American Indian Nations and the International Law of Colonialism

by Robert J. Miller

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Most of the non-European world was colonized under an international legal principle known today as the Doctrine of Discovery.[1] Beginning in the early 1400s, European countries and the church began developing legal principles to exploit and acquire lands outside of Europe.[2] As the doctrine developed, it provided that Europeans could acquire property rights over lands owned by indigenous peoples and could also acquire sovereign, political, and commercial rights over indigenous nations and peoples. This legal principle was allegedly justified by religious and ethnocentric ideas of European superiority. When Europeans, and later Americans, planted flags and religious symbols in "newly discovered" territories, they were undertaking the well recognized legal procedures and rituals of the doctrine to establish their country's legal claim to the lands.[3] Needless to say, indigenous peoples objected to the application of this European international law to themselves, their governments, and their property rights.

The doctrine is still international law today, and its effects are still being felt by indigenous peoples around the world. For example, in recent decades courts in Canada, New Zealand, Australia, and the United States have continued to struggle with questions regarding the doctrine and native titles to land and indigenous sovereign powers. Amazingly, in August 2007, Russia invoked the doctrine when it placed a flag on the floor of the Arctic Ocean to claim natural resources under the seabed. In 2010 China claimed sovereign rights by planting its flag on the bottom of the South China Sea. China continues to use the elements of the doctrine to try to bolster its sovereign claims in this region.[4]

The most famous explication of the doctrine is contained in the 1823 case of *Johnson v. M'Intosh*.[5] The *Johnson* case has been cited scores of times by courts in Australia, Canada, and New Zealand and by the English Privy Council. The case has also been relied on by hundreds of federal and state court cases in the United States.

I argue that the *Johnson* Court defined the doctrine through 10 distinct elements.[6] Understanding those elements greatly assists in analyzing how the Discovery doctrine was used against Indian nations and peoples throughout American history and to observe its continuing impacts today. It is clear that all of these elements were also used to justify the United States' continental expansion and the displacement of native nations under the policy or historic era called American Manifest Destiny.

1. First Discovery

The first Euro-American country to discover areas unknown to other Euro-Americans claimed property and sovereign rights over the lands and indigenous inhabitants. First discovery alone, however, only created an inchoate claim of title.

2. Actual Occupancy and Current Possession

To turn a first discovery into fully recognized title, a Euro-American country had to actually occupy and possess the newly found lands. This was usually done by building forts or settlements. Physical possession had to be accomplished within a reasonable amount of time after a first discovery to create a complete title.

3. Preemption/European Title

Discovering Euro-American countries also claimed the power of preemption—that is, the sole right to buy the land from indigenous peoples. This is a valuable property right analogous to an exclusive option in land. The government that held the preemption right claimed to be able to prevent or preempt any other Euro-American government or individual from buying land from the native owners. The United States still possesses this power over Indian lands today. This was enacted as part of the "Non-Intercourse Act" and is codified at 25 U.S.C. § 177.

4. Indian Title

After a first discovery, Euro-American legal systems claimed Indian nations had lost some of their property rights and the full ownership of their lands. Euro-Americans claimed that indigenous nations only retained the rights to occupy and use their lands, and

if they ever chose to sell land, they could only sell to the Euro-American government that held the power of preemption over their lands. Thus, "Indian title" is a limited ownership right.

5. Tribal Limited Sovereign and Commercial Rights

After first discovery, Indian nations and indigenous peoples were considered to have lost some aspects of their inherent sovereign powers and the rights to international free trade and diplomatic relations. Thereafter, they were only supposed to trade and engage in diplomacy with the Euro-American government that had "discovered" them.

6. Contiguity

Euro-Americans claimed a significant amount of land contiguous to their actual discoveries and settlements. Contiguity became very important when Euro-American countries had settlements somewhat close together. In that situation, each country claimed the lands between their settlements to a point halfway between the settlements. Moreover, contiguity held that the discovery of the mouth of a river gave the discovering country a claim over all the lands drained by that river, even if that was thousands of square miles. For an example, refer to the boundaries of the Louisiana Territory and Oregon country.

7. Terra Nullius

Terra nullius literally means a land or earth that is null, void, or empty. Under this element, the doctrine provided that if newly discovered lands were not occupied by any person or nation, or were not being used or governed in a fashion that European legal systems approved, then the lands were considered empty and available for Euro-American claims. Euro-Americans often considered lands that were actually owned, occupied, and being actively utilized by indigenous peoples to be "vacant."

8. Christianity

Religion was a major aspect of the doctrine. Non-Christian peoples were deemed to not have the same rights to land, sovereignty, and self-determination as Christians.

9. Civilization

The Euro-American idea of the superiority of their civilizations was an important part of justifying the Discovery doctrine. Euro-Americans claimed that God was directing them to bring civilized ways, education, and religion to indigenous peoples and to exercise paternalism and guardianship powers over them.

10. Conquest

Euro-Americans claimed they legally acquired Indian lands by military victories in "just" and "necessary" wars.[7] In addition, conquest was also used as a term of art to describe the property and sovereign rights Euro-Americans claimed to acquire automatically over indigenous nations just by making a "first discovery."

The doctrine has had a significant impact on the rights and powers of American Indian nations and indigenous peoples around the world. The impact continues today, because the doctrine plays a significant role in American Indian law and policies and still restricts American Indians and their governments in the exercise of property, governmental, and self-determination rights. The cultural, racial, and religious justifications that created the doctrine raise serious doubts about the validity of continuing to apply the doctrine and *Johnson v. M'Intosh* in the modern day.

But long before *Johnson* and the idea of American Manifest Destiny, most if not all of America's founding fathers were well aware of the Doctrine of Discovery and what it portended for native peoples. For example, the advice Gen. George Washington gave Congress in 1783 about the Indian nations accurately reflected Discovery doctrine principles and even foretold the policies of Manifest Destiny. In his letter to a congressional committee, Washington advised Congress that the United States did not have to raise taxes and armies to fight tribes to ultimately acquire their lands and assets. Instead, he foresaw that "the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire" and that Indian lands would pass naturally to the United States, and far more cheaply by purchase than by warfare.[8] Furthermore, in 1803, President Thomas Jefferson wrote three private letters and expressed his intention to remove all tribes to the west, and later he even wrote that the United States would have to drive Indians "into the Stony [Rocky] mountains" and to extinction.[9] Obviously, the application of the Doctrine of Discovery, and the Manifest Destiny policies that followed, were not intended for the benefit of Indian peoples.

Needless to say, *Johnson* has been cited hundreds of times by federal and state courts, and the principles of the Discovery doctrine have been used by the federal government in formulating Indian policies and in dominating Indian nations for the past two centuries. Probably the prime example of the doctrine in American history is the political and expansionist movement called Manifest Destiny. This phrase was not applied to American expansion until 1845. But the grand idea that it was the "destiny" of the United States to control North America was "manifest" long before 1845. Instead of it being a new idea, Manifest Destiny grew naturally out of the principles and elements of the Doctrine of Discovery.

The phrase "Manifest Destiny" was apparently first used by New York journalist John O'Sullivan. In a July 1845 editorial, he argued that the United States should annex Texas because it was America's "manifest destiny to overspread the continent allotted by Providence … ."[10] O'Sullivan used the term again on Dec. 27, 1845, in a very influential editorial about the Oregon country. In "The True Title," he used many of the elements of the Doctrine of Discovery, and the idea of Manifest Destiny, to claim the Oregon country for the United States.

O'Sullivan argued that the United States already owned the Pacific Northwest, the Oregon country, because "of old black-letter international law" which he said was comprised of the "right of discovery, exploration, settlement, continuity, etc. … ."[11] But he also argued that even if the United States did not have the better of the argument under "all these points of history and law," the United States would still have a stronger right to own the Oregon country than England because of "our manifest destiny to overspread and to possess the whole of the continent which Providence has given us … ."[12]

Manifest Destiny became the watchword of America's claim to the continent and the justification for the removal and domination of Indian nations. This kind of thinking could only arise, it seems, from an ethnocentric view that one's own culture, government, race, religion, and country are superior to all others. These Manifest Destiny ideas grew from the same thinking that justified and motivated the development of the Discovery doctrine in the 15th century.

Thus, the human, governmental, and property rights of Native Americans were almost totally disregarded by the Discovery doctrine and Manifest Destiny. Just as George Washington, Thomas Jefferson, and a host of American politicians and citizens desired, Indians were to get out of the way of American expansion. In their opinions, the economic and political interests of the United States were destined to dominate the continent and to acquire all its assets.

Today, it is very worthwhile to be aware of the antecedents of federal Indian polices and the history of American/Indian relations and to consider whether such policies, *Johnson v. M'Intosh,* and the international law of colonization should remain American law today. ⊙

Endnotes

[1] Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis,* 15 Lewis & Clark L. Rev. 847 (2012).

[2] *See generally* Robert A. Williams Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (1990).

[3] *See, e.g.,* Robert J. Miller, The International Law of Discovery: Acts of Possession on the Northwest Coast of North America, in Arctic Ambitions: Captain Cook and the Northwest Passage, 191 (2015).

[4] *See* Derek Watkins, *"What China Has Been Building in Contested Waters"*, The New York Times, Aug. 2, 2015, at A8.

[5] 21 U.S. (8 Wheat.) 543 (1823).

[6] Robert J. Miller, Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny, 3-5 (2006).

[7] *See, e.g.,* Northwest Ordinance of 1787.

[8] George Washington Writings 536-41 (John Rhodehamel, ed., 1997).

[9] Miller, Native America, *supra n. 6,* at 78, 86-94.

[10] Annexation, 17 U.S. Mag. & Democratic Rev. 5 (July 1845) (quoted in Julius W. Pratt, "The Origins of 'Manifest Destiny,'" 32 The American Historical Rev. 795, 798 (July 1927)).

[11] N.Y. Morning News, Dec. 27, 1845 (quoted in Pratt, *supra n. 10,* at 796).

[12] *Id.*