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Native America, Discovered and Conquered

Thomas Jefferson, Lewis & Clark,
and Manifest Destiny



Robert J. Miller

Foreword by Elizabeth Furse



NATIVE AMERICA: YESTERDAY AND TODAY
Bruce E. Johansen, Series Editor

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Series Foreword



As the Earth's most powerful nation-state in its time, the United States of America has matured quickly—barely more than two centuries from genesis, in the late eighteenth century, to long-in-the-tooth oligarchy in our time. Robert J. Miller, in *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny*, delineates how the language of empire was spoken in the cradle of our nation-state, as Thomas Jefferson adapted the Doctrine of Discovery's European-centric assumptions to the ideology of Manifest Destiny, propelling the United States' expansion across North America. Following the Louisiana Purchase, the size of the United States doubled. Jefferson sent Lewis and Clark, who have become the country's signature explorers, to report on what the United States had acquired, under European law, from France.

The new United States was assembled on land occupied by other peoples, the tasking of which required justification to protect the self-image of the country's founders as decent (and even heroic) people. This rationale stemmed from the European Doctrine of Discovery, by which an old-world sovereign could assume ownership of New World land by laying eyes upon it, mumbling a few ritual words about God and country, and compensating the Natives with presents and a piece of paper laced with words they usually couldn't read. (Imagine the reaction in Paris if an English sailor had planted the Union Jack on Normandy, said a few words in English, and thereby claimed all of France for the United Kingdom.)

Miller's assay into the records of the Lewis and Clark expedition in the context of Jefferson's thoughts, words, and actions breaks new ground because it provides a critical review of the ethnocentric assumptions of U.S. nation-building from an indigenous point of view, one that has been sorely lacking in the recent national remembrance of Lewis and Clark's transcontinental journey.

Jefferson was a complex man—an intellectually kind way of saying that he displayed some rather stark contradictions. Jefferson's writings sang of freedom (best known in the Declaration of Independence), even as he owned 300 slaves at Monticello. The slaves' shanties made up an entire village. He invoked Native Americans as exemplars of individual freedom in some of his letters as his statecraft led Jefferson to invoke doctrines that assumed European-American property rights, and largely ignored (or did their best to usurp by treaty) the fact that the land on which his feet were planted was owned and occupied by Native peoples with societies and governments of their own.

Jefferson, who is remembered today mainly as a kind and gentle man of letters, architect and scientist, also was one of the most aggressive and expansionist presidents to hold the office, Miller argues. Even as Jefferson wrote that all men were created equal, the legal rules by which property was held were not the least bit equal; Miller traces with a Native eye (he is a citizen of the Eastern Shawnee Tribe of Oklahoma) the ways in which European assumptions laid the legal framework for conquest. Jefferson also advocated removal as early as 1776 of American Indians whose nations stood in the way of Anglo-American expansion. In the world of ideas he held forth in favor of Indians' equality with the immigrants from across the ocean; however, he also used the words "exterminate" and its synonym "extirpate," as a putative solution to "troubles" with Indians who presented violent opposition to the assemblage of empire.

Miller provides an insightful analysis of Manifest Destiny and its roots in the Doctrine of Discovery that may strike some readers as reminiscent of today's news. Manifest Destiny was divinely inspired, so it was said—in much the same manner as George W. Bush has claimed his God's approval for his invasion of Iraq. The messianic aspects of Manifest Destiny also have roots in older forms of European empire-building, which since have echoed down the halls of our history to Vietnam, Iraq, and other points around the world. The stated ambition of Manifest Destiny to spread a "democratic" way of life similarly echoes in U.S. statecraft of recent years, most recently in the presidential rhetoric of G.W. Bush's desire to spread this sort of political manna throughout the Middle East. Self-defined, "civilization" thus seeks to replicate itself, whether the "savages" appreciate the gift or not.

The Lewis and Clark expedition was both a scientific expedition and an imperial mission meant to plant the U.S. flag (and seeds of commerce) on the Pacific shore. Jefferson instructed Lewis and Clark to collect vocabularies of Native languages as he built the empire that would contribute to those people's widespread demise. He also ordered the explorers to name natural features they encountered to provide landmarks to which immigrants could return and claim property.

Although Jefferson studied Native languages and theories of their origins, he also portrayed the United States as a "rising nation ... advancing rapidly to destinies beyond the reach of the mortal eye." During 1809, he wrote to President James Madison, saying of the U.S. Constitution, "No constitution was ever before

so well calculated as ours for extensive empire.” He advocated invasion of Canada in a letter to James Monroe in 1813 and, four years later, set his eyes on Texas.

Jefferson was, in Miller’s analysis, a practitioner of ethics bent to serve political convenience. Compared with the myths of Jefferson with which we sometimes comfort ourselves, Miller’s is sometimes not a pretty picture. Jefferson has his epic qualities, but the myth is hardly the whole picture. Miller shines a light of historical veracity on the mythical Jefferson from a Native point of view, and he does it with uncommon precision.

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Foreword



History is an elusive and misleading discipline. It is practically impossible to find unbiased history, one not filtered through preconceived ideas. That is why this book, *Native America, Discovered and Conquered*, is so important. This history strips away so much cultural clutter and brings us information that until now has been practically impossible to find. Search the “history books” of American schools and I challenge you to learn that there are over 550 Indian tribes in the United States with governmental powers over land and people. Nowhere will you learn that the U.S. Constitution recognizes treaties as the “supreme Law of the Land” or that the U.S. Supreme Court has stated that a “treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.” (U.S. Const. art. VI; *United States v. Winans*, 198 U.S. 371 (1905)).

Through great good luck, I was educated about these issues over 38 years ago. I went down to the Nisqually River in Washington State to find out why there was a war being waged on the state’s rivers, with all jurisdictions and the majority of people opposing Indian fishing. The newspapers (the present history tellers), all portrayed the Indian fishers as renegades and they were being arrested over and over again, despite that the tribal fishers were maintaining that they were fishing under treaty-guaranteed rights. I read a book called *Uncommon Controversy*, published by the American Friends Service Committee, which gave a totally different explanation of the situation than that presented by the press and the federal, state and county authorities. *Uncommon Controversy* was the wake-up call for me that Professor Miller’s book will be for generations to come—the clear light of reason, unfogged by prejudice and, dare I say, racism?

When I went to the Nisqually River that day, I met a most extraordinary man, Billy Frank Jr., a Nisqually Indian, just out of prison that morning, after more than 30 arrests for fishing under the Medicine Creek Treaty. Billy did the most

wonderful thing—he educated me and my husband on treaties, treaty rights and tribal fishing. How amazing to have been educated that way, and, of course, there was no other way to find that information, as it certainly wasn't available through the local media or taught in schools.

My husband Dr. Richard Briggs and I started Citizens for Indian Rights to expand this education to other non-Indians—the Indians had their hands full already in their fight for their treaty rights. For years I learned all I could and the information was hard to come by. How useful Robert Miller's brilliant book would have been to me and countless people working to right the century-old wrongs done to tribes and tribal people. Information such as this is liberating and empowering.

The U.S. Constitution has designated that the United States Congress shall have the sole power to treaty and trade with the Indian tribes—not states and counties: the U.S. Congress. And yet, the majority of the members of the House and Senate are just as uneducated about tribes and treaties and treaty rights as the rest of the population because they are the product of the same education system. All branches of the federal government share a trust responsibility to tribes, and yet they are equally ill-informed.

The education system has ignored Indian issues, laws, governmental powers and the unique government-to-government relationship with the federal government. It is shocking that the members of Congress with awesome powers over the tribes should be so ill informed and that tribes are forced to spend huge amounts of time trying to educate their representatives.

When I was in the U.S. Congress, I had a startling example of the danger of the lack of education on Indian affairs in our system. I received a call from the tribal chairman of the Umatilla Tribe in Eastern Oregon. There is a chemical weapons dump on the banks of the Columbia River that impacts the tribe. This dump has been of great concern to the Army and the citizens of Oregon and Washington because it is unstable. Chairman Don Sampson told me that the tribe had received word over the "grapevine" that the U.S. Army had developed an evacuation plan should the dump go critical. This plan was to evacuate the residents of the four surrounding counties onto the Umatilla Indian Reservation. But no one had informed the tribal government of this plan. I asked the Secretary of the Army if he could come to my office to explain this, as the tribe was getting no response to its inquiries. The Secretary came accompanied by two generals and we had a long discussion about the problem. Finally in frustration I said, "But Mr. Secretary, why did you not inform the Tribe and the tribal chairman?" His answer was, "Congresswoman, we didn't know how to reach them." My response was, "Mr. Secretary, they have telephones, they are listed in the phone book, and they speak English."

When I was elected to the U.S. House of Representatives (OR1) in 1992, I went with all my fellow freshmen and women to a week-long training at the Kennedy School of Government at Harvard University. There we learned our new duties. It was that experience that led me to develop the Institute for Tribal Government at

Portland State University upon my retirement in 1999. It seemed to me that tribal governments would benefit from such training and we have provided training to over 30 tribes nationwide. The board of directors, a fully tribal board, urged us to also develop a project to interview tribal leaders across the country. These interviews are on-going with over 40 tribal leaders video-taped and edited, with an entire curriculum developed for university level teaching presently being adapted for high school classes. Professor Miller serves on the Board of the Institute for Tribal Government and has assisted us with trainings for tribal governments. He is able to do a one-day class on Federal Indian Law which covers fourteen weeks of law school and, most amazingly, keeps the audience awake, eager and begging for more.

Professor Miller's fine book is so important and so relevant to all Americans who care about the truth and want their history to be accurate and unbiased. As a former Congresswoman, I will recommend it to the co-chairs of the Native American Caucus of the U.S. House and Senate for basic reading and will also make it required reading for the students in my Great Tribal Leaders of Modern Times classes. Professor Miller is to be congratulated—he has done a great service to Indian and non-Indian Country in writing this book.

*The Honorable Elizabeth Furse
Director, Institute for Tribal Government
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I appreciate Lewis & Clark Law School in Portland, Oregon, and my dean, Jim Huffman, for granting me the time and resources to undertake this project.

I thank my tribal council, the Eastern Shawnee Tribe of Oklahoma, for appointing me to the Circle of Tribal Advisors in 2003 to work with the National Lewis & Clark Bicentennial Committee.

Finally, I am very grateful to Hilary Claggett, my acquisitions editor at Praeger Publishers; my series editor, Professor Bruce Johansen; and the staff of Praeger Publishers.

Preface



This book grew out of my involvement with the two hundred year anniversary of the Lewis and Clark expedition. In 2002, I replied to a call for presentations at a conference on Lewis and Clark and the Indian Nations at the Buffalo Bill Historical Center in Cody, Wyoming. Since I am a law professor, I naturally asked myself what legal issues were involved in the expedition and what law governed President Thomas Jefferson's dispatch of the expedition to the Pacific coast and Lewis and Clark's conduct during the voyage. The Doctrine of Discovery immediately sprang to mind because this is the international law that governed European exploration and discovery of new lands around the world for centuries. I asked myself "what did Jefferson know about the Doctrine of Discovery" and "did Lewis and Clark use the principles of the Doctrine during their expedition?"

I am very familiar with Discovery because I have taught the subject in American Indian Law classes since 1993 at Lewis & Clark Law School. The Doctrine of Discovery is an international legal principle that allegedly granted Euro-Americans property and sovereignty claims over native peoples and native lands as soon as Euro-Americans "discovered" these lands. The Doctrine is also an important part of American history and modern day Indian Law. Every year my class studies the seminal United States Supreme Court case, *Johnson v. M'Intosh*, in which the Supreme Court adopted the Doctrine of Discovery as federal case law in 1823. I was eager to see what, if anything, the Doctrine had to do with Thomas Jefferson and the Lewis and Clark expedition of 1803-06.

I then began reading and researching the journals of Lewis and Clark and other materials about the explorers and Thomas Jefferson and quickly realized that I had stumbled onto something new. I could not find any discussion by legal or non-legal sources on this topic; yet I found a wealth of information demonstrating that Jefferson accurately understood the Doctrine of Discovery and utilized

it during his entire legal and political career from 1767 forward and that the Lewis and Clark expedition used Discovery principles in the Louisiana Territory and the Pacific Northwest. I then began speaking on this topic across the country, and in late 2003 my tribal council, of the Eastern Shawnee Tribe of Oklahoma, appointed me to the Circle of Tribal Advisors to work with the National Lewis and Clark Bicentennial Committee.

My tribe, and many other American Indian tribes and Indian people, were conflicted by the observance of the Lewis and Clark anniversary. Similar to how Indian tribes had viewed the five hundred year anniversary of Christopher Columbus' "discovery" of the New World, the vast majority of Indians and tribes did not want to "celebrate" the Lewis and Clark expedition. Instead of something to celebrate, Indians saw the expedition as the forerunner of centuries of conquest, oppression, and destruction. Understandably, tribes were very cautious about becoming involved with the anniversary. Consequently, tribal representatives and Indian members of the National Lewis and Clark Bicentennial Committee communicated this concern. The Committee came to understand this issue and expressly decided not to call the Lewis and Clark anniversary a "celebration" because it realized that this was not the case for American Indians. The National Committee called the event a "commemoration," a remembrance of an important event in America's history. This was accurate because the Lewis and Clark expedition was an important event in American history. But the only aspect of this anniversary that Indian people and nations wanted to celebrate was that they were still in existence even after the Lewis and Clark expedition and American Manifest Destiny had rolled over them. The Indian nations are still here, as they had been for thousands of years before Lewis and Clark, and as they will be for thousands of years into the future. That is something worth celebrating.

My book shines new light on American history by demonstrating how the Doctrine of Discovery, President Thomas Jefferson, Lewis and Clark, and Manifest Destiny led to the domination and conquest of the Indian nations, and how the Doctrine remains part of American Indian Law today.

This book is important because it will open the eyes of Americans to how "law" was used by Europeans, the American colonists, and the American state and federal governments to dominate Indian people and nations and to dispossess them of much of their sovereignty, self-determination rights, and their property rights. This book is also important because it demonstrates clearly that Discovery is not just a relic of America's past. The Doctrine of Discovery still has a major impact in federal Indian law and the lives of Indians and their tribal governments today. We can and should work to eliminate this medieval, ethnocentric, religious, and racial doctrine from the lives of modern day American Indians.

This book fits perfectly into many important areas of American history and American Indian history and the question of native rights in the modern era because it helps to explain why certain things are the way they are today. We will see that the Doctrine of Discovery was brought to this continent from 1492 forward and was applied to limit the human and property rights of indigenous

peoples by Spanish, French, and English explorers and colonists. And, remarkably, we will see that the Doctrine still limits native rights today. Thus, it behooves Americans to learn about their history and it is important for Americans and American Indians to identify the vestiges of the Doctrine of Discovery in American law and to work to eliminate these ethnocentric, racial, and feudal ideas from American law and life.

Introduction



The New World was colonized under an international legal principle that is known today as the Doctrine of Discovery. When Europeans and Americans set out to explore and exploit new lands in the fifteenth through the twentieth centuries, they justified their governmental and property claims over these territories and over the indigenous inhabitants with the Discovery Doctrine. This legal principle was created and justified by religious and ethnocentric ideas of European and Caucasian superiority over the other cultures, religions, and races of the world. The Doctrine provided, under established international law, that newly arrived Europeans immediately and automatically acquired property rights in native lands and gained governmental, political, and commercial rights over the inhabitants without the knowledge nor the consent of the indigenous peoples. When Europeans and Americans planted their national flags and religious symbols in these “newly discovered” lands, they were not just thanking Providence for a safe voyage. Instead, they were undertaking the well-recognized legal procedures and rituals of Discovery designed to demonstrate their country’s legal claim over the “newly discovered” lands and peoples. Needless to say, indigenous peoples objected to the application of this international law to them, their governments, and their property rights. Surprisingly, perhaps, the Doctrine is still international and American law today. In fact, Canadian and Australian courts have struggled with questions regarding Discovery, native title, and native ownership of land just in recent decades, and the United States Supreme Court was faced in 2005 with a case that raised Discovery issues.¹

This book undertakes an original analysis of the legal and historical evidence that demonstrates the application of the Doctrine of Discovery by Euro-Americans against the native peoples and their governments in the areas that now make up the United States. We will see that the English/American colonists and then the American state and federal governments all utilized the Doctrine

of Discovery and its religiously, culturally, and racially based ideas of superiority and preeminence over Native American peoples in staking legal claims to the lands and property rights of the indigenous people. The United States was ultimately able to enforce the Doctrine against the Indian Nations as Manifest Destiny led the United States across the North American continent and almost totally swept the Indian Nations from its path. Discovery is still the law today, and it is still being used against American Indians and their governments. Thus was Native America “discovered.”²

The legal and factual evidence of American history proves that the expansion of the United States from the 13 original colonies, or states, in 1774 until 1855, when the Pacific Northwest was acquired by the United States, was rationalized on the basis of the Doctrine of Discovery. Our Founding Fathers were well aware of the Doctrine and utilized it while they were part of the colonial English system. They then naturally continued to use Discovery under the flag of the new United States. From George Washington and Benjamin Franklin on, American leaders utilized this legal principle to justify making claims of property rights and political dominance over the Indian Nations and their citizens. Thomas Jefferson, in particular, demonstrated a working day-to-day knowledge of Discovery and used its legal principles against the Indian Nations within the original 13 colonies, in the trans-Appalachia area, the Louisiana Territory, and the Pacific Northwest. In fact, Jefferson’s dispatch of the Lewis and Clark expedition in 1803 was directly targeted at the mouth of the Columbia River in the Pacific Northwest because the expedition was expressly designed to strengthen the United States Discovery claim to ownership and dominance of that area. Meriwether Lewis and William Clark and their “Corps of Northwestern Discovery” complied with Jefferson’s instructions and desires to solidify the United States’ claim to the Pacific Northwest. The United States then argued with Russia, Spain, and England for four decades that it owned the Northwest under the principles of international law because of its first discovery of the Columbia River by the American sea captain Robert Gray in 1792, the first inland exploration and occupation of the territory by Lewis and Clark in 1805–1806, and then the building of Astoria in 1811, the first permanent settlement in the Northwest.³

After the Lewis and Clark expedition in 1804–1806, American history was dominated by an erratic but fairly constant advance of American interests and empire across the continent under the principles of the Doctrine of Discovery. This was not an accident but was instead the expressed goal of Thomas Jefferson, James Madison, James Monroe, John Quincy Adams, and a multitude of other American politicians and citizens. “Manifest Destiny” is the name that was ultimately used in 1845 to describe this relentless, predestined, and divinely inspired advance across the continent. We will see that Manifest Destiny was fueled by the Doctrine of Discovery and was created by the rationales and justifications of Discovery.

Manifest Destiny was exemplified by three basic aspects that characterized the rhetoric of an American continental empire. These ideas had pervaded American

political and cultural thinking long before the definition of the ideas as Manifest Destiny in 1845. The three aspects that composed Manifest Destiny arose from the same elements as the Doctrine of Discovery. Manifest Destiny first assumed that the United States had some unique moral virtues that other countries did not possess. Second, Manifest Destiny asserted that the United States had a mission to redeem the world by spreading republican government and the American way of life around the globe. Third, Manifest Destiny had a messianic dimension because it assumed a faith in America's divinely ordained destiny. This kind of thinking could only arise, it seems, from an ethnocentric view that one's own culture, government, race, religion, and country are superior to all others. This exact kind of thinking justified and motivated the development of the Doctrine of Discovery in the fifteenth century and then helped develop Manifest Destiny in the nineteenth century.

In the chapters to follow we will trace the legal and historical evidence that demonstrates the development of the Doctrine of Discovery in America and its metamorphosis into Manifest Destiny. By "legal history," I do not mean that we will be looking at only court cases and laws. We will look at far more evidence than just the actions of state and federal courts. We will instead examine how the legal principle of Discovery and its elements were used by politicians, newspapers, governments, courts, and common Americans to justify and prod American expansion across our continent. We will see how Native America came to be "discovered."

We need to clearly define the elements of the Doctrine of Discovery at the outset so that we can observe their historical and legal development and application in Europe in the 1400s. We can then more easily follow the adoption and use of Discovery in North America by European colonists and by the United States to create Manifest Destiny.

There are 10 elements to Discovery:

1. *First discovery.* The first European country to "discover" new lands unknown to other Europeans gained property and sovereign rights over the lands. First discovery alone, without a taking of physical possession, was often considered to create a claim of title to the newly found lands, but it was usually considered to be only an incomplete title.
2. *Actual occupancy and current possession.* To fully establish a "first discovery" claim and turn it into a complete title, a European country had to actually occupy and possess newly found lands. This was usually done by actual physical possession with the building of a fort or settlement, for example, and leaving soldiers or settlers on the land. This physical possession had to be accomplished within a reasonable amount of time after the first discovery to create a complete title to the land in the discovering country.
3. *Preemption/European title.* The discovering European country gained the power of preemption, the sole right to buy the land from the native people. This is a valuable property right. The government that held the Discovery power of preemption prevented or preempted any other European or American government or individual from buying land from the discovered native people.

4. *Indian title.* After first discovery, Indian Nations and the indigenous peoples were considered by European and American legal systems to have lost the full property rights and ownership of their lands. They only retained rights to occupy and use their land. Nevertheless, this right could last forever if the indigenous people never consented to sell their land. But if they ever did choose to sell, they could only sell to the government that held the power of preemption over their lands. Thus, Indian title was a limited ownership right.
5. *Tribal limited sovereign and commercial rights.* After first discovery, Indian Nations and native peoples were also considered to have lost some of their inherent sovereign powers and the rights to free trade and diplomatic international relations. Thereafter, they could only deal with the Euro-American government that had first discovered them.
6. *Contiguity.* The dictionary definition of this word means the state of being contiguous to, to have proximity to, or to be near to. This element provided that Europeans had a Discovery claim to a reasonable and significant amount of land contiguous to and surrounding their settlements and the lands that they actually possessed in the New World. This element became very important when different European countries had settlements somewhat close together. In that situation, each country held rights over the unoccupied lands between their settlements to a point half way between their actual settlements. Most importantly, contiguity held that the discovery of the mouth of a river gave the discovering country a claim over all the lands drained by that river; even if that was thousands of miles of territory.
7. *Terra nullius.* This phrase literally means a land or earth that is null or void. The term *vacuum domicilium* was also sometimes used to describe this element, and this term literally means an empty, vacant, or unoccupied home or domicile. According to this idea, if lands were not possessed or occupied by any person or nation, or were occupied by non-Europeans but not being used in a fashion that European legal systems approved, the lands were considered to be empty and waste and available for Discovery claims. Europeans and Americans were very liberal in applying this definition to the lands of native people. Euro-Americans often considered lands that were actually owned, occupied, and being actively utilized by indigenous people to be “vacant” and available for Discovery claims if they were not being “properly used” according to European and American law and culture.
8. *Christianity.* Religion was a significant aspect of the Doctrine of Discovery and of Manifest Destiny. Under Discovery, non-Christian people were not deemed to have the same rights to land, sovereignty, and self-determination as Christians because their rights could be trumped upon their discovery by Christians.
9. *Civilization.* The European and later American definition of civilization was an important part of Discovery and the idea of Euro-American superiority. Euro-Americans thought that God had directed them to bring civilized ways and education and religion to indigenous peoples and often to exercise paternalism and guardianship powers over them.
10. *Conquest.* We will encounter two different definitions for this element. It can mean a military victory. We will see this definition reflected in Spanish, English, and American ideas that “just wars” allegedly justified the invasion and conquest of Indian lands in certain circumstances. But that is not the only definition we