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# **An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand**

Robert J. Miller\* and Jacinta Ruru<sup>§</sup>

The United States and New Zealand were colonized under an international legal principle that is known today as the Doctrine of Discovery. When England set out to explore and exploit new lands, it justified its sovereign and property claims over newly found territories and the Indigenous inhabitants with the Discovery Doctrine.<sup>1</sup> This legal principle was created and justified by religious, racial and ethnocentric ideas of European and Christian superiority over the other cultures, religions, and races of the world.<sup>2</sup>

The Doctrine provided that newly-arrived Europeans automatically acquired property rights in native lands and gained sovereign, political, and commercial rights over the inhabitants without their knowledge or consent.<sup>3</sup> When Europeans planted their flags and crosses in these “newly discovered” lands they were not just thanking God for a safe voyage; they were instead undertaking the well-recognized procedures and rituals of Discovery designed to demonstrate their legal claim over the lands and peoples.<sup>4</sup>

Surprisingly, perhaps, the Doctrine is still international law and is still applied in the United States and New Zealand today. In fact, American, Canadian, New Zealand, and Australian courts have struggled with questions regarding Discovery and Native land titles just in recent decades.<sup>5</sup> In addition, in August 2007, Russia evoked the Doctrine when it placed its flag on the floor of the Arctic Ocean in an effort to claim the ten billion tons of oil and gas estimated to be there.<sup>6</sup>

In the fifteenth to the twentieth centuries, England fully utilized Discovery in its

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<sup>1</sup> ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* 17-21 (2006).

<sup>2</sup> *Id.* at 1-2; *see also* ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 325-28 (1990); ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE c. 1500-c. 1800* 8 (1995); STEVEN T. NEWCOMB, *PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY* (2008).

<sup>3</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588-97 (1823).

<sup>4</sup> PATRICIA SEED, *CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492-1640* 9 & n.19, 69-73, 101-02 (1995).

<sup>5</sup> *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203 n.1 (2005); *Attorney-General v Ngati Apa* [2003] 3 N.Z.L.R. 643 (New Zealand Court of Appeal); *Te Runanganui o Te Ika Whenua*, [1994] 2 N.Z.L.R. 641 (New Zealand Court of Appeal); *Delgamuukw v. British Columbia*, 3 S.C.R. 1010 [1997] (Supreme Court of Canada); *Guerin v. The Queen*, 2 S.C.R. 335 [1984] (Supreme Court of Canada); *Mabo v. Queensland*, 107 A.L. R. 1 (1992) (High Court of Australia).

<sup>6</sup> Robert J. Miller, *Finders Keepers in the Arctic?*, *LOS ANGELES TIMES*, Aug. 6, 2007, at A19.

explorations and claims over Native peoples in North America and New Zealand. The English colonists and then the American state and federal governments<sup>7</sup> and New Zealand<sup>8</sup> all utilized the Doctrine of Discovery and its religious, cultural, and racial ideas of superiority over American Indian and Maori peoples to stake legal claims to the lands and property rights of these Indigenous peoples. The United States and New Zealand were ultimately able to enforce the Doctrine against the American Indian and Maori Nations. Discovery is still the law and it is still being used against American Indians and Maoris and their governments today.<sup>9</sup>

In this Article, we compare the similarities and differences between the use of the Doctrine of Discovery by English colonists in the United States and New Zealand and examine the state of the law of the Doctrine today in our two countries. In section one, we briefly set out the definition and elements of Discovery. Section two analyzes the legal development of Discovery in the English colonies in America, the thirteen American states, and the federal government of the United States. Section three recounts the use of Discovery in New Zealand from the earliest days of English colonization. Section four highlights the similarities and differences in the use and definition of Discovery in the legal history of our two countries. Section five concludes with the authors' opinions that it is high past time for New Zealand and the United States to stop using the feudal, religious, and ethnocentric Doctrine against their Indigenous citizens.

The value of this Article lies in its comparative methodology. Little comparative work exists between the United States and South Pacific countries, such as New Zealand.<sup>10</sup> This is certainly the first time that we have turned our legal academic gaze upon the other's country. As many comparativists wisely state, one needs to be familiar with the foreign legal system in order to do useful comparative research.<sup>11</sup> By undertaking this collaborative research, we hope to dialogue comparatively and in doing so come to better understand each other's legal system and also our own legal system. Moreover, while some work has been done in the United States and New Zealand to understand the Doctrine of Discovery,<sup>12</sup> this Article seeks to instill the fresh

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<sup>7</sup> See *infra* section II.

<sup>8</sup> See *infra* section III.

<sup>9</sup> Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 104-17 (2006); Jacinta Ruru, *What Could Have Been? The Common Law Doctrine of Native Title in Land under Salt Water in Australia & Aotearoa/New Zealand*, 32 MONASH L. REV. 116 (2006).

<sup>10</sup> *But see, e.g.*, Michael C. Blumm, *Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits a Prendre and Habitat Servitudes*, 8 WIS. INT'L L.J. 1 (1989); Christian N Siewers Jr, *Balancing a Colonial Past with a Multicultural Future: Maori Customary Title in the Foreshore and Seabed after Ngati Apa*, 30 N.C. J. INT'L L. & COM. REG. 253 (2004); Graeme W Austin, *Re-Treating Intellectual Property?*, *The Wai 262 Proceeding and the Heuristics of Intellectual Property Law*, 11 CARDOZO J. INT'L & COMP. L. 333 (2003); Stuart Banner, *Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand*, 34 LAW & SOC'Y REV. 47 (2000).

<sup>11</sup> Nils Jansen, *Comparative Law and Comparative Knowledge*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 307, 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

<sup>12</sup> See, e.g., WILLIAMS, *supra* note 2; Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 104-17 (2006); David V. Williams, *The Foundation of Colonial Rule in New Zealand*,

understandings and appreciations imbedded in a comparative approach. The comparative approach allows us to illustrate with force the pervasiveness of an historic precedent that has had major ramifications for Indigenous peoples living in European colonized countries throughout the world, including the United States and New Zealand. Additionally, this Article contributes to the growing comparative law literature by injecting an Indigenous lens into its theoretical base. Recent comparative law texts gloss over this dimension and in doing so contribute to a perception that comparative law remains fixed in a colonial binary of ethnocentricity. In resisting this trend, comparative legal methodology provides us with a tool to advance the dire need to decolonize judicial systems and legislatures all over the world. It is to this end that we come together to write this Article.

## I. THE DOCTRINE OF DISCOVERY

In 1823, in *Johnson v. M'Intosh*,<sup>13</sup> the United States Supreme Court held that the Doctrine of Discovery was an established legal principle of English and American colonial law and that it was also the law of the American state and federal governments.<sup>14</sup> The Court defined Discovery to mean that when European, Christian nations discovered lands unknown to Europeans they automatically gained sovereign and property rights in the lands even though, obviously, Indigenous people were already occupying and using them.<sup>15</sup> The property right thus acquired was defined as being a future right, an odd form of fee simple ownership, an exclusive title held by the discovering European country that was subject only to the Natives' use and occupancy rights.<sup>16</sup> In addition, the discoverer also gained sovereign governmental rights over the Native peoples and their governments which restricted tribal international political, commercial, and diplomatic powers.<sup>17</sup> This transfer of rights was accomplished without the knowledge or consent of Native people.

In *Johnson*, the Supreme Court defined the Doctrine and set out the exclusive property rights a discovering European country acquired. “[D]iscovery 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>18</sup> Accordingly, the European discoverer gained real property rights in new lands merely by walking ashore and planting a flag in the soil. Native rights, however, were “in no

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13 NEW ZEALAND UNIVS. L. REV. 54 (1988).

<sup>13</sup> 21 U.S. 543 (8 Wheat.) (1823).

<sup>14</sup> 21 U.S. at 571. The case involved land purchases made by British citizens in 1773 and 1775.

<sup>15</sup> 21 U.S. at 573-74.

<sup>16</sup> 21 U.S. at 573, 574, 584, 588, 592, 603; *see also* *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 139-44 (1810); *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11, 17-18 (1815).

<sup>17</sup> *Johnson*, 21 U.S. at 574.

<sup>18</sup> 21 U.S. at 573. *Accord id.* at 574, 584, 588, 592 (“The absolute ultimate title has been considered as acquired by discovery”), 603.

instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.”<sup>19</sup> This was so because, although the Doctrine recognized that Natives still held the legal right to possess, occupy, and use their lands as long as they wished, their right to sell their lands to whomever they wished and for whatever price they could negotiate was limited. “[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”<sup>20</sup> In essence, Indian Nations were preempted from selling their lands to anyone but the discovering European country. The discovering country thus acquired the exclusive option to purchase tribal lands whenever tribes consented to sell. Moreover, the discovering European country could even grant its future interest in the property to others.<sup>21</sup>

Obviously, Discovery diminished the economic value of Native lands and greatly benefited the European countries and colonists.<sup>22</sup> Consequently, Indigenous real property rights and values were adversely affected immediately and automatically upon the “discovery” of their lands by Europeans. Moreover, Native sovereign powers were greatly affected by the Doctrine because their national sovereignty and independence were considered to have been limited by Discovery since it restricted Native Nations’ international diplomacy, commercial, and political activities to only their discovering country.<sup>23</sup>

The political and economic aspects of the Doctrine were developed to serve the interests of Europeans in an attempt to control their explorations and potential conflicts. While they occasionally disagreed over the exact definition of the Doctrine, and sometimes fought over discoveries, one thing they never disagreed on was that Native people lost significant property and governmental rights immediately upon their first discovery by a European country.

The Doctrine was developed in Europe over many centuries by the Church and England, Spain, Portugal and France.<sup>24</sup> It was rationalized under the alleged authority of

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<sup>19</sup> *Id.* at 574.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 573-74, 579, 592; *see also* *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 139-44 (1810).

<sup>22</sup> Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1078, 1110-31 (2000); Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J. L. ECON. 39 (1994).

<sup>23</sup> *Johnson*, 21 U.S. at 574 (“their rights to complete sovereignty, as independent nations, were necessarily diminished”). *See also id.* at 584-85, 587-88 (the English government and then the American government “asserted title to all the lands occupied by Indians [and] asserted also a limited sovereignty over them”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831) (an attempt by another country to “form a political connection with them [American Indian tribes] would be considered by all as an invasion of our territory, and an act of hostility.”).

<sup>24</sup> Miller, 42 IDAHO L. REV. *supra* note 12, at 8-21; PAGDEN, *supra* note 2, at 8, 24, 126; WILLIAMS, *supra* note 2, at 14; THE EXPANSION OF EUROPE: THE FIRST PHASE (James Muldoon ed. 1977); JAMES A. BRUNDAGE, MEDIEVAL CANON LAW AND THE CRUSADER (1969).

the Christian God and the ethnocentric idea that Europeans had the power and right to claim the lands and rights of Indigenous peoples around the world.<sup>25</sup> There is an ample body of literature on this aspect of Discovery that we will not add to here. But we do need to highlight briefly how England defined Discovery to enlighten our explication of how England and its colonists used the Doctrine in the United States and New Zealand.

#### A. *England and Discovery*

England faced a serious problem regarding its desire to explore and colonize in the New World. England was still a Catholic country in 1493 and Henry VII was very concerned about infringing Spain's rights in the New World and being excommunicated if he violated Spain's church-granted rights. In 1493, Pope Alexander VI had granted Spain exclusive Discovery right in the New World in three papal bulls.<sup>26</sup> English explorations would have to be conducted under this canon law and the emerging international law of Discovery. Hence, the English legal scholars had to devise a way around the papal decrees. They analyzed canon law, the bulls, and history, and developed new theories about Discovery that allowed England to explore and colonize in the New World notwithstanding Spanish rights.

The primary theory developed by English scholars was that Henry VII would not violate the papal bulls, which had divided the world for the Spanish and Portuguese, if English explorers restrained themselves to only finding and claiming lands not yet discovered by any other Christian prince.<sup>27</sup> This expanded definition of the elements of Discovery was further refined by the Protestant Queen Elizabeth I and her advisers to require current occupancy and actual possession by Europeans of non-Christian lands as crucial elements of creating a complete title in those lands for the discovering country.<sup>28</sup> Consequently, Henry VII and his successors, Elizabeth I and James I, repeatedly instructed their explorers to discover and colonize lands "unknown to all Christians" and "not actually possessed of any Christian prince."<sup>29</sup>

England also developed another justification for Discovery claims over the lands of Indigenous peoples; the principle of *terra nullius* or vacant land. *Terra nullius* stands for the idea that lands not possessed by any person or nation, or which are occupied and

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<sup>25</sup> PAGDEN, *supra* note 2, at 24, 126 (civilized countries had to be Christian); Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery*, Johnson v. McIntosh, and Plenary Power, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 316 (1993) ("Christians simply refused to recognize the right of non-Christians to remain free of Christian dominion.").

<sup>26</sup> MILLER, NATIVE AMERICA, *supra* note 1, at 13-15; WILLIAMS, *supra* note 2, at 74 & 81.

<sup>27</sup> MILLER, NATIVE AMERICA, *supra* note 1, at 13-15; WILLIAMS, *supra* note 2, at 74 & 81.

<sup>28</sup> See, e.g., WILLIAMS, *supra* note 2, at 121-50.

<sup>29</sup> I FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 18, 22-29 (W. Keith Kavenagh ed. 1973) (reprinting Letters Patent Henry VII to John Cabot March 1496, the November 1620 Patent of New England by King James I); *id.* vol. III, at 1690-98 (reprinting Elizabeth I Letters Patent to Humphrey Gilbert June 1578 and Charter to Walter Raleigh March 1583 and First Charter of Virginia April 1606 James I); SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606 – 1775 24-25 (William MacDonald ed. 1993) (Patent for New England).

possessed by non-Europeans but not being used in a fashion that European legal systems approved, were considered to be waste or vacant.<sup>30</sup> Thus, England argued that land was available for its Discovery claims, first, if no other European country was in actual possession when English explorers arrived, and, second, even if it was occupied by Native people if it was legally “vacant” and “unused” or *terra nullius*. England, the colonies, and the United States often used this argument against American Indians when they claimed, for example, that Indians were using land only for hunting and leaving it a wilderness.

Clearly, England was a strong advocate of the Doctrine and eagerly adopted the international law principle as it was being developed by the Church and Spain and Portugal in the fifteenth century. England then claimed for centuries that John Cabot’s 1496-1498 explorations and his alleged first discoveries of the east coast of North America gave it priority over any other European country even including Spain’s claim of first discovery via Columbus.<sup>31</sup> England also later contested Dutch settlements and trade in North America due to England’s “first discovery, occupation, and possession”<sup>32</sup> of its colonial settlements.

As we will see in Section II below, the Doctrine was enshrined by England and its colonists into American law centuries before it was adopted by the U.S. Supreme Court in 1823 in *Johnson v. M’Intosh*. But we will see that *Johnson* has become the definitive word on the subject in American law, and is the leading case that New Zealand, Canadian, and Australian courts have relied on to apply Discovery in their countries.<sup>33</sup>

### *B. The elements of Discovery*

In addition to the brief discussion above on the basic parameters of Discovery, we

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<sup>30</sup> COLIN G. CALLOWAY, *CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783-1815* 9 (1987); Alex C. Castles, *An Australian Legal History* 63 (1982), *reprinted*, in *ABORIGINAL LEGAL ISSUES, COMMENTARY AND MATERIALS* 10 (H. McRae et al eds. 1991) (*Terra nullius* is a doctrine that essentially ignored the title of original inhabitants based on subjective assessments of their level of “civilization.”). Compare PAGDEN, *supra* note 2, at 91 (Spain and Portugal did not need *terra nullius* claims because they had claims based on papal grants; England and France did not have that benefit). See also *Johnson*, 21 U.S. at 595; *United States v. Rogers*, 45 U.S. 567, 572 (1846) (“the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land”); *Martin v. Waddell’s Lessee*, 41 U.S. 367, 409 (1842):

“The English possessions in America were not claimed by right of conquest, but by right of discovery. For, according to the principles of international law . . . the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. . . . the territory occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants.”

<sup>31</sup> PAGDEN, *supra* note 2, at 90 (citing an English author who claimed in 1609 James I’s rights in America were by “right of discovery”); WILLIAMS, *supra* note 2, at 161, 170, 177-78.

<sup>32</sup> VII EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 30-32 (Alden T. Vaughan & Barbara Graymont eds. 1998) [hereinafter EAID].

<sup>33</sup> See, e.g., note 5 *supra*.

see the Doctrine as being comprised of ten distinct elements:<sup>34</sup>

1. First discovery. The first European country to discover new lands unknown to other Europeans gained property and sovereign rights over the lands and Indigenous people. First discovery alone, without a taking of physical possession, was often considered to create a claim of title to the land but it was usually considered to be an incomplete title.
2. Actual occupancy and current possession. For a European country to turn a first discovery claim into a complete title, it had to actually occupy and possess the discovered lands. This was usually done by building forts or settlements. This physical possession had to be accomplished within a reasonable amount of time after first discovery.<sup>35</sup>
3. Preemption/European title. The discovering European country gained the power of preemption, that is, the sole right to buy the land from the Indigenous people. This is a valuable property right similar to an exclusive option in real estate. The government that held the right of preemption thus prevented or preempted any other European or American government or individual from buying land from the Native owners.
4. Native title. After first discovery, Indigenous peoples were considered by European and American legal systems to have lost the full property rights and ownership of their lands. They only retained the rights to occupy and use their lands. Nevertheless, these rights could last forever if they never consented to sell. But if they did choose to sell, they could only sell to the government that held the power of preemption over their lands. Thus, “Indian title” in the United States, and “Maori title” in New Zealand was, and is today, a limited ownership right.
5. Tribal limited sovereign and commercial rights. After first discovery, Indigenous Nations and peoples were also considered to have lost some of their inherent sovereign powers and the rights to free trade and diplomatic relations on the international stage. Thereafter, they could only deal with the government that had first discovered them.
6. Contiguity. This element provided that Europeans had a claim to a significant amount of land contiguous to and surrounding their actual settlements. Contiguity became very important when European countries had settlements close together. In that situation, each country held rights to a point half way between their 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 miles.<sup>36</sup>

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<sup>34</sup> MILLER, NATIVE AMERICA, *supra* note 1, at 3-5.

<sup>35</sup> New Jersey v. New York, 523 U.S. 767, 787-88 & n.8 (1998) (“Even as to *terra nullius*, like a volcanic island or territory abandoned by its former sovereign, a claimant by right as against all others has more to do than planting a flag or rearing a monument. Since the 19th century the most generous settled view has been that discovery accompanied by symbolic acts gives no more than ‘an inchoate title, an option, as against other states, to consolidate the first steps by proceeding to effective occupation within a reasonable time.’” quoting I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 146 (4th ed. 1990)).

<sup>36</sup> Compare the shapes of the Louisiana Territory and the Oregon Country for examples of this element.



7. Terra nullius. This phrase literally means land or earth that is void or empty. This element held that if lands were not possessed or occupied by any person or nation, or even if they were occupied by non-Europeans but were not being used in a fashion that European legal and property systems approved, then the lands were considered to be empty and available for Discovery claims. Euro-Americans often considered lands that were actually owned, occupied, and actively utilized by Indigenous people to be vacant.

8. Christianity. Religion was a significant aspect of the Doctrine. Non-Christians did not have the same rights to land, sovereignty, and self-determination as Christians.

9. Civilization. The European definition of civilization and ideas of superiority were an important part of Discovery. Euro-Americans and New Zealanders thought that God had directed them to bring civilized ways and education and religion to Indigenous peoples and to exercise paternalistic and guardianship powers over them.

10. Conquest. This element provided for the acquisition of Native lands and title by military victories in just and necessary wars. But conquest was also used as a “term of art” under Discovery to describe the property rights Europeans gained automatically over Indigenous Nations just by showing up and making a first discovery.

England and its colonists applied all these elements, in the legal and practical sense, in their colonization of the United States and New Zealand.

## II. THE DOCTRINE OF DISCOVERY IN UNITED STATES LAW

The Doctrine of Discovery was the international law and legal authority that the English Crown used to explore and colonize America. It is no surprise, then, that the principle was adopted by the American colonial governments. The idea that Discovery passed title to Indian lands to the Crown, the right to preempt all sales of Indian lands, and sovereign rights over the Indian Nations was universally applied by colonial governments in their dealings with the tribes of North America and with their own colonists.<sup>37</sup> After the American Revolutionary War, the new American states continued exercising Discovery to control all purchases of Indian lands and sovereign interactions with tribes. Discovery was the accepted law used by the English colonies and the American states for their interactions with Indian Nations.

### A. *The Colonial law of Discovery*

The English colonists in America and their governing entities assumed that the Crown held the Discovery power over tribes and that the colonies were authorized to

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<sup>37</sup> See, e.g., IV EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 112 (Alden T. Vaughan & W. Stitt Robinson eds. 1983) (reprinting a June 1699 Virginia Committee Report) [ hereinafter IV EAID]; V THE PAPERS OF BENJAMIN FRANKLIN 368 (William B. Wilcox ed. 1959-93) (Franklin stated that “his Majesty’s title [in] America appears founded on the discovery thereof first made, and the possession thereof first taken, in 1497”).

conduct political affairs and property transactions with the Indian Nations under royal authority.<sup>38</sup> All the colonies enacted numerous laws exercising the authority of the King's Discovery power to purchase Indian lands, to protect their exclusive right of preemption and sovereign powers over tribes, and to grant, they alleged, fee simple title in Indian lands even while tribes still occupied and used their lands.

The English colonies spent an enormous amount of time on Indian affairs and enacted an amazing number of statutes concerning Indian and Discovery issues. Each colony enacted numerous statutes exercising preemption rights over the sales of Indian lands, controlling the trade between Indians and colonists, and exercising the sovereign authority they assumed they possessed over the Indian Nations. One of the clearest and earliest examples was the 1638 law enacted by Maryland to control trade with Indians in which the colony stated that its legal authority was based on the Crown's "right of first discovery" in which the King had "became lord and possessor"<sup>39</sup> of Maryland and had gained outright ownership of the real property in the colony.

By far the most prolific subject for colonial statutory enactments and Discovery were attempts to exercise the preemption power to control Indian land sales. Several common themes ran through these statutes: colonies exercised their Discovery power by requiring individuals to get licenses or permission from the colonial legislative assembly and/or governor before buying, leasing, or occupying Indian lands; colonies declared all sales or leases of Indian lands without prior approval to be null and void; sometimes colonial governments retroactively ratified previously unapproved purchases; and most colonies imposed forfeitures and heavy fines on unapproved purchases.<sup>40</sup> Consequently,

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<sup>38</sup> *Thompson v. Johnston*, 6 Binn. 68, 1813 WL 1243, at \*2 (Pa. Sup. Ct. 1813); *Sacarus & Longboard v. William King's Heirs*, 4 N.C. 336 1816 WL 222, at \*2 (N.C. Sup. Ct. 1816). See also SHAW LIVERMORE, *EARLY AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT* 20, 31 (1939); III *THE RECORDS OF THE VIRGINIA COMPANY OF LONDON* 541-43 (Susan Myra Kingsbury ed. 1933) (1622 letter stated that Virginia was the King's property because it was "first discovered" at the charge of Henry VII by John Cabot who "tooke possession thereof to the Kings vse"); XV *EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789* 47-48 (Alden T. Vaughan & Deborah A. Rosen eds. 1998) [hereinafter EAID] (reprinting a Virginia March 10, 1656 law); VIII EAID, *supra* note 32, at 576-77 (reprinting a 1703 New Jersey Indian Land Purchase Act).

<sup>39</sup> II *FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY* 1267 (W. Keith Kavenagh ed., 1973).

<sup>40</sup> See, e.g., I *FOUNDATIONS*, *supra* note 29, at 194, 413, 601 (reprinting June 1687 Connecticut "Act for the Regulating of the Purchase of Lands from Indians"; Laws of Massachusetts Relating to Indians from 1633-48 and 1651 Rhode Island law); *id.* Vol. II, *supra* note 38, at 925-31, 1282 (New Jersey law 1700 and New York law Trade with Indians 1664/65); XV EAID, *supra* note 38, at 46-48, 153-54, 259 (reprinting Virginia laws of 1656 and 1763, Maryland law 1639, North Carolina law October 1748); XVI *EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789* 20-21, 170-71, 295-96, 406 (Alden T. Vaughan & Deborah A. Rosen eds. 1998) (reprinting 1715 North Carolina law, South Carolina laws of 1712 and 1739, Georgia law 1758); II *COLONY LAWS OF VIRGINIA* 1619-1660 467-68 (John D. Cushing ed. 1978); *THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS: 1647-1719* 139 (John D. Cushing ed. 1977) (1719 Rhode Island Act); *ACTS AND LAWS OF NEW HAMPSHIRE 1680-1726* 142 (John D. Cushing ed. 1978) (1719 New Hampshire law); *THE COLONY LAWS OF NORTH AMERICA SERIES* 35-36 (1977) (New Haven & Connecticut Laws 1639-1673). The colonies also utilized the Discovery element of vacant lands, *terra nullius*, to define lands that were available for colonial

every one of the English colonies in America enacted multiple laws that applied the Doctrine of Discovery and preemption to sales of Indian lands.<sup>41</sup>

The colonies also assumed they had been granted sovereign and superior positions over tribal governments and could control the trade with Indians. The colonies enacted statutes requiring colonial licenses for Indian traders.<sup>42</sup> And, as part of their sovereignty over tribes and individual Indians, some colonies assumed that American Indians had become subjects of the Crown and that tribes were the King's tributaries.<sup>43</sup>

The Crown even attempted to enforce its Discovery power against its colonists and colonies; especially after the French and Indian War of 1756-1763.<sup>44</sup> In an attempt to avoid future wars, King George III imposed his authority in America to control the primary issues that led to such conflicts; Indian trade and land purchases.<sup>45</sup> The King centralized the control of Indian affairs in his government and, most significantly, exercised his Discovery power of preemption to take control over the trade with Indians and all sales of tribal lands.<sup>46</sup> He did this in the Royal Proclamation of 1763.

The Proclamation drew a boundary line along the crest of the Appalachia and Allegheny mountains over which British citizens were not to cross. The King ordered that the tribes in this territory "live under *our protection*" and that it was essential to colonial security that the tribes not be "disturbed in the possession of such parts of *our dominions and territories* as, not having been ceded to or purchased by us, are reserved to them . . . ."<sup>47</sup> Thus, King George expressly claimed his Discovery title to tribal lands even though they had not yet been sold by the tribes to England. The King then ordered

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disposal. *E.g.*, IV EAID, *supra* note 37, at 92-93, at 110-14 (reprinting 1688 Virginia law and 1699 Virginia Committee report).

<sup>41</sup> James Madison wrote James Monroe in 1784 that the power of preemption over Indian lands "was the principal right formerly exerted by the Colonies with regard to the Indians [and] that it was a right asserted by the laws as well as the proceedings of all of them . . . ." VIII THE PAPERS OF JAMES MADISON 156 (Robert A Rutland et al eds. 1983).

<sup>42</sup> IV EAID, *supra* note 37, at 51, 70-71 (reprinting 1626 and 1653 Virginia laws).

<sup>43</sup> *See, e.g.*, XV EAID, *supra* note 38, at 40-41, 47-48, 153, 283, 306-07 (reprinting 1649, 1656 and 1723 Virginia laws, 1669 and 1698 Maryland laws); XIX EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 30, 176-78, 406-12, 436, 525, 538-39 (Alden T. Vaughan & Daniel R. Mandell eds. 2003) (reprinting a 1621 document from New England, a 1644 Rhode Island document, a 1644 Massachusetts document, documents from the New Plymouth Colony in 1671, a 1675 document, a 1704 Massachusetts law, a 1723 document allowing the Mohegans to meet and choose their chiefs); XVI EAID, *supra* note 40, at 46-48 (1748 North Carolina law); IV EAID, *supra* note 37, at 70-71 (reprinting 1653 Virginia law).

<sup>44</sup> DOROTHY V. JONES, LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA 36 (1982); JACK M. SOSIN, WHITEHALL AND THE WILDERNESS: THE MIDDLE WEST IN BRITISH COLONIAL POLICY, 1760-1775 79-83 (1961).

<sup>45</sup> SOSIN, *supra* note 44, at 28-31, 45-46, 48-49, 51, 56; FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766 85, 221, 565-57 (2000).

<sup>46</sup> ANDERSON, *supra* note 45, at 85, 221, 565-57.

<sup>47</sup> I HENRY STEELE COMMAGER, DOCUMENTS OF AMERICAN HISTORY 47-48 (8<sup>th</sup> ed. 1968).

that none of his officials could allow surveys or grant titles in this area, and that none of his subjects could purchase or settle on Indian lands without royal permission.<sup>48</sup> Further defining his Discovery power, the King said that these Indian lands were “reserve[d] under our sovereignty, protection, and dominion, for the use of the said Indians . . . .”<sup>49</sup> The King also took control of trade with Indians by requiring all traders to provide bonds and to be licensed by his officials.<sup>50</sup> The Proclamation clearly shows the Crown’s exercise of Discovery powers in North America.

### *B. The State law of Discovery*

The new state governments that developed after the colonies declared independence immediately began applying Discovery. They asserted in their constitutions and earliest statutes the same powers of sovereignty and preemption over the Indian Nations and tribal lands as they had done during colonial times.

In Virginia’s 1776 constitution, for example, the people and the state claimed the power of Discovery and preemption over Indian lands when they alleged that “no purchase of lands shall be made of the *Indian* natives but on behalf of the public, by authority of the General Assembly.”<sup>51</sup> In 1777, New York’s constitution also claimed the preemption power: “no purchases or contracts for the sale of lands, made since . . . one thousand seven hundred and seventy-five, or which may hereafter be made with or of the said Indians . . . shall be binding on the said Indians, or deemed valid, unless made under the authority and with the consent of the legislature of this State.”<sup>52</sup> Moreover, North Carolina in 1776, Tennessee in 1796, and Georgia in 1798, all enshrined Discovery principles in their constitutions.<sup>53</sup>

Furthermore, the laws that the new states enacted regarding Indian affairs also demonstrated the elements of Discovery. In May 1779, Virginia declared that land purchases from Indian Tribes were void if they had been conducted without the permission of the colonial or state government.<sup>54</sup> The law expressly reaffirmed that Virginia possessed the “exclusive right of preemption”<sup>55</sup> to extinguish Indian title within its borders. Connecticut also took control of sales of Indian lands within its borders in

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<sup>48</sup> *Id.* at 49.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> THE FIRST LAWS OF THE STATE OF VIRGINIA 35, ch. II, sec. XXI (John D. Cushing ed. 1982).

<sup>52</sup> N.Y. CONST. art. 37 (1777). The state took steps to enforce its constitutional provision in 1788 by imposing criminal sanctions on violations of the constitutional provision. N.Y. Act of March 18, 1788, Sess. 11, ch. 85; 2 Greenl. ed. Laws 194.

<sup>53</sup> N.C. CONST. art. I, § 25 (1776); TENN. CONST. art. XI, § 32 (1796); GA. CONST. art. I, § 23 (1798).

<sup>54</sup> THE FIRST LAWS OF THE STATE OF VIRGINIA 104, ch. XXV, § II (John D. Cushing ed. 1982). *See also* Marshall v. Clark, 8 Va. 268, 1791 WL 325, at \*3 (Va. Sup. Ct. 1791).

<sup>55</sup> FIRST LAWS, *supra* note 54, at 103, ch. XXV, § I.

1776.<sup>56</sup> In 1783, 1789, and 1802, North Carolina declared purchases of Indian lands to be void unless they had been approved by the colonial or state governments, and it took steps to control other activities on tribal lands.<sup>57</sup> In 1780, 1783, 1784, and 1787, Georgia passed laws that declared null and void any attempts by private parties to purchase Indian lands.<sup>58</sup> In 1798, Rhode Island took total control of Indian affairs, including purchases of Indian lands.<sup>59</sup>

State courts occasionally got involved in applying Discovery principles. In 1835, for example, in *Tennessee v. Forman*,<sup>60</sup> the Tennessee Supreme Court upheld the authority of the legislature to extend state criminal jurisdiction into Indian country. The court relied on the elements of Discovery and the “law of Christendom”<sup>61</sup> to hold that the state possessed sovereign powers over Indian tribes and could impose its laws in tribal territory. A concurring opinion also harkened back to the Spanish idea of Discovery and “just war” to justify taking the lands of Native people because Americans could fight to “defend” themselves if Indian Nations resisted Americans taking tribal lands.<sup>62</sup>

Many other state courts demonstrated their agreement with Discovery and upheld state assertions of sovereignty and jurisdiction over tribes, the imposition of state laws in Indian territory, and the royal, colonial, and state fee simple ownership of tribal lands.<sup>63</sup> In *Arnold v. Mundy*,<sup>64</sup> the New Jersey Supreme Court stated that “when Charles II. took possession of the country, by his right of discovery, he took possession of it in his sovereign capacity . . . .”<sup>65</sup> The court also stated that the people of New Jersey had “both

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<sup>56</sup> THE FIRST LAWS OF THE STATE OF CONNECTICUT 101-02 (John D. Cushing ed. 1982).

<sup>57</sup> *Danforth v. Wear*, 22 U.S. (9 Wheat.) 673, 677-78 (1824); 2 THE FIRST LAWS OF THE STATE OF NORTH CAROLINA 446 (John D. Cushing ed. 1984); *see also* *Sacarus & Longboard v. William King’s Heirs*, 4 N.C. 336, 1816 WL 222 (N.C. Sup. Ct. 1816) (referring to an 1802 law).

<sup>58</sup> *Patterson v. The Rev. Willis Jenks et al.*, 27 U.S. (2 Pet.) 216, 234 (1829); I THE FIRST LAWS OF THE STATE OF GEORGIA 288 (John D. Cushing ed. 1981).

<sup>59</sup> I THE FIRST LAWS OF THE STATE OF RHODE ISLAND 10 (John D. Cushing ed. 1983).

<sup>60</sup> 16 Tenn. 256 (1835).

<sup>61</sup> *Id.* at 258-85, 287, 332-35; *see also* at 277 (“the principle declared in the fifteenth century as the law of Christendom, that discovery gave title to assume sovereignty over, and to govern the unconverted natives of Africa, Asia, and North and South America, has been recognized as a part of the national law, for nearly four centuries”).

<sup>62</sup> *Id.* at 339-45 (based on Discovery, if tribes opposed Anglo-American rights to occupy tribal lands they could “use force to repel such resistance.”). *See also* MILLER, NATIVE AMERICA, *supra* note 1, at 16-17 (Spanish views on “just war”).

<sup>63</sup> *See, e.g.*, *Caldwell v. Alabama*, 2 Stew. & P. 327, 396, 408, 413-16 (Ala. 1831); *Georgia v. Tassels*, 1 Dud. 229, 231-32, 234, 237-38 (Ga. 1830); *Jackson, ex dem. Smith v. Goodell*, 20 Johns. 188 (N.Y. Sup. Ct. 1822); *Jackson v. Sharp*, 14 Johns. 472 (N.Y. Sup. Ct. 1817); *Sacarus & Longboard v. William King’s Heirs*, 4 N.C. 336 1816 WL 222, at \*3 (N.C. Sup. Ct. 1816); *Strother v. Martin*, 5 N.C. 162, 1807 WL 35, at \*2-3 (N.C. Sup. Ct. 1807).

<sup>64</sup> 6 N.J.L. 1, 1821 WL 1269 (N.J. Sup. Ct. 1821).

the legal title and the usufruct . . . exercised by them in their sovereign capacity . . . .”<sup>66</sup> Thus, according to this court, the King and New Jersey owned Indian lands as part of their sovereign authority. The court also relied on the Discovery elements of first discovery and *terra nullius* because it claimed New Jersey was “an uninhabited country found out by British subjects.”<sup>67</sup>

Other state courts used Discovery to define the tribal real property right to be just a possessory right.<sup>68</sup> The Pennsylvania Supreme Court agreed with this idea and relied on the well known concept of preemption.<sup>69</sup> One justice stated further that Indians could not own real property since “not being Christians, but mere heathens [they were] unworthy of the earth” and that the “right of discovery” had given the colony an interest that was “exclusive to a certain extent [and brought] . . . the *Indian* to his own market, where, if he sells at all, the *Indian* must take what he could get from this his only customer.”<sup>70</sup> This statement demonstrated the impact of Discovery and preemption on the prices tribes received for their lands when there was only one possible buyer. This justice also demonstrated the religious and cultural bias that lurks behind the Doctrine.

The American state governments clearly understood and applied the Doctrine of Discovery to exercise sovereign and real property rights over Indian Nations and people.

### C. *United States law and Discovery to 1823*

The newly created United States government quickly adopted the elements of Discovery. This is not surprising in light of the widespread acceptance of the Doctrine by the colonial and state governments. In fact, long before the U.S. Supreme Court agreed in 1823 in that Discovery was the law of the United States, all the branches of the federal government had already been operating under Discovery.

In September 1774, the English colonies in America created their first federal entity, the Continental Congress. This Congress dealt with the Indian Nations on a diplomatic and political basis, controlled the trade with tribes, and spent significant time and money trying to gain the support of the tribes in the Revolutionary War.<sup>71</sup> This Congress soon realized it needed a more formal structure and it drafted the Articles of Confederation in 1777, which were specifically designed to give more authority, taxation

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<sup>65</sup> *Id.* at \*10. *Accord id.* at \*53.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at \*56.

<sup>68</sup> *Strother v. Martin*, 5 N.C. 162, 1807 WL 35, at \*4 (N.C. Sup. Ct. 1807).

<sup>69</sup> *Thompson v. Johnston*, 6 Binn. 68, 1813 WL 1243 a\*2 (Pa. Sup. Ct. 1813).

<sup>70</sup> *Id.* at \*2 & 5 (“the king’s right was . . . founded . . . on the right of discovery”).

<sup>71</sup> *See, e.g.*, XVIII EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 4, 39, 43, 59, 63, 65, 70, 84, 98, 124, 203 (Alden T. Vaughan & Colin G. Calloway eds. 1994); Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 AM. INDIAN L. REV. 133, 137 (1993); IV COLONIAL SERIES: THE PAPERS OF GEORGE WASHINGTON 192-94 (W.W. Abbot ed. 1988).

power, and the sole voice in Indian affairs to the central federal government.<sup>72</sup> The Articles attempted to place the sole power over Indian affairs and the Discovery power in the federal government. Section IX provided that the Congress “shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians . . . .”<sup>73</sup> This language repeated the same claims of sovereign control over Indian affairs that had been previously made by the Crown, the colonies, and the states.

The new Articles Congress then undertook steps to incorporate the Doctrine of Discovery into federal law and to take the preemption power under its control. In 1783, after signing the treaty in which England ceded all its property, sovereignty, and Discovery claims south of Canada and east of the Mississippi River to the United States, Congress adopted the very Discovery precedent of George III’s Royal Proclamation of 1763. On September 22, 1783 Congress issued a resolution stating that no one could settle on or purchase Indian lands “without the express authority and directions of the United States in Congress assembled” and “that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void.”<sup>74</sup> This was nothing less than an emphatic statement by the Articles Congress that it possessed the exclusive Discovery and preemption power over Indian lands and peoples. Thereafter, Congress tried to enforce its preemption and sovereign powers to control the trade and all interactions with tribes against its citizens, its states, and Indian Nations.<sup>75</sup>

The Articles Congress also tried to settle the issue with the states of which government possessed the Discovery and preemption power over the western lands that England had ostensibly ceded to the United States in 1783. The treaty with England clearly passed all of England’s property rights to the United States, but at least seven states still claimed land ownership rights under their charters to the Mississippi River, and even to the Pacific Ocean.<sup>76</sup> The states ultimately, however, came to realize that it was in their best interests to allow Congress to be in charge of the western lands.<sup>77</sup>

The Articles Congress demonstrated most significantly its correct understanding of Discovery in its Northwest Ordinance of 1787. This Act was designed to organize the settlement of the old Northwest Territory. It expressly adopted the elements of Discovery to settle this region: “The utmost good faith shall always be observed towards the

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<sup>72</sup> II OSCAR HANDLIN & LILLIAN HANDLIN, *LIBERTY IN EXPANSION 1760-1850* 146-48 (1989).

<sup>73</sup> ARTICLES OF CONFEDERATION art. IX (1781) (reprinted in *AMERICAN HISTORICAL DOCUMENTS* 90 (Harold C. Syrett ed. 1960)).

<sup>74</sup> FRANCIS PAUL PRUCHA, *DOCUMENTS OF UNITED STATES INDIAN POLICY* 3 (3d ed. 2000) [hereinafter *PRUCHA, DOCUMENTS*]; *see also* CALLOWAY, *supra* note 30, at 9; XVIII EAID, *supra* note 71, at 278.

<sup>75</sup> PRUCHA, *DOCUMENTS*, *supra* note 74, at 4 (reprinting an October 1783 congressional resolution); III *THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY* 2140-42 (Wilcomb E. Washburn ed. 1973) (Ordinance for the Regulation and Management of Indian Affairs, Aug. 7, 1786).

<sup>76</sup> *AMERICAN HISTORICAL DOCUMENTS* 94 (Harold C. Syrett ed. 1960); CATHERINE BOWEN, *MIRACLE AT PHILADELPHIA* 168-70 (1966).

<sup>77</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 142 (1810) (“The question whether the vacant lands within the United States became a joint property or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy”); JONES, *supra* note 44, at 170; VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* 81 (1999).

Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars . . . .”<sup>78</sup> This statute expressly required the Discovery element of consent for any sales of Indian title to real property, impliedly exercised the federal government’s exclusive preemption power, and also raised the specter of “just war,” which was an aspect of Spain’s interpretation of Discovery.<sup>79</sup>

Throughout this time, the Articles Congress also dealt with the Indian Nations in a diplomatic and political relationship through treaty making. These treaties demonstrate vividly the exercise of Discovery and preemption by Congress. The common elements of Discovery are well represented in the eight treaties that the Articles Congress enacted with various Indian Nations.<sup>80</sup> In addition, Congress exercised its preemption power to buy land from Indian Nations in these treaties and to establish borders for lands that the U.S. would recognize as tribally owned.<sup>81</sup> And, the U.S. exercised the sovereign aspect of its Discovery authority over the Indian Nations and took “the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as [the United States] think proper.”<sup>82</sup> Finally, the United States promised to take Indian Nations under its protection and the tribes acknowledged themselves “to be under the protection of the United States and of no other sovereign whatsoever.”<sup>83</sup> This language and the ideas behind them mirrored the colonial understanding and exercise of Discovery.

The Articles Congress came to realize its inherent weakness, primarily in Indian affairs.<sup>84</sup> A call now arose for the creation of a stronger federal government and this led

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<sup>78</sup> PRUCHA, DOCUMENTS, *supra* note 74, at 9.

<sup>79</sup> *Id.*; PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE xiii (1992). See MILLER, NATIVE AMERICA, *supra* note 1, at 16-17 (explaining Spanish views on “just war”).

<sup>80</sup> See, e.g., Treaty with the Wyandot, Etc., Jan. 9, 1789, Art III, 7 Stat. 28; Treaty with the Six Nations, Oct. 22, 1784, Art. III & IV, 7 Stat. 15 (promising the Oneida Nation it would be secure “in the possession of [its] lands”); II INDIAN AFFAIRS: LAWS AND TREATIES 5-25 (Charles J. Kappler ed. 1904) [hereinafter II Kappler’s] (reprinting eight U.S./tribal treaties between 1785-89).

<sup>81</sup> See, e.g., Treaty with the Six Nations, Oct. 22, 1784, Art. III & IV, 7 Stat. 15; Treaty with the Wyandot, Etc., Jan. 9, 1789, Art I & XIII, 7 Stat. 28; Treaty with the Six Nations, Jan. 9, 1789, Art. 1 & 2, 7 Stat. 33; see also Treaty with the Wyandot, Etc., Jan. 21, 1785, Art. VI, 7 Stat. 16; Treaty with the Shawnee, Jan. 31, 1786, Art. II; II Kappler’s, *supra* note 80, at 7, 17-19, 21, 24.

<sup>82</sup> See, e.g., Treaty with the Cherokee, Nov. 28, 1785, Art. IX, 7 Stat. 18; Treaty with the Choctaw, Jan. 3, 1786, Art. VIII, 7 Stat. 21; Treaty with the Chickasaw, Jan. 10, 1786, Art. VIII, 7 Stat. 24; see also Treaty with the Wyandot, Etc., Jan. 9, 1789, Art VII, 7 Stat. 28 (traders need licenses from the Territorial Governor); II Kappler’s, *supra* note 80, at 10, 13, 15-16, 20.

<sup>83</sup> See, e.g., Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15; Treaty with the Wyandot, Etc., Jan. 21, 1785, Art. II, 7 Stat. 16; Treaty with the Cherokee, Nov. 28, 1785, Art. III, 7 Stat. 18; Treaty with the Choctaw, Jan. 3, 1786, Art. II, 7 Stat. 21; Treaty with the Chickasaw, Jan. 10, 1786, Art. II, 7 Stat. 24; Treaty with the Shawnee, Jan. 31, 1786, Art. V; II Kappler’s, *supra* note 80, at 5, 7, 9, 12, 14, 17.

<sup>84</sup> THE FEDERALIST PAPERS, No. 42 268-69 (James Madison) (Clinton Rossiter ed. 1961) (Madison called for full federal power over Indian affairs and deleting the ambiguous caveats in the Articles that allowed for state involvement); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 n.4 (1985) (“Madison cited the National Government’s inability to control trade with the Indians as one of the key deficiencies of



to the 1787 constitutional convention and the creation of a stronger national government that wasted no time in appropriating to itself the Discovery and preemption powers.

The drafters of the United States Constitution solved the problem of states meddling in Indian affairs and Discovery issues by placing the sole power to deal with Indian Tribes in the hands of Congress. In Article I, the Constitution states that only Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”<sup>85</sup> The United States Supreme Court has interpreted this language to mean that Congress was granted the exclusive power to regulate trade and intercourse with Indian Tribes.<sup>86</sup>

The authority to be the only entity to control commercial affairs with the Indian Nations, including the sole power of buying Indian lands and trading with tribes, demonstrates the Doctrine of Discovery. The President and the Senate were also granted the sole authority to control treaty making which granted those entities the power to continue making treaties with tribes as the United States had already been doing since 1778.<sup>87</sup> Thus, the new U.S. Constitution incorporated the Discovery power into the federal system and placed that power solely in the hands of the national government.

The very first Congress to operate under the Constitution immediately exercised the Discovery power it had been granted. On July 22, 1790, Congress enacted a statute that is a perfect example of preemption; in fact, it even used that exact word:

no sale of lands made by an Indian, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, *whether having the right of pre-emption to such lands or not*, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.<sup>88</sup>

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the Articles of Confederation, and urged adoption of the Indian Commerce Clause”); Miller, *supra* note 71, 18 AM. INDIAN L. REV. at 151-52.

<sup>85</sup> U.S. CONST. art. I, § 8. This constitutional provision placed the power to control Indian affairs “entirely with Congress, without regard to any state right on the subject . . . .” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 63-64 (1831) (Thompson, J., dissenting). The Constitution freed the federal government from the “shackles” imposed on its power in Indian affairs by the Articles of Confederation. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

<sup>86</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

<sup>87</sup> U.S. CONST. art. II, § 2. The Constitution also ratified all the treaties the Continental and Confederation Congresses had entered with tribes from 1778-1789. U.S. CONST. art. VI.

<sup>88</sup> Act of July 22, 1790, ch. 23, 1 Stat. 137, 138, § 4 (emphasis added), PRUCHA, DOCUMENTS, *supra* note 74, at 15. In 1792, the House proposed keeping the word preemption in the 1793 Trade and Intercourse Act designed to replace the temporary 1790 act. XIV THE PAPERS OF JAMES MADISON 441 (Robert A Rutland et al eds., 1983). The draft 1793 Act continued to deny purchases of Indian lands by states even if they possessed the power of preemption. *Annals of Congress*, 2d Cong., 2d Sess., 684, 731, 827; *Gazette of the United States*, 16 Jan. 1793. The word preemption was deleted from the final act. Act of March 1, 1793, ch. 19, 1 Stat. 329. The permanent 1802 Trade and Intercourse Act, § 12, March 30, 1802 stated: “no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution . . . .” PRUCHA,

This 1790 Act has been amended slightly and reenacted several times but it is still federal law today.<sup>89</sup>

The 1790 Act and its later versions also required persons desiring to trade with Indians and tribes to secure a federal license, to provide a bond, and to not trade alcohol in Indian country.<sup>90</sup> Consequently, the central government was now firmly in charge of Indian affairs, the sovereign Discovery power, and preemption, just as King George III had tried to do with the Royal Proclamation of 1763, and just as the Articles of Confederation Congress had tried to do with its resolution of 1783 and other laws.

The new Executive Branch was well acquainted with the Discovery powers the federal government possessed and it did not hesitate to exercise them. President Washington and his cabinet readily utilized Discovery in developing Indian policies and in using treaties to buy Indian lands whenever possible and to limit other nations, American states, and individuals from dealing with Indian Tribes.<sup>91</sup>

The Executive Branch was very busy in its early years in negotiating, and the Senate ratifying, at least one hundred treaties with the Indian Nations between 1789 and 1823.<sup>92</sup> These treaties demonstrate precisely the contours of Discovery and preemption, and the federal government's exercise of those powers. The most obvious examples are exemplified in five treaties in 1808, 1804, 1795, 1794, and 1791 which limited the sovereignty of the Cherokee Nation and enforced against the Wyandotte, Osage, and Seneca Nations the United States' preemption power to be the only purchaser of tribal lands.<sup>93</sup> In addition, the United States repeatedly exercised preemption to buy land from tribes but always, allegedly, with their consent.<sup>94</sup>

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DOCUMENTS, *supra* note 74, at 19, § 12.

<sup>89</sup> 25 U.S.C. § 177 (2000). The 1790 Act was amended and reenacted in 1793, 1796, 1799, and made permanent in 1802. Act of March 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of March 3, 1799, 1 Stat. 743; Act of March 30, 1802, ch. 13, 2 Stat. 139.

<sup>90</sup> Act of July 22, 1790, ch. 23, 1 Stat. 137, 138, § 1; Act of March 1, 1793, ch. 19, § 1, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 7, 1 Stat. 469; Act of March 3, 1799, § 7, 1 Stat. 743; Act of March 30, 1802, ch. 13, 2 Stat. 139.

<sup>91</sup> For an extensive discussion of Thomas Jefferson, Washington's Secretary of State, and his views on Discovery, see MILLER, NATIVE AMERICA, *supra* note 1, at 59-98. For Washington's Secretary of War Henry Knox, see PRUCHA, DOCUMENTS, *supra* note 74, at 12; I AMERICAN STATE PAPERS, INDIAN AFFAIRS 12-14 (Secretary Knox' 1789 report to Congress); ANTHONY F.C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS 166-67 (1999) (Knox stated that the U.S. should consider tribes as owning their lands, that could only be purchased with express federal approval). For Washington's Secretary of the Treasury, Alexander Hamilton, see XIV THE PAPERS OF ALEXANDER HAMILTON 89-91 (Harold C. Syrett & Jacob E. Cooke eds. 1969) (Hamilton wrote that federal treaty commissioners should "do nothing which should in the least impair the right of pre-emption or general sovereignty of the United States over the Country [and] impress upon the Indians that the right of pre-emption in no degree affects their right to the soil"); see also *id.* Vol. XIII at 136 (reprinting a May 23, 1799 letter in which Hamilton proposed using treaties for the United States to buy Indian lands).

<sup>92</sup> II Kappler's, *supra* note 80, at 25-203.

<sup>93</sup> Treaty with the Cherokee, July 2, 1791, Art. II, 7 Stat. 39; Treaty with the Six Nations, Nov. 11, 1794, Art. III, 7 Stat. 44; Treaty with the Wyandot, Etc., Aug. 3, 1795, Art. V, 7 Stat. 49; Treaty with the Sauk

The treaties from 1789-1823 also demonstrate other aspects of the United States' Discovery power. For example, the United States further exercised its limited sovereignty over Indian Nations by controlling all trade and commerce with them. The United States included a provision in almost every one of these treaties in which the tribe agreed that "the United States shall have the sole and exclusive right of regulating their trade" and in which the United States promised to protect tribes, and in which the tribes acknowledged themselves "to be under the protection of the United States of America, and of no other sovereign whosoever . . . ."<sup>95</sup>

Moreover, for decades preceding *Johnson* in 1823, the Executive Branch explicitly used the Doctrine of Discovery to argue its territorial claim against England, Spain, and Russia to own the Pacific Northwest.<sup>96</sup> The United States and England never really settled the legal question of who had the superior Discovery claim to the Oregon Country. They argued about their rights under the elements of Discovery for four decades, signed two treaties to jointly occupy the Oregon Country, and finally, in 1846, drew the dividing line between the U.S. and Canada in the Northwest where it is today.<sup>97</sup>

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and Foxes, Nov. 3, 1804, Art. 4, 7 Stat. 84; Treaty with the Osage, Nov. 10, 1808, Art. 10, 7 Stat. 107; II Kappler's, *supra* note 80, at 29, 35, 42, 97.

<sup>94</sup> See, e.g., FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 60 & n.60 (1995) (describing the express use of preemption and tribal consent).

<sup>95</sup> See, e.g., Treaty with the Cherokee, July 2, 1791, Art. II, 7 Stat. 39; Treaty with the Wyandot, Etc., Aug. 3, 1795, Art. V & VIII, 7 Stat. 49 (tribe agreed to only admit and trade with traders that have federal licenses); Treaty with the Creeks, Aug. 7, 1790, Art. II, 7 Stat. 35; Treaty with the Sauk and Foxes, Nov. 3, 1804, Art. 1, 7 Stat. 84; Treaty with the Piankashaw, Dec. 30, 1805, Art. II, 7 Stat. 100; Treaty with the Osage, Nov. 10, 1808, Art. 10, 7 Stat. 107; Treaty with the Winnebago, June 3, 1815, Art. 3, 7 Stat. 144; II Kappler's, *supra* note 80, at 25, 29, 30, 42-43, 47, 74, 89, 97, 105, 130.

<sup>96</sup> III AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 185 (July 30, 1807 letter of President Madison negotiating with England); *id.* at 731 (March 22, 1814 letter of Secretary of State Monroe); *id.* Vol. IV, at 377 (July 28, 1818 letter of Secretary of State John Quincy Adams discussing America's claim to the Northwest); *id.* at 452-57, 468-72 (Secretary of State John Quincy Adams March 12, 1818 letter); FREDERICK MERK, *THE OREGON QUESTION: ESSAYS IN ANGLO-AMERICAN DIPLOMACY AND POLITICS* 4, 14-23, 42, 47, 51, 110, 156, 165-66, 399 (1967) (referencing the decades long debate between England and the U.S. about the Lewis and Clark expedition and the port of Astoria and America's Discovery claims to the Pacific Northwest); James Simsarian, *The Acquisition of Legal Title to Terra Nullius*, 53 POL. SCI. Q. 111, 120-24 (1938) (Russia and England both relied on arguments of first discovery and occupation). The United States disputed Russia's Discovery claim on the basis that ownership required permanent occupation. V AMERICAN STATE PAPERS, *supra* note 96, at 436-37, 449, 791 (John Quincy Adams July 1823 letter to Russia that occupation was required to gain title over *terra nullius*). Jefferson joined the argument in 1816. X THE WRITINGS OF THOMAS JEFFERSON 93 (Andrew A. Lipscomb & Albert Ellery Bergh, eds., 1903) (letter of Dec. 31, 1816: "If we claim [the Pacific Northwest], it must be on Astor's settlement near the mouth of the Columbia, and the principle of the *jus gentium* [international law] of America that when a civilized nation takes possession of the mouth of a river in new country, that possession is considered as including all its waters."); Joseph Schafer, *The British Attitude Toward the Oregon Question, 1815-1846*, 16 THE AMERICAN HISTORICAL REVIEW 283-86 (No. 2 Jan. 1911).

<sup>97</sup> The diplomatic arguments based on Discovery raged for decades. See, e.g., MERK, *supra* note 96, at 22-35, 68-69, 164-66, 185-88, 395-412; IV AMERICAN STATE PAPERS, *supra* note 96, at 331 (Oct. 1818 letter to Secretary of State John Quincy Adams arguing that the U.S. Discovery claim arose from the discovery of the Columbia by the American Robert Gray, and because America "first explored [it], from its sources to

The facts demonstrate that the United States Constitution, the Congress, and the Executive Branch utilized the Doctrine of Discovery. These federal entities understood the property and sovereign rights that Discovery granted the United States over the Indian Nations and their lands. The federal government continues to exercise this power over the American Indian Nations to this day.<sup>98</sup>

It is worthwhile to note the following quotation from *Johnson v. M'Intosh* because it demonstrates most of the elements of Discovery.

The United States, then, have unequivocally acceded to that great and broad rule [Discovery] by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.<sup>99</sup>

#### D. Discovery and Manifest Destiny

We will now highlight a few points to demonstrate the use of the Doctrine of Discovery as America expanded across the continent. Thomas Jefferson, in particular, exemplified a working day-to-day knowledge of Discovery and used its principles against the Indian Nations within the thirteen states, in the trans-Appalachia area, the Louisiana Territory, and the Pacific Northwest. In fact, Jefferson's dispatch of Lewis and Clark in 1803 was directly targeted at the mouth of the Columbia River in the Oregon Country to strengthen the United States' Discovery claim to that area. Lewis and Clark and their "Corps of Northwestern Discovery"<sup>100</sup> complied with Jefferson's instructions and helped

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ocean, by Lewis and Clark . . . [and] Astoria was also the first permanent establishment"); *id.* Vol. V, at 436-37, 449, 554-58, 791 (August 1824 letter to Secretary of State John Quincy Adams regarding the U.S. claim to "absolute and exclusive sovereignty and dominion" of the Northwest based "upon their first, prior discovery" by Robert Gray, actual possession of the Columbia due to "its exploration to the sea by Captains Lewis and Clarke [sic]" and the permanent occupancy of the "vacant territory" due to the building of the Astoria trading post in 1811); *id.* Vol. VI, at 644, 652-53, 666-70 (Nov. 1826 letter to Henry Clay, Secretary of State, arguing that the U.S. owned the Northwest by "discoveries, viz: the mouth of Columbia river by Captain Gray" and Lewis & Clark and that this was "the established usage amongst nations" and that the U.S. claimed the area "by right of discovery . . . our settlement of Astoria" and because England had no settlements on the Columbia "even so late as at the time when that river was explored by Lewis and Clark"). England argued that it had "first discovery," actual "possession," and "occupation" of the Pacific Northwest. It discounted "the alleged discovery of the Columbia river by Mr. Gray . . . the first exploration, by Lewis and Clark . . . and also the alleged priority of settlement." *Id.* Vol. V, at 555-57. *See also id.* at Vol. VI, at 663-66 (England discounted America's claim that "prior discovery constitutes a legal claim to sovereignty" and "the discovery of the sources of the Columbia, and by the exploration of its source to the sea, by Lewis and Clark, in 1805-'6.'").

<sup>98</sup> Miller, 42 IDAHO L. REV., *supra* note 12, at 104-17.

<sup>99</sup> *Johnson*, 21 U.S. at 587. Thus, Indian titles could be extinguished by treaty, purchase, or conquest.

<sup>100</sup> MILLER, NATIVE AMERICA, *supra* note 1, at 110.

to solidify the U.S. claim. The United States then argued with Russia, Spain, and England for four decades that it owned the Northwest under international law because of its first discovery of the Columbia River through Robert Gray in 1792, the first inland exploration and occupation of the area by Lewis and Clark in 1805-06, and then John Jacob Astor's construction of the first permanent settlement in 1811.<sup>101</sup>

After the Lewis and Clark expedition, American history is dominated by an erratic but fairly constant advance of American interests across the continent under the principles of the Doctrine of Discovery. This was not an accident but was instead the expressed goal of Presidents Jefferson, Madison, Monroe, John Quincy Adams, Polk, and a host of other American politicians and citizens. "Manifest Destiny" is the name that was ultimately used to describe this predestined and divinely inspired advance.

Historians identify three basic aspects of American Manifest Destiny. We argue that these aspects arose directly from the elements of the Doctrine of Discovery. First, Manifest Destiny assumes that the United States has unique moral virtues. Second, Manifest Destiny asserts that the United States has a mission to redeem the world by spreading republican government and the American way of life around the globe. Third, Manifest Destiny has a messianic dimension, because it assumes America has a divinely ordained destiny to accomplish these tasks.<sup>102</sup> This kind of thinking could only arise from an ethnocentric view that one's own government, culture, race, religion, and country are superior to all others. This same kind of thinking justified and motivated the development of the Doctrine of Discovery in the fifteenth century and then created Manifest Destiny in the nineteenth century.

The phrase Manifest Destiny was apparently not used to define American expansionism until 1845. But the idea that it was the destiny of the United States to control and dominate North America was obvious long before 1845. Instead of being a new idea, Manifest Destiny grew out of the elements of the Doctrine of Discovery, Thomas Jefferson's ambitions, and the Lewis and Clark expedition.

When Lewis and Clark returned to St. Louis in 1806, however, America's destiny to expand to the Pacific Ocean was not so clear.<sup>103</sup> Yet to Meriwether Lewis, who had just made that arduous voyage, the idea of the U.S. owning the Pacific Northwest was not farfetched. Instead, he wrote President Jefferson in September 1806 that the United States should develop the continental fur trade from the mouth of the Columbia River. Lewis wrote that the United States "shall shortly derive the benefits of a most lucrative trade from this source, and that in the course of ten or twelve years a tour across the Continent by the rout mentioned will be undertaken by individuals with as little concern as a voyage across the Atlantic is at present."<sup>104</sup>

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<sup>101</sup> *Id.* at 77-114.

<sup>102</sup> WILLIAM EARL WEEKS, *BUILDING THE CONTINENTAL EMPIRE: AMERICAN EXPANSION FROM THE REVOLUTION TO THE CIVIL WAR* 60-61, 110 (1996); DEBORAH L. MADSEN, *AMERICAN EXCEPTIONALISM* 1-2 (1998); REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLI-SAXONISM* 86 (1981).

<sup>103</sup> JULIUS W. PRATT, *EXPANSIONISTS OF 1812* 12-14, 261 (1957); WEEKS, *supra* note 102, at 28-29; 3 *OVERLAND TO THE PACIFIC: WHERE ROLLS THE OREGON: PROPHET AND PESSIMIST LOOK NORTHWEST* xiii & 5 (Archer Butler Hulbert ed., 1933).

<sup>104</sup> 1 *LETTERS OF THE LEWIS AND CLARK EXPEDITION WITH RELATED DOCUMENTS 1783-1854* 320 (Donald

Lewis was not telling Jefferson anything new. It seems clear that Jefferson expressly directed the Lewis and Clark expedition to the mouth of the Columbia River precisely to strengthen the U.S. claim to the Oregon Country based on the 1792 first discovery of the river by the American Robert Gray. In fact, Senator Thomas Hart Benton, the main spokesman for over thirty years that the United States should settle Oregon, stated that he got his ideas from Jefferson himself.<sup>105</sup>

The advocates of Manifest Destiny then used the Doctrine of Discovery and its elements to prove that it was America's destiny to reach the Pacific. For example, when the New York journalist John L. O'Sullivan first used the phrase Manifest Destiny in July 1845, he used the term to argue that America should annex Texas.<sup>106</sup> In his second use of the phrase, on December 27, 1845, O'Sullivan wrote a very influential editorial about the Oregon Country entitled "The True Title."<sup>107</sup> Interestingly, O'Sullivan expressly utilized the Doctrine of Discovery in arguing that the United States already held title to Oregon. He then relied on Manifest Destiny and Divine Providence as secondary arguments.

Our *legal title* to Oregon, so far as law exists for such rights, is perfect. Mr. Calhoun and Mr. Buchanan [U.S. Secretaries of State] have settled that question, once and for all. Flaw or break in the triple chain of that title, there is none. Not a foot of ground is left for England to stand upon, . . . [U]nanswerable as is the demonstration of our legal title to Oregon . . . we have a still better title than any that can ever be constructed out of all these antiquated materials of *old black-letter international law*. Away, away with all these cobweb tissues of *right of discovery, exploration, settlement, continuity, &c.* . . . were the respective cases and arguments of the two parties, as to all these points of history and law, reversed—had England all ours, and we nothing but hers—our claim to Oregon would still be best and strongest. And that claim is by the right of our *manifest destiny to overspread and to possess the whole of the continent* which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us. . . . [In England's hands, Oregon] must always remain wholly useless and worthless for any purpose of human *civilization* or society. . . . The God of nature and of nations has marked it for our own; and with His blessing we will firmly maintain the incontestable rights He has given, and fearlessly perform the high duties He has imposed.<sup>108</sup>

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Jackson ed., 2<sup>nd</sup> ed., 1978).

<sup>105</sup> 3 OVERLAND TO THE PACIFIC, *supra* note 103, at 42, 101; I THOMAS HART BENTON, THIRTY YEARS' VIEW; OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820-1850 14, 52, 54 (1856, Reprint 1968); *Register of Debates in Congress*, 18<sup>th</sup> Cong., 2<sup>nd</sup> Sess., at 700, 705, 711-13; *Gales & Seaton's Register*, 699-700; 1 *Cong. Debates* 705-06 (1825); WILLIAM NISBET CHAMBERS, OLD BULLION BENTON: SENATOR FROM THE NEW WEST 82-84 (1956).

<sup>106</sup> *Annexation*, 17 UNITED STATES MAGAZINE AND DEMOCRATIC REVIEW 5 (July 1845) (quoted in Julius W. Pratt, *The Origin of 'Manifest Destiny,'* 32 THE AMERICAN HISTORICAL REVIEW 795, 798 (July 1927)).

<sup>107</sup> NEW YORK MORNING NEWS, Dec. 27, 1845 (quoted in Julius W. Pratt, *The Origin of 'Manifest Destiny,'* 32 THE AMERICAN HISTORICAL REVIEW 795, 796 (July 1927)).

<sup>108</sup> *Id.* (emphasis added).

“Black-letter international law,” “civilization,” the “right of discovery, exploration, settlement, continuity”—can there be any question that O’Sullivan used the elements of the Doctrine of Discovery to justify America’s legal title to Oregon?

One event deserves special emphasis. In 1817, Secretary of State John Quincy Adams and President Monroe decided to reoccupy Astoria at the mouth of the Columbia River to reassert America’s claim to the Oregon Country. This was necessary because England had captured the post in the War of 1812. The mission was designed, they wrote, “to assert the [American] claim of territorial possession at the mouth of [the] Columbia river.”<sup>109</sup> Adams wrote that the mission was “to resume possession of that post [Astoria], and in some appropriate manner to reassert the title of the United States.”<sup>110</sup> The President and Secretary of State were discussing nothing less than using the rituals of Discovery to reassert the U.S. claim to Oregon.

Monroe and Adams then dispatched John Prevost and Captain William Biddle in September 1817 to take symbolic possession of Astoria. It should be no surprise that the actions they took to protect America’s Discovery claim on the Pacific coast were accomplished by Discovery rituals. In fact, they were just carrying out the orders Monroe and Adams gave them to “assert there the claim of sovereignty in the name of . . . the United States, *by some symbolical or other appropriate mode of setting up a claim of national authority and dominion.*”<sup>111</sup>

In August 1818, on the north side of the mouth of the Columbia River Biddle raised the U.S. flag, turned some soil with a shovel, just like the delivery of seisin ritual from feudal times, and nailed up a lead plate which read: “Taken possession of, in the name and on the behalf of the United States by Captain James Biddle, commanding the United States ship Ontario, Columbia River, August, 1818.”<sup>112</sup> He then moved upriver and repeated these rituals on the south side. Thereafter, John Prevost arrived at Astoria in October and staged a joint Discovery ritual. The English flag at Fort Astoria was lowered and the U.S. flag raised in its place. The English troops fired a salute and papers of transfer were signed by the English Captain, the Northwest Company agent, and Prevost.<sup>113</sup> The American Discovery claim to the Pacific Northwest was again in place.

Jumping ahead several decades, we see Discovery and its elements used in the

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<sup>109</sup> VI THE WRITINGS OF JOHN QUINCY ADAMS 1816-1819 204-05, 366, 372-73 (Worthington Chauncey Ford ed., 1916; Reprint 1968).

<sup>110</sup> *Id.*

<sup>111</sup> MERK, *supra* note 96, at 17-18, 22-23 [italics added]. *See also* WEEKS, *supra* note 102, at 50; JAMES P. RONDA, *ASTORIA & EMPIRE* 308-15 (1990).

<sup>112</sup> MERK, *supra* note 96, at 22-23; III OREGON HISTORICAL QUARTERLY, 310-11 (Sept. 1902); XIX OREGON HISTORICAL QUARTERLY, at 180-87 (Sept. 1918); XX OREGON HISTORICAL QUARTERLY, 322-25 (Dec. 1919); MICHAEL GOLAY, *THE TIDE OF EMPIRE: AMERICA’S MARCH TO THE PACIFIC* 15 (2003); SEED, *CEREMONIES OF POSSESSION*, *supra* note 4, at 9 & n.19, 69-73, 101-02.

<sup>113</sup> RONDA, *supra* note 111, at 314-15; MERK, *supra* note 96, at 23-24; *House Document No. 112*, 17<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 13-19; *Annals of Congress*, 17<sup>th</sup> Cong., 2<sup>nd</sup> Sess., at 246; GOLAY, *supra* note 112, at 65.

1840s to justify American expansion into Oregon. The Democratic Party brought the issues to a head and included in its platform for the 1844 presidential election a Discovery demand to occupy Oregon. The platform stated that “our title to the whole of the Territory of Oregon is clear and unquestionable; that no portion of the same ought to be ceded to England or any other power; and that the re-occupation of Oregon and the reannexation of Texas at the earliest practicable period are great American measures.”<sup>114</sup>

The Democrat, James K. Polk, campaigned vigorously on these issues and. His election slogan was about the Oregon Country - “54-40 or fight.” Thus, Polk was claiming as American territory the entire drainage system of the Columbia River, into much of present day British Columbia. The 1844 election was considered to be about American expansion and Polk’s victory was seen as a mandate for expansion.

In his inaugural address on March 4, 1845, Polk addressed the Oregon question and Discovery. While discussing “our territory which lies beyond the Rocky Mountains,” he stated that the United States “title to the country of the Oregon is ‘clear and unquestionable,’ and already are our people preparing to perfect that title by occupying it . . . .”<sup>115</sup> The opening of the Northwest and the “extinguish[ing]” of the “title of numerous Indian tribes to vast tracts of country”<sup>116</sup> for American settlement was a good thing, according to Polk.

Furthermore, in October 1845, President Polk and Senator Benton of Missouri engaged in an amazing discussion about the U.S. claim to Oregon. They agreed that international law, first discovery, contiguity, discovery rituals, and occupation proved that the U.S. owned Oregon.<sup>117</sup> They were clearly applying Discovery and Manifest Destiny to the Oregon Country. Thereafter, in December 1845, Polk delivered his First Annual Message to Congress and discussed the Oregon question at great length. He stated that “our title to the whole Oregon Territory . . . [is] maintained by irrefragable [irrefutable] facts and arguments” and he asked Congress to decide how to maintain “our just title to that Territory.”<sup>118</sup> He was equally confident that the evidence of Discovery proved that “the title of the United States is the best now in existence.”<sup>119</sup> He also claimed that under international law England did not have a valid claim to the Pacific Northwest because “the British pretensions of title could not be maintained to any portion of the Oregon Territory upon any principle of public law recognized by nations.”<sup>120</sup>

Ultimately, in 1846, the United States guaranteed its expansion to the Pacific

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<sup>114</sup> WEEKS, *supra* note 102, at 105; VI *Oregon Historical Quarterly*, p. 271.

<sup>115</sup> 4 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 380-81 (James D. Richardson ed., 1910).

<sup>116</sup> *Id.*

<sup>117</sup> FREDERICK MERK, THE MONROE DOCTRINE AND AMERICAN EXPANSIONISM 1843-1849 65-66 (1968); CHAMBERS, *supra* note 105, at 296.

<sup>118</sup> 4 COMPILATION, *supra* note 115, at 392-97.

<sup>119</sup> *Id.* at 394-99.

<sup>120</sup> *Id.*



coast by signing a treaty with England and, in the 1850s, when it concluded treaties with tribal governments and exercised its preemption right to buy the Indian title to most of the land in the Oregon and Washington territories.<sup>121</sup>

### III. THE DOCTRINE OF DISCOVERY IN NEW ZEALAND LAW

On the British stage of colonization, New Zealand often heralds itself as different and thus better than other colonies in developing relationships with its Indigenous peoples (in particular, superior to its neighbor Australia). This is largely asserted in reference to high intermarriage statistics and the Treaty of Waitangi – a series of documents signed by a representative of the British Crown and more than 500 Maori chiefs in 1840.<sup>122</sup> However, close analysis of the events surrounding British assertion of sovereignty in New Zealand including the signing of the Treaty and its subsequent interpretation by the courts, and today, by Parliament, indicates a less than idyllic picture. We argue here that the ideology of the Doctrine of Discovery, rather than cession, has been alive and well in New Zealand's legislature and courts since their origin. New Zealand has been, and continues to be, caught in the colonial web of the Doctrine in a similar manner to other British colonized countries, including the United States. This is shown in four instances. The first part focuses on the annexation of New Zealand; the second part on an early case to consider the Treaty and the common law, *R v Symonds*;<sup>123</sup> the third part on a case that overtly embraced Discovery, *Wi Parata*;<sup>124</sup> and, the last part on a contemporary case that banished the Discovery mindset in 2003, *Ngati Apa*,<sup>125</sup> only for Parliament to resurrect it.

Before delving into this content, it is imperative to provide a short glimpse of this southern hemisphere country. Aotearoa/New Zealand constitutes of two large islands (the North Island and the South Island), a smaller third island (Stewart Island), and numerous other small islets. The majority of the population live on the North Island (and this was similarly true prior to the arrival of the Europeans). The lands were first discovered and peopled by the Maori tribes sometime on or after AD 800.<sup>126</sup> It is a mountainous landscape, densely forested with a comparatively cooler climate to the Pacific Islands. It swarmed with birds (many flightless) and teemed with fish. Grouped into distinct peoples, the Maori tribes became, literally, the people of the land. The common language (with regional dialectal differences) captured this interrelationship. For

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<sup>121</sup> Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AMER. INDIAN LAW REV. 165, 189-99 (2001); Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OREGON LAW REV. 543, 552-56 (1991).

<sup>122</sup> First Schedule of the *Treaty of Waitangi Act 1975* or the Government's official Treaty website: <http://www.treatyofwaitangi.govt.nz>. To better understand the role of the Crown in New Zealand see Noel Cox, *The Treaty of Waitangi and the Relationship between Crown and Maori in New Zealand*, 28 BROOKLYN JOURNAL OF INTERNATIONAL LAW 123 (2002).

<sup>123</sup> *Regina v. Symonds* [1847] N.Z.P.C.C. 387, 388.

<sup>124</sup> *Wi Parata v. Bishop of Wellington* [1877] 3 N.Z. Jur. (NS) 72.

<sup>125</sup> *Ngati Apa* [2003] 3 N.Z.L.R. 643.

<sup>126</sup> RANGINUI. WALKER, KA WHAWAHI TONU MATOU: STRUGGLE WITHOUT END 24 (2004). Others put it at about AD 1200. MICHAEL. KING, THE PENGUIN HISTORY OF NEW ZEALAND 48 (2003).

instance, *hapu* means sub-tribe and to be pregnant; *whanau* means family and to give birth; and *whenua* means land and afterbirth. Of the about forty distinct *iwi* (tribes), and hundreds of *hapu*, each derived their identity from the mountains, rivers, and lakes.<sup>127</sup>

New Zealand is a unicameral country. Its appeal courts constitute (in order): the High Court, Court of Appeal, and since 2002, the Supreme Court (prior to 2002, the Privy Council was New Zealand's last judicial bastion).<sup>128</sup> Under its constitutional system, Parliament is supreme and has no formal limits to its law-making power.<sup>129</sup> The Treaty of Waitangi is not part of the domestic law. Since the 1980s, the Treaty is commonly said to form part of its informal constitution along with the New Zealand Bill of Rights Act 1990 and the Constitution Act 1986. Therefore, for the judiciary or those acting under the law, the Treaty itself usually only becomes relevant if it has been expressly incorporated into statute. Even so, statutory incorporation of the Treaty has been a relatively recent phenomenon. It was once endorsed in the courts "as a simply nullity."<sup>130</sup> It was not until the 1970s, when Maori visibly took action to highlight Treaty breaches, that the Treaty began to gain mainstream recognition and, in turn, the attention of those in Parliament and the judiciary.

At one level New Zealand's colonial experiences resonate strongly with Indigenous peoples' experiences in Canada, Australia, and the United States. British colonization undeniably shattered who Maori were; disease and warfare decimated the population and legislation criminalized the Maori way of life. But the tools for colonization and the recent remedies to overcome the disasters of colonization are in many ways unique to this South-West Pacific island country. There exists a single treaty of cession, the Treaty of Waitangi, and legal institutions with counterparts not found elsewhere: the Maori Land Court and the Waitangi Tribunal. Today, Maori, as a significant and visible component of the population (currently constituting over 15 per cent of Aotearoa/New Zealand's 4 million people), are rebuilding their communities and ways of knowing. This part of this Article focuses on the permeance of the Doctrine of Discovery in Aotearoa/New Zealand.

#### *A. Claiming Sovereignty: 1840*

In 1840, the British claimed sovereignty of the lands through a mix of Doctrine of Discovery principles and the partially signed Treaty of Waitangi. Following the British explorer Captain James Cook's first visit to and circumnavigation of Aotearoa in 1779, European (consisting mostly of British and to a lesser extent French) explorers, whalers and missionaries began arriving, bringing with them their own distinct worldview, technology, goods and animals. In the 1830s two European countries were seriously

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<sup>127</sup> For an introduction to Maori mythology, see ROSS CALMAN AND A.W. REED, REED BOOK OF MAORI MYTHOLOGY (2004).

<sup>128</sup> See Supreme Court Act 2003. To view New Zealand legislation see [www.legislation.govt.nz](http://www.legislation.govt.nz).

<sup>129</sup> To better understand New Zealand's constitutional system see PHILLIP JOSEPH, CONSTITUTIONAL & ADMINISTRATIVE LAW IN NEW ZEALAND (2007); Matthew Palmer, *Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution*, 29(1) DALHOUSIE L. J. 1 (2007).

<sup>130</sup> *Wi Parata* (1877) 3 N.Z. Jur. (NS) 72, 78.

interested in claiming sovereignty of all, or parts, of New Zealand: Britain and France. Britain strategically acknowledged the independent sovereignty of some of the Maori tribes in 1835,<sup>131</sup> and then set about annexation. There is no clear date upon which New Zealand became a British colony. The whole process has been described as “tortuous,”<sup>132</sup> and involved six or so interrelated events.

The first concerned the Letters Patent of June 15 1839 which amended the Commission of the Governor of New South Wales by enlarging this Australian colony to include “any territory which is or may be acquired in sovereignty by Her Majesty . . . within that group of Islands in the Pacific Ocean, commonly called New Zealand . . . .”<sup>133</sup> The appointment of Captain Hobson as Lieutenant-Governor of the New Zealand dependency on January 14 1840 constituted the second event. The third draws attention to the three Proclamations published by Gipps on January 19 1840 proclaiming 1) that the jurisdiction of the New South Wales Governor extended to New Zealand; 2) that the oaths of office had been administered to Hobson as Lieutenant-Governor; and 3) that no title to land in New Zealand purchased henceforth would be recognized unless derived from the Crown and that Commissioners would be appointed to investigate past purchases of land from Maori.<sup>134</sup> The initial signing of a “treaty of cession” at Waitangi on February 6 1840 is taken as the fourth event. The fifth concerns Hobson’s Proclamations of full British sovereignty over all of New Zealand on May 21 1840. The sixth is the ratification of Hobson’s Proclamations by their publication in the *London Gazette* on October 2 1840.<sup>135</sup>

To explore a little further, by the late 1830s, Britain officially sought to pursue sovereignty of New Zealand via means of cession if possible (treaty-making was in vogue at that time for both British and French colonialists) or, if necessary, by asserting Discovery. On 14 August 1839, the British Government issued instructions to Captain Hobson in New Zealand stating:

we acknowledge New Zealand as a Sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown.

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<sup>131</sup> To read the Declaration of Independence and commentary, see CLAUDIA ORANGE, *AN ILLUSTRATED HISTORY OF THE TREATY OF WAITANGI* 13-16 (2004).

<sup>132</sup> David V. Williams, *The Foundation of Colonial Rule in New Zealand*, 13 *NEW ZEALAND UNIVS. L. REV.* 54, 56 (1988).

<sup>133</sup> David V. Williams, *The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi*, 2 *AUSTRALIAN J. L. & SOC.* 41, 41-42 (1985) (citing A.H. MCLINTOCK, *CROWN COLONY GOVERNMENT IN NEW ZEALAND* 49 (1958)).

<sup>134</sup> David V. Williams, *The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi*, 2 *AUSTRALIAN J. L. & SOC.* 41, 41-42 (1985) (citing 3 *BRITISH PARLIAMENTARY PAPERS, COLONIES, NEW ZEALAND, SESSIONS 1835-42* (1970)).

<sup>135</sup> The six events are set forth and explored in David V. Williams, *The Foundation of Colonial Rule in New Zealand*, 13 *NEW ZEALAND UNIVS. L. REV.* 54 (1988).

The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained.<sup>136</sup>

Hobson immediately sought further directions, claiming in his letter to the Colonial Office that the development of the inhabitants of the North and South Islands was "essentially different" and that "with the wild savages in the Southern Islands, it appears scarcely possible to observe even the form of a Treaty."<sup>137</sup> He suggested that he might be permitted to claim the south by right of Discovery. Apparently Hobson had never been to the South Island. The rationale for such a stance probably lay in the fact that the French had a foothold in parts of the South Island, notably at Akaroa on the Banks Peninsula. Lord Normanby, the Secretary of State for the Colonies, in his reply of 15 August 1839, said that if, as Hobson supposed, South Island Maori were incapable "from their ignorance of entering intelligently into the Treaty with the Crown" then he might assert sovereignty on the grounds of Discovery.<sup>138</sup>

The 'treaty of cession' in English and Maori was presented for signing at Waitangi, a small settlement in the north of the North Island, in early February 1840. Forty-three Maori chiefs, mostly from the northern tribe Nga Puhi, assented to the Maori version of the Treaty on February 6. Hobson, and his party, then traveled through the North Island seeking more signatures. In May 1840, Hobson learned that the New Zealand Company settlement at Port Nicholson (now Wellington) had decided to preempt the Treaty process and establish its own form of government. Infuriated by this, Hobson immediately issued two proclamations of sovereignty, one over the North Island 'by right of cession' and the other over the South Island 'by right of discovery.'<sup>139</sup> The proclamations were made on May 21 1840. Meanwhile, Major Thomas Bunbury, under orders from Hobson, had proceeded to the South Island to seek signatures if possible to the Treaty of Waitangi. On May 30 1840, two Maori chiefs of the Ngai Tahu tribe signed the Treaty at Akaroa. Bunbury then traveled down to the smaller southern Stewart Island, and landed at a part uninhabited. He duly proclaimed British sovereignty over Stewart Island based on Cook's Discovery. Bunbury began his return journey calling in at a very small offshore island, Ruapuku Island, and successfully attained the signature of three Maori chiefs on June 10 1840. Two chiefs at the Maori village at Tairaroa, at the head of the Otago harbour, marked the third and final signature point in the South Island.

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<sup>136</sup> As reported by the Waitangi Tribunal. 2 *Ngai Tahu Report* (Wai 27) 219 (1991).

<sup>137</sup> *Id.* 215.

<sup>138</sup> *Id.* at 215-16.

<sup>139</sup> See Tipene O'Regan, *The Ngai Tahu Claim*, in WAITANGI: MAORI & PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 300-12 (I.H. Kawharu ed., 1989). See also CLAUDIA ORANGE, THE TREATY OF WAITANGI 58 (1987); WALKER, KA WHAWHAI TONU MATOU, *supra* note 126 at 97, noting that Hobson "proclaimed South Island on the basis that it was *terra nullius*, thereby ignoring the existence of the Ngai Tahu. Only the arrogance born of metropolitan society and the colonizing ethos of the British Empire was capable of such self-deception, which was hardly excused by the desire to beat the imminent arrival of the French at Akaroa.").

Calling in at Cloudy Bay, on June 17 1840, Bunbury formally proclaimed the British Queen's sovereignty over the South Island based on cession.<sup>140</sup>

The Treaty of Waitangi is a short document, consisting of three articles expressed in English and Maori. The controversy today lies in the translation of the first two articles.<sup>141</sup> According to the English version, Maori ceded to the Crown absolutely and without reservation all the rights and powers of sovereignty (article 1), but retained full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties (article 2). In contrast, in the Maori version, Maori ceded to the Crown governance only (article 1), and retained *tino rangatiratanga* (sovereignty) over their *taonga* (treasures). Article 2 granted the Crown a pre-emptive right to purchase property from Maori, and article 3 granted Maori the same rights and privileges as British citizens living in Aotearoa/New Zealand. The English version of the Treaty encapsulates the principles of the Doctrine of Discovery; the Maori version purports a blueprint for a different type of future bound more in respectful separation.

The bilingual treaty of cession was certainly a unique contractual agreement not replicated elsewhere.<sup>142</sup> Humanitarian interests,<sup>143</sup> along with the need to control the unruly behavior of some of the new settlers, and to keep at bay the interests of France and to a lesser extent the United States of America, contributed to the British desire for a signed treaty. Maori chiefs signed for similarly numerous reasons. On the face of it, the Treaty looked as if it was asking little of them and offering them much in return. They expected trade to increase, to receive assistance in handling the new changes occurring in society, and “not least, the possibility of manipulating British authority in inter-tribal rivalries.”<sup>144</sup>

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<sup>140</sup> See ORANGE, THE TREATY, *supra* note 139, at 60-91; Tipene O'Regan, *The Ngai Tahu Claim*, in WAITANGI: MAORI & PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 239-42 (I.H. Kawharu ed., 1989); Waitangi Tribunal, *Ngai Tahu Report 1991*. Vol 2 (Wai 27, 1991).

<sup>141</sup> For an analysis of the textual problems with the Treaty, see Bruce Biggs, *Humpty-Dumpty and the Treaty of Waitangi*, in WAITANGI: MAORI & PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 300-12 (I.H. Kawharu ed., 1989); R.M. Ross, *Te Tiriti o Waitangi. Texts and Translations*, 6(2) NEW ZEALAND J. HISTORY 129 (1972) (also reprinted in THE SHAPING OF HISTORY: ESSAYS FROM THE NEW ZEALAND JOURNAL OF HISTORY (Judith Binney ed., 2001).

<sup>142</sup> See William Renwick, *A Variation of a Theme*, in SOVEREIGNTY & INDIGENOUS RIGHTS: THE TREATY OF WAITANGI IN INTERNATIONAL CONTEXTS 199, 207 (William Renwick ed., 1991) (explaining that by the time the treaties were signed on Vancouver Island, BC, Canada - a mere decade later - “British imperial policy was determined by strategic considerations not humanitarian intentions”). See also Caren Wickliffe, *Te Timatanga: Maori Women's Access to Justice* 8(2) YEARBOOK OF NEW ZEALAND JURISPRUDENCE SPECIAL ISSUE – TE PURENGA 217, 229 (2005) (asserting that “The Treaty of Waitangi is fundamentally different to treaties in the Americas ... did not deal with the sovereign status of indigenous polities”).

<sup>143</sup> In particular see the instructions issued by the Permanent Under-Secretary of the Colonial Office responsible for British policy in New Zealand, James Stephen. PETER ADAMS, THE FATAL NECESSITY: BRITISH INTERVENTION IN NEW ZEALAND 1830-1847 (1977); David V. Williams, *The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi*, 2 AUSTRALIAN J. L. & SOC. 41 (1985).

<sup>144</sup> ORANGE, THE TREATY, *supra* note 139, at 58. Note that a colonial government was established in 1852 pursuant to the Constitution Act 1852. For more discussion see PETER SPILLER, JEREMY FINN, RICHARD BOAST (eds), A NEW ZEALAND LEGAL HISTORY (2<sup>d</sup> ed., 2001).

Nonetheless, while the shiny surface of the day may well have reflected a treaty of cession, the Maori version did not and neither did other colonial actions at the time. The inconsistencies lead us to argue here that the English version of the Treaty provided a harmonious gloss of overt cession, whereas the reality lies deeper in the covert Doctrine of Discovery-type actions pursued by the British colonials. For instance, there are the proclamations made pre- the drafting and initial signing of the Treaty; there is Hobson's instruction to seek signatures from South Island Maori followed by his proclamation of discovery over the South Island because those Maori are uncivilized; and, not all Maori chiefs signed the Treaty therefore leaving large tracts of land outside the province of cession despite proclamations asserting cession over the whole country. Even taking a liberal view of the English version of the Treaty, it is questionable whether it does more than the common law principle of Discovery.<sup>145</sup>

### B. Symonds 1847

Following the signing of the Treaty of Waitangi, the British had begun to make serious inroads into acquiring large tracts of land for British settlement. At issue were those Europeans who had purchased land directly from Maori prior to 1840. Did they hold a valid title? The purchasers argued yes because the British Crown had recognized the sovereignty of Maori – in the Declaration of Independence and in seeking a treaty of cession – and therefore Maori must be deemed to have had “the power to alienate land like any other sovereign.”<sup>146</sup> The argument found no favor, and as Dr. Paul McHugh observed “showed the extent to which the American case-law had disseminated through the colonies.”<sup>147</sup> The issue of individuals' rights to purchase land from Maori post 1840 was settled by *R v Symonds*.<sup>148</sup>

In 1847, this case served to reinforce the sovereign rights of Britain in New Zealand. The facts of the case are similar to *Johnson v M'Intosh*, where the U.S. Supreme Court refused to recognize the validity in law of title to land purchased by individuals directly from the Indian owners. In *Symonds*, essentially, a British individual purchased land directly from Maori in accordance with a certificate issued by Governor Fitz Roy allowing him to do so. The question that occupied the courts was whether the individual, Mr. C Hunter McIntosh, had acquired legal title to the property? Both judges sitting on the case said no, and both did so by drawing on United States jurisprudence. This case is said to represent the foundational principles of the common law relating to

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<sup>145</sup> Thus we would dispute P.G. McHugh's claims that “the Crown's acquisition of the sovereignty of New Zealand was premised at all times on the original sovereignty of the Maori chiefs” and “[t]he Crown thus recognized the original sovereignty of Maori over New Zealand. In moving towards the acquisition of sovereignty the Colonial office considered and rejected the possibility of an approach resembling Marshall's ‘doctrine of discovery’ which would have allowed the Crown to issue constituent instruments without reference to Maori consent.” P.G. MCHUGH, *ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION* 166-67 (2004).

<sup>146</sup> *Id.* at 168.

<sup>147</sup> *Id.*

<sup>148</sup> (1847) N.Z.P.C.C. 387.

Maori.<sup>149</sup> It was the first case to explicitly rely on the Doctrine of Discovery ideology in New Zealand law.

The most famous quote in the case is that stated by Justice Chapman:

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country; whatever may be their present clearer and still growing conception of their own dominion over land, *it cannot be too solemnly asserted that it is entitled to be respected, and it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.* But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the *Queen's exclusive right to extinguish it.* It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, *the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.*<sup>150</sup>

The case held that the Queen had the *exclusive* right of pre-emption to purchase land from Maori as articulated in the Treaty. Justice Chapman observed that the "intercourse of civilised nations"<sup>151</sup> (namely, Great Britain) with Indigenous communities (especially in North America) had led to established principles of law. This law, founded in the Doctrine of Discovery and encapsulated in the common law doctrine of native title, stipulates that the Queen's preemptive right is exclusive. Thus, the Crown is the sole source of title for settlers. This was the exact same outcome as in *Johnson*. Both judges in *Symonds* relied heavily on the U.S. Chief Justice John Marshall's judgments.<sup>152</sup>

Justice Chapman, in particular, had been following the United States Supreme Court decisions. Chapman stated in an 1840 article, in reference to *Johnson* and *Worcester v. Georgia*:<sup>153</sup>

discovery gave the Government by whose subjects or authority it was made, a title to the country and a sole right of acquiring land from the natives, *as against all European powers.* . . . it must be clear, that the rights reserved to the native tribes could only be of modified character, but whether those rights were abridged or extensive – whether they were confined to a mere right of occupation, or amounted to something deserving the name of sovereignty,

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<sup>149</sup> See, e.g., Mark Hickford, *Settling Some Very Important Principles of Colonial Law: Three 'Forgotten' Cases of the 1840s*, 34 VICTORIA UNIV. WELLINGTON L. REV. 1 (2003).

<sup>150</sup> *Symonds* (1847) N.Z.P.C.C. 387, 390 (emphasis added).

<sup>151</sup> *Id.* at 388.

<sup>152</sup> MCHUGH, *supra* note 145, at 42 ("There is a strong congruence between the styles of reasoning in *R v Symonds* and the Marshall cases").

<sup>153</sup> 31 U.S. (6 Pet.) 515 (1832).

was a question which did not affect the relation between the discovering nation and civilised powers.<sup>154</sup>

Justice Chapman, in *Symonds*, observed that in guaranteeing Native title and the Queen's pre-emptive right, "the Treaty of Waitangi . . . does not assert either in doctrine or in practice any thing new and unsettled."<sup>155</sup> While this observation could be disputed, especially on reading the Maori version,<sup>156</sup> the decision marked a covert application of the Doctrine of Discovery. It was to take another 150 years before a court was to hold that Maori have proprietary interests in land despite a change in sovereignty.

### C. Wi Parata 1877

The initial British Governors in Aotearoa/New Zealand exerted a distinct colonialist policy based on the assumption that "Maori were unusually intelligent (for blacks) and that intelligence translated into the desire to become British."<sup>157</sup> Between 1840 and 1860 the tools for this evangelism – God, money, law and land – sought to convert Maori from 'savages' to 'civilisation' via assimilation by the "[M]ixing of the two peoples geographically."<sup>158</sup> But the early evangelism had few complete successes. While many Maori did embrace Christianity, it was not at the exclusion of their own religion; "Maori religion had always been open, able to incorporate new gods."<sup>159</sup> Similarly, while many Maori tribes became commercialized (they dominated the food supply market from growing crops, to transporting and selling to the Pakeha), individualism did not flourish.<sup>160</sup>

By the late 1850s, however, the worlds of some tribes had been radically changed by the now accepted shady land deals. In less than 20 years after the Treaty was signed, the British Crown had acquired most of the land in the South Island and the lower part of the North Island (constituting about 60% of New Zealand's land mass and where about 10% of Maori lived).<sup>161</sup> In most instances the tribes had been duped: on the one hand there was controversy about the actual land included in the purchase agreements, and on the other hand there was disquiet in that the Crown had not set aside land for reserves for

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<sup>154</sup> Henry Chapman, *The English, the French, and the New Zealanders*, THE NEW ZEALAND JOURNAL 49 (4 April 1840) (reprinted in Mark Hickford, *Settling Some Very Important Principles of Colonial Law: Three 'Forgotten' Cases of the 1840s*, 34 VICTORIA UNIV. WELLINGTON L. REV. 1, 13-18 (2003)). See also Mark Hickford, *Making 'Territorial Rights of the Natives: Britain and New Zealand, 1830-1847* (D Phil Thesis University of Oxford, 1999).

<sup>155</sup> *Symonds* (1847) N.Z.P.C.C. 387, at 390; see also at 395 (per Martin CJ).

<sup>156</sup> See Eddie Durie, *The Treaty in Maori History*, in SOVEREIGNTY & INDIGENOUS RIGHTS: THE TREATY OF WAITANGI IN INTERNATIONAL CONTEXTS (William Renwick ed., 1991).

<sup>157</sup> James Belich, *The Governors and the Maori (1840-72)*, in THE OXFORD ILLUSTRATED HISTORY OF NEW ZEALAND 78 (Keith Sinclair ed., 2<sup>d</sup> ed. 1996).

<sup>158</sup> *Id.* at 80.

<sup>159</sup> *Id.* at 78.

<sup>160</sup> *Id.* at 80.

<sup>161</sup> *Id.* at 84.



them as per the agreements.<sup>162</sup> Deeply disturbed by the correlation between selling land and loss of independence, the North Island tribes still with land began turning against land sales. Importantly, the pan-tribal sentiment saw the emergence of the Maori King Movement.<sup>163</sup> Perturbed that land selling would come to an end, and thus the amalgamation of Maori would come to a halt, the British concluded that the ‘law of nature’ required help. A new colonial tool was endorsed in the form of warfare. Instead, in underestimating tribal resistance, the New Zealand wars, which began in March 1860, did not abate until a decade later.<sup>164</sup> A tougher new evangelism emerged during this time with law becoming the central tool in destroying the Maori way of life.

Large tracts of Maori land in the North Island were confiscated pursuant to legislation;<sup>165</sup> legislation stipulated that native schools could only receive funding if the curriculum was taught in the English language<sup>166</sup> (a policy which led to the near extinction of the Maori language and culture, and marginalized Maori “by a deliberate policy of training for manual labour rather than the professions”<sup>167</sup>); and legislation ensured that any person practicing traditional Maori healing could become liable for conviction<sup>168</sup> (a policy which led to the loss of much traditional knowledge<sup>169</sup>).

At the heart of the new cultural genocide<sup>170</sup> crusade was the establishment of the Native Land Court. The Crown now waived its right of pre-emption (as endorsed in the Treaty of Waitangi and common law doctrine of native title) in favour of Maori being able to freely alienate their land. The catch being, they first had to obtain a certificate of title. The system sought to transform land communally held by *whanau* and *hapu* (Maori customary land) into individualized titles derived from the Crown (Maori freehold title). The preamble to the Native Lands Act 1862 explained:

whereas it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands . . . were

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<sup>162</sup> See, e.g., Waitangi Tribunal, *Ngai Tahu Report 1991*. Vol 2 (Wai 27, 1991); Tipene O’Regan, *The Ngai Tahu Claim*, in WAITANGI: MAORI & PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 300-12 (I.H. Kawharu ed., 1989).

<sup>163</sup> For a discussion of Maori resistance movements, including the Maori King Movement, see LINDSAY COX, KOTA HITANGA: THE SEARCH FOR MAORI POLITICAL UNITY (1993).

<sup>164</sup> See JAMES BELICH, THE NEW ZEALAND WARS (1998).

<sup>165</sup> See New Zealand Settlements Act 1863, and Suppression of Rebellion Act 1863.

<sup>166</sup> See Native Schools Act 1858; Native Schools Act 1867 and the Native Schools Act 1871.

<sup>167</sup> Stephanie Milroy & Leah Whiu, *Waikato Law School: An Experiment in Bicultural Legal Education*, 8 YEARBOOK OF NEW ZEALAND JURISPRUDENCE. SPECIAL ISSUE, TE PURENGA 173, 175 (2005).

<sup>168</sup> See the Tohunga Suppression Act 1908.

<sup>169</sup> See Maui Solomon, *The Wai 262 Claim: A Claim by Maori to Indigenous Flora and Fauna: Me o Ratou Taonga Katoa*, in WAITANGI REVISITED: PERSPECTIVES ON THE TREATY OF WAITANGI (cite page numbers not - chp 12 citation) (Michael Belgrave, Merata Kawharu, & David Williams eds, 2005).

<sup>170</sup> For a discussion of this term see D Williams, *Myths, National Origins, Common Law and the Waitangi Tribunal*, 11 MURDOCH UNIV. ELECTRONIC J. L. (2004) (view at [http://www.murdoch.edu.au/elaw/issues/v11n4/williams114\\_text.html](http://www.murdoch.edu.au/elaw/issues/v11n4/williams114_text.html)).

assimilated as nearly as possible to the ownership of land according to British law.<sup>171</sup>

The legislation ensured “Maori could participate in the new British prosperity only by selling or leasing their land”.<sup>172</sup> Or, as Hon. Sewell, a Member of the House Representatives in 1870, reflected, the Act had two objects. One was “to bring the great bulk of the lands of the Northern Island which belonged to the Natives . . . within the reach of colonization.”<sup>173</sup> The other was:

the detribalisation of the Natives, - to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Native race into our own social and political system.<sup>174</sup>

The Doctrine of Discovery ideology was obviously permeating deeply into the colonial mindsets. The Land Court was extraordinarily effective. In the early years:

a predatory horde of storekeepers, grog-sellers, surveyors, lawyers, land-agents and money-lenders made advances to rival groups of Maori claimants and recouped the costs in land. Rightful Maori owners could not avoid litigation and expensive surveys if false claims were put forward, since Fenton [the Chief Judge], seeking to inflate the status of the Court, insisted that judgments be based only upon evidence presented before it.<sup>175</sup>

By the 1930s very little tribal land remained in Maori ownership (today it amounts to 5 per cent of Aotearoa/New Zealand’s total landmass). The Court’s early work has been described as a “veritable engine of destruction for any tribe’s tenure of land,”<sup>176</sup> “a scandal,”<sup>177</sup> and the conquering of a people by pen, not sword.<sup>178</sup>

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<sup>171</sup> Preamble of the Native Lands Act 1862. See also Native Lands Act 1865.

<sup>172</sup> Waitangi Tribunal, *Turanga Tangata. Turanga Whenua: The Report on the Turanganui a Kiwa Claims* 444 (Wai 814, 2004).

<sup>173</sup> 29 August 1870, NZPD, vol 9, at 361 (quoted in DAVID WILLIAMS, *TE KOOTI TANGO WHENUA: THE NATIVE LAND COURT 1864-1909* 87-88 (1999)).

<sup>174</sup> *Id.*

<sup>175</sup> ALAN WARD, *A SHOW OF JUSTICE: RACIAL ‘AMALGAMATION’ IN NINETEENTH CENTURY NEW ZEALAND* 185-86 (1974). See also Williams, *supra* note 173; Richard Boast, *Maori and the Law, 1840-2000*, in PETER SPILLER, JEREMY FINN AND RICHARD BOAST, *A NEW ZEALAND LEGAL HISTORY* 122 (2<sup>d</sup> ed. 2001).

<sup>176</sup> I.H. KAWHARU, *MAORI LAND TENURE: STUDIES OF A CHANGING INSTITUTION* 15 (1977). See also B.D. Gilling, *Engine of Destruction? An Introduction to the History of the Maori Land Court*, 24 VICTORIA UNIV. WELLINGTON L. REV. 115 (1994).

<sup>177</sup> M.P.K. Sorrenson, *The Purchase of Maori Lands, 1865-1892* 146 (1955) (Masters Thesis, Auckland University College, citing NEW ZEALAND HERALD, 2 March 1883, at 4).

<sup>178</sup> Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996).

By the late 1870s, the now-named High Court, in line with the new evangelism, began to rewrite history. The Court, in *Wi Parata v Bishop of Wellington*,<sup>179</sup> denied Maori had sovereignty prior to 1840 and thus rejected the Treaty of Waitangi as a valid treaty. In doing so, the Doctrine of Discovery came to the forefront of judicial reasoning.

The facts of the case start in 1848 when the chief of the Ngati Toa tribe sought to give tribal land at Witireia as an endowment for a school to be established there to educate the tribal children. The chief accordingly entered into a verbal arrangement with the then Lord Bishop of New Zealand. In 1850, a Crown grant was made, without the knowledge or consent of the tribe, to the Lord Bishop. The grant stated that the land had been ceded from Ngati Toa for the school. However, no school of any kind was ever established. The tribe sued seeking return of the land. Chief Judge Prendergast ruled in favor of the Crown grant and relied on a new version of historical events.

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at the time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community.<sup>180</sup>

Prendergast stressed that Britain had queried the capacity of Maori and pointed to the direction made by the British Government to Captain Hobson:

we acknowledge New Zealand as a sovereign and independent state, *so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert.*<sup>181</sup>

Prendergast says in reference to this passage:

Such a qualification nullifies the proposition to which it is annexed. In fact, the Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government.<sup>182</sup>

Prendergast then reviewed the Land Claims Ordinance of 1841 and concluded:

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<sup>179</sup> (1877) 3 N.Z. Jur (NS) 72.

<sup>180</sup> *Id.* at 77.

<sup>181</sup> *Id.* (emphasis added); *see also* note 136 *supra*.

<sup>182</sup> 3 N.Z. Jur (NS) at 77.

They express the well-known legal incidents of a settlement planted by a civilised Power in the midst of uncivilised tribes. It is enough to refer, once for all, to the American jurists, Kent and Story, who, together with Chief Justice Marshall, in the well-known case of *Johnson v McIntosh*, have given the most complete exposition of this subject.<sup>183</sup>

He then goes on at length to state:

Had any body of law or custom, capable of being understood and administered by the Courts of a civilised country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines. On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign. In this way British tribunals administer the old French law in Lower Canada, the Code Civil in the island of Mauritius, and Roman-Dutch law in Ceylon, in Guinea, and at the Cape. But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice.<sup>184</sup>

These sentiments are a direct application of United States case law. In particular, a very similar passage exists in *Cherokee Nation v. Georgia*.<sup>185</sup>

In reference to the Treaty of Waitangi, he states:

So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case.<sup>186</sup>

Prendergast refers to American authorities and expressly likens “the case of the Maoris” to “that of the Indian tribes of North America.”<sup>187</sup> He concludes “the title of the

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 77-78.

<sup>185</sup> 30 U.S. (5 Pet.) 1 (1831); see MCHUGH, *supra* note 145, at 172 (noting this similarity).

<sup>186</sup> *Wi Parata* (1877) 3 N.Z. Jur (NS) 72, at 78.

<sup>187</sup> *Id.*

Crown to the country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages.”<sup>188</sup>

At the turn of the century the Privy Council deemed such reasoning as going “too far,”<sup>189</sup> however, Aotearoa/New Zealand’s judiciary ignored the Privy Council - “the only recorded instance of a New Zealand Court’s publicly avowing its disapproval of a superior tribunal.”<sup>190</sup> Later, in 1941, the Privy Council reinterpreted the Treaty as enforceable in the courts if recognized in legislation.<sup>191</sup> This did not occur until 1975, and, in regard to the status of the doctrine of Native Title, it was not fully reinstated into Aotearoa/New Zealand’s common law until 2003.

#### D. Ngati Apa 2003

In the 1980s the High Court began to rectify the *Wi Parata* precedent and reintroduce a more apt application of the doctrine of Native Title into Aotearoa/New Zealand’s common law. The Native Title Doctrine, according to a 1920s Privy Council decision, essentially proclaims that “A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly.”<sup>192</sup> In 1987, the New Zealand High Court held that a Maori person has a right to take undersized shellfish, *paua* (abalone), even though it was in contravention of legislation, because no statute had plainly and clearly extinguished the customary right.<sup>193</sup> Judge Williamson distinguished the earlier case law which purported a *Wi Parata* type reasoning (namely the Court of Appeal’s *In re the Ninety-Mile Beach*<sup>194</sup> decision) because this case was “not based upon ownership of land or upon an exclusive right to a foreshore or bank of a river.”<sup>195</sup> Subsequent case law in the 1990s reinforced the existence of the common law doctrine of Native Title in Aotearoa/New Zealand, but did not accept the arguments posed under it. For example, the Court of Appeal, in 1994, concluded that not under the doctrine (nor under the Treaty of Waitangi) do Maori have a right to generate electricity by the use of water power.<sup>196</sup>

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<sup>188</sup> *Id.* at 78.

<sup>189</sup> *Nireaha Tamaki v. Baker* [1901] AC 561, at 577-78 (Lord Davey).

<sup>190</sup> Sir Robin Cooke, *The Nineteenth Century Chief Justices*, in *PORTRAIT OF A PROFESSION: THE CENTENNIAL BOOK OF THE NEW ZEALAND LAW SOCIETY* 36, 46 (Robin Cooke ed., 1969). One of the more well known cases to assert the *Wi Parata* precedent was *In Re Ninety Mile Beach* [1963] N.Z.L.R. 461. See Richard Boast, *In Re Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History*, 23 *VICTORIA UNIV. WELLINGTON L. REV.* 145 (1993).

<sup>191</sup> *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] A.C. 308. See Alex Frame, *Hoani Te Heuheu’s Case in London 1940-1941: An Explosive Story*, 22 *NEW ZEALAND UNIVS L. REV.* 148 (2006).

<sup>192</sup> *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399 (PC).

<sup>193</sup> *Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 680.

<sup>194</sup> [1963] N.Z.L.R. 461.

<sup>195</sup> *Te Weehi* [1986] 1 N.Z.L.R. 680, at 692.

<sup>196</sup> *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General* [1994] 2 N.Z.L.R. 20, 25.

In 1999, by majority, the Court of Appeal held that Maori are not permitted to claim under the doctrine (or under the Treaty) a customary right to fish for introduced species.<sup>197</sup>

In the 1994 case, *Te Runanganui o Te Ika Whenua*,<sup>198</sup> Cooke P referred to Canadian and Australian case law in devising the nature of Native Title. He explained the doctrine:

On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.<sup>199</sup>

Cooke P elaborated on the nature of Native Title rights stating that: they are usually communal; cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers; can only be transferred to the Crown; the transfer must be in strict compliance with the provisions of any relevant statutes; it is likely to be in breach of fiduciary duty if an extinguishment occurs by less than fair conduct or on less than fair terms; and if extinguishment is deemed necessary then free consent may have to yield to compulsory acquisition for recognized specific public purposes but upon extinguishment proper compensation must be paid.<sup>200</sup> Cooke P then explained the scope of Native Title in terms of a spectrum:

The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. . . . At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law. At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.<sup>201</sup>

In 2003, the Court of Appeal, in *Attorney-General v Ngati Apa*,<sup>202</sup> reintroduced the full spectrum of the Native Title doctrine, accepting the possibility that native title could encompass land either permanently or temporarily under salt-water. The unanimous decision contributed significantly to the removal of the full force of the Doctrine of Discovery. All five judges overruled *Wi Parata*.<sup>203</sup>

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<sup>197</sup> *McRitchie v. Taranaki Fish and Game Council*, [1999] 2 N.Z.L.R. 139. Note Justice Thomas' strong dissent. The third case to discuss the doctrine in the 1990s was *Te Runanga o Muriwhenua Inc. v. Attorney-General* [1990] 2 N.Z.L.R. 641.

<sup>198</sup> [1994] 2 N.Z.L.R. 20.

<sup>199</sup> *Id.* at 23-24.

<sup>200</sup> *Id.* at 24.

<sup>201</sup> *Id.*

<sup>202</sup> [2003] 3 N.Z.L.R. 643.

<sup>203</sup> *Wi Parata* (1877) 3 N.Z. Jur (NS) 72.

Significantly, the *Ngati Apa* decision, explicitly foresaw the possibility of the doctrine of Native Title recognizing Indigenous peoples' exclusive ownership of the foreshore and seabed following a change in sovereignty. For example, Chief Justice Elias stated: "Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature,"<sup>204</sup> and "[t]he content of such customary interest is a question of fact discoverable, if necessary, by evidence."<sup>205</sup> Elias CJ explained "[a]s a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom,"<sup>206</sup> or, and she quotes from a Privy Council decision, *Amodu Tijani v Secretary, Southern Nigeria*,<sup>207</sup> they might "be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference."<sup>208</sup> Elias CJ substantiated this possibility with reference to Canada:

The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to *exclusive ownership* with incidents equivalent to those recognised by fee simple title.<sup>209</sup>

The other four justices discussed the common law doctrine of Native Title in similar terms. For example, Tipping J began his judgment with the words: "When the common law of England came to New Zealand its arrival did not extinguish Maori customary title . . . title to it must be lawfully extinguished before it can be regarded as ceasing to exist."<sup>210</sup> Keith and Anderson JJ, in a joint judgment, emphasized "the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain."<sup>211</sup> Moreover, Gault P expressly recognized the uniqueness of New Zealand in the existence of the common law jurisdiction of Native Title and the statutory jurisdiction of Maori customary land status and stated that he prefers to "reserve the question of whether it is a real distinction insofar as each is directed to interests of land in the nature of ownership."<sup>212</sup>

Interestingly, the judges refer back to *Johnson*.<sup>213</sup> Chief Justice Elias quotes *Johnson*, recognizing that according to the Supreme Court of the United States, Native

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<sup>204</sup> *Ngati Apa* [2003] 3 N.Z.L.R. 643, at 655-56.

<sup>205</sup> *Id.* at 656.

<sup>206</sup> *Id.*

<sup>207</sup> [1921] 2 A.C. 399 (PC).

<sup>208</sup> *Ngati Apa* [2003] 3 N.Z.L.R. 643, 656.

<sup>209</sup> *Id.* at 656 (emphasis added). The Canadian case cited was *Delgamuukw*, SCC [1997] 3 S.C.R. 1010.

<sup>210</sup> *Ngati Apa* [2003] 3 N.Z.L.R. 643 at 693.

<sup>211</sup> *Id.* at 684.

<sup>212</sup> *Id.* at 673.

<sup>213</sup> *Johnson*, 21 U.S. (8 Wheat) 543 (1823).

Title rights “were rights at common law, not simply moral claims against the Crown.”<sup>214</sup> Keith and Anderson JJ rely extensively on the early United States jurisprudence, including citing at length from *Johnson*. For instance, in Chief Justice Marshall’s words:

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.<sup>215</sup>

The reasoning in *Ngati Apa* may be the best yet to be made by a judiciary, at least in the Commonwealth. It poignantly recognizes the interests of Indigenous peoples. For example, Elias CJ stated:

The common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.<sup>216</sup>

The reasoning in the *Ngati Apa* decision suggests acceptance of the fact that the common law of New Zealand is unique. Chief Justice Elias stressed this reality:

In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only ‘so far as applicable to the circumstances thereof’ . . . from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances.<sup>217</sup>

The Court did not proceed to answer whether specific tribes exclusively held land under salt water because the case had been brought on whether the Maori Land Court had jurisdiction to determine whether the foreshore and seabed was Maori customary land (a land status rather than a Native Title issue). All five judges held that the Maori Land Court did have the necessary jurisdiction to consider such an application.

Before the Maori Land Court had an opportunity to do so, the Labour-led Government announced its intention to enact clear and plain legislation asserting Crown ownership of the foreshore and seabed. In response to the Government’s position,

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<sup>214</sup> *Ngati Apa* [2003] 3 N.Z.L.R. 643, at 652.

<sup>215</sup> As reproduced Keith and Anderson JJ in *Ngati Apa*, *id.* at 680.

<sup>216</sup> *Id.* at 668.

<sup>217</sup> *Id.* at 562.



outlined in a report released in December 2003,<sup>218</sup> many Maori groups in protest at the policy lodged an urgent claim with the Waitangi Tribunal. There they argued that the policy if enacted would constitute a serious breach of the principles of the Treaty of Waitangi and wider norms of domestic and international law. The Tribunal agreed. It stated, in its March 2004 report, that the policy gave rise to serious prejudice which by “cutting off their access to the courts and effectively expropriating their property rights, puts them in a class different from and inferior to all other citizens.”<sup>219</sup> Despite the Tribunal’s strong recommendations for continued consultation between Government and Maori, the Government rejected the report’s central conclusions as based on “dubious or incorrect assumptions.”<sup>220</sup> The Government stressed the notion of Parliamentary sovereignty – the idea that Aotearoa/New Zealand’s Parliament is supreme and is unhindered in its law-making abilities.

Section 3 of the Foreshore and Seabed Act 2004 states its object is to:

preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whanau, hapu, and iwi with areas of the public foreshore and seabed.<sup>221</sup>

First, the Act vests the land in Crown ownership: “the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property.”<sup>222</sup> Then, it replaces the Maori Land Court’s jurisdiction to issue land status orders with a new jurisdiction to issue customary rights orders, and, replaces the High Court’s jurisdiction to hear and determine the common law doctrine of Native Title with a new jurisdiction to determine territorial customary rights.<sup>223</sup>

The Government’s handling of the foreshore and seabed issue angered many Maori. Protests included a successful claim to the United Nations,<sup>224</sup> a hiko (march) of

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<sup>218</sup> *Summary of the Foreshore and Seabed Framework* (2003), available at [www.beehive.govt.nz/foreshore/summary.cfm](http://www.beehive.govt.nz/foreshore/summary.cfm).

<sup>219</sup> Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy* xiv-xv (Wai 1071, 2004).

<sup>220</sup> Deputy Prime Minister Michael Cullen’s official speech, ‘Waitangi Tribunal Report Disappointing’ (8 March 2004), available at: [www.beehive.govt.nz/ViewDocument.cfm?DocumentID=19091](http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=19091).

<sup>221</sup> Section 3 of the Foreshore and Seabed Act 2004.

<sup>222</sup> Section 13(1) of the Foreshore and Seabed Act 2004. Note that the ‘public foreshore and seabed’ is defined as meaning the foreshore and seabed but does not include any land that is, for the time being, subject to a specified freehold interest’, *see* section 5.

<sup>223</sup> *See* Parts 3 and 4 of the Foreshore and Seabed Act 2004. For commentary on this Act and its background *see, e.g.*, RICHARD BOAST, *FORESHORE AND SEABED* (2005); Nin Tomas and Karen Johnston, *Ask that Taniwha Who Owns the Foreshore and Seabed of Aotearoa*, 1 *TE TAI HARURU/JOURNAL OF MAORI LEGAL WRITING* 10 (2004); F.M. (Jock) Brookfield, *Maori Claims and the ‘Special’ Juridical Nature of Foreshore and Seabed*, *NEW ZEALAND L. REV.* 179 (2005); PG McHugh, *Aboriginal Title in New Zealand: A Retrospect and Prospect*, 2 *NEW ZEALAND J. PUBLIC & INT’L L.* 139 (2004).

<sup>224</sup> The United Nations Committee on the Elimination of Racial Discrimination on the New Zealand

about 20,000 Maori on Parliament grounds; and the resignation of a Maori Labour Cabinet Minister, Tarina Turia, and her re-election to Parliament as a representative of the newly formed Maori Party. The issue also sparked discussion about reforming New Zealand's constitutional order and, in any such reform, the place of the Treaty of Waitangi.<sup>225</sup>

In conclusion, a couple of points need to be made. One, even though the *Ngati Apa* decision was a bold decision and goes further than the courts in Australia and Canada have gone in accepting the possibility of Indigenous peoples' exclusive ownership of land under salt water, it is still premised on the notion that the British Crown legitimately acquired sovereignty of New Zealand. The Court does not canvass the possibility that sovereignty may still legitimately lie with some of the Maori tribes. Rather, it assumes a transfer in sovereignty has occurred and purports blanket rules as applying to all of New Zealand. Secondly, from the 1980s the New Zealand courts refer to Canadian and Australian case law, not United States jurisprudence even though New Zealand's jurisprudence on this point originated in extensive reference to the Marshall decisions. Thirdly, Parliament would not contemplate Indigenous ownership of the foreshore or seabed in any form. In doing so, it has blatantly resurrected the Doctrine of Discovery in land under salt water. While Parliament has acted in contravention of the common law, it is able to do so because it is supreme – New Zealand's courts have no power to restrict Parliament's behavior. This thus allows for a conclusion to be reached here that the Doctrine is still alive in New Zealand.

#### IV. COMPARATIVE ANALYSIS

We think the best way to compare and contrast the New Zealand and United States law on Discovery is to analyze the ten constituent elements of the Doctrine that we set out in section one.<sup>226</sup> In essence, we are examining whether these countries adopted the Doctrine of Discovery, as defined by international and English law, in full or in part.

##### A. *First discovery*

England, its colonies, the American states, and the United States all relied on the principle of first discovery to allege land ownership and sovereign rights over American Indians. The Crown used this element in its charters for exploration and colonization. Henry VII, for example, directed John Cabot to “discover . . . countries, regions, or provinces of the heathen and infidels . . . which before this time have been unknown to all

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Foreshore and Seabed Act 2004 can be viewed at: <http://www.ohchr.org/english/bodies/cerd/index.htm>. See also Claire Charters & Andrew Erueti, *Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004*, 36 VICTORIA UNIV. WELLINGTON L. REV. 257 (2005).

<sup>225</sup> See B.V. Harris, *The Treaty of Waitangi and the Constitutional Future of New Zealand*, NEW ZEALAND L. REV. 189 (2005); COLIN JAMES, *BUILDING THE CONSTITUTION* (2000); Matthew Palmer, *Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution*, 29(1) DALHOUSIE L. J. 1 (2007).

<sup>226</sup> *Supra* note 34 and accompanying text.

Christians.”<sup>227</sup> Similarly, Elizabeth I directed Sir Walter Raleigh “to discover . . . remote, heathen and barbarous lands, countries, and territories, not actually possessed by any Christian Prince, nor inhabited by Christian People . . . .”<sup>228</sup> And, James I directed his subjects to establish a colony on lands “which are not now actually possessed by any *Christian* prince or People . . . .”<sup>229</sup>

The colonies also utilized this element. One English author wrote in 1609 that James I’s rights in America were by “right of discovery.”<sup>230</sup> Furthermore, in 1638, Maryland enacted a law to control Indian land sales and based its legal authority on the Crown’s “right of first discovery” in which the King had “became lord and possessor” of Maryland.<sup>231</sup> Later, the English colonies used England’s claim of “first discovery, occupation, and possession”<sup>232</sup> to resist the Dutch colonies in the New World.

After the American Revolution, state governments continued to expressly rely on first discovery to define their rights to the lands of Native people.<sup>233</sup> In 1785-86, for example, Alexander Hamilton represented New York in a land claim versus Massachusetts which raised the issue of which state held the preemption power to buy certain Indian lands. In preparing his case, Hamilton created an extensive chart that documented the first discoveries and settlements in America of the English, French, and Dutch.<sup>234</sup> The original thirteen states also based their western land claims, clear to the Pacific Ocean, on their Royal charters; charters that were based on the Crown’s authority under first discovery.

The United States also claimed that first discovery gave it ownership and sovereign rights over the lands and rights of Native peoples. Thomas Jefferson recognized that an American’s first discovery of the Columbia River in 1792 gave the U.S. a claim under international law to the Columbia River and its watershed.<sup>235</sup> He also, for example, drafted a forty page pamphlet in 1804 tracking the French first discoveries in his attempt to determine the boundaries of the Louisiana Territory.<sup>236</sup>

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<sup>227</sup> I FOUNDATIONS, *supra* note 29, at 18.

<sup>228</sup> III FOUNDATIONS, *supra* note 29, at 1694.

<sup>229</sup> *Id.* at 1698. *See also* I FOUNDATIONS, *supra* note 29, at 23 (reprinting James I Patent of New England).

<sup>230</sup> WILLIAMS, *supra* note 2, at 161, 170, 177-78; VIII EAID, *supra* note 32, at 30-32.

<sup>231</sup> II FOUNDATIONS, *supra* note 39, at 1267.

<sup>232</sup> WILLIAMS, *supra* note 2, at 161, 170, 177-78; VIII EAID, *supra* note 32, at 30-32.

<sup>233</sup> *Thompson v. Johnston*, 6 Binn. 68, 1813 WL 1243 a\*5 (Pa. Sup. Ct. 1813) (Breckenridge, J., concurring) (“the king’s right was . . . founded . . . on the right of discovery.”); *Arnold v. Mundy*, 6 N.J.L. 1, 1821 WL 1269, at \*10 (N.J. Sup. Ct. 1821), *accord* at \*53 (Charles II “took possession of the country, by his right of discovery”).

<sup>234</sup> III PAPERS OF ALEXANDER HAMILTON, *supra* note 91, at 702-15.

<sup>235</sup> BERNARD DeVOTO, *THE COURSE OF EMPIRE* 323-28 (1952).

<sup>236</sup> Thomas Jefferson, *The Limits and Bounds of Louisiana*, in DOCUMENTS RELATING TO THE PURCHASE & EXPLORATION OF LOUISIANA 24-37 (1904).

In addition, the United States maintained for more than four decades that it had made the first discovery of the Oregon Country. U.S. Presidents and Secretaries of State James Monroe, John Quincy Adams, Henry Clay, John Calhoun, James Polk, and James Buchanan, and many others were involved in diplomatic negotiations with England, Spain, and Russia on this issue for over forty years with all sides claiming first discovery.<sup>237</sup> Moreover, in 1856, Congress enacted a law that Americans could claim deserted islands based on first discovery and occupation.<sup>238</sup> Plainly, the Crown, colonies, American states, and the United States all claimed rights based on first discovery.

Similarly, in New Zealand the first discovery principles applied. While a treaty of cession was signed with some of the Maori tribes, the Discovery Doctrine pervaded the British motivations and subsequent negotiations with Maori. The British essentially considered the lands of New Zealand as ‘unsettled’ until Britain claimed sovereignty. This is because the British believed that they first discovered the lands and therefore had the sovereign right of the lands whether a treaty of cession was signed or not.<sup>239</sup> The precedent was first discussed in the *Symonds* 1847 case, drawing heavily on the United States jurisprudence, in particular, on *Johnson*. The Court claimed that first discovery gave title against all other Europeans.<sup>240</sup> Moreover, in *Wi Parata*, Judge Prendergast expressly related this element to New Zealand. For example, he stated the rights and duties under international law, *jure gentium*, “vest in and devolve upon the first civilized occupier.”<sup>241</sup> The *jure gentium* or international law that he was referring to is obviously the Doctrine of Discovery.

It is no surprise that this element of Discovery is identical in New Zealand and the United States. It is an element of the international law that England utilized in colonizing both countries and which the colonists in North America and New Zealand adopted to control their relationships with the Indigenous peoples.

### *B. Actual occupancy and current possession*

The English Crown developed the principle that for European countries to turn a first discovery into a complete title they had to actually occupy and possess the lands within a reasonable amount of time after first discovery. The Crown and the colonies actively applied that element of Discovery in America.<sup>242</sup>

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<sup>237</sup> *Supra* notes 96 & 97. *See also* notes 108, 177 *supra*; I CIRCULAR LETTERS OF CONGRESSMEN TO THEIR CONSTITUENTS 1789-1829 376, 381, 386, 401-03, 405-07, 415, 423, 439, 484-85, 496, 501, 571, 1047 (Noble E. Cunningham, Jr. ed., 1978).

<sup>238</sup> Act of Aug. 18, 1856, ch. 164, 11 Stat. 119 (codified at 48 U.S.C. §§ 1411-1419).

<sup>239</sup> Waitangi Tribunal, *supra* note 138.

<sup>240</sup> *Symonds* (1847) N.Z.P.C.C. at 390.

<sup>241</sup> *Wi Parata* (1877) 3 N.Z. Jur (NS), at 77.

<sup>242</sup> *See, e.g.*, I FOUNDATIONS, *supra* note 29, at 23, 28-29, 46, 49 (Crown claimed it had acquired lands by “actual Possession of the Continent” and directed colonists to seek out lands “not actually possessed or inhabited”; and granted lands that “were not then actualie possessed or inhabited”); Simsarian, *supra* note

England and the United States also relied on this element in arguments that raged for over four decades as they tried to prove their actual occupancy of the Oregon Country. They argued about the significance to their claims to Oregon of the Lewis & Clark expedition and John Jacob Astor's fur post at Astoria, and the activities of the English fur companies, the Northwest Company and the Hudson's Bay Company.<sup>243</sup>

Thomas Jefferson was no doubt expressly motivated by this very element of Discovery when he directed Lewis & Clark to the mouth of the Columbia River, which not coincidentally an American had first discovered in 1792.<sup>244</sup> Jefferson was then especially delighted in 1808 when American fur trader John Jacob Astor proposed to build the first permanent American establishment on the Pacific coast, not accidentally, at the mouth of the Columbia River.<sup>245</sup> Jefferson realized the significance of these actions under the international law of Discovery. He even argued in 1813 and 1816 that America's claim to the Oregon Country was based on Astor's permanent occupancy of the region by building Astoria in 1811.<sup>246</sup>

In the 1820s and 1830s, Senators Thomas Hart Benton and Lewis Linn, Congressman Caleb Cushing and numerous others argued for the United States to occupy the Oregon Country to perfect its first discovery claim.<sup>247</sup> Specifically, Caleb told the House of Representatives that America's title relied on "the Law of Nations . . . that priority of discovery, followed in a reasonable time by actual occupation, confers exclusive territorial jurisdiction and sovereignty."<sup>248</sup>

In New Zealand, the British were somewhat worried about the intentions of the French, especially on the east coast of the South Island at Akaroa. The presence of the French motivated Captain Hobson in May 1840 to claim sovereignty of the South Island on the basis of Discovery rather than by treaty cession.<sup>249</sup> This angered some of the

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96, at 113-14, 115-18, 120-24 938; VIII EAID, *supra* note 32, at 30-31; Friedrich August Freiherr von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 450-52, 458-59 (1935).

<sup>243</sup> *Supra* notes 96 & 97.

<sup>244</sup> MILLER, NATIVE AMERICA, *supra* note 1, at 99-100.

<sup>245</sup> *Id.* at 74-75; VI THE WRITINGS OF THOMAS JEFFERSON 55-56 (H.A. Washington ed., 1861); RONDA, *supra* note 111, at 308-15.

<sup>246</sup> X WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 93; *id.* vol. XIII, at 432-34.

<sup>247</sup> See, e.g., *Annals of Congress*, 16<sup>th</sup> Congress, 2<sup>nd</sup> Session, at 679; Charles H. Ambler, *The Oregon Country, 1810-1830: A Chapter in Territorial Expansion*, 22, 30 THE MISSISSIPPI VALLEY HISTORICAL REVIEW 8, 16-17 (June 1943); 3 OVERLAND TO THE PACIFIC, *supra* note 103, at 42, 101; I THOMAS HART BENTON, *supra* note 105, at 14, 52, 54; *Gales & Seaton's Register*, at 699-700; *Register of Debates*, 18<sup>th</sup> Cong., 2<sup>d</sup> Sess., at 700, 705; CHAMBERS, *supra* note 103, at 82-84; I *Register of Debates in Congress*, pp. 711-13; III CIRCULAR LETTERS, *supra* note 237, at 1016, 1018, 1036, 1040, 1047, 1155-54, 1059, 1082, 1138, 1158, 1267, 1281, 1284, 1295, 1300, 1326, 1339, 1344.

<sup>248</sup> *Congressional Globe*, 25<sup>th</sup> Cong., 2<sup>nd</sup> Sess., at 566 (May 1838).

<sup>249</sup> Waitangi Tribunal, *supra* note 138.

French, including Captain Langlois who continued to insist” “The ownership and sovereignty of France over the South Island of New Zealand cannot be disputed. I have myself made treaties both for the land and the cession of sovereignty.”<sup>250</sup> Nonetheless, France tacitly acknowledged British sovereignty of New Zealand in 1840.<sup>251</sup>

### C. Preemption/European title

English and European colonists often claimed that they had gained the complete fee title to the lands of Indigenous peoples under first discovery.<sup>252</sup> Yet they rarely meant that phrase in the literal sense, to mean the “fee simple absolute” title. All European colonists and countries realized that they had to buy the remaining legal rights of the Native people in America. What Europeans meant by claiming the “fee title” was actually that they had acquired the power of preemption, the sole right to buy the lands from the Indigenous people. But since Indigenous people were destined for extinction or assimilation, the European title of preemption only had to await that eventual destiny to morph into a complete fee title.<sup>253</sup>

The English Crown and colonists used the power of preemption over American Indians from the beginning of their settlements in North America. All of the colonies enacted numerous laws to regulate the purchase and leasing of Indian lands because the colonies alleged they held the preemptive authority.<sup>254</sup> In 1763, however, George III attempted to reassert his preeminence in exercising the preemption power over Indian land purchases in the Royal Proclamation of 1763.<sup>255</sup>

The American states and the United States also assumed the power of preemption over American Indians from their very beginning. The states drafted laws and constitutions in which they expressly claimed and exercised preemption.<sup>256</sup> The Articles Congress in 1783 and the new United States government in 1790 also took absolute

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<sup>250</sup> T. LINDSAY BUICK, *THE FRENCH AT AKAROA: AN ADVENTURE IN COLONIZATION* 276 (1928).

<sup>251</sup> *See id.*

<sup>252</sup> *See, e.g.*, *Thompson v. Johnston*, 6 Binn. 68, 1813 WL 1243 a\*2 (Pa. Sup. Ct. 1813) (“The royal charter did indeed convey to William Penn an immediate and absolute estate in fee . . .”); *accord* *Sacarus & Longboard v. William King's Heirs*, 4 N.C. (Taylor) 336, 1816 WL 222, at \*2 (N.C. 1816).

<sup>253</sup> *See, e.g.*, I FOUNDATIONS, *supra* note 29, at 23 (“God’s Visitation rained a wonderfull Plague . . . amongst the Savages and bruitish People there . . . Almighty God in his great Goodness and Bountie towards Us and our People, hath thought fitt and determined, that those large and goodly Territories . . . should be possessed and enjoyyed by such of our Subjects”). In 1783, in his infamous “Savage as Wolf” letter, George Washington advised the Articles Congress that Indians would disappear like animals and the United States would acquire their lands. Letter from George Washington to James Duane (Sept. 7, 1783), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 1-2 (Francis Paul Prucha ed., 3d ed. 2000).

<sup>254</sup> *Supra* notes 40 & 41.

<sup>255</sup> *Supra* notes 44-50.

<sup>256</sup> *Supra* notes 51-59.

control over Indian land sales through preemption clauses in their governing documents, statutes, and treaties.<sup>257</sup>

In 1792, Secretary of State Thomas Jefferson twice illustrated perfectly the definition of this element. First, he explained America's preemption right: "our States, are inhabited by Indians holding justly the right of occupation, and leaving . . . to us only the claim of excluding other nations from among them, and of becoming ourselves the purchasers of such portions of land, from time to time, as they may choose to sell."<sup>258</sup> Second, he explained the American preemption right over England and the Indian Nations to the English ambassador. He said that the United States had a

right to preemption of their [Indian] lands; that is to say, the sole and exclusive right of purchasing from them whenever they should be willing to sell. . . . Did I suppose that the right of preemption prohibited any individual of another nation from purchasing lands which the Indians should be willing to sell? Certainly. We consider it as established by the usage of different nations into a kind of *Jus gentium* [international law] for America, that a white nation settling down and declaring that such and such are their limits, makes an invasion of those limits by any other white nation an act of war, but gives no right of soil against the native possessors.<sup>259</sup>

In New Zealand, the English expressly claimed this exact Discovery right. In Article 2 of the Treaty of Waitangi, the British Crown negotiated for the right of preemption and the Maori expressly ceded this right to the Crown.<sup>260</sup> In 1847, in the *Symonds* case, Judge Chapman reinforced the Queen's pre-emptive right in law, recognizing that the Queen acquired this right independent of the Treaty of Waitangi.<sup>261</sup> The right of preemption was regarded as integral to the assertion of sovereignty. In the 1860s, the Crown waived its right of preemption in favor of establishing a court system empowered to regulate sales between Maori and settlers.<sup>262</sup> A new land status, Maori freehold land, was established. However, in regard to land that the Crown wanted to own but Maori wished to retain, the common law developed to assert that the colonizing power acquired a radical title or underlying title that was subject to existing Maori rights in the land.<sup>263</sup> While those rights are not supposed to be extinguished in times of peace

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<sup>257</sup> *Supra* notes 73-75, 85-89, 93-95. *See also* 25 U.S.C. § 177.

<sup>258</sup> VIII WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 416-17.

<sup>259</sup> Thomas Jefferson, *Notes of a Conversation with George Hammond*, in VII WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 328-29.

<sup>260</sup> Treaty of Waitangi, *supra* note 141.

<sup>261</sup> *Supra* note 155 and accompanying text.

<sup>262</sup> *See, eg.*, Native Lands Act 1862, *supra* note 171 and accompanying text.

<sup>263</sup> *Supra* note 199 and accompanying text.

otherwise than by the free consent of the Maori occupiers, if deemed necessary the Crown can take such drastic action in specific circumstances to compulsorily acquire the land but must pay proper compensation. A modern day example of a breach of this common law rule was the enactment of the Foreshore and Seabed Act 2004. There the Government purported ownership of the foreshore and seabed in return for almost no compensation.<sup>264</sup> The Government was able to do this because in New Zealand the Government is supreme.<sup>265</sup>

#### *D. Indian/Native title*

Under European and American claims to preemption and title it is no wonder that Indigenous people were considered by Euro-American legal systems to have lost the full ownership of their lands. They were considered to have only retained the right to occupy and use their lands. That is still a valuable property right which could have lasted forever if Natives never consented to sell, were forced off, or died out. But under their restricted title, Natives could only sell to the government that held the power of preemption.

The English Crown and colonists used this principle against American Indians from the beginning. The Crown granted legal estates in lands in North America while almost totally ignoring Indian ownership.<sup>266</sup> In the Royal Proclamation of 1763, however, George III demonstrated a more correct understanding of the restricted Indian title and that he would have to buy the remaining Indian property rights before he could acquire possession and use rights.<sup>267</sup> The colonial governments also understood this principle. They all enacted numerous statutes that demonstrated the restricted Indian title and in which they authorized and ratified sales of Indian lands.<sup>268</sup> Under Euro-American legal thinking and Discovery, Native peoples and their governments did not possess the right to sell their lands without the permission of the colonial governments.

Thereafter, the new American state governments immediately imposed these same restrictions on the Indian Nations.<sup>269</sup> The federal government also applied the idea of Indian title and restricted tribal real property rights.<sup>270</sup> In 1810, the U.S. Supreme Court

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<sup>264</sup> *Supra* note 222 and accompanying text.

<sup>265</sup> *See supra* note 129.

<sup>266</sup> *See, e.g.*, I FOUNDATIONS, *supra* note 29, at 26-28, 35, 46, 48, 106; II FOUNDATIONS, *supra* note 39, at 757, 855 (reprinting Charter Pennsylvania granting William Penn authority to grant fee titles); III FOUNDATIONS, *supra* note 29, at 1692, 1696, 1701, 1703; SELECT CHARTERS, *supra* note 29, at 236, 242.

<sup>267</sup> *Supra* note 47.

<sup>268</sup> *Supra* notes 40 & 41. *See also* Thomas Jefferson, *Notes on Virginia*, in II WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 187-89 (Jefferson stated that tribal lands were only sold by the General Assembly if the "Indian title" had been purchased).

<sup>269</sup> *Supra* notes 51-59. An 1835 Tennessee Supreme Court case demonstrates the restrictions states imposed on Indian land holdings under the Discovery principle of Indian title and the resulting loss of economic value to Indians and their governments. *Tennessee v. Forman*, 16 Tenn. 256 (1835).

<sup>270</sup> *Supra* notes 74-75, 80-83, 87-89, 93-95. *See also* The Removal Act, ch. 148, 4 Stat. 411-12 (1830), *reprinted in* 3 THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 2169-71



defined some aspects of the limited rights possessed by the Indian Nations when it held that the states could transfer their future titles in Indian lands even while the Tribes still possessed the lands.<sup>271</sup> In 1955, when the Court was faced with the question of Native land ownership in Alaska, it stated that the Tribe in question held only a limited right of occupancy: “after the coming of the white man [the tribe held] what is sometimes termed original Indian title or permission from the whites to occupy.”<sup>272</sup> Indian or Native title is obviously a limited form of real property ownership far short of the fee simple title.

By comparison, in New Zealand, a unique land title system was established. While the Treaty of Waitangi, in the English version, guaranteed to Maori the ‘full exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties,’<sup>273</sup> or as in the Maori version, continuing sovereignty over their property,<sup>274</sup> in reality the British Crown severely limited the property rights in Maori land. For the first twenty years post the signing of the Treaty of Waitangi, Maori could only sell, lease or gift their land to the Crown in accordance with the right of preemption agreed to in the Treaty of Waitangi.<sup>275</sup> In the 1860s, the colonial Government waived its right of preemption in favor of Maori being able to freely alienate their land (similar to the opening of lands for colonial settlement in the United States pursuant to the Allotment Act of 1887.) The catch being, Maori first had to obtain a certificate of title from the newly established Maori Land Court to prove that they owned the land.<sup>276</sup> Once they had a certificate of title, they could sell, lease or gift their land to whoever they wished. The system sought to transform land communally held by Maori families into individualized titles derived from the Crown. The early legislation was premised on encouraging as much alienation of Maori land as possible. By the 1930s, most Maori land in New Zealand had gone through the Maori Land Court system and had been sold to non-Maori.<sup>277</sup> Today, only a smidgen of Maori freehold land remains, and the legislative intent since 1993 encourages the retention and development of that land by its Maori owners. Thus, today Maori freehold land is heavily legislated depicting stringent alienation rules.<sup>278</sup> Nearly all transactions involving Maori freehold land now need to be

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(Wilcomb E. Washburn ed., 1973) (act to remove eastern tribes west of the Mississippi, Congress expressly required that the “Indian title” to the western lands had to be extinguished before moving Indians there).

<sup>271</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138-39, 142-43 (1810) (“[T]he nature of the Indian title . . . is not such as to be absolutely repugnant to [seisin] in fee on the part of the state.”); *accord* *Meigs v. McClung's Lessee*, 13 U.S. (9 Cranch) 11, 17-18 (1815). *See also* *Meriwether L. Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839).

<sup>272</sup> *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

<sup>273</sup> Treaty of Waitangi, *supra* note 122.

<sup>274</sup> Treaty of Waitangi, *supra* note 122.

<sup>275</sup> *Supra* note 141 and accompanying text.

<sup>276</sup> *See* Native Lands Act 1862 and Native Lands Act 1865. *See supra* note 172.

<sup>277</sup> *See, e.g., supra* note 176.

<sup>278</sup> *See* Maori Land Act 1993/Te Ture Whenua Maori Act 1993.

confirmed by the Maori Land Court, making it timely and costly to even contemplate sale or lease.

Thus, “Indian title” or “native title” in the United States, and ‘Maori freehold in New Zealand was, and is still considered today, a limited ownership right.

#### *E. Tribal limited sovereign and commercial rights*

The inherent sovereign powers of Indigenous Nations and the rights of Indigenous people to free trade and diplomatic international relations were also limited by Discovery. After a first discovery by Euro-Americans, Indigenous Nations were only supposed to deal with the European or American government that had discovered them.

The Crown exerted this alleged authority in the charters it issued when it established governmental authority, jurisdiction, courts, and trade protocols in North America.<sup>279</sup> All the colonies enacted numerous laws exercising exclusive control of the trade with Indians and tribes.<sup>280</sup> The English colonies, in fact, objected to Dutch colonists trading with America Indians, and Dutch colonies in turn objected to Swedish colonists trading with Indians, all based on this element of Discovery.<sup>281</sup>

The American states attempted to control Indian sovereign and commercial powers.<sup>282</sup> The federal government also tried to take complete control of these activities because the Constitution granted it sole authority to engage in treaty making and commercial relations with the Indian Nations.<sup>283</sup> Secretary of State Thomas Jefferson again demonstrated the correct understanding of this element in his 1792 conversation with the British ambassador. Jefferson explained the power the United States held over the Indian Nations: “A right of regulating the commerce between them and the whites. [Hammond asked do the English traders have to stay out? Jefferson said Yes].”<sup>284</sup>

President George Washington utilized this element. In 1795, at his urging, Congress created federal trading houses to totally control the Indian trade. Government trading houses were ultimately operated at twenty-eight locations all across the frontier from 1795-1822.<sup>285</sup> Furthermore, in hundreds of treaties the federal government and tribes agreed that the United States would control the Indian trade and protect tribes in

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<sup>279</sup> See, e.g., I FOUNDATIONS, *supra* note 29, at 18, 26-28, 48, 99, 106 (Henry VII directed John Cabot “to set up our banner and ensigns in every village, town, castle, isle, or mainland newly found . . . getting unto us the rule, title, and jurisdiction of the same”); III FOUNDATIONS, *supra* note 29, at 1692, 1696, 1701.

<sup>280</sup> *Supra* notes 40 & 41.

<sup>281</sup> VIII EAID, *supra* note 32, at 30-32; I FOUNDATIONS, *supra* note 29, at 766.

<sup>282</sup> *Supra* notes 51-59.

<sup>283</sup> *Supra* notes 74-75, 85-95.

<sup>284</sup> Thomas Jefferson, *Notes of a Conversation with George Hammond*, in VII WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 328-29.

<sup>285</sup> Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 808-09 (2002).

many ways.<sup>286</sup> The Supreme Court came to interpret these provisions as creating a trust responsibility that requires the federal government to care for tribes in a ward/guardian relationship and that defines Indian Tribes as “domestic dependent nations.”<sup>287</sup>

More starkly, in New Zealand, post the signing of the Treaty of Waitangi, the colonial Government recognized no sovereign power held by Maori. It was not accepted that Maori retained any sovereignty, government or commercial rights. Maori were simply to become British subjects as articulated in article 3 of the Treaty: “In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.” This approach meant that, in contrast to policies advanced in North America, in New Zealand there were no consistent efforts made to geographically isolate Maori by drawing lines to denote reserves. Maori were simply regarded as ‘noble savages’ who could be hastily christianized and assimilated, thus leading to the demise of the separate Maori race.

#### *F. Contiguity*

This element granted Euro-Americans a Discovery and preemption claim over very large areas contiguous to their actual settlements in the New World. Furthermore, contiguity held that the discovery of the mouth of a river created a claim over the entire drainage system of the river. The shapes of the Louisiana Territory, the western drainage system of the Mississippi River, and the Oregon Country, the drainage system of the Columbia River, demonstrate the scope of this aspect of Discovery.

The English Crown and its colonial governments in North America used this Discovery element against other European and Indigenous governments. The royal charters claimed to grant property rights over vast areas of land, including islands and ocean surrounding colonial settlements.<sup>288</sup> The charters granted rights as far as the head waters of many rivers and the contiguous lands.<sup>289</sup> Thereafter, the colonies claimed their borders to the furthest degree possible based on contiguity. For example, the English colonies objected to Dutch colonies being established in America because they were within areas the English claimed based on contiguity.<sup>290</sup>

Later, American states relied on this element when they cited the charters as setting their western borders at the Pacific Ocean.<sup>291</sup> On the federal side, Thomas Jefferson demonstrated the use of contiguity in his research to determine the size of the

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<sup>286</sup> *Supra* notes 92-95.

<sup>287</sup> *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1, 17 (1831).

<sup>288</sup> *See, e.g.*, I FOUNDATIONS, *supra* note 29, at 28-29, 46, 97; II FOUNDATIONS, *supra* note 39, at 757; III FOUNDATIONS, *supra* note 29, at 1691, 1696, 1699.

<sup>289</sup> *See, e.g.*, SELECT CHARTERS, *supra* note 29, at 51, 131, 236; II FOUNDATIONS, *supra* note 39, at 849.

<sup>290</sup> *See generally* Simsarian, *supra* note 96, at 113, 115-17; VIII EAID, *supra* note 32, at 30-32.

<sup>291</sup> MILLER, NATIVE AMERICA, *supra* note 1, at 41, 96; *supra* note 234 (Massachusetts and New York had a boundary dispute in 1786 based on contiguity).

Louisiana Territory. He relied on the drainage system of the Mississippi River and tried to determine the course and location of the tributaries of that river. Jefferson even hinted in his research that Louisiana gave the United States a claim as far as the Pacific.<sup>292</sup>

Notwithstanding his thoughts on this topic, there is no question that a House Committee claimed in 1804 that the Louisiana Territory stretched to the Pacific due to contiguity.<sup>293</sup>

Other American politicians also used contiguity to claim the Oregon Country. In 1819, Senator Thomas Hart Benton claimed American ownership due to “[c]ontiguity & continuity of settlement & possession.”<sup>294</sup> By the mid-1840s, President Polk and most Americans defined the Oregon Country as being the entire drainage system of the Columbia River, reaching far into present day British Columbia.<sup>295</sup> And American diplomats argued to England that the U.S. owned the entire Oregon Country “on the ground of contiguity.”<sup>296</sup>

By comparison, in New Zealand, the colonial Government sought ownership of land via purchase from Maori or legislation permitting wide-scale confiscation.

However, in regard to lakes and rivers, the owners of land abutting these waters, for example, used the common law to justify exclusive rights to the lake’s fisheries.<sup>297</sup>

### G. Terra nullius

Discovery also defined lands that were not possessed or occupied by any person or nation, or were not being used in a fashion that European legal systems approved, as being “vacant” and available for first discovery claims.

The English Crown and colonists used *terra nullius* to claim the lands of American Indians. Thus, the Crown claimed the authority to grant rights in the “deserts” and the “deserted” and “waste and desolate” and “uncultivated” lands in America because they were only “partly occupied by Savages.”<sup>298</sup> The colonists also relied on *terra nullius* because they thought, for example, that New Jersey was “an uninhabited country found out by British subjects.”<sup>299</sup> A 1765 history of New Jersey agreed and stated that English claims to New Jersey were based on first discovery, possession, and “the well

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<sup>292</sup> Thomas Jefferson, *The Limits and Bounds of Louisiana*, in DOCUMENTS RELATING TO THE PURCHASE & EXPLORATION OF LOUISIANA 40-45 (1904); see also MILLER, NATIVE AMERICA, *supra* note 1, at 70-71.

<sup>293</sup> *Annals of Congress*, 8<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 1124 (March 8, 1804).

<sup>294</sup> I THOMAS HART BENTON, *supra* note 103, at 54; *Register of Debates*, 18<sup>th</sup> Cong., 2<sup>nd</sup> Sess., at 700, 705.

<sup>295</sup> MILLER, NATIVE AMERICA, *supra* note 1, at 153 (Polk’s election slogan, of course, was “54 – 40 or fight,” the northern border of the Columbia River drainage).

<sup>296</sup> *Id.* at 153 (citing authorities).

<sup>297</sup> See BEN WHITE, INLAND WATERWAYS: LAKES: RANGAHUA WHANUI NATIONAL THEME Q (1998).

<sup>298</sup> I FOUNDATIONS, *supra* note 29, at 23; SELECT CHARTERS, *supra* note 29, at 54, 236.

<sup>299</sup> *Arnold v. Mundy*, 6 N.J.L. 1, 1821 WL 1269, at \*56 (N.J. Sup. Ct. 1821).

known *Jus Gentium*, LAW OF NATIONS, that whatever waste or uncultivated country is discovered, it is the right of that prince who had been at the charge of the discovery.”<sup>300</sup>

The United States used this element when arguing to England that the Pacific Northwest was a “vacant territory.”<sup>301</sup> The U.S. Supreme Court also relied on *terra nullius* in discussing Discovery.<sup>302</sup> Finally, in 1895, Senator Henry Cabot Lodge even placed the idea of *terra nullius* into the 1895 Republican Party platform. The platform called for America to expand into “all the waste places of the earth” and noted that Cuba was only “sparsely settled.”<sup>303</sup>

In contrast, the history of *terra nullius* in New Zealand has not been so clear-cut. New Zealand’s Court of Appeal, in 2003, stated that “New Zealand was never thought to be *terra nullius*.”<sup>304</sup> However, the reasoning in *Wi Parata*, the 1877 case, is rife with *terra nullius* discourse.<sup>305</sup> For example, the Court asserted that Maori had no form of civil government or any settled system of law, possessed few political relations to each other, and were “incompetent to act, or even to deliberate, in concert.” In describing the Maori tribes as “petty” and as “incapable of performing the duties, and therefore of assuming the rights, of a civilized community,” the Court essentially declared the country *terra nullius*. Moreover, the Crown’s assumption of ownership of the foreshore and seabed in 2004 is perhaps an example of a revived *terra nullius* claim.<sup>306</sup> There the Government passed legislation claiming ownership of land under salt water without due regard to compensation for Maori because it believed the foreshore and seabed occupies a ‘special juridical space’. Paul McHugh advanced this reasoning in the Waitangi Tribunal. For example, he asserted:

At common law, the Crown’s sovereignty over the foreshore and seabed amounts to a ‘bundle of rights’ less than full ownership; therefore, the common law doctrine of aboriginal title, which has effect because of and at

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<sup>300</sup> SAMUEL SMITH, THE HISTORY OF THE COLONY OF NEW JERSEY 7-8 (1765; Reprint, 1890).

<sup>301</sup> MILLER, NATIVE AMERICA, *supra* note 1, at 153.

<sup>302</sup>

The English possessions in America were not claimed by right of conquest, but by right of discovery . . . according to the principles of international law . . . the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered . . . [T]he territory [the aborigines] occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants.

Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 409 (1842). *See also* United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (“the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land”).

<sup>303</sup> Julius W. Pratt, *John L. O’Sullivan and Manifest Destiny*, 12 NEW YORK HISTORY 213, 234 (1933).

<sup>304</sup> Ngati Apa [2003] 3 N.Z.L.R. 643.

<sup>305</sup> *See supra* note 179 and accompanying text.

<sup>306</sup> *See* Foreshore and Seabed Act 2004.

the moment of acquisition of sovereignty, cannot recognize customary rights that are greater than those of the sovereign.<sup>307</sup>

The Tribunal accepted this reasoning: “the law cannot recognize for Indigenous people what it does not recognize for the sovereign power. It is a variant of the legal maxim: you cannot give what you do not have”.<sup>308</sup> In other words, the foreshore and seabed became *terra nullius*, only capable of Crown ownership.

#### *H. Christianity*

The religion of Europeans, English colonists, and American citizens was a significant aspect of Discovery. Under the Doctrine, non-Christian people did not have the same rights to land, property, sovereignty, and self-determination as Christians.

The English Crown and colonists in North America overtly used this element against American Indians. The Crown called on the Christian God’s assistance and authority to colonize America, to claim Indian lands, and to expand the Christian flock by conversions.<sup>309</sup> The colonies relied heavily on this element to justify their attempts to control Native people.<sup>310</sup>

The American states and the United States also used religion to justify dominating Indian Nations and trying to assimilate Indians into American society. The federal government, for example, turned over the operation of many reservations and the education of Indian children to Christian denominations, and even granted tribal lands to churches.<sup>311</sup> In contrast, Indian religious beliefs and ceremonies were officially ridiculed, suppressed, and outlawed for over one hundred years.<sup>312</sup>

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<sup>307</sup> Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy* 52 (2004), quoting evidence presented by Paul McHugh.

<sup>308</sup> Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy* 60 (2004). For a critique of this position see Jacinta Ruru, *What Could Have Been? The Common Law Doctrine of Native Title in Land Under Salt Water in Australia & Aotearoa/New Zealand* 32 *MONASH. L. REV.* 116 (2006).

<sup>309</sup> See, e.g., I FOUNDATIONS, *supra* note 29, at 22, 23, 33, 34, 50, 98 (“to advance the in Largement of Christian Religion” and “by God’s Assistance” and for “the Conversion and Reduction of the People in those Parts unto the true Worship of God and Christian Religion”); III FOUNDATIONS, *supra* note 29, at 1698 (for “propagating of *Christian* Religion to such People, as yet live in Darkness and miserable ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages . . . to human Civility”); SELECT CHARTERS, *supra* note 29, at 54, 126 (to serve “the holie Christian ffaith . . . and conversione of the poore ignorant Indian natives”).

<sup>310</sup> See, e.g., AMY E. DEN OUDEN, *BEYOND CONQUEST: NATIVE PEOPLES AND THE STRUGGLE FOR HISTORY IN NEW ENGLAND* 48, 51-53, 124-25 (2005) (in 1723 a New England minister said it was better to convert Indians “than to Destroy them”).

<sup>311</sup> See, e.g., PRUCHA, *THE GREAT FATHER*, *supra* note 94, at 512-27, 597, 800-05, 951-53.

<sup>312</sup> FELIX COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 175 & n.347 (Reprint 1971, 1942) (quoting Office of Indian Affairs, Circular No. 1665 (1921)) (“The sun-dance and all other similar dances and so-called religious ceremonies are considered ‘Indian Offenses’ under existing regulations, and corrective penalties are provided.”); *id.* at 176 n.347 (quoting AMERICAN INDIAN DEFENSE ASSOCIATION, INC., *THE NEW DAY FOR THE INDIANS* 12 (1938)) (“children enrolled in Government schools were forced to join a Christian

Similarly, in New Zealand, a significant component of colonization involved the mandate to Christianize Maori, including the banning of Maori religious beliefs and ceremonies.<sup>313</sup>

### *I. Civilization*

The assumed superiority of Euro-American cultures and civilizations was an important part of Discovery. Euro-Americans thought that God had directed them to bring civilized ways and education to Indigenous peoples and to exercise paternalism and guardianship powers over them.

From the beginning of North American explorations, the Crown and colonists justified the domination of American Indians and English legal rights on the assumption that they possessed the superior civilization and that Indians were savage barbarians.<sup>314</sup> The American states and the United States also actively applied this Discovery element against American Indians. These governments attempted to destroy and remake Indian people and their cultures, legal systems, and governments into Euro-American clones.<sup>315</sup> As one example, in 1895, the Republican Party platform stated the goal to expand America into “all the waste places of the earth” because that would be a great gain “for civilization and the advancement of the race.”<sup>316</sup>

In New Zealand, this idea of civilization was inherent in many of the colonial actions. For instance, by the 1860s the colonial Government had begun to legislate against the use of Maori language, customs and laws.<sup>317</sup> The Maori Land Court was established with the express purpose to advance and civilize the Natives.<sup>318</sup> The Court in the *Wi Parata* case justified not recognizing the Treaty of Waitangi or the doctrine of

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sect, to receive instruction in that sect, and to attend its church. On many reservations native ceremonies were flatly forbidden . . . In some cases force was used to make the Indians of a reservation cut their hair”); Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 199-204 (2001).

<sup>313</sup> *Supra* note 168. See also JAMES BELICH, *MAKING PEOPLES: A HISTORY OF THE NEW ZEALANDERS FROM POLYNESIAN SETTLEMENT TO THE END OF THE NINETEENTH CENTURY* (1996); Ani Mikaere, *Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Maori* 8(2) YEARBOOK OF NEW ZEALAND JURISPRUDENCE SPECIAL ISSUE – TE PURENGA 134 (2005).

<sup>314</sup> See, e.g., SELECT CHARTERS, *supra* note 29, at 54, 236 (Charles I said the lands in Maryland were “partly occupied by Savages”); II FOUNDATIONS, *supra* note 39, at 854; III FOUNDATIONS, *supra* note 29 at 1690, 1698 (Elizabeth I ordered Gilbert to colonize heathen and barbarous people; James I ordered his colonists to “bring the Infidels and Savages . . . to human Civility, and to a settled and quite Government”); MILLER, *NATIVE AMERICA*, *supra* note 1, at 26-31 (recounting colonial opinions of Indians).

<sup>315</sup> See, e.g., PRUCHA, *THE GREAT FATHER*, *supra* note 94, at 643-707, 790-96, 815-35, 953-57, 1041-46; Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 199-204 (2001).

<sup>316</sup> Julius W. Pratt, *John L. O’Sullivan and Manifest Destiny*, 12 NEW YORK HISTORY 213, 234 (1933).

<sup>317</sup> See, e.g., Native Schools Act 1858 and above discussion accompanying *supra* note 166.

<sup>318</sup> See note 172 *supra*.

native title because Maori were ‘barbarians’ and ‘uncivilised.’<sup>319</sup> Today, this reasoning is no longer accepted as precedent. In 2003, the Court of Appeal overruled *Wi Parata*.<sup>320</sup> No contemporary case law refers to Maori as uncivilized. Instead, the country is grappling with what it means if the Government now accepts that all land in New Zealand was once owned by Maori. A comprehensive settlement process is taking place in New Zealand whereby the Crown is seeking to address and compensate for historical breaches of the Treaty of Waitangi.<sup>321</sup>

### *J. Conquest*

This element asserts that Native lands and legal titles could be taken by military actions. The word was also used as a term of art to describe the rights Europeans gained automatically over Indigenous Nations by making a first discovery.

We see the implied use of this element when the Crown granted legal estates in Indian lands in America through the charters. English officials expressly used this element, for example, in 1751, when they claimed that Indian Tribes had lost the ownership of their lands due to supporting the French in a losing war.<sup>322</sup> The colony of Connecticut made a similar claim for over a century that it had acquired title to Indian lands due to its victory in the Pequot War of 1637.<sup>323</sup>

The United States Articles of Confederation Congress also tried to utilize this element in 1783-84 when federal officials argued to tribes that they had lost their lands due to fighting for the British in the Revolutionary War.<sup>324</sup> This same Congress then expressly placed the element of conquest in the Northwest Ordinance of 1787 when it stated that a “just” war can take Indian title.<sup>325</sup> In 1848, the United States Congress then applied the Northwest Ordinance and the Discovery element of conquest to the Oregon Country.<sup>326</sup> The United States Supreme Court, of course, defined this element in 1823, and the federal courts have relied on it as part of Discovery ever since.<sup>327</sup>

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<sup>319</sup> See note 184 *supra*.

<sup>320</sup> Ngati Apa [2003] 3 N.Z.L.R. 643.

<sup>321</sup> The Government’s Office of Treaty Settlements, <http://www.ots.govt.nz/>.

<sup>322</sup> DELORIA & WILKINS, *supra* note 77, at 11; CALLOWAY, *supra* note 30, at 9-10.

<sup>323</sup> DEN OUDEN, *supra* note 310, at 5, 10-13.

<sup>324</sup> DELORIA & WILKINS, *supra* note 77, at 11; 34 *Journals of the Continental Congress* 124-25 (1788).

<sup>325</sup> *Supra* notes 78-79.

<sup>326</sup> An Act to establish the Territorial Government of Oregon, 9 Stat. 323, § 14 (1848).

<sup>327</sup> *Johnson v. M’Intosh*, 8 U.S. (8 Wheat.) 543, 589 (1823) (“The title by conquest is acquired and maintained by force.”); *see also Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 289-90 (1955) (“After conquest [tribes] were permitted to occupy portions of territory”; “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force . . . it was not a sale but the conquerors’ will that deprived them of their land.”).



Similarly, in New Zealand, particularly in the 1860s and 1870s, the British unleashed war on North Island Maori to take land. Legislation was passed to legitimate the taking of Maori land even in instances of British military defeats.<sup>328</sup>

In sum, it is striking but not at all surprising how similar the use of the elements of Discovery is in the histories of New Zealand and the United States. The comparative framework that we analyze above illustrates graphically just how deeply rooted the legal fictions of Discovery are in our legal systems. The Doctrine always has been, since European settlement, and still is today part of the property law regimes of both our countries.<sup>329</sup> While there are slight variations, the differences mostly arise from the different social and cultural contexts of Maori people and American Indians. For instance, even though there is a Treaty of Waitangi, Maori Land Court, and Waitangi Tribunal in New Zealand, the underlying tenor that the Parliament relies on to legitimate itself is the dialogue of covert Discovery, most recently evidenced in the Foreshore and Seabed Act 2004. Equally, notwithstanding hundreds of treaty promises by the United States to protect American Indian tribal property and Indian rights, and the U.S. Declaration of Independence statement that all men are created equal, American history demonstrates the exact opposite treatment of American Indian governments, Indian people, and their property rights by the United States.

## V. CONCLUSION

Historically, comparative law, as a Western legal theory, has mostly produced a spectrum of research results for Indigenous peoples ranging from worthless to destructive. Comparative law has its history in a colonial binary of ethnocentricity, meaning that comparisons have often taken place by evaluating other races and cultures by criteria specific to one's own. Lawyers, legal academics, judges, and legislatures, have historically gazed at Indigenous Peoples not through lenses of wanting to understand the differences, but to eliminate differences. This Article is rife with these examples. In both countries, the European colonists pursued a mission to destroy the cultures, laws, and governments of Indigenous peoples. A campaign to 'civilize' these 'others' by making illegal the practicing of all their ways of knowing was sought through the means of law. While no comparative legal theorist would today desire "a larking adventure in prospecting" among "primitive" cultures,<sup>330</sup> and no judiciary or legislature would overtly aspire to destroy Indigenous laws and practices, it is perhaps debatable whether the modern comparative law paradigm can provide a legitimate starting point to conduct worthwhile research for Indigenous peoples. We think, however, that it can.

Despite reserving some concerns, we believe that Western comparative legal theory should be embraced by Indigenous scholars. As some have already asserted, it is important for Indigenous researchers to engage with Western theory to expose its ethnocentricity and decolonize it in order to make a better postcolonial world.

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<sup>328</sup> See BELICH, *supra* note 164 and accompanying text.

<sup>329</sup> 25 U.S.C. § 177; Johnson v. M'Intosh, 8 U.S. (8 Wheat.) 543 (1823); and in New Zealand *see* the Foreshore and Seabed Act 2004.

<sup>330</sup> E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 3 (1954, 1961 Print).

Indigenous peoples have practiced their own versions of comparative law for centuries: the sharing of knowledge and the adaptation of legal traditions through spending time with other tribal groups. Henderson emphasizes the importance for contemporary Indigenous scholarship to “dialogue comparatively.”<sup>331</sup> He explains: “This methodology not only allows others to learn from the Indigenous experience, but also offers greater legitimacy for Indigenous peoples. The relevance of the ‘Indigenous Humanities’ to the postcolonial consciousness and law can provide teachings and lessons learned by Indigenous peoples around the world.”<sup>332</sup> John Borrows has recognized: “Our intellectual, emotional, social, physical, and spiritual insights can simultaneously be compared, contrasted, rejected, embraced, and intermingled with those of others. In fact, this process has been operative since before the time that Indigenous peoples first encountered others on their shores.”<sup>333</sup> It is in this vein of respectfully coming together to share our experiences of the Doctrine of Discovery and our hope for a better future that has motivated us to write within a comparative framework.

Comparative law methodology is not, and should not be, solely a Western theoretical undertaking. Many comparativists, in fact, realize that the primary focus of comparative law on just the United States and Europe has been a problem.<sup>334</sup> But even worse, perhaps, is the ethnocentric failure to even consider Indigenous legal systems. For example, in 1941, one of the pioneering American comparativists, John Wigmore, surveyed 16 principal legal systems: Egyptian, Mesopotamian, Hebrew, Chinese, Hindu, Greek, Roman, Japanese, Mohammedan, Keltic, Slavic, Germanic, maritime, papal, Romanesque, and Anglican.<sup>335</sup> Absent from this list was an Indigenous legal system. Mostly absent, still today, are comparative studies of Indigenous legal systems. There remains little solid interest in undertaking legal comparative work that concerns British colonized Indigenous peoples in the United States, Canada, Australia or New Zealand. Most contemporary comparative work in the United States is concentrated in exploring the similarities and differences with legal systems in Europe, Asia and Latin America.<sup>336</sup> If the gaze turns to Indigenous peoples at all, it is most likely to be in Africa.<sup>337</sup> Moreover, even though some excellent work has been done by academics interested in

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<sup>331</sup> James (Sakej) Youngblood Henderson, *Postcolonial Indigenous Legal Consciousness*, 1 INDIGENOUS L. J. 1, 4 (2002).

<sup>332</sup> *Id.*

<sup>333</sup> JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 147 (2002).

<sup>334</sup> Matthias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 672 & n.8, 675 (2002).

<sup>335</sup> JOHN H. WIGMORE, *A KALEIDOSCOPE OF JUSTICE: CONTAINING AUTHENTIC ACCOUNTS OF TRIAL SCENES FROM ALL TIMES AND CLIMES* (1941). For an excellent recent account of the work of the early American comparativists see David S. Clark, *The Modern Development of American Comparative Law: 1904-1945*, 55 AM. J. COMP. L. 587 (2007).

<sup>336</sup> See, e.g., INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds. 1997).

<sup>337</sup> See, e.g., T.W. Bennett, *Comparative Law and African Customary Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds 2006); but see Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 48 AM. J. COMP. L. 287 (1998).

better understanding the prevalence of colonization for Indigenous peoples in the United States and New Zealand, few have situated their work squarely within a theoretical comparative framework.

Some recent legal texts have sought to better understand the encounter between the common law legal system and the Indigenous peoples of North America and Australia, including the work by Paul McHugh and Stuart Banner although they do so from within a legal-historian lens and not specifically using comparative law theory.<sup>338</sup> Others have also completed impressive work including the recent publications by Paul Keal,<sup>339</sup> Peter Russell,<sup>340</sup> and Christa Scholtz,<sup>341</sup> but these authors write from non-law perspectives, such as political science. The one legal academic who is explicitly situating his work on Indigenous legal systems, and within a comparative methodology, is Canadian law professor H. Patrick Glenn. His book includes a chapter on Indigenous peoples – classified by Glenn as “chthonic peoples.”<sup>342</sup> However, the motivation for us to pursue comparative legal work is not to describe who we are or the legal system dear to our hearts, but rather to examine how the Western legal system has developed and applied a property theory based in fiction to substantiate the continuing colonization of Indigenous peoples’ land and resources.<sup>343</sup> We believe, as Indigenous legal academics, that a comparative legal framework has much to offer the movement of decolonization and in doing so we aspire to make a contribution to an improved application of comparative legal theory. This Article represents some initial thoughts within the context of comparative law and the Doctrine of Discovery.

The discipline of comparative law is burgeoning. In recent years several seminal texts have been published focused on exploring the theory of comparative law. This work provides a particularly helpful paradigm in which to explore Discovery. As von Nessen has stated: “Comparative law accepts the important relationship between law, history and culture, and operates on the basis that each legal system is a unique mixture of the spirit of its people and is the product of a complex matrix of historical events which have produced a ‘distinctive national character and ambience’.”<sup>344</sup> Thus,

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<sup>338</sup> MCHUGH, *supra* note 145; STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* (2007).

<sup>339</sup> PAUL KEAL, *EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES. THE MORAL BACKWARDNESS OF INTERNATIONAL SOCIETY* (2003).

<sup>340</sup> PETER RUSSELL, *RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTENCE TO ENGLISH-SETTLER COLONIALISM* (2005).

<sup>341</sup> CHRISTA SCHOLTZ, *NEGOTIATING CLAIMS: THE EMERGENCE OF INDIGENOUS LAND CLAIM NEGOTIATION POLICIES IN AUSTRALIA, CANADA, NEW ZEALAND, AND THE UNITED STATES* (2006).

<sup>342</sup> H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2<sup>d</sup> ed. 2004).

<sup>343</sup> In saying this, we think we echo John Wigmore’s 1931 definition of comparative law as the “tracing of an identical or similar idea or institution through all or many systems, with a view to discovering its differences and likenesses in various systems, . . . in short the evolution of the idea or institution, universally considered.” John H. Wigmore, *Comparative Law: Jottings on Comparative Legal Ideas and Institutions*, 6 TUL. L. REV. 48, 51 (1931-32).

<sup>344</sup> PAUL VON NESSEN, *THE USE OF COMPARATIVE LAW IN AUSTRALIA* 27-28 (2006).

comparative law might provide the perfect avenue to portray the enveloping character of a cultural and historical development of the Doctrine of Discovery discourse.

We have taken this advice to heart and have focused on the legal history of our two countries and the Doctrine of Discovery. The comparative law framework we set out above illustrates the pervasiveness of the Doctrine on an international scale and more relevantly in our countries. Moreover, Discovery is not just an esoteric and interesting relic of our histories. It continues to impact Indigenous peoples today in the United States and New Zealand, and in many other countries around the world. For example, the Doctrine continues to play a very significant role in American Indian law and policies because it still restricts Indian people and Indian Nations in their property, governmental, and self-determination rights.<sup>345</sup> This is true for Maori too.<sup>346</sup> The cultural, racial, and religious justifications that led to the development of Discovery raise serious doubts about the validity of New Zealand and the United States continuing to apply the Doctrine in modern day American Indian and Maori affairs.

It is not surprising that the legal histories of the United States and New Zealand in regards their Native peoples are so similar. This is a natural result of basing their conduct towards, and their claims against, the Indigenous people on the Doctrine of Discovery. In fact, we are surprised to find any differences at all between the applications of Discovery in our countries. The numerous similarities are not surprising because both of our countries share a very similar colonization discourse. If one understands the international law Doctrine of Discovery and its elements, it makes perfect sense how and why the English colonists in New Zealand and the United States and then our national governments applied the same international legal principles against Native peoples in the ways that they did.

Apparently, Europeans, and then New Zealanders and Americans, possessed the only valid religions, civilizations, governments, laws, and cultures, and Providence intended these people and their institutions to dominate Indigenous people in their countries. As a result, the human, governmental, and property rights of Indigenous peoples were almost totally disregarded as Discovery directed European colonial expansion in our countries. It remains a dangerous legal fiction still in use in modern times.

In focusing on the Doctrine of Discovery, this Article has reinforced what we already know: “legal systems develop in close contact to others: new ideas may evolve within one line of tradition and then spread quickly, with great effect on other legal systems.”<sup>347</sup> The similarities are rife between the United States and a country on the other side of the world, New Zealand, in their treatment of their Indigenous peoples and their definitions of the legal rights of their Native citizens. The common understanding is potent and illustrates the complexity that will be involved in any efforts to decolonize the legal systems in both countries.

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<sup>345</sup> Miller, 42 IDAHO L. REV., *supra* note 12, at 104-17.

<sup>346</sup> See, e.g., the Foreshore and Seabed Act 2004.

<sup>347</sup> Nils Jansen, *Comparative Law and Comparative Knowledge*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 324, 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006).