

What is the Doctrine of Discovery?

NAD Year-end Meeting 2022

I grew up and went to school in Australia and in history class I was taught Australia's origin story. I learned that Australia was discovered in 1770 by a British naval officer called Captain Cook who came ashore and claimed the continent for the British crown.

It wasn't until I got to law school that I learned that Captain Cook was acting on doctrine that was a valid part of the law of nations at the time, and which remained valid in Australian law right up until 1992. And this is the legal doctrine called *terra nullius*—a Latin phrase for “land that is empty or void.” In other words, this continent could be claimed for Britain because it was *terra nullius*—nobody's land.

But actually, it *was* someone else's land. The indigenous peoples of Australia had occupied the land for thousands of years before the arrival of European settlers. And after settlement, they were subjected to violence—at times even genocide—to policies of family separation, and to economic and social marginalization. Naturally, this legacy has left a profound mark on today's generation of indigenous Australians.

I mention this story because, as we know, it isn't a unique story. We could just change a few names, dates, and places, and we could tell a remarkably similar story about Canada, or the United States, or countries of Central and South America, or even India and other parts of Asia, or the islands of the Pacific or the Caribbean, or the colonized countries of Africa.

And so, as you start peeling back the layers of history further and further, certain common legal concepts emerge that link together all these stories of colonization, oppression, and genocide. And these concepts, in turn, are grounded in a legal doctrine that has operated in various forms for the past five centuries—and it's known as the Doctrine of Discovery.

The beginnings of the doctrine can be traced back to the 11th century to the start of the crusades, when the idea emerged that the Pope had jurisdiction over a united Christian commonwealth of countries. This idea of papal jurisdiction was developed in canon law through to the 15th century when Pope Nicholas V, in 1452, issued the first of a now infamous series of papal bulls. He authorized the King of Portugal, and later the King of Spain, to conquer Muslims and non-Christian pagans and to “reduce their persons to perpetual servitude and convert their land to your use and the use of your successors.”¹

Now, clearly, with subsequent political and religious shifts within European Christendom, these papal declarations didn’t hold meaningful legal or political power for very long. But what they *did* do was to solidify certain ideas that purported to justify the colonialization of non-Christian lands by Christian European nations. These ideas included: *terra nullius*—the right to claim any land not already claimed by another Christian nation; the superiority of European civilization and the “duty to civilize” non-Christian nations; and, the idea that indigenous people held diminished land rights after European discovery (their right devolved to that of “occupiers” of the land rather than owners of the land). And this cluster of ideas became embedded in the law of nations under the umbrella of the Doctrine of Discovery—an unholy brew of theology, politics, power, and law.

A natural question at this point is: Why is this relevant today? And the answer, in part, is because the social and political consequences of the Doctrine of Discovery have endured and are with us today. As an overarching legal concept, also, the doctrine has survived both within international law and within domestic U.S. law. Perhaps one of the most well-known legal decisions involving the doctrine in the modern era was an 1823 U.S. Supreme Court case, *Johnson v. McIntosh*. It was an Indian land dispute case, and in it the Court held that the Doctrine of Discovery was an established legal principle of English and European colonial law in North America—and therefore, it had also become the law of the United States.

The *Johnson* decision was subsequently cited with approval by high courts in New Zealand, in Australia, and in Britain. Surprisingly, the Doctrine of Discovery was explicitly acknowledged

¹ Papal Bull *Dum Diversas* (June 18, 1452).

by the U.S. Supreme Court as recently as 2005 in another Indian land dispute case. A footnote by then Justice Ruth Bader-Ginsburg referenced the doctrine and noted that title to lands occupied by Indians when the colonists arrived had become vested in the British sovereign.

This short summary provides only a bare outline of the doctrine and its consequences. But for our purposes, perhaps the most salient point is this: While the Doctrine of Discovery primarily represents a legal paradigm, it has also, historically, relied on the distortion of a number of biblical concepts. Concepts such as the Great Commission—"go ye therefore into all the world." Or Romans 13, which some have used to support the notion of a "divine mandate to rule." Or the narrative of Exodus—where a divinely favored people are justified in taking possession of another land.

It's for this reason that some Christian denominations have, in recent years, sought to engage with the Doctrine of Discovery. To understand better how it has helped shape not only our laws but also the world in which we live. And, most importantly, to acknowledge how Christianity has historically been distorted in the service of justifying acts of colonization and oppression.

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