JOHNSON V. M'INTOSH: 200 YEARS OF RACISM THAT RUNS WITH THE LAND

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I. INTRODUCTION: *JOHNSON V. M'INTOSH* VIEWED FROM 200 YEARS LATER

The United States Supreme Court case of *Johnson v. M'Intosh*[1] is a foundation of property law in the United States.[2] It established the United States government as the only possible buyer of land from people native to the continent.[3] As the only possible buyer, the United States government had the power to negotiate a low purchase price.[4] The bargain basement purchases are at the root of title for most of the property in the western half of the country.[5]

The case also forms an early and critical component of many property law textbooks.[6] The case can be used to introduce the idea of acquisition by discovery[7] and the idea that land ownership and the right to sell land can be limited.[8] Sadly, the case is also a perfect introduction to how racism is fundamental to the law of the United States. The decision rests, at least in part, on "facts" that Christian Europeans considered themselves "superior

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1 Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). While the Defendant spelled his last name "McIntosh," the U.S. Supreme Court used "M'Intosh." Because the spelling of a name is useful in the search for a case electronically, this article will use the Court's spelling when referring to the case and the defendant's spelling when referring to him as a person. To add to the fun, the Plaintiffs in the published case include "Graham," who spelled his name "Grahame."

2 Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 WM. & MARY L. & HIST. REV. 67 (2001).

3 *M'Intosh*, 21 U.S. at 587-88; Kades, *supra* note 2, at 111.

4 Kades, *supra* note 2, at 111.

5 Kenneth Bobroff, *Indian Law in Property: Johnson v. M'Intosh and Beyond*, 37 TULSA L. REV. 521, n.3 (2001). Exceptions to the general rule are Hawaii and lands *formerly* a part of Mexico.

6 JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 26-32 (5th ed. 2021); JESSE DUKEMMINIER ET AL., PROPERTY 4-19 (9th ed. 2018); JOSEPH W. SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 88-97 (7th ed. 2017); THOMAS W. MERRILL & HENRY SMITH, PROPERTY: PRINCIPLE AND POLICIES 90-101 (3d ed. 2017).

7 *M'Intosh*, 21 U.S. at 573.

8 *Id.* at 591-92.

genius"[9] to the "fierce savage, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[10]

Learning about the idea of property ownership, how property can be bought and sold, and how our law is built upon race-based assumptions is important for law students. But at Southern Illinois University, we have a special interest in the case because our law school is located on one of the disputed parcels of land. Our location gives us both knowledge of the area and, I believe, an obligation to consider what responsibilities we may have that stem from the result of the case.

This article will first examine the land in the case and establish that, despite assertions to the contrary, the land claimed by the two parties to the case was overlapping. Next, the article will outline the rather shady path of the case up to the Supreme Court. Then, the article will examine the decision, what important facts were missed, and the impact of the decision in the United States and beyond our borders. Finally, the article proposes actions that we, particularly those of us who live and work in the disputed territory, may take based on our more complete understanding of the case.

Before proceeding, I want to acknowledge my own strengths and limitations. I know the land as an almost life-long resident of Southern Illinois, as a landowner myself, as the wife of a man who was raised on a Southern Illinois farm, as someone who has been involved in many political campaigns covering the area,[11] and as an avid bicycle rider in the area. My limitations are in my knowledge of cultures that were native to this area. I have the background of ordinary Illinoisans in this matter, which is to say I have learned very little about the original inhabitants of the territory in which I live.[12] It is my connection to the land that drives my desire to learn more about its history and whether, based on that history, we have responsibilities today.

II. TWO OWNERS CLAIM THE SAME LAND: SOLVING HISTORICAL MYSTERIES

Johnson v. M'Intosh, at its core, was a dispute between two parties who each claimed they owned the same piece of land.[13] To understand the case,

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9 *Id.* at 573.

10 *Id.* at 590.

11 I have been involved in statewide campaigns in Illinois both as a candidate for office, including a successful run for Lieutenant Governor in 2010, and campaigns of my father, Paul Simon, who held two different statewide offices and represented Southern Illinois in Congress.

12 Awareness of the heritage of the land does not seem to follow a steady course. Thanks to attorney Linda King I have a seventh and eighth-grade textbook of her great, great aunt Ruth Bennett. This 250-page book, only about 5" by 7", has a reference to the 1773 sale to the Illinois Land Company. IRWIN F. MATHER, THE MAKING OF ILLINOIS 92 (1916).

13 *See M'Intosh*, 21 U.S. 543.

its impact, and what is missing from the case, it is important to first understand the nature of the dispute, who the parties are, and what land is involved. The parties are straightforward, the land less so.

A. The Parties—Johnson, Graham, and McIntosh

Pared down to its most basic, the case of *Johnson v. M'Intosh* is a dispute between two people whom each claim to own the same land. The Plaintiff in the case was titled Johnson and Graham's Lessee.[14] Johnson was Joshua Johnson, and Graham was Thomas Graham, who inherited the land together from Thomas Johnson,[15] Joshua Johnson's father, and Thomas Graham's grandfather.[16] Thomas Johnson was one of a group of twenty people who had purchased, on October 18, 1775, land around the Wabash River in what are now the states of Illinois and Indiana.[17] Many of the same twenty investors had purchased land two years earlier from indigenous people consisting of "the Kaskaskias, the Pewarias and the Cahoquias"[18], which were collectively referred to as Illinois.[19] The two overlapping groups of investors formed the United Illinois and Oubache (Wabash) Land Companies, which held all of the land in the two purchases together.[20]

The Defendant, William McIntosh, has an easier ownership record to trace. According to the case, he purchased his land from the United States on July 20, 1818,[21] although Illinois records show his purchases were made on April 24, 1815.[22] The United States had acquired this land in 1803 by treaty with the Kaskaskia.[23]

The Plaintiffs inherited an ownership interest in four large tracts of land that had been purchased from native inhabitants by groups of investors.[24] The

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14 *Id.*

15 In the cozy early American era, where six degrees of separation were rarely needed, Thomas Johnson had been Governor of Maryland and served for just over a year on the U.S. Supreme Court. *Thomas Johnson, 1792-1793*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/thomas-johnson-1792-1793/ (last visited Nov. 5, 2022).

16 *M'Intosh*, 21 U.S. at 556-61.

17 *Id.* at 555-57.

18 *Id.* at 548. The spelling of names of original peoples can come in many variations, and of this list of people we would now spell "Pewaria" as "Peoria," and "Cahoquia" as "Cahokia."

19 *Id.* at 548, 554.

20 LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 148 (2005). Robertson's book contains, as an appendix, a memorial offered to the U.S. House and Senate by the United Illinois and Wabash Land Companies, in their effort to seek a legislative solution to their problem. Ownership of the combined lands was never challenged in the case. *See* section IV.

21 *Id.* at 560.

22 *See Illinois Public Domain Land Tract Sales*, OFF. OF THE ILL. SEC'Y OF STATE, https://www.ilsos.gov/departments/archives/databases/data_lan.html (last visited Nov. 5, 2022).

23 ROBERTSON, *supra* note 20, at 25.

24 Kades, *supra* note 2, at 89.

Defendant bought his land from the United States, who in turn had gained it by treaty with native inhabitants.[25]

B. One Piece of Land, Two Descriptions?

With the parties identified, the next step is identifying the land. It should be easy, right? This takes us back to lessons for first-year law students and the ways land can be described. The two parties, in this case, own lands that are described in two very different ways. Johnson and Graham owned property that was described by metes and bounds, a system of identifying landmarks that, hopefully, have some permanence and can be used by people over time to discern boundaries.[26] Their property interests contain lines as wavy as the course of a river, and some lines that may be straighter, but not necessarily traveling in precise cardinal directions.[27] McIntosh owned properties that were described in terms of lines set by a government survey system, which establishes reference lines parallel to longitudinal and latitudinal lines.[28] McIntosh acquired an interest in land that was most often in perfect squares, with right angles and sides that were perfectly parallel to cardinal directions.[29]

Mapping the land is important because it can help resolve one of the many unknowns about *Johnson v. M'Intosh*. In a thoughtful article, Professor Eric Kades assesses some of the mysteries of the case and asserts that there may not have been an actual conflict between the Plaintiffs and the Defendant over land.[30] A detailed mapping of these properties, to the extent possible, shows that even while some aspects of the case were feigned, the two claims to land in Southern Illinois were indeed overlapping.[31]

1. The McIntosh Land

The McIntosh land can be located with ease and specificity.[32] Focusing on McIntosh's purchases just in Jackson County, Illinois, will be enough to make a more complete historical picture of the dispute in the case.

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25 *Id.* at 78.

26 *See* Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 875 (2019) (providing both critique of the shortcomings of the system and an interesting take on some of the positive aspects of the system).

27 *See M'Intosh*, 21 U.S. at 552-53.

28 *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY, 821-22 (3d ed. 2000).

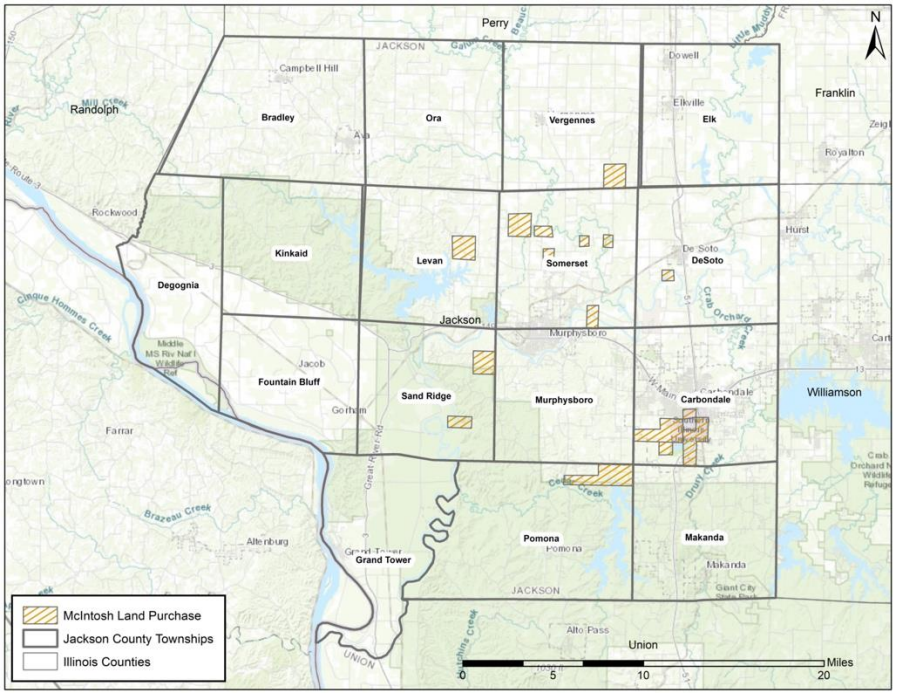
29 *See William McIntosh*, OFF. OF THE ILL. SEC'Y OF STATE, https://www.ilsos.gov (last visited Nov. 11, 2022).

30 Kades, *supra* note 2.

31 *See William McIntosh*, *supra* note 29.

32 *See, e.g.*, *id.*

Illinois land purchase records show that William McIntosh purchased a great deal of land, most of it in Jackson County, Illinois.[33] State records show that almost all of McIntosh's purchases were made on April 24, 1815,[34] but it is possible that this reflects the date that the purchases were recorded. In any event, on that date, there were thirty-three purchases of land recorded by Mr. McIntosh.[35] All purchases were for two dollars an acre.[36] Most of the purchases were for 160 acres of property, a quarter-section of land.[37] One purchase was for a half section, 320 acres,[38] and two were for an entire section of land, 640 acres.[39] Eight of McIntosh's purchases were in Carbondale Township, and each one of these contains land currently used by Southern Illinois University.[40]



Map by Carina Hoyer

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33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *William McIntosh*, *supra* note 29.
38 *Id.* (showing the south half of Township 9 south, 1 west, Carbondale Township).
39 *Id.* (showing section 14 in Township 8 South, 3 west Levan Township, and Section 12 in Township 9 South, 3 West, Sand Ridge Township).
40 *Id.*

2. The Johnson and Graham Land

The land owned by Johnson and Graham, the Plaintiffs, is an interest in one of four tracts of land owned by the Illinois and Wabash Land Companies.[41] The first two pieces of land were purchased in 1773 from the Illinois.[42] The second two tracts were purchased from the Piankeshaw in 1775.[43] All of these properties are described by metes and bounds, using markings that were well known or observable to anyone on the land, along with measurements and cardinal directions.[44] But, well known in 1773 is not a guarantee of being well-known more than two hundred years later.

Determining the boundaries of one of the two purchases made in 1773 will help resolve the question posed by Professor Eric Kades, who asserts that there was no actual conflict of territory.[45] Kades put both study and reason into his choice of maps and found a map drawn by an Illinois history professor, Clarence Alvord, to be his top choice.[46] In the Kades map, based on the Alvord map, the northern line of the land in the deepest of Southern Illinois stretches from roughly the current town of Ware to the current town of Cave-In-Rock.[47] If this northern line is correct, the tract would contain no land in what is now Jackson County, Illinois,[48] and Kades's assertion regarding a lack of conflict would be correct.[49]

Kades's map of the land conflicts with information in a book about *Johnson v. M'Intosh* by Professor Blake Watson.[50] Watson states that the line runs from just below Chester, Illinois, to just below Old Shawneetown, Illinois, but Watson anchors this location with only two points from the metes and bounds description.[51]

Plotting each portion of the metes and bounds description will produce the most accurate determination of the boundaries of this piece of land. The

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41 *M'Intosh*, 21 U.S. at 550.

42 *Id.* at 550.

43 *Id.* at 555.

44 Kades, *supra* note 2, at 115.

45 *Id.* at 99. Kades' map, on page 68 of his article, is reprinted in at least three property law textbooks, including: DUKEMMINIER ET AL., *supra* note 6; MERRILL & SMITH, *supra* note 6; SINGER ET AL., *supra* note 6.

46 Kades, *supra* note 2, at 115 (devoting an appendix to his map selection, noting problems with landmarks that do not last, and even disputes over the exact length of a league).

47 *Id.* at 115 (stating the endpoints of the line can be identified by the distinctive curves in the Mississippi and Ohio Rivers); *see* Quick facts of Illinois, GOOGLE MAPS, https://www.google.com/maps/place/Illinois/@37.3858935,-88.586728,11z/data=!4m5!3m4!1s0x880b2d386f6e2619:0x7f158250641159 56!8m2!3d40.6331249!4d-89.3985283 (last visited Feb. 23, 2023).

48 Kades, *supra* note 2, at 99.

49 *See id.* at 99.

50 BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: JOHNSON V. MCINTOSH AND THE HISTORY OF NATIVE LAND RIGHTS 73 (Univ. of Okla. Press 2012).

51 *Id.*

description itself is contained in the decision,[52] and it can be parsed like a sentence.

The lower Illinois tract is described as:

> Beginning . . . on the east side of the Mississippi, at the mouth of the Heron creek, called by the French the river of Mary, being about a league below the mouth of the Kaskaskias river, and running thence a northward of east course, in a direct line, back to the Hilly Plains, about eight leagues more or less; thence the same course, in a direct line to the Crab Tree Plains, about seventeen leagues more or less; thence the same course, in a direct line, to a remarkable place known by the name of the Big Buffalo Hoofs, about seventeen leagues more or less; thence the same course, in a direct line to the Salt Lick creek, about seven leagues more or less; then crossing the Salt Lick creek, about one league below the ancient Shawanese town, in an easterly, or a little to the north of east, course, in a direct line to the river Ohio, about four leagues more or less; then down the Ohio, by its several courses, until it empties into the Mississippi, about thirty-five leagues more or less; and then up the Mississippi, by its several courses, to the place of beginning, about thirty-three leagues more or less.[53]

A metes and bounds description forms a closed loop.[54] It has a starting point, points along the way, and a return to the starting point.[55] The description for this piece of land, like many metes and bounds descriptions, has a starting point that is itself noted by reference to another location. The starting point here is "on the east side of the Mississippi, at the mouth of the Heron creek, called by the French the river of Mary, being about a league below the mouth of the Kaskaskias river."[56] What the French called the "river of Mary" is still called Mary's River today.[57] A Google map identifies this river as Mary's River and then, for some reason, changes the name to the Mississippi River well before the river meets the Mississippi.[58] The only detail in the starting point that does not match perfectly is the distance from the mouth of the Kaskaskia River.[59] The description says that the mouth of Mary's River is "about a league below" the mouth of the Kaskaskia.[60] A

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52 *M'Intosh*, 21 U.S. at 551-52.

53 *Id.* at 552.

54 *Metes and Bounds*, CORNELL L. SCH. (Aug. 2020), https://www.law.cornell.edu/wex/metes_and_bounds.

55 *Id.*

56 *M'Intosh*, 21 U.S. at 552.

57 Conversation with Cynthia Heisner, long-time resident of Pinckneyville, Illinois, June, 2022. Heisner notes that there is a local band by the name of Mary's River which can be heard at bars, including the Chinchbug Tavern.

58 Mary River to East Side of Mississippi, GOOGLE MAPS, https://www.google.com/maps/@37.896551,-89.7494999,13z (last visited Feb. 23, 2023).

59 *Id.*

60 *M'Intosh*, 21 U.S. at 552.

league is roughly three miles,[61] and Mary's River is, at this time, roughly nine miles from the mouth of the Kaskaskia River.[62] As rivers can change course over time and have done so, particularly at this location,[63] this starting point can be called likely until completing the property's perimeter can provide a more convincing answer.[64]

With the starting point established, or at least tentatively established, the first direction from that point is "and running thence a northward of east course, in a direct line, back to the Hilly Plains, about eight leagues more or less."[65] This is one of the more vague parts of the description, but it still has value. While those not familiar with Illinois can be excused for thinking the state is flat,[66] the southernmost part of the state has hills that glacial scouring did not reach.[67] The line described is the start of an eastward path. Starting at the mouth of Mary's River, there are three distinct routes to the east. The first is by the course of the Mississippi, which is how the boundary comes back to meet the starting point.[68] The second would be to go directly east, which would put the boundary in one of the hillier parts of Southern Illinois.[69] Going slightly north of due east would lead to a large plain and landscape that is more gently rolling,[70] territory that could be described as a "hilly plain." A history of Randolph and Perry counties describes this area as "comparatively

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61 *League*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/science/league-measurement (last visited Nov. 11, 2022).

62 Driving Directions from Chester, IL to Fort Kaskaskia State Hist. Site, GOOGLE MAPS, https://www.google.com/maps/dir/37.8825294,-89.7920719/Fort+Kaskaskia+State+Historic+Site,+4372+Park+Rd,+Ellis+Grove,+IL+62241/@37.8831391,-89.7881237,13z/data=!4m9!4m8!1m0!1m5!1m1!1s0x8877d347959ee715:0x55d23e23389c0ea3!2m2!1d-89.9104895!2d37.968839!3e0 (last visited Feb. 23, 2022) (following "Directions" hyperlink; then searching the starting point field for "Chester, IL" and searching destination field for "Fort Kaskaskia State Hist. Site"); MAPOMETER, https://www.mapometer.com/canoeing (last visited at Nov. 11, 2022) (allowing for measurement of a water route, which confirms this rough distance).

63 James Baughn, *Where the river drives a thousand map makers crazy*, SE. MISSOURIAN (July 30, 2010), https://www.semissourian.com/blogs/pavementends/entry/36305.

64 *See generally id.*

65 *M'Intosh*, 21 U.S. at 552.

66 Mitch Smith, *Study says Illinois is second-flattest state on mainland*, CHI. TRIB. (June 19, 2014), https://www.chicagotribune.com/news/ct-xpm-2014-06-19-chi-study-says-illinois-is-second-flattest-state-on-mainland-20140619-story.html.

67 *Glaciers Smooth the Surface*, ILL. STATE GEOLOGICAL SURV., https://isgs.illinois.edu/outreach/geology-resources/glaciers-smooth-surface. (last visited Nov. 11, 2022).

68 *Id.*

69 *Datasets*, USGS, https://apps.nationalmap.gov/downloader/ (last visited Nov. 11, 2022).

70 W. John Nelson & David A. Grimley, *Surficial Geology of the Welge Quadrangle, Randolph and Jackson Counties, Illinois*, ILL. STATE GEOLOGICAL SURV. (2010), https://www.ideals.illinois.edu/items/79192. As a bicycle rider, I have experienced the difference between the very hilly area and the rolling high plains.

of a level or rolling surface."[71] Eight leagues, or twenty-four miles, in this direction would get to somewhere near the current town of Ava, Illinois.[72]

From the Hilly Plain location, the next direction is "thence the same course, in a direct line to the Crab Tree Plains, about seventeen leagues more or less."[73] This, again, is not precise, but the current town of Crab Orchard, Illinois, near Crab Orchard Creek, is roughly forty-six miles from Ava, Illinois,[74] close to the fifty-one miles or seventeen leagues given in the description.[75] The direction between Ava and Crab Orchard is not due east, but slightly south of due east.[76] According to local history, Crab Orchard Creek, near the town of Crab Orchard, took its name from the abundance of crab apples "where thickets of wild crab trees furnished the Indians and then the settlers with fruit."[77] "[E]xcellent mincemeat was made by the pioneer women from the less tender portions of venison, such as the neck, wild crab apples, and maple sugar."[78] Another source identifies the source of the names from surveyors for the new state of Illinois who found so many orchards of crab apple trees that they named the local creek Crab Orchard.[79] A topographical map of the area confirms that much of the area around Crab Orchard Creek is flat and would fit well into the category of "plains."[80]

From the Crab Tree plain that can be roughly located, the next step is the least plottable, "thence the same course, in a direct line, to a remarkable place known by the name of the Big Buffalo Hoofs, about seventeen leagues more or less."[81] This place might have been remarkable in 1773, but there is

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71 J.L. MCDONOUGH & CO., COMBINED HISTORY OF RANDOLPH & PERRY COUNTIES, ILLINOIS, WITH ILLUSTRATIONS, DESCRIPTIVE OF THEIR SCENERY AND BIOGRAPHICAL SKETCHES OF SOME OF THEIR PROMINENT MEN AND PIONEERS (M.A. Roever, 1974).

72 *See* Driving Directions from Chester, IL to Ava, IL, GOOGLE MAPS, https://www.google.com/maps/dir/37.8839133,-89.7835744/37.8891344,-89.4969249/@37.8724683,-89.7091883,12z/data=!4m9!4m8!1m5!3m4!1m2!1d-89.7066986!2d37.8969031!3s0x8877ca0305fbea85:0x9fb75a0de32b06ef!1m0!3e1 (last visited Feb. 23, 2023) (following the "Directions" hyperlink; then searching the starting point field for "Chester, IL" and searching destination field for "Ava, IL").

73 *M'Intosh*, 21 U.S. at 552.

74 Driving Directions from Ava, IL to Crab Orchard, IL., GOOGLE MAPS, https://www.google.com/maps/dir/Ava,+IL/Crab+Orchard,+IL/@37.8094632,-89.2896066,11z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x8877ae98960b7199:0xf66d56ade054dd21!2m2!1d-89.4948169!2d37.8883846!1m5!1m1!1s0x8877334324f8ebd1:0x73ec173639b67a1e!2m2!1d-88.8042303!2d37.7292162!3e2 (last visited Feb. 23, 2023) (following "Directions" hyperlink; then searching the starting point field for "Ava, IL" and searching destination field for "Crab Orchard, IL").

75 *M'Intosh*, 21 U.S. at 552.

76 Driving Directions from Ava, IL to Crab Orchard, IL., *supra* note 74.

77 *Crab Orchard Creek and Township History*, WILLIAMSON CNTY. HIST. SOC'Y, https://www.wcihs.org/history/crab-orchard-creek-history/ (last visited Nov. 11, 2022) (citing BARBARA BURR HUBBS, PIONEER FOLKS AND PLACES 1-2 (1939)).

78 *Id.*

79 JOHN M. BREWER, STEAL-EASY, MY HOME TOWN: A MEMOIRIC HISTORY OF CRAB ORCHARD, ILLINOIS 35 (1985).

80 *Datasets*, *supra* note 69.

81 *M'Intosh*, 21 U.S. at 552.

no trace of anything with a similar name in Southern Illinois today.[82] One possibility is an area with two oxbow ponds formed from the south fork of the Saline River not far from the town of Carrier Mills.[83] The ponds have a tight U-shape characteristic resembling a buffalo hoofprint.[84] Alternatively, there is a remarkable rock formation known as the Garden of the Gods that is farther south and east, but a visit to the area does not immediately lead to the thought of buffalo hooves.[85] A third possibility is that the landmark no longer exists due to extensive strip mining in the area.[86]

Pinpointing places gets easier after Big Buffalo Hoofs. The next step is "thence the same course, in a direct line to the Salt Lick creek, about seven leagues more or less."[87] There is a Lick Creek in Southern Illinois, but it fails to fit into what follows in the metes and bound description. Lick Creek is more than sixty miles from Old Shawneetown, the next described location,[88] which should only be one league away.[89] But, there is another course of water that fits into this geography—the Saline River. The Saline River runs in Southeastern Illinois and feeds into the Ohio River.[90] The river is fed, in part, by local salt springs,[91] so the label "salt lick" could certainly apply. More importantly, the location of the river fits with the generally straight west-to-east line describing the property.[92]

The final step to the Ohio River is a short one, "then crossing the Salt Lick creek, about one league below the ancient Shawanese town, in an

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82 *See* Kades, *supra* note 2, at 115.

83 *See FSTopo Map Products*, U.S. DEPT. AGRIC., https://data.fs.usda.gov/geodata/rastergateway/states-regions/states.php (last visited Nov. 15, 2022) (searching "Carrier Mills, Illinois" on map).

84 *See id.* For an example of the buffalo hoof shaped, see Patti Buck, *Buffalo Animal*, PINTEREST, https://www.pinterest.com/pin/90846117454222546/ (last visited Feb. 25, 2023).

85 *See* Garden of the Gods, Herod, IL, GOOGLE MAPS, https://www.google.com/maps/place/Garden+of+the+Gods/@37.6046363,-88.3843684,17z/data=!3m1!4b1!4m5!3m4!1s0x8870931343262073:0x66142566a5d25626!8m2!3d37.6046363!4d-88.3843684 (last visited Feb. 23, 2023).

86 *See generally History of Mining in Illinois*, ILL. MINE SUBSIDENCE INS. FUND, https://www.imsif.com/about-mine-subsidence/history-of-mining-in-illinois (last visited on Nov. 15, 2022).

87 *See FSTopo Map Products*, *supra* note 83.

88 Driving Directions from Lick Creek, IL to Old Shawneetown, IL., GOOGLE MAPS, https://www.google.com/maps/dir/Lick+Creek/Old+Shawneetown/@37.4816007,-88.7018767,11z/data=!4m14!4m13!1m5!1m1!1s0x88774242062933a3:0x6c97706e72ef83a8!2m2!1d-89.075076!2d37.5225506!1m5!1m1!1s0x88705f30bb3878c1:0x90c3a189a7257736!2m2!1d-88.1367006!2d37.6969906!3e1 (last visited Feb. 23, 2023) (following "Directions" hyperlink; then searching the starting point field for "Lick Creek, IL" and searching destination field for "Old Shawneetown, IL).

89 *M'Intosh*, 21 U.S. at 552.

90 Saline River, GOOGLE MAPS, https://www.google.com/maps/place/Saline+River/@37.6469631,-88.2496706,13z/data=!4m5!3m4!1s0x8870f41e4d65f0d7:0x771755d561d4dc56!8m2!3d37.6581224!4d-88.258424 (last visited Feb. 23, 2023).

91 Joe McFarland, *When Salt was Gold: A distant chapter in Illinois history reveals the value of this once-precious commodity*, OUTDOOR ILL. (Oct. 2009), https://www2.illinois.gov/dnr/OI/Documents/Oct09Salt.pdf.

92 *See* Saline River, *supra* note 90.

easterly, or a little to the north of east, course, in a direct line to the river Ohio, about four leagues more or less."[93] It is fairly certain that "the ancient Shawanese town" is what is now called Old Shawneetown.[94] The town is named for the Shawnee who settled in the area.[95] This was recorded as early as 1765 when a visitor to Shawneetown noted that it was the place called "the old Shawanease Village."[96] While the town is fairly certain, the distances, again, do not line up as described.[97] There are certainly places where the Saline River is four leagues, or twelve miles, from the Ohio River, but those places are much farther away from Old Shawneetown.[98]

The remainder of the description is the easiest part to plot, "then down the Ohio, by its several courses, until it empties into the Mississippi, about thirty-five leagues more or less; and then up the Mississippi, by its several courses, to the place of beginning, about thirty-three leagues more or less."[99] The route along the Ohio River should be 35 leagues, or 105 miles.[100] A route following as closely as possible to the river now is about 130 miles long.[101] The route from the confluence up to Mary's River should be the same thirty-three leagues, or ninety-nine miles.[102] Again, following as closely as possible to the river, this route is about eighty-five miles long.[103]

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93 *M'Intosh*, 21 U.S. at 552.

94 *See* VIRGIL J. VOGEL, INDIAN PLACE NAMES IN ILLINOIS 135-36 (1963).

95 *Id.* Current Shawneetown, Illinois, was moved to higher ground after repeated flooding of the Ohio River, but Old Shawneetown, complete with the remains of an old bank, still exists. *Id.* at 135-36.

96 *See* Norman Caldwell, *Shawneetown: A Chapter in the Indian History of Illinois*, 32 J. ILL. ST. HIST. SOC'Y 193, 204 (1939).

97 Old Shawneetown, GOOGLE MAPS, https://www.google.com/maps/@37.6885495,-88.1931999,12z (last visited Feb. 23, 2023).

98 *Id.*

99 *M'Intosh*, 21 U.S. at 552.

100 *See id.* at 552.

101 Driving Directions from Old Shawneetown, IL to Cairo, IL., GOOGLE MAPS, https://www.google.com/maps/dir/Old+Shawneetown/Cairo/@37.4414477,-89.0288475,10z/data=!4m39!4m38!1m30!1m1!1s0x88705f30bb3878c1:0x90c3a189a7257736!2m2!1d-88.1367006!2d37.6969906!3m4!1m2!1d-88.1633389!2d37.5325633!3s0x8870620108976f4f:0xde84ba86a80c93a4!3m4!1m2!1d-88.2715207!2d37.477468!3s0x88708f14568d238d:0x4f1a8a6575e84fd!3m4!1m2!1d-88.4766305!2d37.1973695!3s0x887a7352209aaba9:0x36b418322d0aa4d9!3m4!1m2!1d-88.6767652!2d37.1622344!3s0x887a045418794c8b:0x20fdc3efdd3010f1!3m4!1m2!1d-88.7976282!2d37.2134617!3s0x8879ff53b442895b:0xc7ede9774d16523c!1m5!1m1!1s0x8879c6ace405f89f:0x1ea46c834803db68!2m2!1d-89.1764608!2d37.0053293!3e1 (last visited Feb. 23, 2023) (following "Directions" hyperlink; then searching the starting point field for "Old Shawneetown, IL" and searching destination field for "Cairo, IL"). This maps a bike route.

102 *See M'Intosh*, 21 U.S. at 552.

103 Driving Directions from Cairo, IL to Chester, IL., GOOGLE MAPS, https://www.google.com/maps/dir/Cairo/37.8807704,-89.7823069/@37.6275112,-89.7060893,11z/data=!4m29!4m28!1m25!1m1!1s0x8879c6ace405f89f:0x1ea46c834803db68!2m2!1d-89.1764608!2d37.0053293!3m4!1m2!1d-89.3152794!2d37.1411182!3s0x8879d1f1fd6ceb2d:0xc301c2a741642015!3m4!1m2!1d-89.4202113!2d37.1997579!3s0x88782cbd7e6eef9f:0x831f4e94d93aa004!3m4!1m2!1d-89.4483742!2d37.2877142!3s0x88782a6e33a519e1:0x4ec03ce3915e46ee!3m4!1m2!1d-89.5164103!2d37.7073634!3s0x8877a39df96f75e1:0xd5ae85af21499

Taken together, the points in the metes and bounds description appear on the map on page 323. The map resembles the 1805 maps found in the records of the United Illinois and Wabash Land Companies.[104] The Land Companies' map is less than satisfying because it adds no geographic detail to the northern boundary line of the property.[105] The map below more accurately reflects the land description than the Kades map does because, in this map, the northern boundary is more of a straight line, rather than the line that heads northeast and then southeast at what appears to be the Saline River.[106]

The most important conclusion to be drawn from the map offered below is that there was indeed overlapping territory between the purchases of the Illinois Land Company and the purchases of William McIntosh.[107] McIntosh's land, as plotted on the map on page 315, shows many acres owned in what is now Jackson County, Illinois.[108] The Illinois land purchase mapped out here contains most of Jackson County, Illinois, including all of present-day Carbondale, Illinois.[109] So there was, in fact, a dispute between those who were owners of the Illinois and Wabash Land Companies and William McIntosh. Counting McIntosh's sections, half-sections, and quarter sections in Jackson County alone[110] there are 1,760 acres described by both McIntosh's deeds[111] and the metes and bounds description of the investors' purchase.

809!1m0!3e1 (last visited Feb. 23, 2023) (following "Directions" hyperlink; then searching the starting point field for "Cairo, IL" and searching destination field for "Chester, IL").

104 Illustration of Map of the Lower Illinois Purchase, *in* UNITED ILLINOIS AND WABASH LAND COMPANIES, UNIV. OKLA. L. DIGIT. COLLECTIONS, https://digital.libraries.ou.edu/IWLC/docs/map-02.pdf (last visited Nov. 14, 2022).

105 *Id.*

106 *See* Kades, *supra* note 2, at 68; Illustration of Map of the Lower Illinois Purchase, *supra* note 104.

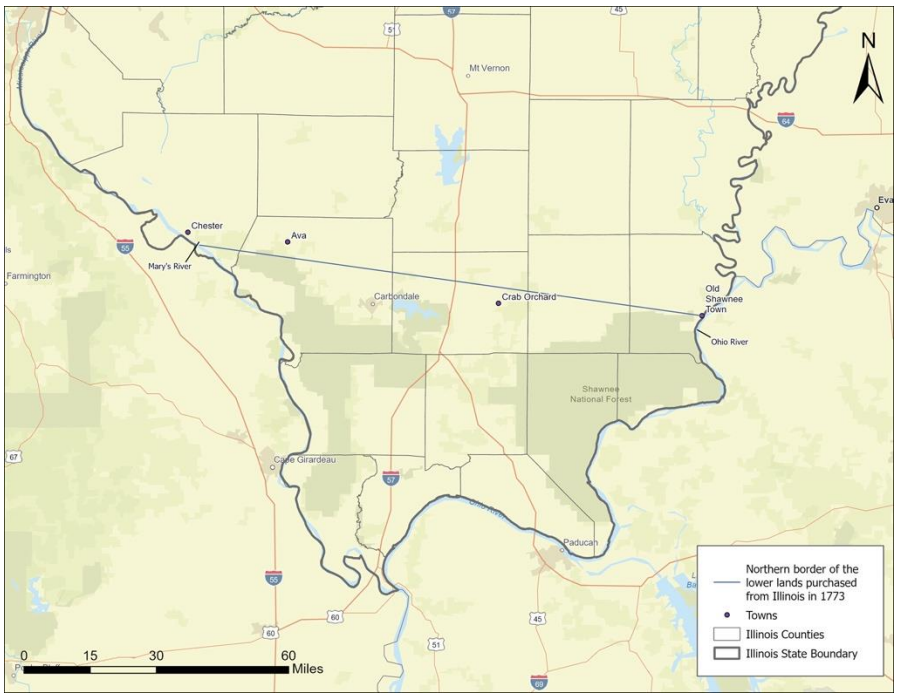
107 *See* sources cited *supra* note 106.

108 *See* sources cited *supra* note 106.

109 *See* sources cited *supra* note 106.

110 McIntosh owned forty-four quarter-sections of land, at forty acres each. *See Illinois Public Domain Land Tract Sales*, *supra* note 22.

111 *See generally id.*



Map by Carina Hoyer

III. THE INVESTORS UNITED COMPANIES TRY TO SECURE TITLE THROUGH LEGISLATIVE AND EXECUTIVE MEANS

A disputed claim of title is the root of *Johnson v. McIntosh*, but solving that dispute in court was not the first route the investors sought.[112] The driving force behind the lawsuit, and behind many steps taken before the suit, was the owners of the United Illinois and Wabash Land Companies.[113]

The owners of the land companies were two overlapping groups of investors—speculators. The Illinois lands were purchased in July 1773,[114] and the lands along the Wabash River, in both Illinois and Indiana, were purchased in October 1775.[115] It would be hard to identify a less stable time for the British colony in North America.[116] Just ten years before the first purchase, the Seven Years' War ended.[117] As a result, this ended French

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112 *See generally M'Intosh*, 21 U.S. 543.

113 *See generally id.* at 552.

114 UNITED ILL. AND WABASH LAND CO., MEMORIAL OF THE UNITED ILLINOIS AND WABASH LAND COMPANIES TO THE SENATE AND HOUSE OF REPRESENTATIVE OF THE UNITED STATES (1810), *reprinted in* ROBERTSON, *supra* note 20, at 146.

115 ROBERTSON, *supra* note 20, at 147-48.

116 *Id.* at 5.

117 *Id.* at 5.

dominance in the interior of the colony.[118] In between the first and the second land purchases, the first shots of the Revolutionary War were fired.[119] The instability was appealing to investors who were ready to take a risk.[120] Even George Washington considered investing in a land purchase from Indian groups, but only if title could be established.[121]

Washington's concern over title was valid, as the colonial experience included both sale of lands from the indigenous people to individual Europeans and decrees or laws banning such sales. Noteworthy sales include Roger Williams's purchase of the land that is now Providence Rhode Island,[122] and the 1626 purchase of Manhattan Island by the Dutch West India Company.[123] Prohibitions on sales like these included a Proclamation by King George in 1763 that prohibited the individual purchase of land west of the Allegheny Mountains,[124] and bans of purchases issued by colonial legislatures as a matter of preserving peace.[125]

Investors in the United Illinois and Wabash Land Companies ("the Companies") were willing to take the risk. To make that risk, they had to demonstrate that their purchase produced a valid title. They needed some authority to confirm that the land now belonged to the companies. The companies sought to get this confirmation through the existing governments, starting with the state of Virginia.[126] The companies had roped in what should have been a good ally, the governor of Virginia, by giving him shares of the upcoming Wabash purchases.[127] This effort failed when the governor was driven out of power by a revolutionary government in Virginia in 1775.[128] The revolutionary state government then denied the purchase by proclaiming void all the prior and upcoming individual purchases of indigenous land.[129]

The Companies continued to advocate for effective title to the lands they had purchased as the Continental Congress was formed.[130] Virginia's ownership of land past the Allegheny Mountains almost proved to be a stumbling block for the formation of the new nation's government. [131] Both Virginia and the national government wanted control of the lands, each so

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118 *Id.* at 5.

119 *Minute Man National Historic Park Massachusetts*, NAT'L PARK SERV., https://www.nps.gov/mima/learn/historyculture/april-19-1775.html (last visited Nov. 14, 2022).

120 ROBERTSON, *supra* note 20, at 5.

121 WATSON, *supra* note 50, at 100.

122 *Id.* at 11.

123 *Id.* at 19.

124 ROBERTSON, *supra* note 20, at 6.

125 *Id.* at 7.

126 *Id.* at 14.

127 *Id.* at 11.

128 *Id.* at 14.

129 *Id.* at 16.

130 *See generally* WATSON, *supra* note 50, at 109-11.

131 *Id.* at 109-11.

that they could sell the land for their own financial benefit.[132] George Mason identified the Illinois and Wabash purchases as the real sticking point to ratification of the Articles of Confederation.[133] The Articles were eventually ratified, and Virginia retained its abilities to deal with its interior land claims.[134] Nothing was resolved for the investors, but nothing had been precluded either.[135]

Ratification of the Articles of Confederation did not end the dispute over western lands. The debate centered on indigenous ownership of the land.[136] Those claiming that the indigenous people had ownership and the ability to sell the land were those who stood to benefit from the sales.[137] Eventually, Virginia ceded their western lands to the newly organized national government, but it was still unclear whether the Illinois and Wabash purchases would be considered valid.[138]

The ratification of the U.S. Constitution in 1789 gave more authority to a central government, which promptly used it to enact the Trade and Intercourse Act, prohibiting anyone but the federal government from buying lands from indigenous people.[139] All the while, the United Companies had been petitioning both the old and the new central government for an endorsement of their title.[140] When the Federalists lost legislative and executive power, owners of the companies, most of whom were members of the Federalist Party, continued to petition Congress, but also started to look to the court system.[141]

IV. A LAST-DITCH EFFORT: PLOTTING A PATH TO A SUPREME COURT DECISION

Having failed to validate their title through developing state and national legislatures and executives, the United Company owners turned to the courts.[142] Their efforts are a story of collusion among the parties and a court decision that went beyond the limited issues that were presented.[143]

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132 *Id.* at 111.
133 *Id.* at 112.
134 *Id.* at 117.
135 *Id.* at 117.
136 *See generally* WATSON, *supra* note 50.
137 *Id.* at 141.
138 *Id.* at 153.
139 ROBERTSON, *supra* note 20, at 19.
140 WATSON, *supra* note 50, at 194-95.
141 ROBERTSON, *supra* note 20, at 23.
142 *See generally* WATSON, *supra* note 50.
143 *See generally id.*

A. Rounding Up the Right Case

While a conflict between owners of the land was geographically real, there was no actual fight involved.[144] Johnson and McIntosh had claims to the same land, but they were not tussling over who got to move into a particular cabin in the woods. That would have been more convenient.

What the United Companies wanted was an opinion from the United States Supreme Court finding that the investors owned these lands.[145] Absent a real tussle in the woods, however, the investors had to construct a way to get themselves to court.

There were at least two layers of deception at work, one that appears to have been accepted legal practice at the time and one that does not square with notions of an adversarial case.[146]

The first level of deception was the nature of the dispute between the parties.[147] The case was an action for ejectment, between two parties who never existed, over a lease that was similarly non-existent.[148] This fact creation was so acceptable that the party names indicated the falsehood: Thomas Troublesome and Simon Peaceable.[149] This filing of an ejectment action was the way to get a property dispute before a court.[150] With fake disputants and a fake lease,[151] it is no surprise that a specific piece of property is not named.

But the deception runs deeper than the names of the parties to the ejectment. The entire case—from the selection of the venue to the selection of the parties to getting the fact before the court—was orchestrated by the United Illinois and Wabash Land Companies.[152] The conductor of this orchestration was Robert Goodloe Harper.[153] Harper had been working for the United Companies as early as drafting a memorial to Congress in 1810 outlining why Congress should confirm the Land Companies' titles.[154] Harper knew his audience, as he was the most frequently appearing advocate in the Supreme Court at the time.[155]

Harper's choice for the plaintiff was Thomas Johnson, Jr., a former governor of Maryland and one of the most well-respected owners of the

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144 *See generally id.*
145 *See generally id.*
146 *See generally id.* at 257.
147 *See generally id.* at 257.
148 WATSON, *supra* note 50, at 257.
149 *Id.* at 257.
150 *Id.* at 256-57 (citing LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 18-19 (1973)).
151 *Id.* at 257.
152 *See generally id.*
153 *Id.* at 243-49.
154 WATSON, *supra* note 50, at 243-49.
155 *Id.* at 251.

United Companies.[156] When Johnson died in 1819, Harper substituted Johnson's heirs, his son Joshua Johnson and grandson Thomas Jennings Grahame.[157] Harper also picked Indiana, where the only federal judge had once been hired by the United Companies, as the venue for the case.[158] Harper also sent one of the United Companies' shareholders, Benjamin Gratz, to find a defendant.[159] Gratz found a defendant but also found that the judge was hesitant about his potential conflict of interest.[160] If the only sitting judge were to have recused himself, it would have left the case with no judge at all,[161] so Harper nimbly shifted plans.

The next best option was Illinois, by now a state complete with a federal judge.[162] Gratz, now needing to find a defendant in Illinois, located William McIntosh.[163] McIntosh not only owned significant amounts of land in Illinois,[164] but he was accustomed to being in court. McIntosh's common-law wife, an African American woman, had to sue to prove she was not the property of another man.[165] Also, McIntosh had been successfully sued for slander by William Henry Harrison.[166] Here, McIntosh may have been motivated to be a part of the United Companies' lawsuit in order to embarrass Harrison,[167] who had executed the 1803 purchases of land in the northwest territory for the United States.

Harper's final orchestration was of the facts. A jury was impaneled, but one juror was removed, followed by the rest being excused.[168] This, too, was apparently a standard method for removing uncertainties like a jury from a case.[169] The decision was left to the judge. But even that was less than desirable for Harper, so the parties presented an agreed statement of facts.[170] The facts were based on Harper's 1810 memorial to Congress and stated that the independent tribes who had sold properties to the United Illinois and Wabash Land Companies were absolute owners and proprietors of the land they sold.[171] For good measure, the agreed facts stated that the transactions were fair, for good and valuable consideration, and that the parties met

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156 ROBERTSON, *supra* note 20, at 47.
157 *Id.* at 56-57.
158 *Id.* at 47.
159 *Id.* at 49.
160 *Id.* at 49-50.
161 *Id.* at 50.
162 ROBERTSON, *supra* note 20, at 50-53.
163 *Id.* at 51.
164 *William McIntosh*, *supra* note 29.
165 ROBERTSON, *supra* note 20, at 53 (citing U.S. & M'Intosh v. Vanarsdal, 198, 207, 240, & M'Intosh v. Vanarsdal, 299, 340).
166 *Id.* at 51-53.
167 *Id.* at 51.
168 Kades, *supra* note 2, at 101.
169 *Id.* at 101.
170 WATSON, *supra* note 50, at 257.
171 *Id.* at 258.

federal diversity requirements.[172] Harper had successfully narrowed the issue to the effect of the Royal Proclamation of 1763 prohibiting individual land purchases from Indians west of the Allegheny Mountains.[173] With no dispute on the facts, the judge issued the order planned by Harper, a brief order, with no reasoning, finding for McIntosh.[174] The case was set for appeal, and McIntosh waived a required appeal bond from the plaintiffs.[175] In the estimation of Professor Lindsay Robertson, the "magnitude of Harper's accomplishment, and the facility with which he achieved it, can hardly be overstated."[176]

Harper had accomplished everything he needed to in order to cue up a winning case at the United States Supreme Court. The facts were limited and favorable to his client. The Supreme Court heard arguments for three days.[177] Despite the agreed facts and despite every edge that Harper had lined up in favor of the United Companies, the Supreme Court found that the United Companies did not "exhibit a title which can be sustained in the Courts of the United States."[178]

B. At the Surface: What the Court Wrote

The decision in *Johnson v. M'Intosh* was written by Chief Justice John Marshall, with no dissenting votes or opinions.[179] The lack of dissent was common at the time,[180] although Justice Johnson had only recently issued a dissent in a case where he suspected the controversy was a false one.[181] The decision in *Johnson v. M'Intosh* handled the controversy before the Court in a way that was predicted by some. But it went beyond that controversy in a way that resolved other matters not before the Court and affected other people, specifically indigenous peoples, in profound, lasting, and negative ways.

Marshall started his opinion by framing the question as being "confined to the powers of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country."[182] Marshall answered his questions in two steps, first, the principle of discovery, and second, the limited ownership rights of Indians.

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172 *Id.* at 258-59.
173 ROBERTSON, *supra* note 20, at 56.
174 WATSON, *supra* note 50, at 259.
175 Kades, *supra* note 2, at 101.
176 ROBERTSON, *supra* note 20, at 58.
177 *Id.* at 68, 72-73.
178 *M'Intosh*, 21 U.S. at 605.
179 *Id.* at 571.
180 Meredith Kolsky, *Justice William Johnson and the History of Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995).
181 WATSON, *supra* note 50, at 234.
182 *M'Intosh*, 21 U.S. at 572.

Discovery is a principle that makes sense. Someone who discovers a thing that is unknown to others can claim ownership over that thing.[183] Marshall applied this theory to the foundational question of which European nations could claim "discovery" of "this immense continent."[184] But Marshall acknowledged that the new continent was inhabited, "and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency."[185] So the discovery wasn't so much a discovery as it was a way to solve disputes among the European nations claiming territory in this continent.[186] Marshall wrote that once this "discovery" was made, the discovering nation was the exclusive authority to set the rules about who owned the discovered lands, and no other European nation could interfere.[187]

Marshall then listed how other European powers all had taken title to lands they discovered[188] and that the country most fully enamored with the powers of discovery was England.[189] England asserted that discovery had given it the power to take possession of the land even if the land was occupied by the natives, "who were heathens."[190] After the Revolutionary War, all that had belonged to England was now that of the United States.[191] That included the "exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[192] Marshall then follows his logical path and states that no other persons or governments can assert control when the discovering nation has the absolute right to extinguish any native claims to the land.[193]

Marshall then folded into his decision the theory of conquest, noting that conquest gave the sovereign the same right to extinguish native title.[194] According to Marshall, the victor in conquest should blend the defeated people into the nation as possible or govern them as a distinct people.[195] But the natives of this country, "whose occupation was war, and whose subsistence was drawn chiefly from the forest," could not be governed.[196] As European populations and agricultural practices advanced, the land became

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183 For more discussion on the Doctrine of Discovery, see generally Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847 (2011).

184 *M'Intosh*, 21 U.S. at 572.

185 *Id.* at 573.

186 *Id.* at 573.

187 *Id.* at 573.

188 *Id.* at 574-76.

189 *Id.* at 576-79.

190 *M'Intosh*, 21 U.S. at 577.

191 *Id.* at 584.

192 *Id.* at 587.

193 *Id.* at 588.

194 *Id.* at 588.

195 *Id.* at 589-90.

196 *M'Intosh*, 21 U.S. at 590.

"unfit for Indians," Marshall stated.[197] And so, because the law of conquest could not have been followed, a different tradition developed, and the new tradition became "the law of the land, and cannot be questioned."[198] That circumstance built the new reality "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."[199]

Marshall concluded by noting that this case took so much time and attention only because of "the magnitude of the interest in the litigation and the able and elaborate arguments of the bar"[200] The "Court is decidedly of the opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States."[201]

So, the elaborate preparation by Robert Goodloe Harper, with every possible fact fixed in favor of the United Illinois and Wabash Land Companies, turned into what Marshall thought was a slam dunk for the other side.

C. A Deeper Look at the Decision's Language and Reasoning

The structure of the decision alone calls readers to look at the case closely. Many have taken that closer look, including the authors of two books[202] and numerous articles.[203] Some attempt to understand or describe the decision, and some critique it. This extra consideration helps show what may have been a less obvious agenda for the Court, and results that extend even further.

Marshall's decision invites critical reading in several ways. The first is its structure. Lawyers are careful readers with expectations that are both logical and traditional. Lawyers expect the structure of legal analysis to identify the issue, identify the law that governs the issue, explain that law, apply it to the facts of the current dispute, and conclude.[204] Law professors know that students will often struggle with this structure, change the order, and often leave out important steps. Marshall's opinion in *Johnson v. M'Intosh* would not earn him top grades for writing.

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197 *Id.* at 591.
198 *Id.* at 591.
199 *Id.* at 591.
200 *Id.* at 604.
201 *Id.* at 604-05.
202 ROBERTSON, *supra* note 20, at 101; WATSON, *supra* note 50, at 258.
203 ROBERTSON, *supra* note 20. Robertson noted more than 750 articles citing the case in a twenty-year period.
204 RICHARD K. NEUMANN, JR., SHEILA SIMON & SUZIANNE D. PAINTER-THORNE, LEGAL WRITING (4th ed. 2019).

To start, Marshall gets full credit for a clear issue statement. Next, instead of a statement of the rule, Marshall wanders into history, a history that is often beyond the agreed facts of the case.[205] Marshall's history comes, in large part, from his own writing in a biography of George Washington.[206] This is not plagiarism, Justice Marshall, but not a good practice either. Then Marshall states his rule about discovery, based on international practice, and an exclusive right to extinguish the Indian title based apparently not on any law, but on the practice of England and other countries.[207] Marshall proceeds to lose even more points on his grade by slipping in the issue of conquest without explaining why this is important to resolving the current dispute.[208] Marshall gets to precedent for his decision only *after* he has made his conclusion.[209]

Finally, Marshall's concluding paragraph indicates that this decision was actually very easy to make.[210] This is the equivalent of a student writing in a memo that a defendant will "clearly" be found guilty. The word "clearly," just like Marshall's assertion that the case was easy, will make many legal readers doubt the writer even more and wonder what kind of insecurity these words are trying to cover.

From a very broad perspective, Professor Joseph Singer sees *Johnson v. M'Intosh* as one in a series of United States Supreme Court cases that shape property law to reflect relationships among people.[211] The relationships set out by the Court, according to Singer, are based on a racial caste system that gives less protection to the property rights of indigenous people and more protection to the property rights of non-indigenous people.[212] That is the essence of Johnson. Professor Robert Williams sees this racism as fitting into the structure identified by Albert Memmi—that first real or imaginary differences are identified by the racist, then an assignment of value is given to those differences, next a generalization is made about the differences, and finally using those differences to justify privilege or aggression.[213]

Other theories about why we establish and protect some property interests are useful to understanding Johnson. One such theory came from John Locke, who wrote that people own their bodies and their labor, and when they use their labor on something, their labor then becomes a part of

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205 *See generally* ROBERTSON, *supra* note 20, at 101.

206 *Id.* at 101.

207 *M'Intosh*, 21 U.S. at 593.

208 *Id.* at 589.

209 *See generally id.*

210 *Id.* at 604-05.

211 Joseph W. Singer, *Sovereignty and Property*, 86 NW. UNIV. L. REV. 1, 47-50 (1991).

212 *Id.* at 43-44.

213 Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 262 (1989).

that thing, and they become the owner of the thing.[214] Under this theory, a farmer can turn unowned land into their own land by their efforts on the land.[215] Locke noted that this applied where there was still enough land left for others.[216] Some saw this labor theory as particularly well-suited to the European settlement of North America because "land was plentiful, one person's occupation of land did not deny his neighbor the chance to gain land too."[217] Of course, European settlement really did deny land to the indigenous neighbor, who may have actually been the occupant or owner of the land previously.[218]

Locke's theory, in fact, fit perfectly with those who wanted to continue to work on and achieve ownership of lands in North America. Professor Robert Williams connects Locke's theories on labor and property with Locke's understanding of a biblical imperative to work the land and Locke's misunderstanding of indigenous life and culture in North America.[219] Locke stated that natives in the Americas were furnished with plenty, but because of their failure to improve the land through labor, their material life was "worse than a day laborer in England."[220] Locke's ideal of the value of labor actually devalued labor when it was that of indigenous peoples in North America.

Locke's theory, and its flaws, are more than 400 years old.[221] A newer addition to theories of property is Margaret Jane Radin's theory that some connections between property and personal identity are so strong that they should have legal significance.[222] Professor Kenneth Bobroth wrote that this theory of personhood fits neatly with some indigenous groups' concerns about selling land to persons outside of the group, seen as threatening the identity of the group.[223] While this theory is indeed a good fit, it does not yet reach beyond theory and into practice.

A theory with both intellectual legs and real-world application is that of possession, specifically adverse possession. Professor Carol Rose asserts that

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214 JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Essay Two, § V, ¶ 27 (P. Laslett rev. ed. 1963).

215 *See generally id.*

216 *Id.* He described it as at least where there is enough, and as good, left in common for others.

217 Eric Freyfogel, *Owning the land: Four Contemporary Narratives*, 13 FLA. STATE UNIV. J. OF LAND USE & ENV'T L., 279, 282 (1998) (citing CAROLYN MERCHANT, REINVENTING EDEN: WESTERN CULTURE AS A RECOVERY NARRATIVE, *in* UNCOMMON GROUND: TOWARD REINVENTING NATURE 154-56 (William Cronon ed. 1995)).

218 *See* Mark Armao, *Study: Indigenous tribes lost 99% of land to colonization*, GRIST (Oct. 28, 2021), https://grist.org/accountability/indigenous-land-loss-forced-people-into-land-with-higher-climate-risks/ (describing a study published that confirmed "[t]he colonization of North America resulted in near-total land loss for the continent's original inhabitants" and discussed the other impacts this land loss had on these inhabitants).

219 Williams, *supra* note 213, at 262.

220 *Id.* at 252 (citing LOCKE, *supra* note 214).

221 *See generally* LOCKE, *supra* note 214.

222 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1013-15 (1982).

223 Bobroff, *supra* note 5, at 537.

our legal system identifies first possession as the most important factor in determining ownership.[224] But, first possession is not a guarantee because the doctrine of adverse possession rewards owners who do something to show their possession of the land, and the doctrine also rewards interlopers who make obvious and effective use of the land.[225] Rose cites an argument made by the attorney for McIntosh that could have helped Marshall with his decision.[226] The argument was that the people who sold land to the United Companies had not taken acts sufficient to establish property rights.[227] In other words, they had not made it evident that they were owners.[228] This argument was based on an assumption about the sellers of the land as people who moved from place to place and left few traces of their occupancy.[229] This assertion about where and how indigenous people lived falls somewhere between generalization and myth, as will be discussed in Section V of this article.

The theories of labor, personhood, and first possession combined with adverse possession all contribute to the understanding of the *Johnson v. M'Intosh* decision. But the two scholars with the most practical takes on the case are Eric Kades and Lindsay Robertson.[230] Both Kades and Robertson examine the decision in terms of historical circumstances. Chief Justice Marshall's decision points to these same realities in language that is remarkably honest. In referring to his conclusion that Indians had no ability to transfer title to their lands to anyone but the government, he wrote, "[h]owever 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."[231]

Professor Kades's practical take on *Johnson v. M'Intosh* is that the Court understood the immensity of possible application of a ruling from this case and formed a rule that allowed for the continued, inexpensive takeover of indigenous lands.[232] Marshall could have found the United Companies'

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224 Carol M. Rose, *Possession as the Origin of Property*, 52 UNIV. CHI. L. REV. 73, 75-76 (1985). The ideas of first possession, prescription, conquest, and contract are also discussed in Richard Epstein's article, *Property Rights Claims of Indigenous Populations: The View from the Common Law*, 31 UNIV. TOLEDO L. REV. 1, 6 (1999), in which Epstein credits Chief Justice Marshall for not trying to make *Johnson v. M'Intosh* easier by denying the early conveyances by the Illinois and Piankeshaw.

225 Rose, *supra* note 224, at 78-79.

226 *Id.* at 85.

227 *Id.* at 85-86.

228 *Id.* at 85-86.

229 *Id.* at 86.

230 *See generally* Kades, *supra* note 2; ROBERTSON, *supra* note 20, at 101.

231 *M'Intosh*, 21 U.S. at 591-92.

232 *See generally* Kades, *supra* note 2.

purchases invalid based on either the Royal Proclamation of 1763 or a Virginia statute of 1662, both of which prohibited sales from Indians to anyone but the crown.[233] Kades asserts that the decision goes beyond that limited but sufficient basis in order to establish a broad ruling that would cover even more purchases of land from indigenous people.[234]

Kades also identifies custom as the legal basis for Marshall's decision.[235] This is a good choice, on at least one level, because Marshall does not identify or discuss anything in the United States Constitution that leads to the resolution of the case.[236] The use of custom fits well in considering the claims in *Johnson v. M'Intosh* because there are elements of international law throughout the case, and custom is an important source of international law.[237] Marshall refers to England, Spain, France, and Holland in explaining the discovery rule.[238] Even after resolving the discovery issue, Marshall continues to refer to the Indians as having a nation and laws,[239] so the continued use of international law principles, such as custom, continues to work well.[240]

While Kades's identification of Marshall's motivation and course is on track, it is Kades's brutally honest assessment of the broad impact the decision would have that is most compelling. Kades asserts that the decision in *Johnson v. M'Intosh* was directed at allowing cheap expansion of the new nation.[241] Kades explains that permitting only a single buyer can allow that single buyer to control the market in just the same way as having a single seller can control the market.[242] While a single seller can demand high prices, a single buyer can set a low price.[243] And a low price for vast amounts of land held by indigenous people meant a great opportunity for European-American westward expansion.[244]

Professor Lyndsay Robertson's practical understanding of the decision in *Johnson v. M'Intosh* is similar to that of Kades, but more specific. Marshall had personal interests and institutional interests that could all be wrapped up

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233 *Id.* at 103.

234 *Id.* at 103.

235 *Id.* at 107-10. Joshua Seifert, in a student note, also identifies custom as the basis for Marshall's decision. *See* Joshua Seifert, *The Myth of Johnson v. M'Intosh*, 52 UCLA L. REV. 290, 290-91 (2004).

236 Kades, *supra* note 2, at 110.

237 As an example, the International Court of Justice has identified custom as one of four sources of international law. I.C.J. statute, Article 38.

238 *M'Intosh*, 21 U.S. at 574, 579.

239 *Id.* at 593.

240 *See supra* note 237.

241 *See generally* Kades, *supra* note 2, at 111.

242 *Id.* at 111.

243 *Id.* at 111.

244 *Id.* at 111.

by stepping just outside the boundaries of the case presented to him.[245] Marshall's personal interest came from land he was granted by virtue of his service in the revolutionary war.[246] Marshall's father was involved in land claims, in what is now Kentucky, for veterans from Virginia.[247] Marshall's father, on behalf of the militia, sued George Rogers Clark over those competing land claims between Virginia veterans, the new state of Kentucky, and the Chickasaw.[248] Chief Justice Marshall decided *Johnson v. M'Intosh* in a way that also resolved the Kentucky claims—favorably to the Virginia veterans.[249]

Marshall not only had personal interests in the *Johnson* case, but he had institutional interests as well.[250] The United States Supreme Court decided the case of *Fletcher v. Peck* in 1810.[251] The case involved multiple levels of corruption, including a false deed between two investors and a procedural sleight of hand to allow the case to reach the United States Supreme Court.[252] The level of trickery was apparent to Justice William Johnson, who, in a dissent, wrote, "I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case."[253] Robertson asserts that finding for the plaintiffs in *Johnson* would subject the Court to allegations of misuse of power similar to those that followed the decision in *Fletcher*.[254]

In *Johnson v. M'Intosh*, Chief Justice John Marshall wrote that the case was easy to decide, yet he cited little authority for support. This tension and others have caused many scholars to review the decision and attempt to parse the reasoning Marshall used, along with what might not be apparent in the decision itself. Certainly, the case is based on racism—the value of land ownership is weighed differently for European-Americans than for indigenous people. Racism plays into the application of what seems to be a neutral theory of property acquisition, Locke's labor theory of property. Here too, one people's labor is valued differently than another people's labor. A theory of property and personhood, certainly more recent than the case, has intuitive appeal in this situation but was not around to help with the decision. Ideas of first possession and adverse possession may be at work in the case, but again even ideas that seem neutral can fail when cultures have different uses and values for property. The most practical theories find that Marshall

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245 ROBERTSON, *supra* note 20, at 92.
246 *Id.* at 86.
247 *Id.* at 87.
248 *Id.* at 87.
249 *Id.* at 92.
250 *Id.* at 77.
251 Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).
252 ROBERTSON, *supra* note 20, at 30-35.
253 *Id.* at 35 (citing *Peck*, 10 U.S. at 147-48).
254 *Id.* at 74.

understood both the breadth of the problem at hand and how the case would affect his own interests and those of his institution. This final assessment squares with Thomas Jefferson's critique of the opinion. In a letter, Jefferson wrote, "this practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable."[255]

Knowing the decision and its reasoning, both express and implied, the next question is what was not in this decision.

V. A COLLUSIVE CASE PAVES THE WAY TO FACTUAL ERRORS

Knowing the language of the decision in *Johnson v. M'Intosh* and exploring some theories about the decision is still not enough to understand the case and its impact. The case is supported by information that is incomplete or incorrect, particularly when it comes to how people use and value land. This incomplete information is the result of a powerful combination of a collusive case and race-based assumptions.

The United States Constitution allows the federal judiciary to hear "cases and controversies."[256] As early as 1793, the Supreme Court declined President George Washington's request for an advisory opinion because there was no case present.[257] Requiring an actual controversy—someone with a stake in the outcome—helps to ensure that a court is fully informed before making a decision that will have a binding effect beyond the case itself. [258]

Joshua Johnson and Thomas Grahame, as heirs to an owner of the United Illinois and Indiana Land Companies, had an ownership interest that overlapped with land owned by William McIntosh,[259] but there was no adversarial case or controversy.[260] McIntosh, the defendant, was selected by Benjamin Gratz, one of the shareholders of the United Companies.[261] The venue, the attorneys for McIntosh, and the agreed facts of the case were all arranged by Robert Goodloe Harper, the attorney for the United Companies.[262]

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255 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 15, 92 (1823).

256 U.S. CONST. art. III, § 2.

257 *ArtIII.S2.C1.4.2 Advisory Opinion Doctrine and Practice*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-4-2/ALDE_00013564/(last visited Nov. 9, 2022) (citing Letter from Chief Justice Jay and Associate Justices to President George Washington (August 8, 1793) *reprinted in* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 52 (7th ed. 2015)).

258 Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306-08 (1979).

259 *See infra* section II.

260 *See generally M'Intosh*, 21 U.S. 543.

261 *See infra* section IV.

262 *See infra* section IV.

The case before the Court had potential, but not actual, controversy. The case did, however, present an opportunity for the Court to determine a much broader question: what rights did indigenous people have to the land? In arguments before the Supreme Court, the parties presented differing views. The United Companies argued that all or nearly all of the land in the United States was purchased from indigenous people,[263] and at the time of the purchases involved in the case, there was no prohibition against purchases by individuals.[264] McIntosh's attorneys argued that indigenous people had limited property rights and had no power to sell land.[265] They argued that indigenous people had no more rights to land they hunted on than did those who fished have a right to own and sell the sea.[266] They also asserted that neither individual nor collective groups of indigenous people could have title to land because they did not use the land "in such a manner as to prevent their being appropriated by cultivators."[267]

So, while the case may have had a pre-packaged controversy between two landowners, there was a controversy about what rights indigenous people had to the lands on which they lived.[268] That controversy was litigated by two sides composed exclusively of European-American litigants and European-American attorneys.

Our current federal legal system allows for joinder of a party in instances when a person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest."[269] And where joinder is not feasible or possible, a court can dismiss a case or take other measures to ensure that a non-party will not be harmed.[270]

A final method for non-represented parties to participate in a case is by way of an *amicus curiae* brief. Amicus briefs had been used in courts in England as early as 1736 as a vehicle to call attention to collusive lawsuits.[271]

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263 *M'Intosh*, 21 U.S. at 563.

264 *Id.* at 566.

265 *Id.* at 567.

266 *Id.* at 569, 570.

267 *Id.* at 570.

268 *See generally id.* at 569.

269 FED. R. CIV. P. 19(a)(1)(B)(i). The idea behind Rule 19 is well distilled in the motto "nothing about us without us." This motto is long used by Marca Bristo and other disabled advocates in the movement to gain rights and recognition for people with disabilities. *Nothing about us without us*, CHI. CMTY. TR., https://www.cct.org/stories/nothing-about-us-without-us/ (last visited August 4, 2022). Bristo was a leading advocate for the Americans with Disabilities Act. Glenn Rifkin, *Marca Bristo, Influential Advocate for the Disabled, Dies at 66*, N.Y. TIMES (Sept. 8, 2019), https://www.nytimes.com/2019/09/08/obituaries/marca-bristo-dead.html.

270 FED. R. CIV. P. 19 (b).

271 Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694, 696 (1963).

Though possible, an amicus brief was rare, and the first such brief filed in the United States Supreme Court was in the case of *Green v. Biddle* in 1821.[272] The *Green* case is curiously related to *Johnson v. M'Intosh* in that the *Green* opinion was issued one day before *Johnson*, and together with *Johnson*, the cases resolved a large number of issues related to Indian title.[273] The amicus in *Green* sought a rehearing based on the rights of occupants of land in Kentucky that were not being represented.[274]

The Illinois and the Piankeshaw, not to mention all other tribes west of the Allegheny Mountains, were not original parties to the suit, not joined in the suit, and were not represented by any amicus attention.[275] Their legal interests were not represented, but they were certainly affected by the decision in the case.[276] Although the Illinois and Piankeshaw had sold their land, they, and all other native peoples, had just lost the ability to fully own the land that they had lived on, hunted on, and farmed for generations.[277]

So, without a case or controversy, without parties who represent an interest at stake, and without the benefit of amicus action, a case was decided that had an impact on the Illinois, the Piankeshaw, and all others who occupied and used the land of their ancestors. If they had been a part of the case in some way, the Court could have had the opportunity to hear the truth about Illinois and Piankeshaw land use practices and the value of land to those original occupants.

Participation of the Illinois and the Piankeshaw could have helped the Court understand Illinois and Piankeshaw land use practices and avoid factual errors upon which the case decision was built. The agreed facts of the case stated that tribes were the sovereigns and owners of territory that Europeans came to purchase.[278] The agreed facts also state that the land was owned in common with no separate ownership.[279] There was no information in the agreed facts about land use practices of the Illinois and Piankeshaw.[280]

Oral arguments presented to the Court contained information that was similar. The attorney for the defendant asserted that "[Indians] remain in a state of nature, and have never been admitted into the general society of nations."[281] They also stated that the "Indians never had any idea of individual property in land."[282] According to the defense, indigenous people

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272 *Id.* at 700.
273 ROBERTSON, *supra* note 20, at 92.
274 Krislov, *supra* note 271, at 700.
275 *See generally M'Intosh*, 21 U.S. at 548.
276 *See generally id.* at 548.
277 *See generally id.* at 548.
278 *Id.* at 545.
279 *Id.* at 550.
280 *See generally id.*
281 *M'Intos*h, 21 U.S. at 567.
282 *Id.* at 568.

could have acquired no proprietary interest in the vast tracts of territory which they wandered over: and their right to the lands on which they hunted could not be considered superior to that which is acquired to the sea by fishing in it.[283] Finally, the defense stated that "the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators."[284]

The Court adopted the assertions of the defendant with regard to natives and land.[285] Marshall's opinion described the natives as "fierce savages, . . . whose subsistence was drawn chiefly from the forest."[286] Then, describing what was thought to be current circumstances, Marshall wrote, "As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturalists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed."[287]

Between the agreed facts, the assertions of the defense, and the factual findings of the Court's opinion, the picture of the Illinois and the Piankeshaw was that of a group of people who used land collectively, strictly for hunting, in a way that was incompatible with agricultural production. Each of these assertions, assumptions, and conclusions were wrong.

The assertion that indigenous people only owned land collectively was wrong. Generalizations can easily be overbroad, and generalizations based on race are particularly suspect. The generalizations about collective ownership are probably based on the inability or unwillingness of European-Americans to see and understand another culture.

A reexamination of native land ownership can start with broad considerations, but it should proceed to considerations of specific peoples and specific places. In cultures around the world, rights to land vary depending on the land.[288] In areas where crops are planted, land rights for at least the production season are often limited to a family group.[289] On this continent, before Europeans came, native populations had many different political and cultural systems, including different systems for managing land and allocating resources.[290] Some differences in land-holding practices were based on differences in the physical landscapes where a particular group

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283 *Id.* at 569, 570.

284 *Id.* at 570.

285 *See id.* at 562.

286 *Id.* at 590.

287 *M'Intosh*, 21 U.S. at 590, 591.

288 Martin Bailey, *Approximate Optimality of Aboriginal Property Rights*, 35 J. OF L. & ECON. 183, 184 (1992).

289 *Id.* at 191-92.

290 Jessica Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J. L., PROP. & SOC'Y 11 (2020).

lived.[291] Professor Douglas Hurt argues that even generalizations based on tribes may be overbroad, and a small group, similar to a Greek city-state, is a better focus.[292] At least one concept of land use in these small groups involved a large territory under the control of the community, but within that territory, cultivated fields belong to family lines, with the oldest woman in a particular family line exerting overall control of her family's cultivated land.[293] Looking broadly at land practices in North America and beyond, there is at least the possibility of family-based rather than group-based land control.[294]

The next step is to focus on the land practices of the Illinois and the Piankeshaw, the groups who sold land to both the plaintiff and defendants in *Johnson v. M'Intosh*.[295] With a more specific focus, some of the problems with generalization are removed, but there are still difficulties in establishing an accurate history. Even as early as 1920, Illinois historian Clarence Alvord noted that since most of the recorded observations about native life were made by Europeans and not the natives themselves, "[t]he story must therefore be told with the use of many question marks and with many confessions of ignorance."[296]

With those limitations expressed, there is some knowledge of land control practices in what is now Southern Illinois and Southern Indiana. Cultures from up to 2,000 years ago had settled in what is now Jackson County, Illinois, and grew crops and traded up and down the Mississippi.[297] About 1,000 years ago, farming was the most important means of providing food in the Mississippi valley in what is now the state of Illinois.[298] The Illinois did engage in hunting and foraging, but cultivating corn was their main subsistence.[299] Preparing a field to grow corn was an investment of much time, so villages became more permanent, at least during the growing season.[300] While the land may have been considered to belong to a village, the crops belonged to the individual women who grew the crops.[301] In sum, land control practices varied, but among people who practiced agriculture, villages rather than tribes controlled property, and there were elements of individual ownership.[302]

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291 *Id*.
292 R. DOUGLAS HURT, INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT 65 (1987).
293 *Id*. at 66.
294 *See generally id.* at 65.
295 *See generally M'Intosh*, 21 U.S. 543.
296 CLARENCE W. ALVORD, THE ILLINOIS COUNTRY: 1673-1818 21 (Univ. of Ill. Press 1987) (1920).
297 IRVIN M. PEITHMANN, INDIANS OF SOUTHERN ILLINOIS 29-30 (1955).
298 *Id.* at 34, 35.
299 *Id.* at 39.
300 *Id.* at 40.
301 *Id.* at 42.
302 *See generally id.*

This brings us to the next factual flaw in the *Johnson v. M'Intosh* opinion—the idea that indigenous people use land exclusively for hunting and not agriculture.[303] This assertion was inconsistent with what is known now, and even with what was known at the time of the case.

As early as 1666, French soldiers fighting the Onandagas described cornfields two miles long on either side of a village.[304] Even a source that was cited in *Johnson v. M'Intosh* to support a theory of natives living in a "state of nature"[305] recorded the growing of corn by Iroquois people in New York.[306]

Current methods of identifying where people have lived and where they came from tell us even more. The combined work of archaeologists and geneticists continues to push back the date that what is now North America was first populated—possibly as early as 30,000 years ago.[307] In the area that is now Illinois, people settled in semi-permanent locations as early as 3,000 to 5,000 years ago.[308] Small, garden-type agriculture probably began around 3,000 years ago, with cultivation that included squash, corn, and beans.[309] Around 2,000 years ago, people in the area lived in villages, engaged in agriculture, and used the rivers as a means to trade throughout a large area.[310]

People living farther south, in what is now Illinois, practiced more agriculture than those from the north.[311] Glacial deposits and easily worked soil made agriculture an important part of life in Southern Illinois 1,000 years ago.[312] Flint hoes, made from local material, are common artifacts in the area from around the same time.[313]

In history recorded by Europeans, agriculture was prominent.[314] DeSoto's expedition would have failed due to starvation but for corn grown by local people.[315] In 1699, Chief Black Hawk, further north in what is now Illinois, stated that there were 800 acres in cultivation on either side of the

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303 *M'Intosh*, 21 U.S. at 570.

304 Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of the Property Rights*, 77 N.C. L. REV. 637, 659 (1999) (citing MATTHEW DENNIS, CULTIVATING A LANDSCAPE OF PEACE: IROQUOIS-EUROPEAN ENCOUNTERS IN SEVENTEENTH-CENTURY AMERICA 27-28 (1993)).

305 *M'Intosh*, 21 U.S. at 567, n.f.

306 Dussias, *supra* note 304, at 651-52.

307 JENNIFER RAFF, ORIGIN: A GENETIC HISTORY OF THE AMERICAS xviii (Hatchet Book Group 2022).

308 PEITHMANN, *supra* note 297, at 29-30.

309 *Id.* at 23-26.

310 *Id.* at 30.

311 *Id.* at 39.

312 Melvin Fowler & Robert Hall, *Late Prehistory of the Illinois Area*, *in* 15 HANDBOOK OF NORTH AMERICAN INDIANS 560, 560-61 (Bruce Trigger ed. 1978).

313 *Id.* at 566.

314 *See generally* Carl Zimmer, *Agriculture Linked to DNA Changes in Ancient Europe*, N.Y. TIMES: MATTER (Nov. 23, 2015), https://www.nytimes.com/2015/11/24/science/agriculture-linked-to-dna-changes-in-ancient-europe.html.

315 HURT, *supra* note 93, at 28.

Mississippi.[316] In that same time period, the Illinois were farming in the rich valley further south along the Mississippi.[317] The farmers—women—planted corn, squash, and beans in the same location.[318] Not only did the combination of foods provide protein and nutrition, the plants themselves interacted symbiotically.[319] The corn provided a stalk for the beans to climb, the beans provided nitrogen for the corn, and the large leaves of the squash vines covered the soil and discouraged weed growth.[320] The Europeans were taught to farm corn by the natives, and the variety of corn used then became the basis for many hybrids used today.[321]

So how could indigenous settlement and agriculture have been both so important to both indigenous and European populations and ignored in a United States Supreme Court decision? The answer may be something we now call intersectionality.[322] Not only was the farming done by a group of people considered to be "fierce savages,"[323] it was done by the women among them.[324] It is clear that work done by women was disregarded.[325] Early French explorers spent most of their time along the rivers and got a limited perspective on land use.[326] A closer look would have shown that there was farming, done largely by women.[327] The explorers met some men among the Illinois who behaved as women, noting that these men "[g]lory in demeaning themselves to do everything the women do."[328] Professor Allison Dussias summarizes well:

> The fact that farming was women's work might simply have been regarded as evidence that farming did not make a significant contribution to the Indians' livelihood. In other words, the Court might have concluded that if such work were important to the tribes, they would not have entrusted it primarily to women.[329]

Without an adversarial exchange, important facts were not included in the record. Without a controversy, the Court was free to rely on assumptions based on a lack of cross-cultural understanding. The Court either missed or

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316 *Id.* at 36.
317 Dussias, *supra* note 304, at 668.
318 *Id.* at 668 (citing HURT, *supra* note 93, at 11).
319 *Id.* at 668-69.
320 *Id.* at 668-69.
321 HURT, *supra* note 93, at 15.
322 *See What is Intersectionality*, NAT'L L. REV., Oct. 22, 2022.
323 *M'Intosh*, 21 U.S. at 590.
324 ALVORD, *supra* note 296, at 42.
325 *See generally id.*
326 *Id.* at 29.
327 *Id.* at 41.
328 Raymond Hauser, *The Berdache and the Illinois Indian Tribe During the Last Half of the Seventeenth Century*, ETHNOHISTORY, Winter 1990, at 45.
329 Dussias, *supra* note 304, at 652-53.

misstated important factual details. Missing those practical details also meant missing some ideas at a more conceptual level, such as the value people held for property.

Chief Justice Marshall described law about property as something "the Creator of all things has impressed on the mind of his creature."[330] But differing cultures have differing belief systems, including understanding of what our legal system calls real property.[331] To establish the possibility of differing attitudes to property, consider a statement by a local leader in Zimbabwe who compared the idea of buying land to the idea of buying the wind. [332] A similar idea was expressed by Chief Sealth, for whom Seattle was named.[333] He compared the idea of buying land to buying or selling the sky, the freshness of the air, and the sparkle of water.[334]

Closer to the Midwest, Professor Bobroff quotes a Lakota view on land, "To the Lakota land is the mother of all that lives, the source of life itself—a living, breathing entity—quite literally a person.[335] This stands in stark contrast to the laws of the United States, which concluded that, for some purposes, a corporation is a person.[336] Professor Robin Wall Kimmerer, a member of the Citizen Potawatomi Nation, describes that instead of a private property economy, she knows a "gift economy," which creates a set of relationships.[337] "In Western thinking, private land is understood to be a 'bundle of rights,' whereas in a gift economy property has a 'bundle of responsibilities' attached."[338] As Professor William Cronon describes it, "The difference between Indians and Europeans was not that one had property and the other had none; rather, it was that they loved property differently."[339] We all come from people who were attached to the land, even if we now use computers as our tools, work in air-conditioned offices, and feel less of that connection.[340]

Because the Supreme Court could not see and understand, or because they did not want to see and understand another culture, their decision in

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330 *M'Intosh*, 21 U.S. at 572.

331 *See generally* Dr. Hernando de Soto, *Putting Aside Differing Cultures: It is Instructions and Systems*, 13 L. & BUS. REV. AM. 3 (2007).

332 SIMON WINCHESTER, LAND: HOW THE HUNGER FOR OWNERSHIP SHAPED THE MODERN WORLD 369 (HarperCollins Pub. 2021).

333 *See id.* at 405.

334 *Id.* at 405 (noting the speech by Chief Sealth exists in many versions and may be romanticized).

335 Bobroff, *supra* note 5, at 536.

336 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343 (2010).

337 ROBIN WALL KIMMERER, BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHING OF PLANTS 28 (2013).

338 *Id.* at 28.

339 Bobroff, *supra* note 5, at 534 (quoting WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS AND THE ECOLOGY OF NEW ENGLAND 80 (1983)).

340 *See* TIM PARKS, THE HERO'S WAY: WALKING WITH GARIBALDI FROM ROME TO RAVENNA 56 (2021).

Johnson v. M'Intosh was based on flawed facts.[341] The truth may have led to a different result, but because the Illinois and the Piankeshaw were not present in the case to tell their truth, the flawed decision set the course for continued racist results.[342]

VI. THE POWERFUL IMPACT OF *JOHNSON V. M'INTOSH*

Chief Justice Marshall's opinion in *Johnson v. M'Intosh* had direct and immediate impacts, but the impact has also lasted beyond its time and beyond the boundaries of the United States.[343] The decision launched the removal of the Cherokee people from Georgia by way of the infamous Trail of Tears.[344] Cheap land for the United States government promoted more western settlement and further purchase of western lands.[345] And the decision has had an influence on Canada, Australia, and New Zealand.

Chief Justice John Marshall's impact on the Court and the country is unquestioned. In *Marbury v. Madison*[346] and *McCulloch v. Maryland*,[347] Marshall defined the role of the Supreme Court and the federal government in relation to the states.[348] But *Johnson v. M'Intosh* has had a tremendous impact as well.[349]

The decision was used as a tool to force the Cherokee out of Georgia.[350] After *Johnson v. M'Intosh*, Georgia enacted a law in 1828 that took ownership of all territory occupied by the Cherokee.[351] The law gave the Cherokee two years to leave before losing any sovereignty they had.[352] President Andrew Jackson, sworn into office in 1829, followed by promoting similar federal legislation.[353] *Johnson v. M'Intosh*, and its conclusions about limited indigenous title, was part of the debate that eventually led to passage of the bill.[354] Chief Justice Marshall kept up with the congressional action on the removal bill and wrote in a letter that "Humanity must bewail the course which is pursued."[355] Marshall seemed to try to prevent that course in his

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341 *See generally* Matthew L.M. Fletcher, *New Book by Blake Watson on Johnson v. M'Intosh*, TURTLE TALK (July 23, 2012), https://turtletalk.blog/tag/johnson-v-mintosh/.
342 *See generally M'Intosh*, 21 U.S. 543.
343 *See generally* Bobroff, *supra* note 5.
344 *See generally id.*
345 *See generally* Dussias, *supra* note 304.
346 Marbury v. Madison, 5 U.S. 137 (1803).
347 McCulloch v. Maryland, 17 U.S. 316 (1819).
348 *See* Herbert A. Johnson, *The Chief Justice Marshall (1801-1835)*, 1 J. SUP. CT. HIST. 3, 3-4 (1998).
349 *See generally M'Intosh*, 21 U.S. 543.
350 *See generally* ROBERTSON, *supra* note 20, at 125.
351 *Id.* at 125.
352 *Id.* at 125.
353 *Id.* at 125.
354 WATSON, *supra* note 50, at 320-21.
355 ROBERTSON, *supra* note 20, at 129.

opinion in *Worcester v. Georgia.*[356] In that decision, Marshall tried to limit the discovery doctrine he had cited in *Johnson*.[357] But the removal itself continued, based in part on a treaty that was alleged to be fraudulent.[358] Four thousand people died[359] on a set of routes, one of which passed through southern Illinois[360] and the land in the Lower Illinois tract was sold in 1773.[361]

The Trail of Tears was an observable, indirect result of the decision in *Johnson v. M'Intosh*.[362] Less obvious was the direct impact on the ability of native groups or individuals to sell their land.[363] By finding that there could be only one buyer of native land, the decision gave that one buyer, the United States Government, tremendous negotiating power.[364] It's as if the United States Government went to the land auction only to find out that there were no other bidders. This decision is great for the one buyer looking for cheap land, but horrible for the seller. And this decision is the foundation, the original root of title, for most land in the western United States.[365]

The decision in *Johnson v. M'Intosh* continued to influence court decisions as well. In a series of cases from 1836 to 1842, the Supreme Court supported title by discovery and a sole right to purchase for the government.[366] By 1873, the Court referenced *Johnson v. M'Intosh*, stating, "The authority of that case has never been doubted."[367]

The *Johnson* decision continued to have an impact into the nineteenth and twentieth centuries.[368] In 1955, in *Tee-Hit-Ton Indians v. United States*, the Supreme Court relied on and quoted extensively from *Johnson* to conclude that indigenous title is not a property right and, therefore, not compensable as a taking.[369] The Supreme Court cited *Johnson* again in 1985

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356 Worcester v. Georgia, 31 U.S. 515 (1832); *see also* ROBERTSON, *supra* note 20, at 133.

357 ROBERTSON, *supra* note 20, at 133.

358 Dennis Zotigh, *The Treaty That Forced the Cherokee People From Their Homelands Goes on View*, SMITHSONIAN MUSEUM: SMITHSONIAN VOICES (April 24, 2019), https://www.smithsonianmag.com/blogs/national-museum-american-indian/2019/04/24/treaty-new-echota/.

359 *Id.*

360 *Trail of Tears*, NAT'L PARK SERV., https://www.nps.gov/trte/planyourvisit/maps.htm (last visited Nov. 20, 2022).

361 *See id.*

362 *See generally* Bobroff, *supra* note 5.

363 *See generally id.*

364 *See* Kades, *supra* note 2, at 111.

365 Bobroff, *supra* note 5, at 521 (noting that Hawaii and lands acquired from Mexico have a different source and many lands east of the Allegheny Mountains had been purchased before the decision in Johnson).

366 ROBERTSON, *supra* note 20, at 138-42 (citing Mitchel v. United States, 34 U.S. 711 (1835); United States v. Fernandez, 35 U.S. 303 (1836); Clark v. Smith, 38 U.S. 195 (1839); Mitchell v. United States 40 U.S. 52 (1841); Martin v. Waddell's Lessee, 41 U.S. 367 (1842)).

367 United States v. Cook, 86 U.S. 591, 593 (1873); WATSON, *supra* note 50, at 331-33 (discussing *United States v. Cook* and other cases).

368 *See generally* Bobroff, *supra* note 5.

369 Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-80 (1955); WATSON, *supra* note 50, at 332 (discussing the decision in *Tee-Hit-Ton Indians v. United States*).

in *U.S. v. Dann*, in which two native sisters were not allowed to graze their cattle on what had once been native land.[370] Even as recently as 2005, in *City of Sherill v. Oneida Indian Nation*, the Court, without mentioning *Johnson v. M'Intosh* by name, cited the doctrine of discovery, in which colonists became vested with fee title to land.[371]

Johnson v. M'Intosh has also been cited and used as a model outside of the United States. The Treaty of Waitangi, between New Zealand and England, used a model of native possession of lands with sales only to the government or its agents.[372] Shortly after that, in 1847, the New Zealand Supreme Court used the reasoning of *Johnson* that only the state, and not private parties, could purchase land from indigenous people.[373] Canadian courts have also relied on the *Johnson* decision,[374] including in a 1984 Canadian Supreme Court case.[375] Australian courts held that native people had no rights of ownership or occupancy[376] until the 1992 case of *Mabo v. Queensland (No. 2)*, a case that recognized a limited native title for the first time.[377] Australian history serves as a reminder that despite the factually incorrect statements and racist conclusion of the *Johnson* decision, the Court could have done worse.[378]

The United States Supreme Court's decision in *Johnson v. M'Intosh* fired up the push for the removal of Cherokee people from Georgia, made it easy for the United States government to buy land from native people, and has been cited on a continuing basis both within and outside of the United States. It's time to think about changing the legacy.

VII. RECOMMENDATIONS FOR ACTION NOW

The United States Supreme Court's decision in the 1823 case of *Johnson v. M'Intosh* was based on a dispute that was mostly fictional.[379] The two parties to the case likely owned overlapping interests in land, but they never had a real dispute between them.[380] The parties were picked to get a

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370 United States v Dann, 470 U.S. 39, 41 n.3 (1985).

371 City of Sherill v. Oneida Indian Nation of New York, 544 U.S. 197, 203 n.1 (2005) (referencing the 1984 case of *County of Oneida v. Oneida Indian Nation*, which does cite to *Johnson*, 470 U.S. at 235). The recent case, *McGirt v. Oklahoma*, does not deal with land ownership, but does reinforce self-governance in land that was held to be a reservation. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

372 Epstein, *supra* note 224, at 13.

373 WATSON, *supra* note 50, at 338 (citing The Queen v. Symonds (1847) NZPCC 387, 390 (N.Z.)).

374 *Id.* at 339.

375 ROBERTSON, *supra* note 20, at 144 (citing Guerin v. The Queen, [1984] 2 S.C.R. 335 (Can.)).

376 *See* WATSON, *supra* note 50, at 338 (referring to the doctrine of terra nullius).

377 *Id.* at 340-41.

378 *See generally id.* at 338.

379 *See generally M'Intosh*, 21 U.S. at 572.

380 *See generally id.* at 572.

case before the Court, only after one side failed in a long series of attempts to get the legislature to endorse their title.[381] The case was presented on agreed facts, so no judge was able to dig more deeply into what was presented.[382] And neither the parties to the case nor the judges considered including representation for those who lost the most in the case—the Illinois, the Piankeshaw, and all other native people who lived on the land as their ancestors had before them. Without any representation from the indigenous groups, the agreed facts and the Court's conclusions were full of assumptions and flat-out factual errors, many of them based on an unwillingness to see land through the eyes of a different culture with different gender-based roles with regard to the land.[383] The decision allowed for cheap western expansion by European peoples at a very high cost to native peoples.[384] And the decision continues to have an impact in the United States and beyond. Two hundred years after the decision, it is time to reconsider our national, state, local, and personal response to *Johnson v. M'Intosh.*

On the national level, our courts can take at least one lesson from *Johnson v. M'Intosh* that should still be valid—look to international law.[385] Just as Chief Justice Marshall found ample international sources on the law of discovery,[386] United States courts now have ample international sources on indigenous rights. The United Nations adopted the International Declaration on the Rights of Indigenous Peoples in 2007, which recognizes the injustice involved in the dispossession of native lands.[387] While the United States was only one of four countries to vote against the Declaration, in 2010, President Barack Obama announced that the United States would support the Declaration.[388] The Organization of American States also has general language on private property rights, and an autonomous body to protect human rights, the Inter-American Commission on Human Rights ("IACHR").[389]

The Inter-American Court of Human Rights has already provided one authoritative counterweight to United States courts' continued denial of native land rights. Sisters Mary and Carrie Dann, whose claim was rejected

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381 *See generally id.* at 572.

382 *See generally id.* at 572.

383 *See generally id.* at 572.

384 *See generally* Bobroff, *supra* note 5.

385 *See generally M'Intosh*, 21 U.S. at 572.

386 *Id.* at 574-76 (referring to "universal" principles held by Great Britain, France, and Portugal).

387 U.N. DRIP, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

388 *See Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm; *United States Endorses International Declaration on Indigenous Rights*, ACLU (Dec. 17, 2010), https://www.aclu.org/press-releases/united-states-endorses-international-declaration-indigenous-rights.

389 WATSON, *supra* note 50, at 353 (citing Article XXIII of the OAS Declaration of the Rights and Duties of Man).

in a 1985 case citing *Johnson*,[390] took their case to the IACHR and won a recommendation that the United States review its laws, procedures, and practices to ensure conformity with the American Declaration of the Rights and Duties of Man.[391] While the United States declined to comply with the court's determination,[392] the favorable determination exists for future use.[393]

One area where national law can be changed is in how the federal government disposes of lands it owns. Canadian law gives preference to indigenous groups when disposing of nationally owned land.[394] The United States Department of the Interior is taking at least one step in that direction by working with a group of indigenous nations and tribes to manage Bears Ears National Monument.[395] A lieutenant governor of the Zuni Pueblo tribe said, "Today, instead of being removed from a landscape to make way for a public park, we are being invited back to our ancestral homelands to help repair them."[396]

While changing the law would be the best recognition of indigenous property rights, other meaningful steps can be taken as well. In the infamous *Korematsu* decision, the Supreme Court allowed the internment of United States citizens of Japanese heritage.[397] When a later dissenting opinion referred to the *Korematsu* case, the majority used the occasion to clarify, "The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[398] The legislative and executive branches moved in the same direction regarding *Korematsu*, passing and signing a law that offered a formal apology and compensation to victims of the internment.[399] Compensation, and an apology from the Court, would be significant for people injured by *Johnson v. M'Intosh*.

State-level courts and legislatures may have an even more free hand to correct the injustices that stem from *Johnson v. M'Intosh*. State courts can,

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390 *Id.* at 353.

391 *Id.* at 353 (citing Inter-Am. Ct. H.R. (ser. A) No. 75/02).

392 *Id.* at 353.

393 *Id.* at 353.

394 Norimitsu Onishi, *In Vancouver, Indigenous Communities Get Prime Land, and Power*, N.Y. TIMES (Aug. 23, 2022), https://www.nytimes.com/2022/08/23/world/americas/canada-vancouver-indigenous.html.

395 Alex Traub, *In a Return to the Land, Tribes will Jointly Manage a National Monument*, N.Y. TIMES (June 20, 2022), https://www.nytimes.com/2022/06/20/us/bears-ears-native-american-tribes-management.html.

396 *Id.*

397 Korematsu v. United States, 323 U.S. 214 (1944).

398 Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

399 Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians, 2 PUB. PAPERS 1054, 1055 (Aug. 10, 1988).

just like federal courts, look to international law in considering land disputes.[400] State legislatures and executives can, like the response to *Korematsu*, offer compensation and apology for a European takeover of lands that was on the cheap. State-level institutions can also play a role, as is demonstrated by the Illinois State Museum, which recently created its first position of director of tribal relations.[401]

Organized activity at a level geographically smaller than the state may offer even more room for creative solutions. Private organizations focusing on reserving natural environments can work to return land, as Save the Redwoods League has done in California, returning ownership of hundreds of acres to an intertribal council.[402] Private and state universities, along with school districts, can take action to promote a better understanding of the lives of native peoples at the time Europeans arrived on the continent. Land acknowledgments at the start of meetings—a reminder that the land once belonged to different peoples—are becoming more common in the United States and even have a longer tradition in Australia and New Zealand.[403] Knowing the history of the land can help ensure that future decisions are less likely to be based on racial generalizations and assumptions, as was the case in *Johnson*.[404]

The University of Illinois, located close to the Upper Illinois purchase of 1773, has a record of some action. The school may be most famous for having "Chief Illiniwek" as its mascot, despite criticism from indigenous people and debate for decades.[405] Maybe because of the controversy over the mascot, or maybe in spite of it, the University has made connections with the Peoria tribe.[406] Two actual chiefs from the Peoria tribe visited the school in

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400 Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1760 (2003).

401 Nika Schoonover, *Illinois State Museum Hires First Director of Tribal Relations to 'Address Part Harms'*, NPR ILL. (Oct. 6, 2022, 3:45 PM), https://www.nprillinois.org/illinois/2022-10-06/illinois-state-museum-hires-first-director-of-tribal-relations-to-address-past-harms.

402 Isabella Grullón Paz, *Redwood Forest in California is Returned to Native Tribes*, N.Y. TIMES (Jan. 26, 2022), https://www.nytimes.com/2022/01/26/us/california-redwoods-native-american-conservation.html.

403 *See* WINCHESTER, *supra* note 332, at 28.

404 *See generally M'Intosh*, 21 U.S. 543.

405 An interesting timeline of the story of the school's mascot is presented by WILL, the local public radio station in Urbana, Illinois. *Chief Illiniwek: Understanding the Issues*, ILL. PUB. MEDIA: WILL, https://will.illinois.edu/chief-illiniwek-understanding-the-issues (last visited Nov. 28, 2022).

406 WATSON, *supra* note 50, at 358 (citing Terrell Starr, *Peoria Tribe Representatives Travel to Campus*, DAILY ILLINI (Mar. 11, 2009), https://will.illinois.edu/chief-illiniwek-understanding-the-issues).

2009, sharing information about their history and culture.[407] The school also has a full tuition scholarship program for members of the Peoria tribe.[408]

As a professor at Southern Illinois University, and a long-time resident of Southern Illinois, I am interested in actions that can be taken here, in how our University and community can be a part of educating about the heritage of this area and the people who once lived, farmed and hunted here. In this region, we all live and work in the area that was once the home of the Illinois people, now organized as the Peoria Tribe of Indians of Oklahoma.

Our University, and particularly the law school where I teach, can establish connections with the Peoria Tribe so that our students can learn more about the history of the land. Thanks to the pandemic, our ability to make a meaningful connection across a long distance is better than ever.[409] Scholarships, like the ones at the University of Illinois, also seem to be a good goal.[410] But the connections should not be limited to university and graduate students. Connections could be established between grade school and high school students and the Peoria Tribe. Imagine a rural Southern Illinois school where students, whose parents farm rich river bottom land, connect with the descendants of those who farmed the land 200 years ago.

And the University itself can go further. The University system is governed by a board of trustees who are appointed by the governor of Illinois.[411] The governor could, simply by choice of appointees, ensure that a member of the Peoria Tribe is serving on the board at all times. This would be one way to incorporate a sense of responsibility to the land itself from people with a historical connection to the land.

Finally, knowledge of the case and the injustice it has caused over 200 years has to inspire us to take individual action. That action could be working together on institutional, local, state, or national ways to address injustice. The action could also be much more personal, seeking out information about those who used to occupy the land we occupy now. It could be as easy and fun as enjoying indigenous foods.[412] That alone should reinforce the

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407 *Id.* at 358.

408 *University of Illinois Native American Student Scholarships: Peoria Tribe Scholarship*, UNIV. OF ILL., https://oiir.illinois.edu/native-american-house/university-illinois-native-american-student-scholarship (last visited Nov. 28, 2022).

409 Related to this topic, Professor Lyndsay Robertson was a guest speaker, via Zoom, at the Southern Illinois University School of Law in 2021, inspiring students and faculty alike.

410 *See University of Illinois Native American Student Scholarships: Peoria Tribe Scholarship*, *supra* note 408.

411 110 ILL. COMP. STAT. 520/2 (2020).

412 *See* Carolyn Kormann, *How Owamni Became the Best New Restaurant in the United States*, NEW YORKER, (Sept. 12, 2022), https://www.newyorker.com/magazine/2022/09/19/how-owamni-became-the-best-new-restaurant-in-the-united-states; Claire Savage, Hannah Schoenbaum &Trisha Ahmed, *Access to Indigenous foods decline*, ASSOCIATED PRESS (Aug. 24, 2022), https://apnews.com/article/inflation-indigenous-food-declines-

importance of being open to and interested in understanding cultures other than the ones in which we have been raised. Because while we need to address the injustices of *Johnson v. M'Intosh*, we also need to be watchful to prevent injustices of our own time and our own making.

858a9544f0fa3acc64958f6af73b00b5 (describing a Native American catering business in Chicago called Ketapanen Kitchen).