"However, Extravagant The Pretensions Of Johnson V. M'Intosh" by Betty Lyons and Adam DJ Brett

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Betty Lyons and Adam DJ Brett

The George Washington Belt, the Two Row Wampum, and the Hiawatha Belt. The Canandaigua, Two Row, and Haudenosaunee Confederacy Wampum Belts. Image by Lindsay Speer, 2008.

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"*Democracy didn't come across on the Mayflower. Indeed not. Nor with the Niña nor Santa Maria. Certainly not. Democracy was here. It was in full flower. It was rampant. It was all over. All nations were free, and that includes the buffalo nation, that includes the fish nations,*

and the nations of trees. They were all free."

— Oren Lyons, "The Ice is Melting in the North"

The original free nations of Turtle Island have lived in a relationship with Mother Earth and all living beings since the beginning of time. There have been times of great harmony and balance and times — like now — of war and imbalance. Thousands of years ago, before the Haudenosaunee Confederacy was formed, the nation fought against the nation, and there was an imbalance. During this time, the Creator sent a prophet, the Peacemaker. The Peacemaker arrived on the shores of Onondaga Lake in a stone canoe. There on the shoes of the Onondaga lake, he met Hiawatha. Hiawatha listened to the Peacemaker's message of cooperation, peace, and a Good Mind. Tadodaho, a powerful sorcerer and warlord, sought revenge against Hiawatha and killed his daughters as retribution for Hiawatha following the Peacemaker. Grieving, Hiawatha returned to Onondaga lake, where he saw glistening white Quahog shells called wampum. Using these shells, he developed a process to cope with his grief. The Condolence Ceremony clears the eyes, ears, and throat; this practice continues even to this day.

With a renewed sense of purpose, Hiawatha joins the Peacemaker, and they travel to meet and speak with the leaders of the Oneida, Cayuga, Mohawk, and Seneca nations. Upon hearing the Peacemaker's message, the leaders of these nations decided to form a Confederacy united in a longhouse. Only one nation and leader resisted: the Onondaga nation and its leader Tadodaho. Embracing his fears, Hiawatha confronts the man who killed his daughter. To convince Tadodaho to join the Confederacy, Hiawatha, and the Peacemaker sought an ally, Jigonsaseh. Jigonsaseh would help them on their quest, and she would become the first clan mother because of this brave act. The Peacemaker's deal with Jigonsaseh was that if she could stop the war and unite the five nations, she could choose the leaders (chiefs or sachems). She agrees to help, and she combs the snakes from Tadodaho's hair so that he can hear the message of peace. Transformed by the care and hospitality shown by Jigonsaseh, Tadodaho accepts the Peacemaker's message. After undergoing the Condolence Ceremony, Jigonsaseh places an antler-horned Gustoweh on his head. The worst among the five warring nations has become the best and the leader of the new Confederacy. Having renounced war, the five nations (Seneca, Cayuga, Onondaga, Oneida, and Mohawk) come together and give the Peacemaker wampum, which he weaves into the Hiawatha belt. The Peacemaker gathers the five nations on the shore of Onondaga Lake under the shade of a great white pine. This auspicious event was marked by a total eclipse of the sun. Here the Peacemaker gives the Great Law of Peace for the first time. Moved by the Peacemaker's speech, the leaders of the five nations cast their weapons of war underneath the Great Tree of Peace. The message of the Great Law of Peace was so powerful that the Tuscarora Nation would eventually join the Haudenosaunee Confederacy.

This message of the Great Law of Peace, which has been incredibly truncated here, is a powerful message. It serves as a reminder that there is a way to live in peace and harmony with one another and the natural world, and all living beings. It is a powerful reminder that greed can drive people mad. Greed can drive people to do crazy things, like thinking that they can own a piece of their mother, the Earth. Onondaga Nation Turtle Clan Faithkeeper Oren Lyons summarizes the story by reminding us that "it was recognized and provided for in the Great Law of Peace that liberty and equality demanded great oral fortitude, and it was the nature of free men to defend freedom."

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The American Indian Law Alliance encourages you to take a moment and go and read the Great Law of Peace and allow it to change and transform you as well. While some readers may or may not be familiar with this message, the "Founding Fathers" of the United States were undoubtedly familiar. The Albany Plan of Union of 1794 and the concurrent resolution H.Con.Res.331 in 1988 further attests to this inspiring influence. We say *influence* here because the "Founding Fathers" omitted women, the natural world, and all living beings from their writing, which also advocated for enslavement, exploitation, and extraction. Everything that would be required to live in a healthy relationship was reduced to a resource for capitalist advancement. American politicians ignored and continue to ignore our sacred relationships and obligations to the natural world and all living beings. They failed to acknowledge a world where all living beings are treated fairly and with dignity.

Two Row Wampum

Article II, Section 2 of the U.S. Constitution says treaties are the supreme law of the United States. Going back a bit further than the U.S. Constitution, we find the Guswenta or Two Row Wampum Treaty. In 1613 the Haudenosaunee Confederacy made this treaty with the Dutch. The Two Row Wampum belt and a Silver Covenant Chain of Friendship represent the treaty. The wampum belt features two purple rows against a white background. Each purple row represents a part of the treaty traveling down the river of life, living in a mutual and reciprocal relationship with each other and the natural world. Neither would interfere with the other. This treaty is still in effect today. The Haudenosaunee and Dutch both agreed to uphold the treaty "as long as the grass is green, as long as the water runs downhill, as long as the sun rises in the East and sets in the West, and as long as our Mother Earth will last."

The Silver Covenant Chain of Friendship, which is part of this treaty, has been honored by Queen Elizabeth II of England, the Attorney General of Canada, and others. While the settler-colonial governments have frequently ignored their obligations enshrined in this treaty, they are still bound by it. We bring up the treaty here because it illustrates how another world was and still is possible, one in which people live in mutuality with each other and Mother Earth: a world marked by obligation, not by private property and the enslavement,

exploitation, and extraction of the Doctrine of Discovery. The United States constitution sees treaties like the Guswenta or Two Row Wampum Treaty as legally binding, while the courts and Congress seek to provide legal justifications to dishonor and ignore these treaty obligations. The Haudenosaunee Confederacy and the Original Free Nations of Turtle Island are still here, and the treaties must be honored.

The Personal is Political

On this the 200th anniversary of *Johnson v. M'Intosh* it is essential to make the case against other competing precedents regarding the Original Free Nations of Turtle Island. The Haudenosaunee Great Law of Peace and the Guswenta or Two Row Wampum Treaty provide two important counter-narratives to the U.S. system of private property and title. The former offers a way of living in harmony and balance with the natural world and all living beings. The latter allows European nations to live in relationship with the Indigenous peoples and the natural world. Both provide a map to a world without a capitalistic notion of private property. In 1974, Lakota scholar Vine Deloria, Jr. reminded Indigenous scholars of this often-overlooked case and called for further investigation into the theological and legal justifications for land theft.

Thomas Johnson was appointed to the U.S. Supreme Court by Hanadagá•yas President George Washington. Johnson served on the court from 1791-1793. Having worked as an attorney, Governor of Maryland, and an Associate Justice of the Supreme Court, Johnson would become a land speculator and one of the first investors in the Illinois-Wabash Company, one of the principal litigants in the case. After his death, his son and grandson would sue William M'Intosh, ushering in this now infamous court case. The court and its justices had (and have) a vested interest in private property.

Shawnee and Lenape Indigenous Legal Scholar Steven T. Newcomb examines Associate Justice of the Supreme Court of the United States Joseph Story's vast land holdings. Story, who was part of the majority on the *Johnson,* clarifies the connections between the papal bulls, English charters, and U.S. law. Additionally, Story would become one of the leading voices for what Newcomb calls the claim of the right of Christian domination in U.S. Law.

Story was not alone in being a land-speculating Justice; Chief Justice John Marshall owned a home in Richmond, Virginia, a retreat called Chickahominy Farm, the thousand-acre Oak Hill Plantation, and a large land purchase which resulted in him having to recuse himself from the Supreme Court Case *Martin v. Hunter's Lessee* in 1816. Additionally, as biographer Charles F. Hobson notes, this land purchase made him wealthy, and Marshall derived much of his wealth directly and indirectly from the sale of lands in the west. Marshall was also an enslaver who benefited directly and indirectly from selling human beings. We bring up this background of Thomas Johnson, Joseph Story, and John Marshall because, as feminist

scholar Carol Hanisch reminded us in 1969, the "personal is political." These men's background as justices, land speculators, and in some cases, enslavers highlights how, despite the idealized rhetoric, the courts are rarely ever blind, much less neutral.

International Impact

In 2010 AILA's founder Tonya Gonella Frichner submitted the "Preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery" to the United Nations Permanent Forum on Indigenous Issues (UNPFII). As a legal principle, the Doctrine of Discovery is meant only for adjudicating claims between European nations and dominating Indigenous nations. Indigenous nations are not party to the disputes that the Doctrine of Discovery seeks to regulate. This preliminary report provided a detailed overview of the global impact of the Doctrine of Christian Discovery and the theological and legal framework of domination which it established. This report helped to expand the conversation about the Doctrine of Discovery and raise consciousness and awareness around this critical ideological framework. What is perhaps less well known is that "this preliminary study provides a detailed examination of the premise of that system as found in the United States Supreme Court ruling *Johnson's Lessee v. McIntosh*. Evidence is then provided demonstrating that the Doctrine of Discovery continues to be treated as valid by the United States Government."

Gonella Frichner, Robert Williams, Jr., Joseph J. Heath, and Peter P. d'Errico have sounded a clarion call for the rescinding and repudiating of the Doctrine of Discovery and *Johnson v. M'Intosh* everywhere. Law professor Blake Watson calls Williams's account a "criminal indict" that "presents evidence of the western world's 'discourse of conquest,' and that is not an understatement." Likewise, Heath is no less direct when he calls for the removal of the Doctrine of Discovery, and by extension *Johnson*, arguing that "with that 'moral' cover removed, we can then move on to building pressure on the United States government and institutions to admit that this racist doctrine has no place in a true democracy." Heath, as the General Counsel of Onondaga Nation, understands well the Haudenosaunee influence on democracy and that the Haudenosaunee democratic principles present a compelling and powerful alternative to what d'Errico emphatically underscores as "Federal Anti-Indian Law."

Johnson v. M'Intosh serves as an *exemplar par excellence* of an effective theological and jurisprudential justification for the theft of Indigenous lands. Watson highlights how "*Johnson v. McIntosh* has also influenced indigenous rights in Australia, New Zealand, and Canada." Watson is not alone in making this argument. Tonya Gonella Frichner, Robert J. Miller (Eastern Shawnee), Steven T. Newcomb (Shawnee/Lenape), and many others make this point as well. The United Nations and its member states have a daunting task to take up Gonella Frichner's call for a further study on the Doctrine of Discovery. Should the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) ever rise to its rightful status as a

convention, it would be well on its way to starting this work. As Pawnee legal scholar Walter Echo-Hawk reminds us, UNDRIP Article 28 "seemingly repudiates the discovery doctrine of *Johnson v. M'Intosh*."

The etiology for the Christian theological and legal justification for the Doctrine of Discovery can start in many places. For brevity's sake we will start with the Roman Catholic Church and monarchies looking to expand their empires and economies after the Crusades. The papal bulls of *Dum Diversas,* *Romanus Pontifex,* and *Inter Caetera* record this part of the story. While not a central focus of *Johnson v. M'Intosh,* the Roman Catholic Church and their crusades and conquests form the backdrop to the rise and development of the Protestant churches' own crusades and conquests. Together the Catholic and Protestant churches are part of a much longer theological history of domination within Christianity, a story that we believe stretches from *at least* the Crusades to the resurgence of white Christian Nationalism today. Within a larger historical interrogation of Christian hegemony through law and theology, Marshall's evocation of English charter and Christian princes to justify land theft is hardly innovative. What is innovative is his bricolage of sources and his ability to weave them into U.S. property law. It was his clarification and distillation of these opaque instruments of domination that solidified the Doctrine of Discovery in U.S. law.

While Marshall focuses primarily on English law and theology, it is important to note that there can be no Protestant Crusade without the Catholic ones. Marshall's assertion of ultimate dominion rests on those of all the monarchs and churches of Europe. While Marshall sought to delimit the case to the English in 1496, there would be no English conquest without the prior conquests of Spain, Portugal, and the Pope.

***Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. 543 (1823)**

To briefly restate what is already well known, this case was feigned. Both litigants colluded "for effect" to get the case before the Supreme Court. In 1774 and 1775, The Illinois and Wabash Company claimed to have purchased lands from the Illinois and Piankeshaw nations in violation of treaties and the Royal Proclamation of 1763. The attorneys for the plaintiffs would also pay for the attorneys of the defendant, M'Intosh. As law professor Eric Kades highlights, the two parcels of land in question here probably did not overlap. For this reason, Kades writes, "there was no real 'case or controversy,' and *M'Intosh*, like another leading early Supreme Court land case, *Fletcher v. Peck*, appears to have been a sham." Marshall, who had presided over one potentially sham case and Story, who had been part of that case, now both found themselves involved in another case concerning land acquisition and land sales. Land as a resource and saleable commodity mattered deeply to the Marshall court. Unlike in *Martin v. Hunter's Lessee* (1816), Marshall did not recuse himself for having a vested interest. Instead, he wrote the unanimous majority opinion. One of his primary sources for this opinion was his biographical series on George Washington, a series that he

did to help with the refinancing of his property due to the costs incurred regarding the land in *Martin*. Gonella Frichner suggests that it would have been prudent for Marshall to recuse himself, but he did not.

Ostensibly the question before the court involved the legal mechanism for the justification of Indigenous land theft. In the majority opinion, Marshall argued that "that discovery gave title to the government, by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession." He continues, "the title by conquest is acquired and maintained by force. The conqueror prescribes its limits." In Marshall's circular logic, European discovery granted the title, and the chain of custody of these titles from European countries to the United States (despite a revolution) remains unbroken. He failed to consider if conquest is just or ethical; likewise, he failed to consider if it is legal or ethical to even own land. To quote Marshall at length:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned.
>
> So, too, with respect to the concomitant principle that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice… the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

This passage is crucial to understanding the past and present of *Johnson*. Marshall opens with a tautology. He concedes that the Doctrine of Discovery is absurd and that Turtle Island was indeed inhabited. Then he rhetorically shrugs, and opines that once conquest has started and the colonizers impose a legal system, this legal system "cannot be questioned." Next, he attempts to reduce Indigenous peoples to "mere occupants," as if living in the land means one's tie to that land is somehow less than the colonizers. The term "occupants" was meant as a diminishment, and a way to reduce the original inhabitants of the land to temporary residents in an attempt to add validity to the colonial viewpoint. Here Marshall

seeks to not only delegitimize Indigenous peoples' ties to the lands, but also to cast them as incapable of land management and title transfer. He sees Indigenous civilizations as being uncivilized, and he admits that while the system he is creating is opposed to "natural rights," it should be used even if it is not necessarily reasonable; thus might makes right and the Euro-Christian power of church and crown are transferred from the monarchy and ecclesiastical hierarchy to Hanadagá•yas (Town Destroyer).

Marshall correctly cedes the point that Indigenous nations and peoples are the rightful and original inhabitants of these lands and should have legal claims to the land. However, he attempts to diminish these rights by claiming that the colonizers' rights are superior because Indigenous "rights to complete sovereignty as independent nations were necessarily diminished" because of the "original fundamental principle" of discovery. Marshall's tautological argument here collapses under its weight. The original fundamental principle of the Doctrine of Discovery, in our estimation, is the Christian theological and legal framework of domination which has for so long provided justification for enslavement, exploitation, and extraction. Gonella Frichner reminds us that this "original fundamental principle" is restricted as "this principle [is] applicable only to themselves [the colonizer]." Newcomb emphasizes this critical point: "when it had been necessary for the Court to reason about the rights of 'civilized' European nations, it did so based on a concept of justice. Conversely, however, this implies an admission, when the Court had to reason about the rights of *Indian* nations, nations that the Court considered to be uncivilized, it did so based on a conceptual framework of injustice." Marshall assumes that the "civilized" have a right of dominion over the "uncivilized." The Christian princes represent civilization, and the "heathen" Indians represent the "uncivilized." For Marshall, civilization is concomitant with Christianity.

For Marshall, the principle of discovery seems to be irrefutable, but what is the power behind the principle? As he briefly summarizes the age of discovery, he glosses over the chain of power and authority. "Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States all show that she placed in [*sic*] on the rights given by discovery." The mercurial power of Spain's title seems to reset not only in the Pope, the nation-state itself, and European alliances, but also in something more. In the documents cited by Marshall such as the Charter to Sir Walter Raleigh (1584), the power seems to be granted by God. This can be seen in Marshall's admission that the right of occupancy by "natives, who were heathens" was a relationship to the land that he saw as inferior to the relationship of the title held by Christian people. Following Newcomb's careful reading of Joseph Story's and John Marshall's *oeuvre*, we concur that *Johnson v. M'Intosh* illustrates and codifies the domination framework. In this case, there is something intrinsically more powerful about the colonizer's claim to the discovery of the land, and that powerful dominating force is couched in religious language. The colonizer's ignorance of lands previously unknown to them grants them power and authority over the lands. The domination framework of the Doctrine of Discovery and *Johnson* weaponizes ignorance. That which one does not know one must conquer by force

and by law. Marshall clarifies that "it is supposed to be a principle of universal law that if an uninhabited country is discovered by a number of individuals who acknowledge no connection with and owe no allegiance to any government whatever, the country becomes, so far at least as they can use it." The fantasy of uninhabited and unused land proves to be an intoxicating fantasy throughout Johnson's ruling. To use Daniel Immerwahr's provocative book title, this is *How to Hide an Empire* in plain sight. Indigenous peoples, plants, and animal life are rendered null and void. The divine right to conquer is dressed up in theological and legal language to make it seem like the colonizer is merely moving into a new house. We see this as a theology of conquest. The twin legacies of the Doctrine of Discovery and *Johnson v. M'Intosh* provide a theological and jurisprudential justification of domination.

It is perhaps unimaginable to Marshall that Indigenous nations, the natural world, and all living beings could live in a reciprocal and mutual relationship with the land. Is not the land being "used" by deer, birds, fish, plants, and humans? Is the land not being "used" when the Haudenosaunee Confederacy built villages that Hanadagá•yas destroyed? It seems like the primary uses for land imagined by the Supreme Court of the United States are uses for extractive industries. Why are only colonial uses for the land considered beneficial and useful?

To conclude by way of agreement with d'Errico, *Johnson* underscores several things about "Federal Anti-Indian law": 1) it "is a claim of unlimited power,"; 2) it "has facilitated the genocide and attempted genocide of Native peoples"; 3) it ignores the original free nations of this land, and 4) it is the basis of continued "U.S. invasions of Native lands and domination of Native peoples."

Value Change for Survival

Today we are reminded of Oren Lyons's prescient words: we need "value change for survival." Mother Earth and all living beings are in crisis. Land theft, extraction, enslavement, and exploitation are only some of the problems facing us in the Anthropocene. Without a serious rethinking of values and relationships, an embrace of peace, and an end to ecocide, enslavement, exploitation, and extraction, there will soon be nothing left. To paraphrase Mark Fisher, it is easier to imagine the end of the world than the end of this capitalist system of domination. Continuing to embrace the theological and legal justifications of domination leads only to more harm and death. After 500 years of the Doctrine of Discovery and 200 years of *Johnson v. M'Intosh*, let us try instead to embody the values put forth by the Great Law of Peace and The Two Row Wampum. These Haudenosaunee principles underscore how another world is possible and is still here. ♦

Betty Lyons, President & Executive Director of the American Indian Law Alliance (AILA), is an Indigenous and environmental activist and citizen of the Onondaga Nation. Betty has worked for the Onondaga Nation for over 20 years. Ms. Lyons serves as a member of the

Haudenosaunee External Relations Committee and has been an active participant at the annual United Nations Permanent Forum on Indigenous Issues (UNPFII) since the first session in 2001 as a delegate of the Onondaga Nation. Betty attended Cazenovia College and is a Bryant Stratton College Graduate of the Paralegal Program.

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.

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