Christian Reformed Church

The Christian Doctrine of Discovery: A North American History

A Literature Review Commissioned by the Doctrine of Discovery Task Force with the support of

Christian Reformed Centre for Public Dialogue

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Introduction

The doctrine of discovery is the legal principle that facilitated and continues to facilitate colonization. It is a legal construct that began with a series of papal bulls, evolved alongside colonial history, was encoded in the judiciary of settler nations,[1] and continues to influence legal and policy decisions today. It encoded a cultural logic that provided the intellectual framework that dictated how non-Natives interacted with First Nations. This became the basis of international law and effectively legalized colonization.[2] While it evolved from a set of papal bulls, it was further encoded in a set of Supreme Court decisions in the United States and was applied across North America either as a legal precedent, as was the case in the United States, or as an underlying unstated ideology, as was the case in Canada. The doctrine encoded racial ideas that created a hierarchy within humanities that invariably placed European, Christian nations in the position of power. Having said this, European powers revised and restated the doctrine of discovery according to the cultural realities of the day. This literature review will show the life of the doctrine of discovery from its origins to the present day. This review will provide historical perspective for the synodical task force on the doctrine of discovery to be conducted by the Christian Reformed Church in North America.

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This literature review takes a chronological approach, emphasizing moments that changed, codified, or best illustrated the impact of the doctrine of discovery. I begin with

[1] These are the United States, Canada, Australia, and New Zealand

[2] Walter Echo-Hawk, *International Seminar on the Doctrine of Discovery*, Sept. 20-21, 2012, Secwepmecul'ecw, cohosted by the Shuswap Nation Tribal Council and Thompson Rivers University, p. 3. http://shuswapnation.org/wordpress/wp-content/uploads/2012/11/Conference-Report-Doctrine-Discovery-Sept-20-21-2012.pdf

antecedents in Europe, especially during the era of crusades. I then assess how Christianity became the primary justification for colonial actions through papal bulls of the fifteenth century. As colonialism developed, the religious obligations of these papal bulls went largely ignored, which changed the doctrine from a theological justification of colonialism to a secular tool of land acquisition. During the nineteenth century, the legal dimensions of this doctrine were encoded in the judiciary of both Canada and the United States. This pattern persisted into the twentieth century, until in Canada a number of important challenges overturned key portions of the doctrine. Today, the doctrine of discovery continues to be cited in legal cases and guides policy regarding Aboriginal peoples. Finally, I end with a brief discussion of the impact of the doctrine today both in courts and international politics. This fits the chronology that Vine Deloria, Jr., proposed. He argued that the doctrine of discovery put into effect a logical sequence whereby settlers first determined that the culture and religion of Aboriginal peoples were inferior to that of Europeans. Second, the Europeans offered their religion and culture as compensation for the lands they took. Finally, discovery became a guiding framework that avoided international conflict with other settler nations.[3]

A number of issues plague the study of the doctrine of discovery in North America. The first challenge is scope. On the one hand, in order to capture the significance of the doctrine, it must be placed in the global context as well as the broad historical narrative that starts before the Vatican issued its papal bulls. However, a history of the entire globe over the span of more than 500 years is outside of the reach of this project. Second, the diversity of Aboriginal nations must be respected. Because Aboriginal peoples in North America are so diverse, no single experience of the doctrine exists. Respecting this diversity is a daunting task, but anything less would be reductive. A third challenge has to do with possible Eurocentric interpretations of the doctrine. The doctrine of discovery is an invention of fifteenth century Christendom, and Aboriginal peoples had no input into its creation. Given recent scholarly trends that ascertain the role

[3] Deloria and Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin: University of Texas Press, 1999), 83.

Aboriginal peoples played in their history, we need to consider how Native peoples may have been active participants in their history while living in a context that included the doctrine. This task force will go a considerable distance toward answering this important question.

I circumvent these challenges by focusing on the legal dynamics of the doctrine, recognizing that the law codified ideas of a particular age. Stephen Newcomb referred to this as the "cognitive infrastructure" of the law, by which he meant that the law encoded a set of cultural narratives that guide decision-making processes.[4] For example, the fifteenth-century doctrine was the cultural product of Christendom, and a consideration of the theological basis of Christendom sheds light on the doctrine.[5] Documenting the roots of that cultural reality is a significant task that I take on in this literature review because it necessitates going back further than 1455, when Pope Nicholas V issued his bull, *Romanus Pontifex*.[6] Regarding the challenge of the diversity of Aboriginal Nations, I intended to offer a selection of Indigenous responses to the doctrine of discovery as a distinct portion of the analysis within this literature review. That proved to be impossible.[7] Many of those Indigenous peoples who responded in scholarly work to the doctrine of discovery are leaders in their fields, and making a distinction between scholarly work and Indigenous responses to the doctrine is extremely problematic. Further, to privilege the written work of Indigenous academics and to position them as "Indigenous responses" would

[4] Stephen Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Golden, Colo.: Fulcrum, 2008), xxi.

[5] I use the term "Christendom" in the political sense, as in the European Nations that were united in the Medieval period by a common Christianity, and whose interactions especially with those outside that group were built upon theological principles. This will be explored in much more detail below. Some scholars define the doctrine in the more precise terminology of "Doctrine of Christian Discovery" because of the environment in which the papal bulls were produced. See UNESC, Permanent Forum on Indigenous Issues, Ninth Session, New York, 19-30 April 2010, "Preliminary study of the impact of indigenous peoples of the international legal construct known as the Doctrine of Discovery," p. 5.

[6] It is for this reason that the Special Rapporteur to the United Nations used the phrase "framework of dominance" to connote the behavioral norms that are encoded in the doctrine but not reliant upon it.

[7] In addition, the doctrine of discovery can only be understood holistically. I began this literature review anticipating that separate discussion of the doctrine as applied in Canada and the United States would be appropriate: this quickly proved not to be the case.

ignore the fact that many Indigenous communities were and are orally focused cultures, so to treat such work as the definitive voice of Aboriginal people would project Eurocentric expectations and values. Therefore, I do not feign that this literature review represents all Indigenous perspectives on the doctrine of discovery even though I do include the work of several Indigenous academics. Finally, I proceed with the caveat that this review documents an imposed European construct that did not reflect Aboriginal peoples. It is for the synodical task force to grapple alongside with Indigenous peoples to find our collective response to this doctrine. These final two challenges are areas that the task force must address alongside the peoples most affected by the doctrine.

Finally, whenever scholars discuss the interactions of Aboriginal peoples and settlers, issues of terminology inevitably emerge. Nearly every term of geography and cultural groups can become a quagmire. "North America," for example, is an invented term of recent origin, naming the land after Amerigo Vespucci, the European cartographer. In many First Nations traditions, however, this same land mass is referred to as Turtle Island in reference to a commonly accepted creation story. Another famous example is that for many years Europeans referred to the Inuit people as Eskimos, which is in fact a derogatory term in Inuktitut, meaning "eaters of raw meat." *Inuit*, in their language, means "the people," and is the term they use to refer to themselves. For simplicity I use the most common written usage, understanding that all languages are culturally meaningful representations of the land based on cultural constructs. This is a decision made on the basis of clarity, not correctness. In addition, language has political connotations, and I use the language that best reflects the historical realities. Therefore, I refer to Indigenous peoples as Nations, or in the Canadian context as First Nations, because the relationship between Aboriginal Nations and the Canadian and American states is that of sovereign nations, as deemed appropriate in the Supreme Courts of both Canada and the United States. When referring to Aboriginal peoples, I opt for specificity, using their cultural affiliation as they self-identify.

Origins of the Doctrine of Discovery

When Pope Nicolas V issued *Romanus Pontifex* and created the doctrine of discovery in 1455, it was not a knee-jerk reaction to a continent full of peoples with whom Europeans were unfamiliar; rather, it was the product of centuries of European interactions with racialized "others" through religious conflict. Tracing the antecedents to the doctrine of discovery sheds light on the theological, intellectual, and political legacies of the doctrine in the colonial era. Colonialism was predicated upon a theological and intellectual understanding of Aboriginal peoples as distinct from Europeans at the social, cultural, and spiritual level. The earliest usage of Christianity in the service of empire comes from Rome, and several scholars point to this as the origin of the intellectual processes at work in the doctrine of discovery.[8] During the Medieval period Europe was governed by a number of Christian states, and the Pope held spiritual jurisdiction over each of these nations. In most cases, the distinction between holy war and political war was immaterial, as political allegiances were founded upon religious lines. Therefore, when a monarch went to war, he needed the blessing of the Pope, but that blessing was almost universally granted as part of the political structure of the era.[9] Thus, bulls issued by the Pope established normative relations that governed the ways Christian states interacted both with "infidels," or peoples who subscribed to other faiths. By setting the rules of interaction with Aboriginal peoples, this doctrine became the first international regulation regarding Indigenous peoples.[10] As one of the earliest documents of international law that governed the *societas*

[8] Pagden, Anthony. *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800* (New Haven: Yale University Press, 1995) 24-31.

[9] Carl Erdmann, *The Origin of the Idea of Crusade* (Princeton: Princeton University Press, tr. Marshall W. Baldwin and Walter Goffart, 1977), 24.

[10] Robert T. Coulter and Steven M. Tullberg, "Indian Land Rights," in *The Aggressions of Civilization: Federal Indian Policy Since the 1880s*, edited by Sandra L. Cadwalder and Vine Deloria, Jr. (Philadelphia: Temple University Press, 1984), 185, 190; Whitney Bauman, *Theology, Creation, and Environmental Ethics: From Creatio Ex Nihilo to Terra Nullius* (Florence, Ky.: Routledge, 2009), 47-48.

Christiana, or the Christian body politic, the doctrine of discovery issued by the Vatican in the fifteenth-century reflected the political realities of its era.[11]

Many scholars consider the Medieval Crusades of the thirteenth century as the first practical application of this theology of difference. By framing the Muslim Moors as less human than soldiers of Christendom, and by gaining papal sponsorship for holy wars, the crusades established a pattern of justifying warfare on theological grounds.[12] Robert A. Williams, Jr., in his useful overview of the legal constructs that guided imperialism, argued that the central concept that guided settler-colonized relationships was that "the West's" religion, civilization, and knowledge were superior to that of non-Westerners, and that this logic was employed for the first time in the Crusades. Williams goes on to argue that a seamless intellectual web connects the medieval Crusades to the colonial conquests that took place centuries later.[13] Following generations of utilization of papal thought in the service of crusade and conquest, it was natural that European powers expanded this intellectual milieu to include what became known as the Americas.[14] The crux of the matter is that the doctrine of discovery was generated by European nations in response to the addition of the Americas into their intellectual world. At the time of its creation, those who produced the doctrine knew so little about the peoples it victimized that we cannot point to Aboriginal peoples as in any way accurately reflected in the papal bulls. Edmundo O'Gorman has even argued that the language of "discovery" obscures the true meaning of what happened in the Americas. The

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[11] Williams, *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990), 23.
[12] Erdmann, 155–156.
[13] Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New Haven: Yale University Press, 1990), 6-13.
[14] This logic can also be traced to the slave trade and colonization because this pattern of thought was concerned with self-perception more than it was an issue of characterizing others.

Americas, inasmuch as they existed in the European mind, he argued, were not discovered; rather they were invented to fit a context that already existed.[15] It evolved in a worldview forged in the crusades, which then evolved into conquest and colonization.[16] By building a theological justification of war against "the other," Western thinkers needed little imagination to fit Aboriginal peoples in the Americas into that framework. Armed with these theological and philosophical arguments, European powers easily developed a mental framework that created a hierarchy of humanity in which they stood at the top.[17]

The doctrine of discovery comes from the same intellectual background as *terra nullius*, a Latin term that means "unused or vacant land." It was a legal construct that assumed that Aboriginal peoples only held the right to occupancy. According to *terra nullius*, Aboriginal peoples did live on the land, but they occupied the land in a way like fish occupied water or birds occupied air.[18] European lawyers, philosophers, and theologians expanded this notion to include land that Aboriginal peoples did not utilize according to Eurocentric expectations. Essentially, this meant that if the land was not farmed, it was "empty."[19] To determine that land was indeed *terra nullius*, Europeans characterized Aboriginal peoples in derogatory terms. For example, one of the key issues in Aboriginal title litigation was the notion of self-government. European colonizers did not see the same patterns of government or of land use that was in place in Europe, so they assumed that Aboriginal peoples did not have the social structures to enforce property ownership, and with it property rights. Because Europeans had this legal structure in

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[15] Edmundo O'Gorman, *The Invention of America: An Inquiry into the Historical Nature of the New World and the Meaning of Its History* (Ann Arbor: Greenwood Press, 1972).
[16] Rivera, Luis N., *A Violent Evangelism: The Political and Religious Conquest of the Americas* (Louisville: Westminster/John Knox Press, 1992), 51– 52.
[17] Larissa Behrendt, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010), 94.

[18] See: Armitage, *Comparing the Policy of Aboriginal Assimilation*, 16 ; Weaver, *The Great Land Rush*, 135 ; Julie Evans et al., *Equal Subjects, Unequal Rights*, 11.
[19] RCAP, Volume 1 - Looking Forward, Looking Back, Part One: The Relationship in Historical Perspective, Chapter 4 - Stage One: Separate Worlds
http://www.collectionscanada.gc.ca/webarchives/20071211061905/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg5_e.html#26

place, they could claim land because no owner had a legal claim against them. These arguments rested on ignoring the fact that Aboriginal peoples had complex social, political, and economic structures in place based on, in many cases, collective ownership of land.

In attributing a set of personality characteristics, the doctrine of discovery caused the most harm. James Axtell, in his overview of the early settlement of North America, effectively illustrated that the ways settlers envisioned the Aboriginal peoples in North America aligned with the ways they imagined "others" from around the world, tracing this notion of "othering" to the ancient Greek historian Herodotus. These imagined people had monstrous characteristics, such as a large eye in the middle of their chest, abnormally large body parts, and parts of beasts. This sort of derisive othering contrasts with the way Aboriginal peoples tended to envision those who were different from themselves: as deities.[20] When Europeans came to North America and expected to find human monsters and were surprised to find decidedly unmonstrous humans, they assumed behavioral differences. They settled on defining Aboriginal peoples as pagan, and therefore as "enemies of God." Tenuous as it was, this allowed colonization to fit within the worldview of the colonizers. For this reason, Michael Palencia-Roth argues that the Americas became an allegory that linked notions of theology, civilization, biology, and philosophy.[21] If settlers accepted that Aboriginal peoples were fully human, the entire logic of discovery would have fallen apart, since all the land in question had been discovered by Aboriginal nations beforehand. In fact, most of the European explorers' voyages were more akin

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[20] Axtell, *Natives and Newcomers* (New York: Oxford University Press, 2001), 18-20.
[21] Michael Palencia-Roth, "Enemies of God: Monsters and the Theology of Conquest" in *Monsters, Tricksters, and Sacred Cows: Animal Tales and American Identities,* ed. Albert James Arnold (University of Virginia Press, 1996), 24-25, 42.

to guided tours than genuine discovery.[22] Therefore, defining the Aboriginal peoples of North America was one of the most important intellectual projects underlying colonization.

Framing Aboriginal peoples as enemies of God positioned Europeans as the harbingers of civilization and Christianity to the so-called pagans of the Americas. The doctrine of discovery became the justification for colonial actions, especially regarding the acquisition of land. It did this by asserting that Aboriginal peoples, based on the fact that they were not European, did not hold the same rights to the land, and this assertion became the origin of the term "Aboriginal Title." This invariably included fewer rights than the rights of dominion asserted by Western powers.[23] Walter Echo-Hawk, a Pawnee lawyer and artist, has described this in his book, *In the Courts of the Conqueror*: "Under this doctrine, European explorers may claim title to Native land 'discovered' in the name of the monarch who sponsored their journey—a title recognized by all of Europe. Pretty sweet, huh?"[24]

Development of the Doctrine of Discovery in the Early Colonial Period

During the race for empire, economic motives increasingly governed the practice of colonization as the papal franchise became increasingly a secular tool of real estate accumulation.[25] Having said this, the doctrine was not universally accepted when competing European powers laid claim to the same portion of Indigenous land. Frederick August von der Heydte summarized this political reality in the following terms:

> At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation. . . . Whenever statesmen deduced sovereign rights from the bare fact of discovery it was not because they were convinced of

[22] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 17.
[23] Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (New York: Dell Publishing Company, 1974), 86.
[24] Walter Echo-Hawk, *In the Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided* (Golden, Colo.: Fulcrum Publishers, 2010), 18.
[25] Only the Spanish considered proselytizing a necessary and integral part of their colonial practice. See: Deloria and Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin: University of Texas Press, 1999), 4.

> the correctness of their argumentation, but because they had no better arguments to support their political claims.[26]

Von der Heydte showed that the rules governing engagement between Christian states were not always accepted. To resolve disputes, a hierarchy of settlement was established which complicated the notion of discovery as granting the right to the land itself. If one state "discovered" land, but another state settled, farmed, and occupied that land, the question of whose rights that land fell under became unclear. Von der Heydte terms this the distinction between discovery and appropriation, the latter of which relies upon occupation.[27]

On the ground in the Americas, the language of discovery was muddied in interactions with First Nations peoples. Living among Aboriginal populations meant that the practical implications of the doctrine of discovery laid in wait until the European states in question could muster the political, military, economic, and social capital to marginalize Aboriginal peoples. The charter of the Hudson's Bay Company and the invention of "Rupert's Land" shows this dynamic in the application of the doctrine of discovery. The economy of British North America relied on the fur and lumber trade from the resource rich northwestern portions of the continent. Having established a small colony on the banks of the St. Lawrence River, King Charles II of England "gave" the rights to trade and hunt in the Hudson's Bay watershed to his cousin, Prince Rupert. The charter then became the governing document of the heretofore-unceded lands of the Hudson's Bay watershed. The language of the charter was steeped in the logic of discovery. This charter began,

> WE HAVE given, granted and confirmed, and by these Presents, for Us, Our Heirs and Successors, DO give, grant, and confirm, unto the said Governor and Company, and their Successors, the sole Trade and Commerce of all those Seas, Streights, Bays, Rivers, Lakes, Creeks, and Sounds, in whatsoever Latitude they shall be, that lie within the Entrance of the Streights commonly called Hudson's Streights . . . that are not already actually possessed by or granted to any of our

[26] Frederick August von der Heydte, *Discovery, Symbolic Annexation, and Virtual Effectiveness in International Law,* American Journal of International Law, Vol. 29, no 3 (July 1935), 452.
[27] Von der Heydte, 452-460.

> Subjects or possessed by the Subjects of any other Christian Prince or State . . . .[28]

The charter goes on to grant to Rupert the rights to resources yet unknown. Within the charter, the company accepted the legal, political, and economic rights over a considerable portion of North America, but the geographical details within the charter were ambiguous because those who drafted the charter did not know what lands the charter actually contained. They only knew that the lands were rich in resources and that their proximity granted them the right of discovery. The charter explicitly stated that these resources had yet to be discovered. Here, the rights of the discoverer were preemptive.

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However, an alternative reality underlies the charter, and this is that both Aboriginal Nations and European traders lived in the fur trading hinterlands and worked together to create a new culture that was not as hegemonic as the language of discovery suggests. One example of this cultural creation was the many marriages between traders and Aboriginal women. In these marriages, men obtained the permission of parents to marry their daughters, paid the dowry, and solemnized the marriage with rituals borrowed from Aboriginal cultures. This was marriage *á la façon du pays*, or "in the custom of the country." These marital unions were bona fide marital unions treated without prejudice, which eventually caused consternation among European clergy.[29] Another area of cultural convergence was in the culture of *voyageurs*, French-Canadian adventurers who traded in the interior on a seasonal or multiyear basis. Their culture was created by their French-Canadian heritage, their working conditions on the interior, and largely by the

[28] http://www.hbc.com/hbcheritage/collections/archival/charter/charter.asp
[29] Sylvia Van Kirk, *Many Tender Ties: Women in Fur Trade Society, 1670-1870* (Winnipeg: Watson and Dwyer, 1980), 36-51; Jennifer Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: UBC Press, 1980).

cultural contributions of Aboriginal colleagues in the fur trade.[30] Indeed, the Métis are an entire culture based on this dynamic culture that resulted from exchanges between settler and Aboriginal peoples.[31]

During the early colonial period the doctrine of discovery, while it was a fundamental mechanism for how colonizers understood both their roles and the roles of Indigenous peoples in global history, did not dictate every area of interaction between Aboriginal peoples and non-Aboriginal settlers. Indeed, in the United States early settlement conflict with Aboriginal peoples came about because the settler worldview did not match the realities of Aboriginal sovereignty. What life on the fur-trading interior of the continent illuminates is the importance of personal encounters in historical processes. Even as intellectual trends in Europe dehumanized Aboriginal peoples, those who dealt with Aboriginal peoples on a daily basis deeply understood the humanity of Aboriginal peoples.

The Royal Proclamation of 1763

As settlement expanded and Europeans continued to rely on Aboriginal peoples for the daily needs of colonization, the British government, in one of the least popular moves among American republicans of the time, issued the Royal Proclamation of 1763. King George III signed this proclamation at the close of the Seven Years War, immediately after what is now known as "the Pontiac Rebellion," or what Colin Calloway terms the First American War of

[30] Carolyn Podruchny, *Making the Voyageur World: Travelers and Traders in the North American Fur Trade* (Toronto: University of Toronto Press, 2006), 1-17.

[31] This cultural creation was not something unique to the hinterlands but was a fundamental part of what made North America on a social, political, cultural, and economic level. A similar cultural creation existed in areas of more intensive settlement in British North America and in the thirteen colonies. In his influential, Pulitzer prize-winning book *The Middle Ground*, Richard White shows how between 1650 and 1815 politics in North America was guided by relationships between Aboriginal and settler nations. Through what White refers to as "creative misunderstanding," where each side tried to adapt diplomacy to the cultures of their counterpart but mistook the meanings of dialogue, these interactions created an entirely new way of interacting at the local and political levels. See: Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991), xiv, 50, 81.

Independence.[32] In the colonial history of North America, the Royal Proclamation of 1763 has been interpreted in many different ways. For those in British North America, this document was a guarantee of Aboriginal sovereignty that allowed the peaceful settlement of North America. British North America was in a tenuous political and military situation concerning the United States, and as the two powers competed for control over the St. Lawrence watershed, it was not prudent to impose the norms established in the doctrine upon their allies. The royal proclamation was a means to walk a line between conflict with Aboriginal nations and the United States.[33] For American settlers, the proclamation was a betrayal that surrendered vast tracts of potential land for the United States, and thus marked the beginning of the revolutionary period. For Aboriginal peoples, the proclamation was solemnized through a wampum treaty that set terms for a sacred covenant.

This organized the rights that Aboriginal nations had concerning land hungry speculators who encroached on Indigenous land.

The Royal Proclamation's purpose, as the British interpreted it, was to normalize the settlement of the frontier while it reserved preemptive land rights for the British crown.[34] It did this by drawing a line along the Appalachian Mountains beyond which no land prospectors could go to acquire Indigenous lands. The boundary between European lands in North America and "Indian country" that existed on the far side of the mountain range became known as the "Proclamation Line." The document set measures by which land could be purchased, and this was only through the British and later American governments. This organized the rights that Aboriginal nations had concerning land hungry speculators who encroached on Indigenous land.

[32] David Wilkins and Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman, Okla.: University of Oklahoma Press, 2001), 35; Colin Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2010), 66.
[33] Larissa Behrendt, *Discovering Indigenous Lands*, 99.
[34] Jennifer Reid, "The Doctrine of Discovery and Canadian Law," *Canadian Journal of Native Studies,* Vol. 30, no. 2 (July 2010), 342.

Essentially, the King of England attempted to solidify his right of discovery through the proclamation whereby he gained the right to exclusive authority in dealing with Aboriginal peoples economically through trading goods and the purchase of land. Paradoxically, the Royal Proclamation included in the same breath the rights of Aboriginal peoples as sovereigns. The Royal Commission on Aboriginal Peoples characterized this as a mixture of "imperial pretention and cautious realism."[35] In acknowledging the right of occupancy in Aboriginal lands, and of Aboriginal rights within the lands, the Royal Proclamation referred to the lands in Indian country as "our dominion" and under the protection of the crown.[36]

As noted above, the Royal Proclamation was also the beginning of the revolutionary period in the history of the United States, a period that would only be truly settled in the drawing of borders after the War of 1812.[37] Raymond Williams argued that the reason American colonists took issue with the Proclamation Line was that it seriously threatened the image that those in the thirteen colonies imagined as their place in the country.[38] The Royal Proclamation was so abhorrent to the colonists that the Declaration of Independence referred to it as a cause for the revolution.[39] No surveys ever drew this line, and even if they had, the boundary was nearly impossible to enforce. Even so, drawing the line at the intellectual level was the harbinger of years of conflict. Historian Colin Calloway referred to this as "a peace that threatened their freedom."[40] Thus, to American colonists, the Royal Proclamation was a cowardly betrayal that abandoned the grand visions the colonists had for themselves.

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[35] RCAP, Part One, Chapter Five, Section Two. http://www.collectionscanada.gc.ca/webarchives/20071207025829/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg11_e.html

[36] Robert Miller, *Native America Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny* (Westport, Conn: Praeger, 2006), 31-33.

[37] Lindsay Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford: Oxford University Press, 2005), 6; Alan Taylor, *The Civil War of 1812: American Citizens, British Subjects, Irish Rebels, and Indian Allies* (New York: Knopf, 2010).

[38] Williams, *The American Indian in Western Legal Thought*, 228.

[39] Miller, *Native America Discovered and Conquered*, 32.

[40] Colin Calloway, *The Scratch of a Pen*, 66.

One of the least heard perspectives on the Royal Proclamation comes from John Borrows, an Annishinaabe legal scholar. Borrows argued that the Royal Proclamation was the documentary copy of a treaty agreed to between the First Nations of North America and the British Crown. It assured that the British could secure their territories while the First Nations concerned could maintain their sovereignty.[41] The most important aspect of Borrows's analysis is that the treaty was agreed to by way of Wampum Belts, the sacred mechanism through which many Aboriginal peoples recorded their agreements since long before contact. Treaty belts were signs of a covenant between the two sides, and therefore had more validity in many Indigenous cultures than a signed document because they were solemnized through ceremony.[42] The specific Wampum Belt used was the Two Row Wampum, which had a deep significance in Aboriginal-Settler relationships. The belt was white with two purple rows running parallel, representing two canoes traveling alongside each other, neither interfering with the other. In light of the ratification at Niagara, Borrows argues that the Royal Proclamation was and remains the basis for Aboriginal self-government.[43]

Nineteenth Century Codification of the Doctrine in North American Law

Most of the literature concerning the modern application of the doctrine of discovery focuses on the judiciary of the United States because the U.S. Supreme Court encoded the modern doctrine of discovery in a "secular" court. Three decisions by Supreme Court Justice John Marshall between 1823 and 1832 made up what is now termed the "Marshall Trilogy," which is still the basis of U.S. Federal Indian policies.[44] Each of these cases further encoded the language of "Indian savagery" in the common law.[45] In all of the cases the reasons for judgment

[41] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch (Vancouver: UBC Press, 1997), 171.
[42] Borrows, "Wampum at Niagara," 155.
[43] Borrows, "Wampum at Niagara," 165.
[44] The Marshall Trilogy includes the following cases: Johnson v. M'Intosh 21 US (8 Wheat) 543 (1823); Worcester v. Georgia, 31 US (6 Pet) 515 (1832); Cherokee Nation v. Georgia 30 US (5 Pet) 1 (1831).
[45] Williams, *Like a Loaded Weapon*, 70.

have become important as they were applied wholesale during the colonization of North America.[46] In these decisions, Marshall borrowed language from previously articulated Indian policies that relied on rhetoric about Indigenous savagery to establish the legal framework supporting colonial practices. Robert Williams has argued that although the Supreme Court recanted other racially charged decisions, this language has persisted because John Marshall is revered in law schools as "the greatest chief justice of all time" and scholars take his decisions as canonical.[47] This has led to the problematic assumption that American Indian policy has been straightforward application of the doctrines set out in the Marshall Trilogy. As outlined by David Wilkins and Tasianina Lomawaima, Indian policy is rather marked by inconstancy, indeterminacy, and variability in interpretation.[48]

Each of these cases further encoded the language of "Indian savagery" in the common law.

The first case in the Marshall Trilogy, and the most important case in the establishment of Indian policy in the United States, was the 1823 decision in *Johnson and Graham's Lessee v. M'Intosh*, or more succinctly *Johnson v. M'Intosh*. The 1763 Royal Proclamation forbade land speculators from purchasing land directly from Aboriginal peoples, but William Murray and Louis Vivant set out to do just that on behalf of Thomas Johnson. On July 5, 1773, Murray purchased two portions of land from the Illinois Natives, and in 1775 Vivant followed suit with a purchase from the Piankeshaw peoples, both on behalf of the Illinois-Wabash Company. Between these initial illicit purchases and the case in 1823, all of the lands in question had been ceded during various military actions on the United States frontier or by treaty. In 1818 the federal government sold some of the lands from Murray and Vivant's initial purchases to

[46] Matthew L.M. Fletcher, "The Supreme Court's Indian Problem," 59 *Hastings L. J.* 579 (2007), 592-595.
[47] Raymond Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005), 49.
[48] David Wilkins, K. Tasianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Oklahoma: University of Oklahoma Press, 2001), 6.

William M'Intosh, the defendant in the case. Therefore, in the case of *Johnson v. M'Intosh* the question at stake was whether Aboriginal peoples had sovereign rights over their land, in which case the original sale would have been legitimate and the government could not sell the land to M'Intosh.[49] The court ultimately decided in favor of M'Intosh that the Aboriginal peoples did not have complete title over their land and therefore could not sell it to whomever they pleased. The U.S. government therefore had the lawful title in the eyes of the court, which stated:

> As they [European colonizing nations] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.[50]

The court viewed this as a minor procedural act, but in articulating this doctrine, the case took on a meaning far beyond the imaginings of the court.[51] The core of this decision was that the United States inherited the right of discovery from the British following the War of Independence; by stepping foot on North America, settlers had, according to this understanding of discovery, the absolute right to the land on which they stood. This created a situation in which the American government owned a monopoly concerning the purchase of Aboriginal land, which decreased the price of that land.[52] This referred to the papal bulls of the fifteenth century, encoding it in federal case law. This has since been declared a legal fiction, meaning that it has no foundation in law in spite of its common legal and popular usage.[53] It has still been the foundation for legal and

[49] Details of the case taken from Williams, *The American Indian in Western Legal Thought*, 288-290, 308-317.
[50] Johnson v. M'Intosh, 573 (cited in Eric Kades, "History and Interpretation of the Great Case of Johnson v. M'Intosh," *Law and History Review* 19, no. 1 (Spring 2001), 70.
[51] Robertson, *Conquest by Law*, 76.
[52] The decision was based neither in application of the constitution nor in interpretations of previous cases, but rather it was based on the established custom barring private purchase of Indigenous lands. See: Eric Kades, "History and Interpretation of the Great Case of *Johnson v. M'Intosh*," 67-71.
[53] Wilkins and Lomawaima, *Uneven Ground*, 55; Jen Camden and Kathryn E. Fort, "'Channeling Thought': The Legacy of Legal Fictions from 1823," *American Indian Law Review,* Vol. 33, no 1 (2008/2009):77-109; Avaim Soifer, *Reviewing Legal Fictions*, 20 Georgia Law Review, 871, 877 (1986).

policy decisions in Canada and the United States. The impact of *Johnson v. M'Intosh* is, according to Wilkins and Lomawaima, an Indian policy that "rests on a foundation of racism, ethnocentrism, repression of tribal histories, inappropriate policy-making by judicial bodies, and inaccurate historical understandings."[54]

Johnson v. M'Intosh was necessary to clarify property law in the United States for two reasons. First, numerous European powers competed to lay claim to land in the Americas, so laws needed to be adapted in order to organize who could claim ownership over what lands. Second, the colonizers needed to find a legal solution to the problem that Aboriginal occupation posed. Specifically *Johnson v. M'Intosh* set out to determine what rights Aboriginal peoples had to the land, and how to eliminate those rights.[55] The solution was the doctrine of discovery, which ostensibly transformed Indigenous occupants from owners to tenants in the wake of "discovery." Within this framework, Indigenous peoples owned the right only as an occupant, while the government of the United States claimed the right of a landlord. This included the right to eviction. The language used was that of Aboriginal occupancy and European dominion. As Patrick Wolfe argues, this distinction marginalized Aboriginal societies in an attempt to eliminate Aboriginal peoples culturally without waging outright war or explicitly stating their goals.[56]

Within this framework, Indigenous peoples owned the right only as an occupant, while the government of the United States claimed the right of a landlord.

In articulating the doctrine of discovery, the Marshall court redacted and consolidated imperial thought processes in one judicial document, meaning that the case of *Johnson v.*

[54] Wilkins and Lomawaima, *Uneven Ground*, 11.
[55] Eric Kades, "History and Interpretation of the Great Case of Johnson v. M'Intosh," *Law and History Review* 19, no. 1 (Spring 2001), 70.
[56] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research*, 8(4) 2006: 391.

M'Intosh was the final articulation of colonial discovery.[57] Discovery was not a new idea in this case, but rather this case was the first official articulation of a previously unstated practice. In his sweeping account of developing legal thought concerning Aboriginal peoples, Robert Williams, Jr., positioned the decision in *Johnson v. M'Intosh* as encoding American perspectives on Aboriginal land rights that began during the revolutionary period whereby colonists denied the existence of natural rights to American Indians. Williams argues that likely the most important legacy of the decision was that it "preserved the legacy of 1,000 years of European racism and colonialism."[58] Historian Stuart Banner framed this decision as putting a stamp of approval to a transformation in legal thought that had taken place over the preceding decades.[59] Raymond Williams wrote that it was "a point of closure, not a point of origin, in United States colonizing discourse."[60] Thus, Marshall's decision in the case of *Johnson v. M'Intosh* was the final codification of the doctrine of discovery. Later decisions by Marshall and subsequent justices added to this legacy by refining the norms established in this case.

Perhaps the most important book in the ongoing scholarship regarding the *Johnson* ruling is Lindsay Robertson's work, *Conquest by Law*. Robertson uncovered documents that revealed a number of troubling realities about the decision, including how the Illinois Company arranged to have its case heard in the Supreme Court and in so doing won a favorable decision. Robert Goodloe Harper, who organized the Illinois-Wabash Land Company's claim, used a number of judicial loopholes for political gain by setting his claim in the frontier so that he could appeal a decision at the circuit court directly to the Supreme Court. To do this, he needed a defendant who would lay claim to over 2,000 dollars' worth of property to take the case to a federal judge. No such claimant existed, so the company invented one in William M'Intosh, a fur trader who lived

[57] In the study of case law, many people tend to assume that the first case that established certain norms were the basis of that intellectual pattern. Several scholars have gone out of their way to prove this is not true.
[58] Williams, *The American Indian in Western Legal Thought*, 312-317.
[59] Stuart Banner, *How the Indians Lost their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005), 182-183.
[60] Robert Williams, *The American Indian in Western Legal Thought*, 231.

in the region.[61] The Illinois-Wabash Company then funded the entire court process, including the prosecution and defense. Thus, the entire court was orchestrated according to the company's interests, even to the point that the company instructed the defense on how to articulate their argument. Robertson referred to this process as the foundation of "the judicial conquest of North America."[62] It turned out that the decision went against Harper's wishes, and Marshall articulated, in light of the Royal Proclamation of 1763 as a basis for his argument, the doctrine of discovery as it has since existed in American federal law. It may be because Marshall owned considerable land near the area of dispute that his decision protected it from other speculators.[63]

Newcomb argues that Christian theological metaphors, most notably that of conquering the Promised Land, became the dominating intellectual mechanism through which colonization could take place.

What many scholars have missed by focusing on the practical outcomes of the doctrine of discovery is that the religious overtones of the doctrine were foundational to its usage in legal contexts. Recent separation of church and state has not dampened the usage of biblical imagery, especially that of the Old Testament conquest, in legal decisions. Stephen Newcomb, a Shawnee/Lenape legal scholar, used what he called a cognitive legal approach to argue that the *Johnson* case encoded "the dominating mentality of Christendom" used against American Indians. In *Pagans in the Promised Land*, Newcomb argues that Christian theological metaphors, most notably that of conquering the Promised Land, became the dominating intellectual mechanism through which colonization could take place.[64] He argues that metaphors shape thoughts and are more

[61] Robertson, *Conquest by Law*, 46-75.
[62] Robertson, *Conquest by Law*, 45.
[63] Echo-Hawk, *In the Courts of the Conqueror*, 70-71.
[64] Stephen Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Golden, Colo.: Fulcrum, 2008), 14. Newcomb believes that his book could be critiqued because it tends to focus on the creation of policy at the intellectual, or in his words cognitive, level and lacks specific stories of the impacts of the doctrine of discovery. It is this task that Newcomb left unfinished that the task force can accomplish.

than mechanisms for expression. Therefore, the usage of conquest-as-metaphor in the United States has shaped U.S. Indian law and policy in ways that are, in his words, "truly bizarre."[65] In using the dichotomy of "Christian" and "heathen," the doctrine used explicitly religious language to marginalize Aboriginal peoples. Vine Deloria, Jr., also illuminated how the doctrine of discovery relied upon "finessing" religious justifications into the decision that made the doctrine such a powerful rhetorical weapon in the hands of the colonizers.[66] Newcomb's argument is more powerful because he argues that the religious metaphor and imagery shaped the law, whereas Deloria argues it was a rhetorical tool. While they disagree on questions of degrees and usage of biblical imagery as either formative or retroactive in articulating decisions, both show an important dynamic that scholars often forget in discussions of discovery in the modern era: discovery is a fundamentally religious worldview.

Subsequent decisions by John Marshall in *Cherokee Nation v. Georgia* and *Worchester v. Georgia* further developed the doctrinal standard and showed that the initial decision was not a fully thought-out articulation of the future of Native rights. In *Cherokee,* Marshall affirmed that Native tribes were not sovereign nations in the international sense, but rather fully under the jurisdiction of the U.S. government. In making this decision, he coined the term "domestic dependent nations" to characterize the jurisdictional position of Aboriginal peoples.[67] When the same court heard the case of *Worchester v. Georgia* in 1832, Marshall tried to reverse his earlier decision, but by then it was too late.[68] Marshall decided that the law of the U.S. government did not apply wholesale to Indian country. The *Royal Commission on Aboriginal Peoples* cited *Worchester v. Georgia* as evidence that settler judiciaries did not always happily enforce the norms of discovery, as the court overturned portions of the doctrine of discovery articulated ten

[65] Newcomb, *Pagans in the Promised Land,* xv-xxvi.
[66] Vine Deloria, Jr., "Conquest Masquerading as Law," in *Unlearning the Language of Conquest*, ed. Wahinkpe Topa (Four Arrows) aka Don Trent Jacobs (Austin: University of Texas Press, 2006), 97.
[67] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831).
[68] Miller, *Native America, Discovered and Conquered*, xii.

years earlier.[69] Robertson called *Johnson v. M'Intosh* a "tragic mistake" that the court could not undo. The decision became the basis for the Indian Removal Act of 1830, which allowed colonists to do what many of them had long desired.[70]

There are no explicit legal decisions regarding the doctrine in Canada, though many cases echo the attitudes inherent with the doctrine. This is not to say that the doctrine made any less impact north of the border. Instead, the result of the lack of codification of the doctrine led to a legal framework that Ken McNeil has described as "the most uncertain and contentious body of law in Canada."[71] In the Canadian context, thanks to the Royal Proclamation and the lack of explicitly stated doctrine of discovery, the central issue in these types of cases had to do with the meanings of the treaties. While Aboriginal treaties were sacred agreements, especially when solemnized with Wampum Belts and ceremonies, Europeans interpreted the treaties as land transfers. The pivotal case of *St. Catherine's Milling v. The Queen*, decided in 1888, established the nature of Aboriginal title in Canada and the meaning of the treaties in settled areas of British North America. The British government had granted a small lumbering company license to harvest on a small area off reserve crown lands in Treaty No. 3 Territory. The Ontario government objected, arguing that according to the treaty, the land belonged to the province and was not the federal government's to give. In this case, representatives of only the Federal Government, the Government of Ontario, and St. Catherine's Milling Company were in the courtroom: Aboriginal people were not present. This decision continued to be a point of reference for land claim decisions until the 1973 Calder decision,

The effect of this case was to narrow Aboriginal title to exist only on reserve lands.

[69] See Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven: Yale University Press, 1987), p. 24.
[70] Robertson, *Conquest by Law*, 118-119; Miller, *Native America, Discovered and Conquered*, xii
[71] McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" *Alberta Law Review*, 36 (1) (1997), 117.

discussed below. The British Privy Council ruled that the according to the Royal Proclamation, Aboriginal peoples had land rights akin to occupants, and that their title existed "at the pleasure of the crown."[72] The effect of this case was to narrow Aboriginal title to exist only on reserve lands. This ran contrary to the spirit and intent of the treaties, which were covenants between sovereign nations, and many First Nations leaders continue to argue that land exchange was never part of the oral negotiations.[73] Sidney Harring has labeled this a racist law because it assumed that by their very nature Aboriginal peoples could not hold the title Europeans did.[74]

By the turn of the nineteenth century, Aboriginal title had found its place in European common-law jurisprudence. With decisions from the Marshall Court, *St. Catherine's Milling*, and the Royal Proclamation, Aboriginal title in North America was set. In Canada, the Eurocentric interpretations of the treaties marginalized Aboriginal peoples. In the United States expansion westward continued apace, with often more violent means to the same ends of removing Aboriginal peoples from their land and marginalizing them geographically, culturally, and economically. Globally, the norms established in the colonization of the Americas had a profound impact.[75] These narratives, while important for the history of many Aboriginal Nations, did not change the meaning or the discourse of discovery in settler societies. Indeed, it was assumed that Aboriginal peoples had lesser title and that European "advancement" took priority. Unreceptive courts, cultural barriers, and legislation under the Indian Act in Canada that made it illegal for an Aboriginal person to hire a lawyer to challenge the European law until 1951 meant that issues of title did not go before the court until the mid-twentieth century.

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[72] Arthur Miller, *Telling It to the Judge: Taking Native History to Court* (Montreal and Kingston: McGill-Queens University Press, 2011), xxi-ix.
[73] Sarah Carter, Dorothy First-Rider, and Walter Hildebrandt, *The True Spirit and Intent of Treaty 7* (Montreal: McGill-Queens University Press, 1996); Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press); Borrows, *Wampum at Niagara*.
[74] Sidney Harring, *White Man's Law: Native Peoples in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998), 146-147.
[75] See: Blake A. Watson, "The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand," 34 *Seattle U. L. Rev*. 507 (2011).

Impact of Discovery in the Twentieth Century Law

The latter half of the twentieth century was an important period for the development of the doctrine of discovery as Indigenous peoples increasingly used litigation to challenge for their rights. It was during this period that the judiciaries of Canada and the United States began to diverge on significant issues concerning Aboriginal title and the doctrine of discovery. In Canada, following the landmark case of *Calder v. British Columbia*, which overturned the logic of discovery set out in the Marshall Court and *St. Catherine's Milling*, and in *Guerin v. the Queen,* we saw a glimpse of hope. However, at the same time, the decisions in *Tee-Hit-Ton Indians v. United States, Delgamuukw v. Attorney General of British Columbia,* and *Oliphant v. Suquamish Indian Tribe* show that the attitudes that supported the doctrine of discovery persist.

In 1955 *Tee-Hit-Ton Indians v. United States* went before the U.S. Supreme Court to establish how Aboriginal peoples in Alaska fit into American Federal Indian legislation. The United States gained possession of Alaska in 1867, and it remained a territory until 1959 when it entered statehood. The case came up when the Tee-Hit-Ton, a subgroup of the Tlingit, brought the U.S. government to court over what they believed to be the unlawful harvesting of lumber on traditional lands. They argued that the years of logging without compensation for the Tlingit generally or the Tee-Hit-Ton subgroup specifically was illegal. Further, since they argued that they still held title to their lands, they deserved payment for the lumber harvested up to that point. The government argued that they had right to the land based on the treaty between the Emperor of Russia and the government of the United States. That theory included the following stipulation: "uncivilized tribes will be subject to such laws and regulation that the United States may, from time to time, adopt in regard to aboriginal tribes of that country."[76] Thus, according to the treaty between Russia and the United States, the Tlingit fit within the framework built in the continental United States through the Marshall Court and its successors. The question, then, was what right the U.S. government had on the land that no First Nations had ceded through treaty or conquest.

[76] Walter Echo-Hawk*, In the Courts of the Conqueror*, 360.

The problem is that no treaty existed between the Tlingit and either Russia or the United States, and in the U.S.-Russian treaty Aboriginal submission was assumed rather than granted. In justifying the seizure of Tlingit resources, the Supreme Court explained:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror's will that deprived them of their land.[77]

The court made it clear that while Aboriginal peoples had the right to occupancy, it took literally nothing for the government to eliminate that right. *Johnson v. M'Intosh* was one of the key pieces of case law that shaped the decision.[78] What is especially discouraging is that *Tee-Hit-Ton* was decided a year after *Brown v. Board of Education*; the court had already made a decision against the racial logic of separation, yet the racial logic of discovery persisted. That the court fundamentally misunderstood the meaning of treaties, which were neither land sales nor conquest but were rather covenants between sovereigns, is immaterial. It is also immaterial that the Tlingit had militarily fended off the Russians.[79] The United States had "discovered" the resources on Tlingit land, and for them this was enough.

What is especially discouraging is that Tee-Hit-Ton was decided a year after Brown v. Board of Education; the court had already made a decision against the racial logic of separation, yet the racial logic of discovery persisted.

[77] *Tee-Hit-Ton v. United States,* 348 US 272 (1955). Quoted in Walter Echo-Hawk*, In the Courts of the Conqueror*, 363.
[78] Williams*, Like a Loaded Weapon*, 90-95.
[79] Nell Jessup Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," *The Hastings Law Journal* 31: 1215, 1243 (July 1980).

The Rehnquist court, headed by chief justice William Rehnquist, further refined the doctrine of discovery and curtailed Aboriginal self-government in the 1970s and 1980s. This court was noted both for hearing many cases concerning Aboriginal rights and for using the nineteenth century logic explicitly in decisions, especially the doctrine of discovery.[80] One typical comment concerning this court and its impact on Aboriginal sovereignty read, "Chief Justice Rehnquist has made it his policy to chip away at the sovereignty of Indian nations. His policy contradicts not only the will of Congress, but also a long line of Supreme Court decisions affirming inherent tribal sovereignty."[81] Robert Williams, in the most thoroughly damning books against Rehnquist's Indian cases, argued that Rehnquist's minority decision in the 1980 case *United States v. Sioux Nation of Indians* was the worst case of racist decision-making in the judicial level.[82]

One of the most important early cases relating to Indian sovereignty that Rehnquist decided was *Oliphant v. Suquamish Indian Tribe.* In this case, two non-Native men were arrested in Puget Sound by Suquamish tribal police officers on Aboriginal lands near Seattle. Mark David Oliphant, in response to this arrest, wrote a writ of *habeas corpus*, arguing that Native courts had no jurisdiction over him as a non-Native person.[83] Ultimately, the Supreme Court decided by a margin of 6-2 that according to the doctrine of discovery Aboriginal peoples do not have the legal jurisdiction to try non-Natives on their land. This decision was based on the application of the doctrine of discovery as articulated in the Marshall court. It assumed that there were levels of sovereignty whereby the rights held by Aboriginal peoples only existed insofar as they did not interfere with the desires of the higher sovereign, in this case the U.S. government.[84] One illuminating detail was that of nineteen cases cited, fourteen were decided between 1810 and 1916. This was a new interpretation of Marshall's trilogy of Aboriginal law cases, but by

[80] Matthew L.M. Fletcher, "The Supreme Court's Indian Problem," 59 *Hastings L.J.* 579 (2007), 640-641.
[81] Ralph W. Johnson and Berrie Martinis, "Chief Justice Rehnquist and the Indian Cases," 16 Pub. Land L. Rev. 1, 7 (1991).
[82] Williams, *Like a Loaded Weapon*, 115.
[83] N. Bruce Duthu, *American Indians and the Law* (New York: Penguin Group, 2008), 19.
[84] Williams, *Like a Loaded Weapon*, 99.

applying nineteenth century intellectual trends to the court, Rehnquist carried on that same colonial logic.

In Canada, courts were more willing to consider questions regarding the doctrine of discovery and Aboriginal title. The first successful judicial challenge of the doctrine of discovery was the 1973 case of *Calder v. Attorney-General of British Columbia* when, following a ninety-year struggle, the Nisga'a nation brought their land rights to the British Columbia Supreme Court. There are important reasons that British Columbia led land claims at the judicial level. Unlike the rest of Canada, British Columbia had never been included in any treaties, with the exceptions of small portions of Vancouver Island. In addition, no military conquest had taken the lands by force. Rather, through a complex process of bureaucratic maneuvers and flexing of economic muscle, the British Columbia reserve map was drawn without the necessary legal prerequisites. Historian Cole Harris referred to this process as the "colonial construction of space," where the physical and cultural processes of colonization intersect.[85] Whereas land-claims issues in the rest of the country, and indeed the continent, are questions of interpretations of treaties, the cases in British Columbia rest on the more fundamental question of whether title in general existed in the first place.

Calder was one of the few judgements that caused Canadians to fundamentally re-examine the country`s basic premises and transformed how Canadian society conceived Aboriginal rights. In so doing, this case brought the issue of Aboriginal title to the centre of Canadian political life at a watershed moment in Aboriginal history.[86] Led by hereditary chief Frank Calder, the Nisga'a delegation argued not only that they had title to their lands in the Nass Valley, but also that that title was never extinguished. The decision broke down into three issues. First, the court had to determine whether Aboriginal title existed in the first place. The second question was whether treaty or conquest extinguished Nisga'a land title. Finally, the court had to

[85] Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), xxi-xxii.
[86] Asch, "*Calder* and the Representations of Indigenous Society in Canadian Jurisprudence," in *Let Right Be Done*, 101.

decide whether they could make such a declaration.[87] In the decision, six out of seven Justices affirmed the first to be true: Aboriginal title existed prior to contact, and contact did not automatically extinguish that title. This directly overturned the long-standing decision of *St. Catherine's Milling* that had guided Aboriginal land title law.[88] In the decision, however, the court rejected the second question specific to Nisga'a title. This meant that officially the Nisga'a lost the case, but they opened the modern era of land claims in the process. It was an important moment of recognition that Aboriginal peoples hold rights based on their humanity.[89]

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There were still problems with the articulation of Aboriginal rights as noted in *Calder*, most importantly the notion of "frozen rights." *Calder* affirmed that Aboriginal title existed, and that those rights extended beyond the rights of occupancy, as classical doctrine of discovery would have it. However, it assumed that for land rights to exist, patterns of land use had to remain constant from the time of initial contact. According to John Borrows, this articulation of Native rights emphasizes the historical moment of contact over the cultures that hold rights. This neglects the legal point that rights come from living Aboriginal cultures, not from a particular time or historical event. By "freezing" Aboriginal rights, this judicial logic neglects the fact that all cultures are evolving and makes all Aboriginal rights retrospective.[90] It was not until 1990, in the case of *Regina v. Sparrow*, that this theory was overturned in court. In *Regina v. Sparrow*, the court upheld that

[87] Godlewska and Webber, "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a," in *Let Right Be Done*, 4-5.
[88] Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), 7.
[89] Asch, "*Calder* and the Representations of Indigenous Society in Canadian Jurisprudence," in *Let Right Be Done*, 106-9.
[90] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 60-75.

Aboriginal traditional practices, in this case fishing rights, could remain under treaty rights even under modern forms.[91]

Another positive step for Aboriginal rights in Canada was the landmark case of *Guerin v. the Queen.* In this case, the judge expanded on the *Calder* decision by deciding that Aboriginal rights were legally enforceable against the crown. This meant that the rights that were recognized in *Calder* became legal, not moral rules.[92] The central issue in this case was a golf course on Vancouver Island; the province had leased Aboriginal land for the course to a developer and had lied to the Musqueam about the true terms of the lease. When the Musqueam became aware of this, they took the province to court for ignoring their unique rights as Aboriginal peoples as based in the Calder decision. The court used the case of *Johnson v. M'Intosh* as proof that Aboriginal peoples have the right of occupancy to their land and that this right needs to be upheld. The decision read, "Indians have a legal right to occupy and possess certain lands, the ultimate fee to which is in the Crown."[93] This decision built upon the doctrine of discovery, stating that the right of dominion was not void of obligations to the original inhabitants of the land. In a peculiar way, *Guerin* affirmed Aboriginal rights through the doctrine of discovery rather than by overturning the doctrine. Lindsay Robertson uses this case specifically to show the lasting and global reach of Marshall's decision.[94] Although the *Calder* case overturned the doctrine of discovery in the interior of British Columbia, in contested space that held treaties the norms established in the doctrine of discovery persisted.

This hard-fought progress took a massive step backwards when British Columbia Supreme Court Justice Alan McEachern handed down his infamous legal decision, deciding in favor of the crown in *Delgamuukw v. British Columbia* in 1991. The case was brought to the Supreme Court of British Columbia by the hereditary chiefs of the House of Delgamuukw, a clan

[91] Arthur Ray, *Telling It to the Judge*, 36.
[92] Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), 11.
[93] *Guerin v. the Queen*, 2 S.C.R. 335 (1984) (Supreme Court of Canada)
[94] Robertson, *Conquest by Law*, 144.

of the Gixsan and Wet'suwet'en First Nations in the interior of British Columbia. Isolated in the interior of the province, the litigants had no impetus to claim their land until resource developers began to intrude in their territory, claiming that the Gixsan and Wet'suwet'en had no legal title to the land. Those who lived in that territory disagreed. What followed was one of the most lengthy and expensive legal cases in Canadian history.[95]

The crown built their case on four premises. First, the Gixsan and Wet'suwet'en were "minimally organized" as a political entity in "pre-historic" times. This is problematic because it imposed a Eurocentric historical narrative, assuming that Aboriginal communities had no history before contact, a notion that is quite simply false. Second, the crown argued that the land was only used sporadically or incidentally, which therefore did not constitute title. Third, the crown argued that the notion of property rights only emerged after contact, and therefore was not aboriginal. Finally, even if these three decisions were not valid, that British sovereignty had extinguished any land rights that might have existed. Discovery had eliminated all rights according to the crown. Each of these arguments assumes that European cultures are superior. The crown deemed that European patterns of social organization, land use, and property rights were superior; this encoded again the intellectual norms of discovery. Taking away the racial dynamic behind the decision, the argument falls apart; the crown ought to have lost the case on those grounds.[96] This is not what happened. Justice McEachern wrote in his reasons for judgment that Aboriginal title exists only "at the pleasure of the crown," echoing the famous decision in *St. Catherine's Milling*.[97] McEachern

Discovery had eliminated all rights according to the crown.

[95] Arthur Ray, *Telling It to the Judge*, 22.
[96] Dara Culhane, *The Pleasure of the Crown: Anthropology, Law, and First Nations* (Burnaby, B.C.: Talon Books, 1998), 151-152, 180.
[97] Dara Culhane, *The Pleasure of the Crown*, 26.

even went so far as to borrow Thomas Hobbes's language in describing the lives of the Gixsan and Wet'suwet'en as "nasty, brutish, and short."[98]

Justice McEachern's disregard for both expert witnesses and the oral testimony of Gixsan and Wet'suwet'en elders and community leaders sparked outrage from both community and academic circles. The furor this created among historians and anthropologists even led to a special issue of the journal *BC Studies* that condemned the decision.[99] Julie Cruikshank wrote that McEachern rejected the evidence from anthropologists and instead invented his own version of anthropology through which he made his decision. Cruikshank was especially critical of the reason McEachern gave for dismissing scholarly evidence: that it is "exceedingly difficult to understand."[100] Robin Fisher argued that the problems of argumentation and analysis in the "Reasons for Judgement" would have rendered any scholarly monograph unpublishable.[101]

Even though the decision at the B.C. Supreme Court was a large step back for Canadian-Aboriginal relations, the lasting legacy of the Delgamuukw decision came when the Canadian Supreme Court reversed this decision on the grounds that McEachern had not given the oral testimony of the Gixsan and Wet'suwet'en the weight it deserved. Because the Supreme Court could not hear new evidence, it could not resolve the questions before the court, and ordered a retrial, which has ultimately never happened. In declining to make a decision regarding the nature of Aboriginal title, the Supreme Court left Aboriginal land-rights issues in the tenuous position they were in beforehand. What the court did accomplish was to affirm the value of oral testimony in legal decisions, which ultimately shaped the way that Aboriginal claims have developed since then.[102]

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[98] McEachern, Allan. (1991) "Reasons for Judgement: Delgamuukw v. B.C," Smithers: Supreme Court of British Columbia.

[99] Special Issue: Anthropology and History in the Courts, *BC Studies*, No. 95 (Autumn 1992).
[100] Julie Cruikshank, "The Invention of Anthropology in BC's Supreme Court: Oral Traditions as Evidence in *Delgamuukw*," *BC Studies*, (No 95, 1992), 25.
[101] Robin Fisher, "Judging History: Reflections on the Reasons for Judgement in *Delgamuukw v. BC*," *BC Studies* (No 95, 1992), 50.
[102] J. R. Saul, *A Fair Country: Telling Truths About Canada.* (Toronto: Viking Canada, 2008), 72-75.

The Doctrine of Discovery Today

Today, the doctrine continues to influence legal, intellectual, and social realities across North America. This is truly remarkable when considering that the intellectual origins of the doctrine of discovery go back at least as far as the crusades. Legal cases are still decided based on norms codified in nineteenth century understandings of discovery. Treaties continue to be interpreted in narrow minded, Eurocentric ways that are rooted in language of discovery. International activism at the United Nations has begun the important work of addressing the legacy of the doctrine and the imperial practices it facilitated. Churches and governments have apologized for their involvement in sins of the past as related to Aboriginal peoples, though the sincerity of those apologies has been called into question. We stand at the edge of a historic precipice, uniquely situated to address the legacy of the doctrine of discovery.

Most recently, in the 2005 case of City of Sherrill v. Oneida Indian Nation of New York, Justice Ginsberg used the doctrine of discovery to justify the sovereignty of the U.S. government.

The doctrine of discovery is still cited in legal cases, especially concerning land use and Aboriginal title. Most recently, in the 2005 case of *City of Sherrill v. Oneida Indian Nation of New York*, Justice Ginsberg used the doctrine of discovery to justify the sovereignty of the U.S. government. The Oneida Nation had purchased land that had once again been theirs, and the city of Sherrill imposed property taxes on what was, at the time of purchase, non-Aboriginal land. The case questioned whether land once ceded could become the sovereign territory of Aboriginal nations once again. The court ruled that this could not happen, and that property taxes would be levied against the purchased lands, even if the Oneida Nation owned them.[103] Though the cases tend to be less dramatic, Canadian

[103] *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)

common law is also based on the doctrine of discovery by reference to the Royal Proclamation, *Johnson v. M'Intosh*, and the reams of litigation that have come from those documents.[104]

Action at the international level, specifically at the United Nations, is addressing some of the problematic legacies of the doctrine. The Universal Declaration of the Rights of Indigenous Peoples (UNDRIP) was ratified after considerable opposition from the settler states of Canada, the United States, Australia, and New Zealand. The UNDRIP affirms,

> All doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.[105]

Indigenous peoples globally gained a political voice through the Special Rapporteur to the Human Rights Council on the Rights of Indigenous Peoples, a position that was initiated in 2001. In a June 2006 report to the Special Rapporteur, the Indian Law Resource Centre argued that the United States was one of a shrinking number of nations who refused to recognize preexisting land rights, which is a legacy of the doctrine of discovery.[106] In 2012, the special theme for the UN's Permanent forum was the doctrine of discovery and its enduring impact.[107] While the legacies of the doctrine of discovery have not been eliminated, the effects are being acknowledged, which is an important first step.

States are beginning to acknowledge the legacy of the doctrine of discovery and colonial practices through apologies to Aboriginal peoples in Canada and the United States. This was largely due to increasingly vocal objections by Aboriginal peoples to their historic subjugation at the hands of colonizers and publicized atrocities against Aboriginal peoples. The wider political

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[104] Jennifer Reid, "The Doctrine of Discovery and Canadian Law," *Canadian Journal of Native Studies,* Vol. 30, no. 2 (July 2010), 351.
[105] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : Resolution / Adopted by the General Assembly*, 2 October 2007, A/RES/61/295, p2.
[106] Indian Law Resource Centre, "Updated Report to the United Nations Human Rights Committee Regarding the United States' Compliance with the International Convention on Civil and Political Rights" (June 2006), 3.
[107] Statement by Professor James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, Eleventh Session of the United Nations Permanent Forum on Indigenous Issues (15 May 2012).

context has also changed to an era in which the notion of apology has gained political traction across the globe to the point that one scholar has called this the "Age of Apologies."[108] Especially after the 1990s, the global trend of apologizing in an effort to reconcile present ideals with past wrongs became increasingly common, particularly in the realm of race relations, often leading to questions of sincerity. If apologizing became an increasingly expected way to address the sins of the past, does it digress into empty gestures aimed at burying the past rather than reconciling?[109] Further, reconciliation and apologies often go hand-in-hand, but they are not the same thing. The mandate of the Truth and Reconciliation Commission (TRC) in Canada reflects this. The purpose of reconciliation is to address past wrongs and give victims the chance to speak to their collective past. Apologies often place undue expectations on victims who may not be prepared to accept the apology. Also, an apology without a call for action is meaningless, as apologies by themselves do not have the power to make the social and political change that they suggest are necessary.[110]

The Government of Canada apologized to Aboriginal peoples for its role in running Residential Schools for over a century, and for the social and personal problems that abuses within that system caused. It was a historic moment as Prime Minister Stephen Harper apologized to First Nations from the House of Commons.[111] The TRC, which was part of the Indian Residential Schools Settlement Agreement, followed this apology. The mandate of the TRC was to acknowledge the legacy and experience of Residential Schools, provide a safe holistic space for survivors, witness, promote awareness, create a historical record, produce a report on the residential schools system, and support commemoration of former students.[112] The

[108] Roy L Brooks, "The Age of Apology," in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, ed. Roy L. Brooks (New York: New York University Press, 1999), 3.
[109] Eric K. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (New York: NYU Press, 1999), 50-52.
[110] Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010), x.
[111] Canada's Statement of Apology, 11 June 2008.
[112] Indian Residential Schools Settlement Agreement Schedule N - Mandate for Truth and Reconciliation Commission, page 1-2.

apology and the TRC have received mixed reviews, with some affirming the value that their experiences are finally acknowledged, and others questioning the rhetoric of apology to the reality that Aboriginal peoples continue to face. Chrisjohn and Wasacase have criticized the government's apology because it limits itself to victims of the Residential School system, and not to the totality of Aboriginal peoples who suffered in the name of colonial practice.[113] Indeed, in light of the doctrine of discovery this apology by the Canadian government has not addressed the totality of the colonial project but rather one of the most aggressive guises of colonization. More recently, the lack of movement concerning Aboriginal issues and recently publicized nutritional experiments against Aboriginal peoples has led to nationwide calls to "Honour the Apology," where Aboriginal peoples and non-Aboriginal Canadians alike voiced their concern that the apology would be in vain.[114] Drew Hayden Taylor was more optimistic, hoping it would be the final chapter of a sordid past, and that following the apology "an entirely new book can begin."[115]

The United States government has also apologized to Native Americans, though their apology has not been accepted to the same degree as in Canada. This is because the United States' apology was passed with no fanfare, hidden in an unrelated budget bill. Further, the bill concludes with the caveat that "nothing in this section. . . authorizes or supports any claim

[113] Roland Chrisjohn and Tanya Wasacase, "Half-Truths and Whole Lies: Rhetoric in the 'Apology' and the Truth and Reconciliation Commission," in *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*, ed. Aboriginal Healing Foundation (Ottawa: Aboriginal Healing Foundation, 2009), 219; Mick Dodson similarly critiqued the apology from the Prime Minister of Australia concerning the focus of that particular apology, saying, "The apology here in Australia will accomplish nothing if all it is about is the validation of the experience of the Stolen Generations"; See: Mick Dodson, "When the Prime Minister Said Sorry," in *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*, ed. Aboriginal Healing Foundation (Ottawa: Aboriginal Healing Foundation, 2009), 111.

[114] This movement was propelled by social media, an increasingly common reality since the beginning of the IdleNoMore movement in Canada. To find more about #HonourTheApology, see their website, at http://honourtheapology.tumblr.com/. The article that motivated the movement was "Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942-1952," *Histoire sociale / Social History* XLVI , no. 91 (Mai/May 2013): 145-172.

[115] Drew Hayden Taylor, "Cry Me a River, White Boy," in *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*, ed. Aboriginal Healing Foundation (Ottawa: Aboriginal Healing Foundation, 2009), 103.

against the United States; or serves as a settlement of any claim against the United States."[116] Whereas the apologies in Canada and Australia have garnered considerable attention and commentary, largely through TRCs that took place in both countries, the nature of the apology in the United States has highlighted the need for reconciliation without prompting genuine dialogue. While some Indigenous peoples have used this apology as a silent protest, or a way of stating the injustices that is part of their historic experience, it has not garnered the necessary soul-searching in the way other apologies have.

Finally, a number of churches have responded to the doctrine of discovery, affirming their own culpability in the creation and application of the doctrine itself and its legacy in North America. The World Council of Churches (WCC) has issued a statement concerning the doctrine of discovery whereby it documented the social and legal history of the doctrine and recommended member churches to examine their own national experiences with the doctrine as it denounced the doctrine on a global level.[117] In response to this call, the United Church has offered an apology for its responsibility in the colonial history of North America, including the doctrine of discovery.[118] The Anglican Church, in 2010, resolved to repudiate the doctrine of discovery as "fundamentally opposed to the gospel of Jesus Christ and our understanding of the inherent rights that individuals and peoples have received

The Christian church played a pivotal role in establishing and developing the doctrine of discovery, and it is therefore in a unique position to address its legacy.

[116] One Hundred Eleventh Congress of the United States of America, "Department of Defense Appropriations Act, 2010," p. 45.
[117] WCC Executive Committee, "Statement on the Doctrine of discovery and its enduring impact on Indigenous Peoples," Bossey, Switzerland, 17 February 2012.
[118] Mardi Tindal, "Mardi Tindal: Leader of the United Church Reflects on Our Nation's Colonial History," *National Post,* June 6, 2014.

from God."[119] The Episcopal Church formally repudiated the doctrine of discovery at the 11th session of the United Nations Permanent Forum on Indigenous Issues.[120] In response to growing calls from Aboriginal peoples to repudiate the doctrine, the Roman Catholic Church has not responded to the doctrine.[121]

Addressing the doctrine of discovery is an important part of reconciliation in Canada and the United States. Frank Calder assessed the role of the doctrine of discovery in global history by saying, "the whole *Calder* case. . . is to get rid of somebody that's holding you down." As he explained, when one person is holding another in a ditch, only one person is oppressed, yet both are in the same place. By helping the oppressed person out of the ditch, the oppressor also leaves for higher ground.[122] In leaving that place together, overturning an important, oppressive aspect of the doctrine of discovery was liberating for both parties. The Christian church played a pivotal role in establishing and developing the doctrine of discovery, and it is therefore in a unique position to address its legacy. This task force has the potential to begin the process of leaving together for higher ground through cooperation and genuine dialogue.

[119] General Synod of the Anglican Church of Canada, A086 R1: Repudiate the Doctrine of Discovery (carried) http://archive.anglican.ca/gs2010/resolutions/a086 (accessed November 4, 2013).
[120] Episcopal Church, 'United Nations Permanent Forum on Indigenous Issues," May 7, 2012.
[121] The Doctrine of Discovery Study Group, based in Syracuse, N.Y., has as its stated goal to influence the Pope to rescind the papal bulls that were the foundation for the doctrine in theological and legal realms. See: http://www.doctrineofdiscovery.org/index.htm
[122] Frank Calder, "Frank Calder and Thomas Berger: A Conversation," in *Let Right Be Done* (Vancouver: UBC Press, 2007), 45; Frank Calder, "Closing Thoughts," in *Let Right be Done*, 218.

Bibliography

Asch, Michael. "*Calder* and the Representations of Indigenous Society in Canadian Jurisprudence," in *Let Right Be Done: Aboriginal Title, The Calder Case, and the Future of Aboriginal Rights*, ed. Michael Asch. Vancouver: UBC Press, 2007: 101-110.

Axtell, James. *Natives and Newcomers.* New York: Oxford University Press, 2001.

Banner, Stuart. *How the Indians Lost Their Land: Law and Power on the Frontier.* Cambridge: Harvard University Press, 2005.

Bauman, Whitney *Theology, Creation, and Environmental Ethics: From Creatio Ex Nihilo to Terra Nullius*. Florence, Ky.: Routledge, 2009.

Behrendt, Larissa. *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*. Oxford: Oxford University Press, 2010.

Borrows, John. *Canada's Indigenous Constitution.* Toronto: University of Toronto Press, 2010.

_____. *Recovering Canada: The Resurgence of Indigenous Law.* Toronto: University of Toronto Press, 2002.

_____. "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. Vancouver: UBC Press, 1997.

Brooks, Roy L. "The Age of Apology," in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, ed. Roy L. Brooks. New York: New York University Press, 1999.

Brown, Jennifer. *Strangers in Blood: Fur Trade Company Families in Indian Country.* Vancouver: UBC Press, 1980.

Calloway, Colin. *The Scratch of a Pen: 1763 and the Transformation of North America.* New York: Oxford University Press, 2010.

Camden, Jen and Kathryn E. Fort. "'Channeling Thought': The Legacy of Legal Fictions from 1823," in *American Indian Law Review*. Vol. 33, no. 1 (2008/2009): 77-109.

Canada, Royal Commission on Aboriginal Peoples. *Report*. 5 vols. Ottawa: Minister of Supply and Services Canada, 1996.

Carter, Sarah, Dorothy First-Rider, and Walter Hildebrandt, *The True Spirit and Intent of Treaty 7.* Montreal: McGill-Queens University Press, 1996.

Chrisjohn, Roland and Tanya Wasacase, "Half-Truths and Whole Lies: Rhetoric in the 'Apology' and the Truth and Reconciliation Commission," in *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*, ed. Aboriginal Healing Foundation. Ottawa: Aboriginal Healing Foundation, 2009.

Coulter, Robert and Steven M. Tullberg, "Indian Land Rights," in *The Aggressions of Civilization: Federal Indian Policy Since the 1880s*, ed. Sandra L. Cadwalder and Vine Deloria, Jr., Philadelphia: Temple University Press, 1984.

Culhane, Dara. *The Pleasure of the Crown: Anthropology, Law, and First Nations.* Burnaby, B.C.: Talon Books, 1998.

Cruikshank,Julie. “The Invention of Anthropology in BC’s Supreme Court: Oral Traditions as Evidence in *Delgamuukw*,” in *BC Studies* (no. 95, 1992), 25.
Deloria Jr, Vine. *Behind the Trail of Broken Treaties: An Indian Declaration of Independence.* New York: Dell Publishing Company, 1974.
Deloria, Jr., Vine. “Conquest Masquerading as Law,” in *Unlearning the Language of Conquest*, ed. Wahinkpe Topa (Four Arrows) aka Don Trent Jacobs. Austin: University of Texas Press, 2006.
Deloria and Wilkins. *Tribes, Treaties, and Constitutional Tribulations.* Austin: University of Texas Press, 1999.
Dodson, Mick. “When the Prime Minister Said Sorry,” in *Response, Responsibility, and Renewal: Canada’s Truth and Reconciliation Journey*, ed. Aboriginal Healing Foundation. Ottawa: Aboriginal Healing Foundation, 2009.
Duthu, N. Bruce. *American Indians and the Law.* New York: Penguin Group, 2008.
Echo-Hawk, Walter. *In the Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided.* Golden, Colo.: Fulcrum Publishers, 2010.
_____. *International Seminar on the Doctrine of Discovery*, Sept. 20-21, 2012, Secwepmecul’ecw, cohosted by the Shuswap Nation Tribal Council and Thompson Rivers University; p. 3. http://shuswapnation.org/wordpress/wp-content/uploads/2012/11/Conference-Report-Doctrine-Discovery-Sept-20-21-2012.pdf
Erdmann, Carl. *The Origin of the Idea of Crusade.* Princeton: Princeton University Press, tr. Marshall W. Baldwin and Walter Goffart, 1977.
Fisher, Robin. “Judging History: Reflections on the Reasons for Judgement in *Delgamuukw v. BC*,” *BC Studies*, No 95, 1992.
Fletcher, Matthew L. M. “The Supreme Court’s Indian Problem,” in 59 *Hastings L.J.* 579 (2007), 2-73.
Johnson, Ralph W. and Berrie Martinis, “Chief Justice Rehnquist and the Indian Cases,” 16 Pub. Land L. Rev. 1, 7 (1991).
Godlewska and Webber, “The Calder Decision, Aboriginal Title, Treaties, and the Nisga’a,” in *Let Right be Done*, 4-5.
Harring, Sidney. *White Man’s Law: Native Peoples in Nineteenth-Century Canadian Jurisprudence.* Toronto: University of Toronto Press, 1998.
Harris, Cole. *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia.* Vancouver: UBC Press, 2002.
Indian Law Resource Centre, “Updated Report to the United Nations Human Rights Committee Regarding the United States’ Compliance with the International Convention on Civil and Political Rights,” June 2006.
Kades, Eric. “History and Interpretation of the Great Case of *Johnson v. M'Intosh*,” in *Law and History Review,* 19, no. 1 (Spring 2001).
McEachern, Allan. “Reasons for Judgement: *Delgamuukw v. B.C.*” Smithers: Supreme Court of British Columbia, 1991.

McNeil, Kent. “Aboriginal Title and Aboriginal Rights: What’s the Connection?” in *Alberta Law Review*, 36 (1) (1997), 117-148.
Miller, Arthur. *Telling It to the Judge: Taking Native History to Court.* Montreal and Kingston: McGill-Queens University Press, 2011.
Miller, Robert. *Native America Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny.* Westport, Conn: Praeger, 2006.
Newcomb, Stephen. *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery.* Golden, Colo.: Fulcrum, 2008.
Newton, Nell Jessup. “At the Whim of the Sovereign: Aboriginal Title Reconsidered,” in *The Hastings Law Journal* 31: 1215, 1243 (July 1980).
O'Gorman, Edmundo. *The Invention of America: An Inquiry into the Historical Nature of the New World and the Meaning of its History.* Ann Arbor: Greenwood Press, 1972.
Pagden, Anthony. *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800.* New Haven: Yale University Press, 1995.
Palencia-Roth, Michael. “Enemies of God: Monsters and the Theology of Conquest” in *Monsters, Tricksters, and Sacred Cows: Animal Tales and American Identities,* ed. Albert James Arnold. University of Virginia Press, 1996; 24-25, 42.
Podruchny, Carolyn. *Making the Voyageur World: Travelers and Traders in the North American Fur Trade.* Toronto: University of Toronto Press, 2006.
Regan, Paulette. *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada.* Vancouver: UBC Press, 2010.
Reid, Jennifer. “The Doctrine of Discovery and Canadian Law,” in *Canadian Journal of Native Studies,* Vol. 30, no. 2 (July 2010).
Rivera, Luis N. *A Violent Evangelism: The Political and Religious Conquest of the Americas*. Louisville, Ky.: Westminster/John Knox Press, 1992.
Robertson, Lindsay. *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands.* Oxford: Oxford University Press, 2005.
Rotman, Leonard Ian. *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*. Toronto: University of Toronto Press, 1996.
Saul, J. R. *A Fair Country: Telling Truths About Canada.* Toronto: Viking Canada, 2008.
Soifer, Avaim. *Reviewing Legal Fictions*, 20 Georgia Law Review, 871, 877 (1986).
Taylor, Drew Hayden. “Cry Me a River, White Boy,” in *Response, Responsibility, and Renewal: Canada’s Truth and Reconciliation Journey*, ed. Aboriginal Healing Foundation. Ottawa: Aboriginal Healing Foundation, 2009.
Turner, Dale. *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy.* Toronto: University of Toronto Press, 2006.
UN General Assembly. *United Nations Declaration on the Rights of Indigenous Peoples : Resolution / Adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

UNESC, Permanent Forum on Indigenous Issues, Ninth Session, New York, 19-30 April 2010. "Preliminary study of the impact of indigenous peoples of the international legal construct known as the Doctrine of Discovery."
Van Kirk, Sylvia. *Many Tender Ties: Women in Fur Trade Society, 1670-1870.* Winnipeg: Watson and Dwyer, 1980.
Von der Heydte, Frederick August. "Discovery, Symbolic Annexation, and Virtual Effectiveness in International Law," in *American Journal of International Law*, Vol. 29, no. 3 (July 1935).
White, Richard. *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815.* Cambridge: Cambridge University Press, 1991.
Watson, Blake A. "The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand," 34 *Seattle U. L. Rev*. 507 (2011).
Wilkins, David and Tsianina Lomawaima. *Uneven Ground: American Indian Sovereignty and Federal Law*. Norman, Okla.: University of Oklahoma Press, 2001.
Wilkinson, Charles F. *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy.* New Haven: Yale University Press, 1987.
Williams, Robert. *The American Indian in Western Legal Thought: The Discourses of Conquest.* New York: Oxford University Press, 1990.
Williams, Raymond. *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America.* Minneapolis: University of Minnesota Press, 2005.
Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native," in *Journal of Genocide Research*, 8(4) 2006.
Yamamoto, Eric K. *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America.* New York: NYU Press, 1999.

Useful Websites

http://www.doctrineofdiscovery.org/

http://ili.nativeweb.org/

http://shuswapnation.org/wordpress/wp-content/uploads/2012/11/Conference-Report-Doctrine-Discovery-Sept-20-21-2012.pdf

http://www.un.org/esa/socdev/unpfii/documents/2012/session-11-CRP2.pdf

http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.13%20EN.pdf