Michigan Law Review

Volume 89 | Issue 6

1991

The American Indian in Western Legal Thought: The Discourses of Conquest

Melissa L. Koehn
University of Michigan Law School

THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST. By *Robert A. Williams, Jr.* New York: Oxford University Press. 1990. Pp. xi, 352. $39.95.

On October 12, 1992, many people in Western nations will celebrate the quincentenary of Columbus' voyage to the New World. The U.S. Congress has established a Quincentenary Jubilee Commission,[1] and the United Nations, in its 1982 session, considered a proposal to designate 1992 as the "Year of the Fifth Centennial of the Discovery of America."[2] Schoolchildren across the United States are taught that "In Fourteen Ninety-Two, Columbus sailed the ocean blue," seeking to find a western route to Asia. Instead, he discovered the land groups that would soon be dubbed "the New World."

On October 12, 1992, many of the Indians of the Americas will mourn the beginning of "five centuries of heartbreak."[3] Indians lobbied the United Nations to have 1992 declared "The Year of the World's Indigenous Peoples" and October 12 declared "The Day of Mourning and Solidarity with the Indians of the Americas."[4] To Native Americans, Columbus is not a hero; instead, he is "the first great slavemaster sent by the Old World to the New World."[5]

The Western colonization of the Americas resulted in many deplorable events, including broken promises, enslavement, and forced relocation. History classes may teach some of *what* happened, but rarely do they delve into the justifications supporting *why* it happened. Professor Williams' book attempts to fill this gap by examining the legal discourses of conquest advanced by countries to rationalize their treatment of indigenous peoples. The book is unique in the field of federal Indian law. Most works in this area begin with the early, foundational Supreme Court cases. *The American Indian in Western Legal Thought,* however, ends with the first of these foundational cases. Rather than show us how law developed from these principles, Williams illustrates how these principles developed. To achieve this task, Williams selects writings from Spain, England, and the United States, because these countries had the greatest impact on the Indians, and he focuses primarily on the early periods of contact, because it was in

1. Act to Establish the Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 98-375, 98 Stat. 1257 (1984).

2. G.A. Res. L.36, 37 U.N. GAOR (83d plen. mtg.) at 1371, U.N. Doc. A/37/L.36 (1982).

3. Joy Harjo, Creek Indian and acclaimed poet, *quoted in* Dunbar-Ortiz, *Christopher Columbus and "The Stink Hiding the Sun,"* Crossroads, Oct. 1990, at 16, 18.

4. Dunbar-Ortiz, *supra* note 3, at 16-17.

5. P. 83. As governor of Hispaniola, Columbus sent Indians back to Spain as slaves and instituted a system of forced labor on the island. Pp. 82-83.

these early stages that "the legal rights and status of the American Indian were most vigorously debated and contested" (p. 7).

Williams uses a legal history format to explore the development of Native American legal status. Each part of the book intertwines the historical facts of discovery and conquest with the major arguments advanced at the time to justify this discovery and conquest. Williams culls these arguments mainly from the sources widely cited in each time period, such as lectures, sermons, essays, treatises, proclamations, and other types of spoken or written material.[6] His purpose in writing the book is to show how this discourse changed and developed over time (p. 7). The book paints an embarrassing picture of narrow-minded beliefs and single-minded determination by Europeans and Americans to pursue commercial opportunities.

Part I of the book explores the development of papal discourse supporting the crusades, and the adaptation of this discourse by Spain to support its New World ventures. In Part II, Williams examines Protestant translations of these medieval and Renaissance ideas, looking specifically at the evolution of colonizing discourse in England. Finally, Part III investigates the versions of these discourses present in the early United States, concluding with the Supreme Court case *Johnson v. M'Intosh,*[7] which adopted the doctrine of discovery[8] as law in the United States.

As Part I reveals, early canon lawyers argued that the non-Christian beliefs of "infidels" deprived these persons of the right to possess land (p. 45). Later, after the introduction of Roman legal ideas and Aristotelian arguments, the discourse was modified to admit that infidels did have natural law rights to own land, but that these rights were qualified by the papal right to intervene for the protection of the infidels' spiritual well-being. Subsequently, Catholic princes and kings manipulated these rights to allow for exploration and conquest of lands newly discovered by the Europeans (p. 67).

Williams has structured this first Part well, exposing in a logical fashion each progression in the chain of reasoning and clearly illustrating how historical events related to and affected these changes. Williams moves the reader from fifth-century papal rhetoric and activity through the work of Franciscus de Victoria in the early sixteenth century, showing at each turn how the present built upon or altered the past.

One striking feature of European culture illustrated by this Part, and to a lesser degree by Parts II and III, is the Europeans' belief that

6. Williams, and consequently this book notice, use the word "discourse" to encompass all of these materials.

7. 21 U.S. (8 Wheat.) 543 (1823).

8. This doctrine declares that title to land passes to the discovering nation, and that the native peoples only have a right of occupancy. Pp. 315-16.

only Eurocentric ideals, practices, and religions are correct. This belief underlies almost all medieval and Renaissance discourses of conquest. The Indians were different, and therefore to the European mind, in error. The conquerors believed it was their duty to show the natives the error of their ways. None of the discourses mentioned by Williams considers the possibility that European norms are not the only yardstick with which to measure degrees of civilization.

Part II begins with the early sixteenth century and the English Reformation. Less organized than Part I, this section devotes a slightly disproportionate amount of space to a summary of historical events. This excess of space occupied by the events results in less discussion of colonizing discourse than was present in Part I.

Williams may spend so much of his time relating the events themselves, rather than discussing the Europeans' justifications, for two reasons. First, much of the discourse that Williams presents in Part II consists simply of variations on the arguments previously elaborated. Second, much of sixteenth-century English international law depended on the individual sovereign, since England was no longer subject to the Pope and Parliament was still inferior in power to the monarch. As the actual and only ruler of the nation, the monarch possessed great control over foreign policy.

Williams advances neither of these justifications in his book, but they probably explain his approach to some extent. The first justification supports the lack of space allotted to discussion of the discourse. If the discourse was largely unchanged from that described in Part I, it required little additional discussion in Part II. The second rationale explains why a greater amount of time was spent reciting history. Increased emphasis on historical data is required if these facts play a larger role in influencing the discourse. Williams does not clearly explain, however, the connections between all the facts he presents and the changes in the discourse.

Part III spans only sixty years, beginning in 1763 and the start of the Revolutionary era in America and concluding with Chief Justice John Marshall's 1823 opinion in *Johnson v. M'Intosh.*[9] Williams uses Part III to focus on the conflicting views of Indian land rights present in the early United States. The origins of one view, the notion that Indians did not possess the right to dispose of land as they chose, trace back to the discourses discussed in Part I (p. 287). In contrast, a second view, partially a result of widespread speculation in Indian lands, held that Indians did possess the natural law right to control the disposition of their land without validation by any Western government (p. 287). Unfortunately for the Indians, the former view eventually prevailed in a political compromise reached by Congress.[10]

9. 21 U.S. (8 Wheat.) 543 (1823).

10. Virginia was the primary advocate of the first view, because its claims to large amounts of

This compromise would later indirectly influence the outcome of *Johnson v. M'Intosh* (p. 316). *Johnson* involved a dispute among whites over proper title to certain land. The plaintiff land company traced its title back to Indians, whereas the defendant's title derived from the federal government. The defendant prevailed because the Supreme Court adopted the doctrine of discovery, ruling that Indians were not able to pass legal title to land. *Johnson* was the first of three decisions[11] written by Chief Justice John Marshall that defined the fundamental relationship between Native American tribes and the federal government, thereby establishing the foundation for modern American Indian law.[12]

In his book, Williams does not attempt to present a detailed account of the time periods or thoroughly analyze all the nuances of the debates. Such a task would require far more space than the confines of the book allow. In fact, Williams' book raises almost as many, if not more, questions as it answers. *The American Indian in Western Legal Thought,* however, is a highly readable, thought-provoking work that provides an excellent overview of the issues and major historical arguments in this field. It is definitely a must read for anyone interested in this subject.

— *Melissa L. Koehn*

---

land derived from a government charter, and the state argued vociferously for Congress to nullify the land purchases of speculators. The dispute continued until late 1783, when

> a political compromise satisfactory to the Virginians and to Congress (but certainly not to the Indians or to the speculators) was finally brokered. Congress would accept Virginia's cession of its claims north of the Ohio, but it would not specifically invalidate all private land purchases from the natives in the territories, as originally demanded by Virginia. Congress however, agreed not to investigate the question of conflicting claims in the region. Given this agreement and the additional promise by Congress that the lands should be used for the common benefit of the states, the Virginians were satisfied that their cession did not require a provision against private purchases from Indians. . . . Congress had essentially acceded to Virginia's demands. . . .
>
> In 1784, Congress formally accepted the Old Northwest cession from Virginia, thus effectively closing the door on the land-speculating companies.

Pp. 305-06.

11. The other two decisions are Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

12. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232-35 (1982); V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 26-33 (1983).