

The Doctrine of christian Discovery: Lutherans and the Language of Empire

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It was springtime in 2012 when I spoke at a university in St. Paul—a pretty time of year in Minnesota, as so many Lutherans know. So I began my lecture looking out at the audience, “Beautiful place y’all have here.” Then after a poignant pause I asked them, “So how’d you get it?” My corollary question for this essay is: how did lutheran folk end up with so much Indian land across the northern tier of the U.S., including much of Minnesota?¹ That is a theological and ethical question that most american folk (not just lutheran folk) never get around to asking themselves. (And the answer is not terrain or climate similarity to the old country.) While the audience in St. Paul had their own narrative, of course, the actual root legal response would be the “Doctrine of (christian) Discovery.”

Discovery is a strange, even bizarre, piece of the american legal code but one that has been incredibly complex and a vitally important legal tool for euro-christian colonization, particularly in north America. As such, it has been critically important to the lutheran occupation of american land. It snatched Minnesota away from Native Peoples, for example, and secured it as largely lutheran and catholic properties,² using legal and theological language to justify thievery as righteous christian acts. Indeed, Discovery is yet today the legal and theological foundation for private ownership of all real estate property in the U.S. We should add that Discovery is also a fiction, a legal invention; yet it has succeeded wildly in its intended aim.

In order to be as transparent as possible, I need to announce early that I am American Indian and intend to write this essay fully from the perspective of those Native Peoples who were displaced by this euro-christian invasion. By an act of the U.S. congress (1924), I am a citizen of the United States; but I am also a citizen of the Osage Nation, a sovereign nation that has signed Treaties with the U.S. Less enviously, we lost a huge territory to the U.S. through this theological fiction called the Doctrine of (christian) Discovery.

So let’s boil down this Doctrine of (christian) Discovery to the essentials: Discovery, in brief, is the legal doctrine that the first “christian” explorers, who ventured away from Europe and landed on foreign soil unknown to european christian folk, had the right by Discovery to claim ownership of those Native People’s land for their own christian monarch.³ By law, then (i.e., by euro-christian law), that christian country had the sole right to negotiate with or

¹ My use of the lower case for such adjectives as “european,” “christian,” “north,” etc., is intentional. While nouns naming religious groups might be capitalized out of respect for each Christian—as for each Muslim or Buddhist—using the lower case “christian” or “lutheran” for adjectives allows readers to avoid unnecessary normativizing or universalizing of the principal institutional religious quotient of the Euro-west. Likewise, I avoid capitalizing such national or regional adjectives as american, european, euro-christian, etc. I also refer to north America. It is important to my argumentation that people recognize the historical artificiality of modern regional and nation-state social constructions. For instance, who decides where the “continent” of Europe ends and that of Asia begins? Similarly, who designates the western half of north America as a separate continent clearly divided by the Mississippi River, or alternatively the Rocky Mountains? My initial reasoning extends to other adjectival categories and even some nominal categories, such as euro, and political designations like the right and the left and regional designations like the west. Likewise, I use lower case for the honorific adjectival identification of a papal name: Alexander, iv, to avoid the normative reification or divinizing of any human being. Quite paradoxically, I know, I insist on capitalizing White (adjective or noun) to indicate a clear cultural pattern invested in Whiteness that is all too often overlooked or even denied by american Whites. Moreover, this brings parity to the insistence of African Americans on the capitalization of the word Black in reference to their own community (in contra-distinction to the [New York Times](#) usage). Likewise, I always capitalize Indian, American Indian, and Native American.

² Still 24 and 25% respectively of the Minnesota population today.

³ With this caveat: ...as long as the discovery was not already “in the actual possession of any Christian king or prince” (*Inter caetera*).

conquer the Native People of that land in order to establish christian ownership of “property.”⁴ Thus, immediately, this civil legal doctrine announces itself equally as a theological doctrine. Thus the facts of christian invasion and conquest essential to any theological reflection on Discovery, perhaps particularly when the mode of conquest is language, legal instead of military.⁵

This legal and political system was first established by the religious head of all christian nations of roman (western) Europe in 1493. Almost as soon as Christopher Columbus returned from his first invasive voyage to the Americas, sailing under the spanish flag, the christian monarchs of Spain⁶ approached the pope, Alexander vi, asking for a decree making the new lands spanish territories. The ensuing “bull” had its legal precedents in the bulls issued in 1452 and 1456 granting the christian king of Portugal similar exclusive rights in Africa, particularly with the right to bring Africans back to Portugal as slaves.⁷ These 1493 bulls⁸ are the pope’s attempt to mitigate competition between Spain and Portugal, two of Europe’s strongest powers at that time. A quirk in these legal maneuverings resulted in Portugal being able to carve off the easternmost part of the Americas and claiming it as portuguese property, namely Brazil.

At the outset, then, we need to understand that the Doctrine is explicitly theological and christian legal discourse, firmly predicated on a global pronouncement made by a catholic pope more than two decades before the Lutheran reformation. Nevertheless, it was also the legal principal used by every protestant christian group who made claims to Native land in north America, from the episcopalians at Jamestown to the puritans and pilgrims in new England—and lutheran immigrants who swept across the northern tier of the U.S. claiming Indian land as their own properties. Readers of this journal may argue that Discovery is certainly not *lutheran* theology, but that is irrelevant. Anyone who owns a home in America, or for that matter rents a home, is a full participant in the theology of christian Discovery even as they live by the laws that have ensued.

It is often argued that doctrine of Discovery is one of the markers of the beginnings of international law. It is critical to note, however, that international law at this point was only european law even as it was explicitly christian. Its legal function was to adjudicate between christian countries as to which christian european country had the exclusive right to plunder any non-christian land newly discovered by european people—particularly Indian lands. Indeed, there was an alexandrian caveat, a proviso repeated in the U.S. supreme court centuries later, that a christian monarch could only claim this newly discovered land if no other christian monarch had a prior claim to it. So Discovery also marks the beginnings of euro-christian

⁴ This in turn initiates another legal process of converting land into the euro-christian category of property. See Anthony J. Hall, *Earth into Property: Colonization, Decolonization, and Capitalism* (McGill-Queen's Native and Northern Series), McGill-Queen's University Press, 2010.

⁵ As linguist Elio Antonio de Nebrija, bishop of Avila, announced to Isabella, queen of Castile, in the introduction to his *Gramatica casetelllan* (August 1492): “Language has always been the consort of empire....” Cited from Glenn Morris, “Vine Deloria, Jr. and the Development of a Contemporary Critique of Indigenous Peoples and International Relations.” In *Native Voices: American Indian Identity and Resistance*, edited by Grounds, Tinker, and Wilkins (University of Kansas Press, 2003), 103.

⁶ They were actually monarchs of Castile and Aragon. Their marriage functioned to unite these two major regions of the spanish isthmus and begin the process of forming modern Spain.

⁷ *Dum diversas*, issued by Pope Nicholas in 1452; and *Inter Caetera* (same name but earlier bull) issued by Pope Calixtus iii. Particularly helpful in this context is the poignant opening chapter, “Zurara’s Tears,” in Willie Jennings, *The Christian Imagination: Theology and the Origins of Race* (Yale, 2010), pp. 15-64.

⁸ There were actually three papal declarations on the matter, called the bulls of donation: *Inter caetera*, May 1493; *Eximiae devotiois*, May 1493; and *Dudum siquidem* in September.

colonialism, which by 1900 had subdued roughly 84-90% of the globe under christian domination.

The protestant reformation intervened in this process very early, within a quarter century. Yet by later in the 16th century and especially into the 17th, protestant christian countries seemed to think of themselves certainly as heirs of these papal declarations, even if Rome no longer coordinated the colonizing action. By the time the Church of England established its beachhead at Jamestown (1607) the Doctrine was so established that the colonists (105 of them) presumed that the king of England had granted them (and had every right to grant them) all the (Indian) territory west of Jamestown to the Mississippi River. Puritans in new England had similar understandings of the reach of their royal grant inland from Boston across extensive Indian territories to the west.

By the 1750s a young George Washington was functioning on the basis of a clear understanding of Discovery—as a surveyor taking care to nail down the best Indian lands in the Ohio valley as personal investments and for the Washington family land business.⁹ It was still Indian country inhabited by and controlled by Senecas and numerous other communities of the Ohio League. It took an all-out war of destruction, declared by Washington as commander of the continental army and then continuing under his presidency, to wrest the land away from the Ohio League and allow christian settlers to cash in on Washington’s investments.¹⁰ A decade after Washington’s tour in the Ohio Valley, in the 1760s and 70s, Thomas Jefferson began his legal career, gaining considerable renown using the principle of Discovery in legal cases involving property rights in Virginia. Then in 1803, as president, Jefferson clearly exercised Discovery in the so-called louisiana purchase. Twenty years later, John Marshall wrote his famous unanimous decision in the *Johnson v. M’Intosh* supreme court case, deciding american property ownership on the basis of christian Discovery. We turn to Jefferson and Marshall for two key pieces of the puzzle.

The Corps of Discovery: Louisiana, Louis and Clark

So, in 1803, the United States bought my land, Osage land (now mostly the modern state of Missouri)—from France! Jefferson did not, however, buy any actual “property,” which undoubtedly comes as a big surprise to most high school history students. No, the U.S. only bought the euro-christian legal *pre-emptory* right of (christian) *Discovery*, the only thing France had to sell. This was not insignificant. Even if the U.S. could not (yet) claim actual ownership of property, it did portend the extension of U.S. sovereignty and the eventual (and not too distant) conversion of the entire territory to “real property,” that is, legally designated property, so defined by the euro-christian Rule of Law.¹¹ To ensure U.S. possession of the entire territory, Jefferson proceeded to send a military unit, the Corps of Discovery (i.e., Lewis and Clark),¹² to enact the legal rituals of *Discovery* to seal the deal. Needless to say, the whole transaction

⁹The Ohio Company of Virginia, formed in 1748 by Washington’s older brothers.

¹⁰This slash and burn war largely against civilian inhabitants lasted from the late 1770s until 1795. See Barbara A. Mann, *George Washington’s War on Native America* (Greenwood, 2005).

¹¹ See again, Anthony Hall, *Earth into Property*. Hall rightly understands that the whole notion of property is deeply rooted in eurochristian theologies and philosophies and represents a category of cognition that was wholly lacking among American Indian communities. To wit, John Locke, *Second Treatise on Civil Government*, chapter 5: “On Property.” TTinker, “John Locke: On Property,” in *Beyond the Pale: Reading Christian Ethics from the Margins*, edited by Stacey Floyd-Thomas and Miguel de la Torre (WJK, 2011), 49-60.

¹² Formally called the Corps of Volunteers for North Western Discovery.

transpired without U.S. politicians' contemplation of negotiating the acquisition with any of the current occupants, that is, the several dozen sovereign Native nations that lived on their lands, now suddenly U.S. territory. This is the euro-christian Rule of Law, deeply rooted in a theology of christian identity.

This louisiana purchase was just the beginning. Converting Indian land into the euro-christian category of "property" would involve a longer legal/military process of eurochristian deceit and force. Jefferson ensured the second part of the *Discovery* process would begin almost immediately, using language to achieve the goal by carefully naming the Lewis and Clark expedition in terms of Discovery. This was not mere courageous romance and adventure, or the exciting expansion of the american frontier. Rather, it established an ironclad christian legal claim to other peoples' homes!

Thus like Spain in California three decades earlier, Jefferson was sending a military unit to perform the historically defined acts and rituals associated with *Discovery* – to mark the territory as the legal expansion of american sovereignty over the territory of louisiana west of the Mississippi – and even to extend the american claim to that territory of the pacific northwest that was as yet unclaimed by any other christian nation.¹³ Of course, Native nations already lived across the entire expanse. Thus, one important aspect of Lewis and Clark's charge was to announce to Indians that the United States was the new sovereign of the whole immense territory. Ultimately, their rituals of *Discovery* were intended to reify american possession.

To grasp Jefferson's explicit understanding of the *Doctrine of Discovery* in appointing this expedition, one has to wait for an Indian historian and legal scholar to do the extensive archival research necessary. Shawnee scholar Robert Miller demonstrates from countless Jeffersonian documents that Jefferson was perfectly clear that his expedition was formally exercising *Discovery* on behalf of the United States.¹⁴ As a real estate lawyer and a land dealer himself, Jefferson ascended the presidency with a firm grasp and practiced understanding of the Discovery principles. He never uses the word *Discovery* in any formal legal context—until naming the Lewis and Clark expedition, yet it is clear that he did indeed function both legally and politically with a clear understanding of the foundational euro-christian law. The importance of Jefferson's knowledge becomes apparent in the sheer mass of legal cases (over 400) he handled involving land and land title.

In the context of religious disestablishment and the separation of church and state, the blessing of a church was no longer deemed necessary for enacting (christian) *Discovery*, unlike the spanish Discovery act In California in which Gaspar de Portola was partnered with (now) St. Junípero to accomplish the religious side of Discovery (1770). Still, there were legal trappings that had to be observed and performed, both to ensure the United States' right of *Discovery* to the louisiana territory and to extend those claims further to the northwest. Miller demonstrates that Lewis and Clark "engaged in an amalgamation" of the formal and legal *Discovery* rituals that had been practiced by euro-christian nations of Europe since Columbus as they competed with one another to claim as much foreign property as each could – and give their land grabbing some legal clothing. It is abundantly apparent that Lewis and Clark were exercising

¹³ T. Tinker, "Rites of Discovery: St. Junípero, Lewis and Clark," in *Yours, Mine, Ours: Unravelling the Doctrine of Discovery*, a special issue of *Intotemak* (Fall/Winter, 2016).

¹⁴ Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny* (Praeger, 2006).

great care, Miller reports, “to ensure that they used all the rituals necessary to make *Discovery* claims.”

Just as clearly as the spanish duo on the beach at Monterey in 1770, Lewis and Clark were enacting the rituals of *Discovery* to insure that their “christian prince,” the invasive sovereign called the United States, could legally and morally claim ownership of someone else’s land. The expedition, concludes Miller, is a living embodiment of *Discovery*. Like Portola and Serra and countless other euro-christian adventurers, they “took physical possession of land, built permanent structures, engaged in parades and formal procedures of possession and occupation, tried to obtain native consent to American possession, and engaged in mapmaking and celestial observations.” Lewis even wrote a 2500-word speech that was recited to each Native nation they encountered—in english! The speech explained to Indian folk the new, *Discovery*-based political structure of american sovereignty. Native leaders were given gifts of medals and american flags, marking those people as well as their territory as belonging now to the U.S.

At the same time, Lewis was careful to delineate the new relationship of parent and child to the Native community. From that time on, the president of the United States – again, only in english– was to be known as the Great Father. Indians were to be his “children” – and should therefore be obedient children, not unlike the expectation of St. Junípero for Indians locked in his missions. In their typical romanticized interpretations of the Lewis and Clark Expedition, historians like Albert Furtwangler or Stephen Ambrose overlook these explicit legal discourses embedded in the actions of the Corps of Discovery. It is all merely a part of the american romance of continental conquest and american exceptionalism. For the Osage People, Lewis and Clark is a tragic narrative describing how we lost our land, all done legally, with perfect attention to the (christian) Rule of Law—however artificial and made up it might have been.

***Johnson v. M’Intosh* (1823)**

An early landmark supreme court case moved to reify *Discovery* in american civil law in 1823, with the chief justice, John Marshall writing the unanimous opinion of the court in *Johnson v. M’Intosh*. Even though the principle had been invoked in american and colonial courts from the beginning of the invasive christian settlement, it was Marshall who created the actual language of Doctrine of Discovery. It is important here for our context to remember that Marshall, like most american folk of his day, was a protestant, even as he summons catholic canon law to solidify his own arguments. To this day Marshall’s majority decision in *Johnson v. M’Intosh* forms the legal foundation for all property ownership in the US.¹⁵

The case decided ownership between two american claimants to a large parcel of property in Piankeshaw territory (modern southern Indiana); but the overriding question had to do with the legitimacy of the purchase. How could these “settlers” own Indian land? Who had the right to buy the land from the Piankeshaw? Ultimately, the court found that the Johnson partnership did not have legal title to the land. Johnson had purchased the land directly from the Piankeshaw just prior to the american revolutionary war. By buying directly from the Indians he had circumvented the colonial government of that day (the english) who had,

¹⁵ *Johnson v. M’Intosh*, 21 U.S. 543, 5 L.Ed. 681, 8 Wheat. 543 (1823)

according to law, the ultimate dominion based on the Doctrine of Discovery. Through its victory in the revolutionary war, the U.S., according to the chief justice writing on behalf of a unanimous court decision, took over England's "right of Discovery" to Indian land, which confers on the U.S. "ultimate dominion" of the continent [Johnson, 574]. Thus, M'Intosh, who purchased the land under a U.S. government grant, possessed the legitimate title, even though Johnson could claim earlier purchase. As Marshall argues: "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments..." [Johnson, 573]; and again, "... **discovery gave an exclusive right to extinguish the Indian title of occupancy**, either by purchase or by conquest..." [587].

In other words, the Piankeshaw might have been a sovereign Native People, but they had no right under law to sell their land to anyone they pleased; rather, they could only sell to the appropriate christian european nation who possessed the right of Discovery. The Indians had no right to sell to a private party; nor did Johnson have any legal standing to make the purchase. A free-market system this was not.

There is still one more important factor in the Johnson v. M'Intosh decision that helps us to understand how such an inequitable system could possibly be rationalized, particularly in christian minds. Namely, Marshall is careful to justify his Doctrine of Discovery on the basis of the christian identity of the colonizer. In the court's opinion it is Christianity, as Lenape scholar Steve Newcomb is quick to point out, that sets european nations apart as a superior race with a superior culture and justifies their conquest of Indian peoples and the theft of Indian land.¹⁶ To emphasize the reality of Marshall's text, Newcomb powerfully insists that it be called the Doctrine of christian Discovery. In Johnson v. M'Intosh, Marshall based his unanimous decision on his and the court's bedrock identification of the United States as a christian nation. Indeed, it was christianity by Marshall's interpretation that marked european folk as a superior race entitled to take Indian land. To wit:

The right of **discovery** given by this commission, is confined to countries 'then **unknown to all Christian** people'... notwithstanding the **occupancy of the natives**, who were **heathens**, and, at the same time, admitting the prior title of any **Christian** people who may have made a previous discovery. [Marshall, *Johnson*, 576-77]

Marshall equates civilized with christian and demonstrates the inadequacy of Indian claims to sovereign ownership sprinkling nasty derogatory language throughout the opinion that even Marshall himself had to have known was untrue. At the same time he avers that the taking (theft) of Indian land was all fair enough, since the "tribes" were well remunerated for their lands "by bestowing on them civilization and Christianity" [573]. Sounds like Vine Deloria's old memory of the coming of the missionaries with their bibles to Indian country.¹⁷ They came and invited us to bow our heads and pray. When we looked up, we all had bibles and they had

¹⁶ Steve Newcomb, *Pagans in the Promised Land* (Fulcrum Publishers, 2008). Newcomb engages a fascinating analysis of John Marshall's legal language in terms of metaphor criticism—a la George Lakeoff, et al, and cognitive linguistic analysis, and is well-worth reading. For our purposes, however, is the extent to which he highlights Marshall's summoning of Christianity and american christian identity as the foundation for Discovery and the deciding legal justification for the theft of Indian lands. [esp. pp 73-87]

¹⁷ Vine Deloria, Jr. (Standing Rock Dakota), was the dean of all Indian academics in the 20th century, author of some two dozen volumes and a graduate of the old Augustana Theological Seminary in Rock Island IL. See his famous *God Is Red: A Native View of Religion*, 30th anniversary edition (Fulcrum Publishing, 2003).

the land. Fair enough; a christian exchange—except for the millions who died and are still dying in the process.¹⁸

To his credit, Marshall does finally acknowledge that his whole legal gambit is a lie. Yet he goes on to justify that lie predicated on a theological position and then calls that the Law of the land:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. [Johnson, 591]

Discovery then was a fiction, a euro-christian legal device to divvy up Indian land amongst themselves according to some invented and then reified Rule of Law. Needless to say, I must insist that the *Doctrine of Discovery* is a device predicated on extreme christian arrogance. As an added benefit, however, once it is invoked, it can be relegated to the hidden depths of law libraries so that Settler christians can live in their homes (on our land) with a distinct degree of plausible deniability. “We never knew.” If you think about this, it is more of a fantasia than any score composed by Mozart. The idea is as if I as an American Indian went to Germany and claimed the territory as henceforth Osage property and began asking german families to move out of their homes and indeed out of their towns and cities so that Osages could move in and take over. So perhaps it is time to end the charade.

I want to end this essay by affirming the wide array of christian judicatories, including the ELCA (churchwide assembly, 2016), that have formally disavowed the Doctrine of christian Discovery, but with an important caveat. At the same time, this is lived theology that will require more than denominational declarations to undo. Indeed, every person in north America who owns a home, or for that matter rents a home, is acting on the Doctrine of Discovery, validating the theological / legal premise. The american law that most plagued African American folk post slavery was Plessy v. Ferguson (1896), the obscene law that legalized segregation of Blacks. Plessy was finally overturned by Brown v. Board of Education in 1954. The case that has most affected American Indians, the equally obscene race-based and religious-test law, Johnson v. M’Intosh, has never been overturned and still stands as the Law of the land. Overturning *Johnson* would be a very useful theological/political project. The ultimate salvation of american peoples may hang in the balance.

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¹⁸ It seems impossible to stem the tide that *Johnson* initiated. Discovery is still today being implemented in places like north Dakota, where the BLM and Army Corps of Engineers has granted final easement for the Dakota Access Pipeline across Unceded Indian Land in the face of rigorous non-violent resistance on the part of the Standing Rock Sioux Reservation communities.

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