frame our task in such a limiting manner, we might find ourselves operating on the basis of an unconscious belief that the system of domination which the United States has been forcibly imposing on our nations and peoples for generations is a *valid* system of "law." Such an approach would fail to provide us with our own view-from-the-shore vantage point, from which to challenge the ideas and arguments called "U.S. law" and "U.S. federal Indian law."

Setting the Context

These days I consider it imperative to provide a context for every presentation I make. A way to set the context is by acknowledging the pre-invasion, *free existence* of the original nations and peoples of this continent, now typically called "North America," which many Native peoples call Turtle Island.[1] Our free existence as original nations[2] is traced to the beginning of time by means of oral histories and oral traditions. Next, we need to acknowledge the *contrast* between the free existence of our Native nations and the *system of domination*[3] expressed in Vatican papal decrees and other documents that the Christian European world carried by ship across the ocean, with an *intention* of imposing the contents of their *mental world* on everyone and everything they encountered.[4]

Having acknowledged the contrast between the free existence of our original nations and the system of domination that was brought by ship from Western Europe, we are able to reflect upon two main perspectives: the viewpoint of our Native ancestors, standing on the shore looking at an invasive ship sailing toward them, and the viewpoint of the Christian European

colonizers, standing on the deck of the ship, looking at our ancestors. This contrast enables us to consider the difference between the *mental world* of our ancestors, created by means of our own languages, and the *mental world* of the Christian Europeans created by means of their languages. From this starting point we are able to express a view-from-the-shore perspective and a view-from-the-ship perspective.

The *Johnson* v. *M'Intosh* ruling expresses a view-from-the-ship perspective by means of the English language, and does so on the basis of the mental world of the United States. Those of us as Native people who are able to remain cognizant of the original free existence of our nations and our ancestors would be making a grave mistake if we were to treat the ideas and arguments created by the intellectuals of the United States as unquestionable or unchallengeable "*law*.*"* Knowing as we do that those ideas and arguments are premised upon a claim by the United States of a right of domination, we have the responsibility of pointing out that there is no such thing as *a right of domination*. We have an obligation to reject the U.S. claim of a right of domination over our nations and peoples, whether that claim is being made on the basis of the Bible and Christianity, or on any other basis.

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Having this insight, we face the task of decoding the language of the *Johnson* ruling by looking at the etymology of key English words and metaphors. However, an English-oriented approach to our task of puzzle-solving necessarily excludes the language and resulting mental world of every original nation and people of the continent. A typical English language approach appears to uncritically accept a key presumption: Namely, that as soon as intellectuals working for the Supreme Court of the United States arrive at a decision in a given case, our original nations are then considered (from the viewpoint of the United States) as *automatically subject to* whatever ideas and arguments the Supreme Court had devised. Why? Because our nations and peoples are regarded, again, from the viewpoint of the United States, as being automatically *subject to* the *mental world* of the United States. Why? Because, as Marshall declared in the *Johnson* ruling, the colonizing powers from Western Europe were able to use a "superior genius" to claim a right of Christian "ascendancy" (domination) over the "heathen" nations of the continent.

Looking Back

For decades I've been anticipating the two-hundred-year mark of the *Johnson* v. *M'Intosh* ruling. As a Native person born in 1955, two centuries after Chief Justice John Marshall was born in 1755, I came of age during the activism of the late 1960s and early 1970s. When I entered the University of Oregon (UofO), I focused my entrance essay on my desire to go to law school. I wanted to become an attorney so that I could advocate for Native nations. At

that time, I did not understand that U.S. law was based on a claim of a right of domination. Eventually, I decided to major in Rhetoric, the art of persuasion, and Communication because it would prepare me for law school.

In 1982 I was able to take a single federal Indian law course from then Adjunct Professor Charles F. Wilkinson at the University of Oregon School of Law. The *Johnson* ruling was one of our reading assignments. While reading the decision, I noticed that Chief Justice Marshall had placed italics on the phrase “Christian people” and referred to “natives” as “heathens.” I recalled Vine Deloria Jr.’s book *God is Red*,which I enjoyed reading in 1975, and I remembered Deloria had quoted the papal document issued by Pope Alexander VI on May 4, 1493.[5] It occurred to me that there must be a connection between the *Johnson* ruling and Pope Alexander VI’s document *Inter Caetera*.[6]

Reading the *Johnson* decision made me angry. Because I had been given the great honor of being invited to participate in a number of profound and beautiful non-Christian ceremonies with traditional healers and medicine people, I felt outraged that the U.S. Supreme Court would express the view that “Christian people” had an “ultimate dominion” on the continent, while the so-called heathen Indians were declared by the Court to only have a right of “occupancy.” My rhetoric courses had taught me that if you accept the premise of your opponent, you are likely to lose a rhetorical battle because the framing of the premise will most likely predetermine the outcome of the debate. I saw the *Johnson* ruling as the premise of the federal Indian law system, and saw that system as a rigged game because of the *Johnson* ruling.[7] For this reason, and a number of personal reasons, I left university life, but continued to investigate on my own the connection between the Vatican papal bulls, the *Johnson* ruling, and U.S. federal Indian law.

Studying the Vatican Papal Bulls

A few years later in 1989, I called the library at the Catholic University of America in Washington, D.C. to ask where I could find published versions of the Vatican papal bulls. I learned from a librarian named David Gilson that I could find the documents I was looking for in the book *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, which contains the Latin versions of several Vatican papal bulls, along with English translations. Assisted by Latin-English dictionaries, I’ve been studying those documents ever since. It was also in 1989 that I was referred to Peter d’Errico by his friend Professor Barry O’Connell. Peter was then a professor of Legal Studies at the University of Massachusetts and, after our initial phone call, we have maintained our conversation about these matters for more than thirty years. Our weekly conversations as life-long friends have been invaluable to the development of my thinking and my work.

While I was studying at the University of Oregon, I was able to take two courses taught by Professor C.A. Bowers on the cognitive and social construction of reality. One of those courses was titled “Education and the Politics of Cultural Change.” Professor Bowers and my

rhetoric professors taught me about the important role that metaphor and persuasion play in the mental and physical construction of reality. I found this information fascinating because it helped me to think more comprehensively about how the United States government had worked to violently and genocidally destroy the traditional realities of our Native nations and peoples, by working to overrun our traditional territories and wipe out our languages, cultures, and spiritual traditions.

After an initial decade of research, writing, and reflection, in 1992 I met a man who would become a friend and mentor: Birgil Kills Straight (1940-2019), an educator, a traditional headman of the Oglala Nation, a fluent Lakota language speaker, and a ceremonial leader. That was the year when Birgil and I founded the Indigenous Law Institute and began our global campaign to call upon Pope John Paul II to formally revoke the papal bull of May 4, 1493.

In August of 1992, my wife Paige and I traveled to Jane McCloud's near the Nisqually River in Yelm, Washington, where we met with the Traditional Circle of Elders and Youth. While there, I helped Onondaga Nation Faithkeeper Oren Lyons and a few other people to draft a document about American Indian Religious Freedom issues, the *Johnson* ruling, and the papal bulls of the fifteenth century, as well as what we referred to in the document as The Christian Nations Theory. That document was sent to Senator Daniel Inouye (D-Hawai'i) and the Circle has never received a response.

In October of 1992, I was on a panel at the Healing Global Wounds conference in San Francisco, which had been organized by the Western Shoshone National Council. Attorney Mark Savage, who was also on the panel, kindly offered to ask people at the New York University School of Law if I could add an article to a compendium that was about to be published. They agreed to accept an article from me, and by February of 1993, my first law review article was published in "The Review of Law & Social Change," titled "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson* v. M'Intosh, and Plenary Power." Peter d'Errico considers it to be a seminal work in the field, and, coincidently, it was published one hundred and seventy years after the Supreme Court issued the *Johnson* ruling, and five hundred years after Pope Alexander VI issued four papal decrees, not long after Columbus returned to the Iberian Peninsula from his first voyage to the Bahamas.

Months later in 1993, Birgil and I, along with Maria Yellowhorse Braveheart Jordan (Hunkpapa Dakota), wrote an open letter calling on Pope John Paul II to revoke the *Inter Caetera* papal bull. Toward the end of 1993, the UN Human Rights Centre in New York delivered our letter to the Vatican's Nuncio at the United Nations, who sent it to the Vatican Secretary of State in Rome. Our letter to the pope is quoted by Patrick Thornberry in his book *Indigenous Peoples and Human Rights*, published in 2002.

By the time Birgil and I had begun our efforts to publicize the Doctrine of Christian Discovery by means of the Indigenous Law Institute, with the support of brilliant friends such as Nalani Minton (Kanaka Maoli) of Hawai'i, I had noticed that the *Johnson* ruling and the papal documents of the fifteenth century expressed idea-patterns of domination. A key piece of the puzzle in this regard, which I include in my 1993 article, was the statement by William Brandon in *New Worlds for Old*. After examining the Latin etymology of the word "dominion," Brandon writes, "Political power grown from property—dominium—was, in effect, domination." Marshall's use of "ultimate dominion" in the *Johnson* ruling expressed the U.S. government's claim of a right of domination over our original nations and peoples.

Terminology

Language found in the *Johnson* v. *M'Intosh*, in the papal bull documents of the fifteenth century, in the royal charters of England, along with other information, provides ample evidence that our Native nations and peoples are dealing with a system of domination, which, to a great extent, is premised upon the framework of the Bible and Christianity. I explain this connection in my 2008 book *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery*. In *Pagans*, I demonstrate how patterns of domination from the Old Testament serve as part of the conceptual backdrop for what is typically called U.S. federal Indian law. Evidence of the connection between the Bible and federal Indian law is also found in the previously mentioned metaphorical distinction that Chief Justice Marshall made in the *Johnson* ruling between "Christian people" and "natives, who were heathens." Given that "heathen" is "a word of Christian origin," and given that the word "Christian" is made meaningful by the context of the Bible, which is a central source of authority for Christianity, this means there is a biblical origin for many of the ideas and arguments found in the *Johnson* ruling, and which are used by U.S. courts and in federal Indian law generally.

> [P]atterns of domination from the Old Testament serve as part of the conceptual backdrop for what is typically called U.S. federal Indian law.

Additional evidence of this connection is also found in a U.S. Justice Department legal brief that was delivered to the U.S. Supreme Court in the Fall of 1954 in the case *Tee Hit Ton Indians* v. *United States*, under the leadership of U.S. Solicitor General Simon Sobeloff. The U.S. attorneys who wrote that legal brief referred to papal bulls from 1344 and 1493.[8] They referred to "the Christian nations of Europe,"[9] as well as to Genesis 1:28 in the Bible and to the book of Psalms. They factored those documents into their reasoning process and their argument that the Tee Hit Ton people were not entitled to monetary compensation for the taking of their timber because "the Christian nations of Europe had acquired jurisdiction over the lands of heathens and infidels," a principle the U.S. attorneys connected to the *Johnson* v. *M'Intosh* ruling.

With the exception of Peter d'Errico and myself, I have yet to find any other scholar of federal Indian law who has published information on the Christian religious dimension of the U.S. legal brief in *Tee Hit Ton*. U.S. Supreme Court Justice Stanley Reed who wrote the majority opinion in Tee Hit Ton, also wrote a dissenting opinion in the 1946 ruling *Alcea Band of Tillamooks* v. *United States*. In his dissent, Reed said that the *Johnson* ruling had put forward the theory "that discovery by Christian nations gave them sovereignty over and title to the lands discovered." His phrasing "Christian nations" was most likely in part a result of his history education at Yale University in the early 1900s, and his mentorship by the eminent historian Edward Gaylord Bourne who published *Spain in America*.

Conclusion

We need to pass on to the younger generation the framework we have developed through painstaking effort, over a period of decades, in an effort to challenge the U.S. government's claim of a right of Christian domination over so-called heathen and infidel nations. Here are some potential arguments for us to use in the court of public opinion: 1) There is no such thing as a right of domination, no matter how much would-be dominators want to assume that such a right exists. 2) Our original nations and peoples are First in Time, and, therefore, First in Right, in comparison to the Christian nations of Europe and their political successors, such as the United States and Canada. 3) The documents issued by popes and monarchs were null and void from the moment they were written, because those potentates (a category which includes popes and monarchs) had no rightful jurisdiction thousands of miles away from their own homelands, across an entire ocean. 4) Anything wrong from the beginning can never be made right, because it was wrong from its inception, which is a principle created by Western Shoshone Elder Glenn Wasson. The claim of a right of domination will never be made right because it was wrong from the get-go.

JoDe Goudy, while he was Chairman of the Yakama Nation, illustrated what can be accomplished by the younger generation, through intelligent and innovative Native leadership. He dedicated several years to providing his Nation with background information about the Doctrine of Christian Discovery and Domination. I was able to contribute to this educational process with several talks and a screening of our documentary movie "The Doctrine of Discovery: Unmasking the Domination Code." Eventually, the Council of the Yakama Nation was able to file an amicus brief with the U.S. Supreme Court in the 2018 Cougar Den case in which it challenged the Doctrine of Christian Discovery and Domination. The Supreme Court ruled in favor of the Yakama Nation on the basis of its 1855 treaty. And although the Court's decision was not based on the amicus brief, the majority indicated that it had read the brief by referencing it in their decision. Unfortunately, that historic and heroic accomplishment by the Yakama Nation, the first of its kind by any Native Nation, was met with silence and indifference by the federal Indian law establishment. That kind of response will need to change if any fundamental reform is going to be accomplished in the field in support of our original nations and peoples. ♦

Steven T. Newcomb (Shawnee, Lenape) is the co-founder and co-director of the Indigenous Law Institute, along with Birgil Kills Straight who is an Oglala Lakota headman and ceremonial person. Steve Newcomb is the author of Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery and co-producer of the documentary film, The Doctrine of Discovery: Unmasking the Domination Code, directed by Sheldon Wolfchild (Dakota). He is one of the world's foremost authorities on the Doctrine of Discovery based on the 40 years he has spent investigating and writing about these issues. He has been a tireless advocate for Indigenous nations and peoples for decades and his work has now become a global movement.

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