

S02E01 – The Backstory of *Johnson v. M'Intosh* with Lindsay Robertson

Jordan Loewen-Colón ([00:08](#)):

Hello, and welcome to the Mapping the Doctrine of Discovery Podcast. The producers of this podcast would like to acknowledge with respect the Onondaga Nation, fire keepers of the Haudenosaunee, the Indigenous peoples on whose ancestral lands Syracuse University now stands. And now, introducing your hosts, Philip Arnold and Sandy Bigtree.

Philip P. Arnold ([00:31](#)):

Welcome back, everyone to Mapping the Doctrine of Discovery. My name is Phil Arnold. I'm core faculty in Native American and Indigenous Studies at Syracuse University and the Chair of the Religion Department.

Sandy Bigtree ([00:45](#)):

And my name is Sandy Bigtree. I'm a citizen of the Mohawk Nation at Akwesasne, but resided in the ancestral territory of the Onondaga Nation for most of my life. We're going to bring you episode seven and we're going to be featuring Lindsay Robertson.

Lindsay G. Robertson ([01:03](#)):

I'm Lindsay Robertson, I'm the Chickasaw Nation Endowed Chair in Native American Law at the University of Oklahoma College of Law. I'm a professor of law history and Native American studies and have been in Oklahoma at the university since 1997 and engaged much longer than that in Native American law.

Philip P. Arnold ([01:30](#)):

It's really great to have you, Lindsay. Thanks for joining the podcast. Your book, *Conquest by Law: How the Discovery of the Americas Dispossessed Indigenous Peoples of Their Lands* is really literally the book on the important case of *Johnson v. M'Intosh* of 1823. And we would just like our viewers to understand how you came to really get in behind that ruling, and the story around your finding the documents that helped us understand it so well.

Lindsay G. Robertson ([02:14](#)):

Sure. So I started work on this project in 1991. I had just joined the faculty at the University of Virginia Law School as an adjunct, hired to co-teach with my former dean, Dick Merrill, a class in Native American law, and was inspired by the experience to sort of jump into some of the historical materials related to the earliest of the Supreme Court's Indian Law decisions. The three formative decisions, as no doubt many of your listeners will know, are *Johnson vs. M'Intosh*, and the two cases we call the Cherokee cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. My first impulse was to start with the Cherokee cases because I knew something about them as a historian. And that project was almost immediately abandoned when I realized that the reason I knew something about them was that people had been writing piles of stuff about them for decades, and it wasn't entirely clear to me what I, as a young law professor to-be would have to add to that.

([03:32](#)):

So that left *Johnson vs. M'Intosh*, and there was a literature on that, but it wasn't history-based literature. It was interpretation of the opinion, which of course gave rise to the American version of the Doctrine of Discovery that we have as a part of American law today. But I couldn't find answers to basic questions, including who's Johnson? Who's M'Intosh? What's the story behind the litigation? I had been

a litigator, and so those questions were of great interest to me. And so I rolled up my sleeves that summer of 1991 and started trying to find primary materials that would enable the writing of a very basic history. What I discovered about the materials is they actually existed in public archives, but they were scattered all over the United States. I spent some extremely frustrating months in my car, during which I became absolutely obsessed with finding everything.

[\(04:52\)](#):

I'd find an outgoing letter from the land speculation concern or the lawyers who had engineered the litigation. At Brandeis, the response would be at the National Archives, the next letter in the chain might be in Chicago. And after months of attempting to pull a story together, a very basic story, I was researching at the Historic Society of Pennsylvania. And they, in those days, I don't know if this is still true, had card catalogs, and I found a card in the card catalog the day I was there researching that had a big X through it, but had the names of the land companies that had brought the suit in initials at the top. And so I took it to the very gracious reference librarian. It was a slow day, which I think played into what happened. And she took the card and said, "Well, the big X means that these aren't here anymore. Whatever this document is or these documents, they would've been lent to us and then reclaimed by the lender."

[\(06:08\)](#):

So I asked her if she would mind seeing if there was some record of when this had happened and maybe who it was who collected them. And she, again very graciously, went back into the sort of dark recesses of the administrative section of the HSP and emerged fairly soon after with a file on the reclamation of these documents. She said that the person who owned them and one of them lived in London, and then I thought to ask, did he come all the way back here to pick them up or did he have somebody local? And she said, "I don't know, let's check." And it turned out that the son had collected them, a man named Jasper Brinton of the celebrated Brinton family of Pennsylvania. And then going to the payphone, which I also discover doesn't really exist anymore when I get out in places that used to have payphones.

[\(07:12\)](#):

And I called information, which is a thing I'm not sure people do anymore, and located the Brintons, still living at their home outside of Pennsylvania. I called them, explained that I was obsessed and sort of what this mission was, and asked if they had kept any of the documents, and in fact they had kept almost all of them. There was more than one, it turned out, and they very kindly invited me to come out, have a look. And what I discovered there was absolutely, I don't want to say astonishing, although it sort of was, it was a true testament to the public service performed by the Brinton family over multiple generations. And that's always the first thing I have to say when telling the story, because Jasper's great or great-great grandfather had been the last secretary of the land companies and had preserved these documents, and they were handed down through the family through multiple generations until finally they were there for me to have a look at.

[\(08:22\)](#):

And what they were wasn't a sampler, it was the complete corporate records of the plaintiffs in the *Johnson v. M'Intosh* litigation. All the incoming correspondence, copies of all of the outgoing correspondence. The tale that they told, that was absolutely eye-opening about not simply who the parties were, but the legal efforts and strategies that went into engineering this case: elements of collusion, feigned pleadings, which at one time were permissible, but by this time really weren't, in the federal system, paid agents in Congress, some people who would later become celebrated revolutionaries and founders of the republic. And in any event, just a truly remarkable backstory for *Johnson v. M'Intosh* that not was not only interesting in and of itself, of course it turned the project into

a book from an article because there was so much unknown information, but it also provided a very different understanding of what it was that the case was legally meant to be about.

[\(09:45\)](#):

The question was so narrow that a new question emerged from my eventual absorption of the information in these documents. And the new question was, where did this discovery doctrine come from and why is it in this opinion in the first place? Because it's unnecessary to the resolution of the one question that was asked by the litigants in *Johnson v. M'Intosh*.

Philip P. Arnold [\(10:15\)](#):

So many interesting strands to this story. And I want to thank you on this podcast for hosting us in Norman to come to your law library. We were able to dip into some of those documents. It is really a treasure trove of things, but it's a very complicated story in many ways. If you could just kind of map for us what the case eventually ended up being about. I mean, as you say, people wanted it to be about one thing, it seems, and then it ended up being a much larger, or having much larger consequences than it originally was intended.

Lindsay G. Robertson [\(11:06\)](#):

The case arose from two illegal land purchases from a number of Native nations in the late British colonial period, so one was in 1773, one in 1775. Independence will be declared in 1776. So the questions that the speculators were concerned about involved proving that those purchases were legal under British law in the 1770s. And that's how they pleaded the case. The one large looming legal impediment to them was that the crown, King George III, in 1763 had issued a royal proclamation saying nobody can buy Indian lands west of the Allegheny Mountains without my permission, and these guys had done so.

[\(12:07\)](#):

And so that was the British legal question, and the case that eventually made its way to the Supreme Court, from the speculators' perspective, was only to get the court's answer to the question, was the Proclamation of 1763 constitutional under the British Constitution in the late colonial era? It was a British law, or an English constitutional law question, and they thought they had a good chance of winning because the Revolution was fought in part because the revolutionaries believed that the proclamation which had denied them access to all these Indian lands was unconstitutional.

[\(12:49\)](#):

And they had a bunch of Revolutionary War vets on the Supreme Court, and that's really all this was meant to be about. Interestingly, that question is answered in *Johnson v. M'Intosh*. It's deep in the opinion, you have to know it's there and go looking for it. It's not in any of the popularly available edited transcripts of the opinion. And it says the proclamation was constitutional and these purchases were illegal under English law and we're done. And that should have been the entirety of the *Johnson v. M'Intosh* opinion from the perspective of the speculators, who were the only people who had any real immediate interest in it. That isn't what the court spends most of its time on. And what that turns out to be is this Doctrine of Discovery, which gets introduced into American law in this opinion. And they pitch it as sort of an alternative, although it's the first discussed rationale for denying the company's claims.

[\(14:05\)](#):

Here's how they characterize it. They say, okay, well, let's figure out what it is that the company thought it was buying, which is the title to the lands of these Native nations. Well, and I'll give you the abbreviated version, we can talk about it in as much detail as you want. The fact is that based on a

European rule of international law, the Doctrine of Discovery, at the time that Europeans arrived here, pursuant to this doctrine, the rule was that the discovering European sovereign on discovery of new Native-occupied lands instantly by operation of law acquired ownership of the underlying title to those lands. The Indigenous peoples didn't lose all rights, they retained what the court calls an occupancy right to those lands. They don't define what that means, but presumably it's a right to physically be on the land. And the occupancy right, the court says, is, and this is the legal word, alienable, which means it can be sold or given away by the Indigenous occupiers, but only to the same discovering sovereign.

(15:36):

So we've got sort of two elements to this *Johnson v. M'Intosh* version of the Doctrine of Discovery. One is what I call the vesting of fee title or underlying title portion, with an occupancy right remaining. And then the other is the restraint on alienation portion, which is that the occupancy right can only be alienated to the same discovering sovereign. And what that means for the speculators is that the tribes that they bought from didn't own the land. The title to the land was owned by the English as the discoverers, and the occupancy right that they did own, they couldn't sell to the speculators, again by operation of this international law rule, because the discovery doctrine provides that you can only alienate the occupancy right to the same discovering sovereign, which would've been the English crown. Which is the same thing that the proclamation said, but the Supreme Court in this opinion says that would've operated anyway by operation of international law.

(16:45):

Now, what's also, I think, frequently overlooked is I've sort of made this more rational than it is in a sense because in the way I'm explaining it, it's tied to those late British colonial land purchases and I'm still talking about English law. But Marshall isn't particularly interested in English law, he's interested in American law. And so, by artful manipulation of phraseology in the opening paragraphs of the opinion, he pulls the doctrine into his own time, beyond the Declaration of Independence. He uses phrases like, "Have the American states adopted this rule?" That's irrelevant to the question of whether they were lawful at the time that they were made, these purchases. Marshall wants to pull, John Marshall who writes the opinion, to pull the doctrine into United States law and not leave this doctrine that he's just created as a colonial relic of historical interest only.

Philip P. Arnold (17:55):

So you would say then the British law of what you're calling fee title then is sort of moved over into the American legal framework through this kind of language that Marshall is using, right?

Lindsay G. Robertson (18:14):

Exactly.

Philip P. Arnold (18:15):

Yeah. Wow. Fascinating.

Sandy Bigtree (18:18):

But this wasn't clarified to the Indigenous nations that were involved in these documents. And the law is always supposed to lean towards an Indigenous interpretation and understanding of what was actually happening. So they were misled in just signing on these documents.

Lindsay G. Robertson (18:37):

I don't know if they were misled, they were entirely excluded. So there was no Indigenous participation in the *Johnson v. M'Intosh* litigation.

Sandy Bigtree ([18:48](#)):

Oh, right. But in a lot of these earlier documents where there were signatures, many of those signatures were just random Indians that were signing it. And I remember we had that conversation that there was so much alcohol during this period of establishing these laws that most of the founding fathers were kind of looped, and some of these documents were signed in bars.

Philip P. Arnold ([19:12](#)):

At taverns, yes.

Sandy Bigtree ([19:13](#)):

Taverns.

Philip P. Arnold ([19:14](#)):

Yeah, that was a funny conversation. A lot of these key documents that were fundamental for property law that are still taught in law schools like yours are signed in bars by basically drunken people.

Sandy Bigtree ([19:30](#)):

I mean, I think we have to really see the whole picture here to get a sense what's going on, right?

Philip P. Arnold ([19:38](#)):

Yeah. I mean, this character John Marshall, in and of itself, that's an important story to this whole thing. And one of the things that we learned visiting your place was just what a character he was.

Lindsay G. Robertson ([19:58](#)):

Yeah, Marshall's a really interesting figure. I don't know if underappreciated is the way... I think his complexity is underappreciated. He's certainly talked about a lot in law schools and a lot of his opinions are read. As part of my obsessiveness in writing this book, one of the things I wanted to do was to account for every word in the *Johnson M'Intosh* opinion. And when you read it, the core of the justification for the discovery doctrine, which is Marshall's history of British colonial practice, has no citations. It's the only part of the opinion that is completely citation free. There's a reason for that, but that sort drove me to really, really dig into John Marshall and the sources that he might have used. I don't even remember how much time this took, but you're talking about alcohol, there was definitely some of that involved.

([21:07](#)):

But I sat down and with a stack of Supreme Court reports and read every opinion written by John Marshall in chronological order. It's like reading the works of Shakespeare in chronological order. You learn the phrases that he liked to use. There's a way of expressing himself, the logic strategies and games that he plays, because they recur. People repeat themselves and you don't realize the extent to which somebody like John Marshall does unless you read all of his opinions back to back. So my sense of John Marshall, who oddly is simultaneously praised and cursed by the Indian Law Bar for the *Johnson v. M'Intosh* decision, I reached or rather developed a rather different perspective on the whole experience. See, there's a lot of scholars who work in this area wrestle with how to reconcile Johnson M'Intosh with

a later Marshall court opinion, *Worcester v. Georgia*, which also discusses European colonization and that sort of thing without citing *Johnson v. M'Intosh*.

[\(22:41\)](#):

And what I concluded, again after spending... This project took, I think, 14 years from start to finish. What I concluded ultimately about John Marshall is that those two decisions are irreconcilable intentionally, that *Worcester v. Georgia*, which gives us a very different version of the Doctrine of Discovery, was issued in hopes that people would forget he had ever written *Johnson v. M'Intosh*. I think what drove him to write that opinion with that lengthy discovery doctrine sections, 20 pages of like a 23-page opinion, was a dispute that was alive at the time, very important to Marshall. I think he gave it way too little thought in terms of potential consequences. I think it had enormous consequences. And I think he regretted it fairly soon after issuing it, certainly within a decade, and tried to erase it. And that's the sort of to his credit part, but he just couldn't pull it off for a variety of reasons.

Philip P. Arnold [\(24:00\)](#):

Yeah, he's an interesting figure, certainly, in American history and maybe one that we don't talk about enough outside of the legal profession. One of the interesting things, and I actually ordered the book that you had talked about, was his... Is it *The History of the Life of George Washington* or *The Life of George Washington*, in something like, it was several volumes anyway. But you had talked about how he created this narrative about George Washington that went back to Columbus, that had to frame the life of George Washington in terms of this long period of time which we would tend to see in our area of the world as kind of a myth history, kind of the legend of how Columbus and George Washington are related. And I just wanted you to talk about that because it appears in the decision, right? I mean, that history is part of the decision.

Lindsay G. Robertson [\(25:20\)](#):

Yeah, I can't claim any credit for having any particular inspiration to dig into Marshall's book. A lot of the research that I did for my book was just almost complete fortuity or fate, I guess, if I'm feeling good about myself. And *The Life of Washington* I just stumbled on when I was heading out to lunch one day and it happened to be on the shelf, and I didn't even know it existed, frankly. And so it was a book project Marshall had been encouraged, urged to write this. The Marshall family were good friends with the Washingtons, and one of Marshall's colleagues on the court, Justice Bushrod Washington, was George's nephew and the Mount Vernon heir. If memory serves, a book had just come out about General Nathanael Greene, sort of making him out to be the leading military figure of the American Revolution, and Bushrod Washington was eager that somebody write something to refute that.

[\(26:26\)](#):

And so Marshall agreed, I can't imagine with any particular enthusiasm because he had a full-time job and a large family. In any event, he agreed that he would write this biography, and then he seems to have just gotten completely carried away with it. So it was meant to be Washington's career during the Revolutionary War. And he evidently, at some point early in the process, decided that you couldn't really understand Washington as a general unless you understood Washington the man. And so it becomes a full-blown biography. At some point, again fairly early on, he apparently decided you can't really understand Washington the man unless you understand the world into which he was born, which it turns out was the Virginia colony. So it seems that version two started in 1607 with the establishment of the Jamestown colony.

[\(27:23\)](#):

But then you can't really understand the Virginia colony, evidently he reasoned, unless you understand the history of European colonization of the Western Hemisphere. So the life of George Washington, general-in-chief during the revolution begins with Columbus. And the entire first volume, it's been a while since I looked at it, but I'm not even sure Washington is mentioned. It became a multi-volume series of some value and maybe historical curiosity. It is, I believe, the first comprehensive English language history of European colonization, this first volume. So that's interesting.

Philip P. Arnold ([28:07](#)):

Published about 1803 or something?

Lindsay G. Robertson ([28:09](#)):

Yeah, 1803, I think is the year.

Philip P. Arnold ([28:11](#)):

He's a young man.

Lindsay G. Robertson ([28:13](#)):

... is when the first volume comes out. Well, I don't remember how young he was. I think he was born in the 1750s. So he, in any event, wrote this book. He apologizes for it in the introduction, "Look, I know this isn't all that good. I'm the Chief Justice, I've got a large family, full-time job, and no access to any primary materials." So the entire thing is built on apparently stuff he had at home, William [inaudible 00:28:45] history of this and William Robertson's history of that. And then it's sort of a cut and paste job. And he put it out and it got pretty much universally panned by critics. I think, as I may have mentioned to you when we were together in Norman, I think that the kindest review I could find said something like, "The Chief Justice will add little to our literary reputation as a nation," which isn't really glowing praise.

([29:17](#)):

All of this became important to me, and I guess is important to us, when I started reading this thing, having spent so much time at this point with *Johnson v. M'Intosh*, because I immediately recognized the language in this first volume of *The Life of George Washington*, this one-volume history of European colonization, was that uncited historical section from the *Johnson v. M'Intosh* opinion. And it starts almost immediately. I thought, I've read this before, and the deeper I went, the more obvious it became. What Marshall had done after oral argument, he had decided what the opinion was going to say. He went back to his office and he pulled his Washington biography volume one off the shelf and just started cutting and pasting, from Washington to the *Johnson v. M'Intosh* opinion.

([30:21](#)):

And in retrospect, I felt sort of stupid for not realizing that something like that must have happened, because it's a pretty comprehensive history, and when you look at the calendar, you realize, I think there was maybe a week between oral argument and the issuance of the opinion, and there are other cases being heard during that time. Nobody could have researched and composed the history of European colonization in the *Johnson v. M'Intosh* opinion in a week, with a full-time job doing other stuff.

([30:54](#)):

And it has no citations, and I think maybe this is fair, because he had written it. It was just pulling stuff from his own book. Now, this is especially troubling when you sort of reflect on it, but what it tells us is

that the discovery rule in *Johnson v. M'Intosh* is entirely grounded in a universally panned, cut and paste, throw together biography of George Washington, that there is nothing more to it. And to the extent there is, it's accidental, because there is no research into international law or anything else that went into the crafting of the discovery doctrine.

(31:48):

And it wasn't argued by either of the parties who were fighting over the Proclamation of 1763, that's what the speculators were talking about. And the defendant, so we haven't talked about this. M'Intosh's lawyer was paid by the speculators, this was something that came out of the documents, I think essentially to throw the case. And his argument is... Or their, there are two of them, argument is basically, Indians... Their argument was basically, Indians don't own anything, don't own land, they just run around hunting stuff. And that isn't picked up by the court, that's just sort of brushed aside, nobody takes that particularly seriously. But I don't know that it was intended that anybody [inaudible 00:32:41].

Sandy Bigtree (32:41):

But they came to that view of Native people as just hunting and running randomly on the land. And yet when the capital was in Philadelphia, the founding fathers were actually meeting with the great orders of the Haudenosaunee Confederacy to devise a new plan of an American democracy that was influenced by this thousands of years old Indigenous form of democracy. They even provided lodging for all the [foreign language 00:33:13], which are men of a good mind, because this is not a hierarchical system of domination. They housed them on the second floor of Independence Hall and they met with them regularly. There's been a coin issued commemorating those early influences to forming a more perfect union. And what the Haudenosaunee brought to that were the different branches of government that were a check and balance of sorts that did not exist in Europe. So how does the shift go from that kind of relationship of respect and honor and even replicating this ancient form of democracy, to turning on them and saying, "Oh, they're just random people that can occupy the land and hunt occasionally, because that's all they have to do"?

Lindsay G. Robertson (34:01):

Well, I don't think there was that shift. I think this was a throwaway argument. I think it was made with the expectation nobody would take it seriously, because the federal government had already embarked on a policy in the Trade and Intercourse Act, which was first passed in 1790, so that's 30 years earlier, that they were going to buy Indian lands. And that's still the policy today.

Sandy Bigtree (34:24):

In part, wasn't the non Intercourse Act a way of situating the federal government as the overlying control of statehood? And then somewhere down the line, then they become the guardians of Indian nations that were sovereign. It's like, yeah, it's all a free for all.

Lindsay G. Robertson (34:47):

Yeah. Well, yes. But the Constitution is the one that said between the federal government and the states, the federal government is going to be in charge of Indian affairs. That was to clean up a mess that had been created in the Articles of Confederation. Article 9 attempted to decide between... Again, we're just talking about between the states and the federal government, which is going to be responsible for conducting foreign relations with the tribes. And so they fixed it and that's why Congress passed the Trade and Intercourse Act.

Sandy Bigtree ([35:21](#)):

Weren't they nations, weren't they considered Indigenous nations?

Lindsay G. Robertson ([35:24](#)):

Yes.

Sandy Bigtree ([35:25](#)):

Only the federal government could negotiate with the nationhood of these entities-

Lindsay G. Robertson ([35:30](#)):

Yeah.

Sandy Bigtree ([35:31](#)):

... was also established.

Lindsay G. Robertson ([35:32](#)):

Yeah. And I think that Marshall, again, my read, and this is discussed in detail in this book, is that I think Marshall thought that... Marshall had another problem on his desk that had to do with title to land in Western Kentucky that had been promised Virginia militia veterans by the government of Virginia as compensation for their participation in the revolution, because Virginia didn't have any money to give them. And when Kentucky became an independent state, there is a fight between Kentucky and these Virginia grantees. And Marshall was implicated as a young man in creating the problem, and I think he sees this decision as a way to solve that problem that he played a role in creating, but I don't think that he thought there would be any additional consequence to it.

Jordan Loewen-Colón ([36:47](#)):

Do you need help catching up on today's topic, or do you want to learn more about the resources mentioned? If so, please check our website at podcast.doctrineofdiscovery.org for more information. Now, back to the conversation.

Philip P. Arnold ([37:07](#)):

I'd like for you to talk more about the consequences of *Johnson v. M'Intosh* because, I mean, you've mentioned it before, but its impact on the Five Civilized Tribes, the Removal Act, that really comes after Marshall's death. But nevertheless, this decision is fundamental for those later actions. And Andrew Jackson's involvement in all of these shifts, really a shift of the use of *Johnson v. M'Intosh*. And then also does touch on its importance today, because it's my understanding that it's still taught, it's really an important decision that all law students really have to study getting through their first year.

Lindsay G. Robertson ([38:02](#)):

So Marshall actually lives through in the early stages of Indian removal, and I think it caused him enormous pain based on the historical record. The *Johnson* decision so gets issued and this militia veterans case gets sort of resolved as a political matter. I think Marshall sort of forgot about the decision of 1823, but it got picked up by other folks. Most importantly, the governor of the state of Georgia, who appears to have found it in the late 1820s, five or six years later, somebody in his office. And maybe they always knew it was there and just hadn't really thought about it. Georgia has two Native nations, by the

late 1820s down to one because Muscogee Nation has ceded its lands and moved west into Alabama, but the Cherokee Nation is still there and they're showing no signs of ever having an interest in leaving.

[\(39:12\)](#):

The US had promised Georgia in 1802 when it ceded whatever its claims were to its Western charter lands, which will become the states of Mississippi and Alabama, that it would aggressively try and get the Cherokees to agree to cede their lands so that Georgia could have them. Only the US can do that under the Constitution because only the US has the power to make treaties, states can't make treaties. And so Georgia, from its view, patiently waited for decades and there was no evidence that the Cherokees were ever going to agree to this. And the US, I think it sort of stopped thinking they would, and then somebody discovered *Johnson v. M'Intosh*.

[\(39:59\)](#):

And the governor of Georgia took this case to the legislature and basically said, "Hey, guess what? John Marshall, in this opinion, Supreme Court said that the discovering sovereign acquired by operation of international law ownership of the underlying title to Indigenous lands. Well, in our case, that would've been England. And when we declared independence, we, Georgia, from England, we acquired that ownership. And at no time subsequent to our declaration of independence have we ceded that ownership to the United States or anybody else. So we own the lands of the Cherokee Nation in Georgia. Now, they have a right of occupancy," the governor said. "But what that means is we're basically in a landlord-tenant relationship, We own the building and they have a right to live there."

[\(40:59\)](#):

How do you get rid of tenants you don't like? They didn't use this phrase, but it works out this way, you change the lease terms. And that's what Georgia does, they pass a law that says, "You guys can stay, but from now on you're going to be attached to four Georgia counties. Your government's abolished and you're subject to the laws of the state of Georgia," including some additional stuff they threw in like you got to swear an oath of allegiance if you're a non-Indian in the Cherokee Nation and stuff like that. And then the Cherokees will sue. John Marshall's watching all this. They'll bring two lawsuits, over which Marshall will preside. The first of these, *Cherokee Nation v. Georgia*, the court dismisses because the majority of the justices think they don't have jurisdiction over it.

[\(41:47\)](#):

But the second one, they do decide, the case of *Worcester v. Georgia*, and that's the partner case to *Johnson v. M'Intosh*. What they do in that case is basically rewrite the history of European colonization and rewrite the discovery doctrine. And they're very clear, the court, in this, and it is completely irreconcilable with the discovery doctrine as it appears in *Johnson*, but it's because Marshall wants to have a do-over, basically. And the discovery doctrine that comes out of *Worcester v. Georgia* says very clearly all that Europeans acquired upon discovery of the New World was an exclusive right to purchase such lands as the natives were willing to sell.

[\(42:39\)](#):

And they say this is not a limitation on the rights of the native peoples to sell. It's a limitation on the right of Europeans to buy. So there's nothing in the *Worcester* formulation of the discovery doctrine that in any way limits the powers of Indigenous peoples in the United States. It's a European rule to limit purchases by other Europeans. And that's the John Marshall discovery doctrine that I believe he wanted to be his legacy. Now, this is Andrew Jackson. This is the opinion that Horace Greeley said Andrew Jackson responded to by saying, "John Marshall has made his decision, now let him enforce it." And of course, he doesn't have any special power to, but South Carolina helpfully introduces the doctrine of nullification over the summer. They get so excited that Andrew Jackson seems to be supporting states

resisting the federal government. Jackson can't abide the idea of nullification, this is like stage one to secession, and threatens to send the army into... Gets Congress to pass a [inaudible 00:43:59] called the Force Act, which empowers Jackson to go into South Carolina and kill everybody, basically.

(44:04):

And so South Carolina's cowed into repealing it, and Jackson gets on the line to the governor of Georgia and says, "You let Worcester and his friend Elizur Butler out of jail." And the governor ultimately, on the day before the Supreme Court reconvenes says, "All right, get out of here. Just leave town. We don't want you in Georgia anymore." But Jackson still controls the treaty making process, sends agents out to tell them, "Whatever Marshall said, *Johnson* is the law, and you guys have to either be subject to state laws or you've got to leave." And eventually they bully either legitimate, full tribal governments or, as in the case of the Cherokee, a faction that signs a removal treaty that's illegal under Cherokee law, but that the nation will ultimately accept, I guess. And they force all five of these tribes to remove. And Marshall lives to watch this. He dies soon after.

(45:17):

The reason I think that we have *the Johnson v. M'Intosh* discovery doctrine, and just assume this is the law, is that Marshall will die, as you said, Phil, just a few years later. And even before he dies, the year before he dies, others of his colleagues start leaving the court and Andrew Jackson gets to start making Supreme Court appointments. And we all know how political that can be. And by the early 1840s, the majority of the justices are Jackson appointees, or there's one who's appointed by Martin Van Buren, his vice president and successor. And they will start gratuitously, frankly, reintroducing the *Johnson* formulation of the discovery doctrine into one opinion after another. And in a six-year period or something, five separate Supreme Court opinions throw out the discovery doctrine formulation from *Johnson*, ownership of land, ownership of land, ownership of land. And eventually I think people just forgot that that isn't really what the discovery doctrine was.

(46:37):

People assume, and that's why I think there's so much attention focused on trying to understand the Johnson rule. I think I say this somewhere, but I mean, the reality is that the first justice to restore the original discovery doctrine was a guy named Henry Baldwin who had serious mental health problems. And if you want to talk about the discovery doctrine as it's articulated in *Johnson v. M'Intosh*, which includes ownership of land, I think it's really only fair not to call it John Marshall's discovery doctrine, but to call it Henry Baldwin's discovery doctrine, and to recognize that the only reason it's in US case law now is because it facilitated Indian removal. And the reality of both of those statements, I think, alone make a strong argument for getting rid of it.

Philip P. Arnold (47:35):

Yeah, yeah. That's a conversation for another day. That's for sure what we're all kind of focused on, I think, when it comes to Johnson. So yeah, I want to wrap this up because I know we have to, and I just want to thank you, Lindsay, for a really fascinating conversation and also just thank you for being a gracious host in Norman. We really enjoyed getting a better sense of the importance of this story, and you are very generous with your time.

Sandy Bigtree (48:15):

Yes, thank you.

Lindsay G. Robertson (48:16):

Well, I appreciate it. It was a pleasure having you all out. Look forward to having you out again sometime. And this was fun. What you're doing is really important, and so as a citizen, I applaud you for the time that you and your organization and the university are putting into making sure that people understand exactly what this doctrine is and what its consequences have been.

Philip P. Arnold ([48:48](#)):

And I'm going to also say that this is an example of the way we want to work, is that across disciplines, across professions, right? Because I think we only can get really a purchase on the significance of these things if we're working as we do in Native American and Indigenous studies, we have to work cross-disciplinary, cross-professional. So yeah, I really appreciate you.

Jordan Loewen-Colón ([49:24](#)):

The producers of this podcast were Adam DJ Brett and Jordan Brady Loewen-Colón. Our intro and outro is social dancing music by Orris Edwards and Regis Cook. This podcast is produced in collaboration with Henry Luce Foundation, Syracuse University's Department of Religion and the Indigenous Values Initiative.