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The Historicity of the Doctrine of Discovery in New Zealand's Colonisation

Abstract

Over the last two decades, claims that the Doctrine of Discovery (based on a 1493 papal bull) had some bearing on New Zealand's colonisation have been gaining force in academic and popular literature, with a nexus emerging between historical and legal analyses of its purported role in British intervention in the country from the eighteenth century. This article explores the bases for these claims, and introduces a distinction between functionalist and intentionalist approaches to interpreting Britain's colonisation of New Zealand as a means of contextualising and accounting for the explanatory appeal of the Doctrine as a first cause of New Zealand's colonisation.

Introduction

The argument that a late-fifteenth century papal bull exercised some influence on the philosophical and legal basis for Britain's colonisation of New Zealand from the latter eighteenth century onwards is a comparatively recent one, only beginning to

appear and the literature relating to New Zealand's colonisation from the 2000s. The proposition arrived via a circuitous route that traversed American and Canadian literature dealing with indigenous rights in those jurisdictions, with some of the themes that surfaced in these analyses drawn on by academics searching for an ideological basis that propelled Britain's intervention in New Zealand. What is significant about employment of the Doctrine of Discovery in this context is that it provided what was effectively a missing conceptual aspect of the colonial process in the country. Up until the early twenty-first century, to varying degrees, most historians attributed British intervention in New Zealand to the product of a complex web of individual motives without any long-standing overarching official intent to colonise the territory.¹ Indeed, the fact that it took Britain almost two hundred years from learning about New Zealand's location to deciding to conclude a treaty of session with the country's indigenous chiefs, is strongly suggestive of the absence of any firm commitment to colonise the territory. This circumstantial evidence is corroborated by Colonial Office documentation (particularly from the 1820s and 1830s).² It is also instructive, to consider that from an historiographical perspective, practically all the major histories that deal with New Zealand's colonisation make no reference to the Doctrine of Discovery as having any role whatsoever in Britain's intentions for, and subsequent intervention in, New Zealand.³

However, when viewing the volatile and sometimes violent process of colonisation in the country after 1840, some academics deduced that the nature of

this intervention had to be rooted in particular attitudes towards New Zealand's indigenous population held by the colonising power. This divergent understanding could be labelled an intentionalist interpretation of Britain's colonisation – with preceding philosophies, biases, policies, and actions being directed by a particular doctrine to achieve full cultural, territorial, political, and economic domination of the country – as opposed to the more generally accepted functionalist explanation of New Zealand's colonisation,⁴ in which its impetus arose from a complex interaction of motives by various individuals and groups which were not governed by a form of ideology that induced them to seek such degrees of domination.

The constraints of space prevent a full evaluation of the validity of these two interpretations, although as has been mentioned above, both the documentary and circumstantial evidence weigh heavily in favour of functionalist explanation for Britain's involvement in New Zealand. In addition, the intentionalist approach relies excessively on causal fallacies,⁵ with its primary appeal to authority based on first-cause elements such as the Doctrine of Discovery, which because they precede the colonisation in question are argued to be causative to some extent.

What follows is an analysis of some of the issues that arise from the question of the role the Doctrine of Discovery in New Zealand's history. An overview of the Doctrine itself is followed by an examination of the historicity of claims that it applied to Britain's colonisation of New Zealand. A survey is then undertaken of some of the assertions that have been

made with respect to the Doctrine and New Zealand's colonisation, with a distinction drawn between historical and legal bases for the claims, but in both cases with consideration given to their fundamentally intentionalist character.

While the evidence suggests that the Doctrine of Discovery played no role in New Zealand colonisation, the increasing mention of it in academic and popular literature offers an instructive case study of how an intentionalist interpretation of an event or period, coupled with the conflation of approaches to the past taken by different academic disciplines, can yield conclusions there are not necessarily based entirely on historical evidence, but which nonetheless serve an explanatory function when reviewing a particular event or period.

1. The Doctrine of Discovery

The specific 'Doctrine of Discovery' that has been popularised in New Zealand in recent years in relation to the country's colonisation is based on a papal bull known as *Inter Caetera*, which was issued on 4 May 1493 by Pope Alexander VI. The Bull's purpose was to support Spain (at the time the strongest Catholic state in Europe) with its strategy to claim the exclusive right to certain territories discovered by Christopher Columbus the previous year.⁶ The Bull delineated the specific locations (one hundred leagues west of the Azores and Cape Verde Islands) that would be assigned exclusively to Spain, and imposed a prohibition on other Catholic states

approaching those territories without Spanish approval.⁷

The effect of this Bull was to assert and maintain Spain's trade monopoly in the region. However, this was concealed under a veneer of religious intentions. The Vatican's view was that any territories that were not inhabited by Christians were open to claims of 'discovery' (and implicitly, some form of sovereignty) by whichever Catholic power first asserted sovereignty over these territories.⁸ The Bull was ambiguous in the need for the use of force to achieve such claims of sovereignty, but urged that 'the Catholic faith...be exalted and be everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself'.⁹ Whether this overthrow was to be political or military (or both) was not clarified, but neither approach was explicitly ruled out. This ambiguity was not resolved until 1537, with the appearance of another papal bull: Pope Paul III's *Sublimis Deus*, which explicitly forbade Catholic nations engaging in wars of conquest in potential colonies.¹⁰

Even in the era in which this Bull was issued, however, scholars and jurists questioned aspects of papal jurisdiction when it came to colonisation, although their concern was not so much with the fact of claiming territories, but for the preference that the Pope showed towards Spain rather than other Catholic nations (particularly Portugal).¹¹ Of much more significance, though, is the fact that the 1493 Papal Bull did not guide the nature of intervention in the New World by Catholic nations

so much as respond to incursions that were already well underway.¹² Its purpose (and more so that of its 1537 successor) was as much to temper the violence of Spanish imperial activity as to delineate its territorial extent.

The tenure of *Inter Caetera* was brief, however. In 1494, the Treaty of Tordesillas superseded the papal demarcations laid out in the previous year, and shifted the 'legal' basis of Catholic imperialism from a religious to a temporal basis.¹³ Thereafter, the influence of *Inter Caetera* waned, and by the major age of European imperialism – roughly from the 1620s to the 1830s – not only was the doctrine no longer in effect, but even conceptually, its aim of Catholic proselytising had been supplanted by more mercantile motives, driven primarily by two Protestant powers: the Netherlands and Britain.¹⁴

In a few instances, the literature dealing with the Doctrine of Discovery's subsequent influence casts the net more widely, and encompasses not only other papal bulls – such as Pope Nicholas V's *Dum Diversas* of 1452 and Pope Calixto III's *Inter Caetera* of 1456¹⁵ – but also what is more loosely characterised as a sentiment of racial superiority on which arbitrary territorial acquisition in, along with the ensuing cultural and political domination of non-European lands and their peoples was predicated.¹⁶ These sentiments also constitute a dimension of the Doctrine's definition in some literature.

One of the aspects of Papal Bulls from this era that has received less attention in relation to the Doctrine of Discovery is the authority that they

carried at the time. The presumption in much of the literature is that national leaders in Catholic Europe held their allegiance to the papacy more highly than to their own national interests. However, 'no such international scruples or papal hegemony existed'.¹⁷ Moreover, in the case of the 1493 bull *Inter Caetera*, its function was as much about the involvement of the papacy in European politics as it was about asserting claims to territories outside the continent¹⁸ – claims that were being made in this period without any need for the Vatican's blessing, let alone instruction.¹⁹

2. The Historicity of the Doctrine in Connection with New Zealand's Colonisation

The key question relating to the 1493 Doctrine of Discovery is to what extent did it influence Britain's colonisation of New Zealand? To assist with the answer to this question, it is first necessary to establish briefly the key punctuation points of British intervention in the country, and examine these in the context of any connection they may have with the Doctrine.

Officials of the British East India Company knew about the existence and location of New Zealand from 1644, having received this intelligence from Dutch sources in Java.²⁰ And by the end of that decade, this information on New Zealand, along with maps and details about its terrain and peoples assembled from the 1642 Dutch expedition of Abel Tasman to the territory, was being widely circulated throughout Europe.²¹ It was not until 1768, though, that the Royal Society approached George III to

support a planned expedition to the South Pacific, to be led by James Cook.²² Among other directives, Cook was instructed to visit New Zealand and to take possession in the name of the King any suitable locations that were 'uninhabited', or if already peopled, and if the location in question was considered desirable, to take possession 'with the consent of the natives'.²³ Significantly, there was categorially no religious basis to these instructions, let alone one concerned with spreading the Catholic faith to new territories. The latter injunction would be anathema to Protestant Britain, where there were obstacles in place – some official, others informal – preventing Catholics from civil service, the armed forces, and serving as monarchs.²⁴

Also, there was not even a hint in the instructions to Cook of Britain asserting sovereignty through discovery, which was the axiomatic decree of the Doctrine of Discovery. On the contrary, British officials were explicit that the consent of resident indigenous populations was mandatory, and would necessarily precede any assertions of sovereignty. Moreover, while Cook made a nominal claim of sovereignty over some undefined portions of land, this was later dismissed by the British government,²⁵ and by the beginning of the nineteenth century, its policy was clear that Britain had no sovereign claim over any part of New Zealand.

For more than six decades after Cook's first voyage to New Zealand, the British government expressed no intention to colonise the territory, and by the 1820s, its policy had settled to one of minimal official involvement. It was only with the demands of

a growing settler population in New Zealand, along with greater commercial attachments with the British colony of New South Wales from the late 1830s, that a shift was imposed on British policy on New Zealand.²⁶ This culminated in a decision to intervene formally in the country, with the nature of the involvement encapsulated in the instructions that Lord Normanby (the British Secretary of State for Colonies) issued to William Hobson in August 1839. The overarching aim of the instructions were to ensure that a treaty was concluded with Māori chiefs, who would agree to British sovereignty being established in the country only with their agreement. The relevant passage from the Instructions is explicit on this point: 'The Queen...disclaims for herself and her subjects every pretension to seize on the Islands of New Zealand, or to govern them as a part of the dominions of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained'.²⁷ Official British intervention in New Zealand, and all that would come in its wake, was predicated on obtaining this free and intelligent consent, as opposed to any assertions of sovereignty based on discovery.

As had been the case for the preceding two centuries with respect to New Zealand, there was no reference to the Doctrine of Discovery by British officials, and neither did its tenets inform any aspect of British policy towards this potential colony. On the contrary, instead of arbitrarily asserting absolute sovereignty over Māori territory on the basis that Māori were largely not Christian (as the Doctrine of Discovery required), a limited form of sovereignty was applied, and the sanctity of Māori land

ownership was promised through a treaty between the chiefs and the British Crown. The resulting Treaty of Waitangi guaranteed Māori 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'.²⁸ This was about as far removed as it is possible to get from the non-consensual, invasive seam that ran through the Doctrine of Discovery.

In summary, then, there are several reasons why the Doctrine of Discovery cannot be applied to, or used to characterise British intervention in New Zealand:

- The inherent aversion to Catholicism that was symptomatic of the British government and ruling classes in this period. Anything that even had a semblance of papal influence was shunned;
- The Doctrine was devised for a specific region, of which New Zealand was not a part, for a colonising power which never had any territorial claim to New Zealand, and at a time when New Zealand's existence was unknown to Europe;
- Even for Catholic nations in Europe, the 1493 Bull had carried little authority at the time, and by the eighteenth century was no longer adhered to at all;
- By the time Britain first became aware of New Zealand, in the mid-seventeenth century, the Doctrine had effectively been in abeyance for around 150 years (partly due to its supersession by the Treaty of Tordesillas);

- There is no mention of the Doctrine of Discovery in any British Government document relating to New Zealand's colonisation, and neither did its precepts form part of British policy in this period;
- More than three centuries had elapsed from when the doctrine was formulated to when Britain began to develop a distinct policy on New Zealand. Over that time, the nature of European imperialism had altered dramatically, and precepts devised in fifteenth-century Rome had little bearing on the nature of British colonisation being devised in nineteenth-century London;
- In the approximately two years leading up to New Zealand's cession of sovereignty in 1840 via the Treaty of Waitangi, British policy on the territory was developed on principles that contravene the central tenets of the Doctrine of Discovery. This is especially important because it negates the argument that somehow, the general sentiment of the Doctrine embedded itself in British colonial policy in the nineteenth century as a precursor to New Zealand's colonisation.
- The Doctrine of Discovery was explicitly based on the desire by the Catholic Church to proselytise. However, British intervention in New Zealand from the late-eighteenth century was largely secular in its motives.

3. Assertions of the Doctrine's Applicability to Britain's Colonisation of New Zealand

Assertions that the Doctrine of Discovery applies to New Zealand's colonisation have become much more frequent in the last two decades (having barely appeared at all prior to then). These claims fall into three general (although at times, overlapping) categories. Firstly, there are the suggestions made by academics that the Doctrine determined (to some extent) Britain's intervention in New Zealand, on the basis of appeals to history. Secondly, there are the claims by legal scholars that the Doctrine similarly guided the nature of New Zealand's colonisation by Britain, but through a circuitous jurisprudential route. And finally, there are popular, non-academic statements affirming the centrality of the Doctrine in relation to Britain's colonisation of New Zealand, and which are largely derivative of the preceding two categories of claim. The relevance of this third category is not so much in the veracity of its content (which is generally slight) but its role in the popularisation of the connection between the 1493 Papal Bull and the subsequent modus of British intervention in the country. It is worth noting, too, that in all three categories, these claims maintain a strong intentionalist interpretation of the colonial period in general, and New Zealand's colonisation in particular.

While evidence that the British did not adhere to, were influenced by, or were even aware of the Doctrine of Discovery during the entire period of their colonisation of New Zealand cannot reasonably be refuted, the nature of the Doctrine – one which diminished the rights, cultures, and beliefs of indigenous peoples as a pretext for European

powers claiming rights of 'discovery' and subsequent sovereignty – holds an attraction for those who wish to assign such traits to Britain's intervention in New Zealand regardless. The Doctrine thus maintains a superficially plausible and quasi-ideological basis to contextualise Britain's colonisation of the country, even though its application in any way, as has been illustrated above, is untenable. It also fortifies the notion that the intentionalist view of New Zealand's colonisation, attributing what is positioned as an overarching preceding motive behind Britain's intervention in the country – a motive which determined to varying degrees all subsequent colonial activity in New Zealand. The following sections deal with the historical and legal categories into which these claims about the applicability of the Doctrine of Discovery to New Zealand's colonisation fall, although there is a significant degree of overlap between these categories.

a) Historical

Not only has the Doctrine of Discovery been comparatively recent arrival in historiography on New Zealand's colonisation, but the frequency of its appearance in (non-legal) academic literature addressing the history of British intervention in the country has been noticeably slight. This is instructive considering how potentially profound a change it could impose on so much of the understanding of New Zealand's colonial era. Part of the reason for the modest impact of the argument linking the Doctrine with New Zealand's colonisation could be the fact that it is a relatively new proposition, but there are also evidentiary

hurdles with its application that appear in the literature produced by its proponents. The following small but largely representative sample of works by those academics advocating for the purported role of the Doctrine in New Zealand's colonisation illustrates a particular approach to history that raises questions about the nature and treatment of evidence.

In 2011, an article addressing the history of the country's foreshore and seabed in the context of the Treaty of Waitangi, claimed that 'the early precepts of the doctrine of discovery...remained powerful and persuasive throughout 19th century colonisation, making the discovery doctrine the 'perfect instrument of empire'.²⁹ Unfortunately, in this instance, the extrapolation of a fifteenth-century Vatican decree into a nineteenth-century British colonial policy was not supported by any accompanying authority. This is a common feature of the approach used by proponents of the Doctrine's application to British colonial intervention in New Zealand – relying on an assertion as its own authority, with the implicit suggestion that the assertion is valid enough not to require reference to supporting evidence.

In 2019, Margaret Mutu provided a more detailed commentary on the role of the Doctrine in the country's colonisation. 'The Doctrine of Discovery', she announced, 'underpins our legal system and relies on the myth that White Christians are superior to all other peoples. It gives them permission to dispossess, enslave and exterminate other races, cultures and religions'.³⁰ This general summation, with its erroneous assertion that the

Doctrine was the basis of the New Zealand's present legal system,³¹ was followed by what Mutu claimed was a specific example of the Doctrine in practice: '[i]t was used to take the Foreshore and Seabed from us in 2005 and shapes the government's Treaty claims settlement policies and practices today'. No evidence was offered to support this argument, with Mutu moving on to conclude that the New Zealand government ought to 'ask the Vatican to change its position'.³² This was an unusual demand, because it was based on the presupposition that somehow, a papal bull issued in 1493 exercised influence over the New Zealand government in 2019 to the extent that the Vatican needed to rescind the Bull and free the New Zealand Government's obligations to it. The deficit in historical evidence needed to make the connection was self-evident, but the authority of the statement seemed to rest more with the fact of it being made, rather than its evidentiary basis.

In the same year, Mutu expanded on this topic in an edition of the journal, *Land*, in which she alleged that the Treaty of Waitangi resulted in the 'Queen of England's [sic, Britain] governor [sic, lieutenant-governor] declaring that they had taken over the country, relying on the myth that their whiteness and their Christianity allowed them to say so and because the Doctrine of Discovery authorised it'.³³ This statement is even more at odds with history on the basis that it explicitly asserts that the Doctrine 'authorised' British colonial policy. The doctrine lacked any mechanism for authorisation, and as has been pointed out above, played no role in British policy at this time – not even at a conceptual or ideological level.

By 2022, the argument that the doctrine of discovery somehow played a role in Britain's colonisation of New Zealand had entered the historical bloodstream and was beginning to circulate. That year, the political scientist Dominic O'Sullivan wrote that 'Britain's claim to sovereign authority [over New Zealand] rests on both a treaty signed in 1840 and on the doctrine of discovery'.³⁴ The source O'Sullivan drew on to support the claim about the Doctrine in this segment was Claudia Orange's 1987 book on the Treaty of Waitangi. However, the problem with this citation is that Orange's book makes no such claim regarding the Doctrine.³⁵ This is one of many examples where the assertion of the Doctrine's application to New Zealand's colonisation not only becomes its own authority (simply by virtue of the claim being published), but thereafter serves as an authority from which subsequent writers making claims about the Doctrine can cite as evidence. Matthew Birchill's 2021 article 'History, Sovereignty, Capital: Company Colonization in South Australia and New Zealand', similarly affirms the direct role of the Doctrine of Discovery in nineteenth-century British colonial policy,³⁶ but relies on secondary sources which themselves do not offer evidence to substantiate the claim.

One of the more emphatic statements relating to the Doctrine of Discovery was made at a United Nations' forum in 2012. There, the academic Moana Jackson declared that 'the Doctrine of Discovery was always promoted in the first instance as an authority to claim the land of indigenous peoples', and that it 'was dumped on our [New Zealand] shores in 1769'. As has been established, this is an impoverished

reading of history, but Jackson went further, insisting that the New Zealand Government 'apologise or resile from the Doctrine of Discovery', on the basis that Māori remained 'trapped within the clutches of all that the Doctrine of Discovery presupposed'.³⁷ This represents the application of the argument not for the purpose of advancing the historiography of the period concerned, but instead, for supporting a more ideological position on this aspect of the country's history. This is an example of the intentionalist approach taken to its extreme conclusion, with the evidentiary basis of history in such circumstances being subordinated to a more ideological imperative.

Another example of the argument taking priority over the evidence is found in a 2010 report by Tonya Frichner, who was a Special Rapporteur for the United Nations. Frichner gave a cursory description of the Doctrine of Discovery in her report, and then extrapolated its impact, to apply universally. Relying on such inductive reasoning, she wrote that '[a] strong case can be made for the view that the critical problems and human rights faced by Indigenous Peoples are all traced to the Doctrine of Discovery'.³⁸ However, she failed to make any case at all to support this contention. Yet, despite the absence of evidence, the report itself became a source which was subsequently cited by others researching this topic.³⁹

In 2020, the argument about the doctrine of discovery having a role in New Zealand's colonisation entered into the field of education studies, with two educationalists claiming that '[w]ith the 'discovery' of New Zealand by Captain

Cook, the Doctrines of Discovery became part of New Zealand's legal framework'.⁴⁰ The statement is immediately problematic because the country did not have a legal framework of the sort referred to in this article until 1854 – over eighty years after Cook's arrival.⁴¹ The writers then go on to assert that the 'underlying tenet of the Doctrines of Discovery...[is] that white nations are able to 'discover,' enslave and colonise all Indigenous nations'. The allegation of the Doctrine's universalism that is made here is easily disabused in the case of New Zealand, where the indigenous inhabitants were not subject to slavery, and where the tenets of the doctrine manifestly did not apply. This portion of the article concludes with a plea that the 'Doctrines of Discovery that underpin the history of colonisation of New Zealand need to be fully acknowledged'.⁴² Apart from the challenge of acknowledging something that has not occurred, this statement points to an intentionalist interpretation of New Zealand history, which, as with the other examples cited here, is at odds with the generally functionalist consensus among most historians dealing with this period.

In 2019, Tina Ngata, an indigenous advocate, published a piece in an online magazine called *The Spinoff*, in which she claimed that '[t]he Doctrine of Discovery is still very much present in our society today. Legally, it provided a precedent for the alienation of land by the...New Zealand government'.⁴³ Of course, legally, it provided for no such thing, and neither is the Doctrine in effect 'in our society today', but the claim was made in this publication, and went unchallenged. On her own website in the same year, Ngata went further,

asserting that the Doctrine was a 'Christian principle', thus falsely conflating the New Testament with fifteenth-century Vatican foreign policy, and then argued that the Doctrine created a 'right' for Britain to 'conquer and claim lands, and to...kill the native inhabitants of those lands'.⁴⁴ Not only is this incorrect both historically and theologically, but it is unclear on what jurisdictional basis this supposed 'right' was created. Furthermore, no authority for these statements was provided.

Some institutions have also contributed to this popularisation of the supposed role of the Doctrine in New Zealand's colonisation. From December 2018 until March 2019, for example, Tairāwhiti Museum in Gisborne hosted an exhibition entitled 'He Tirohanga ki Tai: Dismantling the Doctrine of Discovery', which addressed through various artistic media the impact of the Doctrine on New Zealand's colonisation, and the asserted that the Doctrine was still being applied in the twenty-first century.⁴⁵ And as in practically all the other examples of the deployment of the term in popular settings, there was no scholarship drawn on to support the statements made about the Doctrine. Yet, in this case, the authority of an institution such as a museum was likely to give credibility to these claims on the basis that the public could reasonably expect a museum to have researched and reviewed any material before publishing and promoting it.

What many of these assertions have in common are the unusually casual references they make to the Doctrine of Discovery. None of the cases cited above, for example, rely on any detailed analysis of the role of the Doctrine, its historical context, or most

surprisingly, any aspect of the way in which British colonial policy was developed over the following four centuries. In addition, most rely (often very loosely) on secondary sources as authorities for their claims regarding the Doctrine's application, even if those secondary sources themselves have an insufficient evidentiary basis. In some cases, assertions made about the application of the Doctrine rely on presumptive evidence or flawed inferences, but are used regardless because they conform to particular intentionalist perspectives relating to the interpretation of New Zealand's colonisation, in which an identifiable first cause is needed.

b) Legal

One of the possible reasons for the paucity of references by historians to the Doctrine of Discovery in relation to New Zealand's experience of colonisation is that the historical evidence – both documentary and circumstantial – does not support the contention in any substantial way. And more broadly, the arguments do not fit with the generally-accepted functionalist interpretation of Britain's intervention in the country. This could also explain why most of the academics who have attempted to provide an historical justification for the application of the Doctrine in relation to Britain's colonisation of New Zealand are not themselves historians, but rather, have specialisations in other disciplines.

It is academics working in the legal field, more than any other group, though, that have been particularly inclined to advance the case for the Doctrine applying to Britain's intervention in New Zealand. This has been possible in part because the

discipline gives priority to the authority of preceding court decisions for the strength of its arguments, rather than the history on which those decisions might ostensibly have been based – ‘ostensibly’ because courts are not designed to settle matters of history, and because history itself is only one of the considerations that comes into play on decisions dealing with issues such the role of the Doctrine from a legal perspective.

The pivotal point when the Doctrine of Discovery resurfaced as a serious consideration – in a legal context – in the role of European colonisation was 330 years after it was initially promulgated. In 1823, in the United States Supreme Court, the case of *Johnson & Graham’s Lessee v. McIntosh*⁴⁶ was heard, with the Plaintiffs seeking to have certain land grants purportedly made by Indian chiefs recognised by the United States Government. In his judgment, on behalf of a unanimous court, Chief Justice John Marshall provided a potted and often extremely truncated history of European colonisation specifically in North America, and one which as far as British policy was concerned, bypassed any consideration at all of the workings of the British Colonial Office. Such omissions were perfectly fair, however, as the Court’s attention was solely on aspects of European intervention in what became the United States that had some bearing on indigenous title.

In addressing the Doctrine of Discovery (or more accurately, the generic principle, as it was effectively characterised in the Court’s decision), Marshall made no mention of the Doctrine being predicated on the 1493 Papal Bull. On the contrary, the Court determined that the Doctrine had emerged primarily

from a practical arrangement between European powers engaged in colonising North America, by which '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'.⁴⁷ The Court further noted – in a more explicit distancing from the 1493 Papal Bull – that 'Spain did not rest her title solely on the grant of the Pope'. This, perhaps inadvertently, draw attention to the questionable authority of papal bulls even at the time that they were issued.⁴⁸ Examples of British royal charters in the sixteenth and seventeenth centuries were referred to in the judgment, but these had been drawn up increasingly as a means of delineating boundaries with other competing European powers, and only persisted until 1663. Thereafter, claims to territories in the country were largely between European powers rather than between an individual European power and the country's indigenous occupants.⁴⁹

Significantly, the Court pointed out that the bases on which various European powers asserted claims to territory in what later became the United States did not involve an outright dismissal of native rights, as the Doctrine of Discovery had prescribed. Instead, Marshall noted that 'the different nations of Europe respected the right of the natives, as occupants', and that although European powers 'asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives', Marshall observed that '[t]hese grants have been understood by all, to convey a title to the grantees, subject only to the

Indian right of occupancy'.⁵⁰ This recognition of indigenous title, however diffuse in theory and abrogated in practice, differed fundamentally from the Doctrine of Discovery on the key point of the recognition of indigenous occupancy.

In addition, throughout the judgment, Marshall was explicit that whatever principles or doctrines the Chief Justices were making their determination on applied only to the area of the United States. The geographical confinement of this judgment is critical, because if principles drawn from it are to be applied to any other geographical region outside of the United States, then those undertaking that application have the burden of establishing a clear and incontestable chain of evidence with respect to such principles or doctrines being given effect in the territories they are addressing. There is also the accompanying requirement to verify the link between the original papal Doctrine of Discovery and, in the case of New Zealand, its application to eighteenth- and nineteenth-century British foreign policy on the country.

It is a feature of much of the legal literature dealing with the applicability of the Doctrine of Discovery to New Zealand's colonisation that such evidentiary undertakings are effectively repudiated to some extent in favour of the greater weighting given to the legal significance of a judgment. The strength of a court's decision – especially one with the standing of the United States Supreme Court – are privileged over any concerns regarding the quality of history on which the Court's judgment was based. This is understandable to an extent, but it still does not remove the obligation of determining whether the

historical evidence used in one jurisdiction (notwithstanding its laconic nature) can simply be transposed to another jurisdiction.

One of the examples of the Doctrine being applied to New Zealand by legal scholars occurred in 2008, when Robert Miller and Jacinta Ruru published an article in the *West Virginia Law Review* which contained the following statement: '[w]hen England [sic. Britain] set out to explore and exploit new lands, it justified its sovereign and property claims over newly found territories and the Indigenous inhabitants with the Discovery Doctrine'.⁵¹ One of the first aspects of this statement to note is that it is supported by a reference. However, the source cited in the reference is by one of the authors of this statement, which supplies a circular form of authority to the assertion.⁵² There is no other authority cited for this claim other than those making the claim. Another minor but telling point to observe is that reference is made to England rather than Britain. It was the latter which was the state actor responsible for policy on New Zealand, and had been since 1707.⁵³ In addition, if Britain did justify its sovereignty other countries with the Doctrine of Discovery, as is claimed in this extract, then documentary evidence of this act of justification would exist in be referenced. However, as with other academics involved in the legal field, historical claims are not verified as they are positioned as being subordinate to the process of extracting legal principles and precedent from other jurisdictions.⁵⁴

Occasionally, the process of interpreting the character of the Doctrine of Discovery in a legal

sense can collide even more directly with its historical application. An example of this occurred in a 2010 analysis in the *Seattle University Law Review*, in which the author wrote that 'British officials and jurists in New Zealand acknowledged that the indigenous inhabitants possessed limited property rights. Consequently, the discovery doctrine was applied in New Zealand'.⁵⁵ British officials did indeed acknowledge Māori property rights prior to the Treaty of Waitangi. However, precisely because of that acknowledgement, Crown policy was formulated that went in completely the opposite direction of the tenets of the Doctrine of Discovery. Normanby had insisted, for example, that because New Zealand was likely to be subject to extensive European settlement in the future, there was a risk that 'unless protected and restrained by necessary laws and institutions', those settlers would 'repeat unchecked in that quarter of the globe the same process of war and spoliation under which uncivilised tribes have almost invariably disappeared, as often as they have been brought into the immediate vicinity of emigrants from the nations of Christendom'. Far from the unbridled rights of Christian nations in non-Christian territories, which was at the core of the doctrine of discovery, in 1839, the British Government was cautioning explicitly against such threats coming from a Christian nation. Normanby went even further, highlighting 'the dangers of the acquisition of large tracts of country by mere land jobbers', and demanding that indigenous land only be obtained 'by fair and equal contracts with the natives'.⁵⁶ Thus, the 2010 allegation in the *Seattle University Law Review* that 'the discovery doctrine was applied in New Zealand',⁵⁷ is demonstrably contrary to the

historical record, which is treated in a manner that is more cursory than comprehensive.

This tendency to relegate history in favour of legal arguments in a work on legal history published in 2010. In one of the chapters, entitled 'Asserting the Doctrine of Discovery in Aotearoa New Zealand:1840-1960s', the author writes about 'Captain James Cook's first visit to and circumnavigation of Aotearoa in 1779',⁵⁸ whereas, in fact, Cook first visited the country and circumnavigated it a decade earlier. This may not be material to the argument about the Doctrine, but suggestive of the subordinate role afforded to history when such arguments are formulated. The author then goes on to claim that from 1835, Britain 'set about [New Zealand's] annexation',⁵⁹ when in fact, the plans for annexation were not made for a further four years. And in a similar vein, the author of the chapter argues that '[T]he British Government recognised the Declaration [of Independence, 1835]'. This is narrowly true only in the sense that the British Government recognised the fact that the Declaration had been signed. It did not in any way ratify it, and it was so dissatisfied with the outcome of the Declaration that it eventually rejected it entirely (which in turn led to the policy being developed for Britain to have a treaty with New Zealand).⁶⁰ None of this is explained in the chapter.

In what is perhaps tacit recognition of the absence of evidence, the author of the chapter argues that there was a 'Doctrine of Discovery mindset', and elsewhere, even more tellingly, that there were 'covert Doctrine of Discovery-type actions pursued by the British colonials [sic]'.⁶¹ The documentary

evidence from the British Colonial Office and from British officials in New South Wales, reveals no such 'covert' plot to enact its policies on New Zealand according to the Doctrine of Discovery, and as has been noted above, the opposite was the case in the six decades preceding the Treaty of Waitangi.

As a corollary to the arguments that have been made regarding the Doctrine of Discovery's status as some form of proto-international statute, reference is sometimes made to the authority of international law by those supporting the Doctrine generally, and its application to New Zealand's colonisation from a legal perspective in particular.⁶² However, this appeal often depends on the implicit presumption that international law, as it currently exists, has been fundamentally a constant presence over several centuries, and therefore both the force and authority of international law as it presently stands can be applied in a roughly similar way in previous eras.

The first point to note is that when the Doctrine of Discovery was formulated, in 1493, international law – in the sense of a codified and widely agreed-upon body of rules and principles governing the relations between nation states – barely existed.⁶³ In most respects, 'modern international law arose in the last third of the nineteenth century'.⁶⁴ The work of Jeremy Bentham at the beginning of that century, and John Stuart Mill from the 1840s, in arguing for reform in the relations between nation-states, epitomised this embryonic stage when legal theorists foresaw a time when international law (as weakly developed as it then was) would be governed by more than the pursuit of trade and the avoidance

of war.⁶⁵ Even into the mid-nineteenth century, the law of nations was still little more than the law of the jungle, while in the 1400s, devices such as papal mandates only tended to have effect if they coincided with the secular motives of dominant European powers.⁶⁶

The legal scholars referring to the role of the Doctrine of Discovery from an international perspective in the context of New Zealand's colonisation do not make explicit claims of historical authority in their works. Instead, the deference to previous judgments, decisions, and arguments from various courts form the basis of their claims. However, for these claims to have any currency beyond the narrow confines of theoretical legal positions, they must possess some evidentiary basis in history. In surveying the texts which make these claims, what becomes apparent is not only that the international law arguments which are drawn on to apply the Doctrine to New Zealand are not entirely consistent with the history of British colonisation of the country, but in several fundamental respects are completely at odds with it. In addition, the historical precedent cited in the 1823 United States Supreme Court decision applies exclusively to portions of North America, and have no connection with New Zealand. Such challenges in reconciling historical evidence with legal argument remain problematic for those pursuing claims about the Doctrine's role in New Zealand's colonisation from an international law perspective.

Conclusion

In literature dealing with international law, and to a lesser extent in works covering the history of New Zealand's colonisation (in both popular and academic forms), the Doctrine of Discovery's alleged role in the country's history has become more pronounced over the last two decades. Chronologically, the argument that the Doctrine applied to Britain's colonisation of New Zealand emerged first via the work of legal academics, for whom the historical basis of the claims was supplanted by the process of applying legal precedents to other jurisdictions. The idea then fanned out to academics involved in other disciplines, and then into some of the popular literature addressing British intervention in the country.

The application of the Doctrine to New Zealand's colonial experience has been possible not only because of the approach to such issues taken by legal academics (as opposed to academics working in fields such as history), but also because, ideologically, it conforms to intentionalist notions about Britain's intervention in the country in the eighteenth and nineteenth centuries. The functionalist explanation of New Zealand's colonisation does not require an ideological First Cause in order to account for the reasons and nature of subsequent colonial activity. Consequently, the approach to the Doctrine of Discovery's purported role in the country's colonisation depends more on an evidentiary chain that connects the 1493 Papal Bull directly with particularly nineteenth-century British colonial policy – an evidentiary chain that has too many

missing links to allow for the connection to have any basis in fact.

What also emerges from this analysis is the role that constructs of authority play in historical assertions. To some extent, the authority with which an assertion is made, coupled with the fact that such claims appear in academic sources, can supplant the need for corroborating evidence. This need not be, in and of itself, a deficiency. There are several works on history, for example, published by reputable academics, where the status of the author is depended on some degree for the reliability of the information contained in the work. However, it can be problematic (as the example of the Doctrine of Discovery's application to New Zealand history illustrates) on the basis that adherence to the intentionalist view of the country's colonisation provides a conceptual framework where examples such as the Doctrine are admitted is having a role on the basis that they conform to the intentionalist interpretation, rather than that they necessarily have a foundation in evidence. This is a particularly noticeable issue in relation to the Doctrine of Discovery because the historical evidence militates so strongly against claims that it played any role at all in Britain's intervention in New Zealand.

Clearly, a tension exists between the functionalist and intentionalist interpretations of New Zealand's colonisation, and the debate over the significance of the Doctrine of Discovery is one of the areas where this tension has played out, and where divergent approaches to the treatment of evidence are at their most salient. As claims about the role of the Doctrine in Britain's intervention in New Zealand

are likely to persist, the functionalist/intentionalist dichotomy will continue to provide an important seam for further exploration as part of the broader process of giving meaning to the country's colonial experiences, and their historical bases.

Notes

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- ¹ Tony Ballantyne, *Entanglements of Empire: Missionaries, Māori, and the Question of the Body* (Auckland: Auckland University Press, 2014), 2-3; Belich, 180-187; Ward, 12-41; Hazel Petrie, *Chiefs of Industry: Māori Tribal Enterprise in Early Colonial New Zealand* (Auckland: Auckland University Press, 2006), 28-99; Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand 1832-1852* (Wellington: Department of Internal Affairs, 1968), 2-24; Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Reed Methuen, 1988); Peter Adams, *Fatal Necessity British Intervention in New Zealand, 1830-1847* (Wellington: Bridget Williams Books, 2013), 3-98; Orange, 1-23.
- ² This is borne out in a range of sources, the following of which are intended to be indicative rather than comprehensive. Daniel G. E. Hall, *A History of South East Asia* (London: Macmillan, 1988), 530, 642; Rupert Emerson, *Malaysia: A Study in Direct and Indirect Rule* (New York: Macmillan, 1937), 91; Paul Knapland, *James Stephen and the British Colonial System, 1813-1847* (Madison : University of Wisconsin Press, 1953), 261; John S. Furnivall, *Colonial Policy and Practice. A Comparative Study of Burma and Netherlands India* (New York: New York University Press, 1956), 28-31; Colin C. Eldridge, *England's Mission: The Imperial Idea in the Age of Gladstone and Disraeli, 1868-1880* (Chapel Hill: University of North Carolina Press, 1974), 26-8; Eris O'Brien, *The Foundation of Australia* (London: Sheed & Ward, 1937), 230-240; Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1989), 46;
- ³ As a sample selection, see James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Honolulu: University of Hawaii Press, 2001); Alan Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 2013); Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 2010); Ann Salmond, *Two Worlds: First Meetings Between Maori and*

Europeans 1642-1772 (Honolulu: University of Hawaii Press, 1991); Vincent O’Malley, *Beyond the Imperial Frontier: The Contest for Colonial New Zealand* (Wellington: Bridget Williams Books, 2014); Andrew Sharp and Paul McHugh, eds., *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (Wellington: Bridget Williams Books, 2015); Tony Ballantyne, *Webs of Empire: Locating New Zealand’s Colonial Past* (Vancouver: UBC Press, 2012); Michael King, *The Penguin History of New Zealand* (Auckland: Penguin, 2011); Giselle Byrnes, *Boundary Markers: Land Surveying and the Colonisation of New Zealand* (Wellington: Bridget Williams Books, 2015); Alan Lester and Fae Dussart, *Colonization and the Origins of Humanitarian Governance: Protecting Aborigines Across the Nineteenth-Century British Empire* (Cambridge: Cambridge University Press, 2014); Ronald Hyam, *Understanding the British Empire* (Cambridge: Cambridge University Press, 2010); Jeremy Black, *The British Empire: A History and a Debate* (London: Ashgate Publishing, 2015); Peter J. Cain and Antony G. Hopkins, *British Imperialism, 1688-2015* (London: Routledge, 2016).

- 4 The functionalist/intentionalist dichotomy has been used in other areas of history, See Richard Bessel, “Functionalists vs. Intentionalists: The Debate Twenty Years on or Whatever Happened to Functionalism and Intentionalism?,” *German Studies Review* 26, no. 1 (2003): 15-20; Kosal Path and Angeliki Kanavou, “Converts, not ideologues? The Khmer Rouge practice of thought reform in Cambodia, 1975–1978,” *Journal of Political Ideologies* 20, no. 3 (2015): 304-332.
- 5 Mariusz Maziarz, “A Review of the Granger-Causality Fallacy,” *The Journal of Philosophical Economics: Reflections on Economic and Social Issues* 8, no. 2 (2015): 86-105.
- 6 Betsy McCall, “From the Doctrine of Discovery to Manifest Destiny: How Religion and Race Formed the Backbone of American Expansion,” MA thesis (New York: Southern New Hampshire University, 2020), 25.
- 7 James Muldoon, “Papal Responsibility for the Infidel: Another Look at Alexander VI’s “Inter Caetera”,” *The Catholic Historical Review* 64, no. 2 (1978): 168-184; H. Vander Linden, “Alexander VI. and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493-1494,” *The American Historical Review* 22, no. 1 (1916): 1-20.

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- ⁸ Glen Carman, "On the Pope's Original Intent: Las Casas Reads the Papal Bulls of 1493," *Colonial Latin American Review* 7, no. 2 (1998): 193-204.
- ⁹ The Gilder Lehrman Institute of American History, "Pope Alexander VI's Demarcation Bull, May 4, 1493," trans. 2012, The Gilder Lehrman Collection, GLC04093.
- ¹⁰ Glen Carman, "On the Pope's Original Intent: Las Casas Reads the Papal Bulls of 1493," *Colonial Latin American Review* 7, no. 2 (1998): 193.
- ¹¹ Carman, 194.
- ¹² Lyle N. McAlister, *Spain and Portugal in the New World, 1492-1700* (Minnesota: University of Minnesota Press, 1984), 74.
- ¹³ Samuel Edward Dawson, *The Lines of Demarcation of Pope Alexander VI and Treaty of Tordesillas, AD 1493 and 1494* (Ottawa: James Hope & Company, 1899), 471-8.
- ¹⁴ Christopher A. Bayly, "The First Age of Global Imperialism, c. 1760-1830," *The Journal of Imperial and Commonwealth History* 26, no. 2 (1998): 28; Ira Gerstein, "Theories of the World Economy and Imperialism," *Insurgent Sociologist* 7, no. 2 (1977): 12.
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- ³⁵ Orange, 23-90.
- ³⁶ Matthew Birchall, “History, Sovereignty, Capital: Company Colonization in South Australia and New Zealand,” *Journal of Global History* 16, no. 1 (2021): 154.
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- 51 Robert J. Miller and Jacinta Ruru, "An Indigenous Lens Into Comparative Law: The Doctrine of Discovery in the United States

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- ⁶² Watson, 524; Miller and Ruru, 849, 850; Jennifer Reid, “The Doctrine of Discovery and Canadian Law,” *The Canadian Journal of Native Studies* 30, no. 2 (2010): 335-359; Steven T. Newcomb, “The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power,” *New York University Review of Law and Social Change* 20 (1992): 307-8.
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