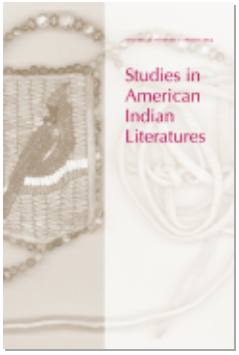
Buying America from the Indians : Johnson v. McIntosh *and the History of Native Land Rights* by Blake A. Watson (review)



Valerie Henry

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Blake A. Watson. *Buying America from the Indians:*
Johnson v. McIntosh *and the History of Native Land Rights*.
Norman: U of Oklahoma P, 2012. ISBN: 978-0-8061-4244-9. 494 pp.

Valerie Henry, *University of Texas–Austin*

In *Buying America from the Indians*, law professor and former attorney Blake Watson conducts an extensive investigation into the historical context surrounding the Supreme Court case that established early federal policy on Native land rights. In *Johnson and Graham's Lesee v. McIntosh* (1823) Chief Justice John Marshall ruled that Indigenous peoples did not own their lands based on the infamous doctrine of discovery. While the case has been denounced as "conquest by judicial fiat" and "an extraconstitutional fiction," it remains the oft-cited legal precedent upon which many Indigenous land claims are settled to this day. Watson seamlessly integrates primary source material into the flow of the narrative, privileging readers to the original language alongside his own thorough commentary. Watson's mode of historicism portrays history as an ongoing process and demonstrates how decisive events emerge from a variety of actors fighting for divergent interests amid shifting alliances, opinions, and fortunes. Watson proves that prior to the *Johnson v. McIntosh* decision, land policy in the Americas was a highly contentious debate that was by no means settled.

The work is divided into an excessive eighteen chapters, which causes discontinuity and unnecessary repetition. At times the narrative devolves into a miasma of cluttered details that do not contribute to understanding the legal dilemma. While the extent of the historical research is impressive, it is unclear whether this volume is intended as an academic argument or a reference work. Written from a scholarly perspective that emphasizes the European settler-colonial context, the author's attention to Native concerns may fall short of the expectations of those immersed in Native studies.

Watson rightly proposes to emphasize the role of the Native tribes as actors in the struggle by asking why they decided to sell their land in 1775 and again in 1805, by examining how legal arguments affected their communities and by giving attention to what tribal chiefs had to say about the issue. Despite recognizing the Illinois and Piankeshaw leaders as decision-making agents, these early chapters fail to offer any insight into why these tribes decided to sell their land and read as a fated declen-

sion narrative. While giving ample attention to the resistance efforts, battles, and arguments of Native tribes and leaders, Watson's colonial history focuses on eighteenth-century British attempts to counter the French, with Native tribes playing an intermediary role. However, Watson astutely complicates the often oversimplified set of contending forces by reminding us that in some cases different tribes held conflicting claims to an area, conquered land from each other, and in fact sold land occupied by enemy tribes. Watson brings to life the early debates of the 1600s through the voices of prominent French, Spanish, Dutch, and British intellectuals to prove there was never an agreement among Europeans concerning land rights. In many cases early settlers argued *for* Native rights in order to circumvent royal grants and proclamations to purchase land directly from the tribes. Even amid the pressure of western settlement, some seventeenth-century settlers such as Roger Williams argued for the absolute rights of Native peoples to their land.

Watson spends a considerable amount of time reviewing the maze of attempts made by eighteenth-century speculators to secure land, giving attention to the specific individuals such as George Croghan, William Murray, and the earl of Dunmore, who argued in favor of tribal rights in order to enrich their own claims. Framed against the backdrop of the American Revolution, the efforts of Founding Fathers such as Benjamin Franklin, Thomas Jefferson, George Washington, and Patrick Henry are cast into a new light as their involvement in land speculation takes center stage. Enraged by restrictive policies such as the Proclamation of 1763 and the Quebec Act, colonists argued against the Crown's title to land in the Americas. While at times Watson uncovers gems of legal history such as the circuitous application of the East Indian Camden-Yorke opinion to American Indians, much of the minute historical data does not advance the understanding of land rights or legal history.

Watson traces how during and after the American Revolution, land policy in the United States underwent two major shifts. In 1773 colonial intellectuals began to argue that the Crown was not the legal source of title to land in America and that colonists received title by buying directly from Native inhabitants. As the newly established federal government began developing its policy toward the Indians, the United States first contended that as conquered nations, the Indians had ceded all land rights to the US government by right of conquest. This opinion was soon abandoned for a policy centered on the right of preemption by

which the US government asserted an exclusive right to buy land from Indians that preempted the claims of all others, including land speculators and private purchases. Native leaders, however, continued to argue for their right to sell to whomever they pleased. Federal officials maintained that they were not obligated to pay for Native land but did so as an expedient to bloodshed.

Watson recounts the specific arguments made during the *Johnson v. McIntosh* hearing, focusing on the efforts of lawyers Daniel Webster and Robert Goodloe Harper to convince the Supreme Court that individuals could purchase directly from the Indians. In defense of a 1775 purchase by the Illinois and Wabash Land Company, Webster and Harper argued against the precedents set by statutes, judicial decisions, and committee reports from authorities ranging from the British Crown to the state of Virginia to the Continental Congress. Watson considers how the prior case of *Fletcher v. Peck* addressed Indian titles with the rationale that Indians possess the land but do not own it. The additional precedent of *Thompson v. Johnston* (1813) argued Indians did not have any *right* to the land, but rather held a *claim* that "more for the sake of peace than obligation" was extinguished with treaties and payment. After examining the particular histories and interests of each justice on the court, Watson explains Chief Justice John Marshall's opinion that the international European agreement to respect each other's right of discovery "diminished" Native sovereignty and disallowed them from selling to anyone other than their conqueror.

Watson concludes with an insightful examination of the legacy of *Johnson v. McIntosh* as it has affected Native land rights in such pivotal decisions as the Indian Removal Act, *Cherokee Nation v. The State of Georgia*, *Worcester v. Georgia*, and cases as recent as 2005. Surprisingly, in *Worcester v. Georgia* (1832) John Marshall renounced his earlier view, dismissed the doctrine of discovery as a "pretension," and declared tribes to hold sovereignty and property rights. While this ruling arguably overturned *Johnson v. McIntosh*, it has rarely been acknowledged or cited in subsequent cases. The discovery doctrine remains central to US federal Indian policy today. It established the influential policies of diminished tribal sovereignty, the federal trust relationship, and the plenary power doctrine. Despite Chief Justice Marshall's later disavowal of the *Johnson* decision, it remains the leading case cited concerning Native property rights.

Watson concludes by examining how recent legal scholars have inter-

preted and denounced the *Johnson v. McIntosh* opinion, with special attention to the emergence of Native scholars, such as Vine Deloria Jr. and Robert Williams, invested in interrogating legal history. He considers the case's influence on international law, such as the UN Declaration of the Rights of Indigenous Peoples in 2007, and cases beyond US borders in Australia, New Zealand, and Canada. Most critics agree that Marshall was wrong to give credence to the doctrine of discovery and correct to reinstate Native ownership in *Worcester*. Some have even called for the Supreme Court to overturn the *Johnson* decision. As Watson demonstrates, scholarly debates continue to untangle the contradictory terms and legal positions that have shaped Native land rights. Watson's impressive volume leaves the reader with the sense of how all US law, far from being historically determined, has resulted from decisions made by particular persons with their own sets of interests. Watson concludes that while the Illinois and Wabash Land Company disbanded in defeat, the Illinois and Piankeshaw tribes joined with the Kaskaskias and Weas to become the Peoria Tribe of Oklahoma, and advocates for Indigenous rights continue to fight against the doctrine of discovery today.

Gerald Vizenor and Jill Doerfler. *The White Earth Nation: Ratification of a Native Democratic Constitution*. Intro. David E. Wilkins. Lincoln: U of Nebraska P, 2012. ISBN: 978-0-8032-4079-7. 100 pp.

Anne Stewart, *University of Texas–Austin*

Simultaneously an argument and a cultural record, *The White Earth Nation: Ratification of a Native Democratic Constitution* is a uniquely constructed collection of documents including the full text of the proposed Constitution of the White Earth Nation, bookended by a series of essays produced by authors Gerald Vizenor and Jill Doerfler and consultant David E. Wilkins, all of whom were closely involved in the writing and ratification of the Constitution. For the purpose of this review, I follow David J. Carlson's review of the Constitution in *SAIL* 23.4 in referring to the Constitution itself as the CWEN. I refer to the subject of this review as *Ratification*, in order to distinguish it from the Constitution itself and to draw out the ways in which this collection is very much a narrative of public debate, political action, and, ultimately, democratic process.