

## The Year of Discovery, Part Two: “Discovery” and our American Legal History

This is the second in a series of articles on the “Doctrine of Discovery,” and the ELCA’s decision to join with other Christians in repudiating the ongoing role this doctrine plays in the history of our nation.

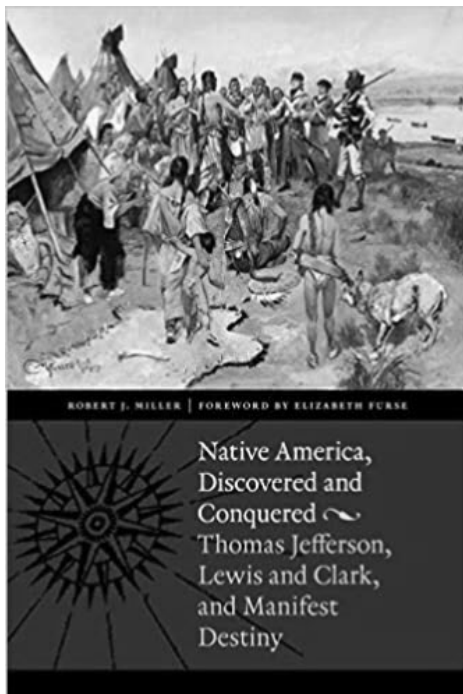
The Papal Bull “Inter Caetera,” issued by Pope Alexander VI on May 4, 1493, played a central role in the Spanish conquest of the New World. The document supported Spain’s strategy to ensure its exclusive right to the lands discovered by Columbus the previous year. It established a demarcation line one hundred leagues west of the Azores and Cape Verde Islands and assigned Spain the exclusive right to acquire territorial possessions and to trade in all lands west of that line. All others were forbidden to approach the lands west of the line without special license from the rulers of Spain. Other Europeans would claim this right was also theirs as sovereign nations in opposition to Spain. The single exception is the section of South America east of the line of demarcation, which became a part of Portugal’s territory, and today is the country of Brazil.

The Bull stated that any land not inhabited by Christians was available to be “discovered,” claimed, and exploited by Christian rulers and declared that “the Catholic faith and the Christian religion 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.” This “Doctrine of Discovery” became the basis of all European claims in the Americas as well as the foundation for the United States’ western expansion.

In the US Supreme Court in the 1823 case *Johnson v. McIntosh*, Chief Justice John Marshall’s opinion in the unanimous decision held “that the principle of discovery gave European nations an absolute right to New World lands.” In essence, American Indians had only a right of occupancy, which could be abolished. The doctrine was cited in other cases as well. With *Cherokee Nation v. Georgia*, it supported the concept that tribes were not independent states but “domestic dependent nations”. The decisions in *Oliphant v. Suquamish Indian Tribe* and *Duro v. Reina* used the doctrine to prohibit tribes from criminally prosecuting first non-Indians, then Indians who were not a member of the prosecuting tribe.

The doctrine has been cited by the US Supreme Court as recently as 2005, in *City of Sherrill v. Oneida Indian Nation of New York*: “Under the ‘doctrine of discovery’ fee title [ownership] to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original states and the United States.”

I have found the work of Robert J. Miller to be very helpful in understanding the legal impact of this doctrine in the history of the United States. One of his best books is *Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny*, Praeger, 2008. Miller points out that even to our present day, the lands that comprise Indian reservations are legally owned by the United States government, and the Native tribe is only the “beneficial occupier” of those lands.



Miller focuses on Thomas Jefferson and the Lewis and Clark expedition, because the purchase of the Louisiana Territory from France in 1806 was based on this theory of Discovery. Even though the territory was occupied by 20 million native Americans, from the Mississippi to the Pacific, France claimed ownership of the land by right of discovery, and sold that claim to the United States government. The expedition of Lewis and Clark was named after that doctrine: the **Corps of Discovery** was intended by President Jefferson to establish the sovereignty of the United States over all of that land and all of its Native peoples. The subsequent history of treaties, violations, and Indian wars were all founded on the legal doctrine that by right of discovery, all the lands occupied by Indian tribes were actually owned by the United States.

Next month I will examine the decision of the ELCA at the churchwide assembly in 2016 to repudiate the theological Doctrine of Discovery, and efforts to restore justice and fairness to the relationship of the United States and its native peoples.