

STATEMENT ON THE HISTORICAL USE
OF THE DOCTRINE OF CHRISTIAN
DISCOVERY
BY THE UNITED STATES
SUPREME COURT SINCE 1823



May 24, 2014

This paper has been prepared for the May 24, 2014 conference, entitled: "Doctrine of Christian Discovery: After Repudiation, What Next?". The purpose of this paper is to review the history of the use of the Doctrine of Christian Discovery in United States Supreme Court decisions since 1823.

It is hoped that the historical perspective in this paper will be of assistance to readers and help them gain a better understanding as to how fundamental the Doctrine of Discovery is to all United State Indian law, particularly with regards to land rights.

A. For the Haudenosaunee, sovereignty is the foundation of any discussion or position relative to land rights:

To the Onondaga and to the other traditional Haudenosaunee nations, all discussions of land and land rights begin with and are founded upon sovereignty; this is how their lands are held and this is the fundamental basis and the strength for their protection of the land and their jurisdiction over and responsibility for it.

The Onondaga Nation strongly urges that all discussions on Indigenous land rights should be likewise based upon sovereignty, as the foundation for protection of the land and land rights. Certainly, there was sovereign control by all Nations of their lands in 1491, and long afterwards.

Further, any discussion of land rights should be based upon a general principle, that: "The sovereignty of Indian Nations is confirmed in our treaties with the United State government. Treaties are the supreme law of the land."

B. There is nothing acceptable about the Doctrine of Christian discovery, either in its history, in its use against Indian peoples, or in the use of it against Indian Nations by the US courts:

There is nothing good about this racist, ethnocentric doctrine which is so fundamentally based upon the self-serving myth of Christian superiority and which labels the Indigenous peoples of the Western hemisphere and elsewhere as heathens and infidels whose ancestral lands became ripe for the taking by European imperial nations, with the arrival of the first Europeans.

By taking this position, to completely reject the doctrine in all its aspects, we do NOT mean to say that the Haudenosaunee lost any rights in the 17th century when they first encountered the Dutch in 1613, or when Champlain attacked the Onondaga town, on Onondaga Lake, in 1615. It should go without saying that their clear position on, and record of advocacy for sovereignty clearly precludes any such concession. This is a straw argument, which has been repeatedly used in past debates. The Haudenosaunee do not concede any such loss of rights.

1. The Nation agrees with Vine Deloria, Jr. that we must expose and reject the doctrine of Christian discovery:

In 1972, Vine Deloria Jr., openly challenged the doctrine of discovery, when he wrote "*An Open Letter to the Heads of the Christian Churches in America*," an essay in which he focused on the Christian centric nature of this excuse for taking Native lands, and he attached the word "Christian" to

the doctrine in this article and in another, later chapter which he wrote for the book *Unlearning the Language of Conquest* (2006) just before he passed over. For decades, Vine taught that the struggle for land rights had to include education around and eventual repudiation of the doctrine of Christian discovery.

His words from 42 years ago still ring true to the Nation, when he wrote that, after the Europeans “discovered” the “new world”: “[Q]uestions of a theological nature arose. Who were these newly discovered peoples? What rights did they possess? How were they to be treated?” He went on to point out that the Christian monarchs of Western Europe created a system: “that whoever discovered lands **inhabited by non-Christian peoples** would have the exclusive rights to ‘extinguish’ such [Indian] title as against any other Christian nation.” (Emphasis added.)

His essay continued to observe the consequences of the doctrine in the 20th century in the US: “The present position of the United States is that it holds our lands and communities as its wards. When this [current] doctrine is traced to its origin[,] it lands comfortably within the Doctrine of Discovery.”

Vine concluded by pointing out how critical it is to work against the doctrine: “the United States claims its rights over us not by right of conquest but by having succeeded to the rights of Great Britain to extinguish our titles to land.” He said that we will continue to have great difficulties “maintain[ing] our lands, our communities, and cultures so long as the major reason that they are protected is to enable the United States to one day extinguish them as is legal right against the other Christian

nations.”

The Nation agrees that rejecting the doctrine of Christian discovery, and removing it from US law, must be central in our efforts to preserve our sovereignty and lands. The Nation also rejects these claims to our rights by the United States, as being unilateral and in violation of international law.

2. The historical origins of the Doctrine of Christian discovery: the Papal bulls of 1452 and 1493, and the 1496 Patent granted by King Henry VII to John Cabot:

We only need to look at and understand these three “proclamations” of Christian superiority and of “rights” to dominate and conquer Indigenous peoples and take their lands, to realize that this doctrine is entirely unacceptable and that it must be erased from American law, as a fundamental principle in our work for preservation of Indian land rights. Much has been written by scholars about these proclamations, so we will only provide a brief review of their statements and claims.

We note that Marshall specifically invoked the 1496 Cabot Patent in *Johnson v. McIntosh*, when he wrote:

So early as the year 1496, [the English] monarch granted a commission to the Cabots, to discover countries unknown to the *Christian people*, and to take possession of [the lands] in the name of the king of England. (Emphasis in original.) 21 US 543, 576 (1823).

We will come back to *Johnson* in the next section of this paper, but find it to be a good starting point for this historical understanding of the origins of the doctrine. This seems particularly appropriate given the reference to *Johnson* in *Oneida II*, and in the first footnote in *Sherrill*. Any positive reference to *Johnson* should be avoided, if possible. Over the decades, there have been some good statements by the courts, but these have been subsequently ignored.

a. **1496 Patent granted by King Henry VII to John Cabot:**

In 1496, eager to get England into the race among European powers competing to create empires by carving up the “new world”, King Henry VII issued a patent to John Cabot and his sons. Henry granted Cabot “full and free authority” to sail under the flag of England:

to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were **unknown to all Christians**. . . . And that the before-mentioned John and his sons or their heirs and deputies may **conquer, occupy and possess** whatsoever such towns, castles, cities and islands **by them thus discovered** that they may be able to conquer, occupy and possess, as our vassals and governors lieutenants and deputies therein, **acquiring for us the dominion, title and jurisdiction of the same**

towns, castles, cities, islands and mainlands so discovered; (Emphasis added.)

US law relative to Indian land rights is fundamentally unfair and unacceptable because it accepts and has adopted the mind-set of 15th century proclamations, one by the king of England, who purported to give an Italian citizen ¹ the right to conquer, occupy and possess any land not occupied by Christians; and the others by the Pope in various Papal Bulls. Cabot was not to intrude on Spanish or Portuguese “discoveries”, as these were “discoveries” by Christian nations. Henry reserved one fifth of the value of merchandise brought back to England, though he invested no money of his own. From the very beginning, it has always been about Christians making money off illegally seized and claimed Indian land.

The federal government’s claim of the right to “conquer, occupy and possess” any and all of Indigenous lands, is a very serious threat to their sovereignty and their very existence as distinct nations with their own cultures, language and governments.

b. The 1452 and 1455 Papal Bulls *Romanus Pontifex*:

Henry VII adopted the artificial concept of Christian discovery, which had been blessed by the Popes, for at least a half century. In 1452, Pope Nicholas V issued the Bull *Romanus Pontifex*, to King Alfonso V of Portugal,

¹ “John Cabot” was born in Venice, Italy as Giovanni Caboto and the 1496 Patent from the king refers to him as a “citizen of Venice.”

which declared war against all non-Christians throughout the world, and specifically sanctioned and encouraged the conquest, colonization and exploitation of non-Christian nations and peoples. The Pope directed the king to “invade, capture, vanquish, and subdue all saracens, pagans, and other enemies of Christ,” to “reduce their persons to perpetual slavery,” and “to take away all their possessions and property, both movable and immovable.” This remarkably suspect authorizaion was used by Portugal to excuse its slave trafficking from, and exploitation of, Africa.

c. The 1493 Papal Bull *Inter Caetera*:

Later, on May 4, 1493, Pope Alexander VI issued the Papal Bull *Inter Caetera*, to capitalize on the voyage of Columbus by granting Spain the title to all “discovered” lands, to advance the spread of Catholicism and the Christendom’s attempt to dominate the world. Spain was granted title to all “discovered” lands to the west of a pole-to-pole line 100 leagues west of any of the islands of the Azores or the Cape Verde Islands.

Alexander VI wrote that his god was pleased “that in our times especially the Catholic faith and the Christian religion be exalted and be everywhere increased and spread, . . . and that **barbarous** nations be **overthrown**, subjugated and brought to the faith itself.” Alexander also called for the propagation of the Christian empire (“*emperii christiani*”). The Pope claimed that god favored this “saving of the heathens and “barbarians”, by noting that Columbus had sailed “with divine aid” and that he had:

discovered certain very remote islands and even mainlands that hitherto had not been discovered by others; wherein dwell very many peoples living in peace, and, as reported, going unclothed. . . . [T]hese very peoples living in the said islands and countries believe in one God, the Creator in heaven.

Despite this acknowledgment that the Indigenous peoples had their own culture and religion the Bull went on to purport to convey title to, dominion over and jurisdiction of the “discovered” lands:

And, in order that you may enter upon so great an undertaking with greater readiness and heartiness endowed with benefit of our apostolic favor, we, of our own accord, . . . and out of the fullness of our apostolic power, by the authority of Almighty God conferred upon us in blessed Peter and of the vicarship of Jesus Christ, which we hold on earth, do by tenor of these presents, should any of said islands have been found by your envoys and captains, give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to

be found, discovered and to be discovered. . . .

However, the Pope went on to make it clear that such claims to title, dominion, jurisdiction and rights relative to any “discovered” lands, could not be made if another Christian nation had previously “discovered” [arrived at] the lands:

With this proviso however that none of the islands and mainlands, found and to be found, discovered and to be discovered, beyond that said line towards the west and south, be in the actual possession of any Christian king or prince; . . . with this proviso however, that by this our gift, grant, and assignment no right acquired by any Christian prince, who may be in actual possession of said islands and mainlands, . . . is hereby to be understood to be withdrawn or taken away.

In contrast to these Bulls, the Onondaga Nation fully agrees with the Declaration of Vision which was drafted in 1992 by over 60 Indigenous delegates to the Parliament of World Religions, which called for the revocation of the 1493 Vatican papal bull and which reads in part:

We call upon the people of conscience in the Roman Catholic hierarchy to persuade [the] Pope . . . to formally revoke the *Inter Certera* Bull of May 4, 1493,

which will restore our fundamental human rights. That Papal document called for our Nations and Peoples to be subjugated so that the Christian Empire and its doctrines would be propagated. The US Supreme Court ruling [in] *Johnson v. McIntosh* (in 1823) adopted the same principle of subjugation expressed in the *Inter Caetera* Bull. This Papal Bull has been, and continues to be, devastating to our religions, our cultures, and the survival of our populations [nations and peoples].

C. We reject the notion, that has been advocated by others, that the federal law about “discovery has not been used to purport to take away the land rights of Indian nations”:

US Indian law is just a mish-mash; the courts have merely made it up at they went along, changing it at will to suit their purposes and to continuously whittle away at our rights. The US courts have continuously come up with some new “gimmick” to deny real justice to Indians—such as the recent and flawed application of laches and other “equitable” principles to deny Haudenosaunee land rights.

Over the years, there have been some good statements, by some courts and judges, such as the *Worcester* decision of 1832, that should have limited the negative impact of the doctrine of Christian discovery. However, the cumulative impact of 200 years of Supreme Court use of the doctrine has resulted in *Sherrill*, the dismissal of the Cayuga Nation’s and the Oneida Nation’s land claim and the Onondaga Nation’s Land Rights Action.

The Nation rejects the proposition that the Supreme Court and other US courts have used the doctrine of Christian discovery to protect our rights (other than rights of “mere occupancy,”--what the United States has termed “a usufructuary” title, to wander and roam,) or that the courts’ rulings based upon the doctrine have been “good” for us.

Further, we reject the claim that: “the US Supreme Court has never actually decided that discovery . . . took away [any of] the land rights of Indian nations. . . .[or that] the Supreme Court has repeatedly said that the Indian nations continue to have all the rights of ownership.”, as stated in some other position papers. This is simply not accurate and we need to acknowledge the actual and harmful rulings of the US courts over the years in applying the doctrine in their attempts to limit our rights.

Indian title and rights to land were first addressed by the Supreme Court in 1810, in *Fletcher v. Peck*: (10 US 87): “What is the Indian title? It is a **mere occupancy** for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. **It is not a true and legal possession.** . . . It is a right **not to be transferred, but extinguished.**” (10 US at 121.) (Emphasis added.) The Court went on to justify this claim by observing:

The Europeans found the territory in possession of a rude and **uncivilized** people, consisting of separate and **independent nations**. They had no idea of property in the soil but a right of occupation. A right not individual but national. This is the right gained by conquest. The

Europeans always claimed and exercised the right of conquest over the soil. (Id. at page 122.) (Emphasis added.)

After this extremely negative beginning, the Supreme Court has repeatedly used the doctrine of Christian discovery to claim the right to take Indian peoples' sovereignty and rights to land.

Acknowledging these negative rulings does not mean that we accept them; it does mean that we must understand where we are and the arguments and assumptions of the United States courts and Supreme Court rulings before we can move forward to successfully defend our sovereignty and land rights. The citing of *Johnson v. McIntosh*, on page 35 of the Draft Principles, in a favorable light is deeply troubling to the Nation, and so, we will begin with a careful look at this leading case on the doctrine and then identify other Supreme Court cases, wherein the doctrine has been used to limit Native land rights.

1. *Johnson v. McIntosh*, 21 US 543 (1823):

There is no dispute that this is the leading case, when the Supreme Court articulated that the doctrine of Christian discovery is the foundation of US Indian law. The more legal scholars research this case and its background, the more troubling its history and impact become. Lindsay G. Robertson is a professor of law, history and Native America Studies at the University of Oklahoma and he is one of the legal and historical experts who has submitted Declarations in support of the Nation's opposition to the

state's motion to dismiss the Nation's Lands Rights Action. Lindsay's 2005 book: *Conquest by Law, How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*, exposes many new details about this troublesome case, and its jacket cover states:

In 1823, Chief Justice John Marshall, a Revolutionary War veteran, former Virginia legislator, and a well-know land speculator, handed down a Supreme Court decision of monumental importance in defining the rights of indigenous peoples. . . . The case was *Johnson v. McIntosh*, and from the beginning, it was all about land: 43,000 square miles of lush, rolling farmland commanding the junctures of four major rivers in Indiana and Illinois. At the heart of the decision was a "discovery doctrine" that gave rights of ownership to the European sovereigns who "discovered" the land and converted the indigenous owners into tenants. Though its meaning and intention have been fiercely disputed, more than 175 years later this doctrine remains the law of the land and indigenous peoples all over the world have been dispossessed of their property as a result. . . .

The tale . . . is unsettling. *Johnson v. McIntosh* was a collusive case, an attempt to buy off many of the leading figures of the early republic, including the lawyer for the [Wabash Land] Companies' opponent, and to take

advantage of loopholes in the early federal judicial system in order to win a favorable decision from the Supreme Court. Acting in his own interests, Marshall extended his opinion in the case from the necessary one paragraph to one comprising more than thirty-three pages. When the legitimacy of the decision came under scrutiny in a subsequent Supreme Court case, *Worcester v. Georgia*, Marshall tried to back-track and repudiate the doctrine. By then, however, it was too late. . . .

This . . . is a story of how a spurious claim gave rise to a doctrine—intended to be of limited application—that itself gave rise to a massive displacement of persons and the creation of a law that governs indigenous people and their lands to this day.

It is this paper's position that this nefarious case must be denounced, just as the doctrine must be, and that all Indian Nations and their legal teams must work to overturn the decision and to fully repudiate the doctrine. This is true even though there may be some, limited favorable language tucked away in the shadows of the case. This case was the beginning of the US courts' efforts to limit the sovereignty of Indian Nations and to progressively take away more and more of Indian peoples' rights of ownership of their ancestral homelands.

In *Johnson*, the dispute over this land was between one group of land speculators who traced their title to purchases, in 1773 and 1775, from the

Native Nations themselves, and another group who traced their title to a 1813 purchase from the United State government. The ruling favored the later groups and stated: “*A title to lands, under grants to private individuals, made by Indian tribes or nations, . . . cannot be recognised (Sic.) in the Courts fo the United States.*” (*Id.* at page 562.) Unfortunately, Marshall did not stop there but went on to write that:

The [Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but **their rights to complete sovereignty, as independent nations, were necessarily diminished**, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that **discovery gave exclusive title to those who made it.**

While the different nations of Europe respected the right of the natives, as occupants, they asserted the **ultimate dominion** to be in themselves; and claimed and exercised, as a consequence of this **ultimate dominion**, a power to grant the soil, while yet in possession of the natives. (*Id.* at pages 573 and 574.) (Emphasis added.)

The US courts have held that our sovereignty has been diminished

and that “exclusive title” to, and “ultimate dominion” over our lands has been lost to the Christian “discoverers”. This is obviously extremely negative. We need to denounce this ruling and the doctrine, not attempt to sugar coat it, and call for its removal from US law..

Marshall then wrote many pages reflecting that all the European “discoverer” nations claimed their “right of dominion” to “acquire and dispose of the soil which remained in the occupation of Indians.” (575.):

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the **right of dominion** to the grantees. (579)

. . .

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.(584.)

. . .

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of

the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted. (586.) (Emphasis added.)

After this extensive discourse on the history of taking Indian lands by Spain, France, Holland and England, Marshall summed up by writing:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. . . .

All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians. (587 and 588.)

Marshall did not hide his racist opinion of Native Americans:

But the tribes of Indians inhabiting this country were fierce **savages**, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness. (590.) (Emphasis added.)

. . .

The right of discovery given by this commission, is confined to countries “then **unknown to all Christian people;**” and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the **natives, who were heathens**, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

. . .

The same principle continued to be recognised. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, **heathen, and barbarous lands**, as were not actually possessed by any Christian prince or people. (576 and 577.) (Emphasis added.)

One final quotation from Marshall’s *Johnson* opinion should leave no doubt about its negative ruling and its claim of severe diminishment of

sovereignty and land rights:

The **absolute ultimate title** has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a [possession] in fee, than a lease for years, and might as effectually bar an ejectment. (592.) (Emphasis added.)

So, we see that *Johnson* ruled and claimed that Native sovereignty and land rights were severely diminished upon discovery and the rights of Indian peoples were reduced to no more than a leasee.

2. Other negative Supreme Court decisions, following *Johnson*:

In 1842, The Supreme Court, in *Martin v. Waddell*, 41 US 367, that:

The English possessions in America were not claimed by right of conquest, but by right of discovery. For, according to the principles of international law, as understood by the then civilized powers of Europe, **the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong**

to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe, at their pleasure, **as if it had been found without inhabitants.** (367.) (Emphasis added.)

The law limiting Indian land rights did not improve over the next 100 years, as can be seen by examining the 1945 decision by the Supreme Court, in *Northwestern Band of Shoshone Indians v. US*, 324 US 335, which says:

Even where a reservation is created for the maintenance of Indians, their right **amounts to nothing more than a treaty right of occupancy.** Prior to the creation of any such area, formally acknowledged by the United States as subject to such right of Indian occupancy, a certain nation, tribe or band of Indians may have claimed the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians. . . . [W]e shall refer to the aboriginal usage without definite recognition of the right by the United States as Indian title.

Since *Johnson v. McIntosh*, decided in 1823, gave

rationalization to the appropriation of Indian lands by the white man's government, **the extinguishment of Indian title by that sovereignty has proceeded, as a political matter**, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss. **Exclusive title to the lands passed to the white discoverers**, subject to the Indian title with power in the white sovereign alone to extinguish that right by “purchase or by conquest.” (338 and 339.)

a. Tee-Hit-Ton:

Certainly, we must acknowledge the heavily negative ruling in *Tee Hit Ton*, 348 US 272 (1955), in which the Supreme Court held that Alaskan Natives had no right to compensation for timber resources removed from their lands against their will. All US Indian law practitioners and scholars recognize that this case clearly limited Native land rights, when it held that:

Indian Title.-- The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or **permission** from the whites to occupy. That description means **mere**

possession not specifically recognized as ownership by Congress. . . . This is not a property right but amounts to a right of occupancy which the sovereign grants, . . . but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians. (279.)
(Emphasis added.)

The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. **Every American schoolboy knows that the savage tribes** of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land. (289 and 290) (Emphasis added.)

b. Plenary Power:

The doctrine has also been used by the Supreme Court to extend the jurisdiction of the federal government over Indians, whether the Indians like it or not, and to create the claim of "plenary power" over Indians out of thin air. The leading case in this regard was *US v. Kagama*, 118 US 375 (1886),

in which criminal jurisdiction was extended over Indians even though the Court openly admitted that the Constitution did not give such power to Congress. With the doctrine of Christian discovery as its excuse, the Court wrote:

Following the policy of the European governments in the discovery of America, towards the Indians who were found here, the . . . United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an **ultimate title** in the land itself, . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, **not as possessed of the full attributes of sovereignty**, . . . (*Id.* at 381.) Emphasis added.)

. . . .

They are spoken of as “wards of the nation;” “pupils;” as local dependent communities. . . . These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States,-dependent largely for their daily food; dependent for their political rights. . . . The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among

whom they dwell. (*Id.* at 383.and 384)

This case is still recognized as one of the leading precedents for US Indian law, despite its 19th century racist language and assumptions of racial superiority. *Kagama* was cited by then Justice Rehnquist, in his majority opinion in *Oliphant v. Suquamish Indian Tribe*, 435 US 191 (1978), which was one of the 20th century Court's most important decisions on severely limiting the jurisdiction of Indian Nations. In *Oliphant*, Rehnquist ruled that Indian Nations do not have criminal jurisdiction over non-Natives, even when they murder or rape citizens of the Nation on Nation territory.

This opinion cited over a dozen 19th century Supreme Court precedents, executive branch statements, and Congressional laws and reports to attempt to justify this limitation of Nations' sovereignty and jurisdiction. Essentially, Rehnquist ruled that Indian Nations were so culturally inferior that they should not be permitted to exercise criminal jurisdiction over crimes committed against their own citizens. This racist conclusion was reached by citing another 19th century decision:

In *In re Mayfield*, 141 U.S. 107, (1891), the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization." (435 US at 204.)

This is but one of over a dozen reliances by Rehnquist on 19th century sources of racist attitudes towards Indians. He even dug out an 1834 Congressional report, which was generated during the height of the racist, removal era of US Indian policy. Shamelessly, these racist attitudes from the past permeated the Court's decisions when Rehnquist became Chief Justice and are still dominant in the Roberts Court.

3. The recent and continuing use of the doctrine by United States courts to deny rights of Indian Peoples:

Lest we think that the doctrine is not still being used by the US courts to take away Indian land rights, we only need to look at the very recent 6th Circuit decision in *Ottawa Tribe v. Logan*, 577 F. 3d 634, (6th Cir., Aug. 18, 2009), in which the 6th Circuit affirmed the District Court's dismissal of the Ottawas' action for a declaratory judgement that they retained fishing rights in Lake Erie in the 1795 Treaty of Greenville:

We hold that, because the Tribe, under these treaties, retained **at most a right of occupancy** to the lands in Ohio, and that this right was extinguished upon abandonment, any related fishing rights it may have reserved were similarly extinguished when the Tribe removed west of the Mississippi. (*Id.*) (Emphasis added.)

The Circuit acknowledged that this so-called "abandonment" had

actually been forced removal in the 1830s. This denial of treaty fishing rights was upheld despite the fact that in the 1795 Treaty of Greenville, the United States “relinquish[ed] their claims to all other Indian lands”; and the Treaty also provided that: “the Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States.” Additionally, the subsequent Treaty of Detroit, in 1807, provided that: “[I]t is further agreed and stipulated, that the said Indian nations shall enjoy the privilege of hunting and fishing on the lands ceded as aforesaid. . . .” (*Id.* 636.)

It should also be noted parenthetically, that the Circuit dismissed a number of other treaty based claims by the Ottawa on the basis of laches, without reference to *Sherrill*.

Thus, as late as last August, the 6th Circuit has denied treaty fishing rights because of the doctrine of Christian discovery and in so doing, they relied upon the 1917 Supreme Court decision in *Williams v. Chicago*, 242 US 434 (1917), which had earlier interpreted the 1795 Treaty of Greenville. In *Williams*, the Court acknowledged the claim of the Pottawatomie Nation, that: “from time immemorial, . . . the Pottawatomie Indians were the owners and in possession as a sovereign nation, as their country, of large tracts of lands around and along the shores of Lake Michigan.” (*Id.* at 435 and 436.); and then the Court went on to flatly reject the Pottawatomes’ rights:

The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own in 1795 was that of occupancy. *Johnson v.*

McIntosh. . . . We think it entirely clear that this treaty did not convey a fee-simple title to the Indians; that under it no tribe could claim more than the right of occupancy; that under this was abandoned, all legal right or interest which both the tribe and its members had in the territory cam to an end. (*Id.* at 437 and 438.)

There can be no doubt that the doctrine of Christian discovery is still very much alive in the US courts and that it is being used to this day in extremely negative ruling against Indian peoples.

4. Conclusion: the United States courts have consistently used the doctrine of Christian discovery to deny land rights of Indian Peoples:

The Nation simply rejects the statement, made by some, that: “Although US courts have repeatedly asserted in dicta that the doctrine of discovery gave the US title to Native lands and resources, no court has ever held, that is, made a formal decision, that the US validly acquired Native title under the doctrine of discovery. The few cases that have suggested otherwise are inconsistent with US law. . . . The doctrine of discovery under US law . . . did not give ownership to those lands.” (Draft Principles, page 17.)

As shown by the above quotes from several key Supreme Court rulings which claimed to limit Indian land rights, this is simply not an accurate statement. The US courts have consistently held that all title

except the Indian right of occupancy, which could be terminated by the discoverer, transferred to the Christian discoverer Nation and that Native sovereignty was significantly limited upon discovery. Further, the doctrine of Christian discovery is currently being used against Onondaga and Haudenosaunee.

Once the US courts first said that sovereignty was diminished, and that exclusive title and “ultimate dominion” passed to the “discoverer;” then the slicing of sovereignty, like bologna, began down a very dangerous slippery slope. The Nation finds that, even after the August 2nd revisions, this legal argument, in Chapter II of Principles, has not changed, and that such an argument, which accepts the doctrine of Christian discovery, will likely be used against our Nations.

New York has gained dismissal the Onondaga Nation’s Land Rights Actions, relying in part of the doctrine.

D. Our work ahead: elimination of the Doctrine of Christian Discovery from United States law:

The Nation recognizes that it will not be an easy task to get *Johnson* reversed and to get the doctrine of Christian discovery removed completely from US law. However, we submit that this is the proper task for Native peoples and their legal teams, as the best protection of our rights to our lands and sovereignty. The Nation is aware that it took decades to reverse another racist Supreme Court ruling: *Plessy v. Ferguson*, 163 US 537 (1896), a 7 to 1 decision that claimed that racial segregation, even in public places (particularly railroads) did not violate the equal protection provisions of the US Constitution.

However, because of tireless and concerted efforts, this ruling was reversed in 1954, by *Brown v. Board of Education*, 347 US 483 (1954). The movement that brought about this reversal did not deny the harm of the *Plessy* ruling, but faced it squarely without any sugar coating of the difficulties faced. We must do the same: we must face the realities of the racism of these rulings against our sovereignty and human rights and work collectively to reverse them. To be successful in these efforts, we must always denounce the doctrine of Christian discovery and its use against us by the US courts.

The Nation agrees with Prof. Robert A. Williams, Jr., when he wrote that:

My argument on the need for this type of confrontations strategy that focuses on identifying and bringing to the fore the nineteenth-century racist judicial language on Indian savagery used by the present-day Court in its major Indian rights decision does not entail one axiom of belief and Native knowledge: Indian rights will never be justly protected by any legal system or any civil society that continues to talk about Indians as if they are uncivilized, unsophisticated, and lawless savages. The first step on the hard trail of decolonizing the present-day US Supreme Court's Indian law is changing the way the justices themselves talk about Indians in their decisions on Indian Rights. (*Like a Loaded Weapon*, pages xxvii and xxviii.)

Conclusion:

The Onondaga Nation has strongly urged all Native Peoples and Nations to join in the efforts to:

- ◆ *Encourage* that President Barack Obama fully adopt and implement the United Nations Declaration of Indigenous Rights;
- ◆ *Participate* in the international movement to annul the doctrine of discovery and to rescind the Papal Bulls which are used for its justification;
- ◆ *Advocate* in international forums and venues, such as the United Nations, as a means of advancing sovereignty and the rights of all Indigenous nations and peoples.
- ◆ *Strengthen* our sovereignty and jurisdiction over our lands.

The Onondaga Nation is a sovereign Nation with valid treaties with the United States in 1784, 1789 and 1794. They travel on their own passports, because they are citizens of their Nation and their Confederacy; they are not US citizens. They believe that their best hope for regaining their lost homelands does not lie within the US court system or reliance on constitutional protection. The best hope has been and will be found with international law and with exercising and expanding upon the rights in the United Nations Declaration of Indigenous Rights.

The Haudenosaunee are aware that Haudenosaunee rights must be asserted against both the United States and Canada because the existence of our Nations and our Confederacy long predates the existence of that

“border”, and because there are Haudenosaunee communities and citizens on both sides of the Great Lakes and the St. Lawrence River Valley.

They further believe that the doctrine of discovery must be exposed, renounced and annulled and they are engaged in international efforts towards this goal. While they support all Nations’ efforts to bring about change “domestically”, they urge all Native peoples and Nations to recognize the limitation of this approach and to look to work more in international venues.

It is important to have these types of exchanges and this type of thorough discussion among Native peoples of all perspectives. We look forward to further dialogue and future meetings; as the White Roots of Peace still extend far in the Four Directions.

Let us all put our good minds together to find the answers that are best for all and for the seven generations yet to come.

Respectfully submitted,

Joseph J. Heath, Esq.
Onondaga Nation General Counsel
512 Jamesville Avenue
Syracuse, New York 13210