

## BOOK REVIEW

**HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER**

STUART BANNER, BELKNAP PRESS OF HARVARD UNIVERSITY PRESS,  
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At the close of the nineteenth century, the *Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896-1897* included what became a famous compilation by Charles Royce. This compilation, he said, 'indicates the number and location of each cession by or reservation for the Indian tribes from the organisation of the Federal Government to and including 1894, together with descriptions of the tracts so ceded or reserved, the date of the treaty, law or executive order governing the same, the name of the tribe or tribes affected thereby, and historical data and references bearing thereon. 'These came to 709 entries. Matters that the compilation did not show were the colonial cessions and the constant gnawing at Indian lands from first settlement of the New World through to that time late in the nineteenth century when new means other than the simple transactional 'cession' were also eating at the crumbling tribal land-base. It is those broad historical processes of loss that Stuart Banner relates in his important book *How the Indians Lost Their Land: Law and Power on the Frontier*. It is a long-arched history that commences with the fledgling Atlantic seaboard colonies, perched precariously on the edge of the continent and reliant upon Indian support, through the consolidation of the colonies and their progress westwards into Revolution, republican nationhood and yet more tribal land.

Banner is one of the most – if not the most – versatile Anglo-American legal historians. He has turned his hand and powerful mind to a vast range of historical topics across Australian and New Zealand colonial legal history as well as his native America. The hallmarks of his style are evident in this book: accessibility, keen historicisation (that is, the insistence that past actors be seen by their own lights not ours) and a grasp of the interplay between law as ideology and how it actually plays out on the ground as it encounters what Harold Macmillan famously called 'events, dear boy, events.' Banner's legal history is lived in; it inhabits changing value structures and is the outcome of continual and dynamic disputation. This gives it immediacy and accessibility as well as complexity.

The title of the book essentially poses a question: today the outcome of the history of Indian encounter with Anglo-American settler society over four centuries is all too plain: they have been ring-fenced onto reservations where many live in conditions of relative poverty and extreme under-privilege. Since reduction to that condition was not caused by a single seismic event, how did it happen? Banner's response is that it was a complex, essentially westward-moving process that involved a range of actors, operating within their historical contexts and value structures, most – though far from all – of them well-meaning and concentrated upon their own particular situation. There are no easy answers to the book's question, but rather a series of them, historical processes in which the sheer negativity of the eventual traumatizing outcome is far from ever-present. This is most certainly not history driven by the outcome embodied in the book's title. Indeed it is Banner's aim and fine achievement to dislodge that kind of deterministic history. Instead he shows that the road to the reservation was mostly paved with good intent. Ultimately that is the disturbing theme of this book.

Banner describes a sequence of phases in the history of tribal land loss. It was only with the Royal Proclamation (1763) and establishment of the republic that High Politics really addressed the 'Indian Question'. Prior to that, Indian policy was largely left to the individual colonies. All put in place laws to regulate transactions, regularise relations and deal with such persistent issues as stock trespass and squatting, but for most of the colonial period 'Indian land was purchased by a wide variety of individuals and groups – from ordinary farmers to large-scale real estate speculators, from towns to colonial governments' (85). At that time, for all the variation, land transactions were essentially contracts and capable of analysis on that basis, albeit inflected with the religiosity of the time (chapter 2). Thereafter, however, they became 'treaties' with the Crown, and later, the federal Government. This policy of governmental monopsony and centralisation of the management of Indian relations was embedded in the law described by Banner (chapters 3, 4 and 5): the Royal Proclamation, through the Northwest Ordinance (1787) through the Indian Intercourse Acts through to the Congressional suspension of treaties in 1871 (247-53). And in the midst of that long century of treaty-making, there is also the dramatic story of removal. The legal side of it included the fractious politics of early confederation; for the tribes this was an off-stage drama but one that was to have devastating consequences for them. In these days when the Marshall cases have been elevated into the foundation for a canon of common law aboriginal rights across the Anglo-American jurisdictions of North America and Australasia, it is salutary to be reminded of their actual outcome. As Banner's subtitle reminds us, 'law' and 'power' are not synonymous. Finally, we enter the period of reservations and allotment as the remaining lands get nibbled away, tribal impoverishment rises, ('the winners were mostly white settlers and land speculators' (287)) and the integrity of the dwindling acreages compromised by the presence of non-Indian owners. Banner leaves his history in 1934, with the Indian Reorganization Act about to be passed by Congress.

In an epilogue to the book, Banner returns to his theme of the engagement between law and power. During the mid-twentieth century the tribes acquired more political power, much of that a result of court judgments restoring some leverage to them in the conduct of their relations with the federal and state governments and in the governance of their remaining lands. That engagement represents a new and modern phase outside his period but he is clear that it is also one driven by the history that lies behind the land claims and related litigation. This is the link between the history he has given and the politics of today. Banner gives us a past in which Anglo-Americans can see themselves as inheritors and inhabitants of a dynamic Christian and common law tradition beset always by the problematics of location in time and place. In that regard this book squares with the intellectual orientation of Banner's other work. The sources he uses are well-known to imperial and republican legal and political historians but none have marshaled the legal dimension inside those sources with the historiographical sensitivity, broad range and depth of Banner. This is an important book demonstrating powerfully why this scholar is at the very forefront of Anglo-American legal history.

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