Deconstructing the Doctrine of Discovery

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"Again, were we to inquire by what law or authority you set up a claim [to our land], I answer, none! Your laws extend not into our country, nor ever did. You talk of the law of nature and the law of nations, and they are both against you."
—Corn Tassel (Cherokee, 1785)

There's been a lot of talk lately about the so-called Doctrine of Discovery, originally a theological fiction produced in the 1400s, later transformed into a political fiction by European heads of state, and then into a legal fiction by U.S. Supreme Court Chief Justice John Marshall in 1823. Today it has been dangerously repurposed as popular fiction that serves to revise neo-colonial history, fuel oppressive legal decisions, and assuage majority culture guilt. Left unchallenged, the myths generated pose grave threats to our identities as peoples with inalienable sovereign rights to governance and territory.

Without question the doctrine of discovery is one of the most important tenets of federal Indian law, working in tandem with several other doctrines--trust, plenary power, and reserved rights—to provide the ambiguous and uneven political framework for modern day Indigenous/State relationships. Notwithstanding its general acceptance, the concept has been so misused to distort perceptions of past and present oppression that it should be stricken from the federal government's political and legal vocabulary.

Discovery, as originally conceived in Pope Alexander VI's 1493 papal bull, granted the Spanish exclusive interests in the Americas. When Portugal petitioned for a share of the spoils the following year the Treaty of Tordesillas granted both countries the authority to divide much of the Western hemisphere between them and to ignore the territorial rights of existing Native nations in the process. This sanctified division is what most people remember about the doctrine.

But it is more complicated than just saying the Pope gave European Catholics the rights to colonize and convert. In reality, the absolute denial of Native land rights was replaced less than fifty years later when Charles V, the devoutly religious Spanish emperor, sought the advice of Francisco de Vitoria, a prominent theologian, as to what rights the Spanish could legally and morally claim in the New World. Vitoria, in a clear rebuttal to the Pope and the discovery notion, declared that Native peoples were the true owners of their lands. He reasoned the Spanish could not claim title through discovery because this action could only be justified where property was ownerless.

Felix Cohen, a leading architect of federal Indian law, reiterated Vitoria's statement in his well-known *Handbook of Federal Indian Law* (1941), when he wrote that "even the Pope has no right to partition the property of the Indians, and in the absence of a just war, only the voluntary consent of the aborigines could justify the annexation of their territory."

So, in fact, the original no-holds barred papal doctrine of the discovery was discarded early on in favor of Vitoria's view of indigenous property rights. Subsequent legal and political relations between Native nations and competing European powers over the following three centuries were generally based on this philosophical understanding of Natives as true landowners. Treaty-making between tribal nations and Europeans, and later the U.S, affirmed that Native peoples were recognized as land-owning nations on par with any other political power.

Had Pope Alexander's original sweeping decree of unlimited Christian domination held sway, there would have been no reason for colonizers to bother with treaties. Furthermore, contrary to common assumptions that ultimate legal title to occupied Native lands passed upon discovery to European states or the U.S. as successor, the historical record, both written and oral, shows that legal ownership remained with tribal nations. And for the most part, Native peoples retained legal ownership of their respective territories until such time as they formally ceded their claims to lands in consensual treaty arrangements with one of the competing European states or, later, the American government.

Three classes of evidence—1) the actual political and diplomatic relations between Native nations and Spain, France, Great Britain; 2) the record of the federal government in its dealing with Native peoples as evidenced in treaties, policies, and statutes; and 3) a number of relevant Supreme Court decisions that have addressed the doctrine of discovery--affirm that ownership of the North American continent rested in the hands of indigenous peoples.

This is not to say that injustices were not committed and great swaths of land taken without recourse. We all know too well that this occurred in many cases. However, it is critically important that we remember our history and the over-arching legal basis of our land ownership. Even as other powers sought to vanquish them, Native peoples retained power over their lands, just as they retained sovereignty. To simply say that the discovery doctrine allowed colonizers to take land without consideration for indigenous property rights is to passively accept a revised history that claims we never had those rights in the first place.

In reality, the discovery doctrine (either the papal or the Vitoria version) was only sometimes referenced during much of the colonial period as land was bought, sold, and traded with the understanding that indigenous peoples held ownership rights. But it was famously reprised and redefined by the US Supreme Court in *Johnson v. McIntosh* (1823) when Chief Justice John Marshall, in a case without any Native parties, dramatically modified historical understandings and suggested the doctrine of discovery was a mechanism designed to prevent conflict between European competitors vying for lands in the New World. However, he declared that in relations between colonizing powers and indigenous nations, the doctrine affirmed that tribal nations were the "rightful occupants of the soil," and acknowledged that they had "a legal as well as just claim to retain possession of it, and to use it according to their discretion."

While on the surface, Marshall's resurrection of the concept seems to support the case for indigenous property rights, the details of the decision were a major setback for Native peoples' sovereign territorial rights. His interpretation gave the discovering state the exclusive or preemptive right to purchase land from the indigenous inhabitants. Even though Native nations had the right to own their lands, their right to sell was limited. In this sense, he wrote, "rights to complete sovereignty, as independent nations, were necessarily diminished."

Marshall seemed fixated on the doctrine and reversed definitional course in *Worcester v. Georgia* (1832). Discovery he said, was merely "an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those [like tribes] who had not agreed to it." The concept was thus reinvigorated and became a standard point of legal reference.
Since then judicial rulings have referenced the doctrine. One of the most notable was *Tee-Hit-Ton v. United States* (1955) involving Alaskan Natives in which the Supreme Court equated the discovery doctrine with the doctrine of conquest. In that case, written during the Termination era, the discovery doctrine was misused to deny Alaskan Native nations any legal title to their lands, whatsoever. Justice Stanley F. Reed's inaccurate description of the Americans' alleged conquest of Natives bears repetition: "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral range by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."

Reed's statement ranks among the most glaring and racist misrepresentations of fact ever uttered by a Supreme Court justice. Little in the historical record corroborates his contention that Alaskan Natives or many other Native peoples had been conquered, and, in fact, federal Indian policy and the history of treaty making give ample evidence to the contrary.

Nevertheless, this spurious decision has never been overturned and it continues to undermine indigenous property rights, as evidence by its citation in a recent 9th Circuit Court of Appeals decision, *White v. University of California* (August 2014), involving human remains of the Kumeyaay Nation of California.

Despite historical facts, the legal fiction of the discovery doctrine endures. But why is there such a drive these days to revert to the long ago discredited papal version of the doctrine of discovery when historical reality clearly show it was not used in any practical way by subsequent colonizers after Vitoria's writings? I believe it serves two purposes, both detrimental to contemporary indigenous nations.

The first seems to be a well-intentioned eagerness by some, often with progressive Christian affiliations, to acknowledge the injustice of former generations of colonizers. By hearkening back to a time when immigrants to the Americas were given supposedly free reign to conquer and pillage, today's sympathetic non-Native citizens and certain church leaders of the larger culture can apologize for the sins of their forbearers. At the same time, the exercise provides the opportunity for them to distance themselves from blame, even though most are the inheritors of privileges gained at the expense of Native peoples.

Second, as the mythical narrative goes, because the injustices were so numerous, so horrific and *undocumented*, there is a perception that no practical recourse remains. Conveniently, if there is no record, there can be no remedy so it's time everyone agrees to heal, join hands, and move forward as one nation, putting grievances and claims aside. The phenomenon is fascinating—it is simultaneously an enthusiastic embrace of a historically inaccurate and cutthroat view of the discovery doctrine and a profound disavowment of current reality. In this way, overlaying history with the original papal doctrine of discovery becomes at once a way to show sympathy with Native peoples while at the same time denying them any substantive justice.

To simplistically explain away loss of territory as the fault of the doctrine of discovery is to ignore our own retained land rights and forget that our ancestors were determined, intelligent, and politically astute people who defended their sovereign territories through strength and reason. To accept a dumbed-down version of history is to relegate our people to the role of victim. It is to accept that we have been conquered and as such are no more than rapidly disappearing ethnic groups of a by-gone era who no longer deserve the rights outlined in our treaties.

We know all too well that words matter. Our people have come together to challenge the use of derogatory mascots because it is plain that reckless use of words impacts us directly. While arcane legal terms may seem far removed from our daily lives, they also drive behavior and determine policy with significant consequences.

Abandonment of the flawed concept of the doctrine of discovery, both in legal and everyday parlance, is good common sense. We must strive to enlist terms that accurately reflect what transpired in countless treaty negotiations, land transactions, and other binding agreements. We must value and protect our sovereignty and our property in their totality. To do so would be a significant first step in reformulating federal Indian policy and law so that justice, fairness, and historical accuracy were the basis of political relations.

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