REVIEWS 209

Recently, in many successful lawsuits, Native American tribes have received payment for territory that was illegitimately taken over a century ago. While the principles behind these victories are often misunderstood by those...
unfamiliar with the history of American Indian law, two new books help provide clarity. Stuart Banner’s *How the Indians Lost Their Land* examines Indian property rights and the mechanisms of land transfer from the colonial era through the 1930s. According to Banner, the exchange of land was neither a simple matter of conquest, nor entirely voluntary, but rather existed along a continuum between absolute force and the willful sale of land. Yet, from the colonial era through the early twentieth century, land transfers occurred increasingly under coercion.

Banner posits distinct periods wherein intercultural power relationships and non-Indians’ understanding of Indian land ownership changed markedly. His early chapters argue that the first English settlers squabbled among themselves over the nature of Indian land ownership: Could Christians simply take “heathens’” land? Or was it necessary to purchase such territory? By the end of the seventeenth century, the confusion was resolved: English settlers agreed that Indians possessed their lands outright and settlers were legally bound to buy titles from the Indians. While such sales often followed from violence, epidemics, and economic dependency, the transfer of title from one party to another in exchange for payment proved the norm. Later, the Proclamation of 1763 prohibited anyone except royal officials from purchasing Indian lands, a policy that effectively drove down the price Indians might receive on the free market. After the American Revolution, Euro-American thinking shifted again. The land of those tribes that had fought against the Americans could now be acquired by right of conquest, obviating the need for purchase. Even allied or neutral tribes suffered from restrictions, as the Constitution allowed only the federal government to acquire Indian lands. As state governments and frontier residents grew increasingly desirous for land, they pressured the federal government to use its land-purchasing powers to cajole or threaten Indians to cede lands.

These pressures led to another shift, embodied in the Supreme Court’s 1823 *Johnson v. M’Intosh* decision. Justice John Marshall used this case to posit the “discovery doctrine,” which asserted that Indians had never enjoyed full rights to their lands after the Europeans’ discovery of America. Instead, he reasoned, they had merely held the right to “occupancy,” a right that could be extinguished at the will of the European discoverer, and later, the U.S. government. Banner emphasizes the contrast between Marshall’s decision and the way in which colonists actually conceived of Indian land ownership. Yet, with “occupancy” as the applicable legal principle, the decision provided the United States with legal justification to acquire territory without solid Indian consent. Later periods of removal, reservation, and allotment saw Indians forced onto smaller plots of land,
resulting in increasing territorial losses. Banner’s narrative skillfully unpacks centuries of legal decisions, examining their contradictions and the controversies they engendered, and defining the legal jargon in layman’s terms. His work will prove an especially good resource for generalists who want a greater understanding of the complex legal and political relationship between Indians and non-Indians.

Lindsay G. Robertson’s Conquest by Law focuses specifically on one key episode in Banner’s broader narrative: Johnson v. M’Intosh. Robertson provides a detailed history of the case, beginning with the Illinois and Wabash Land Companies’ original land purchases in what became southern Illinois and Indiana, a decade after (and in clear violation of) the Proclamation of 1763—purchases that formed the basis for Johnson’s land claim. For Robertson, Marshall’s extensive treatment of the discovery doctrine can be explained, in part, by his desire to quash Johnson’s suit, and in part, by his deference to Revolutionary War veterans, whose claims would have been jeopardized by a decision for Johnson. Marshall’s long explication, he argues, was otherwise superfluous to the case at hand, even as it exerted long-lasting impact on Indian law (Marshall tried to revise the principle a decade later in Worcester v. Georgia [1832]).

Robertson’s contribution to this discussion is considerable. He has uncovered corporate records of the United Illinois and Wabash Land Companies stored in a trunk owned by a descendant of an officer of the company. The previously unexamined documents enrich his discussion of litigious persistence and reveal a shocking amount of legal collusion by the attorneys on both sides of the case. The story is an intriguing one, and it elucidates the murky legislative and judicial history of the late-colonial era and the Early Republic. His discussions of the origins of the dubious “discovery doctrine,” and of Marshall’s own attempts to rein it in during the removal era, constitute his most significant contributions. In fact, Banner states explicitly that Robertson’s dissertation and earlier articles formed the basis of his own discussion of the Johnson case (p. 321). Obviously, Robertson’s analysis of Johnson has already influenced the field. While Conquest by Law might be a challenging book for an undergraduate audience, those interested in the territorial history of the Midwest or the Early Republic will find in it a dramatic account coupled with a scholarly analysis of a long-standing but problematic legal principle.

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