The Journal of Libertarian Studies, Vol. VII, No. 1 (Spring 1983)

Libertarians and Indians: Proprietary Justice and Aboriginal Land Rights

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Two remarks will serve to introduce my subject. Several years ago, Rosalie Nichols was asked if the Indians had ever had a title deed to North America. She responded, "Who should have issued them one, I don't know, unless it was the buffalo."[1] Secondly, Jonathan Hughes, in his book *The Governmental Habit*, contrasts the allodial and socage forms of land tenure. "Socage tenure was part of the feudal order" and was inevitably carried over by the English to their landholdings in North America. It was designed to protect the interests of the feudal donor ("transformed in our time into the state") by forcing "property owners to support the taxing power at all times" regardless of whether they desired or used state services. The property owner could never "withdraw his support" from the state by not paying real estate taxes. If he attempted to discontinue his payment, the state would confiscate his title and auction off his property to someone who would pay taxes. "This form of coercion is a product of history" and ultimately traces itself back to the principle of the Right of Discovery, upon which all European nations based their claims to land in North America.[2]

According to the international law of Europe during the fifteenth century, priority of discovery gave a nation supreme and unlimited right to the discovered territory.[3] Title to lands hitherto unknown to Europeans was based on the union of discovery and possession.[4] This meant that although numerous European nations claimed first discovery, actual sovereignty could only be established by effective colonization. (Since the English, in North America, generally proved themselves the most effective colonizers, succeeding comments will refer largely to the practice of the English.) The rights of the Crown were not merely those of head of state or feudal lord paramount. The King was the immediate owner and lord of the soil and exercised unlimited power in its disposition.[5] Theoretically, no settlement could be made without his consent, and if any settlement took place without his prior approval, then he could force it either to disband or to seek a royal charter to confirm its existence. Once the Crown established sovereignty over an area, it then enlarged its authority to include the right to extinguish any vestige of Indian title.[6]

Under international law, the Indians had only a right of uncivilized occupancy.[7] This meant that the natives had no right to dispose of their title except to the Crown

or its proprietary agents. The Indians were consistently held incapable of alienating their lands to private parties.[8] By implication, the Crown took the position that if it cared to recognize any Indian title (to lands occupied by the Indians) at all, such title could be transferred only to the Crown. Any purchase of land made by settlers from the natives without the consent of the Crown was regarded and treated as absolutely void. It was a fundamental principle in the English colonial jurisprudence that all titles to land within the colonies passed to individuals only from the Crown or proprietary authorities.[9] No land title examined in the colonial or early state courts was ever admitted to depend upon any Indian deed of relinquishment.[10,11]

These views were confirmed by the Royal Proclamation of 1763, in which the territory still occupied by the Indians west of the Appalachian Mountains was disposed of without reference to the natives. The Crown's assumption was that the aboriginal tribes had neither title to the soil nor sovereignty. The Royal Proclamation reserved to the British government the exclusive right to purchase and extinguish the rights of the Indian tribes as occupants of the soil. Furthermore, it forbade European settlement on Indian Territory, until permission was granted by the Crown and until after the Indian right had been extinguished by conveyance to the Crown.[12]

The first European in North America to challenge the principle of the Right of Discovery and to uphold the native rights to the soil was Roger Williams. In 1633 he became an ardent proponent of the idea that King James had no right or power to claim ownership of North American lands occupied and used by the Indians. The King was granting things beyond his power to grant when, for example, he issued royal patents to Plymouth, Massachusetts Bay, and other colonies. From Williams's point of view these patents were invalid. The English could justly occupy lands in North America only by purchasing those lands from their rightful owners, the Indians. Undoubtedly these claims caused alarm among the royal patriots, for they struck at the very foundations of the colonial governments which King James had authorized. Williams was banished from Massachusetts and left to establish his colony in Rhode Island, where he began by purchasing the land from the Indians.[13]

Williams asserted that the rights of the Indian stood upon the original principles of the law of nature, which meant that the lands they had occupied and used could not be alienated from them without their free consent.[14] Roger Williams pointed out that a modified form of private ownership of land did exist among the Indian tribes and that they did not simply live in a state of nature.[15] They had improved the land by burning the underbrush and had cleared the land where they lived, and their woodlands were no less useful than the King's parks in England.[16] John Winthrop, one of Williams's detractors, maintained that the unimproved lands of North America belonged to no one, and that whoever labored on unimproved and unclaimed land thereby made it his own. According to Winthrop, land became private property only through cultivation, manuring, and enclosure. Since by English standards the Indians had not noticeably improved their land or enclosed it, it was not rightfully theirs, but simply lay ownerless in the state of nature. Even though

the Indians had not cultivated or enclosed their lands, Williams insisted that the colonists first purchase the right to the land from its original users and occupants, the Indians. Williams demanded that the Indians be dealt with on the principle of equality and maintained that so-called civilized states have no right, however nomadic or savage they (the Indians) might be, to divest the title to the soil from them.[17]

Misunderstanding arising from their differing concepts of property in land was one of the main causes of disputes between the Europeans and the Indians. The Indians did not recognize land appropriation by individual members of the tribe, and even Roger Williams recognized that landownership among the Indians was usually held by the tribe. Nevertheless, among the Indians articles of personal property were owned by the individual.[18] Each Indian tribe was perfectly well acquainted with the limits and bounds of its landholdings, even though these holdings were not enclosed in the normal European fashion.[19] Indian land tenure has been characterized 1) as a right of beneficial use and occupancy, rather than an exclusive ownership, and 2) as a group right rather than an individual one. It was probably difficult for the Indians to think of land as individual, private property, which could be sold or permanently alienated.[20]

Besides Roger Williams, there were others concerned with respecting Indian rights. In 1626 the West India Company instructed its New Netherland's agents to formally acquire title to lands, by purchase from the Indians. As early as 1623, records indicate that the Hollanders had purchased land of the Indians.[21] Thus Manhattan Island was purchased by the Dutch in 1626, for goods valued at 60 guilders.[22] This was a sum probably representing the real value of the land in that day, and the Indians made a good trade. The Dutch probably initiated the practice of purchasing lands from the Indians in order to counter the claims of the other European powers. They had little chance of sustaining themselves under the principle of Right of Discovery. They decided to argue, against the claims of the English, that the Indian tribes or nations were the true owners of the land discovered by the English and that title could be obtained from the natives only by gift or purchase. Interestingly enough, when the Swedes arrived in 1638, they recognized the claims of the Dutch, to lands purchased of the Indians. Likewise, the Dutch formally admitted the validity of Swedish titles, when a deed or transfer from the Indians could be produced.[23] The only English colonists to emulate the Dutch and Swedish practice were the Quakers in Pennsylvania; practically all the other English settlers refused to recognize Swedish or Dutch claims since the Indian title had no standing in English law.

The Quakers were the only group of European settlers to have their hands free from the blood of innocent Indians.[24] They never deliberately schemed for the extermination of the Indians and were nearly always concerned to do full justice to Indian claims.[25] They were an unimaginative, pecuniary people, who thought that justice to the Indian consisted in doing him no harm, paying him for his land, and letting him go.[26]

The curious aspect of William Penn's approach was that his chief object seems

to have been to extinguish Indian claims and to give satisfaction to the natives for their possessory rights, rather than to fix definite and accurate boundaries of the land purchased. The wording of the deeds implies that the intent was to cover all possible claims of those making the grants to Penn. Hence it was of little importance that these deeds overlapped and included areas obtained from other claimants.[27] Thus, practically the whole of Pennsylvania was purchased of the Indians, and some of it several times over.[28] The price of these land purchases seems as nothing now, but it was a fair price in those days in the minds of both parties. It took centuries for the white people to learn the value of land in America. In every instance when Penn dealt with the Indians, so long as the bargain was fairly made, the Indians returned to their wigwams satisfied.[29]

What seems to have impressed the Indians was the fact that Penn insisted on purchase at the first and all subsequent agreements as being an act of justice, to which both parties were to give their assent voluntarily. They also felt that the price was ample to extinguish their claims, and that no advantages were taken by plying them with drink or cheating them with false maps. The treaties were open and honorable contracts, and not characterized by sharpness and chicanery. As the Indians reflected on them at their leisure, they saw nothing to repent of and everything to admire in the conduct of Penn, and they preserved inviolably the terms to which they had solemnly agreed.[30]

Even before Penn arrived in his colony, land was purchased of the Indians, under his instructions, as early as 1682. As a Quaker and quasi-pacifist and as a proprietary of the Crown, Penn had a dual role to fulfill as colonial leader. As in many of the other colonies, to resort to buying the lands of the natives may have been an act of expediency, for it must have been much cheaper and easier to purchase the lands of the Indians than to attempt to take them away by force.[31] Liberty and peace were the two main elements of Penn's Holy Experiment and could be obtained only if no aggression were made on the rights, real or supposed, of the native inhabitants.[32] Penn's Quaker conscience inspired him to buy not only the Indian lands, but those of all claimants in order to quiet all possible land disputes. It should be noted, however, that regardless of Penn's concern for justice, Pennsylvania law prohibited purchase of Indian land by individual Quakers or other settlers. Quieting title was a government monopoly which Penn held for himself.[33]

It has been urged by Penn's critics that neither he nor any other European colonist could with perfect integrity and honesty purchase the land of the aboriginal natives of America, for several reasons. First, savages can never, for any consideration, enter into contracts obligatory upon them. They stand by the law of nations, when trafficking with the civilized part of mankind, in the situation of infants, incapable of entering into contracts, especially for the sale of their country. Second, should this be denied, it may then be asserted that no monarch or chief of a nation has the power to transfer by sale the soil of the nation over which he rules. Neither William Penn nor any other European since made a purchase of lands from any Indian nation other than through the agency of their sachems or head men, who certainly could have no more right to sell their country than

any European monarch has to sell theirs. Third, should these objections be overruled, then it may be safely asked, what could William Penn or at least what did he give which should be considered from any point of view as a consideration or a compensation to those aborigines for their land?[34]

Before dealing with these critical points, let it be said that the Indian land issue ought to be viewed from the standpoint of man's natural and inalienable rights to life, liberty, and property.[35] This means that, since the Indians were human beings, they had the same rights as Caucasians. This means they had the right to control their own minds and bodies free of coercive interference and to own the land on which they and their ancestors had lived since time immemorial. Thus, when "discovered" by the Europeans, parts of the North American continent were not ownerless. The American Indians, by virtue of being first users and occupiers of parts of the continent, were its rightful owners.[36] Since legitimate property owners have an unrestricted right to make arrangements for the disposition of their property, this effectively disposes of the first argument that savages cannot enter into obligatory contracts.

Since the Indians did not hold the land as individuals, but as collective tribal entities, it is difficult to determine whether or not land allocations (under the tribal regime) were more just than the English land grab which took place under the guise of discovery.[37] However, it is plain that private collective ownership is perfectly valid and moral, as long as it is voluntary and there is no violation of individual rights.[38] Private collective ownership must originate in the ability of the individual to own property, which he then cooperatively pools with the property of others. However in the case of the Indians, it has never been asserted that tribal title rested on the agglomeration of individual titles. The actual settler—the first transformer of the land—whether white or Indian—had to fight his way past a nest of arbitrary land claims by others.[39] Were the tribes, in effect, voluntary associations of individuals who consented to their collective ownership of the land? The fact that no form of tribute or taxes was ever collected among the Indian tribes inhabiting what is now the United States lends some credence to the view that the tribes were voluntary organizations.[40]

As voluntary associations, the tribes could, and in fact did, historically, sell their rights to the soil by allowing their chiefs to represent tribal interests. These chiefs were authorized to make and execute deeds on behalf of the tribe, to receive for the tribe the consideration for the deeds, and to divide such consideration among the individuals of the tribe. The authority of the chiefs, so acting for the whole tribe, is attested by the presence and assent of the individuals composing the tribe and by their receipt of their respective share of the price.[41] Thus could the Indian tribes deal with the Europeans for the sale of their lands, and granted that the chiefs had this authority, it must be admitted that they were capable of determining what in their opinion would be ample compensation for their lands.

With these preliminary concerns out of the way, it must now be determined whether or not the bulk of Indian claimed land was actually used and occupied, settled and transformed by the tribes claiming them. If it be admitted that the tribal

organizations were voluntary and that Indian landownership was just, then it is plain that European intervention into the allocation of property was a usurpation and a crime against the rightful Indian owners. If the Europeans settling in North America had operated in a free-market or even semi-free-market framework, then the British government would have refrained from claiming sovereignty over the unused domains of America. It would have denounced the principle of the Right of Discovery, and recognized that true ownership could only be established under the principle of "first ownership by the first user" (whether white or Indian).[42]

What exactly does first occupation and use mean? What are the criteria by which the principle of first ownership by the first user is to be interpreted? The crux of the dispute over whether Indian claimed lands were truly owned by the Indians or actually ownerless stems from the failure to distinguish between cultivation and other forms of use. If cultivation and enclosure are deemed to be the hallmarks of establishing occupancy and use, then that large portion of the Indian claimed land which was never "homesteaded" must be viewed as actually ownerless (and thus open to settlement by the actual first user).

Claiming that the American Indians, by virtue of being the first users and occupiers of the continent, were its rightful owners, Rosalie Nichols maintains that "use" is decided upon according to the condition and natural resources of the land, the level and particular type of technology of the occupants, and the desires of the owner.[43] Undoubtedly, the Indians rightfully owned the land that they cultivated and upon which they erected their wigwams and shelters. *The main question to settle is whether they rightfully owned the land upon which they regularly or sporadically hunted.*

Lysander Spooner in the mid-nineteenth century asserted that those lands which the Indians merely roamed over in search of game, could not be said to have been rightfully owned by them.[44] Rightful ownership of unoccupied lands is established by either actually living upon the land, or improving it, or bestowing other useful labor upon it. "Nothing short of this actual possession can give any one a rightful ownership of wilderness lands, or justify him in withholding it from those who wish to occupy it." He based his assertions on the principle that occupation and use meant more than standing upon a portion of the North American continent and claiming possession of it. To establish ownership a person must bestow some valuable labor upon the land. In these cases he holds the land in order to hold the labor which he had put into it.[45] Similarly, Rothbard has written that the bulk of Indian claimed land was not settled and transformed by the Indians, and that the new European settlers were justified in ignoring the Indians' vague abstract claims because they knew they were the first to actually cultivate and enclose the lands upon which they settled.[46]

The fact that the Indians and Europeans did not share a common technology seems to be of no import in establishing legitimate property titles. To live, all people (regardless of their technology) must occupy certain places on the land, and whoever first establishes a homestead becomes its rightful owner. Unless the Indians bestowed some form of valuable labor over the wilderness areas they hunted, their claims

of ownership were unsubstantiated. At most, they could claim the wild animals they killed and the trails that they cleared. The fact that the tribes each had their own hunting areas does not disprove this and indicates that they only wished to live in peace with one another. If and where the Indians attempted to bound off their hunting lands, so that no one else could enter and game could not escape, and where they made efforts to help propagate game, then their ownership would be valid.

Thus game preserves or wilderness areas could exist in a free society. It is also important to understand that land once cultivated, even if allowed to go wild, does not become ownerless. Once a piece of land has passed into just ownership, the owner cannot be divested of title without his consent. Thus even though a piece of land is not currently being farmed, but is perhaps being used for cycle racing or as a rifle range, it is still owned, so long as sometime in the past a rightful possession took place. The present owner is the rightful owner so long as he can trace his title through a historical chain of voluntary transfers from the first occupier and user.[47] The fact that certain forest areas, desert lands, and open ranges, even at this late date (four hundred years after the European discovery of the continent) have never been homesteaded or cultivated means that they are still rightfully ownerless and will probably remain so because of their uneconomic value.[48]

Thus granting that some Indian claims were valid and others invalid, what were the Europeans to do when they discovered America? Even though there were probably few areas which the Indians did not claim, were the Europeans under the necessity of abandoning the country and relinquishing their own pompous claims established under the principle of Right of Discovery?[49] All unjust claims—by the Indians and the European powers—should have been ignored. "The English who colonized this country had no right to drive the Indians from their homes; but on the other hand, there being here an abundance of unoccupied land, the colonists had a right to come and settle on it, and the Indians had no right to prevent them from doing so."[50] I believe that the history of Quaker settlement proves that this policy was possible and furthermore believe that until the latter stages of settlement, the Indians were not as concerned to establish their title to hunting lands as we might think.

If Penn had not been a representative of the Crown, but only a private Quaker or the recognized leader of a corporate body of Friends, his conduct toward the Indians would serve as an example of how a libertarian colonization process could have worked. The fact remains that the Indian tribes he dealt with voluntarily relinquished their claims to him (and in this respect, his position as a Crown representative was unimportant). The Europeans did not need to abandon the continent upon discovering that parts of it were inhabited. Individual settlers or groups of settlers could have quieted Indian claims and extinguished Indian titles much as Penn did. Thus it is conceptually possible that the bulk of Indian landholdings could have passed legitimately into non-Indian control. This is not to say that all tribes would have alienated all their lands, but at least historically some Indians did willingly relinquish their land.[51] Thus the historical picture clearly demonstrates that liber-

tarians and Indians could have lived peacefully together under a regime of proprietary justice.

NOTES

1. Rosalie Nichols, "Right-Wing Rationale of Non-Recognition of Indian Rights," *The Indian Historian* 3 (Spring 1970): 27.
2. Jonathan Hughes, *The Governmental Habit* (New York: Basic Books, 1978), p. 233.
3. James E. Ernst, *The Political Thought of Roger Williams* (Seattle: University of Washington Press, 1929), p. 95.
4. Melville Egleston, *The Land System of the New England Colonies,* Johns Hopkins University Studies in Historical and Political Science, 4th ser., vols. 11–12 (Baltimore, 1886), p. 4.
5. *Ibid.*
6. Ernst, *Political Thought of Roger Williams,* p. 95.
7. Alpheus Snow, *The Question of Aborigines in the Law and Practice of Nations* (New York: G. P. Putnam's Sons, 1921), p. 25.
8. Alfred N. Chandler, *Land Title Origins* (New York: Robert Schalkenbach Foundation, 1945), p. 36.
9. *Ibid.*
10. Snow, *The Question of Aborigines,* p. 121.
11. Several interesting questions are raised by the case of Johnson and Granham's Lessee vs. William McIntosh (8 Wheaton 543) which was decided by the U. S. Supreme Court in 1823. This was an action by Johnson and others to eject McIntosh from lands granted to them by the Piankeshaw Indians during the 1770's. The land claimed by Johnson was part of the Indian territory claimed by the State of Virginia and then ceded to the federal government in 1783. Although the plaintiffs had petitioned the U. S. Congress numerous times to recognize their conveyance from the Piankeshaw, the federal government granted McIntosh title to the identical piece of land in 1818. In concluding that the Indian deed was of no value and that the grant from the United States government was paramount, Chief Justice Marshall pointed out that: "The person who purchases land from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract in severalty [that is, to hold the land as a separate individual, apart from the tribe]. As such a grant could not separate an Indian from his nation, nor give a title which our courts could distinguish from the title of his tribe, we can perceive no legal principle which will authorize a court to say that different consequences are attached to this purchase because it was made by a stranger. By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy had been ceded to the United States without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country without any reservation of this land affords a fair presumption that they considered it as of no validity," (8 Wheaton 593–94). Query 1) Why would an Indian grant to a member of the tribe to hold the land in severalty be incapable of separating the Indian from his tribe? Query 2) By what "unquestionable right" did the Indian tribes have the right to annul grants made to outside parties (whether such parties be American citizens or not)? Would the fact that a grant was made to an enemy citizen prior to the commencement of war entitle the Indians to cancel their conveyance after the war had begun? Query 3) Would Marshall have decided the case differently had the Indians actually made a reservation in their treaty with the United States, whereby they recognized the existence of a prior grant of land to Johnson? The presumption that the Indians annulled their former conveyance would have been overcome. Then to rebut the presumption thus created in favor of Johnson's title, Marshall would have had to revert to the principle of the Right of Discovery.
12. Snow, *The Question of Aborigines,* p. 19.
13. William C. Macleod, *The American Indian Frontier* (New York: Alfred A. Knopf, 1928), p. 199.
14. Ernst, *Political Thought of Roger Williams,* p. 96.

15. Macleod, *American Indian Frontier,* p. 19. There is some discrepancy between Ernst and Macleod over Roger Williams's recognition of landownership by the Indians. For the conflicting discussion see *ibid.*, pp. 18–19, and Ernst, *Political Thought of Roger Williams,* p. 104.
16. William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth Century to the Twentieth Century* (Bloomington: Indiana University Press, 1977), p. 16.
17. Ernst, *Political Thought of Roger Williams,* p. 105.
18. *Ibid.*, p. 102.
19. Chandler, *Land Title Origins,* p. 30.
20. John Provinse, "Tenure Problems of the American Indians," in Ken H. Parsons, ed., *Land Tenure* (Madison: University of Wisconsin Press, 1956), p. 421.
21. Macleod, *American Indian Frontier,* p. 194.
22. Marshall Harris, *Origin of the Land Tenure System in the United States* (Ames: Iowa State College Press, 1953), p. 165. Also see Macleod, *American Indian Frontier,* p. 194.
23. *Ibid.*, pp. 195–96. Macleod also footnotes the interesting and similar practice of the Dutch East India Company at the Cape in South Africa: "forced by virtue of desire to avoid an immediate issue of arms with the Hottentot Africans," the Dutch East India Company during the 1660's, were "holding formal treaties with the native tribes, giving them money or goods in exchange for land and privileges, and even paying a stated tax to the local tribe for each ship entering the harbour at the Cape" (*ibid.*, p. 196). The Dutch claimed that outright conquest and subjugation of the natives would entitle the invaders to the land of the conquered, but apparently the Dutch never adopted this unlibertarian practice.
24. *Ibid.*, p. 376.
25. This was true while William Penn lived (until 1748). The story of his son's fraudulent interpretation of Indian deeds is related in William J. Buck, *History of the Indian Walk* (Philadelphia: Edwin S. Stuart, 1886).
26. Macleod, *American Indian Frontier,* p. 376.
27. Cyrus Thomas, "Introduction," in Charles C. Royce, comp., *Indian Land Cessions in the United States,* 18th Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institute (Washington: Government Printing Office, 1899), p. 599.
28. Isaac Sharpless, *A History of Quaker Government in Pennsylvania* (Philadelphia: T. S. Leach & Company, 1900), 1:162.
29. Rayner W. Kelsey, *Friends and the Indians* (Philadelphia: The Associated Executive Committee of Friends on Indian Affairs, 1917), pp. 45–46.
30. Sharpless, *A History of Quaker Government,* pp. 157–58.
31. Buck, *History of the Indian Walk,* pp. 31–32.
32. Rufus M. Jones, *The Quakers in the American Colonies* (London: Macmillan and Co., 1911), p. 470.
33. Royce, *Indian Land Cessions,* p. 597.
34. John L. Bozman, *The History of Maryland* (Baltimore: James Lucas & K. E. Deaver, 1837), pp. 569–70.
35. Nichols, "Right-Wing Rationale," p. 26.
36. Rosalie Nichols, "An Open Letter to an American Author," *The Indian Historian* 1 (Spring 1968): 17. Also see Nichols, "Right-Wing Rationale," pp. 29–30. Ms. Nichols takes the position that the various Indian tribes owned every part of the continent, not just parts of it.
37. Murray N. Rothbard, *Conceived in Liberty* (New Rochelle, N. Y.: Arlington House, 1975), 1: 187.
38. Nichols, "Right-Wing Rationale," p. 32.
39. Rothbard, *Conceived in Liberty,* 1:187.
40. Nichols, "Right-Wing Rationale," p. 33. Referring to the Comanches, Ms. Nichols remarks, "There was no Internal Revenue Service to come after him [the Indian hunter]" (*ibid.*, p. 32).
41. Johnson vs. McIntosh, 8 Wheaton 550.
42. Rothbard, *Conceived in Liberty,* 1:49.
43. Nichols, "Right-Wing Rationale," pp. 29, 31.
44. Lysander Spooner, *Address of the Free Constitutionalists to the People of the U. S.* (Boston: Thayer and Eldridge, 1860), p. 33.
45. Lysander Spooner, *The Law of Intellectual Property* (Boston: Bela Marsh, 1855), pp. 21–22.

46. Rothbard, *Conceived in Liberty,* 2:54.
47. Thus comments Murray N. Rothbard, *Man, Economy, and State* (Princeton: D. Van Nostrand, 1962), 1:147–48: "There is no requirement, however, that land continue to be used in order for it to continue to be a man's property. Suppose that Jones uses some new land, then finds it unprofitable, and lets it fall into disuse. Or suppose that he clears new land and therefore obtains title to it, but then finds it is no longer useful in production and allows it to remain idle. In a free society, would he lose title? No, for once his labor is mixed with the natural resources, it remains his owned land. His labor has been irretrievably mixed with the land, and the land is therefore his or his assigns' in perpetuity." Also see Carl Watner, *Towards a Proprietary Theory of Justice* (Baltimore: by the author, 1976), p. 8.
48. Nichols, "Right-Wing Rationale," p. 30. Neither does the federal government rightfully own such land as has never been homesteaded and which falls within the so-called public domain.
49. Royce, *Indian Land Cessions,* p. 538, and Johnson vs. McIntosh, 8 Wheaton 590.
50. Benjamin Tucker, *Liberty,* Whole No. 360 (March 1899), p. 1.
51. Even Ms. Nichols, an advocate of Indian rights to all the land, implies that some holdings by Europeans of Indian land were justly acquired. Otherwise, how could she write: "Fraud also was used by European invaders to obtain land that they could not obtain by voluntary consent" (Nichols, "Right-Wing Rationale," p. 26).