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Cover Page Footnote

Jessica Buckelew is a graduating third-year law student at Seattle University School of Law and an Articles' Editor for Seattle University's American Indian Law Journal. I want to thank all of the dedicated staffers of AILJ who helped get this article to its present state. Special thanks to Jessica Barry and Hannah Nicholson for their editing prowess and careful attention to detail, Professor Eric Eberhard for his guidance and constructive criticism, and to Nancy Mendez and Jocelyn McCurtain for whipping our journal into shape, sometimes literally.

THE MAN WHO SOLD THE WORLD: THE LONG CON OF DISCOVERY

Jessica Buckelew*

Con: (from: confidence trick)

Noun 1. An instance of deceiving or tricking someone by gaining their trust

Verb 2. Persuade to do or believe something by use of deception¹

The grifter hall of fame is filled with a myriad of unbelievable stories (albeit only in hindsight). Frank Abagnale, during the 1960s, passed more than 2.5 million dollars in forged checks.² George Parker made his living selling public landmarks to tourists, including the Brooklyn Bridge, Statue of Liberty, and Grant's Tomb.³ Eudardo de Valifierno (the Marquis) masterminded the theft of the Mona Lisa then proceeded to sell six forgeries after word spread of the heist.⁴ Victor Lustig not only conned Al Capone out of fifty thousand dollars, he sold the Eiffel Tower for scrap... twice.⁵ But the world seems to overlook what is surely the greatest heist in all of history. The longest con ever played, spanning centuries, with the largest take on record. The Doctrine of Discovery was the rouse by which the rulers of Christian Europe were able to lay claim, not to priceless art or an architectural masterpiece, but to the entire world.

The Doctrine of Discovery, which forms the foundation of federal Indian law in the United States, is the longest running con in history. Tactics have evolved, and various ringleaders have taken their turns rigging the decks; popes, princes, presidents. The game has changed, but the story is the same. The world can legally be bought and sold, from under the feet of those who inhabit it, by the leaders of the western Christian nations simply because this is, was, and always shall be. Oftentimes, this concept has been taken as a given, as a product of the xenophobic days of old without any deeper look at the political gameplay that brought it about. This paper seeks to contextualize Discovery from its earliest constructs to show that it was more than the overriding sentiment of Christian nations: it was a conscious positivist construct created by and for politics to achieve political ends.

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¹ Google Dictionary, *available at* <https://www.google.com/google+dictionaryq=+con> (last visited May 26, 2014).

² James Frater, *Top 10 Famous Con Men* (Listverse, Aug. 28, 2007) *available at* listverse.com/2007/08/28/top-10-famous-con-men/ (last visited Jan. 17, 2014)

³ *Id.*

⁴ A member of the Marquis' gang was eventually caught trying to sell the true Mona Lisa and it was returned to The Louvre in 1913. *Id.*

⁵ *Id.*

Discovery is a legal fiction, which has been perpetuated time and again to champion political ends, to the detriment of the aboriginal populations of the planet. In the twelfth century the Catholic Church convinced the leaders of Christian Europe to leave their kingdoms for a fabricated war, and when the leaders weren't looking they pickpocketed the sovereignty of Europe. During the Age of Discovery, the Church and its Christian rulers played a game of bait and switch with the laws of war and property in order to legitimize spurious claims to territory in the New World. And, in 1823 this legal fiction was indoctrinated into black letter law as the United States hurtled toward Manifest Destiny. In truth, Discovery had very little to do with the populations that it dispossessed, they were merely collateral damage in a game of political warfare.⁶

Recently, the United Nations has turned its attention to the doctrine, officiating a committee to substantiate the extent of the damage that has befallen indigenous people in the name of the Doctrine.⁷ Further, the United Nations has begun to put pressure on the United States to formally reject the doctrine, which, according to the Special Rapporteur to the United States, James Anaya, "can only be described as racist."⁸ Anaya calls for the United States, in accordance with its commitment to the United Nations Declaration on the Rights of Indigenous Peoples,⁹ to "reinterpret relevant doctrine... in light of the Declaration."¹⁰

Following and expanding upon Anya's recommendation, this paper seeks to wipe the paint off the Doctrine of Discovery to reveal the forgery underneath. By tracing the Doctrine back to its roots in pre-Crusades Europe and the papal revolution, it can be seen how the "doctrine" has been molded and reconstructed to justify claims or ends that were categorically illegitimate. Part I will discuss how the Doctrine was formulated by the Catholic Church in a misdirected attempt to oust the rulers of Europe from seats

⁶ For an in depth discussion of this practice, from antiquity to the modern practices of the Supreme Court, in choosing Indian cases in order to champion unrelated, non-tribal, political interests see, Fletcher, Mathew L.M., *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 580 (2008) ("Indian law disputes are often mere vessels for the Court to tackle larger questions; often these questions have little to do with federal Indian law").

⁷ UN Permanent Forum on Indigenous Issues, *The Doctrine of Discovery*, 11TH SESS. (7 May, 2012) available at

http://www.un.org/esa/socdev/unpfii/documents/2012/News%20and%20Media/EN%20Fact%20Sheet_Doctrine%20Discovery.pdf (last visited May 26, 2014).

⁸ James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, The Situation of Indigenous Peoples in the United States of America, U.N. Doc A/HRC/21/47/Add.1, ART. 15 (30 Aug, 2012), at http://unsr.jamesanaya.org/docs/countries/2012-report-usa-a-hrc-21-47-add1_en.pdf (last visited May 26, 2014).

⁹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, U.N. Doc. A/RES/61/295 (2 October 2007), at <http://www.refworld.org/docid/471355a82.html>.

¹⁰ Anaya, *supra* note 8 at ART. 105.1

of power held over the Church and unify spiritual and political power in the Pope. Part II follows the doctrine to the colonization of the New World, where tenets of “discovery” and “conquest” were reformed to justify the creation of the Empire of Christendom. Finally, this article will discuss the iniquitous application of *stare decisis* in federal Indian law, and the necessity of formally disavowing the Doctrine of Discovery as unconstitutional and unsound.

I. FOOL’S ERRAND: THE PIRACY OF EMPIRES

A. *The Set-up:*

Feudal Europe in the tenth century was far more concerned with preventing incursions into its territory than it was with expansion.¹¹ The idea of Empire was something explored in bedtime stories telling of the forgotten times of Caesar and Alexander the Great. Functioning under a system of vassalage, the “cities” of Europe were only loosely tied together by allegiance to their respective kings, who were constantly at war with one another.¹² During this time period Europe was known as the “poor relation of Byzantium,” because both the Greek and Islamic systems were more powerful and sophisticated.¹³

A similar lack of unity existed within the Catholic Church during this period, as well as a similar system of reliance; monks were beholden to their bishop in the same way serfs were reliant upon their lords.¹⁴ Bishops were members of the aristocracy, by birth or by marriage, and were reliant upon the king.¹⁵ Therefore, the clergy was entirely bound by the whims and wishes of the secular ruler of the state; the Pope was appointed, and could be deposed, by the Emperor.¹⁶ Accordingly, the rulers of Europe were considered both secular and spiritual authorities, which placed the Catholic Church in a precarious position; many bishops were weakly situated under one King.¹⁷

¹¹ Europe was under constant threat of attack from Norsemen in the north, Slavs and Magyars in the east, and Arabs from the south. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 102 (Harvard Univ. Press) (1985).

¹² The “cities” were more correctly called strongholds, known as fiefs. Property was owned by a lord, typically a knight, to whom all those living and working on the property, serfs, owed fealty in exchange for protection. The lords of a state all owned their property by the grace of their king, prince, or emperor. *Id.*

¹³ *Id.*

¹⁴ Bishops usually owned the land where priories were situated and pledged allegiance to the states ruler in the same way as the lords. *Id.* at 104

¹⁵ Often bishops would use marriage as a way to gain power and political favor with the king, when the papal revolution takes hold one of the main changes will be that bishops will no longer be able to marry, thus separating them from political life. *Id.* at 104.

¹⁶ William the Conqueror, in 1067, declared that it was the King that determined whether or not the Pope should be acknowledged and who would decide all secular and spiritual issues of law. *Id.* at 92

¹⁷ BERMAN, *supra* note 11 at 104.

This power was further compounded by a belief that God himself ordained the king.¹⁸ This backdrop set the stage for the papal revolution of the 11th and 12th centuries, where the Church's mission was to unify the church and all of Europe's many kings under one Pope. In undertaking this mission the seeds of "discovery" were planted, both theoretically and physically,¹⁹ in conquest and crusade.

B. The Con: The Fool's Errand

Send the secular rulers of Europe off to the Holy Land to reclaim Jerusalem for Christianity, and when they aren't looking: steal their watches (by watches, I mean kingdoms).

This mission began, in part, with an idea to unify the Church, originating with the Abbot of Cluny²⁰. The Cluniacs pushed for the unification of the Church under the Pope, who they believed should be able to appoint the Emperor, and not the reverse. Under their guidance, the church embarked upon a campaign of propaganda that began by forbidding Priests and Bishops to marry²¹ and ended by denouncing the secular ruler's place in the spiritual realm. The Cluniac reformists also believed something else that was novel in the life of the church thus far: the idea that "progress could be made in this world toward achieving some of the preconditions for salvation in the next" through a "mission to reform the world."²² Within this concept, they found both a pathway towards the freedom they sought, as well as towards the power to control an empire.

Pope Gregory VII, in 1045, was the first to contemplate the notion of "crusade."²³ He had witnessed the unifying power of a common enemy. He believed that by giving the secular princes and knights a common enemy in the eastern Moslem empire, he could create a united Europe that would recognize the power of the papacy²⁴. Pope

¹⁸ *Id.*

¹⁹ Not only will the same rhetoric of Crusade provide justification for seizing territory in the New World, but the early precursors of the Crusades, against Muslims on the Iberian peninsula, will leave the Mediterranean Sea, once a defensive barrier, open and beckoning for discovery. BERMAN, *supra* note 11 at 104.

²⁰ *Id.* at 116

²¹ This prevented political marriages between leaders of the clergy with females of the ruling classes, which were prevalent at the time. *Id.* at 117.

²² BERMAN, *supra*, note 11 at 118.

²³ Pope Gregory issued a decree in 1045 to "all who are willing to defend the Christian faith, greeting and apostolic benediction," which went on to describe the "cruelty and devesta[tion]" of Constantinople by the Muslims. In Minge, *Patrologia Latina*, 148:329, trans. OLIVER J. THATCHER AND EDGAR HOLMES MCNEAL, EDS., *A SOURCE BOOK FOR MEDIEVAL HISTORY* 512-13 (New York: Scribners) (1905).

²⁴ BERMAN, *supra* note 11 at 105-112. Pope Gregory IV became embroiled in a struggle for power with Emperor Henry IV over investiture rights and was never successful in carrying out his plan of crusade. He would die penniless and exiled, but his notion of crusade would carry on to his successor. H.G.

Gregory was also likely prompted by the favorable situation that would result if the ruling class, knights and warrior kings, were far from home; the door for the clergy to take power in their place would be left wide open. Pope Gregory was unsuccessful in actualizing a crusade to free Byzantium from the Moslems, yet the idea would be kept alive until Urban II was able to successfully implement it in 1095²⁵.

C. The Mark: Kings and Princes of Europe

Pope Urban had a better grasp of politics than his predecessors and was able to tempt his constituency to crusade with more than just indulgences.²⁶ A population surge in Europe at the time of his reign allowed Pope Urban to appeal to a younger generation of nobility; these men had too many successors in front of them to ever hope to inherit fiefs of their own and could, therefore, be tempted with high-ranking titles in crusading armies²⁷. He used this reality to urge Europe's surplus of nobility to crusade and implement feudal society in the "lands of the infidel."²⁸

As predicted, the Crusades greatly increased the speed with which the papal revolution progressed. The princes were gaining territory for the Holy Empire,²⁹ which then vested more and more power in the church that had acted as the unifier of Europe. Additionally, there was great wealth in crusading, especially when the wars shifted to the "holy lands" near Jerusalem. Since the Pope had the final say in whether or not a particular prince could go to war, the ruling power of Europe shifted to the papacy, who effectively controlled who was able to earn their share of foreign wealth.³⁰ The Church also reaped the spoils of the war more directly through gifts of gold "relics" from the Holy Land. By the culmination of the Crusades, the Catholic Church was the predominant ruler of Europe, the sole legal vessel of Europe, and owned one-third of all the lands in all of Europe. Conquest also left Europe herself hungry for expansion; the Mediterranean Sea, once a natural safeguard against Moslem invasions, opened with the promise of wealth and adventure.

WELLS, A SHORT HISTORY OF THE WORLD; THE CRUSADES AND THE AGE OF PAPAL DOMINATION (Bartleby Books) (1922).

²⁵ Pope Urban II's speech calling for crusade promised "all who die by the way, whether by land or by sea, in the battle against the pagans, shall have immediate remission of sins." Bongars, *Gesta Dei per Francos*, 1, pp. 382 f., trans. in THATCHER AND MCNEAL, *supra* note 23 at 513-17.

²⁶ In exchange for going to fight the holy war, Urban granted a "plenary indulgence" or absolution for all sins committed prior to going to war. *Id.* at 118.

²⁷ DANIEL J. MONAHAN, *THE EXPANSION OF EUROPE*, 21 (Image Books) (1958).

²⁸ *Id.*

²⁹ Formerly Islamic or pagan states (Greece, Hungary, Scandinavian lands) quickly shifted to Christian domination. *Id.*

³⁰ Crusades were carried out "under the banner of heaven," and were commissioned by God. The act of killing, and thus the act of war, was a sin and therefore one had to get the papal "okay" in order to participate, otherwise, to go to war without papal approval would be to condemn oneself to eternal damnation. *Id.* at 24-25.

D. The Misdirect: Legitimizing Conquest and Crusade

Despite these benefits, the implementation of the Crusades was not an easy feat for the Church because strictly speaking, they were illegal. The prevailing humanitarian laws of the era espoused the “just war” principle of St. Augustine, Justinian, and Grotius; which explained that wars were only “just” and legitimate if they were a response to a “grave injury” by another. Therefore, being a holy authority that ascribed to these laws, the Church first required crusaders to justify their aggression.

Until this point in time, Europe had only ever participated in defensive wars, those to protect territory or regain what had been taken. Accordingly, a war of aggression was difficult to contemplate. The church then needed to twist the concept of “just war” to fit their policy of conquest. They did this in three ways: 1) by claiming that this was not a war of conquest but one to reclaim land that belonged to Christians by right and was dispossessed of them by the Moslems, as well as one to aid the Christian Byzantines, 2) by claiming that Moslems, as non-Christians, were enemies of Christ and that therefore, war against them was “just,” and 3) by claiming that crusaders were going to war for the benefit of the Moslems, to save their souls for Christ and convert them to Christianity. This begins the Doctrine’s methodology of “legal” argumentation, where concepts and maxims are manipulated to suit an economic and political goal.

It is clear from the outset that the actual goal of the Crusades did not adhere to the above claims. First, crusaders did not aid the Christian Byzantines who had been forced from their homelands. Instead the Church encouraged the surplus of young nobles to recreate feudal society by establishing fiefs of their own in the east³¹. These knights would routinely refuse to fight under Byzantine lords and upon suppression of the enemy infidels, they would refuse to cease occupation of the land or turn it over to the “rightful” Byzantines³². They instead created Crusader States, a further outpost of the Holy Roman Empire’s domination, making the crusader knights as “unjust” as the Moslems under the Church’s definition.

Second, the idea of Moslems as enemies of Christ is an equally faulty conclusion, both in practice and in theory. It is clear from the practice of nations at the time that the people did not consider Moslems, by virtue of their lack of Christianity, to be their enemies. For example, European lords of Crusader States frequently intermarried with Moslem women.³³ Crusader knights with new eastern fiefs were also

³¹ Sparknotes, *High Middle Ages (1000-1200), The Crusades: 1095-1204*, available at <http://www.sparknotes.com/history/european/middle2/section5.rhtml> (Last visited May 21, 2015).

³² MONOHAN, *supra* note 27 at 60-65.

³³ *Id.*

reticent to actually “cast out” the conquered Moslems in their newly acquired territory as Crusader States required serfs to work the land and Moslems were frequently admitted to fill these positions.³⁴ Christian princes would routinely hold court with Moslem rulers and in the society of the time, Moslems were considered to be worthy of respect and cohabitation, just as the Jewish people were.³⁵ The concept of a religious “enemy” was further illegitimated when the “Crusades” spilt over into the conquest of Ireland by the English.³⁶

According to the predominant canonists of the time, conquest could not be justified on the Church’s grounds. While a few canonical scholars claimed that conquest could be predicated on lack of Christianity³⁷ most did not see it as a “just” reason to strip a people of their sovereignty or territory.³⁸ This included Pope Innocent IV, who said that he “did not believe that Christians could take land and power from people just because they were non-Christian.”³⁹ Although he believed that the Crusades were justified to protect and defend the faithful who lived in the Holy Land, he did not believe that conquest, or assertion of dominion over the infidels was proper.⁴⁰ Pope Innocent IV further posited that because the conception of “sovereignty, possessions, and jurisdiction” existed for infidels, absent sin, it was “not lawful for the Pope or for the faithful to take sovereignty or jurisdiction from infidels,”⁴¹ and that therefore the

³⁴ They were employed in the same way European serfs were employed and there were no connotations of slavery or forced servitude by conquest. *Id.* at 73-74.

³⁵ Alfonso X of Castile: “Moors shall live among Christians in the same way that Jews shall do, by observing their own law and not insulting ours.” *Id.* at 95.

³⁶ The justification for this conquest is that the Irish still followed the traditional Catholic practices and not those of the Gregorian reform church. *Id.* at 127.

³⁷ See, Hostiensis (Bishop of Ostia, 1200-1271), *LECTURA QUINQUE DECRETALIUM*, 2 vols., trans. James Muldoon (1512) (“the right of sovereignty was taken from all non-Christians with the coming of Christ”).

³⁸ Paulus Vladimiri, a noted canonist, considered the Crusades to be illegal. He claimed that those who espoused the idea of “infidel enemies” were allowing “for people to commit murder and rapine... Christians can sin, steal, rob, ravish, occupy and invade the possessions and territories of infidels who do not recognize the Roman Church or Empire, even if the infidels wish to live at peace with Christians. He believed that letters from the Emperor or Pope granting the right to occupy infidel lands were “without legal value” since “neither the Emperor nor the Roman Pontiffs can give what he does not possess... especially as it is against natural and divine law.” JAMES MULDOON (TRANS.), PAULUS VLADIMIRI, *Opinio Hostiensis in* HERMANNUS VON DER HARDT MAGNUM OECUMENICUM CONSTANTIENSE CONCILIUM, 7 vols., 203 (Frankfurt and Leipzig, 1696). St. Augustine, had long prior to this time, thrown out the idea that God could grant temporal dominion to his chosen people. “The claim that the God’s fostered the remarkable extension of the Roman Empire is refuted by the reference to the growth of the Assyrian Empire without the help from the Roman dieties. Similar arguments are based on the martial successes of the Persians and Alexander the Great.” ST. THOMAS AQUINAS, *CITY OF GOD*, TRANS. GERALD G. WALSH 89 (Image Books) (1958). “Disagreement between the faithful and infidel, considered in itself, does not invalidate the government or dominion of infidels” “in case of pre-existing government, divine law does not abolish human law”

³⁹ Pope Innocent IV, *Commentaria Doctissima in* QUINQUE LIBROS DECRETALIUM, 176-77 (1256).

⁴⁰ “Men can select rulers for themselves as [the Israelites] selected Saul and many others... sovereignty, possessions, and jurisdiction can exist, without sin, among infidels, as well as among the faithful” *Id.*

⁴¹ *Id.*

Crusades could only be justified to “reclaim” the land possessed by the infidels illegally.⁴² This shows that he espoused the “just war” theory of Augustine, the only war that was just was a war to right an affirmative wrong.

Third and finally, there was the idea of the aggressive evangelism that the Crusaders were to save the souls of the Moslems and convert them to Christianity; this argument is equally untenable, and again was not a predominant motive in practice. There are numerous cases of crusaders continuing crusades even in areas where the “enemy” had submitted and been entirely converted to Catholicism⁴³. For example, in Prussia, the Teutonic Knights “made it a habit to crusade at least twice a month even after the enemy had been fully vanquished and converted.”⁴⁴

It was also clear from the writings of the era, from both canonical legal scholars and crusading leaders alike, that it was not permissible to conquer in order to convert. In fact, the opinions of these scribes suggest a universal understanding that conversion through coercion and fear was unjust and unlawful. Pope Innocent IV said, “Infidels should not be forced to become Christians because all should be left to their own free will in this matter.”⁴⁵ The devoutly Catholic ruler, Alfonso X of Castile, wrote in his Charter to his Crusading Knights that they should not use violence or compulsion to convert the infidels, “If God desires compulsion he shall use it. He is not pleased with service through fear but that which men come to on their own.”⁴⁶ While Thomas Aquinas, the foremost legal thinker and theologian of the time,⁴⁷ was clear that “belief depends on the will” and that force was futile since “even if [the crusaders] were to conquer them and bring them captive, the latter would still be at liberty to believe or not.”⁴⁸ Further, in *City of God*, St. Augustine⁴⁹ clearly denounces the idea of empires building, which he considered “robbery on a grand scale.”⁵⁰

⁴² *Id.*

⁴³ These included Hungary, Prussia, Iberian Peninsula. MONAHAN, *supra* note 27 at 126.

⁴⁴ MULDOON, *supra* note 37 at 187.

⁴⁵ Pope Innocent IV, *supra* note 39.

⁴⁶ Muldoon, *supra* note 37 at 191-2.

⁴⁷ St. Thomas Aquinas (1225-1274) was a Dominican priest and one of the most important Medieval philosophers and theologians of his time, pioneering the interrelation of philosophy and religion in the concept of Natural Law, his ideas have formed the basis of much of our modern law. He was canonized by Pope John XXII in 1323. Bio., *St. Thomas Aquinas*, available at <http://www.biography.com/people/st-thomas-aquinas-9187231> (last visited March 21, 2015).

⁴⁸ J.G. DAWSON (TRANS.) *Secundus Secundae in*, SELECTED POLITICAL WRITINGS OF ST. THOMAS AQUINAS, 153 (The MacMillan Co.) (1959).

⁴⁹ A preeminent theologian and scholar, St. Augustine of Hippo is one of the originators of the “Just War” theory, and the father of humanitarian law. REFLECTIONS ON LAW AND ARMED CONFLICTS; THE SELECTED WORKS ON THE LAWS OF WAR, Gerald Irving Anthony Dare Draper (Kluwer Law International, 1998), 2-3.

⁵⁰ AUGUSTINE, *supra* note 36.

*For elegant and excellent was the pirate's answer to the great Macedonian Alexander: the King asked him how he durst molest the seas, so he replied with a free spirit: 'How darest thou molest the whole world? But because I do it with a little ship only, I am called a thief: thou, doing it with a great navy, art called an Emperor.'*⁵¹

St. Augustine then asks "whether it is fitting for good men to rejoice in extended empire" and then uses the "just war" theory to prove that it is not: conquest is only legal in a just war; therefore, if "peace and justice with neighbors had not by any wrong provoked" then "all kingdoms would have been small." "Your wishes are bad" he says, "when you desire that one you hate or fear should be in such a state that you can conquer him."⁵²

St. Augustine's writing represents the dominant opinion in an overwhelming amount of discourse on the subject: that the right of conquest was not a given. In fact, it seems clear that it was a known illegality. Accordingly, the Church knew that it needed to skew the facts to legitimize the acts of conquest that would increase its power.

E. The Score: European Christian Empire

Europe, once a fractured set of middling fiefs at war with one another, had now surpassed the power and wealth of the great Islamic states. United under the Pope, and working as a unit, Europe, of the Family of Nations, had become a full-fledged empire that had tasted the sweetness of conquest and was hungry for more territory.

In 1455, Pope Nicholas V issued the papal bull *Romanus Pontifex*, which officially condoned the Crusades and advocated that King Alfonso of Portugal "invade, search out, capture, vanquish, subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed."⁵³ He advocated for an empire, an "increase of the faith" in order to "cause the most glorious name of the said Creator to be published, extolled, and revered throughout the whole world, even in the most remote and undiscovered of places."⁵⁴ The bull exemplifies the careful rhetoric extolled by the Church throughout the Crusades: the infidels are savage and cruel, they have unjustly deprived Christians of their rightful domain; they have murdered and sinned against Christian Byzantines. However, this rhetoric did not represent the existing passions or true beliefs of the Church. Instead, it was merely meant to circumnavigate the legal

⁵¹ DAWSON, *Supra* note 48 at 72.

⁵² *Id.* at 73.

⁵³ FRANCES GARDINER DAVENPORT (ED.), *EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648*, 21 (Carnegie Inst. Kessinger Legacy Reprint) (1917).

⁵⁴ *Id.* (talking about the war in Ceuta, Africa against Saracens).

tenets of “just war” and the illegality of wars of conquest in place at the time. The Church therefore, was masterfully able to transform a lust for gold into a desire to help Christians and Moslems alike that was carried through the next four centuries. This would be the first of several papal bulls that would come into play in the founding of the “New World” that would become America, as the crusading spirit began to morph into the Age of Discovery.

II. SNAKE OIL AND SOVEREIGNTY IN THE NEW WORLD

A. *The Set-up*

The Crusades had not only united Europe, but had also made it the predominant world power. Massive wealth was gleaned from the conquered territories in the east, which bolstered the European nation states as well as the Church⁵⁵. The Pope had solidified himself as the foremost authority on matters spiritual as well as secular; the nature of the “Holy War” was such, through the genius invention of the church, that only the Pope could declare an act of war “just,” thus permitting the State to invade and gain territory through acts that would otherwise have been considered illegitimate⁵⁶. This relationship between the Pope and the State was a reciprocal one. It was in the interest of the nation states to align with Rome because they were able to gain power through the papacy; in exchange, the Church was able to gain authority and wealth from the crusades it authorized⁵⁷.

The crusading spirit shifted to a colonizing zeal in the early fifteenth century, as the wealth of the east began to be tapped out, and Europe looked to expand its growing wealth in other locales.⁵⁸ United by the Crusades, Europe was now reverting back to nationalistic tendencies and new power struggles were taking shape between the nation states, who engaged in a race to appropriate riches available in the un-colonized world.⁵⁹

For example, Portugal under the *Romanus Pontifex* was beginning to reap the benefits of her “missions” on the west coast of Africa, which would eventually be the start of the slave trade.⁶⁰ And although the great Catholic nations of Portugal and Spain

⁵⁵ THOMAS ANDREW ARCHER, THE CRUSADES: THE STORY OF THE LATIN KINGDOM OF JERUSALEM (London: J. Fisher Unwin, 1894) 432-433.

⁵⁶ Michel Balard, ed., LA PAPAUTE ET CROISADES/ THE PAPACY AND THE CRUSADES (Soc’y for the Study of the Crusades 2011) 135.

⁵⁷ Davenport, *supra* note 53.

⁵⁸ N. JAYAPALAN, THE HISTORY OF THE UNITED STATES OF AMERICA (Atlantic Pub. 1999) 1-2.

⁵⁹ Muldoon, *supra* note 37 at 207.

⁶⁰ WORGER, CLARK, ALPERS, EDS., AFRICA AND THE WEST: VOL. I FROM THE SLAVE TRADE TO CONQUEST, 1441-1905 (Oxford University Press 2010).

would lead the way to the New World, they would merely be cutting the trail for the secular states of Great Britain, France, and Holland to reap the rewards of colonization.

B. The Con: Bait and Switch (Conquest for Discovery)

Although many justifications were posited for the Crusades, the only one that remained legitimate at this time was the idea that Christians were acting to reclaim their rightful territory that they were unjustly dispossessed of during the Muslim wars of expansion. As discussed earlier, wars for the purpose of acquiring territory were still considered unjust. However, the Christian explorers of Europe were discovering lands they had not known existed previously, and therefore could lay no claim to them by right of religious inheritance. For this reason, the Catholic rhetoric regarding acquisition of territory had to expand along with the Catholic empire.

So began the writing of the bulls. Following the precedent set out by the *Romanus Pontifex*, Pope Alexander VI issued the first of three *Inter Caetera* bulls in the early sixteenth century.⁶¹ The first bull reiterated the *Romanus* and gave Portugal the right to “invade, search out, capture, vanquish and subdue all Saracens and pagans whatsoever, and other enemies of Christ,”⁶² thus extending the Crusades into discovery. Subsequent bulls would transfer the power of discovery in the New World from Portugal to Spain by drawing a line of demarcation (cutting the world in half) and allotting the lands west of the Azores to Spain.⁶³

Despite these bulls, the secular powers became more active in acquiring lands in the New World, and more willing to reject the authority of the Pope. Accordingly, they issued their own charters granting power of discovery in the New World. For example, John Cabot, who would settle America for England, was issued a charter by King Henry VII “to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatever part of the world placed, which before this time were unknown to all Christians.”⁶⁴

⁶¹ DAVENPORT, *supra* note 53 at 22.

⁶² *Id.*

⁶³ The shift in power is attributable to papal politics, the final *Inter Caetera* was issued by Pope Nicholas VI, a native of Castile and friend of Ferdinand and Isabella. The Pope was also reaping the riches of the New World and Spain, being a larger power with a more equipped military strength, would be able to subjugate more lands more efficiently. *Id.* at 26.

⁶⁴ THE CABOT VOYAGES AND BRISTOL DISCOVERY, 2nd Ser., No. CXX, Haklyut Society (Cambridge University Press, 1961)[HEREINAFTER CABOT VOYAGES].

There were a few justifications posited for acquiring and settling the New World for Europe, most still based off of “just war” theory.⁶⁵ 1) The Pope, by virtue of being God’s hand on earth, has rightful jurisdiction over the entire world; therefore wars to preserve this power, or punish those who deny that power, are “just.” 2) When Jesus came to earth he transferred all sovereignty and jurisdiction to Christians. 3) By bringing Christianity to the indigenous populations of the New World, Europe made adequate payment in the form of salvation and thus may take ownership. Finally, 4) Non-Christians are not “people” in the eyes of the law and have no rights of sovereignty or property; therefore, Christian nations can claim the land as if it was *terra nullius*, desert land void of inhabitants.

In addition to these four justifications, was the idea that performing certain rituals could grant to a discovering explorer the right of ownership of the discovered land.⁶⁶ When a discovering explorer made first contact, setting foot on new soil, he would place two flags into the ground, one for Church and one for country, claiming the land for his sovereign.⁶⁷ These rituals were considered legal acts of “discovery,” and show the beginning of the amalgamation of two concepts: justifications of conquest being used to facilitate tenets of discovery. This is important because, in point of law, the indigenous people were never “conquered” in a technical sense. Although skirmishes broke out between settlers and natives, and certainly some treaties were entered into under threat of military strength, there was not a full-scale campaign against the indigenous people in the same way the Crusades were waged against the Muslim nations. In other words, this was not a war per se; instead the discovering explorers attempted to make a conquest, a right typically pertaining to war, valid under discovery.

C. The Mark: Indigenous Populations the World Over

The settlers of Europe did not come into the New World with guns ablaze; in fact, the reality was quite the opposite. The nation states, with knowledge of their precarious legal quandary, were eager to seal their acquisitions with more legitimate means than the precarious construct afforded them. Therefore, treaties and alliances were made with the Native populations of the New World; the majority of the land acquisitions in the New World were solidified by treaty and payment.⁶⁸ By and large, the Natives were

⁶⁵ CARL SCHMITT, *THE NOMOS OF THE EARTH; THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* ch.2. (Telos Press) (2003).

⁶⁶ ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED*; THOMAS JEFFERSON, *LEWIS & CLARK, AND MANIFEST DESTINY* 15 (Praeger) (2006). For those interested in learning more about how conquest progressed into Manifest Destiny and contributed to the settlement of the Americas, Professor Miller’s book provides a fantastic chronology and assessment.

⁶⁷ *Id.*

⁶⁸ Robert J. Miller, *The Indians and the United States Constitution*, FLASHPOINTMAG.COM, <http://www.flashpointmag.com/amindus.htm> (last visited March 21, 2015).

treated as possessors of all the sovereignty and rights of any nation state. However, it seems many of these treaties and rights were “for show,” and held little legal value that the European powers were willing to recognize.

In these dealings with the Natives, the European powers acted as if the Native peoples were sovereign nations that deserved treaty rights and were worth forming alliances with. However, these “negotiations” were conducted more for the purpose of solidifying claims against other European powers than for the purpose of recognizing the ownership rights of the Natives. These dealings began a trend that carried through to modern times- the practice of using Natives as instruments to promote unrelated interests.⁶⁹ Making treaties and buying land from the Natives became just another ritual of “discovery.”

D. The Misdirect: Exclusion Becomes Acquisition

Since this ritual served as the “well established” principle that John Marshall will use to extinguish all sovereignty from the Native population, it is important to look at what rights actually were “well established” concerning both conquest and discovery. It is also necessary to examine the justifications given for European expansion to determine which, if any, were legitimate at the time.

1. Conquest and Discovery

Conquest has long been a source of debate among legal scholars, going back to the time of the Greeks. As far back as Hugo Grotius,⁷⁰ it was held that land was not considered captured merely by its occupation.⁷¹ Thomas Hobbes⁷² echoed the same sentiment, writing: “It is not, therefore, Victory, that giveth the right of Dominion over the Vanquished, but his own Covenant.”⁷³ The one notion that has been consistently agreed

⁶⁹ L.C. GREEN & OLIVE P. DICKASON, *THE LAW OF NATIONS AND THE NEW WORLD*, 225-226 (University of Alberta Press) (1989). This strategy can be seen in the practice of allying with Natives in the New World, as during the War of 1812, and then at the cessation of hostilities ceding land that was inhabited (and never sold or ceded by treaty) by a nations’ so-called allies to the other nation state without consulting the Natives whose land they had ceded

⁷⁰ Dutch philosopher Hugo Grotius (1583-1645) was, and still is, a hugely influential figure in the development of Natural Law theory and the Laws of War. Stanford Encyclopedia of Philosophy (2005), <http://plato.stanford.edu/entries/grotius/> (last visited March 21, 2015).

⁷¹ For proof Grotius cites an instance where Hannibal held full occupation of a tract of land by his army and, even so, it was sold by the conquered nation for the same price it was originally bought for. Hugo Grotius, *THE RIGHTS OF WAR AND PEACE*, M. Walter Dunne trans., 667 (London, 1979).

⁷² English philosopher Thomas Hobbes (1588-1679) was, and is still, a vastly influential political philosopher, famed for his “social contract” theory. Thomas Sorrell, *Thomas Hobbes*, *ENCYCLOPEDIA BRITANNICA* available at <http://www.britannica.com/EBchecked/topic/268448/Thomas-Hobbes> (last visited March 21, 2015).

⁷³ THOMAS HOBBS, *LEVIATHAN* 1651, 155 (Oxford Clarendon Press) (1929).

upon is that conquest does not vest title in itself, but is a means of “creating a favorable situation for the acquisition of title.”⁷⁴ Therefore, sovereignty and title did not “give the conqueror plenary power” until the land had been ceded by treaty or formally annexed. Officially, according to noted political scholar Jean-Jacques Burlamanqui, moreover, sovereignty must be consensual because “without consent, the state of war always subsists between two enemies, and one is not obliged to obey the other.”⁷⁵ One of the foremost legal thinkers of the era, the Abbe de Mably⁷⁶, very simply noted that “if conquests by their nature form a legitimate right of possession, it would be ridiculous for a victor to demand a cession from the conquered, as he would be demanding what is already his.”⁷⁷

If conquest vests only a limited amount of power in the conqueror, then discovery vests even less. Discovery grants rights only if the land discovered is *terra nullius*, which translates to desert wasteland, or “land belonging to no one.”⁷⁸ In other words, if the land “discovered” was already inhabited, discovery was not a valid means of acquisition. Therefore, a new version of discovery was constructed to facilitate the founding of the New World colonies. This new doctrine was not a power of sovereignty or property but an exclusionary principle. If one nation were afforded the right of discovery in the form of a papal bull, all the other European nations were excluded from discovering those lands; however, this did not grant the land itself but merely the right to attempt to discover or conquer the land. A great Papal “dibs.”

The language of the bulls, and of subsequent charters of the secular nations that would follow, clearly show that they don’t transfer title or property rights from the Natives to the Conquerors, instead, they merely permit the right of “discovery,” the possibility to acquire. Specifically, the bulls called for the discoverer to “seize, punish, subdue.” For example, King Henry of France relied on the “defense of the faith... where war is not only necessary but just and holy,” while John Cabot’s charter called for him to “conquer, occupy, and possess.”⁷⁹ These examples show that the leaders of Europe clearly did not see “discovery” as an instrument for obtaining title, but an instrument that gave them

⁷⁴ ROBERT J. MILLER, *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* (Oxford University Press, 2010).

⁷⁵ J.J. BURLAMANQUI, *THE PRINCIPLES OF NATURAL AND POLITICAL LAW*, Vol.1, Mr. Nugent trans., 42 (Larkin & White eds.) (1792). he went on to say that very few if any conquests were truly lawful since conquest should be a last resort whereby

⁷⁶ Gabriel Bonnot Abbe de Mably (1709-1785) was a French philosopher and republican political writer, famed for his theory of redistribution of wealth. *Gabriel Bonnot Abbe De Mably*, ONLINE LIBRARY OF LIBERTY, <http://oll.libertyfund.org/people/gabriel-bonnot-abbe-de-mably> (last visited March 21, 2015).

⁷⁷ MATHEW McMAHON, *THE LEGAL LIMITATIONS ON THE ACQUISITION OF TERRITORY BY CONQUEST: A DISSERTATION*, 108, 44 (Catholic University Press) (1940).

⁷⁸ Screen Australia Digital Learning, *Native Title Revolution*, [WWW.NFSA.GOV.AU](http://www.nfsa.gov.au/digitallearning/mabo/tn_01.shtml), http://www.nfsa.gov.au/digitallearning/mabo/tn_01.shtml, (last visited March 21, 2015).

⁷⁹ CABOT VOYAGES, *supra* note 64.

the sole power, to the exclusion of the other members Europe, to acquire territory by conquest or other legitimate means.

Discovery did not pertain to the Natives. It was “the law of Christendom; as little applicable to infidels as was the ‘common law’ of the Greek cities to societies of barbarians,”⁸⁰ therefore, it was only powerful when used against other members of the European nations. The nation that was granted the right of discovery then had the right to acquire territory by valid means. In this way, discovery was the new name given to the banner of the Crusades. However, in secular nations, those who did not recognize the power of the papal bulls, the tenets of discovery operated by excluding others who might happen upon settlements. Accordingly, the setting of flags and ensigns was a way of signaling to other European nations that this land had already been discovered by a nation, who then held the sole option of acquiring said land from the Natives.

2. Justifications

Having laid out the contradictions between the legal understanding of discovery of the time and the practical application of the concept, it is important to now return to the four principle means of justification used during the time to permit a country to acquire territory belonging to indigenous peoples. As stated earlier, there were four theories used predominantly to justify the taking of land; however, as shall be shown below, there remain inherent clashes between the understood legal meaning behind the justifications and how they were twisted to achieve political means in practice.

a. The Pope, by virtue of being God’s hand on earth, has rightful jurisdiction over the entire world; therefore wars to preserve his power, or to punish those who deny that power, are “just.”

This theory can be disproved simply by the fact that the vast majority of Europe, France, Great Britain, Holland, Germany, and Russia did not believe it. The idea that the Pope could cut the world in half and gift it to particular nations was as preposterous then as it is now. The secular nations of Europe disregarded the papal bulls entirely and there was no asserting them as true power from Portugal or Spain to prove their holdings.⁸¹ For example, when explorer Juan de Grijalva tried to claim Cozumel in the Yucatan for the Spanish by affixing a Spanish coat of arms to a Mayan tower, (considering the Mayans vassals of the Spanish King by virtue of the papal bull), the

⁸⁰ THOMAS ERSKIND HOLLAND, STUDIES IN INTERNATIONAL LAW (1898).

⁸¹ There is no record of the bulls in any archives but that of Portugal and Spain, and no reason to believe that any other nations were even made aware of them. DAVENPORT, *supra* note 53.

incident was considered a great source of embarrassment for the Spanish crown that did its best to play it down.⁸² Additionally, it was also clear that the Natives did not acquiesce to this theory; in Martin Fernandez Encisco's account of his travels to the New World he describes the reaction by a group of Natives to being told of the papal donation; "they thought it was funny that the Pope was so liberal with what was not his."⁸³

In reality, the only power the Pope had was as an arbiter "less those numerous spiritual evils should befall which are the inevitable result of a war between Christian princes."⁸⁴ In other words, he had no temporal power to grant dominion or land rights. The Pope "cannot give what he does not possess," was the contention of the great theologian and jurist Paulus Vladimiri⁸⁵, "it is against natural and divine law."⁸⁶ A distinction was made between the Pope's spiritual authority and his lack of secular authority. Francisco de Vitoria, often considered the father of international law, noted that the Pope was not able to give away towns or houses at his pleasure because his power was not one of ownership but of spiritual jurisdiction⁸⁷. Vitoria went on to explain that, even assuming the Pope held secular power over the earth, that power was derivative (from God) and held in the office of the Pope and not in his person. Thus, he could not grant the power of his own office to secular princes.⁸⁸

b. When Jesus came to earth he transferred all sovereignty and jurisdiction to Christians.

While the Christian nations of Europe may have believed that God was the ruler of heaven and earth, that belief did not extend to God granting the temporal power of law and jurisdiction to Christian rulers. Hobbes said "it is true, that God is King of all the Earth" but he also found the idea that God was King of a particular nation to be as absurd as "that he hath the general command of a whole Army, and Should have withal a peculiar Regiment, or Company of his own."⁸⁹ He also made note of the separation of God's spiritual power and the secular power of nations, saying that "God is the King of

⁸² GREEN, *supra* note 69 at 233.

⁸³ *Id.*

⁸⁴ James Brown Scott, THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW, 9 (Georgetown University Press, 1934).

⁸⁵ Paulus Vladimiri (latin translation of Pawel Wlodkowic)(1370-1435) was a professor of law, priest, and rector at the University of Crakow. He espoused the Augustinian notions of Just War in his teachings related to the acquisition of pagan nations. Stanislaus F. Belch, *Paulus Vladimiri and His Doctrine Concerning International Law and Politics*, THE CATHOLIC HISTORICAL REV., 358 Vol.54, No.2 (1968).

⁸⁶ MULDOON, *supra* note 37 at 24.

⁸⁷ SCOTT, *supra* note 84 at 7.

⁸⁸ *Id.*

⁸⁹ HOBBS, *supra* note 73 at 90.

all the Earth by his Power: but of his chosen people, he is King by Covenant.⁹⁰ This explains that God's sovereignty on Earth was by choice, not by a matter of inherent law.

What is even more persuasive is that even the Church did not believe in taking sovereignty from the Natives. For example, Pope Paul III was outspoken about the atrocities taking place in the New World,⁹¹ and issued a proclamation that "the Indians or any other peoples who may be hereafter discovered by Catholics, although they be not Christians, must in no way be deprived of their liberty or their possessions."⁹² He felt strongly that the Catholics would be punished for their misdeeds against the Natives; he told the Spanish council in 1537, with Diego Columbus standing by:

If the blood of one man never ceased crying to God until it was avenged, what Shall not the blood of thousands do, who have perished by our tyranny and Oppression now cry to God: 'Vindica sanguinem nostrum Deus noster!' By the Blood of Jesus Christ, and by the stigmata of St. Francis, I beg and beseech Your Majesty to put a stop to that torrent of crime and murdering of people, in Order that the anger of God may not fall upon us all.⁹³

Pope Paul III was not the only outspoken member of the Church who was against the injustice committed in the New World in the name of Catholicism. In the dictation of his last will and testament, Las Casas, a theologian monk and early advocate of indigenous rights, asked that the volume of his experiences in the New World, which he bequeathed to the College of St. Gregory at Valladolid, be forever placed in a focal area of the library so, "should God decide to destroy Spain, it may be readily seen that the punishment is caused by our own destruction in the Indies and thus the reason of His justice will be made apparent."⁹⁴ Likewise, Pope Benedict XVI bemoaned the fact that "there are still men found confessing the true faith who have the audacity... to deprive of their possessions the poor Indians."⁹⁵

c. By bringing Christianity to the indigenous populations of the New World, Europe made adequate payment in the form of salvation and thus may take ownership.

⁹⁰ *Id.*

⁹¹ More than 12 Million died during the first 40 years after Columbus. More than 72 million may have inhabited the western hemisphere circa 1492 but it declined to 4M in a few centuries (a loss of 1M /century. WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED, 15 (Fulcrum Pub.) (2010).

⁹² JOHN EPPSTEIN BURNS, THE CATHOLIC TRADITION OF THE LAW OF NATIONS, 408 (Oats & Washburn Ltd.) (1935).

⁹³ *Id.* at 409.

⁹⁴ *Id.* at 409.

⁹⁵ *Id.* at 423.

This was the same argument that was rejected for use during the Crusades; the idea that the great nations of Europe were “saving” the heathen populations of the earth from eternal damnation. This notion was, again, theoretically untrue as well as untrue in practice.

Instead, the dominant maxim of the time was that non-Christians could not be converted by force: this remained the maxim of the time. While proselytizing was encouraged, the use of force was not. For example, Burlamanqui condoned trying to “bring the vanquished to the true religion” but not by the use of means “contrary to humanity.”⁹⁶ He was adamant that the Natives be allowed the “exercise of their religion, unless they happen to be convinced of the truth of that which [we] profess.”⁹⁷ Furthermore, it was also not permissible to punish or go to war with the Natives for failure to believe. Explaining this, Vitoria noted that Natives “were not guilty of what they didn’t know.”⁹⁸ Vitoria went on to explain that feigned belief out of fear of violence and war was not true belief and was, moreover, “monstrous and a sacrilege.”⁹⁹

Additionally, it is also clear that missionary work was not the true motivation of the rulers of Europe. While Churches were built and missionaries were sent out to preach the gospel to the Natives, the powers of Europe were far more concerned with reaping the earthly riches of the New World. The King’s Charter for the Colonization of Jamestown described the purpose of colonization as to “bring Christianity to the heathen savages who live in darkness and miserable Ignorance of the true Knowledge and Worship of God,” but, a mere sentence after, the charter instructs the settlers not to build churches or preach but to “dig, mine and search for all Manner of Mines with Gold, Silver, and Copper and Yeild a cut to the King.”¹⁰⁰ Therefore, the European conquerors could not claim to have made a payment of salvation that they made little effort to bestow.

What’s more, even if the conquerors had in fact made this effort, it would have made little difference when the Natives didn’t consider the salvation of Jesus to be just compensation. For example, Herrera of Tabasco noted in his journals that the Natives laughed at the missionaries, asking why they would want another Lord when they already had one; while the Maya in the Yucatan stated outright that they did not desire Christianity.¹⁰¹

⁹⁶ BURNES, *supra* note 92 at 387.

⁹⁷ *Id.*

⁹⁸ ECHO-HAWK, *supra* note 91 at 13.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 20.

¹⁰¹ *Id.* at 12.

d. Non-Christians are not “people” in the eyes of the law and have no rights of sovereignty or property; therefore, Christian nations can claim the land as if it was terra nullius, desert land void of inhabitants.

It is clear from the teachings of the time and the practice of nations that the Natives were considered people. Las Casas issued a “categorical denial” that difference in race, social organization, or ignorance of Christianity can “destroy the fundamental character of a man and of civil society, or the rights which they derive from the Natural Law.”¹⁰² He believed that the Natives’ Chiefs possessed true authority and that Native peoples had a right to property and a right to develop as they chose.¹⁰³ Further examples echoing this sentiment include Spanish canonist Diego Leyva who came to the conclusion that,

War cannot be declared justly against the heathen simply because they are heathen even by the authority of the Pope... for unbelief does not deprive the heathen of their dominion, which they have by natural law [nor do they] lose their dominion over things or territories which they hold and have come to possess by human law.”¹⁰⁴

Vitoria espoused this understanding as well, and explained that the Natives were “true owners in both public and private law,” and that their chiefs were “true princes and overlords” prior to the Spanish arrival. He believed it was robbery to deprive them of their lands or possessions, no less than if they were taken from Christians.

Although much of this land was systematically robbed from the Natives, the bulk of the land in the New World was acquired by treaty, making it apparent that the settlers and their sovereigns were aware of the humanity of the Natives, insomuch as they were worth making treaties with. Many nations, especially the Netherlands, treated the Natives the same way they would have treated any nation state; the United Netherlands instructed the Dutch East India Company in 1630 to only obtain land for settlement with the consent of the Natives. These instructions were indoctrinated into the law of the New Netherlands. The Dutch were also very clear that all cessions be made voluntarily.¹⁰⁵ Similarly, William Penn, who founded Pennsylvania, insisted that land only be purchased from tribes who sold it willingly.¹⁰⁶

¹⁰² EPPSTEIN, *supra* note 92 at 409-410.

¹⁰³ *Id.*

¹⁰⁴ GREEN, *supra* note 69 at 159.

¹⁰⁵ FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, Lexis-Nexis, Introduction.

¹⁰⁶ *Id.*

However, not all nations were so concerned with the appearance of propriety or voluntariness. While England required a formal purchase of land from tribal governments, that purchase did not always come absent coercion; in 1624, the Virginia Assembly, settled under Great Britain wrote:

We never perceived that the natives of the Countrey did voluntarily yield themselves subjects of our gracious Sovraigne, neither that they took any pride in that title, nor paid at any tyme any contribution for sustenation of the Colony, nor could we at any tyme keepe them in such good respect of correspondency as we became mutually helpful each to the other but contrarily what at any [time] was done proceeded from fear and not love, and their corne procured by trade or the sworde.¹⁰⁷

However, even when taken through coercion, the land was not assumed to be under the jurisdiction of the foreign power until it was annexed or ceded. Therefore, land was obtained by purchase, not by discovery. For example, Roger Williams, who founded Rhode Island, noted that “the Natives are very exact and punctuall in the bounds of their Lands, belonging to this or that Prince or People.”¹⁰⁸ Accordingly, treaties had to recognize the sovereignty of the tribes as separate nations and not conquered peoples.

e. The Score: World Domination

After examining the justifications, which attempted to legitimize discovery, and the existing scholarship of the times, it becomes clear that discovery was legally illegitimate. Discovery could only be applied by fabricating non-existent injuries, either to nation or to God, or by using the ethnocentric idea of *terra nullius*, which was a hackneyed concoction of the Church that wasn't truly accepted by the rulers and legal thinkers of the time period. What's more, these concepts could only be stretched to pertain to land rights and property and were never conceived to be used to extinguish the sovereignty of the Natives. Discovery and conquest do not, in themselves, vest title in the nations employing them, but merely provide a platform for acquiring said title by another means. Therefore, Natives retain all sovereignty and property not officially ceded by treaty or subjugation.

Unfortunately, however, legal thought and physical practice are two different things. Despite that the leading jurists of the era believed that “discovery” as applied

¹⁰⁷ LYON GARDINER TYLER ED., NARRATIVES OF EARLY VIRGINIA 1606-1625, 23 and 233 (New York) (1907).

¹⁰⁸ COHEN'S HANDBOOK, *supra* note 105.

was not legitimate, the nations of Europe continued to “discover.” The wealth and power that acquisitions in the New World afforded was too much to give up, and thus, the legal fiction of discovery was acquiesced to. A form of legalism took shape in regard to Native policy, whereby the most powerful nations would get to make the rules for everyone else. Adherence to this fiction developed via the positivist concept that because a number of nations engage in an activity, that activity is then legal. In other words, this idea explains that the dominant power decides what the law will be and all subordinate powers are bound by it, or at least live amongst it. Therefore, natural law and an inherent concept of fairness was no longer the rule of the day; instead positivist notions of “might makes right” dictated the actions of nations.

III. PULLING BACK THE CUFF-LINKS ON FEDERAL INDIAN LAW

Button, Button. Whose Got the Button?

A simulacrum is a concept in philosophy used to describe a representation without an original, a copy of a copy. It first entered the etymological landscape in the sixteenth century and was usually used to describe depictions of God. In philosophy it stands for something that gives the pretense of reality while bearing no relation to reality, whatsoever. Nietzsche suggested it was what happened when people “ignored the reliable input of their sense and resorted to the constructs of language and reason to arrive at a distorted copy of reality.”¹⁰⁹ Discovery is just this, a simulacrum, a theoretical fallacy given legitimacy by rhetoric. The Doctrine will eventually become law in 1823, when Justice John Marshall, under pressure to legitimize the land claims of a nation struggling free herself from colonial domination, will indoctrinate it into law in *Johnson v. M’Intosh*.¹¹⁰ After this case, a concept that has been questioned and argued for centuries will become a legal maxim and *stare decisis*, literally translated “to stand by things decided,” will allow the court to rely on the ruling as fact, and never again need to question the legality of the underlying concept. The simulacrum is never that which conceals the truth- it is the truth that conceals that there is none.¹¹¹

The United Nations Preliminary Study on the Doctrine of Discovery found that it “lies at the root of these human rights violations,” and that it has resulted in “mass appropriation of the lands, territories and resources of indigenous peoples. Indian nations have been denied their most basic rights simply because, at the time of Christendom’s arrival in the Americas, they did not believe in the God of the Bible.”¹¹² President Obama, when signing the United Nations Declaration on the Rights of

¹⁰⁹ FREDERICK NIETZSCHE, *THE TWILIGHT OF THE IDOLS* (2007).

¹¹⁰ 21 US 543 (1823).

¹¹¹ Poster, Mark and Baudrillard, Jean, *Selected Writings*. Cambridge, UK: Polity (1988).

¹¹² Steven T. Newcomb, *Five Hundred Years of Injustice*, available at http://ili.nativeweb.org/sdrm_art.html (last visited May 21, 2015).

Indigenous Peoples in 2010, committed the United States to “supporting tribal self-determination, security and prosperity for all Native Americans.”¹¹³ He also asserted that the United States was “committed to serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples.”¹¹⁴ This cannot be achieved without disavowing the Doctrine of Discovery, which James Anaya has determined to be “out of step with contemporary human rights values.”¹¹⁵ The purpose of this paper is to show that this statement has been true since time immemorial.

Many might wonder why this is an important step. It is not about land rights, most of which were acquired via treaty or prescription and not discovery. It is not about reparations or Constitutional challenges. At its heart, it is simply about coming clean and recognition of a historic wrong. What is at issue is the continued disenfranchisement of a people, the continued subjugation of a nation, and the continued assertion of illegitimate power. Discovery has taken more than land rights from Native Americans; it has taken their identity as a distinct nation. It was relied upon to steal ancestral homelands and resources without compensation; it has taken away Native’s ability to protect themselves by pulling jurisdiction over non-Indians away from them. Disavowing discovery is a symbolic move with perhaps no tangible gain but a moral victory. For this reason, the United Nations and Native groups have sought disavowal from multiple Popes of the underlying Bulls which would produce no change in circumstance but is greatly sought after despite the fact.

In accordance with the recommendation of Mr. Anaya, the “federal court should discard [this] colonial era doctrine in favour of an alternative jurisprudence infused with the contemporary human rights values that have been embraced by the United States.”¹¹⁶ If the United States is truly committed to its obligations to Native Americans, the Supreme Court will formally disinherit the ethnocentric, racist and discriminatory Doctrine of Discovery. The Court will act in accordance with the United Nations Declaration and “affirm... that all doctrines... based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.”¹¹⁷ As this paper has shown, this was true when the doctrine was first concocted as an instrument of war and it is equally true now. The nation had fallen for

¹¹³ *Id.*

¹¹⁴ *Id.* at 2.

¹¹⁵ ANAYA *supra* note 8 at Art. 16.

¹¹⁶ *Id.* ART. 104.

¹¹⁷ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, (2 October 2007)*, UN Doc. A/RES/61/295, at sec. 1, available at <http://www.refworld.org/docid/471355a82.html> (last visited May 26, 2014).

the hoax, and what's more, they preferred the illusion to the reality. It is truly time we pulled back the curtain.