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Doctrines of Discovery

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DOCTRINES OF DISCOVERY

DOUGLAS LIND*

ABSTRACT

The idea that “discovery” of unknown lands carried with it the right to assert sovereignty and claim ownership was widely used by European sovereigns during the age of modern colonialization to justify appropriating indigenous lands. Felix Cohen’s pioneering work in the 1940s on federal Indian law made discovery a matter of jurisprudential interest and highlighted its role in advancing the English colonial empire in what became the United States. Specifically, Cohen argued that the natural law right of discovery, as formulated by Spanish philosopher Francisco de Vitoria, helped facilitate the early European settlement of the American colonies and became a bedrock of federal Indian law. Today, legal scholars in the United States and elsewhere across the former British Empire view discovery as a discredited idea that contributed painfully to the displacement of indigenous peoples. That scholarship is incisive and valuable. Yet it contains a characteristic feature which exposes a serious flaw in Cohen’s work. The characteristic feature is the treatment of discovery as an idea manifested in a single “Doctrine of Discovery” purportedly accepted as a principle of international law influencing European adventurism beginning in Iberia during the Renaissance and continuing throughout the colonial era. The serious flaw is that this single doctrine of discovery thesis originated with Cohen and is mistaken. In this

* Professor and Head, Department of Philosophy, Virginia Tech. An earlier version of this paper was presented at the XXVIII World Congress of the Internationale Vereinigung für Rechts- und Sozialphilosophie (IVR), University of Lisbon, Portugal, July 17, 2017. I am grateful to the discussants there, and most especially to Sophie Papaefthymiou, Jason Tipton, Jerry Burkette, and Brendan Lind, for their helpful comments on the paper in its various drafts.

paper, I question Cohen's claims about the influence of Vitoria's right of discovery on United States federal Indian law. More generally, I question the thesis that a single doctrine of discovery held sway for centuries in international law guiding European exploration and appropriation of indigenous lands. I argue that the history of jurisprudential thought and legal decision does not support the single discovery doctrine thesis. Rather, the idea of discovery appeared in a number of distinct theories favored by European powers in different ages and geopolitical contexts. I identify and distinguish four different discovery doctrines: (1) the medieval papal theory of discovery which helped spread Christianity across Europe and beyond beginning in the Middle Ages; (2) the natural law right of discovery begun by Vitoria in the 1530s and refined by later philosophers writing in the traditions of natural law and the law of nations; (3) the form the idea of discovery took with the United States Supreme Court early in the nineteenth century; and (4) the discovery theory of terra nullius employed by the British in settling Australia. I conclude that carefully distinguishing the different ideas of discovery is necessary to address and seek recompense for specific instances of indigenous dispossession and displacement.

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INTRODUCTION

During the era of European exploration and colonization of distant regions of the earth, the nations of Europe drew upon various religious, political, and legal justifications to appropriate indigenous lands. Among the most frequently invoked was the idea that “discovery” of unknown lands by a European sovereign carries with it the right to assert sovereignty and claim ownership. Today, this idea of discovery, for good reason, is widely discredited. Discovery was a notion fashioned by the powers of Europe to facilitate national expansion and territorial acquisition. In its various forms, it embraced European conceptions of both divine law and secular justice. Discovery was used to override and displace the norms, mores, belief systems, and dominion of the indigenous peoples the Europeans encountered in their worldwide expansion. Despite the sometimes lofty pretexts of bringing civilization to supposedly backwards peoples and cleansing their fraught souls, the idea of discovery was designed to aggrandize European cultures by justifying the expropriation of indigenous lands.

Felix Cohen made the idea of discovery a matter of modern jurisprudential interest in his pioneering work on United States federal Indian law in the 1940s.¹ Cohen identified the jurisprudential *right of discovery* formulated by the sixteenth century natural law philosopher Francisco de Vitoria as foundational to the early European settlement of what became the United States.² By the late 1960s, Cohen’s insights began to influence scholars and activists in American Indian law. This led to a long overdue examination of how the idea of discovery had furthered the rise of the English colonial empire in the United States and elsewhere, including the displacement and subjugation of indigenous peoples. Legal scholars such as Vine Deloria, Jr.,³ David E. Wilkins,⁴ Robert A. Williams, Jr.,⁵ and

1. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1], at 8–14 (Nell Jessup Newton ed., 2012) (1941) [hereinafter COHEN’S HANDBOOK]; Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43–46 (1947); Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 9–21 (1942).

2. See, e.g., COHEN’S HANDBOOK, *supra* note 1, § 1.02[1], at 9–14; Cohen, *Original Indian Title*, *supra* note 1, at 43–46; Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, *supra* note 1, at 11–21.

3. See, e.g., VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 4–5, 81–85, 161 (1999); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 2–6 (1983); VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES 85–111 (1974).

4. See DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 31–35, 176–84 (1997).

5. E.g., ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 229–31, 269–70 (1990).

others⁶ drew attention to the role the notion of discovery played in the territorial dislocation of American Indians. Federal courts in the United States simultaneously began to reference it in tribal land claims cases.⁷

Concurrently, interest in the idea of discovery arose in Australia and New Zealand. In New Zealand, many demanded to know how discovery had contributed to the diminution of Māori land rights. This resulted in the 1975 legislative formation of the Waitangi Tribunal, a special judicial body created to consider claims of wrongful appropriation of Māori lands dating back to the nineteenth century.⁸ The specific discovery notion of *terra nullius* (land belonging to no one) likewise came under criticism in Australia, where it had served as the principle of English settlement. This culminated in the landmark 1992 Australian High Court decision, *Mabo v Queensland*, which decried the country's historical reliance on *terra nullius*.⁹

Recently, legal scholars from across the former British Empire have revived critical inquiry into the idea of discovery.¹⁰ Their work is powerful and incisive. Yet a characteristic feature of this current scholarship has laid bare a serious flaw in the work of Felix Cohen. The characteristic feature is the treatment of discovery as an idea manifested in a single “Doctrine of Discovery” said to have been accepted as a principle of international law influencing European adventurism for centuries, beginning in the 1400s in Iberia and continuing throughout the age of modern colonialism.¹¹ The

6. See, e.g., FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 123–26 (1995); PETRA T. SHATTUCK & JILL NORNGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM 31–38 (1991).

7. See, e.g., *Catawba Indian Tribe of S.C. v. South Carolina*, 865 F.2d 1444, 1451 (4th Cir. 1989); *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 616–17 (2d Cir. 1981); *Cherokee Nation or Tribe of Indians v. Oklahoma*, 402 F.2d 739, 745 (10th Cir. 1968); *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 997–98 (Ct. Cl. 1967).

8. See GISELLE BYRNES, THE WAITANGI TRIBUNAL AND NEW ZEALAND HISTORY (2004); THE WAITANGI TRIBUNAL: TE ROOPU WHAKAMANA I TE TIRITIO WAITANGI (Janine Hayward & Nicola R. Wheen eds., 2004); Jacinta Ruru, *The Waitangi Tribunal*, in WEEPING WATERS: THE TREATY OF WAITANGI AND CONSTITUTIONAL CHANGE 127 (Malcolm Mulholland & Veronica Tawhai eds., 2010).

9. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (Austl.).

10. See, e.g., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (Robert J. Miller, Jacinta Ruru, Larissa Behrendt, & Tracey Lindberg eds., 2010) (collection of essays on the effect of discovery in the settlement of Australia, Canada, New Zealand, and the United States); LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 75–80, 96–105, 111–44 (2005) (discussing how the idea of discovery helped facilitate European appropriation of American Indian lands); BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: *JOHNSON V. MCINTOSH* AND THE HISTORY OF NATIVE LAND RIGHTS 322–58 (2012) (examining the impact of the idea of discovery in the exploration and settlement of the United States).

11. See, e.g., Larissa Behrendt, *The Doctrine of Discovery in Australia*, in DISCOVERING INDIGENOUS LANDS, *supra* note 10, at 171 (maintaining that in settling the Australian continent, the British chose to exercise the discovery precept of *terra nullius*); Larissa Behrendt, *Asserting the Doctrine of Discovery in Australia*, in *Discovering Indigenous Lands*, *supra* note 10, at 187 (same); Patrick

serious flaw is that this ‘*single doctrine of discovery thesis*’ originated with Cohen and is mistaken.

Cohen’s studies and advocacy in federal Indian law were groundbreaking. He deserves esteem. He represented tribal interests before the United States Supreme Court,¹² helped draft the Indian Reorganization Act of 1934,¹³ and greatly influenced the development of federal Indian law as a distinct field of legal study.¹⁴ One of his signature contributions was “[t]o show that the basic principles of the law of the United States relating to Indian rights were derived from Spanish sources.”¹⁵ He gave special prominence to the work of the Salamanca jurist Francisco de Vitoria. Cohen argued first, that federal Indian law originated and is best understood in the context of international law, and second, that the basic concepts of international law addressing European discovery of indigenous lands and peoples “were all hammered out by the Spanish theological jurists of the sixteenth and seventeenth centuries, most notably . . . Francisco de Vitoria.”¹⁶ Cohen went on to say:

Macklem, *What is International Human Rights Law? Three Applications of a Distributive Account*, 52 MCGILL L.J. 575, 591 (2007) (arguing that early international law recognized a doctrine of discovery containing several precepts); Robert J. Miller, *The Doctrine of Discovery*, in DISCOVERING INDIGENOUS LANDS, *supra* note 10, at 1 (defining a Doctrine of Discovery with ten elements and detailing its development in Europe and impact in North America and elsewhere); Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849 (2009) (same); ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY 9–23 (Univ. of Neb. Press 2008) (2006) (same); Jacinta Ruru, *The Still Permeating Influence of the Doctrine of Discovery in Aotearoa/New Zealand: 1970s–2000s*, in DISCOVERING INDIGENOUS LANDS, *supra* note 10, at 227 (expressly extending Miller’s conception of a ten-element doctrine of discovery to the British settlement of New Zealand); Jacinta Ruru, *Concluding Comparatively: Discovery in the English Colonies*, in DISCOVERING INDIGENOUS LANDS, *supra* note 10, at 247 (same); WATSON, *supra* note 10, at 349 (referring to *terra nullius* as “the most extreme version of [the] doctrine of discovery,” which is also taken to include the concept of discovery followed by the United States Supreme Court in its formative cases on federal Indian law).

12. See *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941).

13. 25 U.S.C. §§ 461–479 (2012).

14. See Neil Jessup Newton et. al., *Forward to COHEN’S HANDBOOK*, *supra* note 1, at vii, which highlights the significance of Cohen’s *Handbook* by noting that prior to its first publication in 1941, “lawyers and courts regarded federal Indian law as a collection of loosely connected, tribally specific treaties, statutes, case decisions, and other sources. Felix Cohen’s *Handbook* brought focus and coherence to this confusing welter of sources and, in effect, created the field of federal Indian law.” *Id.*

15. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, *supra* note 1, at 16. See also COHEN’S HANDBOOK, *supra* note 1, § 1.02[1], at 11 (stating that “many principles of Spanish jurisprudence found their way into early American Indian law”); Cohen, *Original Indian Title*, *supra* note 1, at 43–44 (“[American] concepts of Indian title derive only in part from common law feudal concepts. In the main, they are to be traced to Spanish origins.”).

16. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, *supra* note 1, at 17. Accord COHEN’S HANDBOOK, *supra* note 1, § 1.02[1], at 9 (maintaining that Vitoria’s writings “formed the foundation of both international law and modern Indian law”); Cohen, *Original Indian Title*, *supra* note 1, at 44 (identifying Vitoria works as the principal influence on the American concept of Indian land title).

While Vitoria himself is not directly cited in any of the early opinions of the United States Supreme Court on Indian cases, these opinions frequently refer to statements by Grotius and Vattel that are either copied or adapted from the words of Vitoria. It is thus clear that the tradition of legal teaching carried Vitoria's theories on Indian rights to the judges and attorneys who formulated our legal doctrine in this field.¹⁷

This statement oversimplifies the highly complex idea of discovery. That idea never denoted a singular concept or an enduring and unchanging jurisprudential notion. Rather, it evolved and took distinctly different doctrinal forms over the centuries. Vitoria crafted the natural law right of discovery in the 1530s.¹⁸ Other legal philosophers, including Hugo Grotius and Emer de Vattel, advanced the idea of discovery in subsequent centuries. Yet they hardly just "copied or adapted from the words of Vitoria," as Cohen claimed.¹⁹ Vattel in particular conceived of the right of discovery in a manner that directly contradicted Vitoria. Moreover, none of the early opinions of the United States Supreme Court, including the famous set of cases known as the Marshall trilogy,²⁰ carried Vitoria's right of discovery forward "to the judges and attorneys who formulated our legal doctrine in this field" of federal Indian law.²¹ The idea of discovery adopted by the Supreme Court was not Vitoria's.

In this paper, I question Cohen's claim about Vitoria's influence. More generally, I question the thesis that a single doctrine of discovery held sway for centuries in international law, guiding the European exploration and expropriation of indigenous lands. I ask whether the history of jurisprudential thought and legal decision supports the single discovery doctrine thesis, or if the idea of discovery instead was manifested in philosophically distinct theories favored by European powers in different ages and geopolitical contexts to expropriate newly 'discovered' lands. The jurisprudential record supports the distinct theory thesis, revealing four different discovery doctrines.

In Parts I–IV, I discuss the four discovery doctrines in historical sequence. Part I considers the earliest doctrine, the medieval papal theory

17. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, *supra* note 1, at 17. *Accord* COHEN'S HANDBOOK, *supra* note 1, § 1.02, at 11.

18. *See infra* text accompanying notes 84–119.

19. *See* Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, *supra* note 1, at 17.

20. *See* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

21. *See* Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, *supra* note 1, at 17.

of discovery. Developed by the papacy and employed in consort with Catholic monarchs, this theory helped facilitate the spread of Christianity across Europe and beyond beginning in the Middle Ages. Part II examines the natural law right of discovery. First formulated by Vitoria in the 1530s and subsequently refined by later philosophers writing in the traditions of natural law and the law of nations, this jurisprudential right of discovery influenced European adventurism until the nineteenth century. Part III analyzes the form the doctrine of discovery took in the United States Supreme Court during the nineteenth century, beginning with the Marshall trilogy. Part IV examines the theory of *terra nullius* employed by the British in settling Australia. Finally, I consider the effects of the single doctrine of discovery thesis. I conclude that by failing to carefully distinguish the different ideas of discovery, the thesis misrepresents jurisprudential history, generates needless theoretical confusion, and undermines future efforts to rectify past injustices.

I. PAPAL THEORY OF DISCOVERY

A. In General

The idea that “discovery” of unknown lands gives to the discoverer the right to claim and assert sovereign ownership began to appear in Western culture as early as fifth century Rome. Historians trace it to the Roman Catholic Church and the efforts of early popes to assert worldwide papal jurisdiction.²² The form discovery took under the enterprising resolve of the medieval Church is best understood as a close analog to what is known as the principle of *terra nullius*.

In pursuit of its self-proclaimed global calling to cure the spiritual health of all persons, the early Catholic Church considered itself justified to intervene in the secular affairs of nonbelievers. Intervention extended to all infidels who offended Church-sanctioned precepts of divine and natural law. Foremost among those precepts was the obligation to abide by the will and commands of the Christian God. Purportedly for the heathens’ own sakes, the Church claimed an obligation to undertake the burden of conversion by spreading the gospel’s redemptive word.²³ The Church promised salvation and eternal life. To achieve that beneficial end, it collaborated with European nobility to conquer and subdue whole populations of the unenlightened. Submission often required repressing

22. See, e.g., ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN, AND FRANCE C. 1500–C. 1800* 24–31 (1995); WILLIAMS, *supra* note 5, at 13–18.

23. See, e.g., PAGDEN, *supra* note 22, at 24–31.

freedom, even to the point of enslavement. It also justified diminishing the dominium of nonbelievers, appropriating their lands, and compromising their sovereignty.²⁴

A prime example of church/crown collaboration is the bull *Laudabiliter*, issued by Pope Adrian IV in 1155. The bull directly addressed King Henry II of England who was contemplating an invasion of Ireland. Adrian used the bull to grant Henry the island's possession in advance. The bestowal was made "to enlarge the boundaries of the Church, to teach rude and ignorant peoples the truth of the Christian faith and to stamp out the plants of evil from the field of the Lord."²⁵ The pope further proclaimed to Henry:

You have signified to us, most beloved son in Christ, your desire to enter the island of Ireland in order to subject the people of it to laws and to extirpate the vices which have taken root there; and also your willingness to pay an annual pension to St. Peter of one penny from every house We, therefore, . . . consider it as accepted and agreed that you should enter that island in order to extend the boundaries of the Church, to restrain the downward course of vice, to correct morals and implant virtues, to advance the Christian religion and to execute there everything which tends to the honour of God and to the salvation of the land.²⁶

Through such strategic collaborations between the Church and European powers, heathen lands fell subject to appropriation under the rough-hewn fiction that, as a matter of law, they belonged to no one—*terra nullius* in inchoate form. The medieval papal and political authorities of course knew that the lands of non-Christian infidels were occupied. The very justification for expropriation presumed as much. The presence of nonbelievers gave cause for confiscation. Self-burdened with responsibility to spread the gospel to all infidels wherever found, the Church treated confiscation of heathen lands by its political partners as part and parcel of its redemptive mission. To say that the papal theory of discovery was closely analogous to the principle of *terra nullius* thus does not mean that the idea of discovery operative in medieval Christian Europe authorized the appropriation of land actually belonging to no one. 'No one' meant no Christian, or no one but infidels. The principle was *terra infidelibus* ('land belonging to infidels').

24. See *id.* at 24–35.

25. Bull "Laudabiliter" of Pope Adrian IV Sanctioning the Conquest of Ireland by Henry II, King of England (1155), in CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES 53, 54 (Sidney Z. Ehler & John B. Morrall eds. & trans., Biblio & Tannen 1967).

26. *Id.* at 55.

This incipient discovery idea authorized the expropriation of lands belonging to non-Christian peoples that were ‘discovered’ by European expansionists acting under authority of Christian rulers in partnership with the Catholic Church.

B. The Question of Infidel Rights

For several centuries, *terra infidelibus* worked its influence as a practical, religio-political idea. It helped facilitate the Catholic Church’s expansion across Europe during the Early and High Middle Ages. It also accommodated the political ambitions of Christian rulers. By the mid-thirteenth century, however, the idea that discovery of unknown lands could give Christian rulers legitimate authority to subdue non-Christians and confiscate their lands came under pressure from the dawning sentiment that infidels may have rights worthy of legal protection. Central to the emergence of this sentiment was a brilliant canon lawyer, Sinibaldo Fieschi, better remembered as Pope Innocent IV (1243-1254).²⁷

Prior to Innocent, the rights of non-Christians had received relatively little consideration from canonists. The first collection of canon laws, Gratian’s *Decretum* (c. 1140), paid almost no attention to nonbelievers.²⁸ The second volume of canon law, Pope Gregory IX’s *Decretals*, published nearly a century later in 1234, included a limited number of canons addressing the personal and social relations between Christians and non-Christians in Europe.²⁹ Not until the papacy of Innocent did the question of whether Christians have a general right to seize the lands of infidels become a subject of study in canonist thought. His *Commentaria doctissima in Quinque Libros Decretalium* (1245)³⁰ addressed the question directly.

Heavily influenced by Aristotelian philosophy and drawing authority from both Roman law and Biblical passages, Innocent argued that Christians do not have an unqualified right to seize the lands of infidels.³¹ Innocent thought this position followed necessarily from natural law. For while all property was originally held in common, the light of natural reason, as informed by worldly affairs, revealed the social utility of private

27. See JAMES MULDOON, *POPES, LAWYERS AND INFIDELS* 29 (Edward Peters ed., 1979).

28. See *CORPUS IURIS CANONIC: VOL. I, DECRETUM* (Emil Friedberg ed., Bernard Tauchnitz 1879–81) (c. 1140).

29. *CORPUS IURIS CANONIC: VOL. II, DECRETALES* (Emil Friedberg ed., Bernard Tauchnitz 1879–81) (1234).

30. INNOCENT IV, *COMMENTARIA DOCTISSIMA IN QUINQUE LIBROS DECRETALIIUM* (Apud haeredes Nicolai Beuilaquae, 1581) (1245).

31. *Id.* at 3.34.8., fol. 176v.

property.³² Hence, the natural right of dominium became a secondary precept of natural law.³³ Innocent conceived of it as a right that extended to all people, independent of spiritual standing. Accordingly, the law of nature qualified the Church's power over infidel lands. The Church could not deprive heathens of their lands simply on the ground that they were nonbelievers. Seizure was lawful only when predicated on specific, just cause.³⁴

Innocent did not, however, question or qualify the pope's responsibility to secure the salvation of all souls, Christian and heathen alike. He affirmed that this pastoral responsibility was absolute and universal. As such, the pope's redemptive obligations and temporal jurisdiction extended across the entire world, though as to infidels the jurisdiction was *de jure* only, not *de facto*.³⁵ Innocent argued that so long as infidels abided by the precepts of natural law and welcomed peaceful Christian missionaries, the Church did not have just cause to deprive them of their lands or interfere with their self-governance.³⁶ However, the papacy could authorize the invasion and conquest of heathen societies when necessary to enforce the dictates of natural law or secure safe entry for missionaries.³⁷

Pope Innocent IV thus importantly qualified the theory of *terra infidelibus*. Medievalists consider his conviction that infidels can possess dominium to be a principal legacy of his papacy and one of his most significant contributions to canonical thought.³⁸ This concession to the rights of infidels should not be taken as a weakening of papal power, however. For Innocent asserted as forcefully as any pontiff before him the Church's universal jurisdiction. He assumed absolute responsibility for the spiritual well-being of all people.³⁹ To fulfill this responsibility, he issued formal restrictions on European Jews and Muslims to protect Christians from spiritual and bodily injury.⁴⁰ He ordered that the Talmud be burned to shield Jews from false teachings.⁴¹ And he authorized indulgences for crusades to the Holy Land and to Muslim-controlled regions of Spain.⁴² His

32. *See id.*

33. *See id.* Accord THOMAS AQUINAS, SUMMA THEOLOGIAE I. q. 94 art. 5 (Fathers of the English Dominican Province trans., Benzinger Bros. 1948).

34. *See* INNOCENT IV, *supra* note 30, at 3.34.8., fol. 176v.

35. *See id.* ("Papa super omnes habet iurisdictionem. et potestatem de iure, licet non de facto.")

36. *See id.*

37. *See id.*

38. *See* MULDOON, *supra* note 27, at 29–30, 47.

39. *See id.* at 45; WILLIAMS, *supra* note 5, at 13–14.

40. *See* MULDOON, *supra* note 27, at 45.

41. *See id.*

42. *See id.* at 45–46.

commentary on Pope Innocent III's decretal *Quod super his* proclaimed the Church's unqualified power to authorize the invasion of heathen lands by Christian armies to spread the gospel and convert nonbelievers.⁴³ Infidels could possess dominium, but spiritual redemption provided ample just cause for overriding that natural right. All told, the first half of the thirteenth century, which included Innocent's pontificate, was the high point of the Roman Catholic Church's power and political influence.⁴⁴ Innocent's death in 1254 marked the beginning of its decline.⁴⁵

Debate within the Church and among canon and civil lawyers over the rights of infidels to lordship and property, as well as over the scope of the Church's power and jurisdiction continued for over a century and a half after Innocent. Some notable figures, such as the early natural law philosopher Giovanni de Legnano, continued Innocent's line of reasoning. Legnano's principal work, the *Tractatus De Bello, De Represaliis et De Duello*, written in 1360, remains significant today as the first formal work on the theory of just war.⁴⁶ In examining the question of who could rightfully declare war, Legnano followed Innocent in affirming the rights of non-Christians to govern themselves and possess property.⁴⁷

Other canon and civil lawyers rebutted Innocent. His own student, Henry of Segusio, widely known as Hostiensis, published an influential argument against his teacher shortly after Innocent's death.⁴⁸ To Hostiensis, Christ and the Roman pontiffs held unqualified jurisdiction over all spiritual and temporal affairs worldwide.⁴⁹ When Christ became incarnate, nonbelievers lost their natural rights to property and lordship; hence, the pope could take their lands and expunge their sovereignty at will, since they were usurpers of all lands and offices they occupied.⁵⁰ Similar sentiments came from the early fourteenth century Italian jurist Oldratus de Ponte. Focusing strictly on infidels living in Europe, Oldratus argued that the birth of Christ irrevocably altered the content of natural law.⁵¹ According to Oldratus, the Nativity signified that all people were created to worship the Christian God. While the rights to property and self-governance previously had been universal, those who refused to accept Christ forfeited those rights. Further,

43. See *id.* at 6–14; WILLIAMS, *supra* note 5, at 44–50.

44. See MULDOON, *supra* note 27, at 46–47, 49.

45. See *id.* at 49.

46. GIOVANNI DE LEGNANO, *TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO* (Thomas Erskine Holland ed., James Leslie Brierly trans., Oxford Univ. Press 1917) (1360).

47. See *id.* at 269–76.

48. See HOSTIENSIS, *LECTURA QUINQUE DECRETALIIUM* 3.34.8, fol. 124v (1512).

49. See *id.*

50. See *id.*

51. See OLDRATUS DE PONTE, *CONSILIA consilium* 72, fols. 72–73 (Franciscus Zilettus 1571).

Oldratus insisted nonbelievers were not wronged by Christians who seized their property or crushed their sovereignty, for such temporal losses might lead them to faith and ultimately salvation.⁵²

This debate over the rights of infidels and the Church's power to expropriate under the theory of *terra infidelibus* reached a formal, though frail, resolution early in the fifteenth century. Conflict between the Kingdom of Poland and the crusading Teutonic Knights over pagan Lithuania provided the stimulus. The Poles and the Knights had long asserted competing claims and skirmished over Lithuania.⁵³ Both based their claims on papal authority. The conflict wore on for over a century with neither faction gaining lasting political advantage. This was due in no small part to the refractory Lithuanians' persistent desire for self-determination. Finally, in 1386, Poland and Lithuania reached an accord and formed a political alliance.⁵⁴ Their combined might led to a suffering defeat of the Teutonic Knights in 1410.⁵⁵ The need for diplomacy was still fresh when the ecumenical council known as the Council of Constance convened in 1414. There, the Church and secular Christian rulers, along with the Teutonic Knights, adopted a formal doctrine of cooperation regarding their adventures in heathen lands.⁵⁶ The doctrine expressly affirmed Innocent's position on the rights of infidels, as they agreed not to intervene in the governance and affairs of non-Christians who complied with the Church-sanctioned dictates of natural law.⁵⁷

Growing out of the conflict over Lithuania, the understanding of *terra infidelibus* agreed to at the Council of Constance was conceived with European infidels in mind. It put to rest the debate over the rights of nonbelievers that had simmered since the mid-thirteenth century. Innocent's views on the natural right of infidels to possess property and exercise sovereignty prevailed; Hostiensis' argument that natural rights depend upon divine grace was repudiated. It soon became clear, however, that the clarity regarding the rights of non-Christians provided by the Council of Constance did not carry over to the exploits of Christian European rulers acting beyond the boundaries of Europe.

52. *See id.*

53. *See* ERIC CHRISTIANSEN, *THE NORTHERN CRUSADES 138–76* (1997); MULDOON, *supra* note 27, at 32–33, 107.

54. *See* MULDOON, *supra* note 27, at 107; LYNN THORNDIKE, *THE HISTORY OF MEDIEVAL EUROPE 552* (1917); WILLIAM URBAN, *THE LAST YEARS OF THE TEUTONIC KNIGHTS: LITHUANIA, POLAND AND THE TEUTONIC ORDER 17* (2019).

55. *See* CHRISTIANSEN, *supra* note 53, at 227–30; URBAN, *supra* note 54, at 105–29.

56. *See* MULDOON, *supra* note 27, at 107–19.

57. *See* CHRISTIANSEN, *supra* note 53, at 233; Miller, *The Doctrine of Discovery*, *supra* note 11, at 10; MULDOON, *supra* note 27, at 118–19; PAGDEN, *supra* note 22, at 24, 126; WILLIAMS, *supra* note 5, at 58–67.

C. *The Fifteenth Century Bulls of Donation*

Just two decades after the Council of Constance, Pope Eugenius IV issued a papal bull, the *Romanus Pontifex* (1436). The bull's principal purpose was to settle a dispute between Portugal and Castile by awarding the Canary Islands to Portugal.⁵⁸ The kings of Portugal and Castile had each laid claim to the Canaries. Both based their claims on discovery. Uncertain at first how to resolve competing claims by two Catholic monarchs, Eugenius banned all Christians from engaging with the islands in 1434.⁵⁹ King Duarte of Portugal protested. In a long letter to the pope prophesying the inevitable European conquest of the West African island chain, Duarte assured Eugenius that the Portuguese interest in the islands rested foremost in converting the native Gauches people to Christianity. He noted that his brother, Prince Henry the Navigator, had already begun significant missionary work among them. As to the rights of the Gauches to dominium, Duarte's letter largely fell silent. He was careful not to contradict Innocent's line of argument regarding the rights of infidels. Yet he did not encourage respect for the Gauches. He described them as fierce and primitive, as "nearly wild men . . . lacking in normal social intercourse, living in the country like animals."⁶⁰ The Portuguese would bring them civil laws, organized government, and the blessings of Christian baptism.⁶¹ The implication was that little concern needed to be given to the Gauches' interests in dominium, for depriving them of their earthly holdings was far outweighed by the spiritual rewards they could receive. After first securing legal advice on the rights of infidels from two prominent canon lawyers,⁶² Eugenius issued the *Romanus Pontifex*. With it, he authorized Portugal to assert managerial control over the Canaries on behalf of the Church, on the condition that it convert the Gauches to Christianity.⁶³

Subsequent popes reissued the *Romanus Pontifex*. Additional papal bulls on discovery and conquest followed later in the fifteenth century. Each bull augmented the powers of the Church and the Christian rulers, further reinvigorating the longstanding principle of *terra infidelibus*. Most of the edicts inured to the benefit of Portugal for its escapades along the west coast

58. See MULDOON, *supra* note 27, at 120.

59. See Miller, *The Doctrine of Discovery*, *supra* note 11, at 10; MULDOON, *supra* note 27, at 120; WILLIAMS, *supra* note 5, at 68.

60. MULDOON, *supra* note 27, at 121.

61. See Miller, *The Doctrine of Discovery*, *supra* note 11, at 10–11; MULDOON, *supra* note 27, at 121; WILLIAMS, *supra* note 5, at 69–70.

62. See MULDOON, *supra* note 27, at 124–28.

63. See Miller, *The Doctrine of Discovery*, *supra* note 11, at 10–11; MULDOON, *supra* note 27, at 119–27; EDGAR PRESTAGE, *THE PORTUGUESE PIONEERS* 8–9, 38–50, 54–59 (1933); WILLIAMS, *supra* note 5, at 69–72.

of Africa. Among the most wide-ranging and generous was the version of the *Romanus Pontifex* issued by Pope Nicholas V in 1455. This bull noted that the earlier *Romanus Pontifex* and other papal letters had granted the Portuguese “full and free permission . . . to invade, search out, capture, conquer and subjugate all Saracens and pagans whatsoever and wherever they exist, together with their kingdoms, duchies, principalities, lordships, possessions and whatever goods . . . and to bring their persons into perpetual slavery”⁶⁴ It further stipulated:

[T]he aforesaid letters of permission . . . are to be extended . . . to the above-mentioned [regions along the west coast of Africa] and any other acquisitions whatsoever, even if acquired before the date of the aforesaid letters of permission, and to those provinces, islands, ports and seas, whatever they may be, which henceforth in the name of the said King Alfonso [of Portugal] and his successors . . . may be acquired from the hands of the infidels or pagans in those and the adjoining regions and in the further and more remote areas. We also decree that . . . the territories already acquired and those which shall happen to be acquired in the future . . . for ever do belong and pertain “de iure” to the same King Alfonso and his successors⁶⁵

Starting with the first *Romanus Pontifex*, the principal effect of the fifteenth century series of papal bulls on discovery was to reserve land for Portugal. Well aware that the bulls earmarked West Africa for Portugal’s expansionist exploits, Spain’s Catholic monarchs began to look westward. With the blessing of King Ferdinand of Aragon and Queen Isabella of Castile, Christopher Columbus sailed to the West Indies in 1492. Promptly after Columbus’ return to Iberia, King Ferdinand and Queen Isabella sought papal recognition of Spanish title to the islands Columbus ‘discovered.’ Pope Alexander VI quickly confirmed Spain’s title. On consecutive days in May 1493, he issued two bulls, each beginning with the words *Inter caetera Divinae*.⁶⁶ The second, issued May 4, 1493, carried more importance. It granted title to the claimed islands to Spain. Further, it included language clarifying how the discovery rights it extended to Spain fit with those earlier

64. Bull “*Romanus Pontifex*” of Pope Nicholas V Granting the Territories Discovered in Africa to Portugal, January 8, 1455, in CHURCH AND STATE THROUGH THE CENTURIES, *supra* note 25, at 149; see also Miller, *The Doctrine of Discovery*, *supra* note 11, at 11; MULDOON, *supra* note 27, at 126–27; WILLIAMS, *supra* note 5, at 71–72.

65. See Bull “*Romanus Pontifex*” of Pope Nicholas V, *supra* note 64, at 149–50.

66. See Bull “*Inter caetera Divinae*” of Pope Alexander VI Dividing the New Continents and Granting America to Spain, May 4, 1493, in CHURCH AND STATE THROUGH THE CENTURIES, *supra* note 25, at 154.

promised to Portugal by the series of donative bulls beginning with the first *Romanus Pontifex*.⁶⁷

Inter caetera II began by declaring the Caribbean islands in question to be Spanish possessions since they were “actually discovered” by Columbus and had “not been found by any one else before.”⁶⁸ The bull further granted Spain title to whatever other lands it may subsequently discover, provided they were not already “actually possessed by some other Christian king or prince.”⁶⁹ Next, the bull stipulated a longitudinal line from the North Pole to the South Pole, bisecting the Atlantic Ocean. Spain was given discovery rights over all lands to the line’s west (nearly all of the New World), Portugal to the east (all of Africa and the East Indies).⁷⁰ A year later, in 1494, Portugal and Spain entered into the Treaty of Tordesillas.⁷¹ The treaty moved the line of donative demarcation further west, far enough for Portugal to explore and colonize much of what later became Brazil.⁷² By virtue of the bulls from the first *Romanus Pontifex* to *Inter caetera II*, as modified by the Treaty of Tordesillas, Portugal and Spain thus could explore, subdue, and assert dominion over all non-Christian peoples and lands worldwide, on behalf of and in the name of Christendom.⁷³

With this, the papal idea of discovery, in the sense of *terra infidelibus*, began to influence the Americas.⁷⁴ Historians correctly note that the form the idea took as the fifteenth century drew to a close consisted of four key points. As described by Robert J. Miller, the doctrine established that:

1. the Church had the political and secular authority to grant Christian kings a form of title and ownership in the lands of infidels; 2. European exploration and colonization was designed to exercise the Church’s guardianship duties over all the earthly flock, including infidels; 3. Spain and Portugal held exclusive rights over other European, Christian countries to explore and colonize the entire world; and 4. the mere sighting and discovery of new lands by Spain or Portugal in their respective spheres of influence and the symbolic possession of these lands by undertaking the rituals and formalities

67. See *id.*

68. See Bull “*Inter caetera Divinae*” of Pope Alexander VI *Dividing the New Continents and Granting America to Spain*, May 4, 1493, *supra* note 66, at 156.

69. *Id.* at 157.

70. See *id.*

71. See Miller, *The Doctrine of Discovery*, *supra* note 11, at 12; MULDOON, *supra* note 27, at 139.

72. See Miller, *The Doctrine of Discovery*, *supra* note 11, at 12.

73. See *id.*; PAGDEN, *supra* note 22, at 47; WILLIAMS, *supra* note 5, at 80.

74. See Miller, *The Doctrine of Discovery*, *supra* note 11, at 11–12; WILLIAMS, *supra* note 5, at 74–78.

of possession, such as planting flags or leaving objects to prove their presence, were sufficient to create rights in these lands.⁷⁵

Notably absent from this list is the universal natural right to dominium that Pope Innocent IV introduced to the idea of discovery in the mid-1200s. The Council of Constance endorsed Innocent's line of thinking in 1418.⁷⁶ Yet as the fifteenth century wore on and European dreams of adventure and conquest turned resolutely beyond the continent, mention of natural rights of non-Christians fell away. The bulls of donation to Portugal and Spain from the first *Romanus Pontifex* through *Inter caetera II* all deftly sidestepped any reference to the rights of infidels. The lawyers who drafted those letters of donation were careful to avoid direct mention of natural rights so as not to inconvenience the papacy's assumed power to bestow dominium over the entire world outside Europe.⁷⁷ The discovery doctrine of *terra infidelibus* could countenance natural rights for European pagans like the Lithuanians, but the indigenous others the Europeans began to encounter in Africa, Asia, and the Americas were just too different.

II. NATURAL LAW RIGHT OF DISCOVERY

A. Political Opposition to Terra Infidelibus

The medieval papacy's conception of discovery substantially influenced the exploration and colonization of Latin America. To a large extent, the church/state partnership it embraced shaped the colonial adventures of Portugal and Spain until the late eighteenth century.⁷⁸ However, the papal theory only nominally impacted the imperial exploits of other European nations. Two forces, one political, the other philosophical, worked against it.

Politically, the papal doctrine quickly drew opposition from Christian European monarchies other than its two donative beneficiaries. By the mid-sixteenth century, England, France, and other European nations began to contest the practice, common to Spain and Portugal, of establishing territorial claims by performing rituals or even just sighting land.⁷⁹ These

75. Miller, *The Doctrine of Discovery*, *supra* note 11, at 13.

76. See, e.g., MULDOON, *supra* note 27, at 126.

77. See *id.* at 120–24, 128–29.

78. See LEWIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* 2–3, 25–26 (1949); PAGDEN, *supra* note 22, at 32–33, 46–49; Bull “*Inter caetera Divinae*” of Pope Alexander VI *Dividing the New Continents and Granting America to Spain, May 4, 1493*, *supra* note 66, at 156.

79. See PAGDEN, *supra* note 22, at 33–37. See also HUGO GROTIUS, *COMMENTARY ON THE LAW OF PRIZE AND BOOTY* 306 (Martine Julia van Ittersum ed., Liberty Fund 2006) (1868) (contending

European nations also argued that the pope did not have authority to parcel the entire ‘undiscovered’ world to the Spanish and Portuguese.⁸⁰ Columbus’ voyages to the West Indies, along with other European maritime adventures, such as Vasco da Gama’s discovery of a sea route to India in 1498 and Ferdinand Magellan’s circumnavigation of the earth from 1519 to 1522, left Europeans convinced that there was substantial land unknown to them lying beyond their continent.⁸¹ They hungered for adventure and conquest. The idea that the papacy could bequeath this untold abundance to only Portugal and Spain offended other European nations. Those like England, with a strained relationship with the Catholic Church, readily dismissed papal assertions of donative power.⁸² Yet even a staunch Roman Catholic country like France largely disregarded the bulls of donation even though the French did not question the Church’s claim to universal ecclesiastical jurisdiction.⁸³ This widespread opposition to Portugal and Spain’s favored-nation status in the letters of donation significantly eroded the authority of the papal discovery doctrine well before the European age of discovery began in earnest. However, the opposition focused almost entirely on the pope’s donative authority. As a rule, European monarchs did not challenge the presumption at the heart of *terra infidelibus* that the lands of distant foreign infidels were ripe for Europeans to explore and colonize, with little need to consider the rights of the indigenous others.

B. *Francisco de Vitoria*

The papal discovery doctrine fell subject to broader, more trenchant criticism in the realm of philosophy than in the political arena. Early in the sixteenth century, disaffection emerged within Spanish religious and legal communities over the legitimacy of Spain’s claims to dominion in the New World. King Charles V responded by convening a group of legal scholars, including the influential natural law philosopher, Francisco de Vitoria. In 1535, Vitoria presented a set of lectures, *De Indis (On the American*

that “discovery consists, not in perceiving a thing with the eye, but in actual seizure”); *id.* at 307 (“Discovery suffices to create a title to ownership only when possession is an accompanying factor”); EMER DE VATEL, *THE LAW OF NATIONS* 215 (Béla Kaposy & Richard Whatmore eds., Liberty Fund 2008) (1758) (arguing that, by the law of nations, claims of ownership over discovered, uninhabited lands require “actual possession,” for “when navigators have met with desert countries in which those of other nations had, in their transient visits, erected some monument to shew their having taken possession of them, they have paid . . . little regard to that empty ceremony”).

80. See Miller, *The Doctrine of Discovery*, *supra* note 11, at 18–22.

81. See, e.g., JAMES BRYCE, *THE HOLY ROMAN EMPIRE* 362–63 (new ed. 1904).

82. See, e.g., PAGDEN, *supra* note 22, at 35–37.

83. See *id.* at 33–35.

Indians).⁸⁴ Significantly, Vitoria rejected the assertion of unqualified papal or royal authority to parcel indigenous lands, including on discovery.⁸⁵

Vitoria reasoned that the indigenous peoples of the Americas could not be displaced and dispossessed of their lands simply on the ground that they were Christian heretics. Appropriation of their lands on that ground alone amounted to robbery.⁸⁶ The conclusion clearly holds, Vitoria wrote, “*that before arrival of the Spaniards these barbarians possessed true dominion, both in public and private affairs.*”⁸⁷ He argued that their dominion was no less legitimate than that of Christians.⁸⁸ Further, neither king nor pope could nullify that dominion at will. For by natural law, all people are free and no one is master of the whole world.⁸⁹ While human law has introduced temporal supremacy, “no one can be emperor of the world by natural law.”⁹⁰ Hence, any Spanish claims to ownership over tribal lands in the Americas based solely on papal or monarchical authority led to an illegitimate and unjust title.⁹¹ This was true, Vitoria continued, even though by natural law and the law of nations derived from it, property and lands that belong to no one—i.e., *terra nullius*—pass to the first discoverer or occupier.⁹² For the lands of the New World were not *terra nullius*. They had indigenous owners. Hence, their ‘discovery’ by the Spanish “of itself provides no support for possession of these lands, *any more than it would if they had discovered us.*”⁹³

Vitoria did allow, though, that discovery could lead to a just title if connected with other considerations.⁹⁴ He observed that by natural law and the law of nations, all people have rights to travel and engage in fair trade.⁹⁵ “[S]o long as they do no harm” to the people or their homelands, Vitoria reasoned that the Spaniards have the right to travel and live in the Americas, and the right to trade lawfully among its indigenous inhabitants.⁹⁶ If the Indians were to abridge these natural rights that belong to all, then discovery

84. Francisco de Vitoria, *On the American Indians*, in POLITICAL WRITINGS 231 (Anthony Pagden & Jeremy Lawrence eds., Cambridge Univ. Press 1991).

85. *See id.* at 252–65.

86. *See id.* at 250.

87. *Id.* at 251.

88. *Id.* at 250.

89. *See id.* at 254.

90. *Id.*

91. *See id.* at 252–64.

92. *See id.* at 264–65.

93. *Id.* at 265 (emphasis added).

94. *See id.*

95. *See id.* at 278–81.

96. *Id.* at 278, 279.

would give a European ruler a limited right to interfere with their dominion.⁹⁷

Further, Vitoria combined the rights to travel and engage in commerce with the natural law condition of common property. He reasoned that, “*if there are any things among the barbarians which are held in common both by their own people and by strangers, it is not lawful for the barbarians to prohibit the Spaniards from sharing and enjoying them.*”⁹⁸ Hence, any lands or water resources treated by the American Indians as common property had to be shared communally with the Spaniards. The rights of the discoverers to shared use of such common property was conditioned, however, by the traditions of the Indians. Vitoria argued that Europeans “are only allowed to do this kind of thing [i.e., use and draw resources from common property] on the same terms as the [Indians], namely without causing offence to the native inhabitants and citizens.”⁹⁹ According to Vitoria, this limited right to use common resources directly followed from the rights to travel and trade, as protected by natural law. He wrote that “proof of this follows from the first [right to travel] and second [right to trade] propositions. If the Spaniards are allowed to travel and trade among the barbarians, they are allowed to make use of the legal privileges and advantages conceded to all travelers.”¹⁰⁰

Vitoria also argued that the Spanish could acquire just title to occupied lands in the Americas if the indigenous inhabitants were to obstruct them from spreading word about the Christian religion.¹⁰¹ All Christians, he maintained, have a natural right to preach the gospel in the lands of nonbelievers.¹⁰² This right held special prominence for the pope, since his “special business [is] to promote the Gospel throughout the world.”¹⁰³ Though Vitoria denied that the pope had jurisdiction over temporal affairs, he insisted that the Roman pontiff “has power in temporal things insofar as they concern spiritual things.”¹⁰⁴ Hence, the pope could not only delegate and “restrict . . . the right to preach, but also the right to trade, if this is convenient for the spreading of the Christian religion.”¹⁰⁵ In this way, the grants to Spain and Portugal in the fifteenth century bulls of donation fell within the authority of the papacy. Indigenous Americans who obstructed

97. *See id.* at 281–82.

98. *Id.* at 280.

99. *Id.*

100. *Id.*

101. *See id.* at 285.

102. *See id.* at 284.

103. *Id.*

104. *Id.*

105. *Id.*

the Spaniards from proclaiming the message of Christian redemption infringed the Spaniards' natural right to preach the gospel. Such infringement gave the Spaniards just cause to declare war on them and appropriate their land.¹⁰⁶ Yet Vitoria insisted there must be genuine obstruction. For "if the barbarians permit the Spaniards to preach the Gospel freely and without hindrance, then *whether or not they accept the faith, it will not be lawful to attempt to impose anything on them by war, or otherwise conquer their lands.*"¹⁰⁷

This right of discovery fashioned by Vitoria differed importantly from the papal theory of *terra infidelibus*. Two main points distinguish the theories. First, under the papal theory of discovery, European monarchs, acting in combination with the Catholic Church, possessed nearly unabridged authority to vanquish Christian infidels and assert ownership over their lands. This power derived from the Church's assertion of universal ecclesiastical jurisdiction. In theory, the power was limited by Pope Innocent IV's argument regarding infidel rights. In practice, however, Innocent's argument carried little force and effect. This was especially true regarding the discovery claims made in the Americas and elsewhere by Spain and Portugal under the bulls of donation.¹⁰⁸

By contrast, Vitoria's right of discovery secured for Europeans only a qualified right to travel among and engage in commerce with the American Indians; to be afforded equal opportunity to share in their common resources; and to preach the Christian gospel to them freely. Vitoria was emphatic: discovery alone could not occasion just title.¹⁰⁹ Only in the event of Indian hostilities or violation of the rights accorded by natural law did he discern that the Europeans could legitimately wage war or make adverse claim to Indian lands.¹¹⁰ Vitoria firmly rejected the papal claim of universal power to subjugate and assert dominion over the lands of infidels. Neither the papacy nor the Spanish monarch held a legitimate claim to worldwide dominion.¹¹¹

Second, the theory of *terra infidelibus* did not differentiate between genuinely unoccupied lands and those inhabited by non-European infidels. When the Spanish and Portuguese began to explore and lay claim to lands in Africa, the Americas, and elsewhere, Pope Innocent IV's position on infidel rights became impotent. The papacy and its political affiliates

106. *See id.* at 285.

107. *Id.*

108. *See, e.g.,* MULDOON, *supra* note 27, at 120–24; PAGDEN, *supra* note 22, at 46–49.

109. *See* Vitoria, *supra* note 84, at 265.

110. *See id.* at 281–91.

111. *See id.* at 253–64.

effectively treated all lands of non-European indigenous peoples as if they were unoccupied.

Vitoria, by contrast, categorically distinguished European discovery of inhabited foreign lands from lands that were truly unoccupied. He acknowledged that by the law of nations, “a thing which does not belong to anyone (*res nullius*) becomes the property of the first taker.”¹¹² So too does natural law stipulate that lands belonging to no one (*terra nullius*) become the property of the first discoverer or occupier. Vitoria understood this precept of first possession as applying *only* to lands “unoccupied or deserted.”¹¹³ This was because his conception of natural law bore the influence of the awakening humanism in Renaissance thought. He argued that freedom is the natural condition of all humans.¹¹⁴ As free persons in aboriginal occupancy of lands in the Americas before the arrival of the Spanish, the Indians “undoubtedly possessed [their lands] as true dominion, both public and private, as any Christians.”¹¹⁵ No Christian monarch or pope could strip them of that dominion by mere will or on account of their unbelief.¹¹⁶ Therefore, Vitoria concluded, “the Spaniards, when they first sailed to the land of the [Indians], carried with them no right at all to occupy their countries.”¹¹⁷

This circumscribed right of discovery formulated by Vitoria exerted far greater influence over the European exploration and colonization of what became the United States than the medieval papal sense of *terra infidelibus*. This is not to deny that some American colonists used the rhetoric of Christian salvation to rationalize their encroachment into Indian lands.¹¹⁸ Yet the rhetoric of individuals, even individual politicians, does not provide conclusive evidence of sovereign policy. The rhetoric must be accompanied by sovereign action and reflect at least part of the sovereign’s motive. Moreover, to the limited extent that British colonists in the Americas sought to justify their expropriation of Indian lands with missionary rhetoric, it used a rhetoric wholly severed from the doctrine of *terra infidelibus*. For that discovery doctrine rested on papal authority, and the British colonial ventures in North America never depended upon a pontifical grant.¹¹⁹

112. *Id.* at 280.

113. *Id.* at 264.

114. *See id.* at 251, 254.

115. *Id.* at 250.

116. *See id.* at 244, 246, 253–64.

117. *Id.* at 264.

118. *See, e.g.,* Miller, *The Doctrine of Discovery*, *supra* note 11, at 36–41.

119. *See, e.g.,* PAGDEN, *supra* note 22, at 32–37, 47, 73–75.

C. Hugo Grotius

Though the papal discovery doctrine had little impact on the European exploration and settlement of what became the United States, Vitoria's right of discovery did. As the sixteenth century wore on, Vitoria's principle supplanted the papal doctrine of *terra infidelibus* for all European maritime powers other than Spain and Portugal. By the start of the 1600s, it was the most prominent discovery doctrine and one of the earliest principles of international law. The eminent Dutch jurist Hugo Grotius appealed to it both in his early works, *De Jure Praedae Commentarius (Commentary on the Law of Prize and Booty)* (c. 1604)¹²⁰ and *Mare Liberum (The Free Sea)* (1609),¹²¹ and in his monumental *De Jure Belli ac Pacis (The Rights of War and Peace)* (1625).¹²² Citing Vitoria, Grotius insisted that discovery provides a right to claim foreign lands only if they are truly unoccupied. He wrote:

Nor is it less unjust to go to War, and lay Claim to a Place upon the Score of making the first Discovery of it, if already inhabited, tho' the Possessor should be a wicked Man, or have false Notions of GOD, or be of a stupid Mind; because by the Right of Discovery we can pretend to those Places only which are not appropriated.¹²³

Grotius admonished both the Spanish and Portuguese for failing to abide by the limitations inherent in the right of discovery. He argued that both nations had offended natural law and the law of nations by displacing indigenous populations across the globe without just cause. Further, Pope Alexander VI had lacked authority to partition the world between Spain and Portugal in the bull *Inter caetera II*.¹²⁴ For the sea is free, Grotius maintained; it is a paradigm of common property and cannot, by natural reason and the law of nations, be appropriated and parceled.¹²⁵ The freedom of the seas extends to the seashores,¹²⁶ thereby endowing all nations with a

120. See, e.g., GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 328–31.

121. See, e.g., HUGO GROTIUS, THE FREE SEA 38–52 (David Armitage ed., Richard Hakluyt trans., Liberty Fund 2004) (1609).

122. See 1 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 446–53, 1104–14 (Richard Tuck ed., Liberty Fund 2005) (1625).

123. *Id.* at 1104.

124. See GROTIUS, THE FREE SEA, *supra* note 121, at 15–17, 38–39; COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 309–11, 339–40, 357–58.

125. See, e.g., GROTIUS, THE FREE SEA, *supra* note 121, at 25–37, 98–99, 106–08; COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 328–31.

126. See *id.* GROTIUS, THE FREE SEA, *supra* note 121, at 25–27, 98–99.

right to explore and lay claim to unoccupied lands.¹²⁷ Yet land must be genuinely unoccupied to be justly claimed.¹²⁸ For the right of discovery is not a “right of prey.”¹²⁹ Accordingly, Grotius concluded that the Spanish conquests in the Americas could not be justified by right of discovery. As Vitoria had argued, the American Indians enjoyed proper dominion over their lands and possessions.¹³⁰ The mere sailing to the Americas and sighting or setting foot on their islands and provinces gave the Spaniards no right to assert possession.¹³¹

Grotius further categorically rejected all pretext of religious justification for the appropriation of indigenous lands in the Americas. He maintained that neither the Spaniards nor the papacy could expropriate American Indian lands on the ground that the Indians were infidels and would “not acknowledge the doctrine of true [Christian] religion.”¹³² For accepting Christianity as the true religion requires a faith irreducible to reason.¹³³ Upon first hearing, the story of the resurrection of Christ and of the miracles and testimonies reported in the New Testament can seem wildly improbable. Truly accepting Christianity, Grotius argued, is thus exceedingly difficult “without the inward Assistance of GOD’s grace.”¹³⁴ It should never be “forced by temporal Punishments, or be awed by the Dread of them.”¹³⁵ Inexplicably to human reason, God has revealed himself to some persons and not others, and has enabled widespread faith across some cultures while permitting the gospel to go unheeded elsewhere.¹³⁶ Accordingly, Grotius reasoned that religion must be understood as a cultural practice, and differences in culture, customs, and traditions do not give one people or nation just cause to vanquish another.¹³⁷ He found this proposition

127. *See id.* at 27, 30.

128. *See, e.g., id.* at 14 (“Besides the finding [i.e., discovery] of [lands] gives no right but in that which was no man’s before their finding.”); GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 308 (“[D]iscovery imparts no legal right save in the case of those things which were ownerless prior to the act of discovery.”).

129. GROTIUS, THE FREE SEA, *supra* note 121, at 17.

130. *See id.* at 14–15; GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 308.

131. *See, e.g.,* GROTIUS, THE FREE SEA, *supra* note 121, at 15, 17; COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 308, 310–11.

132. GROTIUS, THE FREE SEA, *supra* note 121, at 18.

133. *See* 1 GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 122, at 1041.

134. *Id.*

135. *Id.* at 1042.

136. *See id.* at 1041.

137. *See* GROTIUS, THE FREE SEA, *supra* note 121, at 18–19.

to be conclusively established by Vitoria, and long before him by Boethius¹³⁸ and Aquinas.¹³⁹

Grotius did allow, however, for legitimate Spanish claims in the Americas on the basis of what he called “the law of hospitality”¹⁴⁰ or “*law of human fellowship*.”¹⁴¹ Vitoria had argued for a natural right to trade which complemented and could enlarge the right of discovery.¹⁴² He maintained that violation of this right could provide just cause to commence war and seize property.¹⁴³ Grotius agreed. To him, the right to trade was a corollary to the freedom of the seas. Freedom to engage in trade and commerce with peoples of foreign lands followed necessarily from the common right of all nations to navigate the seas to foreign ports. The law of nations recognized this.¹⁴⁴ It also obliged, by the law of hospitality, those in foreign lands to provide safe harbor and engage in trade with seafarers who reached their ports.¹⁴⁵ The law of hospitality further ensured travelers safe passage across foreign lands, so long as their trespass was harmless.¹⁴⁶ The combined

138. See *id.* at 18 n.3 (quoting BOETHIUS, DE CONSOLATIONE PHILOSOPHIAE IV 4. 7–10 (“Is it because they differ and their customs disagree, that they unjustly wage such cruel wars and by each others’ weapons are willing to die? Not right enough is cruelty’s reasoning.”)).

139. See GROTIUS, THE FREE SEA, *supra* note 121, at 15 n.12 (quoting AQUINAS, SUMMA THEOLOGIAE IIaIIae, q. 10, a. 12 (“For faith doth not take away natural or human law from whence dominion proceedeth; nay it is a point of heresy to believe that infidels are not lords of their own goods, and to take from them their goods which they possess for this very cause is theft and robbery no less than if the same be done to Christians.”)). See also *id.* at 18–19 n.6 (quoting CAJETAN, CAJETAN ON AQUINAS, SUMMA THEOLOGIAE IIaIIae, q. 4, 66, a. 8 (“Certain infidels . . . inhabiting countries where the Christian name never came . . . are lawful lords . . . [and] neither are they deprived of the dominion of their lands or goods for their infidelity, seeing dominion is by a positive law and infidelity by the divine law which taketh not away the law positive.”)).

140. *Id.* at 11.

141. GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 305.

142. See Vitoria, *supra* note 84, at 279–80.

143. See *id.* at 281–82.

144. See GROTIUS, THE FREE SEA, *supra* note 121, at 49–51; GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 354–57.

145. See GROTIUS, THE FREE SEA, *supra* note 121, at 11. Grotius characterized the law of hospitality as a “most sacred law.” *Id.* He found support for it in Virgil. *Id.* at 11 n.6. See 1 VIRGIL, THE ÆNEID 23 (John Dryden trans., The Heritage Press 1944) (c. 19 B.C.E.):

What men, what monsters, what inhuman race,
 What laws, what barb’rous customs of the place,
 Shut up a desert shore to drowning men,
 And drive us to the cruel seas again?
 If our hard fortune no compassion draws,
 Nor hospitable rights, nor human laws,
 The gods are just, and will revenge our cause.

146. See GROTIUS, THE FREE SEA, *supra* note 121, at 12 (arguing, on the basis of an historical example, that there is just cause for war if “a harmless passage [is] denied which by the most just law of human society ought to have been open to them”). Accord GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 305 (citing the same and other historical examples to establish the

weight of the right to trade and the law of hospitality led Grotius to conclude that in those cases where the Spaniards were prevented from trading or traveling safely among the American Indians, they acted with just cause in taking tribal lands by force.¹⁴⁷ In other situations, however, he suggested that those justifications were no more than a subterfuge for unjust appropriation.¹⁴⁸

D. Alberico Gentili

The Italian jurist Alberico Gentili, widely viewed alongside Vitoria and Grotius as a founder of international law, affirmed Vitoria's principle in terms generally similar to Grotius. In his principal treatise, *De Iure Belli Libri Tres (The Law of War Three Books)* (1612),¹⁴⁹ Gentili agreed with Vitoria and Grotius that the first precept of the right of discovery is *terra nullius*—"the seizure of vacant places is regarded as a law of nature,"¹⁵⁰ "those who take [vacant land] have a right to it, since it is the property of no one."¹⁵¹ He further assented to its second precept—that land must be truly unoccupied to be taken on discovery. "Those lands which are not vacant," he wrote, "ought not to be taken."¹⁵² From there, Gentili drew from the law of nations the same three qualifications to the second precept as Grotius: namely, that initiating hostilities and seizing inhabited foreign lands is justified "if it is undertaken because of some privilege of nature which is denied us by man. For example, if a right of way is refused us, or if we are excluded from harbours or kept from provisions, commerce, or trade."¹⁵³ Specifically as to the Americas, Gentili noted that the Spanish appealed to these rights to defend their warring and suppression of indigenous dominium.¹⁵⁴ He conceded that to the extent the Spaniards' rights were in fact infringed, they had a legitimate defense against charges of unjust aggression and unlawful appropriation.¹⁵⁵ Yet Gentili considered their defense in general a diversion and ruse:

proposition that transit along "the thoroughfares of human intercourse" should "be freely permitted according to the absolutely just *law of human fellowship*".

147. See 1 GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 122, at 1035–38.

148. See GROTIUS, THE FREE SEA, *supra* note 121, at 18.

149. ALBERICO GENTILI, DE IURE BELLI LIBRI TRES (John C. Rolfe trans., Clarendon Press 1933) (1612).

150. 1 Gentili, *supra* note 149, at 80.

151. *Id.*

152. *Id.* at 81.

153. *Id.* at 86.

154. See *id.* at 89.

155. See *id.*

But the Spaniards were aiming there [in the Americas], not at commerce, but at dominion. And they regarded it as beyond dispute that it was lawful to take possession of those lands which were not previously known to us; just as if to be known to none of us were the same thing as to be possessed by no one.¹⁵⁶

This passage makes it appear that Gentili conceived of the right of discovery more favorably to the American Indians than either Vitoria or Grotius. He did adopt a more critical stance toward Spain than Grotius, suggesting that the Spaniards' discovery claims in the New World were mainly pretextual. Yet the appearance deceives, for Gentili added further conditions to the right of discovery beyond those found in Vitoria or Grotius. They each qualified the discovery right's second precept with a set of conditions grounded in natural law and the law of nations. Gentili adopted the same conditions as Grotius—that occupied land could be appropriated following discovery if the inhabitants infringed the discoverers' rights to navigate free seas to open harbors, to engage in trade and commerce, or to pass unmolested through others' property.¹⁵⁷ To these, Gentili added three more considerations which substantially compromised the discovery right's second precept such as to enable Western Europe's maritime powers to pursue their adventurous colonial ambitions.

The first consideration Gentili added was to posit that the earth contained an abundance of unoccupied land. This assumption, wholly disassociated from natural law, significantly muted the effect of the right of discovery's limiting second precept. Again, the first precept of the right of discovery is *terra nullius*—unoccupied land, by the law of nature, is free to be taken by a discovering nation. The second precept limits the first. It stipulates that land must be *truly unoccupied* to be taken by discovery; lands that are inhabited ought not be taken. How much of the earth is characterized as unoccupied, and how much is deemed inhabited, thus determines the amount of land available for the taking under the first precept of the right of discovery.

During the era of European discovery there was no measure for assessing whether land was 'unoccupied' or 'occupied.' Hence, application of the right of discovery turned, in substantial part, on two assumptions. First, the natural law philosophers made general factual assumptions about the amount of the earth that was unoccupied. Second, they premised the right of discovery's application, as to particular regions, on subjective judgments about whether the known indigenous populations were large enough, by

156. *Id.*

157. *See id.* at 86–92.

European standards, to classify the land as ‘occupied.’ As to the Americas, Vitoria presumed that most of the land was occupied.¹⁵⁸ Gentili assumed the opposite. Asking rhetorically, “But are there to-day no unoccupied lands on the earth?”—he replied that the world is “being reduced more and more to the wilderness of primeval times.”¹⁵⁹ This is true, he continued, most of all in the Americas: “It is the most populous country of all; yet under the rule of Spain is not almost all of the New World unoccupied?”¹⁶⁰ By this understanding, Gentili opened for European appropriation under the first precept of the right of discovery a much greater amount of indigenous land in the Americas than contemplated by Vitoria or Grotius.

Beyond this consequential assumption about the unoccupied condition of the Americas, Gentili introduced two further considerations affecting the second precept of the right of discovery. While affirming that a discovering nation can only expropriate lands in the Americas that are truly vacant, he stipulated that the Indians should share their abundance, reasoning that “a slight loss ought to be endured.”¹⁶¹ Further, Gentili maintained that those in possession of land are obligated to put it to beneficial use or justifiably risk suffering its loss.¹⁶² He reasoned that God did not create the earth for it to remain vacant soil.¹⁶³ Thus, the discovering nations of Europe could take indigenous lands in the Americas if the Indians were not using them productively, based on European standards. He argued that “even though such lands belong to the sovereign of that territory, . . . yet because of that law of nature which abhors a vacuum, they will fall to the lot of those who take them.”¹⁶⁴ Gentili found support for this proposition in a law issued by the second century Roman emperor Pertinax “who assigned all the uncultivated land in Italy and the rest of the world to those who would take possession of it and improve it.”¹⁶⁵

Gentili thus characterized the right of discovery in a manner more accommodating to European exploration than both Vitoria and Grotius. Though he remained true to the basic structure of Vitoria’s principle—positing two central precepts and a set of qualifying conditions grounded in natural law—Gentili’s three supplemental considerations augured a more flexible right of discovery. Direct evidence of how these considerations influenced subsequent understanding of the right of discovery is lacking.

158. See Vitoria, *supra* note 84, at 250–51.

159. 1 GENTILI, *supra* note 149, at 81.

160. *Id.*

161. *Id.*

162. See *id.*

163. See *id.* at 80.

164. *Id.* at 81.

165. *Id.*

However, the same line of argument that Gentili introduced was taken up later and developed more fully by others, most notably the English philosopher John Locke and the Swiss jurist Emer de Vattel.

E. John Locke

In *The Second Treatise of Government* (1690), John Locke argued in defense of a natural right to private property.¹⁶⁶ He wrote outside the natural law tradition, and his work should not be taken as furthering the right of discovery *per se*. Yet Locke's political philosophy was taught and studied in England and the American colonies during the eighteenth century. His theory of natural rights to life, liberty, and property¹⁶⁷ inspired some of the principal founders of the American republic.¹⁶⁸ Hence it is worth briefly noting that the assumptions Gentili grafted onto the right of discovery became foundational premises in the philosophy of natural rights that was most influential during the formative era of British colonial expansion in North America.

Like Gentili, Locke viewed most of the New World as an uncultivated commons of little value.¹⁶⁹ He maintained that in the Americas "there are still great tracts of ground to be found which . . . lie waste, and are more than the people who dwell on it do or can make use of, and so still lie in common."¹⁷⁰ The American Indians, he argued, should share this plenty. For "God gave the world to men . . . for their benefit and the greatest conveniences of life,"¹⁷¹ yet in its natural state, the earth is "almost worthless."¹⁷² Uncultivated for planting or unenclosed for livestock, land is "waste land."¹⁷³ Locke believed that those, like the American Indians, whose possessions exceed what they can put to productive use thus are "exceeding . . . the bounds of . . . just property."¹⁷⁴ Accordingly, the lands they do not make use of are "still to be looked on as waste and might be the possession of any other."¹⁷⁵

166. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

167. See, e.g., *id.* at 5.

168. See, e.g., DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 211 (1951) (noting that Thomas Jefferson viewed Locke, along with Isaac Newton and Francis Bacon, "as the three greatest men that have ever lived, without any exception, and as having laid the foundation of those superstructures which have been raised in the physical and moral sciences").

169. See LOCKE, *supra* note 166, at 22–29.

170. *Id.* at 27.

171. *Id.* at 20.

172. *Id.* at 26.

173. *Id.* at 22.

174. *Id.* at 28.

175. *Id.* at 23.

The American Indians' occupancy of their tribal lands thus constituted "just property" ownership on Locke's account only to the extent that those lands were put to beneficial use. By his measure, "great tracts of [tribal] ground" were not being used productively, and thus, as "waste land," remained part of the commons and freely available for appropriation. Yet by this Locke was not striving to justify the territorial claims to Indian lands made by European sovereigns. He was not contemplating or promoting the right of discovery. Rather, he was seeking to establish the natural right of individuals to possess private property. He argued that everyone has a personal, natural right to work common land and, through their industry and labor, appropriate it as their own.¹⁷⁶ For "[a]s much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property."¹⁷⁷ That is to say, on Locke's account, the "subduing or cultivating the earth and having dominion . . . are joined together" in the farms, estates, and homesteads of individuals.¹⁷⁸

F. Emer de Vattel

Though Locke did not write in contemplation of the right of discovery, the Swiss jurist Emer de Vattel did. In his influential eighteenth-century treatise, *The Law of Nations* (1758),¹⁷⁹ Vattel advanced a line of argument remarkably similar to Locke's. Like Locke, Vattel included all three of the supplemental considerations that Gentili introduced in 1612. Unlike Locke, and more directly than Gentili, he expressly treated them as central elements of the right of discovery.

Consistent with Vitoria, Grotius, and Gentili, Vattel began his discussion of the right of discovery by affirming the principle of *terra nullius* as a natural right of all nations. He wrote:

All mankind have an equal right to things that have not yet fallen into the possession of any one; and those things belong to the person who first takes possession of them. When therefore a nation finds a country uninhabited and without an owner, it may lawfully take possession of it.¹⁸⁰

Only by implication, however, did Vattel acknowledge the second discovery precept of *true vacancy* that was affirmed by his predecessors.

176. *See id.* at 18.

177. *Id.* at 20.

178. *Id.* at 21.

179. VATTEL, *supra* note 79, at 215.

180. *Id.* at 214.

Vitoria, Grotius, and Gentili each emphasized that laying claim to occupied land by discovery was unjust and an offense against the law of nature.¹⁸¹ Vattel did not directly accept (or deny) that proposition. Nor did he mention any of the qualifying conditions the others attached to it.

Vattel instead went directly from the first discovery precept of *terra nullius* to ask what he called the “celebrated question, to which the discovery of the new world has principally given rise.”¹⁸² The question was, “whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole?”¹⁸³ Vattel’s framing of this question presupposed his analysis. The Americas comprised a “vast country” with a “scanty population” that left much of the land unoccupied.¹⁸⁴ “[I]mmense regions” in the Americas remained unsettled, where “the savages stood in no particular need, and of which they made no actual and constant use.”¹⁸⁵ Since God gave the earth to humans “to furnish them with subsistence,” Vattel surmised that it is the duty of all people to cultivate the land and bring forth its bounty.¹⁸⁶ For “if each nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants.”¹⁸⁷ Hence, Vattel contended that the American Indians’ “unsettled habitation in those immense regions *cannot be accounted a true and legal possession.*”¹⁸⁸ Accordingly, “the people of Europe . . . were lawfully entitled to take possession of [the Indians’ land], and settle it with colonies.”¹⁸⁹

Vattel thus presented the right of discovery as a doctrine of European entitlement. For all practical purposes, he removed the doctrine’s limiting second precept: that inhabited land could not be claimed on discovery. Vitoria had argued that, as to their ancestral homelands, the American Indians “*possessed true dominion both in public and private affairs.*”¹⁹⁰ He insisted that Europeans, by the law of nature, were bound to honor and

181. See, e.g., 1 GENTILI, *supra* note 149, at 81; 1 GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 122, at 1104; Vitoria, *supra* note 84, at 264, 265.

182. VATTEL, *supra* note 79, at 216.

183. *Id.*

184. *Id.*

185. *Id.* (alteration in original).

186. *Id.*

187. *Id.*

188. *Id.* (emphasis added).

189. *Id.* (alteration in original).

190. Vitoria, *supra* note 84, at 251.

respect that dominion.¹⁹¹ This was affirmed by both Grotius¹⁹² and Gentili.¹⁹³ Vattel, however, rejected or at least ignored this limiting proposition. To him, population density and beneficial use—both as understood by European standards—provided the determining criteria for whether land should be deemed true and legal dominion. Measured by those standards, American Indian dominion faltered. For Indian occupancy of tribal homelands was relatively low density and the land was not put to productive, i.e., agricultural, use. Hence, to Vattel, Indian occupancy could not “be accounted a true and legal possession.”¹⁹⁴ This entitled Europeans to claim Indian lands adversely. Vattel concluded: “We do not therefore deviate from the views of nature in confining the Indians within narrower limits.”¹⁹⁵

G. Samuel Pufendorf

While Vattel sought to override the limiting condition of true vacancy that Vitoria included in the right of discovery, the German legal philosopher Samuel Pufendorf reaffirmed and strengthened that precept. Arguably the most influential natural law philosopher of the Enlightenment, Pufendorf viewed that second, limiting precept as the hallmark of the right of discovery.

According to Pufendorf, “*Premier Seisin*, or the first Occupancy” of things provides the original way property is appropriated.¹⁹⁶ He affirmed that it is the foundation of the right of discovery: “After this manner Titles are made to desolate Regions, which no Man ever claim’d, which become his who *first enters* upon ‘em with an Intention of making them his own, provided he cultivate them and assign *Limits* how far he propounds to occupy.”¹⁹⁷ Yet as with Vitoria, Grotius, and Gentili, Pufendorf insisted that this precept, the principle of *terra nullius*, is strictly limited to lands “which no Man ever claim’d.”¹⁹⁸ He articulated this limitation differently from

191. *See id.* at 250–65.

192. *See* 1 GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 122 at 1104; GROTIUS, THE FREE SEA, *supra* note 121, at 14–17; GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra* note 79, at 308, 311.

193. *See* 1 GENTILI, *supra* note 149, at 81, 89.

194. VATTEL, *supra* note 79, at 216.

195. *Id.*

196. SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN, ACCORDING TO THE LAW OF NATURE 131 (Ian Hunter & David Saunders eds., Andrew Tooke trans., Liberty Fund 2003) (1673) [hereinafter THE WHOLE DUTY OF MAN] (first published in Latin in 1673 as *De officio hominis et civis*).

197. *Id.*

198. *Id.*

those others, however. For Pufendorf reasoned that it gives rise to certain duties implicit in the law of nature. He wrote:

Every Man is obliged to suffer another, who is not a declared Enemy, quietly to enjoy whatsoever Things are his; and neither by Fraud or Violence to spoil, . . . removing of Boundaries, and the like Crimes, which tend to the Invading and Incroaching upon other Mens Properties, are forbidden.¹⁹⁹

Pufendorf added that should any person realize that they are in possession of property that rightfully belongs to others, “the Duty of Restitution” makes them “obliged to take care, as far as in [them] lies, to return it to its right Owner.”²⁰⁰

With these duties, Pufendorf laid the groundwork for a more robust characterization of the right of discovery than any of his predecessors. Vitoria, Grotius, and Gentili conceived of the second, limiting precept of discovery as a simple proposition entailed by negative implication from the principle of *terra nullius*. Vitoria reasoned that since the law of nations affirms that “a thing which does not belong to anyone (*res nullius*) becomes the property of the first taker,”²⁰¹ it follows that *things which do belong to someone*, i.e., occupied lands over which others have rightful dominion, may not be claimed on the basis of discovery alone.²⁰² Grotius agreed that the right of discovery entitled European nations to assert ownership over “those Places only which are not appropriated;”²⁰³ hence, it is “unjust to . . . lay Claim to a Place upon the Score of making the first Discovery of it, if already inhabited.”²⁰⁴ Gentili similarly inferred from the precept that since “seizure of vacant places is regarded as a law of nature,”²⁰⁵ it follows that “lands which are not vacant . . . ought not to be taken.”²⁰⁶

Pufendorf did not draw such a simple negative inference. Rather, from what he called the right of first occupancy (the first precept of discovery), he inferred the three duties stipulated in the passages quoted above, to wit:

199. *Id.* at 137.

200. *Id.*

201. Vitoria, *supra* note 84, at 280.

202. *See id.* at 264–65.

203. 1 GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 122, at 1104.

204. *Id.*

205. 1 GENTILI, *supra* note 149, at 80.

206. *Id.* at 81.

Duty of Respect: The duty to respect the property rights of others, such that they may “quietly . . . enjoy whatsoever Things are [theirs].”²⁰⁷

Duty of Non-appropriation: The duty to refrain from taking any action which would “tend to the Invading and Incroaching upon other Mens Properties.”²⁰⁸

Duty of Restitution: The duty “to take care, as far as in us lies, to return [wrongfully appropriated property] to its right Owner.”²⁰⁹

These duties collectively represent Pufendorf’s second precept of discovery. In two respects, they provide a more powerful limiting precept than the negative inferences drawn by the others. First, taken together, Pufendorf’s three duties make for a more comprehensive limiting principle. The duty of non-appropriation by itself is equivalent to the others’ second discovery precepts. Consider, for example, Gentili’s second precept: “lands which are not vacant . . . ought not to be taken.”²¹⁰ Pufendorf’s duty of non-appropriation contains the full content of that proposition—i.e., *lands which are “other Mens Properties” ought not be “Invad[ed] and Incroach[ed] upon.”*²¹¹ Yet beyond that negative duty, Pufendorf proffered the two *positive* duties of respect and restitution. These add substantial weight to the second precept of the right of discovery, for they oblige all people to affirmatively honor the dominion of others and restore its integrity if it is wrongfully compromised. These positive obligations go well beyond the bare prohibition against seeking to appropriate others’ property.

The second way Pufendorf’s three duties led to a more seriously limited right of discovery is that he refused to qualify them. This was unlike any of his predecessors. Vitoria qualified his second discovery precept by arguing that in the aftermath of Spanish ‘discovery’ of their lands, the American Indians were obligated to respect the Spaniards’ natural rights to travel among and trade with them, to be given fair opportunity to share their common resources, and to preach the Christian gospel. If the Indians infringed any of these rights, the Spaniards could adversely lay claim to their lands.²¹² Grotius and Gentili adopted similar qualifying conditions. By contrast, Pufendorf rejected this approach altogether.

207. PUFENDORF, THE WHOLE DUTY OF MAN, *supra* note 196, at 137.

208. *Id.*

209. *Id.*

210. 1 GENTILI, *supra* note 149, at 81.

211. PUFENDORF, THE WHOLE DUTY OF MAN, *supra* note 196, at 137 (emphasis added).

212. *See* Vitoria, *supra* note 84, at 265.

In his seminal work *Of the Law of Nature and Nations* (1672),²¹³ Pufendorf levelled withering criticism against Vitoria. He argued against each of Vitoria's natural rights to travel, trade, and partake of common goods. To Pufendorf, Vitoria's right to travel fell under what Grotius referred to more generally as the law or "Right of Hospitality."²¹⁴ Pufendorf readily acknowledged this right as a fundamental "Duty of Humanity."²¹⁵ He affirmed that it is incumbent upon all people to admit strangers, welcome travelers, and provide the needy with access to shore and shelter.²¹⁶ Yet he cautioned that "to give a natural Right to these Favours, it is requisite that the Stranger be absent from his own House on an honest, or on a necessary Account."²¹⁷ The right does not extend to "those who wander into foreign Countries purely on account of Curiosity."²¹⁸

Further, Pufendorf objected to Vitoria's right to travel on two additional grounds. For one, he thought it denied indigenous peoples their right to cultural self-determination. Vitoria's natural right implied that being hospitable obliges a self-sufficient people to welcome any foreigners who wish to travel or explore in their homeland for any reason. Pufendorf found this to be unjust. He wrote, "[b]ut supposing that any one Nation, contented with what it finds at home, utterly refrains from all foreign Travel, it does not appear what Obligation such a State can have to admit those who would visit it, without a necessary or weighty Cause."²¹⁹

Even more damning on Pufendorf's account was the apparently unlimited scope of the obligation entailed by Vitoria's right to travel. The right seemingly set no temporal bounds or limit on the number of foreigners a people was duty-bound to accept. Pufendorf found this ludicrous:

[I]t seems very gross and absurd, to allow others an indefinite or unlimited Right of travelling and living amongst us, without reflecting either on their Number, or on the Design of their coming; whether supporting them to pass harmlesly, they intend only to take a short view of our Country, or whether they claim a Right of fixing themselves with us for ever. And that he who will stretch the Duty of

213. SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* (4th ed., The Lawbook Exchange, Ltd. 2013) (1729).

214. *Id.* at 244. See GROTIUS, *THE FREE SEA*, *supra* note 121, at 11 ("the law of hospitality"); GROTIUS, *COMMENTARY ON THE LAW OF PRIZE AND BOOTY*, *supra* note 79, at 305 ("law of human fellowship").

215. PUFENDORF, *OF THE LAW OF NATURE AND NATIONS*, *supra* note 196, at 244.

216. *See id.* at 244, 245.

217. *Id.* at 244.

218. *Id.*

219. *Id.* at 245.

Hospitality to this extravagant Extent, ought to be rejected as a most unreasonable, and most improper Judge of the Case.²²⁰

Vitoria's right to travel thus struck Pufendorf as overbroad. He viewed it as allowing unjust encroachment upon the dominion of indigenous nations. Likewise, he thought Vitoria's natural rights to trade and share common resources were equally indefensible. He dealt with both summarily. To Pufendorf, the right to trade was inscrutable. He argued that no sovereigns have the power to compel their own subjects to engage in trade or commerce with each other.²²¹ It is incomprehensible to think that the far more ambitious proposition could be true, that there is "any such Liberty of trading" in the law of nature or nations that "shall force and obtrude Strangers upon us, whether we will or no."²²² Pufendorf similarly questioned whether Vitoria's right to share common resources could be found in the law of nature or nations. Vitoria's proposition was, "*If the Indians had amongst them any Rights and Privileges allow'd in common to Natives and Foreigners, in these they ought not to hinder the Spaniards from their Share: For Example, If other Strangers were permitted to dig Gold, the Spaniards might fairly claim the same Liberty.*"²²³ Pufendorf challenged this by asking "first, whether those Privileges were granted to others, by way of *Debt*, or by way of free Gift and Favour."²²⁴ If by way of debt, he argued that no right can be said to extend generally to strangers.²²⁵ Further, Pufendorf expressed doubt about whether the right to the commons was an unlimited right. If it entitled the Spaniards to share in the common resources of the American Indians as far as the Spaniards in their discretion saw fit, then it made the Indians vulnerable to the rapine of their resources. For the Indians would have no say over "whether these new Comers will behave themselves with the same Justice and Modesty" as the Indians themselves, or even "whether these late Guests propose no other End of their Visit."²²⁶ That is to say, Vitoria's right to the commons potentially opened American Indian land and resources to unlimited European appropriation.

Given these injustices implicit in the conditions that Vitoria placed on the second precept of discovery, Pufendorf offered a counter-proposition: "That it is left in the power of all States, to take such Measures about the

220. *Id.*

221. *See id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *See id.*

226. *Id.*

Admission of Strangers, as they think convenient.”²²⁷ This could be understood as Pufendorf’s third precept of discovery. He reasoned that every people and culture is entitled to act in its own “interest and safety.”²²⁸ No nation can be obligated to accept strangers in such numbers as to subject itself to danger and injury. This included the American Indians in advance of the adventurous Spaniards. For no people, Pufendorf concluded, can be obligated “to receive and incorporate a great Multitude, especially if now in Arms, or naturally addicted to War; since it is scarce possible, but that their Admission should highly endanger the Natives.”²²⁹

Pufendorf’s critique of Vitoria highlights the varied content that the natural law right of discovery took over time. Yet the contrast between Vitoria and Pufendorf was not as stark as that between either of them and Gentili or Vattel. Quite simply, the right of discovery, though a single doctrine grounded in natural law, was highly variable. Vitoria and Grotius were the most similar. They each offered a relatively balanced discovery right, insisting that the dominion of indigenous populations be protected while positing limited sets of natural rights which enabled European colonial expansion. Pufendorf’s right of first occupancy, with its derivative duties to respect and restore native dominion, was the most favorable to American Indians and other indigenous peoples. By contrast, Gentili and Vattel were the least favorable. Both conceived of the right of discovery as a doctrine of European entitlement. Their assumptions that much of the world—and nearly all the New World—was unoccupied gave Europeans a near *carte blanche* to explore and expropriate. Gentili presented Europeans with a broad range of rationales for overriding native occupancy. Vattel diminished the legitimacy of aboriginal title, arguing that the Indians’ sparse populations and “unsettled habitation” of the Americas “cannot be accounted a true and legal possession.”²³⁰

Nonetheless, these jurists’ understandings of discovery all fall within the same doctrinal family. Their foundation in natural law and the law of nations places them in the same theoretic traditions. Despite their contrasting features, they differ even more from the ecclesiastically-grounded papal theory of discovery. Their foundation in natural law also distinguishes them doctrinally from the next discovery doctrine, the jurisprudential principle of discovery crafted by the United States Supreme Court.

227. *Id.*

228. *Id.* at 246.

229. *Id.*

230. VATTEL, *supra* note 79, at 216.

III. PRINCIPLE OF DISCOVERY IN THE UNITED STATES

A. General Principles of Federal Indian Law

Beginning with its earliest nineteenth century cases addressing tribal relations, the United States Supreme Court has made the idea of discovery a bedrock principle of federal Indian law. This is found most prominently in the first and third cases of the Marshall trilogy: *Johnson v. M'Intosh* and *Worcester v. Georgia*. In *Johnson v. M'Intosh* (1823), the Court referenced the natural law right of discovery.²³¹ But Chief Justice John Marshall, writing for the Court, did not abide by it. Rather, he subtly moved away from it in pragmatic adaptation to the history of European exploration of North America, two centuries of English colonial settlement, and certain peculiarities in the common law concept of property. This led to a distinct *principle of discovery* not to be confused with the natural law right of discovery.

Beginning with the Marshall trilogy, the Supreme Court has consistently acknowledged that prior to the European settlement of North America, the Indian tribes were self-governing political communities.²³² Each enjoyed the “inherent powers” of a sovereign.²³³ Incorporation into the United States diminished that sovereignty,²³⁴ but did not abrogate it.²³⁵ The tribes became limited sovereigns,²³⁶ semi-independent entities existing within the geographic boundaries of American society.²³⁷ The Court characterizes this retained sovereignty as neither that of a foreign nation²³⁸ nor of a state of

231. See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572–73 (1823).

232. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 559 (1832). *Accord* *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978).

233. *United States v. Wheeler*, 435 U.S. at 322–23. See COHEN'S HANDBOOK, *supra* note 1, § 4.01, at 207 (“Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather ‘inherent powers of a limited sovereignty which has never been extinguished.’”).

234. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 574. See also *United States v. Wheeler*, 435 U.S. at 323 (stating that Indians’ incorporation within the United States and acceptance of its protection divested them of certain previously exercised aspects of sovereignty).

235. *United States v. Wheeler*, 435 U.S. at 323; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 574.

236. *United States v. Wheeler*, 435 U.S. at 323; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 574. *Cf.* *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 685–87 (1965) (noting that the federal government has always permitted Indians largely to govern themselves).

237. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

238. See *Montoya v. United States*, 180 U.S. 261, 265 (1901) (explaining that Indian tribes have never been “nations” in the international law sense of the word); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (stating that Indian tribes are not foreign nations as that term is used in the Constitution). *But see* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–60 (1832) (noting that word “nation” has the same meaning when applied to Indians as it does when applied to any other nation).

the union.²³⁹ Rather, Indian tribes comprise “unique aggregations” exercising a range of sovereign powers over their land and members.²⁴⁰

Among the incidences of sovereignty that the Supreme Court has frequently recognized as retained by the Indians is some degree of dominion over their tribal homelands. The scope of those retained rights was before the Court in both *Johnson v. M’Intosh* and *Worcester v. Georgia*. In both cases, the Court addressed the question of tribal dominion primarily by considering the correlative question of how the United States came to lawfully possess dominion over such vast territory in North America. The Court’s answer was the principle of discovery.

B. *Johnson v. M’Intosh*

Chief Justice Marshall characterized the principle of discovery in *Johnson v. M’Intosh* as a doctrine premised on creating two relationships. First, it put in place an agreement between the great maritime powers of Europe. The agreement was that the first among them to ‘discover’ a particular region in the Americas would hold an exclusive right to establish settlements and acquire title of ownership from its indigenous inhabitants. Marshall described this relationship between the European nations as follows:

This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.²⁴¹

This is to say that the first object of the principle of discovery was to enable European conquest of the Americas while ensuring peaceful relations among the competing maritime powers. The principle sought to prevent continual conflict and war between European nations in their empire

239. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 16; *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 544 (10th Cir. 1980).

240. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 561, wherein Chief Justice Marshall stated that an Indian nation “is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of [a state] can have no force.”

241. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) at 573.

building.²⁴² It postulated an implicit agreement to recognize “the exclusive right of the discoverer to appropriate the lands occupied by the Indians.”²⁴³ Marshall maintained that for the most part this principle had been effective.²⁴⁴ For as a matter of historical fact, it was recognized and respected by “all the nations of Europe, who have acquired territory on this [American] continent.”²⁴⁵

The second discovery relationship the Supreme Court posited in *Johnson v. M’Intosh* was between individual European and Indian nations after ‘discovery.’ It concerned their relations during colonial settlement, along with the terms and conditions by which the European nation could acquire title to tribal lands. The specific terms of each relationship were to be regulated by mutual agreement.²⁴⁶ The principle of discovery set the parameters. Marshall wrote:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They 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.²⁴⁷

By this, the Supreme Court affirmed that before European exploration and settlement in the Americas, each Indian tribe held a natural right of possession over the lands it occupied.²⁴⁸ The European settler nations were to respect the Indians’ right to continued occupancy.²⁴⁹ The Indians’ right to remain in possession and use their tribal homelands was thus protected. However, the discovery principle vested the ultimate fee title to

242. *Id.*; *Accord* *Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55, 67 (1886) (citing *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823)); *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 543. *See generally* Cohen, *Original Indian Title*, *supra* note 1, at 43–45.

243. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) at 584.

244. *Id.* at 574–84.

245. *Id.* at 584.

246. *Id.* at 573.

247. *Id.* at 574.

248. *Id.* at 574 (noting 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”); *id.* at 603 (“It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.”). *Accord* *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 559.

249. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) at 574, 583, 587, 588, 592.

‘discovered’ tribal lands in the European nation making the exclusive claim.²⁵⁰ During the American colonial period, England had come to hold the underlying fee title to the full territory that comprised the colonies. When the United States gained independence, it accordingly acquired “clear title” to all lands within its territorial boundaries.²⁵¹ Chief Justice Marshall was adamant, however, that the new republic acquired no greater title than what England had previously held. He reasoned that “neither the declaration of independence, nor the treaty confirming it, could give [the United States] more than that which [the colonies] before possessed, or to which Great Britain was before entitled.”²⁵² The “clear title” which the United States acquired at independence, that is, was the ultimate interest in fee simple “to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy.”²⁵³ The Indians retained a legal as well as a moral right to continued use and occupancy of their aboriginal lands.²⁵⁴ Yet those rights had become greatly limited.²⁵⁵ Moreover, they were fully defeasible. For the nascent United States government asserted the right to unilaterally extinguish tribal land holdings at any time through purchase or conquest.²⁵⁶

C. *Worcester v. Georgia*

In *Worcester v. Georgia*, decided nine years after *Johnson v. M’Intosh*, Chief Justice Marshall reaffirmed that the European settlement of North America had proceeded according to the principle of discovery.²⁵⁷ Calling it a “settled doctrine of the law of nations,”²⁵⁸ he asserted that the principle comprised “the general law of European sovereigns, respecting their claims in America.”²⁵⁹ Nonetheless, he articulated it differently than he had in *Johnson*.²⁶⁰

250. *Id.* at 574, 585, 587, 588, 592, 603. *Accord* *Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55, 67 (1886) (citing *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823)).

251. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) at 584–85.

252. *Id.* at 584.

253. *Id.* at 585.

254. *See id.* at 574.

255. *Id.*

256. *Id.* at 585, 587, 588.

257. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543–45 (1832).

258. *Id.* at 560–61.

259. *Id.* at 551. *Accord id.* at 545 (“the common law of European sovereigns respecting America”).

260. For excellent discussions of the different ways Marshall construed the principle of discovery in *Johnson* and *Worcester*, see ROBERTSON, *supra* note 10, at 133–42; WATSON, *supra* note 10, at 318, 326–37, 342–51.

Worcester, like *Johnson*, described the fundamental object of the principle of discovery as establishing two relationships. The first relationship remained constant across the two decisions. Marshall reaffirmed that in its first purpose the principle acknowledged an agreement by the European maritime powers “as between themselves.”²⁶¹ This largely implicit agreement aimed to preempt hostilities by settling in advance competing European claims to indigenous lands in the New World. The agreement was that title to a particular region would go to the first among them to ‘discover’ it, so as to “avoid bloody conflicts, which might terminate disastrously to all.”²⁶² Marshall reasoned:

This principle [of discovery], acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition It regulated the right given by discovery among the European discoverers²⁶³

This language matches *Johnson*’s description of the first discovery relationship. In this first purpose, the discovery principle thus remained unchanged across Marshall’s two opinions.

As to its second purpose, however, the principle of discovery took on a new form in *Worcester*. The overall objective was unchanged: it aimed to set the parameters that would govern the relationship between a European nation and an American Indian tribe following European ‘discovery’ of the tribe’s homeland. Specifically, the purpose was to articulate the sovereignty and dominion of each, so as to facilitate the transfer of tribal land to the European colonial power. *Worcester* and *Johnson* described this sovereign relationship differently in two respects. First, they construed the rights retained by the Indians after discovery differently. Second, they set forth different processes for effecting land transfers.

Johnson characterized the Indians’ retained property rights as a defeasible entitlement to occupy and use their ancestral tribal homelands. Marshall maintained that this right of tribal occupancy could be extinguished at will by the European nation which discovery had vested with the underlying and ultimate fee title. Unilateral action in the form of purchase or conquest by the discoverer nation or its assignees—e.g., the United States—could terminate a tribe’s right of occupancy and effectuate a land transfer.

261. *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 543.

262. *Id.*

263. *Id.* at 544.

Worcester, by contrast, did not characterize the Indians' retained right of occupancy as defeasible at the will of the discoverer nation. Rather, Marshall argued that the Indian title of occupancy continued unimpaired, subject only to the discoverer nation's "exclusive right of purchasing such lands as the natives were willing to sell."²⁶⁴ He insisted that the mere fact of discovery "could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave [only] the exclusive right to purchase."²⁶⁵

Marshall opined that it was an "extravagant and absurd idea" to think that the mere discovery of the Atlantic coast of North America and the founding of immigrant settlements could legitimately give Europeans the power to govern the native inhabitants and occupy the entire continent.²⁶⁶ He argued that such an understanding of the power of discovery "did not enter the mind of any man."²⁶⁷ For discovery regulated rights between European nations. The scope of those rights could not extend to the discovery of lands never imagined by the nations that had fashioned that implicit compact. Echoing *Vitoria*, Marshall reasoned:

It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.²⁶⁸

As such, Marshall argued that the colonial grants and charters from the British Crown and others "asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."²⁶⁹ The land rights that discovery gave the European powers were limited to the exclusive right to purchase those lands that the Indians were willing to sell.²⁷⁰

264. *Id.* at 545.

265. *Id.* at 544.

266. *Id.*

267. *Id.* at 545.

268. *Id.* at 543.

269. *Id.* at 546.

270. *See id.* at 545.

D. Contrasting the Principle of Discovery from the Papal and Natural Law Doctrines

While *Johnson v. M'Intosh* and *Worcester v. Georgia* are somewhat inconsistent, the principle of discovery that Chief Justice Marshall articulated in those cases comprises a distinct discovery doctrine that stands markedly apart from both the papal and natural law theories of discovery. It is distinct in part because Marshall crafted it to serve a different purpose than those earlier theories. Both the papal and natural law discovery doctrines were designed to guide European maritime powers in their global exploration and colonization of foreign lands. They were doctrines aimed at justifying and, to a degree, limiting the scope of *ongoing and future* European expansion. By contrast, Marshall's principle of discovery provided a theory to account for how, on the basis of European explorations *then past and completed*, a vast expanse of the North American continent had come to be held by the young republic of the United States. Only as to the second relationship which he articulated—that between the European discoverer nations or their assignees and individual Indian tribes—did Marshall's principle offer a guide to future action. It provided a theoretical justification for future American acquisition of tribal lands. As to European discovery *per se*, it was a doctrine of history.

The only commonality between Marshall's principle and the papal theory of *terra infidelibus* is the bare concept of discovery. Marshall only mentioned the papal theory once in *Johnson*. He ignored it entirely in *Worcester*. In *Johnson*, he denied that Spain's settlements in the New World depended upon a papal grant.²⁷¹ Instead, Marshall argued that the principle he articulated provided the true historical basis for Spain's discovery claims.²⁷²

Marshall further thought that his principle of discovery provided a more historically accurate account of European exploration and settlement in the Americas than the natural law right of discovery. *Johnson* did make passing reference to that natural law doctrine.²⁷³ Marshall did not, however, rely on any precepts or rights grounded in natural law. Nor did he entertain the natural law doctrine's two basic precepts.

The natural law right of discovery, it will be recalled, rested on two basic propositions. First, *terra nullius*: unoccupied lands belonging to no one may

271. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

272. See *id.*

273. See, e.g., *id.* at 572–73.

be seized and become the property of the first to discover them.²⁷⁴ Second, occupied land may not be seized on discovery; i.e., discovery alone does not provide just cause to appropriate land inhabited by others.²⁷⁵ Each of the natural law jurists understood this second, limiting precept differently, with all but Pufendorf allowing appropriation of occupied land if certain conditions were met.²⁷⁶

Chief Justice Marshall paid no heed to these natural law precepts. To him, they set up a false dilemma. The precepts presumed that the appropriation of indigenous lands on discovery should turn on whether the lands were occupied. That is, if discovered lands were unoccupied, then *terra nullius* became operative; if the lands were occupied, then *terra nullius* did not control. As to the discovery of the New World, however, Marshall considered the principle of *terra nullius* irrelevant. For on his account, the question of whether land in the United States was unoccupied prior to European discovery was moot. He knew the land was occupied.²⁷⁷ The function served by the idea of discovery was not to feign a vacant continent. Instead, it was to explain how just title to the Indians' aboriginal lands, *which admittedly were occupied at the time of European exploration and settlement*, had come to be held by the United States.

The doctrine of discovery from *Johnson v. M'Intosh* and *Worcester v. Georgia* thus differs in its underlying assumptions and functional effect from both the papal and natural law discovery doctrines. One more distinct doctrine remains—*terra nullius* in the enlarged, unvarnished form employed by Great Britain in its appropriation and settlement of Australia.

IV. ENLARGED PRINCIPLE OF *TERRA NULLIUS* IN AUSTRALIA

A. *British Settlement and Aboriginal Dispossession*

While Chief Justice Marshall's principle of discovery and the natural law right of discovery both helped shape the course of European adventures and settlement in the New World, the deep-rooted idea of *terra nullius*,

274. See, e.g., 2 GENTILI, *supra* note 149, at 80; 1 GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 122, at 1104; PUFENDORF, *THE WHOLE DUTY OF MAN*, *supra* note 196, at 131; Vitoria, *supra* note 84, at 264, 280.

275. See, e.g., 2 GENTILI, *supra* note 149, at 81; 1 GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 122, at 1104; PUFENDORF, *THE WHOLE DUTY OF MAN*, *supra* note 196, at 131, 137; Vitoria, *supra* note 84, at 264, 265.

276. See, e.g., 2 GENTILI, *supra* note 149, at 86–90; 1 GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 122, at 1104; PUFENDORF, *THE WHOLE DUTY OF MAN*, *supra* note 196, at 137; Vitoria, *supra* note 84, at 281–91.

277. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542, 543 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 579, 583, 584, 586.

operating as an independent and enlarged principle, proved vital in certain other regions colonized by Europeans. Australia was one such region where *terra nullius* served as the operative concept of colonization. Its application resulted in the systematic, uncompensated, and forceful taking of indigenous lands.

European sea voyages to present-day Australia began early in the 1600s.²⁷⁸ For the better part of a century, the expeditions were conducted primarily by the Dutch. After the famed Dutch seafarer Abel Tasman explored the region in 1642, the land became known as New Holland.²⁷⁹ The first Brit to explore New Holland, William Dampier, set foot on its north coast in 1688.²⁸⁰ Not until after Captain James Cook charted the continent's east coast in 1770 did Australia become a quarry for British colonial ambitions.²⁸¹

The British formally began to settle New Holland in 1788.²⁸² They renamed its eastern part New South Wales, the name Cook had chosen.²⁸³ Not until the 1820s did the name Australia enter common use.²⁸⁴ At first settlement, several indigenous populations inhabited the continent and its internal islands. Diverse communities of Aborigines on the continent and Torres Strait Islander peoples collectively yielded a population estimated between 300,000²⁸⁵ and three-quarters of a million.²⁸⁶ None of the indigenous peoples followed forms of social organization that the British could readily understand. The natives' custodial relationships to their homelands also puzzled the British, for they did not entertain European-style concepts of private property or land tenure. Nor could the British identify political leaders among them with whom to negotiate or bargain. The Crown accordingly began to settle and appropriate the entire Australian continent and its surrounding islands without troubling to follow any formal legal procedures.

The British practice of seizing aboriginal lands across New South Wales and dispossessing the native occupants received judicial sanction in a select

278. See Behrendt, *The Doctrine of Discovery in Australia*, *supra* note 11, at 171.

279. See STUART MACINTYRE, *A CONCISE HISTORY OF AUSTRALIA* 21 (3d ed. 2009); *Abel Tasman*, AUSTRALIANHISTORY.ORG, <https://australianhistory.org/abel-tasman/> [https://perma.cc/YSA6-NEN5].

280. See Behrendt, *The Doctrine of Discovery in Australia*, *supra* note 11, at 172.

281. See MACINTYRE, *supra* note 279, at 25–28.

282. See *id.* at 1.

283. See *id.* at 27.

284. See *id.* at 51; *Encounter 1802–2002: Naming Australia*, STATE LIBRARY OF SOUTH AUSTRALIA, <https://encounter.collections.slsa.sa.gov.au/flinders/namingaust.htm> [https://perma.cc/5NMW-5SLG].

285. See NIALL FERGUSON, *EMPIRE: HOW BRITAIN MADE THE MODERN WORLD* 108 (Penguin Books 2004) (2003).

286. See MACINTYRE, *supra* note 279, at 13.

set of early Australian cases. *Attorney-General v. Brown* (1847) held that, from the initial settlement of New South Wales, “all the waste and unoccupied lands of the colony” vested in the Crown.²⁸⁷ Implicit in this judgment was the assumption that the colony was relevantly uninhabited.²⁸⁸ *Williams v. Attorney-General for New South Wales* (1913) similarly ruled that, upon first settlement, Britain held unqualified legal and beneficial title to all lands of the colony.²⁸⁹ Justice Isaacs considered this an “unquestionable position.”²⁹⁰ He further rejected any suggestion that the indigenous occupants had any claims which qualified or reduced the Crown’s absolute ownership.²⁹¹

Most significant is the 1889 judgment of the Privy Council in *Cooper v. Stuart*.²⁹² The case came before the Privy Council on appeal from the New South Wales Supreme Court. At issue was application of the rule against perpetuities to a contingency in an 1823 Crown land grant.²⁹³ The case raised no issues of aboriginal land rights. Nonetheless, the Privy Council stated that, from its establishment, New South Wales “consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law.”²⁹⁴ This assertion, while obiter dictum, became the principal authoritative support for the proposition that in 1788 there was no settled indigenous law of communal title in the colony to which the British owed respect.²⁹⁵ That is, *Cooper v. Stuart* became high authority for the proposition that, from its initial settlement, the territory of New South Wales was *terra nullius* in the expanded sense of ‘land belonging to no one for the purposes of law.’

From the beginning of its settlement of the then-Colony of New South Wales, England thus recognized no practical limits to its confiscation of indigenous lands. It asserted full legal ownership over the whole of the continent and its surrounding islands. Land transfers by the indigenous inhabitants were prohibited. The Crown justified this by portraying the native populations as so low on the scale of social development that no proprietary rights or interests could be imputed to them. An 1837 report to the British House of Commons by the Select Committee on Aborigines described the indigenous Australians as “barbarous” and “so entirely

287. *A-G (NSW) v Brown* (1847) 1 Legge 312, 319 (Austl.).

288. *See Mabo v Queensland [No 2]* (1992) 175 CLR 1, ¶ 43 (Deane and Gaudron JJ.).

289. *Williams v A-G (NSW)* (1913) 16 CLR 404, 439 (Austl.).

290. *Id.*

291. *See id.*

292. *Cooper v Stuart* (1889) 14 App. Cas. 286 (PC) (appeal taken from N.S.W.).

293. *See id.*

294. *Id.* at 291.

295. *See id.* at 286, 291.

destitute . . . of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded.”²⁹⁶ To the British, they were altogether unfit for legal agency.

In this way, the principle of *terra nullius* became operative in Australia. Yet this was not *terra nullius* in the forms previously discussed. The medieval papal theory of discovery was premised on *terra nullius* in the expanded ecclesiastical form of *terra infidelibus*. The Catholic popes assumed the power to commission sympathetic monarchs to conquer foreign lands inhabited by no one but non-Christians. In exchange for their freedom and dominion, the infidels were offered the exquisite promise of an otherworldly paradise. The natural law right of discovery abided *terra nullius* as its first proposition. Yet it limited the principle’s operative force through its second precept: that to be justly seized, land had to be *truly unoccupied*.

The Australian experience with the principle of *terra nullius* was different. It was *terra nullius* expanded and unvarnished. Unlike the natural law jurists, the Crown did not insist that land be actually unoccupied for the principle to be operative. The British in Australia expanded it to justify the seizure of occupied land if the indigenous inhabitants, through English eyes, were so barbarous and low on the scale of civil polity that their cultural attachments to land could be wholly disregarded. Unlike the Catholic Church, the British further made no pretext of giving *terra nullius* in this enlarged sense the gloss of a just principle. They followed the Church’s precedent of disregarding an entire category of indigenous others ‘discovered’ in foreign lands as ‘no one’ for purposes of land ownership. Yet unlike the Church, the Crown pledged nothing in return for the natural abundance they confiscated. There was no heavenly covenant of eternal salvation. The British offered only displacement, degradation, and servitude. Theirs was *terra nullius* unvarnished: the uncompensated, adverse taking of inhabited land on the pretext that its indigenous occupants were so lacking in social development and incapable of agency as to effectively render their traditional homelands uninhabited and ‘belonging to no one.’

This enlarged, unvarnished sense of *terra nullius* that became operative in Australia put two propositions into effect. First, it posited that as of 1788, the territory of New South Wales was uninhabited and unoccupied for purposes of law.²⁹⁷ Second, it assumed that all of the colony’s land had thereby vested in the Crown, giving it full legal and beneficial ownership,

296. *Mabo v Queensland [No 2]* (1992) 175 CLR 1, ¶ 39 (Brennan J.).

297. *Id.* ¶ 55 (Deane and Gaudron JJ.).

unaffected by any claims from indigenous inhabitants.²⁹⁸ These were the propositions upheld in *Brown, Williams*, and *Cooper v. Stuart*. Over time, they effectively dispossessed the indigenous populations of Australia from nearly all their traditional lands.

B. Terra Nullius Challenged: Mabo v Queensland

Terra nullius in the above sense stood largely unquestioned in Australian constitutional and property law until the latter third of the twentieth century. The first significant challenge to it came in the 1971 case, *Milirrpum v Nabalco Pty Ltd*.²⁹⁹ The case concerned an effort by the native Yirrkala people to suspend mining activity in the Gove Peninsula of Australia's Northern Territory. The trial court, the Supreme Court of the Northern Territory, allowed the Yirrkala to present evidence about their traditional relationship with the land and their native system of law and justice. Justice Blackburn found that the evidence revealed –

a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in the evidence before me.³⁰⁰

Nonetheless, Blackburn felt constrained by the 1889 *Cooper v. Stuart* precedent.³⁰¹ Despite contrary evidence, he concluded as a matter of law that no communal native title existed under Australian common law.³⁰²

After *Milirrpum*, the High Court of Australia hinted in a few cases that it might review the Crown's colonial era practice of dismissing all suggestion of native title while arrogating to itself full land ownership as incident to its sovereignty.³⁰³ This culminated in the celebrated 1992 case *Mabo v Queensland*.³⁰⁴ Plaintiff Eddie Mabo came from Mer or Murray

298. *Id.*

299. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

300. *Id.* at 267.

301. *Id.* at 244–45.

302. *Id.* at 244.

303. *See, e.g.*, *Northern Land Council v Commonwealth* (1987) 61 ALJR 616, 620 (discussing fiduciary duties that could arise from the Crown's past practice toward indigenous land); *Gerhardy v Brown* (1985) 159 CLR 70, 149 (Deane, J.) (expressing regret for the long history of injustice marking Australia's indigenous land dealings); *Coe v Commonwealth* (1979) 118 ALR 193 (suggesting that the question of communal native title remained unsettled).

304. *Mabo v Queensland* [No. 2] (1992) 175 CLR 1.

Island in the Torres Strait.³⁰⁵ He learned in his thirties, while working as a laborer at James Cook University, that the land on Murray Island where he and generations of his family before him had been born and raised was not theirs, but Crown land.³⁰⁶ Mabo resisted this news. He set about educating himself on Australian land law and speaking publicly against the legal denial of native title.³⁰⁷ In 1982, a legal action was instituted on his behalf.³⁰⁸ Ten years later and five months after his death, Mabo prevailed.³⁰⁹

The High Court in *Mabo*, per Justice Brennan, expressly condemned the Crown's "enlarged notion of terra nullius" for having given a fictional license to expropriate indigenous lands.³¹⁰ Brennan reasoned: "The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country."³¹¹ To Brennan, any fair reading of the facts substantiated that the Australian continent and its internal islands were inhabited in 1788 by hundreds of thousands of indigenous peoples who lived under various forms of social organization. "The facts," he wrote, ". . . do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England."³¹² That false theory of *terra nullius* "depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs."³¹³ As such, Brennan concluded that the time was ripe for the Court to "overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not."³¹⁴

Justices Deane and Gaudron agreed with Justice Brennan that it was incumbent upon the High Court to reexamine the legal principles by which the Crown had justified its expropriation of nearly all traditional aboriginal lands. The Justices wrote:

Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788, terra nullius in the sense of unoccupied or uninhabited for legal purposes

305. See Noel Loos, *Mabo, Edward Koiki (Eddie) (1936–1992)*, AUSTRALIAN NATIONAL UNIVERSITY, <http://ia.anu.edu.au/biography/mabo-edward-koiki-eddie-16122/text28064> [https://perma.cc/A6F8-UFJU].

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, ¶ 39 (Brennan, J.).

311. *Id.* ¶ 42.

312. *Id.* ¶ 38.

313. *Id.* ¶ 39.

314. *Id.*

and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants.³¹⁵

The Justices deplored how these propositions had set in motion the far-reaching dispossession of aboriginal homelands, calling it “the darkest aspect of the history of this nation.”³¹⁶ They reasoned: “The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices.”³¹⁷

The way that Justices Brennan, Deane, and Gaudron described the Australian experience with *terra nullius* highlights how the form it took constitutes a doctrine of discovery distinct from the others. Justices Deane and Gaudron stated that the dispossession of the indigenous populations was premised on the proposition “that the territory of New South Wales was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited *for legal purposes*. . . .”³¹⁸ Justice Brennan described the principle as the “fiction by which the rights and interests of indigenous inhabitants in land were *treated as non-existent*”³¹⁹ This principle was aptly characterized by Brennan as a legal fiction. For with full knowledge that the territory of New South Wales was occupied by significant populations of indigenous peoples, the British pressed ahead with *terra nullius* hoping that it would legitimize their colonial settlement. *Terra nullius* complied only under the dehumanizing pretext that the aboriginal peoples could be dismissed as barbarians incapable of legal agency. Dehumanized by the British, they became ‘no one’ “*for legal purposes*,”³²⁰ such that their “rights and interests . . . in land [could be] *treated as non-existent*.”³²¹ As applied in Australia, that is, *terra nullius* took on an enlarged form that enabled the British to seize occupied land on the fiction that it was ‘land belonging to no one’ in the sense of *land belonging to people who, for legal purposes, could be treated as non-existent*.

This enlarged characterization of *terra nullius* constitutes a legal fiction of the most harmful sort. Its underlying premise was the dehumanized representation of the legal status of the indigenous Australians during the early years of British settlement. As demonstrated by the 1837 report to the House of Commons by the Select Committee on Aborigines, the Crown

315. *Id.* ¶ 55 (Deane and Gaudron, JJ.).

316. *Id.* ¶ 56.

317. *Id.*

318. *Id.* ¶ 55 (emphasis added).

319. *Id.* ¶ 42 (emphasis added).

320. *Id.* ¶ 55 (emphasis added).

321. *Id.* ¶ 42 (emphasis added).

viewed the indigenous Australians as barbarians with little sense of civil organization.³²² It denied their existence as self-governing indigenous populations with meaningful communal attachments to their homelands. Because the British could not understand their forms of social organization, and because they did not entertain British concepts of land tenure or private transferable rights of property, the Crown deemed them woefully backward and incapable of having rights and interests in land. The British, that is, found the natives' forms of life inscrutable and conceptually irreconcilable with their own forms of governance and dominion. From this, they fallaciously inferred that the aboriginals entirely lacked civil polity and customary concepts of land ownership. By carving the gulf of cultural separation broadly enough, the British thus laid the foundation for the enlarged fiction of *terra nullius*.

Expanded to justify appropriating land occupied by people who, for purposes of law, were treated as non-existent, *terra nullius* readily embraced the indigenous Australians as characterized by the British. That characterization, however, was false. Justices Deane and Gaudron in *Mabo* acknowledged that at first contact the British *may* genuinely have thought that the indigenous Australians lacked the capacity for legal agency.³²³ That perception could not have lasted for long, however. The Justices noted that as the British settlement of the continent grew and contact between the settlers and natives became more regular, the British must have come to understand that individual indigenous communities possessed traditional entitlements to occupy and use particular areas of land for economic, social, and religious purposes to the exclusion of others.³²⁴ Evidence in support of this supposition is found in a range of official documents from the early nineteenth century. For example, a dispatch from the Imperial Colonial Office in 1835 directed the South Australian Colonisation Commission to avoid selling unexplored territory to settlers, given that the new colony –

might embrace in its range numerous Tribes of People whose Proprietary Title to the Soil we have not the slightest ground for disputing. Before his Majesty can be advised to transfer to His Subjects, the property in any part of the Land of Australia, He must have at least some reasonable assurance that He is not about to sanction any act of injustice towards the Aboriginal Natives.³²⁵

322. *See id.* ¶ 39.

323. *See id.* ¶ 53 (Deane and Gaudron, JJ.).

324. *See id.*

325. STUART BANNER, POSSESSING THE PACIFIC: LAND, SETTLERS AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA 35 (2007).

In 1841, James Stephen, then permanent head of the Colonial Office, wrote: “It is an important and unexpected fact that these Tribes had proprietary rights in the Soil—that is, in particular sections of it which were clearly defined and well understood before the occupation of their country.”³²⁶ That same year, Justice Willis of the Supreme Court of New South Wales declared that, “the Aborigines must be considered and dealt with, until some further provision be made, as distinct, though dependent tribes governed among themselves by their own rude laws and customs.”³²⁷

The enlarged principle of *terra nullius* that the Crown enforced in Australia thus rested on a misrepresentation of the indigenous Australians that the British knew was false. Nonetheless, it worked. *Terra nullius* in its enlarged form, though nothing but a legal fiction, effectively gave license to the widespread misappropriation of indigenous lands. Yet there was a second, equally pernicious side to the false representation. It not only enabled the Crown to enlarge *terra nullius*; it also suppressed the application of a British common law principle that should have preserved and protected aboriginal dominion.

In the eighteenth and nineteenth centuries, England recognized a principle of common law native title.³²⁸ That principle preserved the pre-existing territorial rights and interests enjoyed by the indigenous populations the British encountered worldwide in their colonial ventures. It ensured the natives’ continued use, enjoyment, and occupancy of their traditional lands. This was accomplished by reference to their own customs and traditions. Though recognized by the common law, native title was not a common law institution. The common law did not determine the content of a recognized native land title; nor could native title be alienated by common law processes.³²⁹ Rather, as stated in *Mabo* by Justice Brennan: “Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained . . . by reference to those laws and customs.”³³⁰

The High Court in *Mabo* noted that, as to the settlement of Australia, the rights conferred by common law native title would have been “binding on the Crown and a burden on its title,”³³¹ had the indigenous populations not

326. *Mabo v Queensland* [No 2] (1992) 175 CLR 1, ¶ 53 (Deane and Gaudron JJ.) (quoting COLONIAL OFFICE RECORDS, AUSTRALIAN JOINT COPYING PROJECT, File No. 13/16, Folio 57 (1984)).

327. *R v Bonjon* [1841] NSW SupCt 92 (Austl.), reprinted in (1998) 3 AILR 417, 425 (Willis, J.).

328. See *Mabo v Queensland*, ¶¶ 60–73 (Brennan J); ¶¶ 18–21 (Deane and Gaudron JJ.).

329. See *id.* ¶ 65 (Brennan, J.).

330. See *id.* ¶ 64.

331. *Id.* ¶ 60 (Deane and Gaudron, JJ.).

been characterized “as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.”³³² Justice Brennan observed that today this mischaracterization is discredited.³³³ Justices Deane and Gaudron agreed, insisting that it is now “beyond real doubt or intelligent dispute” that

[u]nder the laws or customs of the relevant locality, particular tribes or clans were [at the time of British settlement] . . . custodians of the areas of land from which they derived their sustenance Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognized by other tribes In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession.³³⁴

Had this reality been acknowledged by the British during the colonial era, the enlarged fiction of *terra nullius* would have been inapposite. Moreover, the Crown would not have acquired absolute beneficial ownership to all the lands of Australia. Its title would have been “reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.”³³⁵ The far-reaching dispossession of the aboriginal inhabitants that the British perpetrated thus was achieved by the unjust and discriminatory pairing of the fictional license of *terra nullius* with the Crown’s failure to honor its own principle of common law native title. That pairing facilitated the systematic misappropriation of lands which should have been protected in accordance with traditional native title. In overruling 150 years of existing authorities, the High Court in *Mabo* concluded that the combined effect of *terra nullius*’ fictional license of appropriation and the de facto extinction of native title demanded reconsideration.³³⁶ It held that nearly the entire island of Mer is not Crown land, but belongs, consistent with native title, to the Meriam people.³³⁷ Moreover, it struck down the enlarged fiction of *terra nullius*. Justice

332. *Id.* ¶ 63 (Brennan, J.).

333. *See id.* ¶ 38.

334. *Id.* ¶ 37 (Deane and Gaudron, JJ.).

335. *Id.* ¶ 56.

336. *See id.* ¶ 42 (Brennan, J.).

337. *Id.* ¶ 97 (1), (2); Order (1), (2).

Brennan reasoned that *terra nullius* must be discarded, for “it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.”³³⁸ Justices Deane and Gaudron reached the same conclusion, rightly condemning the country’s systematic extinction of native title and dispossession of its native peoples as “a national legacy of unutterable shame.”³³⁹

C. Distinguishing the Enlarged Fiction of Terra Nullius

The Australian High Court in *Mabo* expressly distinguished the enlarged, unvarnished notion of *terra nullius* from Chief Justice Marshall’s principle of discovery. Justice Brennan remarked that “the common law of this land has still not reached the stage of retreat from injustice” that the United States achieved in 1823 with *Johnson v. M’Intosh*.³⁴⁰ Marshall’s principle recognized that the American Indians retained a legal and moral right to occupy and use their traditional lands.³⁴¹ By contrast, the British in Australia leaned on the enlarged fiction of *terra nullius* to deny the indigenous Australians any rights or interests in land worthy of recognition whatsoever.

The High Court in *Mabo* did not differentiate the enlarged form of *terra nullius* from the natural law right of discovery. It could well have. For the two discovery doctrines differ greatly.

In the tradition of natural law, *terra nullius* served as the first precept in the right of discovery. However, it became operative only if land was truly unoccupied. When first formulating the right of discovery, Vitoria demanded that it extend only to lands genuinely “unoccupied or deserted.”³⁴² Grotius likewise argued that, “by the Right of Discovery [European nations] can pretend to those Places only which are not appropriated.”³⁴³ For by natural law and the law of nations, it is unjust to “lay Claim to a Place upon the Score of making the first Discovery of it, if already inhabited.”³⁴⁴ Gentili agreed. The law of nature, on his account, authorizes the “seizure of vacant places . . . since it is the property of no one,”³⁴⁵ yet “lands which are not vacant ought not to be taken.”³⁴⁶ Pufendorf

338. *Id.* ¶ 41 (Brennan, J.).

339. *Id.* ¶ 50 (Deane and Gaudron, JJ.).

340. *Id.* ¶ 42 (Brennan, J.) (quoting *Gerhardy v Brown* (1985) 159 CLR 70, 149 (Austl.) (Deane, J.)).

341. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

342. Vitoria, *supra* note 84, at 264.

343. 1 GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 122, at 1104.

344. *Id.*

345. 2 GENTILI, *supra* note 149, at 80.

346. *Id.* at 81.

similarly averred that “*Premier Seisin*, or the first Occupancy” of things provides the basis for the right of discovery, according to which “[t]itles are made to desolate Regions, which no Man ever claim’d.”³⁴⁷

This natural law conception of *terra nullius*, with its prohibition against laying claim to occupied land, directly contradicts the enlarged form *terra nullius* took in Australia. This is not to ignore the fact that all of the natural lawyers except Pufendorf argued that the prohibition against claiming inhabited land could be overridden under certain conditions.³⁴⁸ Those conditions, however, became operative *post facto* discovery. They principally concerned the rights of Europeans to travel, trade, and use common resources. Any infringement of those rights by native populations necessarily would occur in the aftermath, or at least independent, of ‘discovery.’ Even if infringement were to occur contemporaneously with discovery—say, if a native tribe denied some seafaring European settlers a safe harbor—the natives’ inhospitable act, not the settlers’ ‘discovery,’ would be the triggering event for overriding the prohibition. As an event logically independent of discovery, the inhospitable act would not have the effect of authorizing seizure of the natives’ land on grounds of discovery alone. Hence, the conditions that most of the natural lawyers attached to the second precept of their right of discovery did not qualify or enlarge the first precept of *terra nullius*. For them, that precept was absolute. It authorized laying claim to land *on the basis of discovery alone* if and only if the land was *truly unoccupied*.

The only possible link between the natural law right of discovery and the enlarged Australian theory of *terra nullius* comes from the writings of John Locke and Emer de Vattel. Locke argued that indigenous lands could be seized by individual Europeans, as if unoccupied, if they were “waste land.”³⁴⁹ He defined land as “waste” according to whether it was put to productive use by European standards—i.e., improved and cultivated for agricultural purposes.³⁵⁰ If an indigenous people occupied land in its natural state, Locke argued it should “be looked on as waste and might be the possession of any other.”³⁵¹

Vattel extended this Lockean idea from the individual acquisition of private property to territorial claims by European nations under the right of discovery. Working from the premise that all people are obligated to cultivate land and make it productive, he argued that “scanty population[s]”

347. PUFENDORF, *THE WHOLE DUTY OF MAN*, *supra* note 196, at 131.

348. *See supra* Part II.

349. LOCKE, *supra* note 166, at 22.

350. *See id.* at 23, 25, 26–27.

351. *Id.* at 23.

of natives, who make “no actual and constant use” of a “vast country” which they are “incapable of occupying [as a] whole,” do not constitute “a true and legal possession.”³⁵² Since such native possession of land is not true and legal by the law of nations, Europeans were entitled to appropriate it and establish settlements.³⁵³

Justice Brennan in *Mabo* cited Vattel as providing theoretic support for the enlarged notion of *terra nullius*. He correctly noted that the idea “that new territories could be claimed by occupation if the land . . . were left uncultivated by the indigenous inhabitants” was a justification for European expropriation on the basis of discovery “first advanced by Vattel.”³⁵⁴ Brennan also discussed some early Australian cases that referred to colonial vacant lands as “waste lands.”³⁵⁵ These observations do not establish a genuine connection, however, between the enlarged theory of *terra nullius* and the natural law right of discovery. For neither Vattel nor Locke were jurists in the natural law tradition. Locke was a political philosopher advancing a theory of natural rights. Vattel wrote in the tradition of the law of nations or *jus gentium* as distinct from the *jus naturale*. While the major philosophers who developed the right of discovery—Vitoria, Grotius, Gentili, and Pufendorf—were natural lawyers who also wrote on the law of nations, Vattel was not. None of those natural lawyers held the position on *terra nullius* that he advanced. Rather, they all insisted that for *terra nullius* to be operative under the right of discovery, land must be genuinely unoccupied. Hence, the enlarged notion of *terra nullius* enforced by the British in Australia, while supported philosophically by Vattel and Locke, is logically inconsistent with the right of discovery.

CONCLUSION

The idea that ‘discovery’ gave European nations just cause to claim ownership of unknown foreign lands significantly influenced European exploration and colonial expansion from the Middle Ages through the nineteenth century. Yet discovery was not a single doctrinal idea. It took several forms. The papal doctrine of *terra infidelibus* sought to justify the taking of land occupied by unbelievers to the Christian faith by promising the redemption of sins and a glorious afterlife. The natural law right of discovery stipulated that unqualified appropriation of discovered land extended only to land that was truly unoccupied. It further aimed to

352. VATTEL, *supra* note 79, at 216.

353. *See id.*

354. *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, ¶ 33 (Brennan, J.).

355. *Id.* ¶ 56.

establish, consistent with justice and natural rights, the conditions under which European sovereigns could claim land inhabited by indigenous peoples. The principle of discovery fashioned by Chief Justice John Marshall provided a historic account of the European settlement of the United States. It was normative and forward-looking only in regard to its description of the American Indians' retained dominion and the processes by which the United States could further acquire tribal lands. The expanded principle of *terra nullius* offered a theory intended to justify the appropriation of land occupied by indigenous populations whose ways of life were mysterious to Europeans. A detestable legal fiction, the principle dehumanized indigenous peoples as incapable of legal agency so as to legitimize the wide-ranging, uncompensated expropriation of their lands.

These four doctrines share the idea of discovery. Beyond that, they differ significantly. Understanding their distinct forms matters historically and for purposes of rectificatory justice. Hence, recognizing that they comprise distinct doctrines of discovery is imperative. Felix Cohen fell short in this regard. He did not appreciate the multiple and distinct forms the idea of discovery took across the centuries and continents of European exploration. Instead, he posited the thesis that the right of discovery formulated by Vitoria in sixteenth century Spain was carried forth as a settled principle of international law into United States federal Indian law through the formative decisions of Chief Justice Marshall. That mistaken thesis has become generally accepted dogma among scholars discussing federal Indian law. It is reflected in the *single doctrine of discovery thesis* advanced in recent legal scholarship. This is unfortunate, for the single doctrine thesis perpetuates a narrative that jurisprudential history shows to be false.

The nations of Europe that explored, conquered, and colonized indigenous lands during the age of discovery did not form a cultural monolith pursuing a grand plan. Rather, they were independent sovereigns guided somewhat by lofty principles, but largely driven by competitive ambition, national self-interest, thirst for wealth, and flawed senses of cultural superiority. The notion of discovery gave them a shared rhetoric to justify their colonial ventures. But that notion came in sundry forms. The thesis that the European powers and their colonial successors worked from a single doctrinal plan over-simplifies the history of the era and obfuscates the manifold ways in which discovery perpetrated injustice.

Historically, the four doctrines of discovery emerged in different centuries. They exerted their principal influence on different continents. Not only were they distinct from each other; they evolved over time and in certain respects were internally inconsistent. The papal theory of discovery viewed infidel rights differently before Innocent IV than after. Though his support of infidel rights became Church doctrine by the close of the Council

of Constance in 1418, papal bulls thereafter viewed European infidels differently than those from afar, often refusing to countenance the latter's rights. The natural law right of discovery retained a consistent form from Vitoria through Pufendorf; nonetheless, it varied importantly in the practical effect of its second precept. With Vattel, it lost all pretense of a just principle. Even Chief Justice Marshall's principle of discovery changed from *Johnson v. M'Intosh* to *Worcester v. Georgia*.

How the idea of discovery impacted any particular displaced indigenous population thus depends upon which doctrine of discovery the relevant colonizing power followed, along with the time, place, and circumstances of the dispossession. Without doubt, discovery in all four of its doctrinal forms resulted in the devastation of indigenous cultures and the misappropriation of their lands. The original sin of colonialism, discovery left a legacy of injustice. Yet to give that legacy its true, sordid measure, and to give each of its victims their due regard, it is necessary to view colonial experiences in historical context, sensitive to factual circumstances and mindful of the justificatory terms of conquest employed by the colonizing nation.

The Australian High Court in *Mabo* rightfully noted that the enlarged notion of *terra nullius* worked injustice on the Aboriginal Australians differently than how Chief Justice Marshall's principle of discovery impacted the American Indians. Both continents' natives were seriously wronged. Yet they suffered injustice under different factual circumstances and contrasting terms of discovery. Though the injustices each endured came mainly from the British Crown and its colonial successors, the patterns and motives of British settlement were heterogeneous. The indigenous cultures of North America and Australia fell before different settlers' swords. Their lands were lost under dissimilar terms of discovery. Acknowledging those differences enhances critical understanding of the historical injustices carried out on both continents.

Beyond historical understanding, carefully attending to the nuanced vagaries that separate the discovery doctrines matters for purposes of rectificatory justice. The High Court in *Mabo* understood this. The Justices distinguished their country's enlarged fiction of *terra nullius* from the American principle of discovery in order to lay the groundwork for reconsidering the Australian legacy of aboriginal dispossession. They recognized that identifying the specific discovery doctrine used by the Crown to annul native title for so long was a necessary condition precedent to redressing that historical wrong. The Justices also foresaw that their decision upholding the Meriam people's native title land rights would carry substantial precedential weight. They knew that other native title claims

would follow in *Mabo's* wake. Several have.³⁵⁶ The Justices' extensive discussion of *terra nullius* in *Mabo* played forward in those cases. For just as with the Meriam people, determining whether other indigenous Australian tribes or clans should receive long-delayed recognition of native title begins with acknowledging its systematic denial under the pretext of *terra nullius*.

The situation is similar in the United States. Adjudicating American Indian land claims or weighing the question of tribal reparations demands sensitive attention to the specific idea of discovery from which the Europeans and early settlers drew license to appropriate Indian homelands. Chief Justice Marshall maintained in *Johnson v. M'Intosh* and *Worcester v. Georgia* that his principle of discovery accounts historically for how the United States came to hold paramount title to those Indian lands. A century later, Felix Cohen argued that Marshall's decisions incorporated Vitoria's right of discovery. That false narrative persists today in the single doctrine of discovery thesis where the natural law right of discovery and Marshall's principle are treated as one.³⁵⁷

Yet Marshall's principle of discovery and the natural law doctrine differ in crucial ways. For one, the Chief Justice's principle attached to the 'discovered' lands of North America certain concepts peculiar to English property law. While reserving the Indians' right to continued use and occupancy of their tribal homelands—a communal property interest on the order of a life estate—Marshall claimed for the British and American colonists the ultimate interest in fee simple title. He further denied the free alienability of the Indians' retained land rights. The colonial governments not only possessed the fee title but also an exclusive right to acquire, by purchase or force, those retained interests.

The natural lawyers did not scrum over the particular forms of property ownership that would follow from discovery. They focused instead on the cardinal question of whether and under what conditions discovery provided just cause to claim indigenous lands. Their answer was clear: European nations could justly claim foreign land on the basis of discovery only if the land was unoccupied. Lands inhabited by indigenous peoples could be claimed only on satisfaction of certain secondary conditions. Discovery by itself did not give just or legal cause to appropriate occupied indigenous

356. See LISA STRELEIN, *COMPROMISED JUSTICE: NATIVE TITLE CASES SINCE MABO* (2d ed. 2009).

357. See, e.g., WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED* 148 (2010) ("Many of [the] legal principles" of jurists such as Vitoria, Gentili, and Vattel, including "the doctrines of discovery, conquest, and just war—were readily incorporated into the fabric of American law in cases like *Johnson v. M'Intosh* [and] *Cherokee Nation v. Georgia*.").

land. Further, most of the natural lawyers—e.g., Vitoria, Grotius, Pufendorf—assumed that the Americas were largely occupied prior to European exploration. To them, Chief Justice Marshall’s position that the British acquired ultimate title to American Indian lands simply on account of discovery would have seemed presumptuous and unlawful.

This is to say that the natural law right of discovery and Marshall’s principle directly contradicted each other over *the* fundamental question of discovery—whether discovery alone provided just cause for European sovereigns to lay claim to lands occupied by indigenous peoples. The contradiction perhaps explains Marshall’s avoidance of the natural law jurists when formulating his principle of discovery. Surely he was familiar with their writings and authority. In drafting his opinions in *Johnson* and *Worcester*, he certainly understood that his discovery principle contravened the fundamental precepts of the natural law right of discovery. Nonetheless, he asserted that his principle was a “settled doctrine of the law of nations.”³⁵⁸ The only support he cited for this assertion was Vattel.³⁵⁹ He ignored Vitoria, Grotius, Gentili, and Pufendorf, the eminent natural law philosophers who not only developed the right of discovery but founded the modern law of nations. In relying only on Vattel, Marshall aligned himself with a significant jurist. Vattel’s writings arguably were the most influential in the tradition of the law of nations during Marshall’s time. But as to the right of discovery, Vattel was an outlier.

Though he affirmed the long-standing natural law position that *terra nullius* comprised the first precept of the right of discovery,³⁶⁰ Vattel ignored the second precept which prohibited the taking of inhabited lands on discovery. He replaced that general prohibition with the Lockean fiction of a natural right to take indigenous lands when, by European standards, they were not being used beneficially.³⁶¹ This philosophic fiction, however, was logically inconsistent with the right of discovery. For the Lockean natural right to property amounts to a largely unconstrained entitlement for individual Europeans to adversely claim inhabited indigenous lands. When Vattel converted that private property right into a sovereign power, he greatly depreciated the normative force of the right of discovery. For it was precisely to gainsay such presumptive, Eurocentric rules of appropriation that Vitoria framed that natural law doctrine in the 1530s.

By the 1820s, natural law jurisprudence had fallen into disfavor. Locke’s fictional natural rights to life, liberty, and property by then were ensconced

358. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560–61 (1832).

359. *See id.* at 561.

360. *See* VATTEL, *supra* note 79, at 214.

361. *See id.* at 216.

in positive law. Vattel's writings on the law of nations were high authority. Hence, Marshall found it unnecessary to address the natural lawyers' line of argument. British concepts of property gave him a convenient framework for appropriating American Indian lands without directly confronting the natural law objections to the taking of occupied indigenous lands. Diminishing the Indians' full dominion could be masked behind temporarily conceding retained rights of use and occupancy, while reserving the paramount fee title for the European settlers.

If Marshall's principle of discovery correctly accounts for the United States' territorial acquisitions, then the justificatory terms and the specific nature of the wrongs committed in dispossessing the American Indians of their tribal inheritances were different than if Vitoria's right of discovery was the operative doctrine. Hence, should the United States ever genuinely wish to redress its shameful legacy of native dispossession, it would do well to follow the lead of Australia and determine which specific doctrine (or doctrines) of discovery enabled its confiscatory settlement. The Australian High Court in *Mabo* understood that general discussion of 'the doctrine of discovery' does not suffice. For that reason, it detailed how the enlarged notion of *terra nullius* functioned as the discovery doctrine behind England's settlement of the continent.

The United States' historical record of native dispossession is more complex. Despite Cohen's groundbreaking work, it remains uncertain how far the natural law right of discovery influenced the exploration and settlement of North America. It further remains debatable whether Chief Justice Marshall's principle of discovery tells a true story. More historical and legal research is needed. It may be that over the long history of America's colonial and frontier settlement—from the ill-fated Roanoke Colony in 1585 to the early twentieth century settling of the Alaskan frontier—one discovery doctrine, then another was operative. Perhaps even the enlarged fiction of *terra nullius* held commanding influence at certain times and places. This is likely, I think, in the displacement of some Alaska native communities. What is clear is that injustice cannot be repaired—land claims fairly adjudicated, the case for reparations fully made—unless the precise terms of the American Indians' dispossession of their lands are understood. For that, general discussion of the doctrine of discovery will not do. The distinct doctrines must be parsed in the context of the facts and circumstances surrounding specific instances of tribal dispossession.

