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## American Indians, the Doctrine of Discovery, and Manifest Destiny

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## AMERICAN INDIANS, THE DOCTRINE OF DISCOVERY, AND MANIFEST DESTINY

*Robert J. Miller\**

I	INTRODUCTION .....	329
II.	HISTORY OF THE DOCTRINE OF DISCOVERY .....	330
III.	MANIFEST DESTINY .....	332
	<i>A. First Discovery</i> .....	333
	<i>B. Actual Occupancy and Current Possession</i> .....	333
	<i>C. Preemption/European Title</i> .....	333
	<i>D. Indian Title</i> .....	333
	<i>E. Tribal Limited Sovereign and Commercial Rights</i> .....	334
	<i>F. Contiguity</i> .....	334
	<i>G. Terra Nullius</i> .....	334
	<i>H. Christianity</i> .....	335
	<i>I. Civilization</i> .....	335
	<i>J. Conquest</i> .....	335
IV.	MANIFEST DESTINY AND THE DISCOVERY DOCTRINE .....	336
	<i>A. 1803–1818</i> .....	339
	<i>B. 1818–1827</i> .....	341
	<i>C. 1828–1855</i> .....	343
	<i>D. Oregon Joins the Union</i> .....	347
V.	CONCLUSION.....	348

### I. INTRODUCTION

North America, and much of the non-European world, was colonized under an international legal principle known as the Doctrine of Discovery (Doctrine).<sup>1</sup>

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<sup>1</sup> See generally ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACY LINDBERG, *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* (2010) [hereinafter *DISCOVERING INDIGENOUS LANDS*]; ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* (2006) [hereinafter

When European countries, and later the United States, set out to exploit new lands in the fifteenth through twentieth centuries, they justified their claims over these territories and over indigenous peoples with the Doctrine.<sup>2</sup> The Doctrine provided that Europeans automatically acquired property rights in native lands and gained governmental, political, and commercial rights over the indigenous inhabitants without their knowledge or consent. This legal principle was created and authorized by religious and ethnocentric ideas of European and Christian superiority over the other races and religions of the world. When Euro-Americans planted flags and religious symbols in newly-discovered lands, they were not just thanking god for a safe voyage across the ocean; instead, they were undertaking the well-recognized legal procedures and rituals of the Doctrine designed to make their country's legal claim to the lands and peoples. Needless to say, indigenous peoples objected to the application of this international law to them, their governments, and their property rights.

Surprisingly, the Doctrine is still international law today. In recent decades, courts in Canada, New Zealand, Australia, and the United States have struggled with questions regarding the Doctrine and native title to land.<sup>3</sup> In addition, on August 2, 2007, Russia evoked the Doctrine when it placed a titanium flag on the floor of the Arctic Ocean to claim the estimated ten billion tons of oil and gas underlying the surface.<sup>4</sup> In 2010, China claimed sovereign rights by planting its flag at the bottom of the South China Sea.<sup>5</sup>

## II. HISTORY OF THE DOCTRINE OF DISCOVERY

The English colonists in North America and then the American colonial, state, and federal governments all utilized the Doctrine and its religious, cultural,

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NATIVE AMERICA, DISCOVERED AND CONQUERED]; STEVEN T. NEWCOMB, *PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY* (2008); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005); Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849 (2009); Robert J. Miller, Lisa Lesage & Sebastian Lopez Escarcena, *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. (forthcoming 2011); Robert J. Miller & Micheline D'Angelis, *Brazil, Indigenous Peoples, and the International Law of Discovery* (forthcoming 2011).

<sup>2</sup> See, e.g., *DISCOVERING INDIGENOUS LANDS*, *supra* note 1, at 97–105, 174–82, 209–21; *NATIVE AMERICA, DISCOVERED AND CONQUERED*, *supra* note 1, at 38–53, 122–28, 131–36, 142–44, 153–57.

<sup>3</sup> E.g., *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Mabo v Queensland* (1992) 107 ALR 1 (Austl.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (Can.); *Calder v. Attorney General*, [1973] S.C.R. 313 (Can.).

<sup>4</sup> Robert J. Miller, *Finders Keepers in the Arctic?*, L.A. TIMES, Aug. 6, 2007, at A19.

<sup>5</sup> *China Plants Flag in South Sea Amid Disputes*, REUTERS, Aug. 26, 2010, available at <http://af.reuters.com/article/worldNews/idAFTRE67P11320100826>.

and racial ideas of superiority over Native Americans to stake legal claims to the lands and property rights of the indigenous peoples. Ultimately, the United States enforced the Doctrine against the Indian nations as American Manifest Destiny led the United States' expansion across the continent.<sup>6</sup> The Doctrine remains federal law today and is still used against American Indians to limit their governmental and sovereign powers as well as their property rights.<sup>7</sup>

The legal and historical evidence prove that the expansion of the United States from its original thirteen colonies was based on the Doctrine.<sup>8</sup> The Founding Fathers were well aware of the Doctrine and utilized it while part of the English colonial system.<sup>9</sup> It was only natural they continued to use the Doctrine under the flag of the United States. From George Washington and Benjamin Franklin on, American leaders utilized this legal principle to justify claims of property rights and political dominance over the Indian nations.<sup>10</sup> Thomas Jefferson, in particular, demonstrated a working knowledge of the Doctrine and applied these principles against the Indian nations in the original thirteen states, the trans-Appalachia area, the Louisiana Territory, and the Pacific Northwest.<sup>11</sup> In fact, Jefferson's dispatch of the Lewis and Clark expedition in 1803 was purposely targeted at the mouth of the Columbia River in the Pacific Northwest in an effort to strengthen the United States' Doctrine of Discovery claim to that area.<sup>12</sup> Meriwether Lewis, William Clark, and the "Corps of Northwestern Discovery" complied with Jefferson's instructions and solidified the United States' claim.<sup>13</sup> The United States then negotiated with Russia, Spain, and England for four decades over who owned the Pacific Northwest under international law. The United States argued it owned the region due to its first discovery of the Columbia River through Robert Gray in 1792, the first overland exploration and occupation of the region by Lewis and Clark in 1805 to 1806, and then John Jacob Astor's construction of the first permanent settlement of Astoria in 1811.<sup>14</sup>

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<sup>6</sup> See *infra* Part IV.

<sup>7</sup> Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 21–75 (2005) [hereinafter *The Doctrine of Discovery in American Indian Law*]; 25 U.S.C. §§ 81, 177, 415 (2006).

<sup>8</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 45–48, 64–71, 121–59.

<sup>9</sup> *Id.* at 25–32.

<sup>10</sup> *Id.* at 33–51.

<sup>11</sup> *Id.* at 59–76.

<sup>12</sup> STEPHEN DOW BECKHAM, LEWIS & CLARK: FROM THE ROCKIES TO THE PACIFIC 11, 92, 139 (2002); BERNARD DeVOTO, THE COURSE OF EMPIRE 411, 420, 430, 512, 527–28, 538–39, 549 (1952); THE JOURNALS AND LETTERS OF SIR ALEXANDER MACKENZIE 1, 42, 518 n.4 (W. Kaye Lamb ed., 1970); NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 70–71, 73–76, 99–114.

<sup>13</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 107–14, 138–43.

<sup>14</sup> *Id.* at 121–26, 130–36, 146–48, 153–57.

After the Lewis and Clark expedition and the building of Astoria, American history was dominated by a slow but steady advance of American interests and empire across the continent under the principles of the Doctrine.<sup>15</sup> This did not happen by accident; it was the express goal of Presidents Jefferson, Madison, Monroe, John Quincy Adams, and Polk, and a host of other American politicians and citizens.<sup>16</sup> “Manifest Destiny” is the phrase coined in 1845 to describe this predestined and divinely inspired expansion.<sup>17</sup> Manifest Destiny was created by the same rationales and justifications that created the Doctrine.<sup>18</sup>

### III. MANIFEST DESTINY

Manifest Destiny is generally defined by three aspects, and all three reflect the rhetoric of an American continental empire.<sup>19</sup> First, the belief the United States has some unique moral virtues other countries do not possess. Second, the idea the United States has a mission to redeem the world by spreading republican government and the American way of life around the globe. And, third, that the United States has a divinely ordained destiny to accomplish these tasks.<sup>20</sup> These ideas pervaded American political and cultural thought long before they were given the name Manifest Destiny in 1845.<sup>21</sup> This kind of thinking could only arise from an ethnocentric view that one’s own culture, government, race, religion, and country are superior to all others. This same kind of thinking justified and motivated the development of the Doctrine in the fifteenth century and later helped develop Manifest Destiny in the nineteenth century.

Ten distinct elements comprise the Doctrine and assist in analyzing its operations throughout American history.<sup>22</sup> All of these elements became part of Manifest Destiny and were used to justify the United States’ continental expansion and the displacement of native peoples.

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<sup>15</sup> *Id.* at 121–59.

<sup>16</sup> *Id.* at 68–76, 121–27, 130–49, 153–57.

<sup>17</sup> *Id.* at 115–21.

<sup>18</sup> *Id.*

<sup>19</sup> See generally *id.*; REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981).

<sup>20</sup> See, e.g., SAM W. HAYNES, JAMES K. POLK AND THE EXPANSIONIST IMPULSE 87–90, 99 (1996); HORSMAN, *supra* note 19, at 86; DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM 1–2 (1998); ANDERS STEPHANSON, MANIFEST DESTINY: AMERICAN EXPANSIONISM AND THE EMPIRE OF RIGHT 21–27, 46–47, 55–60 (1995); WILLIAM EARL WEEKS, BUILDING THE CONTINENTAL EMPIRE: AMERICAN EXPANSION FROM THE REVOLUTION TO THE CIVIL WAR 60–61, 110 (1996).

<sup>21</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 116–21.

<sup>22</sup> *Id.* at 3–5.

### A. *First Discovery*

The first European country to discover new areas unknown to other Europeans gained property and sovereign rights over the lands and inhabitants.<sup>23</sup> First discovery alone, without taking physical possession, created a claim of title but was usually considered to create only an incomplete title.<sup>24</sup> This is why President Jefferson and others were concerned about the United States settling the Pacific Northwest so that actual possession could solidify the United States' claim to title based on first discovery.<sup>25</sup>

### B. *Actual Occupancy and Current Possession*

To turn a first discovery into complete title, a European country or the United States had to actually occupy and possess the newly found lands.<sup>26</sup> This was usually done by building forts or settlements. Physical possession had to be accomplished within a reasonable amount of time after first discovery to create a complete title.<sup>27</sup>

### C. *Preemption/European Title*

The discovering country acquired the power of preemption, that is, the sole right to buy the land from native peoples.<sup>28</sup> This is a property right analogous to an exclusive option in land.<sup>29</sup> The country that held the power of preemption prevented or preempted the United States, any European government, or any individual from buying land from the native owners.<sup>30</sup>

### D. *Indian Title*

After first discovery, Indian nations were considered to have lost full ownership of their lands.<sup>31</sup> They retained only the right to occupy and use their lands, albeit

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<sup>23</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573–74 (1823); *NATIVE AMERICA, DISCOVERED AND CONQUERED*, *supra* note 1, at 10–11, 63–64, 69–70.

<sup>24</sup> *Island of Palmas Case (Neth. v. U.S.)*, 2 R.I.A.A. 829, 845 (Perm. Ct. Arb. 1928) (holding that “symbolical . . . possession . . . completed eventually by an actual and durable taking of possession within a reasonable time” created a complete title); *NATIVE AMERICA, DISCOVERED AND CONQUERED*, *supra* note 1, at 72; Mark A. Smith, Jr., *Sovereignty Over Unoccupied Territories—The Western Sahara Decision*, 9 CASE W. RES. J. INT'L L. 135, 135 n.2 (1977).

<sup>25</sup> *NATIVE AMERICA, DISCOVERED AND CONQUERED*, *supra* note 1, at 73–76, 133–44.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; see also *Island of Palmas Case*, 2 R.I.A.A. at 846.

<sup>28</sup> *Johnson*, 21 U.S. at 573–74.

<sup>29</sup> *NATIVE AMERICA, DISCOVERED AND CONQUERED*, *supra* note 1, at 9.

<sup>30</sup> *Johnson*, 21 U.S. at 573–74.

<sup>31</sup> *Id.*

those rights could last forever if the native people never consented to sell.<sup>32</sup> But if they did choose to sell, they could only sell to the government that held the power of preemption over their lands.<sup>33</sup> Thus, “Indian title” is a limited ownership right.

### *E. Tribal Limited Sovereign and Commercial Rights*

After first discovery, Indian nations and indigenous peoples were considered to have lost some of their inherent sovereign powers and the rights to free trade and international diplomatic relationships. Thereafter, they were only supposed to trade and engage in diplomacy with their specific Euro-American discoverer.

### *F. Contiguity*

Europeans always claimed significant amounts of land contiguous to and surrounding their actual settlements and the lands they actually possessed in the New World. Contiguity issues arose when different European countries had settlements somewhat close together. In that situation, each country held rights over the unoccupied lands between their settlements to a point half way between the settlements.<sup>34</sup> Moreover, this element provided that the discovery of the mouth of a river allegedly created a claim over all the lands drained by that river, even if it included thousands of miles of territory.<sup>35</sup>

### *G. Terra Nullius*

*Terra nullius* literally means land or earth that is null, void, or empty.<sup>36</sup> Under this element, the Doctrine provided that if lands were not occupied by any person or nation, or if they were occupied but were not being used or governed in a fashion of which European legal and property systems approved, then the lands were considered empty and available for Doctrine claims.<sup>37</sup> Europeans and

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<sup>32</sup> *Id.*; NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 73.

<sup>33</sup> *Johnson*, 21 U.S. at 573–74.

<sup>34</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 69–70 (Secretary of State John Quincy Adams), 138–39, 147.

<sup>35</sup> *See, e.g., id.* at 70 (President Jefferson), 136 (Secretary of State John Quincy Adams), 138–39 (United States House of Representatives Report of 1821); U.S. TERRITORIAL MAP 1810, <http://xroads.virginia.edu/~MAP/TERRITORY/1810map.html> (last updated June 17, 1996). The Louisiana Territory and the Oregon country were defined by the drainage systems of the Mississippi and Columbia Rivers.

<sup>36</sup> LYNN BERAT, WALVIS BAY: DECOLONIZATION AND INTERNATIONAL LAW 118 (1990).

<sup>37</sup> *Id.*; *see also* ALEX C. CASTLES, AN AUSTRALIAN LEGAL HISTORY (1971), *reprinted in* ABORIGINAL LEGAL ISSUES, COMMENTARY AND MATERIALS 10, 63 (Heather McRae et al. eds., 1991); HENRY REYNOLDS, THE LAW OF THE LAND 173 (1987).

Americans often considered lands that were owned, occupied, and being actively utilized by indigenous peoples to be vacant and available for claims.<sup>38</sup>

#### *H. Christianity*

Religion was a major aspect of the justification for, and the application of, the Doctrine and Manifest Destiny. Non-Christian peoples were deemed not to have the same rights to land, sovereignty, and self-determination as Christians. As a result, Indian nations and indigenous people not only lost fundamental rights, but they also experienced pressure to convert to Christianity in an attempt to recover them.

#### *I. Civilization*

European and American definitions of civilization were important parts of Discovery. Euro-Americans argued that god had directed them to bring civilized ways, education, and religion to indigenous peoples and to exercise paternalistic and guardianship powers over them.

#### *J. Conquest*

The conquest element had two meanings. First, in *Johnson v. M'Intosh*, the United States Supreme Court stated the United States and European countries could legally acquire Indian title by military victories in just and necessary wars.<sup>39</sup> Second, the Court defined "conquest" as transferring property rights to European countries and the United States automatically and immediately just by making a first discovery.<sup>40</sup>

The Court considered a first discovery analogous to a military conquest because Euro-American countries immediately acquired political, property, and commercial rights over native peoples.<sup>41</sup> In fact, the Court modified the European definition of military conquest and its impact on private property rights because of the different cultures, religions, and the "character and habits" of Native Americans, and because following the European law of conquest in America would leave the lands to Indian nations and would be "to leave the country a wilderness."<sup>42</sup>

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<sup>38</sup> *Johnson*, 21 U.S. at 595–96; NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 21–22, 24, 26–28, 56.

<sup>39</sup> 21 U.S. at 587–91.

<sup>40</sup> *See id.* at 589–91.

<sup>41</sup> *See id.*

<sup>42</sup> *See id.* at 573, 588–91.



The Doctrine had a significant impact on the rights and powers of the Indian nations and indigenous peoples in the United States and around the world. That impact continues today, because it plays a significant role in American Indian law and policies and still restricts American Indians and their governments in exercising property, governmental, and self-determination rights.<sup>43</sup> The cultural, racial, and religious justifications that created the Doctrine raise serious doubts about the validity of continuing to apply the Doctrine in modern day Indian affairs.

#### IV. MANIFEST DESTINY AND THE DISCOVERY DOCTRINE

The phrase “Manifest Destiny” was not applied to American expansion until 1845.<sup>44</sup> But the grand idea that it was the destiny of the United States to control North America was manifest long before 1845.<sup>45</sup> Instead of being a new idea, Manifest Destiny naturally grew out of the principles and elements of the Doctrine and the ambitions of many American politicians and citizens, including George Washington and Thomas Jefferson. In fact, it was specifically anticipated and intended that Manifest Destiny would be a disaster for the Indian nations and native peoples and their legal, cultural, economic, and political rights.<sup>46</sup> This eventuality became even more certain after the Louisiana Purchase in 1803 and the Lewis and Clark expedition of 1803 to 1806 as the Doctrine and Manifest Destiny ensured that a wave of American expansion would sweep over the indigenous peoples and tribes.<sup>47</sup>

When the Lewis and Clark expedition returned to St. Louis in 1806, however, the United States’ destiny to reach the Pacific Ocean was not so clearly visible. The twenty-eight-month voyage and the superhuman efforts required to travel from St. Louis to the Pacific Ocean demonstrated that the United States was going to have a difficult time settling and governing the Pacific Northwest anytime soon.<sup>48</sup> But Meriwether Lewis himself did not think the ownership of the Pacific Northwest by the United States was a farfetched idea. In fact, Lewis wrote President Jefferson on September 23, 1806, urging the United States to develop

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<sup>43</sup> See, e.g., 25 U.S.C. §§ 81, 177, 415 (2006); NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 163–75.

<sup>44</sup> Julius W. Pratt, *The Origin of ‘Manifest Destiny,’* 32 AM. HIST. REV. 795, 798 (1927).

<sup>45</sup> See generally HORSMAN, *supra* note 19.

<sup>46</sup> See, e.g., NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 28, 39–40, 45–46, 86–90 (discussing George Washington’s comparison of American Indians to animals and their eventual retreat from inevitable American expansion and Thomas Jefferson’s plans for Indian removal and assimilation to accommodate American expansion).

<sup>47</sup> *Id.* at 108.

<sup>48</sup> JULIUS W. PRATT, EXPANSIONISTS OF 1812, at 12–14, 261 (1957); WEEKS, *supra* note 20, at 28–29; 3 ARCHER BUTLER HULBERT, OVERLAND TO THE PACIFIC: WHERE ROLLS THE OREGON: PROPHET AND PESSIMIST LOOK NORTHWEST, at xiii, 5 (1933).

the continental fur trade from a post on the Columbia River.<sup>49</sup> He wrote that the United States “shall shortly derive the benefits of a most lucrative trade from this source, and that in the course of ten or twelve years a tour across the Continent by the route mentioned will be undertaken by individuals with as little concern as a voyage across the Atlantic is at present.”<sup>50</sup>

Jefferson had these very goals in mind when he ordered Lewis and Clark to go to the mouth of the Columbia River in his attempt to strengthen the United States’ 1792 first discovery claim to the Oregon Territory and further his dream of settling the Pacific Northwest.<sup>51</sup> United States Senator Thomas Hart Benton from Missouri, who was the leading spokesmen for over thirty years for the United States to settle Oregon, stated that his ideas originated from President Jefferson.<sup>52</sup>

In this short article, only a fraction of the legal and historical evidence may be highlighted, but the evidence proves that Manifest Destiny arose from the elements of the Doctrine. One side point, however, also shows that Manifest Destiny grew out of the Doctrine: it is impossible to understand the statements made by United States Presidents, Secretaries of State, Congressmen, newspapers, and citizens about Manifest Destiny without an understanding of the Doctrine and its elements. The advocates of Manifest Destiny used the Doctrine to bolster their argument that it was America’s destiny to reach the Pacific. The Doctrine became, in essence, Manifest Destiny.

A graphic example of this point is provided by the New York journalist John L. O’Sullivan who first used the phrase “Manifest Destiny” in a July 1845 editorial arguing that America should annex Texas.<sup>53</sup> He used the term a second time on December 27, 1845, in a very influential editorial in the *New York Morning News* about the Oregon country entitled *The True Title*.<sup>54</sup> This editorial and the

<sup>49</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 74–75, 82–83, 109, 117.

<sup>50</sup> DONALD JACKSON, THOMAS JEFFERSON & THE STONY MOUNTAINS: EXPLORING THE WEST FROM MONTICELLO 200 (1981); Letter from Meriwether Lewis to President Thomas Jefferson (Sept. 23, 1806), in 1 LETTERS OF THE LEWIS AND CLARK EXPEDITION WITH RELATED DOCUMENTS 1783–1854, at 320 (Donald Jackson ed., 2d ed. 1978).

<sup>51</sup> BECKHAM, *supra* note 12, at 11, 92, 139; DEVOTO, *supra* note 12, at 411, 420, 430, 512, 527–28, 538–39, 549; THE JOURNALS AND LETTERS OF SIR ALEXANDER MACKENZIE, *supra* note 12, at 1, 42, 518 n.4; NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 70–71, 73–76, 99–114.

<sup>52</sup> 18 REG. DEB. 700, 705, 711–13 (1825); 1 THOMAS HART BENTON, THIRTY YEARS’ VIEW; OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850, at 14, 52, 54 (photo. reprint, Greenwood Press 1968) (1854); WILLIAM NISBET CHAMBERS, OLD BULLION BENTON: SENATOR FROM THE NEW WEST 82–84 (1956); 3 HULBERT, *supra* note 48, at 42, 101; WILLIAM NISBET CHAMBERS, OLD BULLION BENTON: SENATOR FROM THE NEW WEST 82–84 (1956).

<sup>53</sup> *Annexation*, 17 U.S. MAG. & DEMOCRATIC REV. 5 (1845), *quoted in* Pratt, *supra* note 44, at 798.

<sup>54</sup> N.Y. MORNING NEWS, Dec. 27, 1845 (*quoted in* Pratt, *supra* note 44, at 796).

phrase Manifest Destiny created a new slogan that justified the idea of American expansion over the continent. While the phrase was new, the idea that the United States would expand over the continent and acquire the Pacific Northwest had been alive and well since at least Thomas Jefferson's time.<sup>55</sup>

O'Sullivan plainly used the Doctrine in his editorial maintaining that the United States already owned legal title to Oregon. He also relied on Manifest Destiny and Divine Providence as secondary arguments to prove United States ownership:

Our *legal title* to Oregon, so far as law exists for such rights, is perfect. Mr. Calhoun and Mr. Buchanan [United States Secretaries of State] have settled that question, once and for all. Flaw or break in the triple chain of that title, there is none. Not a foot of ground is left for England to stand upon . . . . [U]nanswerable as is the demonstration of our legal title to Oregon . . . we have a still better title than any that can ever be constructed out of all these antiquated materials of *old black-letter international law*. Away, away with all these cobweb tissues of *right of discovery, exploration, settlement, continuity, &c.* . . . were the respective cases and arguments of the two parties, as to all these points of history and law, reversed—had England all ours, and we nothing but hers—our claim to Oregon would still be best and strongest. And that claim is by the right of our *manifest destiny to overspread and to possess the whole of the continent* which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us. . . . [In England's hands, Oregon] must always remain wholly useless and worthless for any purpose of human *civilization* or society. . . . The God of nature and of nations has marked it for our own; and with His blessing we will firmly maintain the incontestable rights He has given, and fearlessly perform the high duties He has imposed.<sup>56</sup>

Notice O'Sullivan's use of the elements of "black-letter international law" such as civilization, the right of discovery, exploration, settlement, and continuity. He was clearly conversant with the elements of the international law of Discovery, and he used the Doctrine and its elements to justify America's legal title to the Oregon country.

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<sup>55</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 77–94.

<sup>56</sup> *Id.* at 118–19 (emphasis added) (quoting John L. O'Sullivan, *The True Title*, N.Y. MORNING NEWS, Dec. 27, 1845).

### A. 1803–1818

Thomas Jefferson's push for a continental American empire was the overriding theme that moved the United States towards the Pacific in this time period. He was the primary architect of the 1803 Louisiana Purchase, the 1803–1806 Lewis and Clark expedition aimed at the Oregon country, and American economic and political activity in Louisiana and Oregon.<sup>57</sup> One of Jefferson's prime objectives for the Lewis and Clark expedition was unquestionably the expansion of the United States.<sup>58</sup>

In 1804, the United States House of Representatives Committee of Commerce and Manufactures reported it "believed . . . [the Louisiana Territory] to include all the country . . . between the territories claimed by Great Britain on the one side [Canada], and by Spain on the other [California], quite to the South Sea [the Pacific]."<sup>59</sup> Jefferson had also noted this idea in a forty-page paper on the boundaries of Louisiana.<sup>60</sup>

It is no surprise, then, that the United States began working to bring the Oregon country under American control. Presidents Jefferson, Madison, and Monroe were "fervent expansionists" who were "willing to go to almost any length to secure additional territory" and their goal was the "[a]nnexation of all the lands of North America . . ."<sup>61</sup> In keeping with these aggressive ideals, President Jefferson and Secretary of State James Madison used the elements of the Doctrine of Discovery to justify the expansion of American territory to the Pacific.<sup>62</sup>

In 1807, for example, Secretary of State Madison mentioned the United States' rights to the Oregon country when he wrote James Monroe regarding negotiations with England and discussed "our claims . . . to the Pacific Ocean."<sup>63</sup>

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<sup>57</sup> *Id.* at 77–118.

<sup>58</sup> JACKSON, *supra* note 50, at 200, 280; Thomas Jefferson, *The Limits and Bounds of Louisiana*, in DOCUMENTS RELATING TO THE PURCHASE & EXPLORATION OF LOUISIANA 6, 24–37 (1904); WILLIAM EARL WEEKS, JOHN QUINCY ADAMS AND AMERICAN GLOBAL EMPIRE 26 (1992) [hereinafter JOHN QUINCY ADAMS AND AMERICAN GLOBAL EMPIRE].

<sup>59</sup> 13 ANNALS OF CONG. 1124 (1804).

<sup>60</sup> JACKSON, *supra* note 50, at 200, 280; Jefferson, *supra* note 58, at 24–37; JOHN QUINCY ADAMS AND AMERICAN GLOBAL EMPIRE, *supra* note 58, at 26.

<sup>61</sup> FRANK LAWRENCE OWSLEY, JR. & GENE A. SMITH, FILIBUSTERS AND EXPANSIONISTS: JEFFERSONIAN MANIFEST DESTINY, 1800–1821, at 1–2, 183 (1997); *see also* VI THE WRITINGS OF THOMAS JEFFERSON 55–56 (H.A. Washington ed., 1861).

<sup>62</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 68–76, 78–84, 121–24; OWSLEY & SMITH, *supra* note 61, at 1–2, 183.

<sup>63</sup> II AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES: FOREIGN RELATIONS 662–65 [hereinafter AMERICAN STATE PAPERS]; III *id.* at 85–86, 126, 185–86.

Madison also referred in 1806 and 1807 to the Doctrine of Discovery element of the United States' exclusive right to commercial and diplomatic interactions with the Indian nations in American territory: "The privileges of British trade and intercourse with the Indians . . . are not to be extended to Indians dwelling within the limits of the United States . . . ." <sup>64</sup>

In 1817, Secretary of State John Quincy Adams and President James Monroe used Doctrine of Discovery principles when they undertook steps to reacquire the port of Astoria on the Oregon coast from the English.<sup>65</sup> The English had taken the post in the War of 1812 and were required to return it to the United States by the treaty that ended that war.<sup>66</sup> After much delay and negotiating, Monroe and Adams dispatched American representatives to retake possession of Astoria using the elements of Discovery.<sup>67</sup> Adams and Monroe deemed it important for the United States to undertake formal steps to reoccupy Astoria and to reassert and protect America's Discovery claim to the Northwest.<sup>68</sup> The mission was designed, as they wrote, "to assert the [American] claim of territorial possession at the mouth of [the] Columbia river."<sup>69</sup> Adams wrote that the purpose was "to resume possession of that post [Astoria], and in some appropriate manner to reassert the title of the United States."<sup>70</sup> Monroe and Adams were clearly using the elements and rituals of the Doctrine of Discovery to reassert the United States' first discovery claim to Oregon.

In September of 1817, the President and Secretary of State dispatched the diplomat John Prevost and Captain William Biddle to take symbolic possession of Astoria for the United States.<sup>71</sup> It is no surprise that the actions they undertook to protect America's interests on the Pacific coast were accomplished by Doctrine of Discovery rituals. In fact, Monroe and Adams ordered Biddle and Prevost to sail to the Columbia and to "assert there the claim of sovereignty in the name of . . . the United States, *by some symbolical or other appropriate mode of setting up a claim of national authority and dominion.*"<sup>72</sup>

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<sup>64</sup> II *id.* at 662–65; III *id.* at 85–86, 126, 185–86.

<sup>65</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 125–26.

<sup>66</sup> *Id.* at 124–25.

<sup>67</sup> *Id.* at 125–26.

<sup>68</sup> *Id.*

<sup>69</sup> Letter from John Quincy Adams to President James Monroe (Sept. 29, 1817), in VI WRITINGS OF JOHN QUINCY ADAMS 1816–1819, at 204–05, 366, 372–73 (Worthington Chauncey Ford ed., Greenwood Press 1968) (1913).

<sup>70</sup> *Id.*

<sup>71</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 126.

<sup>72</sup> FREDERICK MERK, THE OREGON QUESTION: ESSAYS IN ANGLO-AMERICAN DIPLOMACY AND POLITICS 17–18, 22–23 (1967) (emphasis added); *see also* DEVOTO, *supra* note 12, at 512; JAMES P. RONDA, ASTORIA & EMPIRE 308–15 (1990); WEEKS, *supra* note 20, at 50.

Biddle and Prevost did as they were ordered. They arrived at separate times, and Biddle, on the north side of the mouth of the Columbia River and in the presence of Chinook Indians, raised the United States flag, turned some dirt with a shovel, just like the livery of seisin ritual from feudal times, and put up a lead plate which read, "Taken possession of, in the name and on the behalf of the United States by Captain James Biddle, commanding the United States ship Ontario, Columbia River, August, 1818."<sup>73</sup> He then moved upriver and repeated these same Discovery rituals on the south side of the Columbia.<sup>74</sup> Biddle thus reasserted America's Discovery claim by using the exact same rituals that European explorers had utilized for centuries.<sup>75</sup>

In October of 1818, John Prevost arrived at Astoria/Ft. George on a British ship of war and a joint Discovery ritual was staged.<sup>76</sup> The English flag at Astoria/Ft. George was lowered and the United States flag was raised in its place.<sup>77</sup> The English troops fired a salute and papers of transfer were signed by the English Captain, an agent of the English North West Company, and Prevost.<sup>78</sup> The American claim of Discovery to the Pacific Northwest was again legally in place.

From 1803 to 1818, congressional representatives reported these events, and many others, in regular letters to their constituents. The letters demonstrate the widespread understanding of the elements of the Doctrine of Discovery by Congress and voters, the use of these elements to claim American ownership of the Pacific Northwest, and the alleged American destiny to absorb the Oregon country into the Union.<sup>79</sup>

### B. 1818–1827

The United States' claim to the Oregon country was based on Robert Gray's discovery of the Columbia River and the naming of the river in 1792; Lewis and Clark's exploration of parts of that river and their occupation of the mouth of the river from 1805 to 1806; and John Jacob Astor's construction in 1811 of the

<sup>73</sup> MERK, *supra* note 72, at 22–23; RONDA, *supra* note 72, at 308–15.

<sup>74</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 126.

<sup>75</sup> MICHAEL GOLAY, THE TIDE OF EMPIRE: AMERICA'S MARCH TO THE PACIFIC 15 (2003); MERK, *supra* note 72, at 22–23; PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492–1640, at 9 & n.19, 69–73, 101–02 (1995); *Documents*, 3 Q. OR. HIST. SOC'Y 310, 310–11 (1902).

<sup>76</sup> H.R. DOC. NO. 17-112, at 13–19 (1st Sess. 1822); 40 ANNALS OF CONG. 246 (1823); GOLAY, *supra* note 75, at 65; MERK, *supra* note 72, at 23–24; RONDA, *supra* note 72, at 314–15.

<sup>77</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 126.

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

<sup>79</sup> I CIRCULAR LETTERS OF CONGRESSMEN TO THEIR CONSTITUENTS 1789–1829 (Noble E. Cunningham, Jr. ed., 1978).

trading post Astoria, the first permanent settlement at the mouth of the Columbia River.<sup>80</sup> The United States continually asserted these grounds in arguing it owned the Oregon country in its negotiations with England, Spain, and Russia.<sup>81</sup>

Secretary John Quincy Adams foresaw that the Doctrine of Discovery and Manifest Destiny would work together to bring the Pacific Northwest into the Union.<sup>82</sup> He worked towards that goal and finally extinguished Spain's and Russia's competing Discovery claims to the Oregon country in treaties finalized in 1821 and 1824,<sup>83</sup> and in treaties with England in 1818 and 1827 in which the parties agreed to jointly occupy the Northwest.<sup>84</sup> Adams thought that the 1821 Spanish treaty guaranteed American Manifest Destiny, writing that "the remainder of the continent should ultimately be ours."<sup>85</sup> The negotiations between the United States, England, Spain, and Russia not only show how commonly understood the elements of the Doctrine of Discovery were, but also the common acceptance of the elements in international law.

Congress was also actively involved during this time period in applying the Doctrine of Discovery elements to the United States' claim to Oregon. In December 1820, a House committee began studying the possibility of the United States occupying the Columbia River region and building settlements. The committee issued a report in January of 1821 and a proposed bill that would authorize the United States to occupy the Northwest region and to "extinguish the Indian title."<sup>86</sup> This report is filled with lengthy discussions of the elements of

<sup>80</sup> III AMERICAN STATE PAPERS, *supra* note 63, at 185, 731; IV *id.* at 377, 381; MERK, *supra* note 72, at 4, 14–23, 42, 47, 51, 110, 156, 165–66, 399; Letter from John Quincy Adams to Albert Gallatin & Richard Rush (July 28, 1818), in VI WRITINGS OF JOHN QUINCY ADAMS, *supra* note 69, at 400; Joseph Schafer, *The British Attitude Toward the Oregon Question, 1815–1846*, 16 AM. HIST. REV. 273, 285–86 (1911).

<sup>81</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 122–24, 131–36, 142.

<sup>82</sup> *Id.* at 130–36.

<sup>83</sup> *Id.* at 134–36.

<sup>84</sup> *Id.* at 131–34.

<sup>85</sup> I A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 626 (James D. Richardson ed., 1913); *see also* Letter from John Quincy Adams to Pierre de Poletica (Feb. 25, 1822), in VII WRITINGS OF JOHN QUINCY ADAMS, *supra* note 69, at 212–15; THE DIARY OF JOHN QUINCY ADAMS 1794–1845, at 211 (Allan Nevins ed., 1951); V AMERICAN STATE PAPERS, *supra* note 63, at 436–37, 446–47, 449, 791; JACKSON, *supra* note 50, at 53; DALE L. WALKER, PACIFIC DESTINY: THE THREE-CENTURY JOURNEY TO THE OREGON COUNTRY 385 (2000); JOHN QUINCY ADAMS AND AMERICAN GLOBAL EMPIRE, *supra* note 58, at 73, 79–81, 119–20; ALBERT K. WEINBERG, MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY 136 (1958).

<sup>86</sup> H.R. DOC. NO. 19-213, at 5–6, 8–12 (1st Sess. 1826); 40 ANNALS OF CONG. 682–83 (1823); 37 ANNALS OF CONG. 679 (1820); II AMERICAN STATE PAPERS, *supra* note 63, at 629–34; 3 HULBERT, *supra* note 48, at 12, 42, 45; Charles H. Ambler, *The Oregon Country, 1810–1830: A Chapter in Territorial Expansion*, 30 MISS. VALLEY HIST. REV. 3, 8 (1943).

the Doctrine of Discovery and its use to justify American jurisdiction and control of the Pacific Northwest.<sup>87</sup>

### C. 1828–1855

During this time period the United States continued to use the Doctrine of Discovery and Manifest Destiny to acquire the Oregon country. United States Senator Lewis Linn of Missouri, for example, relied heavily on Discovery to support his arguments that America owned Oregon.<sup>88</sup> In 1838, he told the Senate that the United States needed to occupy Oregon because “discovery accompanied with subsequent and efficient acts of sovereignty or settlement are necessary to give title.”<sup>89</sup> Linn relied on the usual American Discovery argument that Robert Gray’s discovery of the Columbia and Lewis and Clark’s expedition were “an important circumstance in our title . . . that was notice to the world of claim,” and that Lewis and Clark’s “solemn act of possession was followed up by a settlement and occupation, made by . . . John Jacob Astor.”<sup>90</sup> Linn believed that the United States’ “right, if placed alone on the strong and certain ground of *prior discovery*, would be as immutable as the everlasting hills.”<sup>91</sup>

Many other members of Congress also relied on the Doctrine of Discovery to argue American ownership of the Pacific Northwest region. In 1838, according to Congressman Caleb Cushing, the “[p]riority of discovery, therefore, is clearly with the United States . . . the United States claim the Oregon Territory by right of discovery.”<sup>92</sup> In addition, Cushing argued that contiguity extended the northwest boundary of the Louisiana Territory and gave the United States rights in the Pacific Northwest and “a claim of title superior to that of any other nation.”<sup>93</sup> Through the Louisiana Purchase, “the United States added to *her own rights of discovery* the preexisting rights of France.”<sup>94</sup> He also clearly argued the Discovery aspects of the Lewis and Clark expedition and the Discovery rituals they performed in 1805 when they “erected the works called Fort Clatsop, and in the most formal and authentic manner asserted the rights of the United States

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<sup>87</sup> H.R. DOC. NO. 19-213, at 5–6, 8–12.

<sup>88</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 146–47.

<sup>89</sup> *Id.* (quoting S. DOC. NO. 25-470, at 5–6 (1838)).

<sup>90</sup> *Id.* at 146.

<sup>91</sup> *Id.*; see Mirth Tufts Kaplan, *Courts, Counselors and Cases: The Judiciary of Oregon’s Provisional Government*, 62 OR. HIST. Q. 117, 123–24 (1961).

<sup>92</sup> CONG. GLOBE, 25TH CONG., 2D SESS. 566–70 (1838); see also John Belohlavek, *Race, Progress, and Destiny: Caleb Cushing and the Quest for American Empire*, in MANIFEST DESTINY AND EMPIRE: AMERICAN ANTEBELLUM EXPANSIONISM 32 (Sam W. Haynes & Christopher Morris eds., 1997).

<sup>93</sup> CONG. GLOBE, 25TH CONG., 2D SESS. 566–70.

<sup>94</sup> *Id.*



in and to the whole country.”<sup>95</sup> He also stated that Astor and Astoria “extended the bounds of empire.”<sup>96</sup> Moreover, Cushing relied on the 1821 treaty with Spain and that country’s Discovery claim from California north to the sixtieth parallel as being based on its “right of early discovery and repeated explorations and acts of occupation.”<sup>97</sup> All of these facts added up to one point according to Cushing: “Here, then, we have the original title of the United States by discovery, fortified by the rights of France, continued by the exploration of Lewis and Clark, by the formal taking of possession, and by regular occupation, and completed by the recognition of Great Britain.”<sup>98</sup>

By 1844, the United States was gripped by an aggressive expansionist fever. The widespread expression of Manifest Destiny ideals resulted from years of governmental and private discussions about American Discovery rights in the Pacific Northwest. It also led the United States to finally settle the Oregon question, annex Texas, and declare war on Mexico in 1846.<sup>99</sup>

The issue of annexing Texas had been a boiling point in American politics for more than two decades, and desires to occupy and own Oregon had been fermenting even longer.<sup>100</sup> The Democratic Party brought these issues to the fore by placing in its 1844 presidential platform a Discovery demand to annex Texas and occupy Oregon.<sup>101</sup> The platform stated that “our title to the whole of the Territory of Oregon is clear and unquestionable; that no portion of the same ought to be ceded to England or any other power; and that the re-occupation of Oregon and the reannexation of Texas at the earliest practicable period are great American measures.”<sup>102</sup>

The Democratic candidate for United States President, James K. Polk, campaigned vigorously on this theme and on Manifest Destiny. His election slogan was the aggressive and warlike statement about the Oregon country “54-40 or fight”—which thereby claimed the Pacific Northwest and much of present day British Columbia as American territory.<sup>103</sup> Thereafter, the 1844 election was considered to have been about expansion, and when Polk won he

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 153–55.

<sup>100</sup> *Id.* at 153.

<sup>101</sup> *Id.*

<sup>102</sup> WEEKS, *supra* note 20, at 105; Edward Gaylord Bourne, *Aspects of Oregon History Before 1840*, 6 Q. OR. HIST. SOC’Y 255, 271 (1905).

<sup>103</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 153–56.

mandated expansion.<sup>104</sup> It is no surprise that Texas was annexed (even before Polk was inaugurated), Oregon acquired, and a war of territorial conquest commenced with Mexico within less than two years.<sup>105</sup>

In his Inaugural Address in March 1845, Polk discussed the Oregon question, Discovery, and Manifest Destiny.<sup>106</sup> He called Oregon “our territory which lies beyond the Rocky Mountains,”<sup>107</sup> and he stated that the United States’ “title to the country of the Oregon is ‘clear and unquestionable,’ and already are our people preparing to perfect that title by occupying it . . . .”<sup>108</sup> He mentioned that Americans were “already engaged in establishing the blessings of self-government in valleys of which the rivers flow to the Pacific.”<sup>109</sup> The opening of the Pacific Northwest and the “extinguish[ing] [of the] title of numerous Indian tribes to vast tracts of country”<sup>110</sup> for American settlement was a good thing because Manifest Destiny and expansion strengthened the Union by not confining its population to small areas but by allowing it to “be safely extended to the utmost bounds of our territorial limits [so as to] become stronger.”<sup>111</sup>

In October of 1845, Polk and Senator Benton engaged in an interesting discussion about the United States’ claim to Oregon.<sup>112</sup> In this conversation, they discussed international law, first discovery, contiguity, discovery rituals, and occupation as establishing the United States’ claim.<sup>113</sup> There is no question that they were analyzing the application of the Doctrine of Discovery and Manifest Destiny to the Oregon country.

On December 2, 1845, Polk delivered his First Annual Message to Congress and discussed the Oregon question at great length.<sup>114</sup> He stated, “[O]ur title to the whole Oregon Territory . . . [is] maintained by irrefragable [irrefutable] facts and

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 85, at 380–81; *see also* HAYNES, *supra* note 20, at 70.

<sup>108</sup> 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 85, at 380–81.

<sup>109</sup> *Id.*

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

<sup>111</sup> *Id.*

<sup>112</sup> CHAMBERS, *supra* note 52, at 296; FREDERICK MERK, THE MONROE DOCTRINE AND AMERICAN EXPANSIONISM 1843–1849, at 65–66 (1968) [hereinafter THE MONROE DOCTRINE AND AMERICAN EXPANSIONISM].

<sup>113</sup> THE MONROE DOCTRINE AND AMERICAN EXPANSIONISM, *supra* note 112, at 65–66.

<sup>114</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 154–55.

arguments” and he asked Congress to maintain “our just title to that Territory.”<sup>115</sup> Polk suggested Congress immediately extend federal protection, laws, and civil and criminal jurisdiction to Oregon and to control the Indian commercial and political relations.<sup>116</sup> He requested the building of forts along the Oregon Trail, federal mail service to Oregon, and the grant of land to the “patriotic pioneers who . . . lead the way through savage tribes inhabiting the vast wilderness.”<sup>117</sup>

Polk was confident Discovery proved that “the title of the United States is the best now in existence.”<sup>118</sup> He also claimed that under international law England did not have a valid claim to the Pacific Northwest because “the British pretensions of title could not be maintained to any portion of the Oregon Territory upon any principle of public law recognized by nations.”<sup>119</sup>

Other American politicians wholeheartedly agreed with Polk’s Discovery arguments. Senator Stephen Douglass stated in 1846, “[W]e do hold the valley of the Columbia in our own right by virtue of discovery, exploration, and occupation, and that we have a treaty-right in addition through the Louisiana and Florida treaty.”<sup>120</sup> He also expressly relied on the Doctrine and Manifest Destiny ideals of converting and civilizing the Indians in the Oregon country, and he utilized *terra nullius* when he claimed that the United States had rights to “the vacant and unoccupied part of North America.”<sup>121</sup> Secretary of State James Buchanan added that he foresaw America’s “glorious mission . . . [of] extending the blessings of Christianity and of civil and religious liberty over the whole of the North American continent.”<sup>122</sup>

The United States finally achieved its goal of internationally recognized ownership of the Oregon country in 1846 when it signed a treaty with England drawing the border between Canada and the United States at the forty-ninth parallel, where it remains today.<sup>123</sup> In the 1850s, the United States used its

<sup>115</sup> 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 85, at 392–97; accord RAY ALLEN BILLINGTON, *THE FAR WESTERN FRONTIER, 1830–1860*, at 156–57 (1956).

<sup>116</sup> 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 85, at 392–97.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 394–99.

<sup>119</sup> *Id.*

<sup>120</sup> CONG. GLOBE, 29TH CONG., 1ST SESS. 259 (1846).

<sup>121</sup> *Id.*

<sup>122</sup> CONG. GLOBE, 33D CONG., 1ST SESS. 337 (1854); see also HAYNES, *supra* note 20, at 98–99; MAJOR L. WILSON, *SPACE, TIME AND FREEDOM: THE QUEST FOR NATIONALITY AND THE IRREPRESSIBLE CONFLICT 1815–1861*, at 111–13 (1974); Robert W. Johannsen, *The Meaning of Manifest Destiny, in MANIFEST DESTINY AND EMPIRE: AMERICAN ANTEBELLUM EXPANSIONISM*, *supra* note 92, at 16.

<sup>123</sup> NATIVE AMERICA, DISCOVERED AND CONQUERED, *supra* note 1, at 156.

Doctrine of Discovery preemption right to begin buying the Indian title to much of the Pacific Northwest by negotiating treaties with tribal governments in what is now Oregon, Idaho, and Washington.<sup>124</sup>

#### *D. Oregon Joins the Union*

Congress quickly assumed control of the Oregon country. In August of 1848, Congress enacted the Territorial Act to create the Oregon Territory.<sup>125</sup> Congress then took control of land ownership in the Territory, nullified all laws of the provisional government that might have granted land or affected land titles, and affirmed the titles of the missionary stations located among the Indian tribes.<sup>126</sup>

While Congress claimed the area was “part of the Territory of the United States,” it also provided that “nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty . . . .”<sup>127</sup> Congress was thereby claiming the Discovery rights of preemption and Indian title. The Territorial Act also applied Discovery elements to Oregon by extending the federal Northwest Ordinance of 1787 to the Oregon Territory.<sup>128</sup> The Northwest Ordinance had itself expressly applied the elements of preemption and Indian title in the Old Northwest; the lands north and west of the Ohio River.<sup>129</sup> Consequently, Congress explicitly mandated the Doctrine of Discovery be used in the Oregon Territory.

In September of 1850, Congress enacted the Oregon Land Donation Act (Donation Act) and began granting land to settlers.<sup>130</sup> In the Donation Act, Congress gave Indian lands to American settlers even though the United States had not yet extinguished the Indian titles by treaty and purchase under its preemption power.<sup>131</sup> The assumption that Indian lands could be granted away by the federal government even before they were purchased from the tribes reflected

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<sup>124</sup> See, e.g., Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 189–99 (2001); Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 552–56 (1991).

<sup>125</sup> An Act to Establish the Territorial Government of Oregon, ch. 177, 9 Stat. 323 (1848).

<sup>126</sup> *Id.* at 323, 329.

<sup>127</sup> *Id.* at 323.

<sup>128</sup> *Id.* at 329.

<sup>129</sup> *The Doctrine of Discovery in American Indian Law*, *supra* note 7, at 46.

<sup>130</sup> Donation Land Claim Act of 1850, ch. 76, 9 Stat. 496.

<sup>131</sup> *Id.*

basic Discovery elements and the long held understanding of the Supreme Court that the United States could grant its *title*, its property interest, to non-Indians even while Indians still occupied the land.<sup>132</sup>

The Oregon settlers had long lobbied for land grants. They felt entitled to land because they had ensured the Oregon country became part of the United States by emigrating, settling in the region, and helping “civilize” the area.<sup>133</sup> In addition to rewarding settlers who helped acquire the territory, Congress used the Donation Act to encourage further immigration to Oregon so that the area could be put to productive use for the United States.<sup>134</sup> On February 14, 1859, Oregon became the thirty-third state of the Union.<sup>135</sup>

## V. CONCLUSION

Manifest Destiny developed from the elements and themes of the international law Doctrine of Discovery. For forty years or more, American politicians, citizens, and newspapers used the elements of the Doctrine of Discovery to justify Manifest Destiny and the expansion of the United States to the Oregon country and the Pacific Ocean. Under the ethnocentric justifications of Discovery, Americans possessed the only valid religions, civilizations, governments, laws, and cultures, and Divine Providence intended these people and their institutions to control and own North America. The human, governmental, and property rights of Native Americans were almost totally disregarded by Discovery and then by Manifest Destiny. Apparently, the Christian god wanted Indians to get out of the way of American progress. The economic and political interests of the United States were destined to dominate the continent and to acquire all its assets.

Four representative statements aptly sum up what the Doctrine of Discovery and Manifest Destiny meant for non-Americans. When United States Senator Benton was asked whether American expansion would cause the extinction of Indian tribes if they “resisted civilization” he stated, “I cannot murmur at what seems to be the effect of divine law . . . . The moral and intellectual superiority of the White race will do the rest . . . .”<sup>136</sup> As American expansion clashed with Indian interests in Wyoming in 1870, a newspaper noted,

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<sup>132</sup> *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839); *Meigs v. M’Clung’s Lessee*, 13 U.S. (9 Cranch) 11, 16 (1815); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139, 142 (1810).

<sup>133</sup> James M. Bergquist, *The Oregon Donation Act and the National Land Policy*, 58 OR. HIST. Q. 17, 18–19 (1957).

<sup>134</sup> H.R. DOC. NO. 33-271, at 5 (1st Sess. 1850).

<sup>135</sup> 9 Stat. 496; *Oregon History: Statehood*, OR. BLUE BOOK, <http://bluebook.state.or.us/cultural/history/history15.htm> (last visited Apr. 22, 2011).

<sup>136</sup> CONG. GLOBE, 29TH CONG., 1ST SESS. 918 (1846).

The rich and beautiful valleys of Wyoming are destined for the occupancy and sustenance of the Anglo-Saxon race. . . . The Indians must stand aside or be overwhelmed . . . . The destiny of the aborigines is written in characters not to be mistaken. . . . [T]he doom of extinction is upon the red men of America.<sup>137</sup>

Secretary of State Henry Clay stated in 1825 that it was “impossible to civilize Indians . . . . [T]hey were destined to extinction . . . .”<sup>138</sup> And, one author stated in 1847 that the destiny of Mexicans would be the same: they must assimilate into the “superior vigor of the Anglo-Saxon race, or they must utterly perish.”<sup>139</sup>

In conclusion, it appears certain that General George Washington’s advice to Congress in 1783 was ultimately reflected in American Manifest Destiny and Discovery practices. In his letter to a congressional committee, Washington advised Congress that the United States did not have to fight tribes to acquire their lands.<sup>140</sup> Instead, he foresaw that “the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire”<sup>141</sup> and that Indian lands would pass naturally to the United States and much more cheaply by purchase than by warfare.<sup>142</sup> Obviously, American Manifest Destiny, and its application of the Doctrine of Discovery, was not intended to benefit the indigenous peoples of North America and their governments, societies, and economic interests.

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<sup>137</sup> DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* 189 (1970) (quoting *CHEYENNE DAILY LEADER*, Mar. 3, 1970).

<sup>138</sup> HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* 53, 105 (1990).

<sup>139</sup> RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 172 (rev. ed. 1995).

<sup>140</sup> Letter from George Washington to James Duane (Sept. 7, 1783), *in* *WRITINGS OF GEORGE WASHINGTON* 135–36 (John C. Fitzpatrick ed., 1975).

<sup>141</sup> *Id.* at 140.

<sup>142</sup> *Id.* at 135–36, 140.

