

Understanding Indigenous Land Rights and Dispossession: The Legacy of the Doctrine of Discovery

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The Doctrine of Discovery laid the framework for early United States colonial expansion through its use in court cases like *Johnson v. McIntosh*. The doctrine is rooted in early medieval European thought and was used as a way for the Catholic Church to be able to take over heathen lands.¹ Eventually, these principles allowed for the creation of mandates that granted power to incoming colonists, thus leading to the foundation of the Doctrine of Discovery. Which would, in turn, be implemented during the early formation of the United States. The history of expansionism in the Americas has created long-lasting repercussions for indigenous peoples. The Doctrine of Discovery has not only been implemented within the United States but across the world. Through certain legal frameworks, the United States has been able to use the doctrine to provide legal justification for their acquisitions of land and the forceful removal of Indigenous peoples from their lands. This legal framework has had detrimental ramifications for Indigenous peoples within the United States. Many scholars have spoken about the consequences of the doctrine being a leading force in the dispossession of Indigenous peoples while contributing to the loss of Indigenous land rights. At the same time, other historians argue that the doctrine has no such long-lasting effects. This essay will trace the evolution of scholarly interpretations of the Doctrine of Discovery and its implications on Native land rights and dispossession.

The Doctrine of Discovery

When “discovered,” the Americas were not an empty land awaiting claims. Ann M. Carlos, Donna L. Feir, and Angela Redish argue that North America was not an empty land awaiting

¹ Joshua J. Jeffers, “Of Laws and Land: The Doctrine of Discovery in History and Historiography.” *Maryland Historical Magazine* 108, no. 1, (2013): pp. 91-115, 92.

European settlers but rather owned by Indigenous nations who were dispossessed within and outside legal frameworks using the Doctrine of Discovery.² To understand why the doctrine was used as support in expansionism, we must first understand the societal differences between the European settlers and Native nations. For example, in the minds of imperialistic nations and the early United States, “civilized” equated to owning weaponry and industrialization. The main premise of this concept was to be able to state that Natives were indeed not “civilized” enough to have attainable rights to the land. If Natives were “civilized” to the European standard, they would be modernized to the degree of the time. However, it did not benefit Natives to modernize the land as it was considered sacred within indigenous culture. The doctrine has been used in judicial infrastructure to justify land acquisition, rendering Indigenous peoples invisible in land rights discussions, shifting legal recognition of Indigenous sovereignty, and removing bargaining power. They explain how expansionism within the United States is directly related to the loss of land rights for Natives.³ Early colonists created the notion that the United States was an empty land for conquering, leaving room for the Doctrine of Discovery to be used.⁴ The United States, which reserves treaties for sovereign nations, contradictorily entered into agreements with Indigenous peoples to acquire land, undermining yet simultaneously affirming their sovereignty.⁵ These scholars argue that because the colonists wanted the natural resources on Native land, it benefited them to create the narrative that no one possessed that land. The Doctrine of Discovery gave the United States the right to the land and any group of people on it. The 1790 Non-Intercourse Act allowed the federal government to declare indigenous territory as the sovereign jurisdiction of the

² Ann M. Carlos, Donna L. Feir, and Angela Redish, “Indigenous Nations and the Development of the U.S. Economy: Land, Resources, and Dispossession” *The Journal of Economic History* 82, no. 2 (2022): 516–555, 528.

³ Carlos, Feir, and Redish, “Indigenous Nations and the Development,” 528.

⁴ Carlos, Feir, and Redish, “Indigenous Nations and the Development,” 528.

⁵ Carlos, Feir, and Redish, “Indigenous Nations and the Development,” 528.

tribal nations. Yet in the *Johnson v. McIntosh* case, such lands were ruled to no longer be under the jurisdiction of these tribes.⁶ Recognizing these nations as sovereign and proprietors of the land would not have been beneficial in the early expansion of the United States. Marshall's ruling and the use of the legal doctrine completely changed the power between Indigenous communities and the federal government.⁷

The implementation of the doctrine of discovery in the *Johnson v. McIntosh* case perpetuated the legacy of colonialism. Cementing its principles into the United States legal framework, the doctrine casts a shadow over Indigenous land rights and their ability to claim sovereignty. Robert J. Miller argues that the Doctrine of Discovery contains ten elements that can be fleshed out through the *Johnson v. McIntosh* case. Understanding the ten elements will provide a clear perspective on how the doctrine is used in modern-day law. Based on Miller's argument, the Doctrine of Discovery was created to limit Indigenous people's humanity, sovereignty, and property rights.⁸ It has been used as an applicable principle in deciding the manners of various countries. Colonial settler societies commonly use it to enforce their power over the acquisition of the lands of indigenous peoples.⁹ Miller speaks on how the Roman Catholic Church developed the doctrine in the 15th century to allow Spain and Portugal to expand their powers into the New World.¹⁰ These papal bulls would build the framework needed to set up the legal principles that the doctrine of discovery follows.

Coined the international law of colonialism, the Doctrine of Discovery has been used to consistently take indigenous people's lands and rights, which severely impacts indigenous peoples

⁶ Carlos, Feir, and Redish, "Indigenous Nations and the Development," 532.

⁷ Carlos, Feir, and Redish, "Indigenous Nations and the Development," 535.

⁸ Robert J. Miller, "The Doctrine of Discovery: The International Law of Colonialism," *Indigenous Peoples' Journal of Law, Culture and Resistance* 5 (2019): 35-42, 35.

⁹ Miller, "The Doctrine of Discovery," 37.

¹⁰ Miller, "The Doctrine of Discovery," 37.

today. The effect of the Doctrine of Discovery continues to be felt today as many of these colonial settler societies still have laws in place that rely on the application of the Doctrine of Discovery.¹¹ Cases within the United States, like *Johnson v. McIntosh* have had everlasting effects on Indigenous peoples around the world. Johnson's case is cited in many other courts to uphold the Euro-centric idea that those discovering the land who are civilized have every right to the land.¹² The Johnson case upheld this fact through the Doctrine of Discovery within the legal framework. It created the notion that indigenous peoples could only sell their lands to the government that had claimed the discovery and made Natives mere occupants of the land they inhabited and not proprietors.¹³ The Doctrine of Discovery states that those discovering the land also have power over the uncivilized savages who inhabit the land, as they are seen as less than others.¹⁴ Robert Miller explains the ten elements reflected in laws, treaties, court cases, and policies in many settler societies around the world that have implemented the Doctrine of Discovery.¹⁵

A few of the ten elements argued by Miller are Christianity, civilization, and Native title. Christianity is a key aspect of the Doctrine of Discovery as it allows Christians to claim that indigenous peoples did not have the same right to land sovereignty, self-determination, or even human rights because they were non-Christians.¹⁶ Christians believed it was their duty to claim land to convert Indigenous people to Christianity. Viewing Native peoples as "savages" incapable of properly cultivating the land, they justified taking possession of it. Conversion thus became a tool to legitimize the seizure of Native lands. Secondly, the civilizational element was that these European countries were being guided by their God to help civilize indigenous peoples and have

¹¹ Miller, "The Doctrine of Discovery," 37.

¹² Miller, "The Doctrine of Discovery," 38.

¹³ Miller, "The Doctrine of Discovery," 38.

¹⁴ Miller, "The Doctrine of Discovery," 38.

¹⁵ Miller, "The Doctrine of Discovery," 38.

¹⁶ Miller, "The Doctrine of Discovery," 39.

guardian powers over them.¹⁷ Referring to this meant European colonist views were rooted in being divinely guided. This civilizing mission became a justification for colonization and the suppression of indigenous sovereignty. Thirdly, the Indian Native title section of the Doctrine of Discovery gave complete ownership of Native lands to their government counterparts.¹⁸ This arrangement effectively reduced Native peoples to tenants on their ancestral lands. Natives simply obtained an Indian or Native title, which gave them the right to occupy and use the lands, but they would never be able to sell their lands since they technically belonged to the government.¹⁹ Overall, Robert J. Miller outlines how the Doctrine of Discovery is still heavily used today in laws and policies in the United States and other nations. This impact has been detrimental to the Indigenous community in many areas.²⁰

The *Johnson v. McIntosh* Case

Chief Justice Marshall ruled on three cases that shaped Native land rights by creating a legal framework that marginalized Native Americans. The most important was *Johnson v. McIntosh*, which provided insight into the foundational principles and biases inherent within property laws and judicial rulings.²¹ Scholar George Pappas explains how, through his ruling, he positioned Natives as perpetual others in the narrative of American expansion.²² He examines Native dispossession from a legal standpoint and characterizes Marshall's rulings as formidable barriers for Native Americans. By deeming indigenous people incapable of holding or cultivating land, it has relegated them to the margins of society.²³ Marshall used the Doctrine of Discovery as

¹⁷ Miller, "The Doctrine of Discovery," 39.

¹⁸ Miller, "The Doctrine of Discovery," 39.

¹⁹ Miller, "The Doctrine of Discovery," 40.

²⁰ Miller, "The Doctrine of Discovery," 41.

²¹ Kenneth H. Bobroff, "Indian Law in Property: *Johnson v. McIntosh* and Beyond" *Tulsa Law Review* 37 (2001): 521, 521.

²² George D. Pappas, *The Literary and Legal Genealogy of Native American Dispossession: The Marshall Trilogy Cases* (Abingdon, Oxon: Routledge, Taylor & Francis, 2016), 24.

²³ Pappas, *Literary and Legal Genealogy*, 24.

the basis for his ruling. Using the doctrine gave the United States the upper hand in having jurisdiction over indigenous peoples and their lands. Through the narrative of this description, Chief Justice Marshall asserted that imperialistic countries had widely recognized the Doctrine of Discovery yet did not include Indian tribes.²⁴ Under the disguise of US jurisprudence, Justice Marshall incorporated these notions of Christianity and the creation of Western civilization to legally dispossess Native Americans of their right to land.²⁵

The ruling was straightforward because the land sale was unlawful, regardless of the Native Americans' involvement.²⁶ Historian Stuart Banner clarifies how John Marshall's discussion of the history of colonization within North America was unnecessary in disposing of the claims of the United Illinois and Wabash Company.²⁷ Through his book, *How the Indians Lost Their Land*, he develops the idea of Justice Marshall using the Doctrine of Discovery as a ploy to allow more colonists to expand westward. If Natives were the sole proprietors of their land and had ownership rights, it could come to question how this may affect land ownership for some colonists in the West.²⁸ The United States was selling lands to settlers in the West from treaties made with Natives. Thus, Justice Marshall used the Doctrine of Discovery to undermine the sovereignty of Natives and dispose of their lands to create a legal foundation over the title claims in the West.²⁹ The ruling makes Natives mere occupants of their lands and removes their ability to sell or cede any of their lands.

Johnson v. McIntosh was monumental in shaping Native Americans' lives while excluding Native voices. Although the case analyzed Natives' role in property rights, none of the parties in

²⁴ Bobroff, "Indian Law in Property," 525.

²⁵ Pappas, *Literary and Legal Genealogy*, 28-29.

²⁶ Stuart Banner, *How the Indians Lost Their Land, Law, and Power on the Frontier* (Cambridge: Belknap Press of Harvard University Press, 2005), 182

²⁷ Banner, *How the Indians Lost*, 180.

²⁸ Banner, *How the Indians Lost*, 181.

²⁹ Banner, *How the Indians Lost*, 181

the case were Natives, and there were no Natives in the courtroom.³⁰ The absence of the Native voice highlights the longstanding disparity in representation. It reincorporates the Christian vs. non-Christian, or rather “civilized” versus “uncivilized” complex that the Doctrine of Discovery stands on. The historiographical interpretation of cases like *Johnson v. McIntosh* reveals the intricate relationship between the federal government and Natives. This has created long-lasting land dispossession experienced by indigenous peoples. Marshall's rulings, entrenched in colonialist rhetoric and the push for expansionism, not only upheld the marginalization of Native Americans but also laid the legal groundwork for centuries of systematic oppression. Through this case, the ruling represented that, through purchase or conquest, Native Americans have been dispossessed of their ownership of their land through legal doctrine.³¹ The works of scholars George Pappas, Kenneth Bobroff, and Stuart Banner offer interpretations through which the implications of the *Johnson v. McIntosh* case could be understood. Historians can uncover the layers of injustice embedded within the Doctrine of Discovery's premise, which Justice Marshall uses as a basis for his rulings.

Implications for Native Land Rights

Echo-Hawk's argument highlights how the Doctrine of Discovery has perpetuated the colonization of Indigenous lands and continues to jeopardize Native rights, particularly evident in the United States federal Indian law system. He argues that this is the legal subjugation and governance of indigenous peoples.³² Echo-Hawk analyzes how the Doctrine of Discovery manifested in many legal frameworks involving Native people and their lands. Through this framework, we can understand that the Doctrine of Discovery was an early international law of

³⁰ Bobroff, “Indian Law in Property,” 522.

³¹ Pappas, *Literary and Legal Genealogy*, 29.

³² Walter Echo-Hawk, “March toward Indigenous Justice,” *Indigenous Peoples' Journal of Law, Culture, and Resistance* 5 (2019): 7-20, 11

colonialism that allowed many of these European nations coming to the new world the ability to appropriate indigenous lands and natural resources.³³ This doctrine served as a tool for expansion, granting powers both the legal and moral justification to claim ownership over territories inhabited by indigenous peoples. The Doctrine of Discovery has allowed for the creation of a legal framework that European colonist nations used to justify the taking of indigenous lands.³⁴ While doing so, it reinforced the notion of indigenous peoples as inferior and incapable of self-governance, further legitimizing their exclusion from legal and political systems that controlled their ancestral territories. It also justifies the implications it has had on Native communities up until the present day.³⁵ Echo-Hawk examines how, specifically in the United States, Native rights are vulnerable. Due to the legal framework set in place during the creation of the nation, there has been a unilateral relationship between the government and Natives, essentially putting their rights at risk.³⁶ Native Americans are now considered sovereign people. The land and other problems lie in the hands of the government. It has created complex social ills in tribal communities that stem from the law of colonialism.³⁷ He illustrates the legal framework of the United States, which is called Federal Indian law. The doctrine has completely berated the human rights of indigenous peoples by making it hard for Native communities to flourish.³⁸ Not revising the legal framework to fit into this day and age has prevented Native communities from getting their problems solved by the federal government.

In *Seeing Red: Indigenous Land, American Expansion, and the Political Economy of Plunder in North America*, author Michael John Witgen explores the disposition of Natives living

³³ Echo-Hawk, "March toward Indigenous Justice", 11.

³⁴ Echo-Hawk, "March toward Indigenous Justice", 11.

³⁵ Echo-Hawk, "March toward Indigenous Justice", 11-12

³⁶ Echo-Hawk, "March toward Indigenous Justice", 11-12

³⁷ Echo-Hawk, "March toward Indigenous Justice", 11-12

³⁸ Echo-Hawk, "March toward Indigenous Justice", 11-12

in Michigan territory. The book does not delve into the use of the *Johnson* case, yet it does offer a glimpse into the implications that the Doctrine of Discovery had on Natives during early colonization. Within the late 1800s, the United States began to make treaties with Natives living in the current states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota in hopes of peacefully having Native Americans secede their lands from the Republic.³⁹ Although the United States constantly used the Doctrine of Discovery to claim sovereignty over them, the US government understood that Native people had title over their land, but because they could not turn their land into private property, it established the United States' dominion.⁴⁰ The establishment of this dominion created drastic repercussions for Native Americans living in the Michigan territory, as a transfer of wealth from Native Americans now fell into the hands of citizens of the United States.⁴¹ The United States exercising their dominion over these unsettled lands allowed them to participate in transactions with incoming settlers as a way to create settlements on Native lands to make the lands part of the United States Republic.⁴²

The primary reason for the United States' newfound interest in this territory was largely due to the fur trade. However, Witgen suggests that while some settlers knew of the fur trade, settlers in the West thought they were expanding their republic with new homesteads.⁴³ The idea of expansion for the benefit of the republic can be explained by how the United States government tactically created treaties with Natives while not offering them total compensation and coercing them. Thus, motivating citizens of the newly formed republic of the United States to feel entitled to act in the same way the United States has. They were out of potential economic flow, thus

³⁹ Michael John Witgen, *Seeing Red: Indigenous Land, American Expansion, and the Political Economy of Plunder in North America* (University of North Carolina Press, 2022), 18

⁴⁰ Witgen, *Seeing Red*, 18.

⁴¹ Witgen, *Seeing Red*, 18.

⁴² Witgen, *Seeing Red*, 18.

⁴³ Witgen, *Seeing Red*, 97.

creating a plunder for Natives living in this region. Incoming settlers offered Natives annuities if they signed treaties giving up their land, but the Natives often did not know what they were walking into. The United States government was often coercive; Natives voluntarily signed treaties they did not understand.⁴⁴ Witgen argues that because of this process, a drastic transfer of wealth took place, creating an economic plunder.⁴⁵ He further explains how the United States needed to establish itself in a Native country, and for the United States government to take possession of Native lands, they needed to be able to control the immigration of settlers onto these new lands.⁴⁶

Furthermore, Witgen illustrates how the United States was founded on land stolen from indigenous peoples and how the Doctrine of Discovery was used because Native peoples failed to turn their common land into private property, which would conclude that they were civilized.⁴⁷ However, Natives leaving their land in a state of nature, allowed for the Doctrine of Discovery to be used to remove their property rights and their sovereign authority over the land.⁴⁸ Thus, Europeans entering North America became representatives of the property rights of Native individuals.⁴⁹ Witgen further goes on to explain how the United States government was fully aware that using the natural law of ideology IE, the Doctrine of Discovery, would allow the United States government actual possession of Native lands.⁵⁰ Additionally, it is important to understand that the expansion of the United States was primarily driven by the dispossession of Native peoples.⁵¹ It becomes clear that this process was not just a territorial conquest but a systematic attempt to erase indigenous cultures and ways of life. This would create a long-lasting effect of consequences that

⁴⁴ Witgen, *Seeing Red*, 19.

⁴⁵ Witgen, *Seeing Red*, 19.

⁴⁶ Witgen, *Seeing Red*, 45.

⁴⁷ Witgen, *Seeing Red*, 31.

⁴⁸ Witgen, *Seeing Red*, 31.

⁴⁹ Witgen, *Seeing Red*, 31.

⁵⁰ Witgen, *Seeing Red*, 98.

⁵¹ Witgen, *Seeing Red*, 98.

would go into the 20th century.⁵² For example, influencing policies of assimilation, displacement, and continued struggles for sovereignty by Native American communities. Witgen discusses that we can connect the histories of governance through plunder, as the United States government has done through actions like the sanctioned construction of the Dakota Access pipeline.⁵³ Witgen gives insight into how the legacy of the Doctrine of Discovery created implications for Natives in various regions of the United States, not entirely within the regions in which the Marshall cases took place. Through this, we can understand the long-lasting implications held over Native Americans and the fight they still fight well into the current century.

In conclusion, the Doctrine of Discovery has a long-lasting legacy. The premise of the doctrine allowed early colonist nations to create a working legal framework to diminish the proprietary rights of indigenous people. Throughout this essay, we have seen that it has proven successful. Cases like *Johnson v. McIntosh* upheld the doctrine in its legal proceedings, and rulings uphold judicial review that can be used today. A body of work drafted in the 15th century has created significant implications for indigenous communities within the United States and worldwide. The work of these scholars allows us to understand how the doctrine was used in silencing an entire community. Engaging with the dialogues of these scholarly historians, it becomes true the magnitude in which the Doctrine of Discovery affects indigenous dispossession and land rights.

⁵² Witgen, *Seeing Red*, 343.

⁵³ Witgen, *Seeing Red*, 343.