

The Year of Discover, Part Three: “Discovery” and the 21st Century

Many of us have been amazed to learn that a papal declaration from 1493 might be the foundation for the United States’ policies and legal structures for the more than 500 recognized Native American tribes in our country. What is perhaps even more surprising is that the United States’ legal rulings, starting with Chief Justice Marshall’s 1823 *Johnson vs. McIntosh*, have been used as legal precedent in Canada, Australia, and New Zealand when those nations made decisions about their indigenous peoples. In every case, the legal power of sovereignty is somehow based on the religious principle of bringing “Civilization and Christianity” to savage peoples. The fact that none of these countries would be considered Roman Catholic, the way Spain and Portugal definitely were in 1493, makes this eagerness to enlist the Doctrine as legal precedent applying all the way down to the present day all the more incredible.

And yet here we are, in the year 2020, trying to understand why our Lutheran Church, along with the Episcopal, Presbyterian, UCC, Methodist, and Unitarian churches, have recognized that it is wise and necessary for the Church to repudiate this “improper mixing of the power of the Gospel with the power of the sword” and to repent for all the ways in which the Church has been complicit in a wide range of hurtful policies toward Native tribes and native individuals. Pastor Melinda VanderSys, Our Redeemer, Newberry, reminded us at the Walking Together event in October that “it is never too late to right a wrong, never too late to ask for forgiveness.” On March 21, 2020, our Synod Council passed the resolution included in this month’s newsletter, inviting our synod to join with 17 other ELCA synods in a “Year of Discovery” to explore our relationship to the Native Americans whose land we live on in 2020.

If you read or listen to the news from across the United States, you will recognize that this issue continues to be a regular feature of our national life. Here is just a short list of newsworthy stories I have encountered in the last year:

1. The Supreme Court decision of July 9, 2020, that the eastern half of Oklahoma actually belongs to the five native tribes who were moved there in the 1800’s, with this opinion from Justice Neil Gorsuch: “On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever.”
2. The decision to shut down the Dakota Access pipeline in March 2020, because the Standing Rock Sioux tribes were never afforded a real environmental impact study.
3. The continued stand-off between the United States and the Black Hills Sioux tribes, with the tribes asking for their land back, and the U.S. government tending a reparation payment of more than one billion dollars, as compensation for broken treaties.
4. The mining controversies on the reservation of the Navajo Nation, in which the United States awards the mineral rights under the Navajo land to non-Indian mining corporations.
5. And closer to home, conflicts continue over fishing and hunting rights that were guaranteed to native tribes in Michigan and Wisconsin by treaty, given in perpetuity in exchange for native lands.
6. Finally, the example of the Menominee Nation of Wisconsin, whose reservation was “disestablished” by Congress in 1961, along with more than 100 other native tribes. The goal was the assimilation of the Menominee tribe and their land into the surrounding white culture of Wisconsin. In 1973 an act of Congress re-established the right of the Menominee Nation to their tribal lands and government.

Robert Miller, in his *Native America: Discovered and Conquered*, describes three fundamental principles of Indian Law in the United States. They flow naturally from the Doctrine of Discovery and reflect the Doctrine at work in modern day Indian law. Those principles are *Plenary Power*, *the Trust Doctrine*, and *Diminished Tribal Sovereignty*.

1. *Plenary Power* means that Congress has exceptional power over Indian affairs. Discovery has meant that “the United States government held dominion over the Indian Nations, because they lost their sovereign, diplomatic, property, and commercial rights immediately upon discovery.” Further, no federal law has ever been overturned because Congress exceeded its plenary power.
2. *Trust Doctrine* gives Congress the power to regulate Indian affairs because of the alleged helplessness of the Indian tribes. In recent cases, Indian Nations have sued the United States for a breach of this trust.
3. *Diminished Tribal Sovereignty* is based on the idea that indigenous peoples were savages and pagans, and thus inferior to civilized Christian Europeans. Upon first contact with Europeans or Americans, their sovereignty was automatically and immediately diminished. They were told that they now had a new “Father”, who could variously be the Pope, King George, or the President in Washington, D.C. All three of these principles are natural extensions of the Doctrine of Discovery.