

## FROM PAPAL BULL TO RACIAL RULE: INDIANS OF THE AMERICAS, RACE, AND THE FOUNDATIONS OF INTERNATIONAL LAW

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The “discovery” and conquest of the “New World” marked the inauguration of international law,<sup>1</sup> and constituted a watershed moment in the emergence of *race* in European thought.<sup>2</sup> What might the coterminous rise of formative moments in race thinking and international law suggest? In my provisional reflections on this question that follow, I trace juridical and religio-racial conceptions of indigenous peoples of the Americas as a central thread in the evolution of international law.

I will begin with a discussion of the fifteenth-century papal bulls issued in regard to the Portugal-Spain disputes over lands in Africa and the Americas. I will then proceed to follow some strands of racial and juridical thought in the accounts of Francisco de Vitoria and Hugo Grotius, two founding figures in international law. I suggest that Vitoria’s treatise, *On the Indians Lately Discovered*,<sup>3</sup> evinces the beginnings of the shift Carl Schmitt identifies from the papal authority of the *respublica Christiana* to modern international law.<sup>4</sup> Vitoria’s account, moreover, is both proto-secular and proto-racial.

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1. See, e.g., CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 49 (G. L. Ulmen trans., 2003).

2. DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 62 (1993).

3. Vitoria’s lecture *De Indis Noviter Inventis* is translated as “On the Indians Lately Discovered.” The version cited hereinafter is published together with his lecture titled *De Jure Bellis Hispanorum in Barbaros* (“On the Law of War Made by the Spaniards on the Barbarians”) in FRANCISCUS DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* (Ernest Nys ed., Carnegie Inst. of Wash. 1917).

4. SCHMITT, *supra* note 1, at 57-138. Schmitt uses “*respublica Christiana*” to

Then, examining two essays by Grotius—*Mare Liberum*<sup>5</sup> in 1608 and *On the Origin of the Native Races of America*<sup>6</sup> in 1642—I will illustrate that one may observe continuities with and breaks from Vitoria’s thought. With Grotius, a shift from papal authority to title by discovery and occupation becomes clearly evident. His 1642 text also evinces early conceptions of race in terms of lineage. Taking his two works together, I suggest that a “liquefaction”<sup>7</sup> of land—in which “discovered” lands are conceived as “free sea”—occurs alongside early racial thinking that would enable the fixing of racial others as titleless inhabitants. We may see early examples of race’s “fixity and fluidity”<sup>8</sup> in the formation of modern international law, as it was marked by racially-inflected fluidization and fixing. Finally, in the last section, I discuss briefly *Johnson v. M’Intosh*,<sup>9</sup> noting that the U.S. Supreme Court’s decision indicates a shift from Christian republic to racially-ordered international law.

### I. RESPUBLICA CHRISTIANA

As Carl Schmitt notes, in the medieval Christian republic the Church was a central authority that presided over divisions of land. He observes, “[t]hose Christian princes and peoples who were engaged in land- and sea-appropriations, still within the spatial order of the *respublica Christiana* of the Middle Ages, had a common ground in their Christian faith and a common authority in the head of the Church, the Roman pope.”<sup>10</sup> Thus, these Christian sovereigns

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refer to the “Christian empire” of the Middle Ages. *Id.* at 59.

5. HUGO GROTIUS, *THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* (James Brown Scott ed., Ralph Van Deman Magoffin, trans., Oxford Univ. Press 1916) (1608) [hereinafter GROTIUS, *THE FREEDOM OF THE SEAS*].

6. HUGO GROTIUS, *ON THE ORIGIN OF THE NATIVE RACES OF AMERICA* (Edmund Goldsmid trans., Privately Printed 1884) (1642) [hereinafter GROTIUS, *ON THE ORIGIN OF THE NATIVE RACES OF AMERICA*].

7. Gil Anidjar, *Terror Right*, *NEW CENTENNIAL REVIEW*, Winter 2004, at 43.

8. Ann Laura Stoler, *Racial Histories and their Regimes of Truth*, in *11 POLITICAL POWER AND SOCIAL THEORY* 183, 198 (Diane E. Davis ed., 1997).

9. *Johnson v. McIntosh*, 21 U.S. 543 (1823).

10. SCHMITT, *supra* note 1, at 92.

regarded “each other as equal parties to a treaty of division and distribution concerning land-appropriation.”<sup>11</sup>

In the bull *Romanus Pontifex* issued in 1455, Pope Nicholas V settled a dispute over land in Africa between Portugal and Spain by granting Portugal exclusive rights to conquer and trade in an extensive southern region of the continent.<sup>12</sup> The goal of universal salvation, the bull opines, “will more certainly come to pass . . . if we bestow suitable favors and special graces on those Catholic kings and princes”<sup>13</sup> who “not only restrain the savage excesses of the Saracens and of other infidels, enemies of the Christian name, but also for the defense and increase of the faith vanquish them and their kingdoms and habitations . . . and subject them to their own temporal dominion.”<sup>14</sup> The bull thus indirectly associates African lands with “Saracens and other infidels.”<sup>15</sup>

Awarding favors and graces in this instance to Portugal’s monarch, the bull provides that “the right of conquest” that “we declare to be extended from the capes of Bojador and of Nãõ, as far as through all Guinea, and beyond toward that southern shore” belongs to “King Alfonso, his successors, and the infante, and not to any others.”<sup>16</sup> Then in the last decade of the fifteenth century, following the “discoveries” made by Columbus in the Americas, Pope Alexander VI issued the bull *Inter Caetera*, which indicated more explicitly that only Christian rulers could legitimately claim land ownership.<sup>17</sup> Addressing the “New World” land claims of Spain and Portugal, the *Inter Caetera* granted to the former’s King Ferdinand and Queen Isabella “countries and islands thus unknown and hitherto discovered by your envoys and to be discovered hereafter, provided however they at no time have been in the actual temporal possession

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11. *Id.*

12. The Bull *Romanus Pontifex* (Nicolas V), January 8, 1455, *translated in EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648*, at 9 (Frances Gardiner Davenport ed., 1967) [hereinafter *EUROPEAN TREATIES*].

13. *Id.* at 21.

14. *Id.*

15. *Id.*

16. *Id.* at 24.

17. The Bull *Inter Caetera* (Alexander VI), May 3, 1493, *translated in EUROPEAN TREATIES*, *supra* note 11, at 56.

of any Christian owner.”<sup>18</sup> Through the twilight of the medieval period, the pope served as an adjudicative authority that resolved disputes over “new” lands, recognizing Christian governments as the sole candidates for ownership.

As the medieval order shifted, however, another source of authority had to settle conflicting claims to land. After the spatial order of the *respublica Christiana* and its theological arguments were undermined, Schmitt argues, Eurocentric international law was compelled to *discover* the basis of its global order: “the only justification for the great land-appropriations of non-European territory by European powers was *discovery*.”<sup>19</sup>

The beginnings of this shift from papal authority to title by discovery, and from religious to racial otherness, may be glimpsed, I suggest, in the account of the Spanish theologian and jurist Francisco de Vitoria. Although Vitoria rejected discovery as a basis for land title, his work was influential in the move Schmitt identifies from a Christian republic to a Eurocentric law of nations.

## II. VITORIA “ON THE INDIANS”

Vitoria’s account is both proto-racial and proto-secular. In his *De Indis* treatise, he argued that the “unbelief” of non-Christians could not in itself preclude them from owning public or private property: “unbelief does not prevent anyone from being a true owner,” as “ownership and dominion are based on natural or on human law; therefore they are not destroyed by want of faith.”<sup>20</sup> He also advocated a significant curtailment of the pope’s geopolitical jurisdiction, declaring that “[t]he Pope is not civil or temporal lord of the whole world in the proper sense of the words ‘lordship’ and ‘civil

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18. *Id.* at 62. Davenport notes that the bulls *Eximiae devotionis* of May 3, 1493 and *Inter caetera* of May 4, 1493 restate and jointly supersede the bull *Inter caetera* of May 3. *Id.* at 71. The later *Inter caetera* establishes a new line of demarcation and land acquisition rights that privilege Castile more strongly, and includes language of Christian proprietorship similar to its predecessor document of May 3: “With this proviso however that none of the [lands] beyond that said line . . . be in the actual possession of any Christian king or prince.” *Id.* at 77.

19. SCHMITT, *supra* note 1, at 131.

20. VITORIA, *supra* note 3, at 123.

power.”<sup>21</sup> Marking a boundary of papal authority, he specifies, “[t]he Pope has temporal power only so far as it is in subservience to matters spiritual, that is, as far as is necessary for the administration of spiritual affairs.”<sup>22</sup> Vitoria accordingly seeks to enforce a division between the temporal and the spiritual, and to divest the pope of authority over the temporal domain. In this aspect of Vitoria’s account, one may see a thread of an evolving secularist logic.<sup>23</sup>

Vitoria further evokes secularism with his reference to “the law of nations (*jus gentium*), which either is natural law or is derived from natural law.”<sup>24</sup> *Jus gentium* is “what natural reason has established among all nations.”<sup>25</sup> In *De Indis*, as Anghie observes, *jus gentium*, which is determined through reason, replaces divine law administered by the pope.<sup>26</sup> For Vitoria, “[n]atural law administered by sovereigns rather than divine law articulated by the pope becomes the source of international law governing Spanish-Indian relations.”<sup>27</sup>

Under the law of nations, Vitoria contends that the Spaniards have various enumerated rights, which include travel, trade, and other forms of commerce.<sup>28</sup> Additionally, as he delimits papal jurisdiction, Vitoria does not, of course, erase religion from his account, but rather resituates it as a “right” in his *jus gentium* structure of ownership and dominion. He writes, “[a]nother possible title is by way of propagation of Christianity. In this connection let my first proposition be: Christians have a right to preach and declare the Gospel in barbarian lands.”<sup>29</sup> And this Christian right of missioning is paramount, with grave implications for the peoples in those lands, because if the Indians prevent the Spaniards from freely preaching the

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21. *Id.* at 135.

22. *Id.* at 136.

23. For a discussion of the complexities of secularization, see generally GIL ANIDJAR, *SEMITES: RACE, RELIGION, LITERATURE* (2008).

24. VITORIA, *supra* note 3, at 151.

25. *Id.*

26. Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, in *LAWS OF THE POSTCOLONIAL* 89, 94 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

27. *Id.* See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

28. See VITORIA, *supra* note 3, at 153-54.

29. *Id.* at 156.

Gospel, Vitoria asserts the Spaniards “may preach it despite their unwillingness and devote themselves to the conversion of the people in question, and if need be they may then accept or even make war, until they succeed in obtaining facilities and safety for preaching the Gospel.”<sup>30</sup> As Anghie notes, while Vitoria curtails the power of the pope, once he establishes “the authority of a secular *jus gentium* that is administered by the sovereign, he reintroduces Christian norms within this secular system; proselytizing is authorized now, not by divine law, but the law of nations, and may be likened now to the secular activities of traveling and trading.”<sup>31</sup>

Significantly, Vitoria advances his proto-secular ideas with a resituated Christianity in *De Indis*, and though he does not use explicitly the term “race” in his account, one may discern a racial sketch of the Indian as a domesticable, virtual-animal other. Indigenous peoples are not “irrational animals” who lack dominion, Vitoria argues.<sup>32</sup> Rather, he implies that they are more analogous to “boys,” who, despite “seem[ing] to differ little from irrational animals . . . even before they have the use of reason, can have dominion.”<sup>33</sup> For Vitoria, in Pagden’s elaboration, the Indian is “some variety of [a] fully grown child whose rational faculties are complete but still potential rather than actual.”<sup>34</sup> As Vitoria suggests the cultivability of the Indian, he is a predecessor of the likes of Las Casas.<sup>35</sup> Thus, in Vitoria’s thought, a racial conception emerges alongside a reconfiguration of religion. His account conceives of indigenous peoples as a religio-racial civilizing project, and articulates

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30. *Id.* at 157.

31. Anghie, *supra* note 26, at 97.

32. VITORIA, *supra* note 3, at 126.

33. *Id.* at 127.

34. ANTHONY PAGDEN, *THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY* 104 (1982).

35. Another similarity between Vitoria and Las Casas is indicated by Goldberg’s comment on the latter: “the *humanism* of Las Casas’s incipient egalitarianism was perhaps still less racial than it was religious, for it consisted in the capacity of the American Indians to be Christianized.” GOLDBERG, *supra* note 2, at 26. For Las Casas, the debate between him and Sepúlveda marks “the onset not the high point of modernity, for it is the capacity to be Christianized that constitutes the egalitarian principle.” *Id.*

nascent racial notions together with newly circumscribed religious “rights.”

Despite positing the domesticability and proprietary capacity of indigenous peoples, however, Vitoria provides for the taking of their lands. He concludes that while a people’s lack of Christian faith per se is not a legitimate ground for seizing dominion, a war waged to secure the right of missioning is just, and indigenous peoples’ lands may be rightly appropriated in the course of such a just war.<sup>36</sup>

Vitoria rejects discovery and occupation as a basis of land title, “because, for him, the territory of America was neither free nor unclaimed.”<sup>37</sup> The papal mandate, then, “even if only indirectly, by means of a just war, was the true legal title to the *conquista*.”<sup>38</sup> Vitoria, Schmitt observes, thus remains a theologian, and regarding “the relation between theological and juridical thinking, and the question of *justa causa*,” his “thinking belongs to the Christian Middle Ages, rather than to the modern international law among European states.”<sup>39</sup>

Yet Vitoria’s proto-racial and proto-secular thought also signals a shift into the epoch of modernity. Although he asserts that “the barbarians were true owners”<sup>40</sup> of lands in the Americas, Vitoria concludes *De Indis* (as Schmitt notes) “with the claim that the Spanish are waging a just war, and therefore may annex Indian lands if the Indians resist free *commercium* (not only ‘trade’) and the free mission of Christianity.”<sup>41</sup> Religion in this scheme is not the source of sovereign authority, but a vitally conceived component in a set of delineated “rights” that the sovereign shall “protect” (or *enforce*).

This shifting role of religion and the rule of law became apparent in seventeenth- and eighteenth-century international law when the papally-awarded legal titles of Portugal and Spain were no longer valid, leaving “discovery and occupation as the only legal title to land-appropriation recognized by the European powers.”<sup>42</sup> With the

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36. See VITORIA, *supra* note 3, at 154-56.

37. SCHMITT, *supra* note 1, at 112.

38. *Id.*

39. *Id.* at 121.

40. VITORIA, *supra* note 3, at 139.

41. SCHMITT, *supra* note 1, at 92.

42. *Id.* at 138.

receding role of religion as a source of legal authority, race began to shape the emergent modern international law. This transition may be glimpsed in the movement from the treatise of Vitoria to the work of Hugo Grotius, one of the “most celebrated and influential teachers of seventeenth-century international law.”<sup>43</sup>

### III. GROTIUS’S ROLE IN THE DEVELOPMENT OF MODERN INTERNATIONAL LAW AND RACE

I will focus on two of Grotius’s less-discussed works. The first is *Mare Liberum (The Freedom of the Seas)*, published anonymously for an objective indicated in its subtitle, “the right which belongs to the Dutch to take part in the East Indian trade.”<sup>44</sup> As the introduction to the English translation explains, Grotius had apparently been “retained by the Dutch East India Company to justify the capture by one of its ships of a Portuguese galleon in the straits of Malacca” in 1602.<sup>45</sup>

#### A. Grotius on Free Seas

In *The Freedom of the Seas*, Grotius follows (and extends) the proto-secularism of Vitoria.<sup>46</sup> The Dutch jurist approvingly cites Vitoria’s position on the rights of missioning and free *commercium* as a basis of just war. Vitoria, he explains, “holds that the Spaniards could have shown just reasons for making war upon the Aztecs and the Indians in America . . . if they really were prevented from traveling or sojourning among those peoples, and . . . finally if they were debarred from trade.”<sup>47</sup> In accord with Vitoria’s provisos, Grotius suggests that when the Portuguese arrived, the lands of the East Indians were not *res nullius* (belonging to no one), for “although some of them were idolators, and some Mohammedans, and therefore

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43. *Id.* at 134.

44. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 5.

45. James Brown Scott, *Introductory Note* to GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 5, at vi.

46. Scott argues that Grotius should be “considered a member of the Victorian or . . . Spanish school, in that he derived his doctrine on the law of nature and of nations from members of the Spanish school.” JAMES BROWN SCOTT, *THE SPANISH ORIGINS OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS* 9a-10a (The Lawbook Exchange, Ltd. 2008) (1934).

47. GROTIUS, *THE FREEDOM OF THE SEAS*, *supra* note 5, at 9.

sunk in grievous sin, [they] had none the less perfect public and private ownership of their goods and possessions.”<sup>48</sup> He concurs with Vitoria’s argument that the East Indians could not be dispossessed for unbelief or without just cause.<sup>49</sup> Grotius thus adheres to Vitoria’s reinscription of Christianity in a secularized structure of international law.

The third chapter of *The Freedom of the Seas*, the heading of which declares that “the Portuguese have no right of sovereignty over the East Indies by virtue of title based on the Papal Donation,” further undertakes a Vitoria-like secularist move.<sup>50</sup> Grotius proceeds to pronounce that “the Pope is neither civil nor temporal Lord of the whole world. On the contrary, even if the Pope did have any such power on earth, still he would not be right in using it, because he ought to be satisfied with his own spiritual jurisdiction.”<sup>51</sup> He thus echoes Vitoria’s nascently secularist deprivation of the papal jurisdiction over the temporal realm.

Moreover, Grotius argues, even if the Pope had intended to give to the Portuguese (or Spanish) monarchs a land grant by the 1493 papal bull, “and had had the power to make such a gift, still it would not have made the Portuguese sovereigns of those places. For it is not a donation that makes a sovereign, it is the consequent delivery of a thing and the subsequent possession thereof.”<sup>52</sup> In Grotius’s account, we see continuities with Vitoria’s secularist delimitation of the pope’s jurisdiction over the temporal domain and the division of land.

Yet in a significant break from Vitoria, Grotius endorsed the discovery doctrine, while he maintained that discovery in combination with possession or occupation would confer title. Possession (and occupation) would be crucial elements of legal title for Grotius. He claimed that “[t]he Portuguese have no right by title of discovery to sovereignty over the East Indies to which the Dutch make voyages” because they failed the test of discovery and possession.<sup>53</sup> “[N]atural reason itself [and] the precise words of the law . . . show clearly that

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48. *Id.* at 13.

49. *Id.*

50. *Id.* at 15.

51. *Id.* at 16.

52. *Id.* at 15.

53. *Id.* at 11.

the act of discovery is sufficient to give a clear title of sovereignty only when it is accompanied by actual possession.”<sup>54</sup> This applies to “movables or to such immovables [i.e., land] as are actually inclosed within fixed bounds and guarded. No such claim can be established in the present case, because the Portuguese maintain no garrisons in those regions.”<sup>55</sup> Here Grotius foreshadows the Lockean inclosure as a means of land appropriation.<sup>56</sup>

Additionally, instead of theology, Grotius here privileges reason and (in invoking the “precise words of the law”<sup>57</sup>) a positivistic, formal conception of law. Thus, he remains in the tradition of Vitoria in some important respects, especially in his proto-secularist divestment of papal temporal authority and reinscription of the right of missioning. Yet Grotius further marks the shift from Christian republic to a secular international law. I suggest below that Grotius’s work indicates that this transition to modern international law is marked by *race*, and, relatedly, by emerging conceptions of land and sea.

### B. Sea Changes

Schmitt notes that Grotius’s book and its title, *Mare Liberum*, was “trail-blazing,”<sup>58</sup> as it “signaled the development of a new stage of the freedom of the sea.”<sup>59</sup> Writing in defense (particularly against Portugal) of the Dutch East India Company’s right of navigation, Grotius enunciated principles of the legal status of the sea that became crucially formative of international law.<sup>60</sup>

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54. *Id.* at 12.

55. *Id.*

56. *See generally* JOHN LOCKE, LOCKE: TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

57. GROTIUS, THE FREEDOM OF THE SEAS, *supra* note 5, at 12.

58. SCHMITT, *supra* note 1, at 179.

59. *Id.* at 180.

60. *See id.* What the context of the East Indian trade itself suggests about the racial formation of Grotius’s thought (and of international law generally) is a question for further research. Indeed, Grotius’s assertion that “the East Indians” are “intelligent and shrewd, so that a pretext for subduing them on the ground of their character could not be sustained” suggests racial differentiation, even if it might arguably be interpreted as a claim of racial egalitarianism. GROTIUS, THE FREEDOM OF THE SEAS, *supra* note 5, at 13-14.

In his exposition on the sea, Grotius writes, “public territory arises out of the occupation of nations, just as private property arises out of the occupation of individuals.”<sup>61</sup> Announcing the freedom of the seas, he posits, “neither a nation nor an individual can establish any right of private ownership over the sea itself (I except inlets of the sea), inasmuch as its occupation is not permissible by nature or on grounds of public utility.”<sup>62</sup> The sea, then, could not be appropriated by discovery and occupation: “[I]f the Portuguese call *occupying* the sea merely to have sailed over it before other people . . . could anything in the world be more ridiculous?”<sup>63</sup> With this logic, Grotius signals the inauguration of an international rule of law that protects the freedom of the seas—“[H]e who prevents another from navigating the sea has no support in law,” and the navigation right of the Dutch “rests upon a common right, since it is universally admitted that navigation on the sea is open to any one [sic].”<sup>64</sup> In a sense, the sea is like what Locke described as “great tracts of ground” that “*lie waste*, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common.”<sup>65</sup> With this brief linking of Grotius and Locke, I suggest that associating the inappropriable sea with wasted (or empty) land subject to appropriation was a formative element of modern international law. Grotius’s account in *Mare Liberum* further indicates that race figured constitutively in this conjunction of appropriable land and inappropriable sea, and in the development of international law. I discuss his racial conceptions next, lingering in one of his later tracts, *On the Origin of the Native Races of America*.<sup>66</sup>

### C. The Sea of Race

Following Schmitt, Gil Anidjar notes the “liquefaction” of land, whereby “the conquest of the New World defined entire stretches of territorial spaces as ‘free space,’ defining them, in other words, as sea

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61. *Id.* at 34.

62. *Id.* at 36-37.

63. *Id.* at 39.

64. *Id.* at 44.

65. LOCKE, *supra* note 56, at 299.

66. See GROTIUS, ON THE ORIGIN OF THE NATIVE RACES OF AMERICA, *supra* note 6.

spaces.”<sup>67</sup> Grotius’s racial thinking marks an elemental moment in this rise of the notion of appropriable land with dispossessable inhabitants; this idea was crucially formative in international law.

“I have often wondered,” muses Grotius at the opening of his essay, “that no one from among so many learned men of our age has earnestly investigated whence those nations sprung which, before the advent of the Spaniards, inhabited the continent, which, unknown to the ancients, some of us have called America from Vesputius, others Western India.”<sup>68</sup> Speaking approximately of indigenous peoples of North America, Grotius suggests they are of Nordic ancestry, descended from migrant Norsemen who had inhabited Iceland and Greenland.<sup>69</sup> Yet for Grotius, the indigenous Americans represented German, Norwegian, and Scandinavian customs of the distant past, frozen in primitivity. The customs of “the Mexicans and their neighbours”<sup>70</sup> provide “no slight mark of their origin,”<sup>71</sup> Grotius argues: “Their judges are twelve in number, as there were formerly among the Goths and other nations of Scandinavia.”<sup>72</sup> Grotius thus purports to follow the cultural lineage of North American Indians. His focus on origins and lineage is a mark of early thinking. For example, Goldberg argues that in the early modern development of race thinking, the “general commitment to race as *lineage*” prevailed “against the background of this early emphasis upon descent in terms of origin, breed, or stock.”<sup>73</sup> Grotius’s quest for the origins of the indigenous peoples of the Americas is a similar attempt to trace racial lines. His 1642 essay invokes a disjunction of race from religion, indicating another shift from the thought of his juridical-theological ancestors.

In regard to native peoples of “Yucatan, and some neighbouring districts,” Grotius claims, “the rite of circumcision discovered among

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67. Anidjar, *supra* note 7, at 56.

68. HUGO GROTIUS, ON THE ORIGIN OF THE NATIVE RACES OF AMERICA, *supra* note 6, at 8.

69. *Id.* at 10. “[T]he peoples of America, those who are towards the north on this side . . . [of] the Isthmus of Panama are of Norse descent . . .” *Id.*

70. *Id.* at 11.

71. *Id.* at 12.

72. *Id.*

73. GOLDBERG, RACIST CULTURE, *supra* note 2, at 63.

them proves to us that they are of a different origin.”<sup>74</sup> He rejects, however, evidence suggesting “that they were Jews,” descended from “the ten tribes driven into Media.”<sup>75</sup> He concurs with “Peter the Martyr,” who postulated the migration of some people to another shore

from Æthiopia by the adjacent ocean, which might easily happen to fisherman sailing a certain distance from their own coast, and then caught by the furious winds, which would carry them directly into America—such a fate as befell that sailor from whom Columbus derived his knowledge of the new world, and those Indians who, Pliny informs us, were borne to the shores of the Suevi.<sup>76</sup>

Reinforcing his link between indigenous Americans and Ethiopians, Grotius notes, “to be circumcised is an old practice of the Æthiopians,” and “[n]or did those of the Æthiopians who became Christians abandon the old practice of their race.”<sup>77</sup> Early modern religious-racial thought (including Grotius’s) often evidenced Geraldine Heng’s characterization (in a medieval context) of “European Christianity” as a discursive “formation,” and what she describes as the functioning of “race-and-religion—‘race-religion’ . . . as a *single indivisible discourse*.”<sup>78</sup> However, Grotius defines Ethiopians by a racial marker that religious conversion does not alter. Lineage, moreover, racially links Ethiopians and native peoples in the Americas.

Grotius’s text also features an early cultural-linguistic conception of racial difference. In the central part of the Americas, “in the range of country from the North to the Isthmus of Panama,” he writes, “the language is neither clearly Æthiopian nor clearly Norwegian.”<sup>79</sup> He believes this is partly because “men of different races were mingled

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74. GROTIUS, ON THE ORIGIN OF THE NATIVE RACES OF AMERICA, *supra* note 6, at 14.

75. *Id.*

76. *Id.* at 15-16.

77. *Id.* at 16.

78. GERALDINE HENG, EMPIRE OF MAGIC: MEDIEVAL ROMANCE AND THE POLITICS OF CULTURAL FANTASY 234 (2003).

79. GROTIUS, ON THE ORIGIN OF THE NATIVE RACES OF AMERICA, *supra* note 6, at 17.

together.”<sup>80</sup> Thus, Grotius describes racial groups as distinct linguistic breeds with implications of miscegenation.

Referring finally “to the other part of America which extends from the Isthmus of Panama to the Straits of Magellan,” Grotius observes that “the more highly-refined minds of the Peruvians, their capacity for just and extended government, testify to another origin, which, if I see anything, can be no other than from the Chinese, a race of equal elegance and equal imperial ability.”<sup>81</sup> Additionally, he muses, “[t]he writing of the Peruvians is not by means of letters, but by marks denoting the things, and it is, as in China, from the top of the paper to the bottom.”<sup>82</sup> These ruminations on racial origins by a founding figure of the modern law of nations suggest that race is inscribed at the origins of international law. Approximately two centuries after Grotius’s reflections, a germinal U.S. Supreme Court decision would further indicate a shift to Grotian logic and the centrality of race in the development of international law.

#### IV. *JOHNSON v. M’INTOSH* AND THE UNITED STATES DISCOVERY DOCTRINE

In the last section that follows, I suggest that the U.S. Supreme Court decision of *Johnson v. M’Intosh*<sup>83</sup> evinces a juridical shift in the United States from papal to Vitorian and Grotian logic in regard to international law, religion, and race. *Johnson* articulates echoes of the papal bulls with a secularized, Vitoria-like *jus gentium*, a welding of race and religion, and an emphasis on racial differentiation.

In both the U.S. Supreme Court’s nineteenth-century pronouncement of the discovery doctrine in *Johnson v. M’Intosh*<sup>84</sup> and the papal bulls (*Romanus Pontifex* and *Inter Caetera*),<sup>85</sup> one finds similar provisions of the exclusive Christian/European eligibility for land title. *Johnson v. M’Intosh* inflects papal-paralleling discourses as it expressly weds the requirement of Christianity and European

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80. *Id.* at 17.

81. *Id.* at 17-18.

82. *Id.* at 19.

83. 21 U.S. 543 (1823).

84. *Id.*

85. EUROPEAN TREATIES, *supra* notes 12 and 17.

heritage for land ownership and reinscribes the Christianity prerequisite (following a reasoning akin to Vitoria's) in a framework of a (secular) international law. The case thus illustrates the shift Schmitt poses from a *respublica Christiana* to a "Eurocentric international law."<sup>86</sup> Moreover, as discussed below in the *Johnson* decision, this shift is expressly bound to racial-epistemological conceptions of indigenous peoples.

To "avoid conflicting settlements, and consequent war with each other," Chief Justice Marshall writes, it was necessary for:

the potentates of the world . . . to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated *as between themselves*. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against *all other European governments*, which title might be consummated by possession.<sup>87</sup>

Referred to as the discovery doctrine, the Supreme Court deemed the acquisition of title by discovery the exclusive prerogative of European nations, following logic similar in structure to the Christianity criterion for ownership in the papal bulls. The discovery doctrine demarcated land rights for European sovereigns while excluding indigenous peoples as recognizable owners of territory; as Williams remarks, in Chief Justice Marshall's analysis, "American Indian tribes had no theoretical, independent natural-law-based right to full sovereignty over America's soil that a European discoverer might be required to recognize under Europe's Law of Nations."<sup>88</sup> Preemptively excluding them from title by discovery, the Supreme Court viewed indigenous peoples as mere "occupants of the soil,"<sup>89</sup> as objects in the landscape of an agreement delineating property rights

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86. SCHMITT, *supra* note 1, at 49.

87. *Johnson*, 21 U.S. at 572-73 (emphasis added).

88. ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 313 (1990). As Williams also notes, "according to *Johnson*, while the Founders may not have been able to agree on whether the several states or Congress held the title to the western frontier, they were unanimous in their agreement that the Indians' interest in their lands was inferior to that of a European-derived government." *Id.* at 315.

89. *Johnson*, 21 U.S. at 574.

between European states. Viewed as objects of European agreement and as part of the “discoverable” natural environment and consigned to the thing-ness of object-being, indigenous peoples were denied the subjectivity of those deemed racially eligible to discover.

The Court further contends that observing the discovery doctrine was common international practice. Chief Justice Marshall proceeds to demonstrate the “universal recognition” of the doctrine by enumerating the European nations, including Spain, Portugal, France, and Holland, that had asserted it as a basis for claims to land in America.<sup>90</sup> But instead of a papal mandate, the Court invokes international “custom,” which is a source of modern international law. In *Johnson* then, one may discern that the transition Schmitt observes has come to pass and papal authority has given way to the order of a Eurocentric international law.<sup>91</sup> Moreover, the racial configuration of the discovery doctrine in *Johnson* indicates a shift from a primarily religiously-ordered system of Christian nations to an international regime with race as a predominant ordering term.

The Supreme Court also refers to European and Christian sovereigns interchangeably as the exclusive candidates for land ownership.<sup>92</sup> Thus, we may observe in *Johnson* a modern example of “race-and-religion” or “race-religion” as an “indivisible discourse.”<sup>93</sup>

In the Supreme Court’s enunciation of the discovery doctrine, race and religion are operating (again) in tangled co-constitutiveness as they did in early modernity. But with race in the foreground of legal discourses, their modalities and landscapes have changed. As race has shaped the terrain of domestic and international law, the Court’s opinion indicates that religion has concurrently undergone shifts in structure and signification with the rise of secularism. *Johnson v. M’Intosh* rearticulated earlier modern iterations of Christianity as a criterion for land ownership, citing religion not as binding legal

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90. *Id.*

91. SCHMITT, *supra* note 1, at 131. As another marker of this shift, Chief Justice Marshall deemphasizes the significance of the papal bull as a ground for Spain’s title to land in America: “Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery.” *Johnson*, 21 U.S. at 574.

92. See *Johnson*, 21 U.S. at 573-77.

93. HENG, *supra* note 78.

precedent in itself, but rather as evidence of compliance with the discovery doctrine in international custom. Religion here is not the source of law; it instead marks the establishment of a secularized doctrine in a law of nations. Marshall's racially-conceived discovery doctrine is the law of the land, while religion is cited as historical evidentiary support for the *de jure* racial rule.

The Supreme Court thus invokes Christianity as a prerequisite for ownership not within the order of a (formally) Christian republic, but within the structure of international law—a law of racially-ordered nations. As illustrated in part by the exclusively European titleholders and the exclusion of indigenous peoples from land ownership in the Court's narration, this international law operates as a legal sinew in what Goldberg calls a “worldly web of racial arrangement.”<sup>94</sup> In *Johnson*, religion has yielded to a secular rule of law, yet it remains in the discourses and practices of the state in regard to indigenous peoples. As Chief Justice Marshall's opinion indicates, during the period in which he writes, the United States subjected indigenous peoples to a project of whiteness cultivation and Christianization that would intensify in the latter part of that century.<sup>95</sup> As this era of federal Indian law illustrates, religion remains expressly in the domain of state action.

Although the secular state of this period may aim to remove itself from involvement with religious expression (per the establishment and free exercise clauses of the First Amendment, for instance), religion exceeds the boundaries of secular containment, especially where it is melded with race, flowing into the state's ruling practices and its public account.<sup>96</sup> In another context, Talal Asad argues that as

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94. DAVID THEO GOLDBERG, *THE RACIAL STATE* 133 (2002).

95. *See generally* FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984).

96. With the move to colorblindness in the United States in the following century, race and religion would become articulated in a different yet related way. Goldberg argues that the contemporary racial reasoning of racelessness conceives of race as a “civic religion.” GOLDBERG, *THE RACIAL STATE*, *supra* note 94, at 229. Conforming to this notion, “the state cannot be seen to express itself in favor of one rather than another in the public realm. But nor can the state interfere with *private* racial expression, much as it is precluded by US constitutionalism from interfering with religious speech.” *Id.* While racism's excesses in the history of federal Indian law have pushed religion (knotted with race) beyond formal secular containment and into the realm of state action, with racelessness the state enforces the proscriptions

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religion is reinserted into the public sphere in a secular state, the state is imbued with the attributes of a rights-bearing, religiously-interested individual:

[T]he modern idea of a secular society included a distinctive relation between state law and personal morality, such that religion became essentially a matter of (private) belief. . . . [T]he idea of religious toleration that helps to define a state as secular begins with the premise that because belief cannot be coerced, religion should be regarded by the political authorities with indifference as long as it remains within the private domain. The individual's ability to believe what he or she chooses is translated into a legal right to express one's beliefs freely and to exercise one's religion without hindrance—so "religion" is brought back into the public domain. . . . This indicates that the secular state, like others, is conceived of as a person who can be morally threatened.<sup>97</sup>

This *personhood* of the secular state, I suggest, is conjured with particular vigor where race and religion are conjoined. Where race-religion conjunctions appear in the nineteenth-century secular United States, racism's excesses propelled religion's reentry into the public domain. Building upon Asad, I note that the state, knotting race and religion, conceives of indigenous peoples as a moral threat and a moral project, as beings whose racial and religious alterity must be contained and kept at bay, and as candidates for *conversion* to whiteness and Christianity. Conversion would become the prevailing discourse in federal Indian law throughout the nineteenth century. However, a conjured threat racially conceived still preoccupies the Court in *Johnson*. "Although we do not mean to engage in the defence [sic] of those principles which Europeans have applied to Indian title," the Supreme Court explains, "they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."<sup>98</sup> The Court thus suggests a cultural conception of racial difference that follows in the trajectory of Grotius's ruminations on races as cultural-linguistic

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of secularism in regard to (and purports to divorce itself from) race, rendering the effects of racist histories beyond redress.

97. TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 205 (2003).

98. *Johnson*, 21 U.S. at 589.

groupings. Here, the *Johnson* Court does not assert the possibility of racial conversion. The character of indigenous peoples could not be cultivated, the Court implies, as the racial excesses of their savagery preclude such grooming. Indians were “a people with whom it was impossible to mix, and who could not be governed as a distinct society.”<sup>99</sup> In this judicial dictum, the cultural-racial alterity of indigenous peoples is not attended by an ascription of civilizability. The Court thus evokes a form of cultural racism suggested by Balibar in another context, a racism which posits the “insurmountability of cultural differences,” the “incompatibility of life-styles and traditions,” and the “harmfulness of abolishing frontiers.”<sup>100</sup>

As the Supreme Court legitimated land appropriation—the primary, “most radical legal title”<sup>101</sup>—its pronouncements of title were bound up with a racially differentiating logic. *Johnson* evinced a shift from a *respublica Christiana* to a Eurocentric international law and illustrated the racial roots that inflect the discovery doctrine as well as international law more generally.

## V. CONCLUSION

While the medieval Christian order adhered to the authority of the pope, the legal force of the papal mandate waned as the *respublica Christiana* gave way to a Eurocentric international law. Beginnings of this shift may be seen in Vitoria’s emergently racial and secular treatise, *On the Indians Lately Discovered*. In moving from Vitoria to Grotius, we may observe in the foundations of international law incipient examples of race’s “fixity and fluidity.”<sup>102</sup> In the liquefaction conceiving land as sea, and as racial discourses began fluidly preying upon discursive building blocks that would render those deemed racially different fixed in alterity, we find early indications of the fluid and fixing powers of race in the germination of international law, which became more express in the *Johnson* decision. Tracing the juridical and religio-racial conceptions of

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99. *Id.* at 590.

100. Etienne Balibar, *Is There a “Neo-Racism”?*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 17, 21 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

101. SCHMITT, *supra* note 1, at 47.

102. Stoler, *supra* note 8, at 198.

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indigenous peoples of the Americas through the papal bulls, Vitoria, Grotius, and *Johnson v. M'Intosh*, we see landmarks indicating the racial roots and evolution of international law.