"Order, Economy, and Legality: Johnson v. M'Intosh after Two Hundred Years" by Andrew Little

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Order, Economy, and Legality:
Johnson v. M'Intosh after Two Hundred Years

Andrew Little

Indian Creek in Bears Ears National Monument by US Bureau of Land Management.

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Mother Earth is the wellspring of indigenous culture, religion, and economic life.
It forms the identity of Native Americans as indigenous peoples.
– Walter R. Echo-Hawk (55)

From the beginning, the appropriation and distribution of Indigenous land had to be orderly. Settler-colonists needed a system to avoid haphazard, disorganized tribal land transactions and achieve their goal of the private commodification of the expanding American frontier. The settlers were well-versed in creating systems, in contrast to how they regarded the supposedly "inferior" native peoples. Condescending views of Indigenous lifeways predominated. William Cronon quotes one colonial apologist as arguing "the Indians 'were not industrious, neither have art, science, skill or faculty to use either the land or the commodities of it'" (p. 56). The colonists self-assuredly possessed all those techniques, plus racism, and built orderly systems of conveyances and record-keeping to support flourishing market prosperity in land. Legal historian Lawrence Friedman notes that, for the American mind in the seventeenth and eighteenth centuries, "The land was a commodity, an asset, something to be bought and sold . . . the point was to transfer it to private citizens, in an orderly, fruitful way" (p. 168). To create this orderly, fruitful economy, settlers needed the firm application of the rule of law.

Colonial authorities wielded the legal sword in such a way that the rights of Indigenous peoples in their land did not interrupt the commercial and economic interests of speculators, farmers, and early commercial enterprises. Differing conceptual frames inevitably led to misconstruals of Indigenous rights. Cronon highlights how a Eurocentric view of land as a private tradable commodity conflicted with the Indigenous usufruct view of land as a public commons for communal use (p. 74-75). Given that colonists ultimately had the power of the rule of law, land merchants and later courts weaponized these misconstruals with catastrophic consequences: one recent estimate is that native tribes have now lost 98.9% of their historic land. Was the loss of land solely because of violence and force? In some cases yes, but certainly not in all or even most cases. This stripping of land rights occurred mostly through *legal* techniques and reflects a much larger legacy of how power was and is applied to Indigenous communities. As de Tocqueville noted in *Democracy in America*, "The ejectment of the Indians very often takes place at the present day, in a regular, and, as it were, a legal manner."

Johnson's Lessee v. M'Intosh is an 1823 United States Supreme Court decision that serves as a hinge moment in the legal conquest of Native Americans. The case reified the colonial and early Republic view of Indigenous peoples and their lands, and the reification created a profound legacy for two centuries, manifesting itself in seemingly unlikely places up until the present day. Native Americans hold a certain set of rights in land, *Johnson* announced, but those rights are only partly cognizable in white settler contexts like courts or administrative proceedings. Backed by state power, these white contexts slowly work to diminish Indigenous culture and identity. *Johnson* is an important legal development in this overall process.

The cultural and economic background for *Johnson* provides helpful context. Order, economy, and legality stand together at the center of the Anglo-American conception of property. For the first 150 years of the English colonies' existence in the North American

continent, land purchases from Indigenous tribes occurred with frequency. This common practice of Indian land acquisition through ordinary purchase is at least one indicator that the prevailing view of land in that era was tribes held a marketable title that could be transferred to a purchaser for a price, similar to any other sale. Speculation, abuse, and fraud inevitably occurred, and by 1763 the English crown sought to end private purchases of Indian land and forbid western settlement through the Royal Proclamation of 1763. From that point on, only the crown could buy land from tribes. The Proclamation promised centralized order in land transactions, yet colonists ignored the 1763 edict to some degree. Frequent land speculation continued because fortunes could be made from such a vast commodity. Even George Washington engaged in illegal purchases of Indian land during this period, recommending the same types of black market real estate investments to others (p. 59).

Following independence, first the states and then the new federal government retained for themselves the same power to purchase tribal land as the English King had in 1763. Yet given the prevalence of pre-independence purchases from tribes, by the early nineteenth century United States courts had to determine the extent to which title in land could be legally recognized when the purchaser's title traced back to Indian tribes during the time period when such sales were prohibited. The result was *Johnson* in 1823, a case where the plaintiffs claimed title to land from purchases from tribes in 1773 and 1775, and the defendants claimed title, allegedly to the same land, from purchases from the government. The Supreme Court ultimately held that Indigenous people had a right of occupancy, but not title, in their lands, thus ruling for the defendants.

> There has been considerable discussion in the last twenty years among both Indigenous and non-Indigenous scholars and lawyers about the collusive background of the *Johnson* case.

Attorney and Indian advocate Walter Echo-Hawk argues that the case was a conflicted scam from the outset, highlighting that Chief Justice John Marshall himself had been the purchaser of more than 240 square miles of land from the new state of Virginia before the 1790 Non-Intercourse Act. If Marshall ruled for the plaintiffs, who claimed title through purchases from the tribes, he would undercut the clean title he no doubt wanted to maintain for his own substantial landholdings, which he acquired from the government. Federal Indian law scholar Lindsay Roberton agrees that *Johnson* was essentially collusive, but does not go as far as Echo-Hawk. Robertson argues the case stands primarily as "an instructive picture of how intelligent people can sometimes unthinkingly create catastrophic problems they find themselves powerless to fix" (p. xiii). Whether through fraud and duplicity or mere collusion and self-interest, Marshall used the archaic doctrine of discovery in two layers of analysis and argumentation to limit the rights of Indigenous peoples in land over which they had maintained a millennia or more of sovereignty. In so doing, he protected his own vast real estate interests.

Chief Justice Marshall invoked the doctrine of discovery in his first level of analysis, holding that the King of England could claim title to land as against other European nations who were colonizing the same continent by "discovering" the land first. Because the King had superior title against other royal-colonial claimants in the discovered lands, his discovery also somehow allowed him at a second level to regulate the legal relationship between the land and its longstanding Native occupants, who lived on the land at the moment of its putative discovery. Thus, according to Marshall's opinion in *Johnson*, discovery allowed the King to define the property rights held by the tribes. American states and then the federal government acceded to the rights of the King following independence, which ultimately meant that tribes only had rights to use and occupy their land until such time as the government determined otherwise (p. 23-26). This nonsensical and troubled holding provided the necessary legal cover for orderly economic transactions. And in preserving legal order in land transactions, the effect was widespread dispossession of native land.

In *Johnson's* central passage Marshall attempted to blame the Indians themselves for losing their land. Discussing the roles of conquering and conquered parties, which are not even apt terms to describe how the legal appropriation of tribal land happened, he suggested that assimilation of vanquished peoples into the larger conquering community is the ideal outcome. But no such assimilation had occurred in the American colonial context because of the alleged character of the conquered peoples:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

In Marshall's retelling of colonial history, it was only the tribes' disorderly resistance and unwillingness to assimilate that resulted in the extinguishment of their limited right of occupancy.

Disaster predictably soon followed. Within the next decade, Georgia undertook the wholesale removal of tribes within its borders based on reasoning similar to *Johnson*. Still on the Court, Marshall attempted to walk back his invocation of the doctrine of discovery in *Worcester v. Georgia* (1832), wherein he clarified that the doctrine merely gave European sovereigns and their successor states the right to purchase Indian land for value, and not extinguish lands or peoples altogether. But it was too late, both in the process of Indian removal and indeed in Marshall's own life. President Jackson had already signed the Indian Removal Act of 1830 into law, and reportedly reacted to the *Worcester* opinion with the quip, "John Marshall has made his decision, now let him enforce it" (p. 110). And Marshall himself died in 1835, having given legal cover and legitimacy to a practice he was, according to Robertson, powerless to stop.

Johnson became the legal stake driven into the ground that served to anchor both prior purchases by state and federal governments (which protected Marshall's interests), as well as ensure good title in future transactions. Only land acquisitions wrapped within the protective garb of longstanding custom and a thin layer of superficial legality could be allowed in a new Republic devoted to order, economy, and legality. In fact, the supposed orderliness of the rule of law became a central focus in native land appropriation, whether it occurred by purchase or force. As legal historian Stuart Banner notes,

> No non-Indian acquiring Indian land thought himself unconstrained by Anglo-American law. Whites always acquired Indian land within a legal framework of their own construction. Law was always present, but so was power. The more powerful whites became relative to the Indians, the more they were able to mold the legal system to produce outcomes in their favor. (p. 4)

The devastating legal application of the doctrine of discovery addressed by *Worcester* in 1832 is not the only reflection of *Johnson's* twisted legacy. Scholars and lawyers can point to any number of legal manifestations of *Johnson's* fundamental premise that misstated and limited Native rights. Ojibwe scholar David Treuer, Native-rights litigator Stephen Pevar, and legal historian Stuart Banner have amply demonstrated the harm that flowed to Indigenous tribes from the Dawes Act of 1887 and the allotment system of breaking up reservations, a legal development that arose from forcing Anglo-American notions of property ownership onto tribes. Historian Louis Warren has shown persuasively that the attempted extermination of the Ghost Dance in the 1890s resulted from fear and suspicion of Native religious ways that did not fit the supposed order of late nineteenth century America. And more recently, the Supreme Court refused protection for peyote-based sacraments in *Employment Division v. Smith* (1990), wherein Justice Scalia argued that the Free Exercise clause did not actually protect free exercise when applied to Native religious practices that might threaten the order and stability of the dominant culture.

These easy examples belie an oft-overlooked outcropping of *Johnson's* legacy of legal appropriation in the public lands domain: the General Mining Law of 1872, which concerns hardrock mining. This law springs from the same cultural impulses of order, private transactional economy, and legality as can be seen throughout American public lands law in the nineteenth century. (7th ed., p. 358). During this era, the federal government relinquished rights in land under the view that land development benefitted all, save for the original inhabitants. The 1872 legislation arrives in history after the Trail of Tears and Indian removal, and rests on an unstated assumption that the Indian right of occupancy had already been federally extinguished through legal means. Under the law, private parties, such as mining companies and mineral prospectors, can stake a protected claim on public land against subsequent claimants, including against the federal government itself. This private patent claim by the discoverer of hardrock minerals results in the exclusion of others and the right to

extract the minerals royalty free. The property rights devolve from the state to private actors, with no acquisition cost to the discoverer other than the effort required for extraction. This is the doctrine of discovery on a small scale.

> In this way, *Johnson* provided a fig leaf of a justification for limiting Indian rights in land, using the dubious and racist doctrine of discovery, which persists to this day.

Johnson's justification for appropriating Indian land along the expanding western frontier provides the legal framework necessary for the General Mining Law to work. Discovery of minerals and the transfer of title from government to private party are wrapped together and work in an orderly manner. The financial consequences are immense: The Pew Trust estimates that over $1 billion of hardrock minerals are extracted royalty-free on federal land every year in the United States, and even at a modest 4-8% hypothetical royalty, the aggregate losses to the federal treasury are significant. The 1872 law is now over 150 years old, yet despite numerous attempts at reform, still remains unchanged. There are even websites to help a person stake their first royalty-free mining claim on federal land.

Royalty-free mining on formerly tribal lands and environmental harm from abandoned mines are not the only problems faced by Native Americans as a result of the General Mining Law; Indigenous religion is implicated as well, as can be seen recently in the controversy over Bear Ears National Monument in Utah. Long considered sacred land and "home, soul, and the setting for the cultivation of cultures," the Obama, Trump, and now Biden administrations alternately expanded, diminished, and re-expanded federal protections for a million-plus acres of public land as a national monument. The controversy stems from incommensurate conceptions and potential uses of the land: cultural and religious values of nearby tribes contrasted with economic claims of mining companies. The tribes are not seeking a return of Bear Ears, only for federal protection of their sacred sites. For now, the Biden administration is safeguarding the Indigenous claims, but numerous plaintiffs filed suit in 2022 seeking to open the land to commercial development, including mining.

The Bear Ears monument designation and resulting litigation brings us at last to the challenge of understanding land as "the wellspring of indigenous culture, religion, and economic life," to use Walter Echo-Hawk's words. Denial that a place can be the locus of religious identity is acutely felt by tribes as they seek access to sacred lands now owned by the federal government for religious ceremonies.

> Just as *Johnson* misconstrued Indian rights in the land as being mere occupancy, so at present there are misconstruals of the religious rights of Native Americans in their sacred spaces.

Worship, in the American mind, is an activity that takes place in a church or synagogue, or perhaps the 50-yard line of a football field. Such worship rights continue to develop with time, especially in the Roberts court. Yet tribes still end up losing First Amendment challenges to

federal regulation of land. Successes in sacred land disputes do sometimes occur. For example, as a result of compromises reached in 1996 there is now partial protection for Bear Lodge/Devil's Tower in Wyoming as a sacred site over and against the recreational claims of sport climbers. Additionally, in 2008 Congress authorized the U.S. Forest Service to temporarily close portions of public land, if, in the Forest Service's discretion, the closure is to allow tribes to privately conduct religious ceremonies on sacred ground (Sec. 8104). But the outcome in many land-based religious disputes is not always a respected compromise. Because much of Native American sacred land is owned by the federal government through decades or centuries of appropriation, the risk that tribes will suffer extinguishment of their right to worship is ever-present. As law professor Bernard Bell recently argued, "constitutional and statutory protections systematically provide much greater protection for Judeo-Christian religions than for Native American religions, in terms of protecting sacred spaces that serve as the site of religious worship."

In light of all this, what is to be done? At a minimum, here are three things. First, law and policy makers should listen to Native voices when they offer desired outcomes. For example, David Treuer provocatively argues that one way to remedy the land theft at the heart of the removal and allotment eras is to put tribes in charge of the National Park System. This suggestion and others offered by Native voices are at least worth considering and should be taken seriously.

Second, explicitly disavow the reasoning in *Johnson*. Even Justice Ginsburg relied on the doctrine of discovery in 2005 when she held that the Oneida Indian Nation did not reacquire sovereignty over its historic land when it repurchased a parcel 200 years after first losing it. She relied on a prior Supreme Court case from 1985, which explicitly cited *Johnson*. Courts should be reluctant to indulge such discredited and racist theories.

Third, Congress should amend the General Mining Law of 1872 to prohibit hardrock mining on historically sacred land and require a royalty paid to the United States government, with royalty proceeds held in trust for environmental cleanup, education and healthcare on tribal reservations. Two centuries of *Johnson's* profoundly disturbing legacy are enough. ♦

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