THE JURISPRUDENCE OF WHITE SUPREMACY:

INTER CAETARA, JOHNSON V. M'INTOSH AND *SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ*

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"To the modern mind, however, there is something essentially shocking in a concept which founds legal title on the naked use of force."[1]

I. INTRODUCTION

As an attorney who represents people who are disabled, impoverished and homeless, the question of what kinds of bodies are entitled to inhabit what kinds of spaces is one to which I have given considerable thought in the decade I have been doing this work. It is this question that led me to begin to think critically about the origins of real property rights and how those rights continue to operate today.

In this paper, I examine property rights and their effects through the lens of three ignominious episodes in United States jurisprudence: 15th century papal bulls that declared lands of the Americas to be the dominion of white Christian Europeans; an 1823 case that reified those bulls in the laws of the United States; and a 1973 case which held the government of the United States is under no obligation to provide landless citizens access to knowledge. Accordingly, my thesis is that white, Christian Europeans

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1. Herbert W. Briggs, *Non-Recognition of Title by Conquest and Limitations on the Doctrine*, 34 AM. SOC'Y INT'L L. PROC. 72, 72 (1940).

obtained legal title to the lands of the Americas by fiat, maintained said title by force, and then used their ill-gotten gains to determine who and who is not entitled to knowledge.

II. PROLOGUE

In the 15th and 16th centuries, acting under color of law[2] as decreed by various popes of the Catholic Church, Spanish and Portuguese conquistadors laid claim to vast lands of the Americas, declaring the New World[3] and its human inhabitants to be under the divine authority and control of Jesus Christ and his church on earth.[4] It is well settled what followed: five centuries of death,[5] displacement and cultural erasure. While many contemporary scholars and opinion makers may uphold the practical legacy of those papal decrees in so far as they were the origin of title to real property in the Americas, and thus the foundation of the world's largest economy, few today would openly affirm the logic of horror[6] by which they operated.

From the outset of European colonization, the conquest of the New World was always and already *legal*, in so far as Europeans were concerned. By right of divine authority, the Holy See[7] claimed the exclusive

2. "Under color of law" is itself an interesting starting place for an article about racism and the law. Here, I am using the phrase not so much in the technical sense, but in the ironic sense. For a more thorough exploration of the term, see Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992).

3. The term "New World" was coined in 1503 by the explorer Amerigo Vespucci in a letter describing a voyage to South America to the Italian banker and politician, Lorenzo di Pierfrancesco de' Medici. *See* MILES H. DAVIDSON, COLUMBUS THEN AND NOW: A LIFE REEXAMINED 417 (1997).

4. *See The Spanish Requirement of 1513*, INDIGENOUS PEOPLES FORUM ON THE IMPACT OF THE DOCTRINE OF DISCOVERY (Feb. 20, 2013), http://doctrineofdiscoveryforum.blogspot.com/2013_02_01_archive.html.

5. As to the question of whether the staggering Indian population reduction in the Americas was a genocide, see generally Rennard J. Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986). *See also* Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 156 (2013); THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE (M. Annette Jaimes ed., 1992).

6. Obviously, "logic of horror" is not a legal term. However, the law's relationship to horror, per se, is very much worthy of study, particularly in relation to the subject of this paper, in so far as the jurisprudence of white supremacy resulted in and results in horror. For now, I will point the reader to the French psychoanalyst and philosopher, Julia Kristeva. *See generally* JULIA KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION (1982).

7. The Holy See is the governing entity of the Catholic Church headquartered in Rome, Italy, and headed by the Pope. The Holy See is regarded as a sovereign state in international law. *See U.S. Relations with the Holy See*, U.S. DEP'T OF STATE (Apr. 16, 2015), http://www.state.gov/r/pa/ei/bgn/3819.htm.

ability to pronounce, interpret and execute laws both spiritual and natural. Doctrines of faith became doctrines of canon law by virtue of papal utterance. There was no more expedient method to have one's actions declared legal than to receive the blessing of the pope, and the Holy See was not reticent about blessing the conquest of the New World. Medieval explorers and conquistadors and the bankers who financed them were all too willing to obey God's will as conveyed by the Bishops of Rome.

The theory which provided legal and moral cover for the conquest of indigenous peoples of the New World by Europeans, and subsequently gave rise to a claim of title to the lands those indigenous people had occupied, was dubiously named the Doctrine of Discovery.[8] This Doctrine, frequently dispensed with in an afternoon in a first year property law class, purported to provide the basis of a fair adjudication of the conflicting real property interests of Europeans (and Europeans alone) and held that the discovery,[9] of land not already discovered by other Europeans gave right to a claim of title.[10] In other words, being first in time necessarily meant first in right, at least where Europeans were concerned.[11]

While public opinion may have soured on genocide and appropriation of continents, the jurisprudence that legalized the same remains the law of the United States, affirmed first in *Johnson v. M'Intosh* (1823) and in many other cases following.[12] In *Johnson*, the Court held that while Indians had a right of occupancy to lands in the New World, alienable title was reserved

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8. *See generally* Robert J. Miller, *American Indians, The Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329 (2011); LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLE OF THEIR LANDS (2005); Special Rapporteur of the U.N. Permanent Forum on Indigenous Issues, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, Econ. & Soc. Council, U.N. Doc. E/C. 19/2010/13 (Feb. 4, 2010) (by Tonya Gonnella Frichner), *available at* http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.13%20EN.pdf.

9. Indeed, it is curious that the doctrine is commonly referred to as the Doctrine of Discovery, rather than the Doctrine of Conquest. Obviously, the Europeans no more discovered the New World, new only to them, any more than they discovered the sun. "Discovery" is much more mild than "conquest."

10. Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1074 (2000).

11. *See generally* Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right,"* 64 NEB. L. REV. 349 (1985).

12. Johnson v. M'Intosh, 21 U.S. 543, 574 (1823). *See generally* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED (2012); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992); David E. Wilkins, Johnson v. M'Intosh *Revisited: Through the Eyes of* Mitchel v. United States, 19 AM. INDIAN L. REV. 159 (1994).

to whichever Europeans discovered the land first.[13] Chief Justice Marshall, writing for a unanimous Court, also made it clear that, by Europeans, he meant Christians.[14] Thus, the Doctrine of Discovery was concocted by European popes and their pontifical scriveners to legitimize the taking of land from non-Christians, settle land disputes among Christians, and create a Christian ownership interest in land where one had never existed before that would be recognized by European courts and their progeny.

Justice Marshall, inspired no doubt by the theories of John Locke,[15] viewed Indians as "heathens" and "savages" who, rather than cultivate the land, left it to waste.[16] To the extent Indians had any interest in the lands they occupied, such an interest was unalienable outside the auspices of colonial government because "discovery gave exclusive title to those who made it."[17] According to Marshall, title - a legally cognizable interest in land acquired by cultivation - was a European concept foreign to Indians. Rather, the Indians "held their respective lands and territories each in common, . . . there being among them no separate property in the soil."[18] Marshall reasoned that, while the Indians had a right to occupy the land (which effectively amounts to acknowledging their existence objectively), after discovery and conquest by Christians, absolute title shifted to the colonial government.[19] Indians could thus not transfer a title which they no longer held, if they could ever be understood to hold title in the first instance. Thus, the Court declared very plainly that the people who had occupied the Americas for thousands of years had no legal rights to sell that land to anyone, save the colonial state power; objectively, Indians existed, but they could never be understood to exist subjectively, on equal terms to

13. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

14. "The right of discovery given by this commission, is confined to countries 'then unknown to Christian people;' . . . ." *Id.* at 576.

15. "As we have seen, Locke argued firstly that the native society has no political authority and hence is not a political society; second, its territory and boundary are not established; third, native people do not use land by agriculture; fourth, there remain vast lands which native people do not use or cultivate but leave waste; finally, since the lands which the native people do not cultivate belong to all mankind in common, and alien has the right to settle and use them." NAGAMITSU MIURA, JOHN LOCKE AND THE NATIVE AMERICANS: EARLY ENGLISH LIBERALISM AND ITS COLONIAL REALITY 73 (2013).

16. Johnson v. M'Intosh, 21 U.S. 543, 577, 590 (1823).

17. *Id.* at 574.

18. *Id.* at 549-50.

19. *Id.* at 591.

Europeans. "[T]he exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted."[20]

Accordingly, the early theorists of U.S. Christian jurisprudence held that Indian sovereignty was "necessarily diminished" by the "Doctrine of Discovery."[21] By virtue of having been born heathens in the lands of the New World, Indians could not avail themselves of the discovery rights afforded to Christian Europeans. Of course, this is a complete inversion of the current logic used to deny rights to people *not* born in the United States: those people with an original connection to the land of the New World - the people born here - had no concept of title, per se, and thus could not ever properly be said to hold title, in any absolute sense. Only those people not born here could ever actually own the land.

This nascent jurisprudence, which became the foundation of real property law in the United States, was unabashed in theorizing and inscribing in law the fundamental rule that absolute title was available only to white Christians. This rule was the primary instrument which displaced the original inhabitants from land which they had occupied for millennia. In exchange for a continent, "the superior genius of Europe" bestowed "civilization and Christianity" upon the savages and heathens of the New World.[22] It apparently never occurred to Justice Marshall or his colleagues on the Court that the reasoning of the Doctrine of Discovery could have ever applied to the people already living in the New World. In Justice Marshall's view, Indians were constitutionally incapable of discovery or cultivation. They were, rather, "warlike"[23] savages, devoid of the capacity for understanding sophisticated European concepts of property, who would later succumb to the beneficence of European civilization.

150 years later, the Supreme Court decided the case of *San Antonio Independent School District v. Rodriguez*.[24] The *Rodriguez* Court held that the Constitution is not offended by disparities in education due to property tax funding schemes.[25] In reaching its conclusion, the Court declined to find that economic status is a suspect class that would trigger strict scrutiny on par with race or alienage, and declined to find that education is a fundamental right protected by the Constitution.[26]

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20. *Id.* at 586.
21. *Id.* at 574.
22. *Id.* at 573.
23. *Id.* at 586.
24. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
25. *Id.* at 37-41.
26. *Id* at 17-22, 35.

In *Rodriguez,* Mexican-American parents of public school students sued the school district, arguing that the district's system of funding public schools violated the Equal Protection Clause of the Fourteenth Amendment, as the system all but guaranteed that poor children would receive a poor education.[27] Whereas *Johnson* concerned the rights of Indians to land, *Rodriguez* concerned the rights of Mexican Americans[28] to knowledge. The quality of education became a function of the value of land which had been appropriated from the ancestors of the *Rodriguez* plaintiffs. Property rights thus controlled the right to knowledge itself; an objective relationship to land determined the subjective relationship to the self and others.

While the Court's logic in *Rodriguez* was more nuanced than that of the *Johnson* Court, the effect was not dissimilar. Where *Johnson* denied non-European, non-Christian[29] people legal title to land, *Rodriguez* denied their descendants an adequate education precisely because they did not hold title to land. Thus, the Court in *Johnson* rendered non-white people *a priori* objectively landless, without recourse to the courts of the conqueror, while the Court in *Rodriguez* effectively rendered non-white people, *a posteori*, objectively ignorant.

These cases established the principles that capital determines knowledge and that people of color are constitutionally entitled to neither.[30] By denying non-white people the right to equal education, the *Rodriguez* court effectively declared that non-white people have no right to knowledge itself. Thus in *Rodriguez,* the jurisprudence of white supremacy reached a kind of apotheosis. Not only would the highest Court in the United States deny non-white people equal land rights, the Court would also deny the descendants of those people the knowledge of their own history. This paper sets out to explore this theme, which might be called the jurisprudence of white supremacy.

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27. *Id.* at 4-5.

28. The *Rodriguez* plaintiffs were Mexican-American parents of public school children. Obviously, some of them may very well have been the descendants of Spanish colonizers as well as the descendants of Indians, or both. What remains salient, however, for the purposes of my argument, is that they were not rich white families living in rich white neighborhoods. They were poor families of color whose kids got a poor education.

29. There is a certain slippage as between non-white, non-European and non-Christian. At the time of *Johnson*, the focus was on the categories of European and Christian. Jurists had become less overtly xenophobic by the time of *Rodriguez*, but their holdings were not so different than their forbears. Certainly, by the time of *Rodriguez*, the effects of European colonialism among Mexican-Americans were very apparent, both in their blood and their faith.

30. *See generally Johnson*, 21 U.S. 543; *Rodriguez*, 411 U.S. 1.

III. THE PAPAL BULLS

In 1455, the Italian Pope Nicholas V, born Tommaso Parentucelli, issued a papal bull called *Romanus Pontifex*.[31] The bull gave the blessing of the Roman Catholic Church to King Alfonso of Portugal to do the following things:

> [I]nvade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit . . . .[32]

By these words, Alfonso was thus authorized to enslave non-Christians and claim title to their lands anywhere in the world.[33] Nicholas V asserted "the plenitude of apostolic power" as authority for his decree.[34] The precise meaning of "the plenitude of apostolic power[35]" is perhaps better parsed by theologians than legal scholars, though at the time the two were indistinguishable; holy scripture was the law and the modern concept of separation of church and state did not arrive until centuries later.[36]

Alfonso had sought the blessing of Nicholas V in order to stave off claims by other European countries, namely Spain, against Portugal's

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31. A papal bull is essentially a letter from the Pope. "Bull" originally referred to the leaden seal which affirmed a document's authenticity but in time came to refer to a particular type of papal document. *See Bulls and Briefs*, NEW ADVENT, http://www.newadvent.org/cathen/03052b.htm (last visited on Mar. 29, 2015).

32. EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, at 23 (Frances Gardiner Davenport ed., 1917). The original text in Latin is in the same volume. *Id.* at 13-20.

33. FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 4 (1975).

34. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 73 (1990).

35. "The manner in which the pope, emperor and king expressed their plenitude of power was a demonstration in itself of how this authority was conceived. Papal plenitude of power was described as plenitude of ecclesiastical power (*plenitudo ecclesiasticae potestatis*), plenitude of apostolic power (*apolosticae plenitudo potestatis*), or plenitude of pontifical and royal power (*plenitudo pontificalis et regiae potestatis*); or it could be explained in a short phrase: the plenitude of power he has because he is vicar of Christ." JANE BLACK, ABSOLUTISM IN RENAISSANCE MILAN: PLENITUDE OF POWER UNDER THE VISCONTI AND THE SFORZA 1329-1535 (2009).

36. *See* Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1801) (on file with the Library of Congress), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html (last visited on Mar. 29, 2015).

efforts to enslave African people and claim title to their land. Nicholas V had already granted Alfonso the right to "attack, conquer and subjugate" the "enemies of Christ" a few years earlier in 1452, in the papal bull, *Dum Diversas.*[37] *Romanus Pontifex* took *Dum Diversas* one step further and made it clear to the European world that Portugal not only had the Church's blessing to enslave and kill infidels, but also to lay claim to their lands.

Portugal having laid claim to Africa, it fell upon Spain to look elsewhere for people to subjugate and land to acquire under authority of the plenitude of apostolic power.[38] So it was that in 1493 the Spanish Pope Alexander VI, born Rodrigo Borgia,[39] issued another papal bull, *Inter caetera*, which granted title to King Ferdinand and Queen Isabella of Spain all lands discovered by Christopher Columbus.[40] Again reifying the assertion that discernible interests in real property were the domain of the faithful alone, Alexander VI reasoned that the lands encountered by Columbus became property of the Spanish crown because they had not been "previously possessed by a Christian owner."[41]

The words of Nicholas V and Alexander VI in *Romanus Pontifex* and *Inter caetara*, respectively, both acknowledge the possibility, if not reality, that the lands in question were in fact under the possession of others, namely non-Christian peoples. Here one may begin to ascertain the logic of the Vicars of Saint Peter: land could be possessed and occupied by non-Christians, but ownership, per se, was reserved to Saint Peter himself, those who succeeded him in the pontificate, and to his assignees (e.g., Alfonso, Ferdinand, etc.). Thus, the justification for appropriating the lands of indigenous people of Africa and the Americas did not lie so much in a concept of possession but in a Christian concept of ownership.

This reasoning foreshadowed the later logic in the *Johnson* and *Rodriguez* cases: indigenous, non-European, non-Christian people may occupy land, but they could never properly be said to own it or even know who did. Knowledge, like property, was strictly a matter for those potentates of old. It was precisely this heavenly knowledge that created the

37. EUROPEAN TREATIES, *supra* note 26, at 12.

38. ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY 14 (2008).

39. Recently portrayed by Jeremy Irons in the cable television series, *The Borgias* (Showtime, 2011-2013). *See The Borgias*, SHOWTIME, *http://www.sho.com/sho/the-borgias/cast/16736/rodrigo-borgia* (last visited Apr. 21, 2015). Irons, pop culture fans may remember, also starred in Hollywood's preeminent treatment of the colonization of the Americas, THE MISSION (Warner Brothers 1986).

40. *See* MILLER, *supra* note 31.

41. *Id.*

basis of earthly ownership, which in turn became a legally cognizable interest in land, recognized generations later in the courts of the conqueror.

In a nod to due process, prior to being enslaved or murdered the indigenous peoples in possession of the Americas were notified, albeit not in a language known to them, that they did not actually own the land they and their people had occupied for millennia. The conquistadors and the priests who accompanied them took pains to inform the Indians of their impending doom by recitation of "*El Requerimiento.*"[42] This instrument was an effort to assuage the conscience of those Europeans who took issue with the appropriation of land and enslavement of indigenous peoples by the sword alone. Written in 1513 by the Spanish jurist, Juan López de Palacios Rubios, *El Requerimiento* contained the following words of advice:

> Of all these nations God our Lord gave charge to one man, called St. Peter, that he should be Lord and Superior of all the men in the world, that all should obey him, and that he should be the head of the whole Human Race, wherever men should live, and under whatever law, sect, or belief they should be; and he gave him the world for his kingdom and jurisdiction . . . .
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> . . . One of these Pontiffs, who succeeded that St. Peter as Lord of the world, in the dignity and seat which I have before mentioned, made donation of these isles and Tierra-firme to the aforesaid King and Queen and to their successors, our lords, with all that there are in these territories, as is contained in certain writings which passed upon the subject as aforesaid, which you can see if you wish.[43]

Palacios Rubios went on to inform those conquered that they would be subject to enslavement and death, of which they were solely responsible, should they decline to accede to the words they generally could not understand.[44] Regardless, the legal reasoning of the church, at least with respect to the land of the Americas, if not the human beings, is laid bare: God[45] gave St. Peter the world for his kingdom and jurisdiction; Alexander

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42. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 28 n.20 (2004); *see also* PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD 1492-1640, at 69-73 (1995).

43. JUAN LÓPEZ DE PALACIOS RUBIOS, EL REQUERIMIENTO (1513), *available at* http://users.dickinson.edu/~borges/Resources-Requerimiento.htm.

44. RONALD WRIGHT, STOLEN CONTINENTS: THE "NEW WORLD" THROUGH INDIAN EYES SINCE 1492, at 66 (1992).

45. The courts, it seems, have yet to define "God," but have no qualms about invoking God. *See* James N. Donovan, *God Is as God Does: Law Anthropology, and the Definition of "Religion,"*

VI succeeded St. Peter; Alexander VI declared the Americas the property of the first Europeans to "discover" them. While indigenous peoples might have occupied the lands, they could never have been said to actually own them as they were always and already owned by St. Peter, and it was St. Peter's power alone to convey ownership.[46] Thus it is no exaggeration to say that the origin of title to all real property in the United States proceeded from God to the pope to the king to the conquistador to us.

Moreover, dispossession and acquisition of the lands of the Americas occurred via performative utterance, by fiat, with the caveat that the speech acts which rendered Indians landless and Europeans continent-rich were unintelligible to Indians. Accordingly, perhaps the very first principle of United States jurisprudence is that white Christians speak gibberish to people of color who have no idea what they are talking about in order to deprive them of life, liberty and property. In this way, *El Requerimiento* can be understood as a precursor to the *Miranda* warning: if you are a person of color, it does not matter whether you speak or remain silent; white people still take away everything you have and blame you for your demise. As long as they warn you first, no matter how unintelligible the warning may be, there is nothing they can not do which the law will not allow.

IV. THE COURTS OF THE CONQUEROR

Over three hundred years later, in 1823, the United States Supreme Court, then not yet 35 years old, would give profound and enduring meaning to the bulls of Nicholas V and Alexander VI in the case of *Johnson v. M'Intosh.*[47] At issue was whether Indians of the Illinois and Piankashaw nations could sell their land directly to European speculators without the involvement or approval of the colonial government.[48] As private individuals were not permitted to buy land from Indians since the outset of English colonization, the outcome of *Johnson* was all but preordained.[49]

Nevertheless, attorneys Daniel Webster and Robert Goodloe Harper, arguing for the plaintiffs, attempted to convince the Court that the Indians had properly deeded their lands, conveyed to speculators via private sales in

(1995). Law Faculty Scholarly Articles. Paper 449. http://uknowledge.uky.edu/law_facpub/449

46. *See* MILLER, *supra* note 31, at 13-14.

47. Johnson v. M'Intosh, 21 U.S. 543 (1823).

48. *Id.* at 571-572.

49. Kades, *supra* note 8, at 1074.

1773 and 1775.[50] While the named plaintiff in the litigation was Thomas Johnson, himself a Supreme Court Justice from 1791-1793, Webster and Harper were actually representing the estate of Johnson and other early investors in the companies that bought the tracts of land at issue from the Illinois and Piankashaw tribes.[51]

Another investor was James Wilson, signatory to the Declaration of Independence and an original Supreme Court Justice from 1789-1798.[52] The direct involvement of two members of the Court, without any overt acknowledgement of the fact in the Court's opinion, recalls the self-referential plentitude of power of Nicholas V and Alexander VI. When one also considers the fact, generally overlooked by subsequent case law, textbooks and analysis, that the opposing parties had no actual conflict—there was no overlap of land claims to dispute[53]—this foundational text of United States property law jurisprudence becomes even more perplexing.

Nonetheless, nine days after hearing oral argument[54] (written briefs were not submitted[55]), Chief Justice John Marshall delivered the opinion of the Court. Channeling the circular logic of Alexander VI, Marshall reasoned that Indians could occupy land but not hold title to land because "discovery gave exclusive title to those who made it."[56] Non-Christian Indians,[57] being outside the benevolence of God's mercy, were incapable of discovering land as the Doctrine of Discovery only applied to Christian Europeans. Non-Christians could no more discover land than they could go to heaven; both were the exclusive domain of the faithful. Indians may have had an occupying interest in the land, but they could not have title to the land; they were constitutionally incapable of owning land, having neither discovered it nor acquired it by conquest. By 1823, even the occupying interests of the Indians in question had significantly waned, as their numbers had been

50. BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: JOHNSON V. M'INTOSH AND THE HISTORY OF NATIVE LAND RIGHTS 4-6 (2012).

51. *See* Kades, *supra* note 8, at 1079-80.

52. *See id*. at 1083-84.

53. *See id*. at 1092.

54. Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 LAW & HIST. REV. 67, 102 (2001).

55. Lawyers arguing before the Supreme Court at the time did not submit written briefs. The justices decided cases on oral argument alone. *See* G. EDWARD WHITE, THE MARSHALL COURT AND THE CULTURAL CHANGE 1815-1835, at 157-200 (1991).

56. Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

57. At the time peoples of Europe encountered lands occupied by Indians, the term, "non-Christian Indian" would have been an oxymoron.

decimated by war, disease and Christianity.[58] The Illinois tribes alone went from 10,500 in 1680 to 500 in 1800.[59]

Even Indian occupancy of land was subject to the right of a European conqueror to extinguish at will. Europeans "asserted the ultimate dominion to be in themselves."[60] Thus, Europeans claimed absolute power over the lands they encountered by divine right, as first espoused by papal authority and later given teeth in practice and custom by sheer might. After a recitation of European claims to land based on the Doctrine of Discovery, Marshall concludes: "Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians."[61] A simpler conceptualization of this jurisprudence might render it thus: white Christian people told themselves they can have land occupied by Indians and we agree.

Without putting too fine a point on the matter, such a transparent reference to the self for moral authority whose direct consequence is allocation of rights based on religion and ethnicity would appear to be a rather clear example of writing white supremacy into United States property law. Viewed more charitably to the *Johnson* Court, they simply affirmed a principle of ethics and law universally recognized by Europeans: whatever land white, Christian people find, white, Christian people have the power to own, regardless of whatever non-white, non-Christian people might already be living there. The *Johnson* Court surely did not come up with this idea. They were simply reifying what was already universally[62] accepted among the sovereigns of Europe and their descendants in the New World.

European discovery of lands and the conquest of the indigenous people occupying those lands conveyed absolute title to Europeans by virtue of their discovery and conquest and nothing more. Marshall was candid: "The title by conquest is acquired and maintained by force;[63] The Europeans were under the necessity of . . . enforcing those claims by the sword . . . ."[64] The courts of the United States could not and would not invalidate the conquest of Europeans: "Conquest gives a title which the courts of the conqueror can not deny . . . ."[65] Title to land proceeded from Christian civilization;

58. Kades, *supra* note 8, at 1081.
59. *Id.*
60. *Johnson*, 21 U.S. at 574.
61. *Id.* at 584.
62. *See id.* at 574.
63. *Id.* at 589.
64. *Id.* at 590.
65. *Id.* at 588.

indigenous peoples were not civilized and therefore not capable of having title to land.[66] While Marshall does not come right out and say it, the implication could not be more clear: If God had wanted Indians to have absolute title, they would not have been conquered.

The practical result of *Johnson* was to give the papal bulls of 1455 and 1493 the imprimatur of the nation's highest court a generation after the nation's founding. Institutionalization of white supremacy with regard to property law remains the law of the United States.[67] It is no exaggeration to say that the key authors of the theoretical foundations of United States property law are Popes Nicholas V and Alexander VI.[68] Anticipating any moral qualms, Chief Justice Marshall explained:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[69]

It is right because that is the way we have always done it.

V. CLASSROOMS OF THE CONQUERED

On May 16, 1968, 400 students staged a walkout of Edgewood High School in San Antonio, Texas.[70] The students, ninety percent of whom were of Mexican origin,[71] were protesting the abysmal quality of their education: their classrooms were literally crumbling, they had few supplies, and many of their teachers were uncertified. Meanwhile, San Antonio's most affluent high school, Alamo Heights, was predominantly white and had no such problems.[72] A substantial portion of each school's funding came from neighborhood property taxes. Where Alamo Heights spent $343 a year per pupil, Edgewood spent $26 a year per pupil.[73]

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66. *See* Wilkins, *supra* note 9, at 166.

67. *See* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 21-75 (2006).

68. For an in depth analysis of the role of Christian theology in the *Johnson* decision, see STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY 73-88 (2008).

69. *Johnson*, 21 U.S. at 591.

70. PAUL A. SRACIC, SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION 20 (2006).

71. *Id*. at 2.

72. *See id*. at 51.

73. JOEL S. BERKE, ANSWERS TO INEQUITY: AN ANALYSIS OF THE NEW SCHOOL FINANCE 45 (1974).

The Edgewood students' walkout and demonstration prompted their parents to form a parents association. Seven of those parents, led by Alberta Snid,[74] sued the San Antonio School District for violating the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Attorneys for the *Rodriguez* plaintiffs argued that the Texas school finance system violated equal protection because the state had neither a rational basis nor a compelling state interest in funding public education according to the wealth of any given school district.[75] Such a funding mechanism necessarily resulted in a crumbling schools and poorly educated children. Moreover, they argued the state's funding scheme effectively amounted to an unconstitutional deprivation of a fundamental constitutional right - education - based on economic status.[76]

Though *Rodriguez* was initially filed in 1968, it did not reach the Supreme Court until 1973, one hundred and fifty years after the *Johnson* decision.[77] Between the time *Rodriguez* was originally filed in 1968 and decided in 1973, the Court went from being under the stewardship of Chief Justice Earl Warren, a liberal jurist whose tenure saw some of the nation's most progressive decisions, to Chief Justice Warren Burger, a strict-constructionist who had been one of Chief Justice Warren's most strident critics.[78] Four of the justices in the majority in *Rodriguez* had been appointed by Richard Nixon, including the author of the majority opinion, Justice Lewis F. Powell, Jr.[79] The fifth vote for the majority was Justice Potter Stewart. All five justices had been corporate lawyers.[80]

Prior to joining the Supreme Court, Justice Powell was a lawyer for big tobacco. He had also been chair of the School Board in Richmond, Virginia, from 1953 until 1961, and the Virginia Board of Education from

74. *See* SRACIC, *supra* note 62, at 26.

75. *See id. at* 79, 81.

76. *See id*.

77. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 1 (1973).

78. *See Warren E. Burger*, THE OYEZ PROJECT, http://www.oyez.org/justices/warren_e_burger/ (last visited on Mar. 27 2015).

79. *See* SRACIC, *supra* note 62, at 28; Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1968 (2008).

80. *See Harry A. Blackmun*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/supct/justices/blackmun.bio.html (last visited on Mar. 27, 2015); *Warren Burger*, BIOGRAPHY.COM, http://www.biography.com/people/warren-burger-9231479#synopsis (last visited on Mar. 27, 2015); *Lewis F. Powell, Jr.*, WASH. & LEE L., http://law2.wlu.edu/alumni/bios/powell.asp (last visited on Mar. 27, 2015); *William Rehnquist*, FINDLAW, http://supreme.findlaw.com/supreme_court/justices/rehnquist.html (last visited on Mar. 27, 2015); CLARE CUSHMAN, THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993, at 456-60 (1993).

1961-1969.[81] For much of that time, white southerners in Virginia were waging a campaign of defiance against the integration mandate of *Brown v. Board of Education.*[82] Powell's law firm had represented one of the defendants in the *Brown* case. Justice William Rehnquist, also in the *Rodriguez* majority, had argued for segregation earlier in his career.[83] When Powell left the Richmond School Board, "only two black children (out of 23,000 African American students) attended school with whites."[84] In 1965, the Fourth Circuit Court of Appeals ruled that the School Board, under Powell's leadership, promulgated policies that unconstitutionally reified racial segregation[85].

Justice Sandra Day O'Connor would later write of Powell: "For those who seek a model of human kindness, decency, exemplary behavior, and integrity, there will never be a better man."[86] In 1958, this paragon of human virtue travelled to the Soviet Union. Upon his return, he delivered a speech to the Richmond School Board entitled "Soviet Education—A Means Towards World Domination."[87] Powell apparently believed that equal funding for public schools was a communist plot: "What would be accomplished if education, so intimately related to the preservation of the U.S. political system, became itself an example of socialism or communism?"[88]

Just as Justice Powell was in no hurry to desegregate public schools in Virginia, neither was he in the mood to provide students of color with an equal education. Rather, *separate and unequal* might describe his policies on public education in the United States. Unmoved by the 400 kids who marched out of Edgewood High School in 1968, a majority of the Court determined that "the Equal Protection Clause does not require absolute equality or precisely equal advantages."[89]

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81. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 235 (2001).

82. *See* SRACIC, *supra* note 62, at 64-65; Brown v. Bd. of Educ., 347 U.S. 483 (1954).

83. "I realize it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues," Mr. Rehnquist wrote, "but I think *Plessy v. Ferguson* was right and should be reaffirmed." *See A Random Thought on the Segregation Cases: Hearings on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 99th Cong. 325 (1986), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-16-6.pdf.

84. SRACIC, *supra* note 62, at 65.

85. Bradley v. School Board of the City of Richmond, 345 F.2d 310 (4th Cir. 1965).

86. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 150 (2003).

87. SRACIC, *supra* note 62, at 66.

88. *Id*.

89. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

The Court was unwilling to apply strict scrutiny to Texas' school finance system because it found that socioeconomic status was "a large, diverse and amorphous class."[90] Poor people, Justice Powell wrote, lack the "traditional indicia of suspectness: the class is not . . . subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection . . . ."[91]

The fact that the children in the *Rodriguez* case were of Mexican descent was not mentioned by Justice Powell. However, Powell did reference racial discrimination when he considered the *Rodriguez* plaintiffs' other argument—that education is a fundamental right guaranteed by the Constitution.[92] At the beginning of his discussion, Powell approvingly and cynically quotes *Brown v. Board of Education*, and insists that nothing in his opinion "detracts from our historic dedication to public education."[93] Nevertheless, Powell determined that there was nothing in the Constitution from which to implicitly or explicitly derive a fundamental right of education.[94]

Powell avoided the obvious but unmistakable corollary to his position: if citizens have no right to education, then they surely have no right to knowledge itself. Thus, 150 years after the Supreme Court declared Indians to be categorically incapable of owning land, the Court weighed in again to declare poor and brown kids unworthy of knowledge. The Court had come full circle. The fields of knowledge are gated communities built on land only white people can own and to which white people alone have keys.

VI. CONCLUSION

"The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence."[95] Civilization and Christianity, maintained by the sword and imparted to indigenous people as just consideration for the unfettered flourishing of the white entrepreneurial spirit, later took shape to deny the descendants of those indigenous peoples an equal education. With *Rodriguez* then, the European metaphysics of discovery and conquest had reached its apotheosis.

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90. *Id.* at 28.
91. *Id.*
92. *Id.* at 29.
93. *Id.* at 29-30.
94. *Id.* at 35.
95. Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).

Separate but equal may well have been technically overruled and people of color technically declared full human beings, but *Johnson* and *Rodriguez* make it plain that the law of the United States continues to deny people of color their own subjectivity and access to spaces both literal and figurative. The legacy of the Doctrine of Discovery remains palpable in every community, in every high school, and in every corporate board room in the United States.

Nicholas V and Alexander VI promulgated a medieval theology - now the heart of American property law jurisprudence - of "universal papal jurisdiction" and a "universal Christian commonwealth."[96] They declared that white Christian Europeans could kill, enslave and appropriate the lands of non-white non-Christians anywhere in the world.[97] 350 years later, Chief Justice John Marshall declared that "war-like" heathens "whose subsistence was drawn chiefly from the forest" could never have absolute title to their own land.[98]

In the words of Robert A. Williams, "*Johnson's* acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples."[99] 150 years after Marshall's judicial denigration of non-white people as constitutionally incapable of holding title, Justice Lewis F. Powell declared non-whites unfit for knowledge at all.[100] Thus, in three separate instances over 500 years, judicial potentates inscribed inferiority of people of color into law, where it remains writ in stone, cut from the quarry of white supremacy.

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96. Miller, *supra* note 59, at 8.

97. *See id.* Indeed, Nicholas V and Alexander V were hardly the first popes to grant title to land via the papal bull. The practice had been existence for at least four hundred years prior to *Romanus Pontifex*. Pope Adrian IV presumed to give control over Ireland to the King of England in 1155 via the papal bull *Laudabiliter*. *See* Friedrich August Freiherr von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 451 (1935).

98. *See* Wilkins, *supra* note 9, at 167.

99. WILLIAMS, JR., *supra* note 28, at 317.

100. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35-37 (1973).