

Destroying the Doctrine of Discovery

Robert J. Miller¹

I. INTRODUCTION

International law is defined by the treaties, laws, rules, policies, and principles that nations agree to follow in their interactions with other nations.² The Doctrine of Discovery is the international law that European nations and the Church developed in the fifteenth and sixteenth centuries to colonize the non-European world.³ In fact, the Doctrine is one of the oldest examples of international law along with the law of the sea and the law of war.⁴

It is important to understand the Doctrine today, the international law of colonialism, because modern-day international borders are based on colonization. One cannot ignore the history, practices, and law of exploration and discovery because, according to another principle of international law, intertemporal law, modern-day territorial boundaries “are to be judged by the law in force at the time the title was first asserted and not by the law of today.”⁵

This international law of colonialism is an inhumane, racist, and destructive principle of law built on and perpetuated by ideals of Christian and European domination of the world. This paper briefly addresses how the Doctrine was created, how it applies around the world today, and then sets out some tactics that Indigenous nations and peoples can use to reverse and perhaps remove the Doctrine from the legal frameworks of their countries that govern their lives today.

Section II addresses the elements or factors that this author asserts constitute the law of colonization as applied in the leading court case from around the world on Discovery: the U.S. Supreme Court 1823 case of *Johnson v. M’Intosh*.⁶ Section III then briefly examines how the

¹ Jonathan & Wendy Rose Professor of Law, Sandra Day O’Connor College of Law, Arizona State University; Chief Justice, Pascua Yaqui Tribe; Citizen, Eastern Shawnee Tribe; Elected to the American Philosophical Society in 2014 and to its Governing Council in 2024.

² PARRY & GRANT, *ENCYCLOPAEDIA DICTIONARY OF INTERNATIONAL LAW* 300 (3d ed., 2009) (“International law may be defined as ‘the standard of conduct, at a given time for states and other entities subject thereto’: . . . Or as ‘the body of rules which are legally binding on states in their intercourse with each other’” (citations omitted)).

³ ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* 9-23 (2006); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 325-28 (1990).

⁴ MILLER, *NATIVE AMERICA*, *supra* note 3, at 9-23 (citing numerous authorities).

⁵ JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 113-14 (2000). *Accord* Antony Anghie, *Europe and International Law: Colonial Legacies*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN EUROPE* 45, 57 (Anne Van Aaken, ed. et al., 2023) (independent African countries still retain the same territorial boundaries as in colonial time); Manuel Servin, *Religious Aspects of Symbolic Acts of Sovereignty*, 13 *THE AMERICAS* 255, 255 (January 1957) (one should not “overlook or ignore the historical importance and significance of the ceremony by which explorers and colonizers lay claim to territory in the New World.”).

⁶ 21 U.S. (8 Wheat.) 543 (1823).

Doctrine was created and applied almost uniformly around the world by Euro-American colonizing countries. Section IV then examines how Indigenous nations and peoples can resist the application of the Doctrine in their lives and work to destroy its pernicious and deadly effects.

II. THE DOCTRINE

A. *Johnson v. M'Intosh*, U.S. (1823)

The already established international law of colonialism was adopted by the United States Supreme Court in 1823 in *Johnson v. M'Intosh*.⁷ The Court relied on what was then four hundred years of international law on colonization and applied it to the Indigenous nations and peoples in the United States. *Johnson* has greatly influenced the laws and histories of other settler colonial countries and has been cited hundreds of times by American courts and scores of times by courts in Australia, Canada, and New Zealand, and by the British Privy Council.⁸

In that case, the U.S. Supreme Court held that the Doctrine of Discovery was the established rule of European colonial law in North America and expressly adopted it as the law of the United States.⁹ *Johnson* was a dispute between non-Indians and involved land purchases allegedly made by British citizens from Indian persons or tribes in 1773 and 1775; before the United States existed. The Court had to decide what rights private individual plaintiffs, and the corporate entities they represented, had acquired through these alleged purchases. In contrast, the defendant McIntosh purchased his land and received his fee-simple title in 1818 from the United States who had purchased the lands by treaties with tribal nations in 1803 and 1805.¹⁰

To decide this dispute, the Court adopted as the rule of law the legal precedent of Discovery, the principle that when Christian European nations discovered lands unknown to other Europeans then the discovering country automatically acquired sovereign and property rights over the lands even though Indigenous nations and peoples possessed the lands.¹¹ The real property right European nations claimed to have acquired was an exclusive title held by the discovering country to buy those lands. That right was subject, however, to the Indigenous nations' and peoples' use and occupancy rights.¹² The discovering country also gained a form of sovereignty over Natives and their governments that restricted Indigenous political, commercial, and diplomatic powers and rights.¹³ These transfers of sovereign and property rights were accomplished without the knowledge or consent of Native peoples, and without payment.

The Supreme Court clearly defined the Doctrine and its application: "discovery gave title to the government by whose subjects, or by whose authority, it was made against all other

⁷ *Id.*

⁸ ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 52-58, 152-54, 215-23, 232-34 (2010) (citing numerous authorities).

⁹ *Johnson*, 21 U.S. at 571.

¹⁰ *Id.* at 560; BLAKE WATSON, BUYING AMERICA FROM THE INDIANS 203-211, 255-258 (2012).

¹¹ *Johnson*, 21 U.S. at 573-74, 587.

¹² *Id.* at 573, 574, 584, 588, 592, 603.

¹³ *Id.* at 574.

European governments, which title might be consummated by possession.”¹⁴ The Court also held that Indigenous rights, however, were “in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.”¹⁵ Thus, while Indigenous nations still held some sovereign powers and some property rights to possess and use their lands, their rights to sell their lands to whomever they wished was destroyed: “their 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.”¹⁶ As defined by the Doctrine, the U.S. Supreme Court held that a discovering European nation gained the right of “preemption,” that is, the power to preclude any other nation from buying the lands and assets from these newly discovered Indigenous nations.

Obviously, Discovery diminished the economic value of land to Native nations, and benefited the discovering countries because Indigenous real property rights and values were adversely affected upon their “discovery” by Europeans.¹⁷ In addition, Indigenous sovereign powers were limited by the Doctrine because their diplomatic, commercial, and political affairs were now legally deemed to be restricted to dealing with just their “discovering” Euro-American country.¹⁸

Through this international law, European countries largely agreed to share the assets and empires to be gained around the world. While they sometimes disagreed over discoveries, and even engaged in periodic warfare, one thing they never disagreed about was that Indigenous nations lost significant property and sovereign rights upon their discovery by Europeans.

The influence of this decision extends far beyond the United States. *Johnson* has had enormous impact on judicial decisions regarding Indigenous rights and colonialism around the world. *Johnson* has been relied on by leading court cases in the United States, Australia, Canada, and New Zealand, and the case has been cited to the English Privy Council several times regarding Indigenous rights cases in Canada and Africa.

¹⁴ *Id.* at 573. *Accord id.* at 574, 584, 588, 592 (“The absolute ultimate title has been considered as acquired by discovery”), 603.

¹⁵ *Id.* at 574.

¹⁶ *Id.*

¹⁷ 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).

¹⁸ *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 (stating that English and American governments “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) (stating that an attempt by another country to “form a political connection with [Indian tribes] would be considered by all as an invasion of our territory, and an act of hostility.”).

B. The Elements of the Doctrine

In *Johnson*, it is clear that the U.S. Supreme Court recognized and applied ten distinct elements or factors that constitute this international law of colonialism.¹⁹ A close examination of the history and laws of almost all colonized countries demonstrates that Euro-American countries expressly used the Doctrine and these elements to colonize Indigenous lands and peoples. Colonization in the United States, Australia, Canada, New Zealand, Chile, Brazil, and eastern Africa, for example, used all ten of the elements of Discovery applied in *Johnson*.²⁰ Most of these elements are still present in the modern-day laws and policies of colonized countries.

Understanding these elements is crucial to understanding colonization, its continued effects on Indigenous nations and peoples, and, most importantly, how to effectively fight against the Doctrine. We briefly define the ten elements used by the U.S. Supreme Court in 1823. (It is important to also note that one of the earliest writers in international law, Francisco de Vitoria in 1532, and the very influential Hugo Grotius in 1609, both expressly and impliedly relied on many of these same elements in their development of international law.)²¹

1. First discovery. The Euro-American country that first discovered lands unknown to other Euro-Americans acquired property and sovereign rights over the lands and Indigenous peoples.²² Discovery alone, however, was considered to create only an incomplete and temporary

¹⁹ MILLER, NATIVE AMERICA, *supra* note 3, at 3-5.

²⁰ *Id.*; Robert J. Miller & Micheline D'Angelis, *Brazil, Indigenous Peoples, and the International Law of Discovery*, 37 BROOK. J. INT'L L. 1 (2011); Robert J. Miller, Lisa Lesage & Sebastian Lopez Escarcena, *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. 819 (2011); Robert J. Miller & Olivia Stitz, *The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery*, 32 DUKE J. COMP. & INT'L L. 1 (2021); DISCOVERING INDIGENOUS LANDS, *supra* note 8.

²¹ *Johnson*, 21 U.S. at 574-604.

In 1532, Francisco de Vitoria, an important professor, priest, and adviser to the Spanish crown, lectured and wrote on Indigenous natural legal rights and the "accepted European Law of Nations on American Indian rights and status." WILLIAMS, *supra* note 3, at 13, 89-91, 97-103. See also FRANCISCUS DE VICTORIA, DE INDIS ET DE IURE BELLIE RELECTIONES 54-55, 115, 123, 125-31, 135-39, 151-61 (Ernest Nys ed. & John Pauley Bate trans., 1917); Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOCIAL AND LEGAL STUDIES 321, 321-22 (1996); ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE c. 1500 - c. 1800 46, 93, 97-98 (1995); LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 17-22, 113-32, 133-46, 156-72 (1949).

In 1609, while addressing international law and answering whether the sea was open to all nations to travel, Hugo Grotius expressly discussed the elements of first discovery, actual possession, occupation, and just war. HUGO GROTIUS, MARE LIBERUM (THE FREE SEA) 7, 12-14, 17, 19-20, 23-24, 27, 29, 40, 47, 51, 59, 78, 82, 109 (Richard Haylukt, trans., David Armitage ed., 2004).

²² *Johnson*, 21 U.S. at 572-77, 582-85, 587, 591-92, 595.

claim to title. The race by Europeans, and later the United States, to be the first to visit and claim, and then occupy new lands exemplifies this element.

2. Actual occupancy and possession. Queen Elizabeth I of England added this element to the international law of colonialism in the 1550s. She and her attorneys argued that for a European country to create an internationally recognized title in newly discovered lands it had to do more than just visit the lands and plant a flag. Thus, England and France, began demanding that Spain and Portugal actually occupy and physically possess discovered lands by building forts or settlements within a reasonable length of time after a first discovery to create an internationally recognized title.²³

3. Preemption. The Doctrine allowed Euro-American countries to automatically acquire property and sovereign rights over Indigenous nations merely by arriving in Native lands and planting their flags and religious symbols. Thus, Euro-Americans claimed the power of preemption, that is, an exclusive right to buy the discovered lands from Indigenous nations.²⁴ This one element alone foretold the Supreme Court's decision in *Johnson v. M'Intosh* in 1823. There, the Court held that the private plaintiffs could not legally buy lands directly from Indian nations because the legal right of preemption, that is, the sole right to buy Indigenous lands, belonged to the discovering Euro-American country.

4. Indian/Native title. After a discovery, Indigenous nations were considered by Euro-American legal systems to have immediately lost the full fee-simple ownership of their lands, although they could still occupy and use their lands as long as they wished.²⁵ This alleged change in legal ownership occurred without the knowledge or consent of Indigenous nations and without payment.

5. Indigenous limited sovereign and commercial rights. Indigenous nations were also considered to have lost some aspects of their sovereignty and their political rights to engage in international trade, treaties, and diplomacy.²⁶ After a discovery, Indigenous nations were only supposed to deal with the Euro-American government that had "discovered" them. In line with this element, in 1831 the U.S. Supreme Court held that American Indian nations are not internationally recognized sovereigns but are instead "domestic, dependent nations" and could engage in trade and treaties only with the United States.²⁷

6. Contiguity. This element identified the boundaries and extent of lands Euro-Americans claimed after discovery. Not surprisingly, they claimed enormous areas of land contiguous to their actual discoveries and settlements. In establishing colonies in North America in the early 1600s, England's James I granted his colonists lands far beyond their actual settlements and even went so far as to claim the entire continent from the Atlantic to the Pacific Ocean.²⁸ In addition, the international law of colonialism stated that when a Euro-American country discovered the

²³ *Id.* at 573, 577, 591.

²⁴ *Id.* at 573-74, 577, 581-82, 585-88, 603.

²⁵ *Id.* at 574, 579-81, 584-89, 591-92, 598, 600, 602-03.

²⁶ *Id.* at 587-88.

²⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

²⁸ *Johnson*, 21 U.S. at 575, 577-79, 582-83.

mouth of a river it acquired a claim to the entire drainage system of the river, such as was exemplified by the “Louisiana Territory” and the “Oregon Country” in North America.

7. Terra nullius. This Latin phrase means empty or vacant land. Under the Doctrine, if lands were not occupied by anyone, then they were available for Discovery claims.²⁹ Euro-Americans were very liberal in defining Indigenous lands as being “empty” and they often included areas that were in reality populated by Indigenous peoples. England claimed Australia under *terra nullius* although Aboriginal peoples had lived there for tens of thousands of years.³⁰ In addition, *Johnson* implies a second definition for *terra nullius*: Euro-Americans also considered lands to be “empty” and available for Discovery even if there were Native peoples present if they used or governed their territories in a fashion that Euro-American legal systems did not approve.

8. Christianity. Euro-Americans always used religion to justify their alleged superiority over Indigenous peoples and cultures. This is not surprising as the Catholic Church was heavily involved in developing the international law of colonialism in the fifteenth century. The papal bulls of 1436 and the 1450s that granted the Canary Islands and parts of Africa to Portugal, and the 1493 bulls that divided the world for Spanish and Portuguese colonization, declared that Christian conversion was the goal of colonization. Non-Christians did not have the same rights to land, sovereignty, humanity, and self-determination as Christians.³¹

9. Civilization. Euro-American ideals about “civilization” and their presumed superior cultures were also crucial aspects of their claims over Indigenous peoples and were used to justify Discovery.³² Euro-Americans claimed that God had directed them to bring civilization and religion to Indigenous peoples.

10. Conquest. By the 1400s, international law already included principles about the law of war and that a conquering Christian country was allowed to acquire the public lands, wealth, and rights of a defeated Christian monarch. Euro-American countries applied this same principle to victories over Indigenous nations.³³ But *Johnson* also hints at a second meaning to this element. The Supreme Court implied that first discovery was the equivalent of a military conquest because Discovery automatically transferred land, property, and sovereign rights over Indigenous nations, their lands, and their assets to Euro-Americans upon first discovery.

Identifying these elements from *Johnson v. M’Intosh* demonstrates the enormous and horrendous impacts the international law of colonialism has had on world history and on Indigenous nations and peoples. The Doctrine is still the law and is very relevant to the modern-day existence and rights of Indigenous nations and peoples around the world. The Doctrine

²⁹ *Id.* at 595-96.

³⁰ *Mabo v. Queensland* (1992), 175 CLR 1, 107 ALR 1 (rejecting *terra nullius* as false and not a basis for England’s claim over Australia).

³¹ *Johnson*, 21 U.S. at 573.

³² *Id.* at 572-73, 589-91, 596-97, 599; Anghie, *Europe and International Law*, *supra* note 5, at 48, 53, 55 (explaining that Indians were perceived as savages, uncivilized, and barbaric).

³³ *Johnson*, 21 U.S. at 576, 587-90.

directed and justified the history of religious, legal, and political practices utilized by colonial powers and it largely remains in effect in colonized countries today.

III. THE DEVELOPMENT AND APPLICATION OF THE DOCTRINE

This section briefly reviews the development of the international law of colonialism, and highlights some major examples of its use around the world over the past six hundred years.

A. The European Development of the Doctrine

The Doctrine was developed primarily by the Church, Portugal, and Spain in the fifteenth century and was rationalized under the authority of the Christian God and ethnocentric beliefs that Europeans could claim the lands and rights of Indigenous peoples and exercise dominion over them.³⁴

Scholars have traced the theories behind the Doctrine to the Crusades to the Holy Lands in 1096-1271.³⁵ To justify the Crusades, the Church established the idea of a worldwide papal responsibility and jurisdiction to create a “universal Christian commonwealth.”³⁶ This claim led to the justification of holy wars against infidels.³⁷ In addition, in 1240, the canon-lawyer Pope Innocent IV asked whether it “is licit to invade a land that infidels possess or which belongs to them?”³⁸ To answer the question, Innocent focused on the authority of Christians to legitimately dispossess pagans of their *dominium*, that is, their sovereignty and property.³⁹ He relied on St. Augustine’s writings on holy war that Christians had the right and duty to wage war on nations that practiced idolatry, cannibalism, and human sacrifice because it was in defense of

³⁴ Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 8-21 (2005) (citing numerous authorities); PAGDEN, *supra* note 21, at 8, 24, 126; JAMES MULDOON, POPES, LAWYERS AND INFIDELS 34-48, 107-52 (1979); THE EXPANSION OF EUROPE: THE FIRST PHASE 3-4, 155-57, 186, 191-92 (James Muldoon ed. 1977); CARL ERDMANN, THE ORIGIN OF THE IDEA OF CRUSADE 8-11, 155-56 (1935, Marshall W. Baldwin & Walter Goffart trans., 1977 ed.).

³⁵ PAGDEN, *supra* note 21, at 8, 24, 126; WILLIAMS, *supra* note 3, at 14, 29-31; EXPANSION OF EUROPE, *supra* note 34, at 3-4, 155-57, 186; ERDMANN, *supra* note 34, at 155-56; JAMES A. BRUNDAGE, MEDIEVAL CANON LAW AND THE CRUSADER 19-26, 136-38, 192-94 (1969).

³⁶ WILLIAMS, *supra* note 3, at 29; *accord* PAGDEN, *supra* note 21 at 24-30 (under Roman and natural law, non-Christians were not part of the world); J.H. BURNS, LORDSHIP, KINGSHIP AND EMPIRE: THE IDEA OF MONARCHY 1400-1525 100 (1992) (philosophers interpreting the teachings of Aristotle say it was only possible to see the world as a single system comprised of Christendom).

³⁷ BRUNDAGE, *supra* note 35, at 19-26; ERDMANN, *supra* note 34, at 155-56; WILLIAMS, *supra* note 3, at 29-30.

³⁸ Innocent IV, *Commentaria Doctissima, in Quinque Libros Decretalium* (1581), in EXPANSION OF EUROPE, *supra* note 34, at 191-92.

³⁹ WILLIAMS, *supra* note 3, at 13 n.4; HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 226-39 (1866, William B. Lawrence ed., 1936); BURNS, *supra* note 36, at 18, 98-100, 161-62.

Christianity and justice.⁴⁰ Accordingly, the pope was deemed to be in charge of the spiritual health of all humans, and to have a role in the secular affairs of all humans.⁴¹

In the early 1400s, these principles were refined when Poland and the Teutonic Knights battled to control pagan Lithuania.⁴² In the Council of Constance of 1414, the Christian Teutonic Knights based their claims to Lithuania on the papal bulls from the Crusades that allegedly authorized the confiscation of heathens' property and sovereignty.⁴³ The Council, however, accepted Poland's argument, based on Innocent IV's arguments from 1240, that infidels possessed the same natural law rights to sovereignty and property as Christians but that a pope could order invasions to punish violations of natural law or to spread the gospel.⁴⁴ Future crusades and conquests had to proceed under Innocent IV's rules that pagans had natural rights, but that infidels also had to comply with European natural law or be attacked.⁴⁵

B. Spain and Portugal

Spain and Portugal began diplomatically and then violently to assert claims to the Canary Islands, and the Azore, Cape Verde, and Madeira island groups.⁴⁶ The Church became involved and began creating international law to regulate European exploration and colonization in non-European lands.⁴⁷ Portugal claimed the Canary Islands, off the northwest coast of Africa, based on "priority of *discovery* and *possession* against any other European power" and under a "right of *conquest*."⁴⁸ Portugal asked the pope to verify its claim. King Duarte of Portugal argued that his discoveries were made on behalf of Christianity because he would convert the infidel "wild men," and he justified his actions because the Canary Islanders allegedly did not have a common

⁴⁰ ERDMANN, *supra* note 34, at 8-11; JOHN MARK MATTOX, SAINT AUGUSTINE AND THEORY OF JUST WAR (2006); XIX DE CIVITAE DEI 13 (quoted in PAGDEN, *supra* note 21, at 98).

⁴¹ WILLIAMS, *supra* note 3, at 14-17, 45-47.

⁴² *Id.* at 59-60.

⁴³ *Id.* at 62-63; MULDOON, *supra* note 34, at 109-19.

⁴⁴ WILLIAMS, *supra* note 3, at 65.

⁴⁵ *Id.* at 66-67; MULDOON, *supra* note 34, at 109-19; PAGDEN, *supra* note 21, at 24 & 126 (civilized countries had to be Christian).

⁴⁶ Jay Lalonde, *Settler Colonialism and the Politics of Colonialism*, in OXFORD RESEARCH ENCYCLOPEDIA ON MIGRATION STUDIES 4 (Maddalena Marinari, ed. 2026); EXPANSION OF EUROPE, *supra* note 34, at 47-48, 54; CHARLES R. BOXER, THE PORTUGUESE SEABORNE EMPIRE 1415-1825 21-29 (1969); EDGAR PRESTAGE, THE PORTUGUESE PIONEERS 294-95 (1933, reprint 1967) (Portugal built "a wooden fort and garrisoned it to safeguard the factory and protect their ally. This was a first step towards dominion"); I ROGER BIGELOW MERRIMAN, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 142-46, 155-56, 171-72, 180, 189 (1918, 1962 ed.).

⁴⁷ Johnson, 21 U.S. at 572-73; WILLIAMS, *supra* note 3, at 7-8, 325-28. See also Antonio Truyol y Serra, *The Discovery of the New World and International Law*, 3 TOLEDO L. REV. 305, 308 (1971) (the New World confronted Europeans "with the problem of the law of colonization" and "it finally became necessary to pose the problem of the law of nations in a global perspective.").

⁴⁸ I MERRIMAN, *supra* note 46, at 144 (emphasis added); *id.* Vol. II, at 172. Accord BOXER, *supra* note 46, at 21-29; PRESTAGE, *supra* note 46, at 8-9, 27, 38-41, 43-50, 54-59, 96-97, 100-02.

religion, laws, money, metal, writing, housing, or clothing.⁴⁹ Duarte argued that if the pope prevented Portugal's expansion, it would interfere with the spread of civilization and Christianity.⁵⁰

Pope Eugenius IV concluded that the Islanders had *dominium* under Roman international law (*ius gentium*) but that the papacy possessed jurisdiction over their secular actions.⁵¹ In light of Portugal's arguments, Eugenius IV issued the papal bull *Romanus Pontifex* in 1436 and authorized Portugal to convert the Canary Islanders and to control the islands for the pope.⁵²

This 1436 bull was reissued multiple times and extended Portugal's jurisdiction and authority to plunder and colonize the west coast of Africa.⁵³ In 1455, Pope Nicholas V granted Portugal title to lands in Africa that Portugal had "acquired and which shall be acquired in the future," and he authorized Portugal "to invade, search out, capture, vanquish, and subdue all Saracens [Muslims] and pagans," and to place them into perpetual slavery and to seize their property.⁵⁴ These bulls authorized the conversion of infidels and granted Portugal title and sovereignty over lands in Africa.⁵⁵

Under the bulls, and the threat of excommunication for a Christian monarch who violated Portugal's rights, Catholic Spain had to look elsewhere for colonies. Thus, Columbus' proposal for a westward voyage interested King Ferdinand and Queen Isabella and they sponsored his venture "to *discover* and *acquire* certain islands and mainland," and they signed a contract agreeing to make Columbus the admiral of any lands he "may thus *discover* and *acquire*."⁵⁶

After Columbus' voyage from the New World, Isabella and Ferdinand sought papal ratification of the discoveries. In May 1493, Pope Alexander VI issued the bull *Inter caetera* and ordered that lands which were "*not hitherto discovered* by others," now belonged to Spain, along with "free power, authority and *jurisdiction* of every kind."⁵⁷ The Pope also granted Spain any lands it might discover in the future if they were not already "in the *actual possession* of any Christian king."⁵⁸ The Pope also placed the Indigenous peoples under Spanish guardianship.⁵⁹

⁴⁹ PRESTAGE, *supra* note 46, at 54-56 (translating Duarte's letter to the pope).

⁵⁰ EXPANSION OF EUROPE *supra* note 34, at 55-56.

⁵¹ *Id.* at 71-72; MULDOON, *supra* note 34, at 126-27.

⁵² WILLIAMS, *supra* note 3, at 72.

⁵³ CHURCH AND STATE THROUGH THE CENTURIES 146-53 (Sidney Z. Ehler & John B. Morrall trans. & eds. 1967); EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648 23 (Frances G. Davenport ed. 1917).

⁵⁴ EUROPEAN TREATIES, *supra* note 53, at 23.

⁵⁵ CHURCH AND STATE, *supra* note 53, at 146, 150.

⁵⁶ THE SPANISH TRADITION 32-33 (Charles Gibson ed. 1968) (emphasis added); *accord* SAMUEL ELIOT MORISON, THE EUROPEAN DISCOVERY OF AMERICA: THE SOUTHERN VOYAGES A.D. 1492-1616 31-44 (1974); SAMUEL ELIOT MORISON, ADMIRAL OF THE OCEAN SEA: A LIFE OF CHRISTOPHER COLUMBUS 105 (1942).

⁵⁷ EUROPEAN TREATIES, *supra* note 53, at 9-13, 23, 53-56 (emphasis added); *accord* THE SPANISH TRADITION, *supra* note 56, at 36-38.

⁵⁸ EUROPEAN TREATIES, *supra* note 53, at 9-13, 23, 53-56 (emphasis added).

⁵⁹ *Id.* at 9-13, 23, 53-56; WILLIAMS, *supra* note 3, at 79.

Remarkably, however, Portugal claimed the islands Columbus had discovered in the Caribbean.⁶⁰ King D. João II argued a new element of Discovery, contiguity, and claimed that Portugal already owned those islands because they were located “*near*” the Azore Islands that Portugal already possessed.⁶¹ Portugal and Spain thus requested another bull to delineate Spain’s lands in the New World. Alexander VI then issued *Inter caetera II* and drew his line of demarcation from the north to the south pole, 300 miles west of the Azores, and granted Spain title to the lands “*discovered* and to be *discovered*” west of that line and jurisdiction over Indigenous peoples, and the same rights were granted to Portugal east of the line.⁶² This bull also assigned Spain and Portugal the duty to convert Indigenous peoples.⁶³ Thus, under international law, Spain and Portugal possessed the sole rights to colonize the entire world.

Spain and Portugal utilized these bulls and argued that their mere discovery of new lands in their spheres of influence and engaging in symbolic acts of possession was sufficient to establish their ownership and empire.⁶⁴ Portugal, for example, ordered that stone *padroas* and wooden crosses be erected along the coasts of Africa and Brazil to prove its first discoveries and symbolic occupation.⁶⁵ Spanish and other European explorers also undertook the same symbolic acts of possession in making claims to new lands.⁶⁶

C. England and France in Eastern North America

England, France, and Holland used this emerging international law to claim rights of first discovery, sovereignty, commercial power, and title to lands in Eastern North America and

⁶⁰ H.V. Livermore, *Portuguese History, in* PORTUGAL AND BRAZIL 61 (H.V. Livermore ed. 1953); MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 56, at 97-98; II MERRIMAN, *supra* note 46, at 199.

⁶¹ PRESTAGE, *supra* note 46, at 237 (emphasis added); *accord* REGINA JOHNSON TOMLINSON, *THE STRUGGLE FOR BRAZIL: PORTUGAL AND “THE FRENCH INTERLOPERS” 1500-1550* 7 (1970).

⁶² *The Bull Inter Caetera* (Alexander VI) (May 3, 1493), *in* EUROPEAN TREATIES, *supra* note 53, at 9 & 23 (emphasis added); *accord* THE SPANISH TRADITION, *supra* note 47, at 38; MORISON, *ADMIRAL*, *supra* note 56, at 368-73; CHURCH AND STATE, *supra* note 46, at 156.

⁶³ THE SPANISH TRADITION, *supra* note 47, at 36-37.

⁶⁴ PATRICIA SEED, *CEREMONIES OF POSSESSION IN EUROPE’S CONQUEST OF THE NEW WORLD, 1492-1640* 9 & n.19, 69-73, 101-02, at 9 & n.19, 69-73, 101-02 (1995); James Simsarian, *The Acquisition of Legal Title to Terra Nullius*, 53 POL. SCI. Q. 111, 113-14, 117-18, 120-24 (March 1938); A.S. KELLER, O.J. LISSITZYN & J.E. MANN, *CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS 1400-1800* (1938); Friedrich August Freiherr von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT’L L. 448, 453-54, 460-61 (1935).

⁶⁵ 1 ANTONIO HENRIQUE R. DE OLIVEIRA MARQUES, *HISTORY OF PORTUGAL: FROM LUSITANIA TO EMPIRE* 219-20 (1972); Heydte, *supra* note 64, at 453-54, 460-61.

⁶⁶ Heydte, *supra* note 64, at 453-54, 460-61; MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 56, at 63, 151; PAGDEN, *supra* note 21, at 81; Miller, Lesage & Escarcena, *supra* note 21; Miller & D’Angelis, *supra* note 21.

elsewhere around the world.⁶⁷ England claimed that John Cabot's 1496-98 explorations and alleged discoveries along the east coast of North America gave it a first Discovery claim to parts of modern-day Canada and the United States.⁶⁸ England also used other elements of Discovery in the 1640s because England claimed "*first discovery, occupation, and the possession*" of lands due to its colonial settlements.⁶⁹ In turn, France contested England's claims of first discovery and instead argued that France had actually discovered those areas and possessed them first.⁷⁰

Both countries, however, faced problems under the papal bulls that granted Spain and Portugal preeminence in colonizing the world. As Catholic countries, French and English monarchs risked excommunication if they violated the bulls. But their legal scholars analyzed canon law and the bulls, and developed new theories on Discovery that allowed their countries to colonize and trade in the New World.⁷¹ England decided that its monarch, Catholic King Henry VII, would not be in violation of the bulls if English explorers only claimed lands that had not yet been discovered by a Christian prince.⁷² A new element of the international law, actual occupancy and possession, was created by Protestant Queen Elizabeth I and her advisers when they demanded that Spain and Portugal actually occupy non-Christian lands before they could prevent England from making Discovery claims.⁷³ France joined England in this argument and in applying the new element of actual occupancy in their dealings with Spain and Portugal. In the 1550s, England and France separately, and unsuccessfully, negotiated treaties with Spain and Portugal that would have requiring actual occupation by Spain and Portugal for their alleged discoveries around the world to be recognized.⁷⁴ In compliance with this new element, Henry VII, Elizabeth I, and James I ordered English explorers to discover and colonize lands "*unknown to all Christians*" and "*not actually possessed of any Christian prince.*"⁷⁵

⁶⁷ MILLER, NATIVE AMERICA, *supra* note 3, at 12-23, 44-48, 120-26, 131-36 (citing numerous authorities).

⁶⁸ *Id.* at 17, 25, 70; PAGDEN, *supra* note 21, at 90.

⁶⁹ VII EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 30-32 (Alden T. Vaughan & Barbara Graymont eds., 1998) (emphasis added).

⁷⁰ PAGDEN, *supra* note 21, at 34; I JOSEPH JOUVENCY, AN ACCOUNT OF THE CANADIAN MISSION 179, 205 (1710); II TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE 33, 127, 199, 203 (Reuben Gold Thwaites ed. 1959); *id.* at Vol. III, at 33, 39, 41; *id.* at Vol. XXXIV at 217-19.

⁷¹ WILLIAMS, *supra* note 3, at 126-225.

⁷² *Id.*

⁷³ *Id.* at 133; Heydte, *supra* note 64, at 450-54, 458-59 ("At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation."; Elizabeth I wrote a Spanish minister rejecting the papal bulls and stated that first discovery alone "cannot confer property"); EUROPEAN TREATIES, *supra* note 53, at 219; I HYDE, TREATISE ON INTERNATIONAL LAW 164 (1922).

⁷⁴ WILLIAMS, *supra* note 3, at 133; Heydte, *supra* note 64, at 458-59 & n.35; I EUROPEAN TREATIES, *supra* note 53, at 220 n.9.

⁷⁵ I FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 18, 22-29 (W. Keith Kavenagh ed. 1983) (emphasis added); *id.* vol. III FOUNDATIONS, at 1690-98; *accord* SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606 – 1775 24-25 (William MacDonald ed. 1993).

England and France also developed another element, *terra nullius* or vacant lands.⁷⁶ This element holds that if lands are possessed by no person or nation, or even if they are occupied but they are not being governed in a manner that European legal systems recognized, then they were considered waste and vacant, and available to claim.⁷⁷ England, Holland, France, and the United States relied on this element to claim that lands actually occupied and governed and used by Indigenous nations were legally vacant or *terra nullius*.⁷⁸

D. Discovery in the Pacific and Northwest Coast of North America

Spain claimed the entire Pacific Ocean under international law when Balboa crossed Panama in 1513, and Magellan sailed around South America into the Pacific in 1521. But other European countries also wanted the lands and riches of the Pacific. In the early 1600s, Holland claimed northwest Australia by erecting pewter plates claiming its discovery. Thereafter, French, Spanish, and English explorers visited islands, left proof of their presence, undertook symbolic acts of possession, and posted signs claiming islands. Captain James Cook, for example, followed very specific instructions from the English Admiralty and made Discovery claims to islands in the Pacific, New Zealand, and in southeast and northeast Australia. He also landed three times in what is now the U.S. state of Alaska and engaged in acts of possession claiming the land for England.⁷⁹ It is worth noting that the Admiralty expressly ordered Cook to use at least six of the ten elements of Discovery this author has identified from *Johnson v. M'Intosh*: first discovery, possession and actual occupation, preemption, Indian/Native title, Native sovereignty, and *terra nullius*.⁸⁰

In the sixteenth to twentieth centuries, England, Russia, Spain, and the United States used international law to claim rights along the Northwest coast of North America. Spain physically occupied several locations on the west coast of Mexico and engaged in other acts of possession on the coasts of Mexico and modern-day California in 1539-1602.⁸¹ From 1769 onwards, Spain

⁷⁶ PAGDEN, *supra* note 21, at 91 (Spain and Portugal did not need *terra nullius* because they had papal grants). This principle derives from Roman law and is also part of Islamic law. SIRAJ SAIT & HILARY LIM, *LAND, LAW AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD* 12, 22, 61, 70, 170 (2006).

⁷⁷ 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). The term has two meanings: “a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all” HENRY REYNOLDS, *THE LAW OF THE LAND* 173 (1987).

⁷⁸ HANKE, *supra* note 21, at 24; THE SPANISH TRADITION, *supra* note 47, at 9; MILLER, *NATIVE AMERICA*, *supra* note 3, at 21, 27-28, 49, 56, 63-64, 156, 159-60 (citing numerous authorities).

⁷⁹ Robert J. Miller, *The International Law of Discovery: Acts of Possession on the Northwest Coast of North America*, in *ARCTIC AMBITIONS: CAPTAIN COOK AND THE NORTHWEST PASSAGE* 191, 205 & n.67 (James K. Barnett & David L. Nicandri eds, 2015).

⁸⁰ *Id.* at 205 (quoting Admiralty Instructions to Captain James Cook regarding the Northwest Coast 1776, in *III THE JOURNALS OF CAPTAIN JAMES COOK ON HIS VOYAGES OF DISCOVERY: THE VOYAGE OF THE RESOLUTION AND DISCOVERY 1776 – 1780* ccxxiii (J.C. Beaglehole ed., 1967)).

⁸¹ WARREN L. COOK, *FLOOD TIDE OF EMPIRE: SPAIN AND THE PACIFIC NORTHWEST, 1543-1819*

occupied missions in Monterrey Bay, San Diego Bay, and San Francisco, all accompanied by acts of possession. In response to Russia's activities in the far north and Captain Cook's voyage in 1778, Spain launched many expeditions to the North Pacific to undertake symbolic acts of possession, and to physically occupy modern-day Nootka Sound in British Columbia and Neah Bay in Washington.⁸²

Starting in 1741, Russia was the first European country to discover the islands and coastline of modern-day Alaska and to begin exploiting the Indigenous peoples and assets. In 1764, Catherine II ordered an expedition "to confirm the *discoveries* already made, to make further *discoveries* and explorations, to *subjugate the inhabitants of newly discovered lands* to Russia, and to collect iasak [tax]."⁸³ Queen Catherine also sent a voyage to Alaska in 1786 "formally to affirm the right of Russia to all lands *discovered* by Russian seafarers and promyshlenniks [traders] in the Pacific Ocean . . . to be included formally among the *possessions* of the Russian state."⁸⁴ She ordered this expedition to engage in acts of possession by placing "crests and burying of metals inscribed in Russian and Latin in suitable places."⁸⁵ She also ordered that "crests and signs of other powers" were to be destroyed, and any foreign settlements were "on the basis of *prior discovery* by Russia" to be ordered "to leave at once the places *belonging* to the Russian state" and "you may destroy them and level and destroy the signs and crests."⁸⁶ This expedition was also ordered to claim territory for Russia "*not previously discovered* by any European power."⁸⁷ Ultimately, Russians buried up to thirty numbered bronze plates from 1787 to 1811 claiming to "establish[] *discovery* and *possession*."⁸⁸

England also engaged in extensive Discovery activities on the Northwest coast. In 1577-80, Francis Drake sailed around the world to attack the Spanish and also to explore the Pacific

58 (1973); BARRY M. GOUGH, THE NORTHWEST COAST: BRITISH NAVIGATION, TRADE, AND DISCOVERIES TO 1812 16 & 18 (1992).

⁸² VOYAGES OF ENLIGHTENMENT: MALASPINA ON THE NORTHWEST COAST 1791/1792 4 (Thomas Vaughn, et al., trans. & eds. 1977); FREEMAN M. TOVELL, AT THE FAR REACHES OF EMPIRE: THE LIFE OF JUAN FRANCISCO DE LA BODEGA Y QUADRA 71-72, 94-95, 203, 213 (2008); GOUGH, *supra* note 81, at 126 & 138; JAMES R. GIBSON, OTTER SKINS, BOSTON SHIPS, AND CHINA GOODS: THE MARITIME FUR TRADE OF THE NORTHWEST COAST, 1785 – 1841 14 & 18 (1992); WARREN L. COOK, *supra* note 81, at 97.

⁸³ RAISA V. MAKAROVA, RUSSIANS ON THE PACIFIC 1743 – 1799 3 & 166 (Richard A. Pierce and Alton S. Donnelly, trans. & eds, 1975) (emphasis added).

⁸⁴ *Id.* at 155-56 (emphasis added).

⁸⁵ *Id.*

⁸⁶ GOUGH, *supra* note 81, at 125 (emphasis added). *Accord* MAKAROVA, *supra* note 83, at 3.

⁸⁷ GOUGH, *supra* note 81, at 13-14, 18, 125 (emphasis added); *accord* MAKAROVA, *supra* note 83, at, 3; LYDIA T. BLACK, RUSSIANS IN ALASKA 1732-1867 107 (2004).

⁸⁸ Mary Foster & Steve Henrikson, *Symbols of Russian America: Imperial Crests & Possession Plates in North America*, CONCEPTS 1-2 (Spring 2009) (emphasis added). *Accord* 2 RUSSIAN PENETRATION OF THE NORTH PACIFIC OCEAN 1700-1797: TO SIBERIA AND RUSSIAN AMERICA, THREE CENTURIES OF RUSSIAN EASTWARD EXPANSION 349 (Basil Dmytryshyn, E.A.P. Crownhart-Vaughn & Thomas Vaughn, eds & trans., 1988).

coast of America and to take possession of areas north of the Spanish occupations. He allegedly sailed as far north as 44° latitude (modern-day Oregon). In June of 1579, he allegedly landed on the California coast north of San Francisco Bay and claimed possession by planting “his famous plates of brass,” which historians believe stated: “in the name of her Majesty Queen Elizabeth of England and her successors for ever I take *possession* of this kingdom”⁸⁹ For centuries, England claimed that Drake’s first discoveries and acts of possession gave it ownership of the Northwest coast.⁹⁰

In 1776, England tried to follow up on Drake’s claims and ordered Captain James Cook to explore the Northwest coast, interestingly starting at the same latitude on the Oregon coast where Drake allegedly sailed in 1579, and to engage in symbolic acts of possession. Cook was ordered by the Admiralty “to take *possession* of [lands] for His Majesty by setting up proper Marks and Inscriptions as first *Discoverers* and *Possessors*.”⁹¹

The United States also desired colonies and riches from the Northwest coast. The U.S. used the elements of Discovery, including acts of possession, to argue for decades that it owned the Oregon Country which included modern-day Oregon, Washington, parts of Idaho and Montana, and British Columbia, Canada. The American Robert Gray discovered the Columbia River in May 1792. He was apparently the first Euro-American to sail into the river and he named it after his ship the *Columbia Rediviva*. The United States’ international law claim to the Oregon Country originated from this first discovery and the element of contiguity from discovering the mouth of the Columbia River. President Thomas Jefferson was eager to strengthen the U.S. claim to the Oregon Country so he targeted the Lewis and Clark expedition of 1803-06 to the mouth of the Columbia.⁹² Lewis and Clark then built and occupied Fort Clatsop near the mouth of the river from December 1805 to March 1806. The fort was physical evidence that the U.S. had occupied the Oregon Country.

Ultimately, the United States and England were the only settler-colonial countries still disputing the Northwest coast. The U.S. repeatedly argued in diplomatic exchanges that it owned the Oregon Country due to its first discovery of the Columbia River in 1792; Lewis and Clark’s exploration of the river and occupation of Fort Clatsop in 1805-06; and, John Jacob Astor’s construction of the American trading post Astoria in 1811.⁹³ In contrast, England claimed it

⁸⁹ GOUGH, *supra* note 81, at 20-22 (emphasis added). *Accord* HISTORICAL DICTIONARY OF THE DISCOVERY AND EXPLORATION OF THE NORTHWEST COAST OF AMERICA xxx & 109 (Robin Inglis ed., 2008).

⁹⁰ VOL. 1 NORTH AMERICAN EXPLORATION: A NEW WORLD DISCLOSED 400 (John Logan Allen ed., 1997); Manuel Servin, *The Act of Sovereignty in the Age of Discovery* 237-38 (unpublished dissertation, University of Southern California, 1959); GOUGH, *supra* note 81, at 23, 27, 156.

⁹¹ III THE JOURNALS OF CAPTAIN JAMES COOK, *supra* note 80, at ccxxiii (emphasis added).

⁹² MILLER, NATIVE AMERICA, *supra* note 3, at 99; DAVID NICANDRI, RIVER OF PROMISE: LEWIS AND CLARK ON THE COLUMBIA 203-17, 239-44 (2010).

⁹³ III AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 185, 731 (1832); *id.* Vol. IV, 377, 381, 452-57, 468-72; *id.* Vol. VI, at 663-66; FREDERICK MERK, THE OREGON QUESTION: ESSAYS IN ANGLO-AMERICAN DIPLOMACY AND POLITICS 4, 14-24, 42, 47, 51, 110, 156, 165-66, 399, 403 (1967).

owned Oregon due to Drake's first discovery and act of possession in 1579; the cession by Spain to England of its trading and settlement rights in the Pacific Northwest in 1790; and the activities of English fur trading companies in western Canada and down the Columbia River.⁹⁴

Surprisingly, in the twentieth and twentieth-first centuries countries are still arguing about their rights under international law and first discovery, acts of possession, and occupancy at various points of the globe. In recent decades, Canada and Denmark have staked claims to Han island near Greenland by planting their flags and engaging in Discovery rituals.⁹⁵ In 2007, Russia planted its flag on the bottom of the Arctic Ocean and in 2010 China did the same in the South China Sea, both to claim the oil and gas resources located under these sea beds and sovereignty over those parts of the ocean.⁹⁶ In 2012, Japan and China pushed competing claims to islands in the South China Sea.⁹⁷ In 2025, China and the Philippines planted flags on sandbars and staked claims to sovereignty also in the South China Sea.⁹⁸

E. The Berlin Act and colonization in Africa

The European "scramble for Africa" came relatively late in the age of colonization. Although Portugal and other European nations had traded with Africans and were involved in the international slave trade for centuries, interest in other economic activities and exploitation of the continent for colonies began in the mid-1800s. As conflicts arose, Germany convened the Berlin Conference of 1884-85. Thirteen European countries and the United States met to decide how to control trade with African countries, manage conflicting colonial interests, and divide up the continent.⁹⁹ The Conference produced the Berlin Act of 1885 which was their agreement on how to manage trade and colonization. The Act called itself "part of international law."¹⁰⁰ The countries involved clearly realized that they were perpetuating international law and utilizing the legal principles of Discovery while agreeing on how to colonize Africa and exploit those nations and peoples.

⁹⁴ IV AMERICAN STATE PAPERS, *supra* note 87, at 436-37, 446-47, 449, 554-58, 791; *id.* Vol. VI, 644, 652-53, 657, 661-70; MERK, *supra* note 93, at 4, 14-35, 42, 47, 51, 68-69, 110, 156, 164-66, 185-88, 395-412.

⁹⁵ *Canada island visit angers Danes*, BBC NEWS, July 25, 2005, at <http://news.bbc.co.uk/2/hi/europe/4715245.stm> (visited September 10, 2026).

⁹⁶ William J. Broad, *China Explores A Rich Frontier, Two Miles Deep*, NEW YORK TIMES, Sept. 12, 2010, at A1; Robert J. Miller, *Finders Keepers in the Arctic?*, LOS ANGELES TIMES, Aug. 6, 2007, at A19, <http://articles.latimes.com/2007/aug/06/news/OE-MILLER6> (visited September 10, 2026).

⁹⁷ Martin Fackler, *Dispute over Islands Reflect Japanese Fears of China's Rise*, NEW YORK TIMES, Aug. 21, 2012, http://www.nytimes.com/2012/08/22/world/asia/dispute-over-islands-reflect-japanese-fear-of-chinas-rise.html?pagewanted=all&_r=0 (visited September 10, 2026).

⁹⁸ Nectar Gan & Kathleen Magrama, *China and Philippines unfurl competing flags on disputed South China Sea sandbars, reviving tensions*, CNN, April, 28, 2025.

⁹⁹ Miller & Stitz, *supra* note 20, at 22-25 (citing numerous authorities); Anghie, *Europe and International Law*, *supra* note 5, at 53.

¹⁰⁰ General Act of the Berlin Conference on West Africa, Arts. 13 & 26, Feb. 26, 1885.

It is significant to note that at the Berlin Conference, and in the 1885 Act, these European nations and the United States expressly used the ten elements of Discovery, just as they were used throughout history, and as they were recognized and utilized in *Johnson v. M'Intosh*.¹⁰¹

IV. DESTROYING THE DOCTRINE

Indigenous peoples have always resisted the international law of colonialism and Euro-American claims to superior rights over tribal sovereignty and resources. In 1788, for example, Shawnee chiefs in North America told England's representatives at a treaty session that neither France nor England had ever acquired any rights in tribal lands because "it is the property of us Indians."¹⁰² Indian leaders even expressly argued against some of the specific elements of Discovery to United States representatives in 1793. These tribal leaders specifically rejected the idea of an American "conquest" of Native nations due to its victory over England in the American Revolutionary War and the U.S. claim to "*pre-emption* and your exclusive right to purchase Indian lands"¹⁰³ Plainly, tribal leaders were aware of and resisted the idea of an "international law" that limited or destroyed their rights and sovereign powers. However, as *Johnson v. M'Intosh* notes, this alleged international law was actually enforced by the United States over the Indian nations "by the sword."¹⁰⁴ Consequently, the question arises how can Indigenous peoples unravel, reverse, and destroy some of the pernicious effects of this international law from their lives and politics today?

Throughout history, various aspects of international law have been amended and even reversed. Thus, it is not a novel idea to argue that the international law of colonization should and could be destroyed. The international slave trade, for example, was ultimately outlawed world-wide and various other efforts have been used in the international arena to reverse negative and deplorable situations such as nuclear proliferation. The League of Nations and the United Nations were established in large parts to attempt to avoid future world wars. International efforts have also been undertaken to address climate change and other serious issues. In addition, one could cite the 2007 United Nations Declaration on the Rights of Indigenous Peoples as a specific example of an attempt to reverse international law and using new policies to ameliorate and unravel the horrendous impacts of world-wide colonization.¹⁰⁵ In this section, I want to briefly lay out how Indigenous Peoples can begin international efforts to reverse and even destroy the Doctrine of Discovery.

Five main strategies appear useful to address removing and destroying the Doctrine:

1. Identify. We must start by identifying the specific harmful impacts of the Doctrine and colonization in our countries and how it manifests itself in the law and our lives today. The ten elements of Discovery laid out above provide excellent tools to specifically and exactly identify the existence and application of this international law in a nation's laws and policies today, and

¹⁰¹ Miller & Stitz, *supra* note 20, at 22-57 (citing numerous authorities).

¹⁰² COLIN G. CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION* 188 (2018).

¹⁰³ JOHN SUGDEN, *BLUEJACKET: WARRIOR OF THE SHAWNEES* 152-54 (2000) (quoting numerous authorities) (emphasis added).

¹⁰⁴ *Johnson*, 21 U.S. at 588-90.

¹⁰⁵ <https://share.google/3LFfJRPvs6Z4XwfV7> (visited September 8, 2026).

the harms they cause for Indigenous Nations and Peoples. We need to catalogue these specific injuries.¹⁰⁶

2. Educate. We need to educate all Indigenous and non-Indigenous peoples around the world on what the Doctrine is, what it has done throughout world history, and most importantly, what it is still doing in the modern-day as it exists in the laws and policies of colonized countries.¹⁰⁷

3. Protest. We must actively and publicly protest the existence of Discovery and its impacts in the modern-day world.¹⁰⁸

4. Lobby. We must lobby all governments and all peoples, Indigenous and non-Indigenous, to inform themselves about the Doctrine and its evil effects, and to take positive steps to counteract, and irradiate these effects from modern day life, and to destroy the Doctrine. One initial step to focus on seems to be lobbying for all countries to adopt the U.N. Declaration on the Rights of Indigenous Peoples as national law.¹⁰⁹ In addition, we must propose and lobby our individual countries to amend current laws and governmental policies that reflect and promote the Doctrine and colonization.

5. Litigation. If education and lobbying do not produce results, Indigenous nations and peoples should litigate their human, sovereign and property rights against governments, corporations, and individuals who benefit from the Doctrine today and impose its pernicious effects on Indigenous peoples. In 1992 and 1993, Aboriginal peoples in Australia demonstrated graphically just how important litigating Indigenous rights is when they created a stunning victory and improvement in Indigenous land rights in Australia.¹¹⁰

¹⁰⁶ See, e.g., *The Doctrine of Discovery: The International Law of Colonialism*, Conference Room Paper, 11th Session of the U.N. Permanent Forum on Indigenous Issues, 7-18 May 2012, Suggestion Three (copy on file with author).

¹⁰⁷ *Id.* at Suggestion Four; *accord The Coalition to Dismantle the Doctrine of Discovery*, <https://share.google/BF7bkfUe7sBDbgmZn> (visited September 7, 2026).

¹⁰⁸ *Id.* (*The Coalition to Dismantle the Doctrine*).

¹⁰⁹ Conference Room Paper (2012), *supra* note 106, at Suggestion Three; *accord The Implementation Project*, <https://un-declaration.narf.org/> (visited September 7, 2026) (working to advance the adoption and application of the DRIP).

¹¹⁰ In 1992, litigation by a Torres Straits Islander led the Australian Supreme Court to review England's and Australia's claims to dominance over Aboriginal Peoples and their lands. That Court held that the Discovery element of *terra nullius*, vacant lands, applied by England and Australia to claim the continent, was a lie! The very next year, the Australian Parliament enacted the Native Title Act and began recognizing Aboriginal rights in land. Incredibly, a wide-variety of Aboriginal property rights are now recognized on over 54% of that continent. *Mabo v. Queensland* (1992), 175 CLR 1, 107 ALR 1 (Austl.); Native Title Act 1993 (Cth) (Austl.); Robert J. Miller & Harry Hobbs, *Unraveling the International Law of Colonialism: Lessons from Australia and the United States*, 28 MICH. J. RACE & LAW 271, 297-307, 325-27 (2023) (the United States has also taken some actions and enacted some policies that have somewhat lessened the impacts Discovery has had on Indian nations and peoples).

These five points are excellent strategies to begin pursuing the removal of the international law of colonization from national laws and preventing it from continuing to adversely impact the rights and lives of Indigenous nations and peoples.

V. CONCLUSION

The Doctrine was developed and applied by Euro-American nations as the legal and religious authority to colonize the world, and to conquer Indigenous nations and peoples. These non-Indigenous countries followed one principle - Indigenous peoples and nations lost sovereign, property, and human rights under international law upon their mere discovery by Euro-Americans. It is absolutely crucial today to study and understand this history of colonization and international law and its continuing impacts, and it is even more imperative to work to eradicate these impacts. Short of that, how will Indigenous nations and peoples unravel and destroy this international law that has so egregiously impacted their sovereignty, lives, human rights, and commercial and political situations for six centuries?