

2008

The "Middle Ground" Perspective on the Expropriation of Indian Lands

Eric Kades

William & Mary Law School, eakade@wm.edu

Repository Citation

Kades, Eric, "The "Middle Ground" Perspective on the Expropriation of Indian Lands" (2008). *Faculty Publications*. 650.
<https://scholarship.law.wm.edu/facpubs/650>

Copyright c 2008 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

The “Middle Ground” Perspective on the Expropriation of Indian Lands

Eric Kades

Banner, Stuart. 2005. *How the Indians Lost Their Land, Law and Power on the Frontier*. Cambridge, MA: Belknap and Harvard University Press. Pp. 344. \$29.95 cloth.

In How the Indians Lost Their Land, Law and Power on the Frontier (2005), Stuart Banner weaves together a perceptive interpretation of the historical record, with a novel economic analysis of conflicts, to create a sophisticated narrative of the process by which European colonists took control of the lands that now comprise the United States. Banner’s view of expropriation falls somewhere between the parsimony of an economic model and the richness of a traditional historical account. It forms part of a growing trend to focus on finding positive facts about the taking of Indian lands, as opposed to making normative judgments.

INTRODUCTION

Scholarship on how the Indians lost their land traditionally has contained a strong normative framework, either celebrating the spread of technology, free markets, and Christianity (Cohen 1947; de Vattel 1758) or mourning the destruction of Indian societies (Williams 1990; Deloria 1974). A growing body of recent research, however, has forsaken moral judgment. Led by economists venturing beyond their discipline’s usual boundaries, this new approach instead focuses on answering positive questions: How did the relative strength of the two sides at different times and places affect their relations? What tactics did colonists use to acquire Indian lands, and which

Eric Kades is a Professor of Law at William & Mary Law School. His research focuses on theoretical and empirical issues in the economics of property rights. He can be reached at eakade@wm.edu.

were most successful? Did seemingly unrelated policies, such as the Homestead Acts, actually facilitate the removal of Indians from their lands?

The historical record is at once patchy, complex, and contradictory. Scholars of all disciplines seek underlying order in this stream of incomplete and inconsistent data. Economists generally embrace parsimony, leaving themselves open to charges of oversimplification, while historians frequently resist this impulse to reduce complex events to compact theories. Stuart Banner's *How the Indians Lost Their Land, Law and Power on the Frontier*, follows a "Middle Ground" of sorts, leavening streamlined economics with historical details that do not neatly fit into simple self-interest models. Banner draws heavily on quasi-economic analysis in explaining expropriation, but his positive models of expropriation are not as parsimonious as their economic counterparts. His instincts, in the end, are historical, but the story he tells is broadly consistent with prior economic accounts of how the Indians lost their land.

Banner's work is part of growing modern consensus, covering scholars from multiple disciplines, about the process of expropriation. Moreover, in addition to this substantive convergence, his work reinforces the trend toward positive fact-finding instead of normative moral judging. Inevitably, some will bemoan the retreat from ethical analysis of a core event in U.S. history. This reaction, however, would be misguided. Positive and normative studies on the expropriation of Indian land are radically different enterprises. Hopefully, the best of future normative scholarship will draw on newly discovered positive facts to make more nuanced, precise judgments about the identity and nature of the processes, institutions, groups, and individuals responsible for the Indians' tragic fate.

ECONOMICS

The great paradox in the process by which Indian tribes lost ownership of almost all of America is the thin veneer of voluntariness (Indian deeds, treaties) covering a process that was, in large part, coercive. Nobody has better captured this paradox than de Tocqueville, writing in 1835 when the process was still far from complete.

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity. (1990, 355)

The destruction of the Indian tribes was far from instantaneous. Indeed, the two cultures lived in close proximity and (relative) peace for more than a century along a number of borders. Richard White (1991), in his detailed study of Indian-colonist relations in the Great Lakes region, documents how a rough parity of power in the early colonial period created incentives for Indians and Europeans to live together peacefully in a “Middle Ground” based on fairly negotiated treaties and voluntary trade. “The middle ground depended on the inability of both sides to gain their ends through force. The middle ground grew according to the need of people to find a means, other than force, to gain the cooperation or consent of foreigners” (52). *Middle ground*, then, has two distinct meanings in this essay: Banner’s blend of spare economics and detailed history and White’s description of how a rough parity of power created conditions for peaceable coexistence of Indians and colonists. They are related in that Banner, like some of his predecessors, uses economics to explain the existence of White’s “middle ground.”

Few, if any, would gainsay the role that military strength played in Indian-colonist relations. The centrality of raw power would seem to make economics—virtually defined as the study of *voluntary* trade—about the last discipline likely to provide any insights into the process by which the Indians lost their land. It may come as some surprise, then, that over the last decade economic analysis has exerted a powerful influence over scholarship on expropriation.

The theoretical basis for applying economics in such an atypical domain is the late Jack Hirschleifer’s “muscular economics”—the application of economic principles to “the dark side of the force—to wit, crime, war, and politics” (1994, 2). Criminals (and their victims) respond to incentives and costs. Nations weigh costs and potential benefits before initiating a war, and may engage in all sorts of strategic behavior (bluffing, building up an army as a deterrent or a threat). Politicians similarly engage in strategic posturing (voting for doomed bills to satisfy an interest group) and vote-trading (often called log-rolling).

The first principle of Hirschleifer’s muscular economics is that conflict should be the exception rather than the rule. Fighting consumes considerable resources of both sides—resources that can be saved *and divided between the potential combatants* if they can somehow reach terms and avoid conflict. If both sides have pretty good information about each other’s military capacity and rationally process that information, they will come to similar estimates about the likely outcome of war (a decisive victory for one side, a stalemate, etc.). Each side then should be willing to settle for any terms at least as favorable as its likely condition after war. The resources saved by avoiding conflict comprise a somewhat unusual pot of gains from trade—trade here meaning an agreement to avoid conflict and its costs.

This precept generally applies to Indian-colonist relations. Despite assertions that there was a “time-honored . . . practice of waging war on the Indians in order to force a land cession” (Williams 1990, 274), conflict was

very much the exception to Indian-colonist relations. "The claims of the historical school maintaining that Indian-white relations in this country were from start to finish determined by violence . . . appear erroneous" (Anderson and McChesney 1994, 45).

If a rough parity of power exists between two societies, neither can force concessions by threats, and we expect to see peaceable trade between the parties. This is precisely the middle ground analyzed by Richard White in the seventeenth and eighteenth centuries between Great Lakes tribes and early colonists. The relatively small bands of Europeans in the region at this time lacked the power to cow the local Indians, and thus conflict was extremely rare. The parties instead met on a middle ground, treating each other as equals. In addition, this created opportunities for consensual trade. The *potential* for gains from trade between Indians and colonists at any point of contact and in any age, were patent, as Thomas Jefferson noted: "[the Indians are] very poor, and they want necessaries with which we abound. We want lands with which they abound; and these natural wants seem to offer fair grounds of mutual supply" (1907, 375). Banner (2005) concurs, noting that "the English, who had plenty of goods, wanted Indian land, while the Indians, who had plenty of land, wanted English goods. There were enormous gains to be had from trade. It would have been remarkable if the Indians *hadn't* traded land for other things" (51).

As the number of colonists in the Great Lakes region expanded in the latter half of the eighteenth century, however, things inevitably changed. "The real crisis and the final dissolution of this world came when Indians ceased to have the power to force whites onto the middle ground. Then the desire of whites to dictate the terms of accommodation could be given its head" (White 1991, xv). Even so, open conflict remained exceedingly rare. The Indians, though weakened, still could impose considerable costs on the colonists in terms of both life and money if war broke out.

Anderson and McChesney (1994) present evidence that the price paid for Indian lands correlated closely with the relative power of each side at different times and different locations. In the Great Lakes region and elsewhere, colonists used means less direct and costly than warfare to exploit their advantages. The most powerful mechanisms for sapping the Indians' strength were spreading disease and thinning forest game. Both resulted inevitably from concentrated settlement of colonists on a given frontier. Through centuries of living in proximity to microbe-harboring domestic animals, combined with natural selection, Europeans had evolved significant resistance to many serious infectious diseases, especially smallpox. These bacteria and viruses did not exist in the Americas, and so when colonists transmitted them to Indians, whose immune systems had never evolved to counter the diseases, death rates were catastrophic. Indian societies suffering 90 percent death rates could offer precious little resistance to Europeans' pressure for land.

After spreading microbes, frontier colonists unleashed their plants and animals on the Indians' forest hunting grounds. Every acre permanently cleared for European-style farming was one less acre of forest that could support deer, boars, and other game animals vital to Indian society for food, clothing, and other necessities. European pigs foraged in the remaining forests, where they out-competed Indian game animals for key foodstuffs (e.g., acorns and other seeds). Thus, Indians on the frontier who survived smallpox plagues soon found their environment devoid of the animals indispensable to their way of life. Starving tribes could offer but feeble resistance to the colonists' expansion and attached little value to their now-denuded homelands. Thus, colonists could purchase Indian lands at extremely low prices in ostensibly consensual transactions.

European migrations to frontier zones were not entirely natural, *laissez-faire* phenomena. From the very first decades in Virginia, culminating in the Homestead Acts of the mid-1800s, governments lured settlers to the sometimes dangerous and definitionally remote frontier by either giving them land or requiring very modest payment. For land-rich (ignoring the Indians' claims, as Europeans generally did) but cash-poor governments, this was convenient. More importantly, it was much cheaper to have settlers spread disease and thin game than it was to equip an army and send it into battle on a distant border. Doug Allen (1991) has argued that the Homestead Acts, often cast as idealist leveling measures, had this much darker purpose (34).

When settlers lured to the frontier had spread disease, thinned game, and thus seriously weakened their neighboring tribes, the parties sat down to negotiate. An Indian land sale (a “cession”) inevitably followed. Here again, in the negotiation process itself, Europeans had a leg up on their Indian counterparts. The colonists' finer division of labor and greater societal wealth translated into a much more experienced cadre of negotiators. A typical Indian chief negotiated one cession, or a couple at most. Some American officials negotiated more than twenty such treaties. In addition, colonial society could employ more agents to gather information about the tribe's strengths, internal divisions, and the minimum price at which they would sell. Superior information conferred a decisive advantage in bargaining.

This amalgam of techniques Europeans employed to obtain Indian lands cheaply (in terms of both blood and money) as a whole does not fit neatly under either “forceable expropriation” or “consensual trade.” Instead, “there was a continuum of techniques between these two poles. The United States mixed and matched techniques from both extremes in order to minimize the cost of Indian lands” (Kades 2000, 1072). Banner (2005) elaborates on this point:

At most times, and in most places, the Indians were not exactly conquered, but they did not exactly choose to sell their land either. The truth was somewhere in the middle. The interesting question about

Indian land sales is not whether they were voluntary or involuntary, but where they were located within that *middle ground* at any given time and place. (4, italics added)

Banner expresses considerable agreement with a theory of least-cost expropriation of Indian lands. One of his central tenets is that “the ability of the English to enforce contested transactions was a function of the degree to which the English were more powerful than the Indians” (83). The main narrative of the book is the story of how the growing power of the colonists enabled them to obtain Indian land on ever more favorable terms.

Banner finds this general pattern applicable from the beginning of colonization to the end. In the early colonial period, the strength of the Indians quickly rendered inoperative assertions that the Indians, as nomads, did not possess any ownership interest. Faced with a formidable foe, the colonists quickly and universally adopted the practice of buying land from the Indians.

Banner assiduously tracks how the growing power disparity between the colonists and Indians spawned terms of land transfer ever more skewed in favor of the colonists, culminating in the reservation regime adopted after the Civil War.

The law governing the acquisition of land from the Indians had always been at odds with the actual practice of obtaining land, going back to the early colonial period, but the divergence between the two reached its widest point in the second half of the nineteenth century. The size of the gap between theory and practice had always been a function of the relative power of settlers and Indians. By the late nineteenth century, the settlers were more powerful relative to the Indians, in terms of numbers and technology, than they had ever been. . . . The government was democratically accountable to the settlers but not to the Indians, who could not vote and who would have been greatly outnumbered even if they could. (244)

Nonetheless, Banner rejects the overarching thesis that the colonists deliberately schemed to expropriate Indian lands at least cost. “It would be too much . . . to conceive of that result [efficient conquest] as having been intended by anyone. Federal Indian policy came about not by plan but by compromise” (148).

Banner may dismiss too quickly the possibility of a semiorganized plan for least-cost expropriation. Although the historical record is complex, some important sources seem to reveal important elements of just such a policy. In a widely quoted letter, General Schuyler described the essentials of obtaining Indian land at minimal cost.

[A]s our settlements approach their country, they must, from the scarcity of game, which that approach will induce to, retire farther back, and

dispose of their lands, unless they dwindle comparatively to nothing, as all savages have done, who gain their sustenance by the chase, when compelled to live in the vicinity of civilized people, and thus leave us the country without the expense of a purchase, trifling as that will probably be. (Schuyler 1783, 593, 601)

Among others, in 1783 George Washington embraced Schuyler’s vision.

[T]he Indians as has been observed in Gen. Schuyler’s Letter will ever retreat as our Settlements advance upon them and they will be as ready to sell, as we are to buy; That is the cheapest as well as the least distressing way of dealing with them, none who are acquainted with the Nature of Indian warfare, and has ever been at the trouble of estimating the expence of one, and comparing it with the cost of purchasing their Lands, will hesitate to acknowledge. (1931, 601)

A much larger governing apparatus helped colonists solve their own collective action problems and handicapped the Indians’ attempts to do the same (Kades 2000, 1118–30). Banner (2005) discusses one of the most common means by which Americans exploited this situation:

Federal land purchasers immediately adopted the primary technique used by devious private purchasers a half century earlier, that of exploiting the collective action problems within tribes by securing “consent” to sales from a small number of tribe members who had not been authorized to speak for the tribe as a whole. (142)

Banner cites a significant number of American officials expressing benevolence towards the Indians, seemingly at variance with such tricks and General Schuyler’s calculating plan. One of Banner’s overarching themes is the ongoing tension between benevolent easterners and a rapacious frontier population.

On the frontier, many settlers hated the Indians and wished to grab their land by force (and indeed to kill as many of them as possible in the process). In the east, on the other hand, there were Americans who genuinely wanted to treat the Indians more honorably, and some of these, like Henry Knox, were in positions of power. . . . Indian land policy, as it came to be carried out in practice, embodied a compromise between these two views—a compromise between the desires of well-placed easterners and of western settlers, between the force of idealism and the force of self-interest on the frontier. (49)

Banner’s belief that sincere benevolence significantly influenced American treatment of the Indians puts him in good company. Felix Cohen (1947), a giant in Indian law scholarship, maintained that “we are probably

the one great nation in the world that has consistently sought to deal with an aboriginal population on fair and equitable terms. We have not always succeeded in this effort but our deviations have not been typical" (34). Similarly, a leading historian declared that "the treaties made with the Indians . . . uniformly guaranteed Indian rights" (Prucha 1962, 248).

Undoubtedly many easterners were sincerely benevolent, and this sentiment motivated them to push (sometimes successfully) for laws intended to safeguard Indian lands and rights. The results, however, were always bitterly disappointing. Banner carefully traces how successive policy measures supposedly designed to benefit the Indians instead proved disastrous to their interests: first removal to the west, then the creation of reservations, and then the allotment regime. Banner seems to believe that these outcomes were unintended, the product of (1) the inability of the central government to control events on the frontier and (2) the general law of unintended consequences.

Perhaps. It is somewhat peculiar, however, that seemingly in *every* instance the law of unintended consequences worked against the Indians. Probability would suggest that, absent specific intent to the contrary, some unintended results would have worked to the Indians' advantage. In addition, easterners were not ignorant of their limited power to influence frontiersmen. Long experience should have enabled them to factor in this constraint in choosing policy measures that would actually benefit the Indians.

Yet the result was consistent: expressions of benevolence never translated into substantial protection of the Indians. If western frontiersmen did have to compromise with their compassionate cousins on the coast, it appears that they did not have to compromise much. In the complex political horse-trading between the two groups, protecting the Indians does not seem to have been a particular priority for the eastern population. No doubt many individuals believed passionately in this cause; Banner quotes them to good effect. In the end, however, muscular economics (as opposed to benevolence coupled with unintended consequences) provides a more credible explanation for the deleterious effect of virtually all American policies on the Indians.

Banner's (2005) view of the role played by physical threats and the actual use of force also deviates from the interpretation offered by muscular economics. He says that although the process of expropriation was a story of power,

it was a more subtle and complex kind of power than we conventionally recognize. . . . It was the power to establish the legal institutions and the rules by which land transactions would be enforced. The threat of physical force would always be present, but most of the time it could be kept out of view because it was not needed. (6)

From the economic perspective, however, these legal institutions and rules were mere window dressing. Without the power to enforce them, of what use were legal rules that colonists hoped would give them an edge? Moreover,

the economic approach offers a cogent and powerful explanation for the relative rarity of conflict: Hirschleifer’s (1994) first principle of muscular economics, that rational and informed parties will avoid conflict and divide the gains implicit in saving themselves the costs of war. The *threat* of force in such situations is not “kept out of view”; indeed, it is critical to make ostentatious displays of power, so that an opponent can accurately forecast the costs of war, or even better, overestimate your military might.

Banner’s (2005) disagreement with the economic theory of least-cost conquest illustrates a fundamental tension discussed at the outset of this essay: the parsimony of economics versus the richness of history. Banner’s book strikes a balance between these two poles. He describes a course of events more nuanced and subtle than least-cost conquest, but the book never turns into a simple catalog of facts without any organizing framework. From a scholarly perspective, he settles on a middle ground that few, if any others, have occupied. Consequently, his work should be of interest to both historians and economists not only for its content but also for its methodology.

HISTORY

Banner’s discussion is ruthlessly positive: he relies on a careful and complete review of the historical record to draw inferences and avoids moral judgments. One might well think that, given the volume of scholarship on Indian relations and the consequent repeated close readings given to the limited historical record, there simply are no new facts to discover, rendering positive projects futile. Banner, however, puts the lie to that supposition.

An additional facet of the “least-cost conquest” model presented in the previous section is the very widely accepted “fact” that colonists, from the earliest of times, barred private purchases of Indian land and instead channeled all such dealings through the government. This “fact” is enshrined in Chief Justice Marshall’s famous opinion in *Johnson v. M’Intosh* (1823), which contains a copious historical discussion of the long-standing and universal bar to private purchases of Indian lands. Marshall found that Indians (under the colonists’ laws) had a limited title of occupancy that did not include free rights of alienability. Barring competitive bidding for Indian lands, of course, fits well within a model of efficient expropriation. A monopsonist (a single buyer—the converse of a monopolist) generally pays less than the price that would prevail in a competitive market.

Without doubt, Banner’s (2005) most important historical contribution is his novel and creative argument that no such monopsony existed for the first century and a half of colonization. He maintains that from landfall at Jamestown in 1607 until The Proclamation of 1763, private colonists purchased most Indian land with no real state oversight. Banner maintains

that “Indian property rights in land in the colonial period were full property rights, not the limited right of occupancy discussed by John Marshall in *Johnson v. M’Intosh* and by later writers” (28).

Banner is taking on not just Chief Justice Marshall and his contemporaries, but the prevailing view among contemporary scholars. “It is a reasonable generalization to say that land purchases from Indians were a governmental monopoly” (Springer 1986, 25). Harris (1953), a leading historian of early American land tenure, also reads the subsequent record quite differently than Banner.

Many formal authorizations for purchase from the Indians indicate that these laws [requiring governmental assent for purchases of Indian lands] were rather well enforced. Many recorded cases of refusal to confirm purchases made outside of these laws also substantiate this conclusion. The New England colonies generally followed the practice of preventing private purchases from the Indians without specific authorization. (159)

Harris seems to have discovered detailed documentation showing that colonies’ enforcement of their statutes regulating Indian land purchase was meticulous, but frustratingly he does not include his sources for this assertion. There is other evidence contrary to Banner’s position. Connecticut in 1702 barred any entity save townships from purchasing Indian land, and voided at least two private purchases (164–65).

The crux of the matter comes down to the application of statutes requiring governmental approval of citizen purchases of Indian land. Every colony enacted such a statute soon after formation. The traditional view, as summarized by Springer (1986) in the previous paragraph, is that colonies used such statutes to monitor and control all purchases of Indian lands.

Banner disagrees. “Individual colonies had long required purchasers of Indian land to obtain the colonial government’s permission, *but that requirement had never been onerous and had never prevented many sales from taking place*” (2005, 94, italics added). He argues that the purpose of the statutes was not to limit purchases of Indians lands, but rather “to *facilitate* purchasing, like the laws regulating any other market” (27, italics added). He seems to have reached this conclusion inductively, based in part on the large number of Indian deeds executed in colonial times.

Banner argues that “the fact that every colony had such laws . . . suggests that the norm was to purchase land from the Indians” (27). This contention, however, is not self-evident. Markets that work well tend to go unregulated, and thus the enactment of the statutes requiring governmental approval for purchasing Indian lands would seem to suggest that the colonists rapidly concluded that unregulated purchases of Indian lands were problematic. The historical record clearly identifies at least one worry: fraudulent purchases might enrage the Indians, who would fight to prevent attempts to occupy

lands so obtained. Moreover, requiring state approval to purchase Indian lands (if such approval was not given perfunctorily) limited bidding for Indian land, thus lowering the price paid.

This debate is of wider historical interest. Banner argues that the ability to sell to whomever they chose meant that the Indians had *full* property rights during the 1600s and through the better part of the 1700s. It is perhaps more precise to say that he endeavors to demonstrate that they had full *rights of alienation* during this period. At any rate, he argues that the Founding generation in effect rewrote history by arguing that from the earliest dates (effectively, the enactment of those colonial statutes requiring governmental approval of land purchases), Indians could sell only when the colonies so desired (chap. 5).

This transition, from free restricted alienability, began no later than 1763, according to Banner, when the British explicitly banned private purchases of Indian land in a famous proclamation (referred to, understandably, as the Proclamation of 1763). It was only at this relatively late date, Banner maintains, that the colonists began the seemingly odd practice, in derogation of the Indians' full alienation rights, of selling land still occupied by Indians to citizens (163, 183).

Banner argues that the conversion from full to limited Indian property rights took place within decades during the Revolutionary era. In discussing Jefferson's assertion that the preemption rights of the United States were "fundamental," he says, "if so, it had become fundamental very quickly, having been proclaimed by Britain only in 1763" (136). "The idea that the Indians possessed only a right of occupancy in their unsold land was a concept that was only three decades old in 1823. English colonial law had included no such concept, nor had American law before the 1790s" (179).

I have some qualms about these assertions. There is no doubt, for example, that the British Crown sold or transferred *every* proprietary colony (e.g., Pennsylvania, Virginia, Maryland) to its proprietor despite the presence of tribes well able to defend their claims. Harris (1953) states that "the early practice in North Carolina involved grants from the proprietors to the settlers, who in turn purchased the Indian rights" (170). These doubts, however, are far from proof that Banner (2005) is wrong. Whatever the ultimate resolution of this question (if it ever is resolved), Banner deserves great credit for creatively and boldly questioning a fundamental assumption of almost every other historian of Indian land rights.

Banner builds on his provocative thesis by arguing that this change in the colonists' mind-set about Indian property rights had important implications for the two groups' relations.

The idea that the Indians owned their land had taken a series of blows, which cumulatively were fatal. First was the Proclamation of 1763, which ended the private purchase of Indian land. When the Indians

were no longer allowed to sell land to buyers *of their own choosing*, it became possible to think of the Indians' property rights as something short of full ownership. (189)

In addition, he finds that the practice of selling lands still occupied by the Indians, along with sentiment that the United States should take land by conquest from tribes who sided with the British during the war, also contributed to the colonists' devaluation of Indian property rights. Elsewhere, he notes that as Europeans, rightly or wrongly, started to view Indians as less agricultural and more nomadic, they showed decreasing respect for Indians' property rights (156–57).

These points are plausible, but they are a marked shift from economic incentives to intellectual conceptions as the driving force behind the evolution in Indian-colonist land relations. To the economically minded, this change in gears is unnecessary and results in a loss of focus. Under the economic view, as discussed above, the colonists' ever-growing power advantage over the Indians is the root explanation for changes in Indian relations. It comes as little surprise, then, that as the power gap widened in the late 1700s, and as divisions in the colonial community (between Revolutionaries and Tories) disappeared, colonists would behave more aggressively and expropriatively towards the Indians. All talk of rights of conquest, ability to sell land still occupied by Indians, barring private purchases, and the inability of nomads to possess true title to land were simply doctrinal excuses to expropriate Indians lands on terms ever more favorable to the colonists. If Americans had taken their own rhetoric seriously, for example, they would have respected the title of the Cherokees more than other tribes based on that tribe's embrace of sedentary European agriculture. The Cherokees' Trail of Tears puts the lie to any notion that abstract legal doctrines stood as anything stronger than gossamer in restraining the exercise of raw power by colonists.

Banner's deviation from his own thesis at this juncture perhaps is symptomatic of his ambitious attempt to depict a multifaceted historical landscape. Although generally maintaining fidelity to his thesis that power relations explain Indian-colonist relations, he does not shy away from subplots with divergent explanations. Although I did not find some of these stories persuasive, they are invariably sophisticated and thought-provoking. More generally, Banner manages to squeeze novel lessons from scant and well-trodden sources. A typical example is his compelling rendition of the original and evolving states of mind of the Indians and the English on the meaning of a land sale. Banner convincingly documents the two sides' unsurprisingly divergent initial understandings and the surprisingly quick convergence brought on by the accelerating frequency of land dealings (56–62). Although only tangentially relevant to the story of expropriation, this careful tracing of societal understandings about land tenure is a valuable addition to the history of Indian-colonist relations.

Banner is one of the few academics able to occupy a middle ground between the rich tapestry of history and the spare explanations of economics. His book is both a contribution to the growing modern consensus about the process of expropriating Indian lands and a deep source of original facts and novel interpretations of the historical record. Banner demonstrates that we still have much to learn from careful, positive, fact-based research on the process by which the Indians lost their lands.

REFERENCES

- Allen, Douglas W. 1991. Homesteading and Property Rights, or, How the West Was Really Won. *Journal of Law and Economics* 34 (1): 1–23.
- Anderson, Terry L., and Fred S. McChesney. 1994. Raid or Trade? An Economic Model of Indian-White Relations. *Journal of Law and Economics* 37 (1): 39–74.
- Cohen, Felix S. 1947. Original Indian Title. *Minnesota Law Review* 32 (1): 28–59.
- Deloria, Vine. 1974. *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*. New York: Delacorte Press.
- De Tocqueville, Alexis. 1990. *Democracy in America*. Vol. 1, ed. Phillips Bradley. New York: Vintage Books [Orig. pub. 1835].
- de Vattel, Emer. 1758. *Law of Nations*. Washington, DC: Carnegie Institute [Repr. 1916].
- Harris, Marshall. 1953. *Origins of the Land Tenure System in the United States*. Ames: Iowa University Press.
- Hirschleifer, Jack. 1994. The Dark Side of the Force. *Economic Inquiry* 32 (1): 1–10.
- Jefferson, Thomas. 1907. Hints on the Subject of Indian Boundaries, Suggested for Consideration. In *Writings of Jefferson*. Vol. 17, ed. Albert E. Bergh. Washington, DC: Thomas Jefferson Memorial Association.
- Kades, Eric. 2000. The Dark Side of Efficiency: *Johnson v. M’Intosh* and the Expropriation of American Indian Lands. *University of Pennsylvania Law Review* 148 (4): 1065–1190.
- Prucha, Francis Paul. 1962. *American Indian Policy in the Formative Years, The Indian Trade & Intercourse Acts, 1790–1834*. Cambridge, MA: Harvard University Press.
- Schuyler, Philip. 1783. Letter to Congress, July 29, 1783. In *Papers of the Continental Congress 1774–89*. Vol. 3 (item 153, microfilm). Washington, DC: National Archives and Records Service.
- Springer, James Warren. 1986. American Indians and the Law of Real Property in Colonial New England. *American Journal of Legal History* 30 (1): 25–58.
- Washington, George. 1931. Letter to James Duane, Sept. 7, 1783. In *The Writings of George Washington*. Vol. 27, ed. John C. Fitzpatrick. Washington, DC: U.S. Government Printing Office.
- Williams, Robert. 1990. *The American Indian in Western Legal Thought: The Discourses of Conquest*. New York: Oxford University Press.
- White, Richard. 1991. *The Middle Ground, Indians, Empires, and Republics in the Great Lakes Region, 1650–1815*. New York: Cambridge University Press.

CASES CITED

- Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).