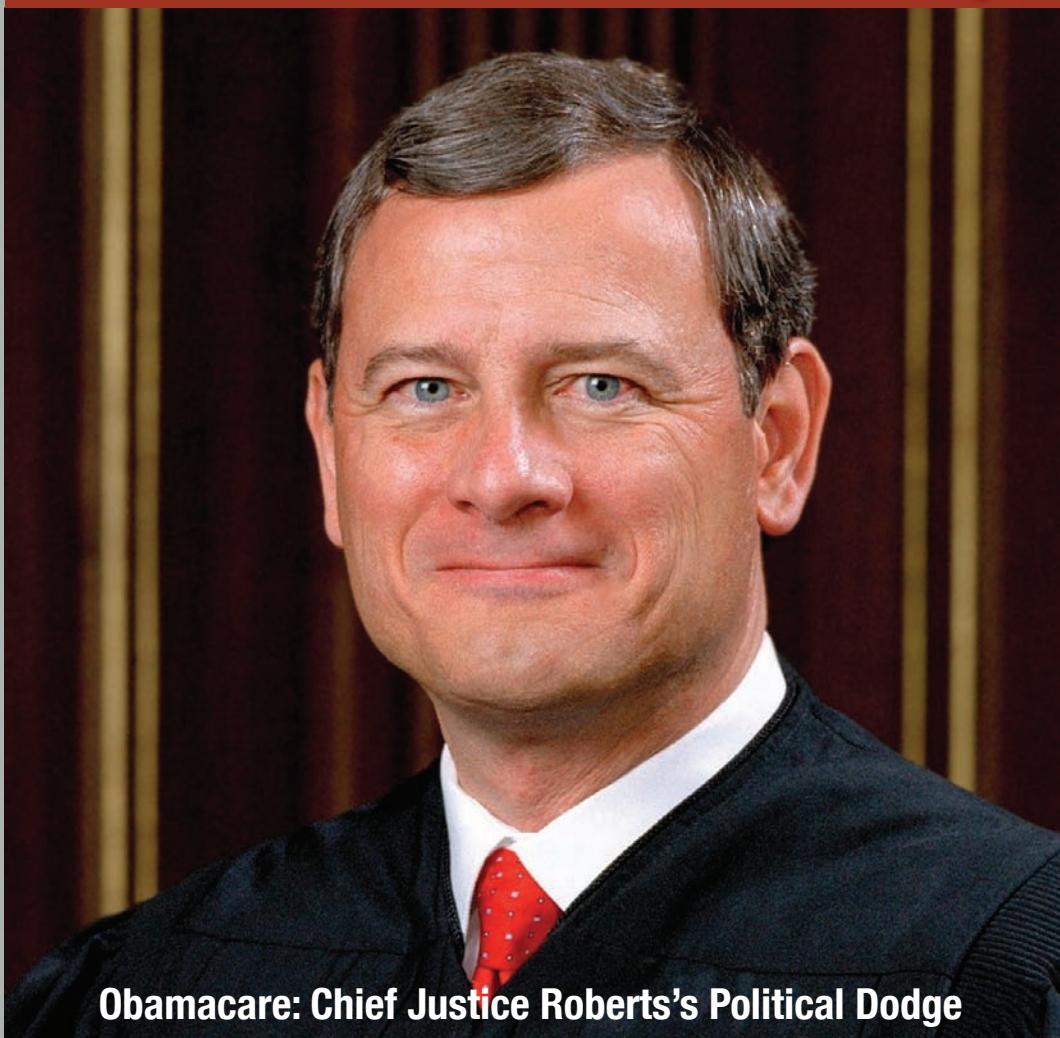


# The INDEPENDENT REVIEW

*A Journal of Political Economy*



VOLUME 18  
NUMBER 1  
SUMMER 2013

**Obamacare: Chief Justice Roberts's Political Dodge**



# The INDEPENDENT REVIEW

Volume 18  
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## BOOK REVIEWS

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◆ **The Invisible Hand in Popular Culture**

By Paul Cantor

Lexington: University of Kentucky Press, 2012.

Pp. 488. \$35.00.

“Television rots your brain.” That’s a refrain many of us grew up hearing, but it isn’t true. So suggests Paul Cantor in *The Invisible Hand in Popular Culture*, his second book about American film and television.

Cantor has become a celebrity within libertarian circles. He is Clifton Waller Barrett Professor of English and Comparative Literature at the University of Virginia and recently became a visiting professor at his alma mater, Harvard University. What’s remarkable about his appointment at Harvard is that it is in the Department of Government, not the Department of English. That doesn’t surprise those of us familiar with his breadth of knowledge and range of interests.

Recognized as an interdisciplinary scholar, Cantor attended Ludwig von Mises’s seminars in New York City before establishing himself as an expert on Shakespeare. Besides publishing extensively on literature of various genres and periods, he has been a tireless advocate for Austrian economics, even though Marxist theories and their materialist offshoots dominate his field. In 1992, the Mises Institute awarded Cantor the Ludwig von Mises Prize for Scholarship in Austrian Economics, and his work at the intersection of economics and literature resulted in *Literature and the Economics of Liberty* (Auburn, Ala.: Ludwig von Mises Institute, 2010), which he edited with Stephen Cox (while contributing nearly half of the book’s contents).

Like that work, *The Invisible Hand in Popular Culture* owes much to the theories of Friedrich Hayek, in particular the concept of spontaneous order. It is

a reflection of spontaneous order that the most beloved films and television shows did not spring perfectly from the mind of some genius working in complete isolation. Rather, they emerged out of the complex interactions between producers and consumers and the collaborative efforts of scores of diligent workers. Viewer feedback facilitated modifications and improvements to films and television, which advanced in meliorative stages.

Hayek discusses spontaneous order to refute the belief that government intervention and central planning ought to force order onto the marketplace. Cantor discusses it to refute the belief that artistic creation stands outside of commercial exchange. Examining depictions of freedom and coercion in a wide variety of films and television shows, he highlights the disparity between elitist and populist understandings of American culture, which he links to “top-down” and “bottom-up” models of order, respectively. His position is that the popularity and artistic appeal of film and television appear to be proliferating despite the objections and insults levied by the cultural elite, who, it should be added with not a little irony, nonetheless probably watch a great deal of television.

Against the cultural elite and their promotion of patrician—and mostly European—standards for the arts, Cantor maintains that the marketplace enables creative and experimental forms of expression that aren’t so different from earlier aesthetic media such as the serialized novel or popular plays. He reminds us that “nineteenth century critics tended to look down on the novel as a popular form, thinking it hardly a form of literature at all,” and adds that it “was not viewed as authentic art, but rather as an impure form, filled with aesthetically extraneous elements whose only function is to please the public and sell copies” (p. 7). This once “vulgar” medium has lately been celebrated as one of the highest and most impressive categories of art. The form and content of great American novels—whether by Twain or Cooper or Salinger or Pynchon—should remind us that popular novels have been elevated as canonical even though they have rejected the standards and conventions that highbrow critics insisted were necessary for a work to constitute “literature.” Twain and Cooper recognized that highbrow presuppositions and expectations for novels derived from influential Europeans, so they set out to forge a uniquely American literature free from Old World constraints.

Because film and television are commercial, they allow ordinary Americans (as opposed to academics and the cultural elite, including and especially the neo-Marxists) to determine aesthetic standards and trends by indicating what does and does not interest them. Authors and television producers, in turn, become responsive and attuned to the demands of their consumers; they become, in short, entrepreneurs who must struggle against the status quo, defy the odds, and push the limits of artistic acceptability.

The elite disparage this process and advocate for aesthetic criteria divorced from the tastes and pleasures of the general public. As Cantor explains, “Elitists who profess to believe in democracy nevertheless have no faith in common people to make sound

decisions on their own, even in a matter as simple as choosing the films and television shows they watch" (p. xiv). The elite would have film and television removed from the marketplace, but without the marketplace there would be no film or television.

Films and television shows might just become the masterpieces of the future; they might have already provided us with canonical "texts." It is too early to say whether they have contributed substance to what Matthew Arnold called "the best that has been thought and said." Greatness, after all, takes time to ascertain.

Orwell, Dr. Johnson, and Hume adhered to the "test of time" measure of greatness by which a work of art or literature is evaluated according to its ability to compete and survive in the literary marketplace over the course of generations. This measure requires the sustained consensus of consumers as opposed to the esoteric judgments of elite critics. A work's ability to attract vast and diverse audiences and to do so long after its production is what makes the work great.

It might seem odd to think of Cantor's subjects—*South Park* and *The X-Files*, for instance—alongside important literary works of the Western canon. And yet the groundlings who paid a penny to enter into the pit of the Globe Theatre, where they would stand and watch performances of Shakespeare's plays, probably didn't think they were witnessing greatness, either. Harold Bloom once said, "Cultural prophecy is always a mug's game," and Cantor is wise not to prophesy about the enduring merit of any films or television shows. Cantor's point is not that the products of film and television will be considered masterpieces one day, only that they might be.

For the record, I consider it extremely unlikely that *South Park* or *The X-Files* will achieve classic status, but I would not extend that speculation to such films as *Casablanca* or the *Star Wars* trilogy. Cantor himself takes pains to distinguish first-rate works from run-of-the-mill entertainment by invoking "traditional criteria for artistic excellence" (p. xxii). We should not take him to mean that film and television are media superior to that which came before them; instead, he considers them as substantially similar to their artistic antecedents, except that their features signal an evolution in artistic preferences. The allure of art comes not from its alienation from popular culture, but from its ability to incorporate popular culture in ways that do not impede its power to speak beyond its moment.

To be sure, American film and television have produced an overwhelming amount of trash, but so did novel serialization. Not all novelists who published their work in contiguous installments in magazines and periodicals held the stature of Charles Dickens or Henry James or Herman Melville. Cantor points out that we forget about the thousands of bad novels from the Victorian era and extol only around one hundred novels from that period, which supposedly represents a zenith in culture. Among the thousands if not millions of films and television shows that have been produced over the past century, perhaps a few will rival the works of Dickens, James, and Melville.

If Cantor weren't such a generous and careful scholar, he might have become the bête noire of sophisticates and lambasted in the pages of *The New Criterion*

for his embrace of the purportedly lowbrow. His command of economics and literary history, however, has spared him from such condemnation and even gained him a devoted following. To do justice to his latest book would require a more comprehensive treatment of his arguments about the figure of the “maverick” in film and television or about the value of collaborative work and coauthorship in generating exceptional products. Yet these arguments demand more attention than a review can give.

The incomparable Cantor has blessed the libertarian movement with a literary voice. He has expanded the study of Austrian economics into the fields that need it most. He himself is a maverick, reading and writing industriously to break up the habits of thought and monopolies on ideology that mark literary scholarship. Would that we had more Cantors to show us how literature flowers when freedom flourishes. There is hope in the idea that artists can turn to the market to cultivate their talents and supply us with the arts we demand. No English department or cultural guardian can rob us of the entertainment that we enjoy.

ALLEN MENDENHALL  
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♦ **What Money Can't Buy: The Moral Limits of Markets**

By Michael J. Sandel

New York: Farrar, Straus and Giroux, 2012.

Pp. 244. \$27.00 cloth.

The conjunction of a stubbornly persistent economic recession, an apostatizing statement by a former Federal Reserve chairman claiming that financial markets' ability to self-correct may have been overestimated, and a resurgent interest in progressive social policies has caused scholars across the board to reevaluate the relative strengths and weaknesses of the market process. Much of the current empirical work is aimed at designing more efficient market regulations. A parallel effort is given both to reconsidering the morality of the market process itself and to asking whether society's broad reliance on markets represents an appropriately moral social choice. If the market process stumbles on moral grounds, then the way will be eased for more progressive regulation of markets and of social institutions generally en route to creating an ostensibly more perfect—albeit still illusory—concept of social justice.

Joining the recent literature on markets and morality is the latest book by the popular philosopher Michael Sandel, entitled *What Money Can't Buy: The Moral Limits of Markets*. Sandel considers whether markets and market values have come to dominate aspects of life where morally they don't belong. Are there, in other words, some things that money can't—and furthermore shouldn't—buy?

This book rises on two legs. One is fairness, arguing that economic inequality causes money and markets to matter more now than in the past. The second leg, which borrows tacitly from Kant, argues that valuing certain goods in money terms corrupts their nature by depriving them of some essential dignity. Sandel acknowledges markets' ability to allocate goods efficiently, but he argues that efficiency entails morally corrosive and corrupting social costs: "we corrupt a good, an activity, or a social practice whenever we treat it according to a lower norm than is appropriate to it" (p. 46). He offers numerous examples of activities that were once guided by long-standing social norms but recently have become infused with market values. He questions throughout whether this truly is the way we want to live.

Ostensible examples of moral corruption fall under four heads: (1) market opportunities for buying our way out of public queues, where earlier norms obliged everyone, regardless of social status, to wait their turn; (2) incentive payments that displace voluntary cooperation and that otherwise compensate individuals for behaving as they ought to anyway (Sandel's consideration of "fines versus fees" coincidentally brings to mind the reviled play-or-pay provision of Obamacare); (3) insurance schemes that arguably have evolved into open gambles involving life and death hedges; and (4) programs that unabashedly award public and private honors in exchange for cash. These examples conceivably represent a coarsening of American culture, although compelling efficiency arguments can be raised in the defense of each, as Sandel candidly acknowledges. The book therefore is asking us to consider whether the efficiency gains created by the intrusion of market values outweigh the costs imposed on the moral sensibilities of society's most philosophical critics. Put differently, the question is, How much ought we be willing to pay for the opportunity to live in a kinder, gentler, and somewhat less prosperous social setting? The answers are neither obvious nor unambiguous.

The book's most tantalizing chapter explores "how markets crowd out morals" (pp. 93–130). The examples here, as elsewhere, are both interesting and provocative. The key principle concerns the relationship between the market process and social signaling (p. 101). Mankind has evolved as a eusocial species that instinctively and rationally incurs great expense to signal trustworthiness and cooperative intentions. These signals must be costly in order to be credible, and the wealth transfers they entail are easily and often mistaken for pure, irrational, moral altruism of the sort Sandel prizes. Signaling breaks down, however, when individuals have the option of behaving mercenarily—as, for example, when blood can be either donated or sold and when charitable contributions can be solicited either by volunteers or by paid workers. Signaling is impaired in these cases because the underlying message is ambiguous. The upshot, as shown by one of the cited studies, is that activities that can be performed *only* on a voluntary basis may be more productive than activities that can be performed either for no cost voluntarily or for compensation. The difference between productivity levels is a rough measure of the signaling value that is lost to "marketization." Destroying the signaling potential

of particular activities by commercializing them is hardly the end of the world, however, because signaling occurs in myriad ways.

Unfortunately, neither Sandel nor the authorities he cites fully comprehend the nature of this signaling process. As a consequence, the observed differences in productivity are attributed erroneously to a loss of “altruism.” Sandel concludes that “ethical behavior is a commodity that needs to be economized” (p. 126), and he quotes the distinguished economist Kenneth Arrow in support: “We do not wish to use up recklessly the scarce resources of altruistic motivation” (p. 127). He relies similarly on the economist Lawrence Summers, who believes that “[w]e all have only so much altruism in us. Economists like me think of altruism as a valuable and rare good that needs conserving. Far better to conserve it by designing a system in which people’s wants will be satisfied by individuals being selfish, and saving that altruism for our families, our friends, and the many social problems in this world that markets cannot solve” (p. 130). Scarcity, of course, constrains benevolent behavior whatever the motivation, but this is a different matter than averring, as Arrow, Summers, and Sandel do, that the quality of “altruism” is strained in other ways by overuse.

The book concludes with a cascade of normative moral implications. To wit:

[O]nce we see that markets and commerce change the character of the goods they touch, we have to ask where markets belong—and where they don’t. . . . For fear of disagreement, we hesitate to bring our moral and spiritual convictions into the public square. But shrinking from these questions does not leave them undecided. It simply means that markets will decide them for us. . . . Our only hope of keeping markets in their place is to deliberate openly and publically about the meaning of the goods and social practices we prize. And so, in the end, the question of markets is really a question about how we want to live together. Do we want a society where everything is up for sale? Or are there certain moral and civic goods that markets do not honor and money cannot buy? (pp. 202–3)

These statements raise a collateral moral issue that parallels Sandel’s inquiry regarding “how markets crowd out morals.” The pronouns *we* and *our* strongly imply the desirability of government action to compel particular forms of social behavior. Some inquiry into how *government* “crowds out morals” is therefore both warranted and expected. None, however, is provided. The point to be taken is that government, by imposing social norms that lack moral universality, absolves individuals of all moral obligations other than a duty to obey the law. Government unavoidably crowds out moral behavior when it prescribes a priori which social relationships are to be left to the market process and which are to be withheld from it. The moral consequences are observable, for example, in the banning of

tobacco use in public places. The philosopher Adam Seligman notes that smoking “was no longer something to be negotiated by the partners to the interaction but was now solely the function of legal and abstract dicta. Where I was legally prevented from smoking, I did not smoke, but where it was legally permitted I stopped thinking to ask people if it bothered them. If I could smoke, I did. I was no longer negotiating the boundaries of acceptable behavior” (*The Problem of Trust* [Princeton, N.J.: Princeton University Press, 1997], p. 173). Readers might be disappointed that Sandel does not explore the crowding out of morals by government in this manner.

The slope of Sandel’s book is at once seductive and slippery. Social choices involving the scope of markets and market values require more comprehensive thinking than this book’s cursory analysis delivers.

JAMES A. MONTANYE  
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♦ **Buying America from the Indians: *Johnson v. McIntosh* and the History of Native Land Rights**

By Blake A. Watson

Norman: University of Oklahoma Press, 2012.

Pp. xvi, 494. \$45.00.

The contested issue of Indian land rights has generated a vast outpouring of scholarship in recent years. With *Buying America from the Indians: Johnson v. McIntosh and the History of Native Land Rights*, Blake A. Watson has enriched this literature with a thoughtful, if somewhat problematic, account of Chief Justice John Marshall’s seminal opinion in *Johnson v. McIntosh* (21 U.S. 543 [1823]). Writing for a unanimous Supreme Court, Marshall established three fundamental principles: (1) that by virtue of discovery, title to land in America passed to the European powers and eventually to the United States; (2) that the discovering powers also obtained the exclusive power to acquire land from the Indians; (3) that the Indians were “the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it” (at 574).

The last principle gave rise to the novel concept of Indian title as a limited right of possession, subject to the rights of ownership and preemption in the United States. Marshall only half-heartedly defended the doctrine of discovery and acknowledged that the doctrine was inconsistent with the natural-law right of ownership. However, he maintained that the history of America “proves, we think, the universal recognition of these principles” (at 574). The tone of his opinion suggests that Marshall, despite some sympathy for the plight of the Indians, was resigned to what he perceived to be a fait accompli. In *Johnson*, he seemingly achieved a compromise result,

rejecting the contention that Indians had no rights at all in land, but denying them full ownership, which might have compromised many land titles held by settlers in the western states and territories. The upshot was that Indian land rights were inferior to the general pattern of fee-simple ownership for non-Indians. The precise nature of Indian title remains a topic of debate to the present.

Watson discusses at length the tangled background of Anglo-American attitudes toward Indian land rights, noting the existence of a wide range of views. As early as 1632, for instance, Roger Williams insisted that the land belonged to the Indians and must be purchased. He questioned the efficacy of royal charters to dispose of land in North America. Many colonists in fact purchased land from Indians, but this practice may have been dictated as much by a desire to avoid costly conflicts as by an acknowledgment that Indians had legal title. Given the ambivalent record, Watson makes a strong argument that Marshall's assertion of "the universal recognition" of the discovery doctrine is inaccurate. Although the discovery doctrine was certainly advocated on a regular basis, it was never the sole view regarding Indian land rights. Ironically, as in *Johnson*, land speculators, anxious only to obtain clear title to Indian land for the purpose of resale, were prominent among those contending that Indians held and could sell fee-simple title.

The *Johnson* case turned on competing land titles. Watson gives particular attention to transactions in 1773 and 1775 by two Indian tribes that sold huge tracts of land in present-day Indiana and Illinois to private land companies, which later merged. The plaintiffs, Joshua Johnson and Thomas Grahame, were grantees of the land companies. The United States acquired the same tract thereafter by treaty with the same tribes and resold it to individuals, including William McIntosh. Watson details the united land company's persistent, if ultimately unsuccessful, efforts to gain compensation for the loss of the land it claimed to own by virtue of the prior titles. After numerous petitions to Congress failed to secure any redress, counsel for the land company arranged a contrived lawsuit in federal court based on diversity of citizenship. The lawyers recruited McIntosh as a cooperative defendant and even paid his attorneys. The company sought judicial confirmation of its title in a bid to strengthen the case for compensation. Large sums were potentially at stake, as evidenced by the fact that such prominent attorneys as Daniel Webster and Robert Goodloe Harper argued for the land company in the Supreme Court.

Marshall's affirmation of the exclusive power of the United States to acquire Indian title doomed the claimants in *Johnson*. The doctrine of preemptive right proved to be a two-edged sword regarding Indian land rights. On one hand, it offered protection against aggressive land companies that might engage in fraudulent practices to obtain land. Thus, it eliminated a fertile source of disputes. On the other hand, recognition of a preemptive right in the federal government denied Indians an opportunity to consider competing offers and bargain for higher prices to relinquish their occupancy rights. (See Eric Kades, "The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands," *University*

of *Pennsylvania Law Review* 148 [2000]: 1108–131.) Of course, nothing in *Johnson* required Indians to sell their title on any terms. Over the course of the nineteenth century, however, as the population of tribes declined and their military threat diminished, *Johnson* facilitated the wholesale purchase of Indian titles by the United States at minimum prices through a series of coerced and one-sided treaties. The voluntary nature of many transactions was simply a fiction.

Watson maintains that *Johnson* has had a lasting and deleterious impact on Indians' legal status. It is debatable, however, whether the *Johnson* case concerned with land titles really laid the basis for diminished tribal sovereignty and the plenary power doctrine. Moreover, Marshall's opinion compared Indian title to a leasehold and spoke largely in terms of purchasing the right of occupancy. During the nineteenth century, the Supreme Court rejected the notion that the federal government could take Indian title without the payment of compensation. Possessory interests are a form of property entitled to protection under the Fifth Amendment. The dubious decision by the Warren Court in *Tee-Hit-Ton Indians v. United States* (348 U.S. 272, 279 [1955]) that Indian title is "not a property right" and may be terminated "without any legally enforceable obligation to compensate the Indians" rested on the erroneous premise that Indian title was simply "permission from the whites to occupy" (at 279). This unfortunate conclusion is a misreading of *Johnson* and cannot be blamed on the property-conscious Marshall. Instead, it reflects the Warren Court's general disinterest in property owners' constitutional rights. (See Richard A. Epstein, "The Takings Jurisprudence of the Warren Court: A Constitutional Siesta," *Tulsa Law Review* 31 [1996]: 643–76.)

In line with much of the current scholarship, Watson is no fan of *Johnson v. McIntosh*. Adopting an advocacy role, he calls for repudiation of both *Johnson* and the discovery doctrine. But his arguments raise a number of troublesome issues. He never explores the effect of such an overruling of a long-standing rule. Would it be purely symbolic? Or would it open the floodgates for prolonged and divisive litigation? Even more vexing is Watson's endorsement of supposed international law norms as a basis to overturn the discovery doctrine. In recent years, scholars on the political left have developed an interest in pushing foreign sources of law upon American courts. Appeals to malleable and elite-framed international norms, many invented in the post–World War II period, seek to trump the unique U.S. constitutional tradition and import extensive social welfare policies. In addition, one might well question whether United Nations declarations, pronouncements of academic symposia, or resolutions by church groups constitute statements of international law. After all, the supporters of these resolutions likely have political agendas and do not have to bear the consequences of the actions they promote. (See Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* [Cambridge: Cambridge University Press, 2004], pp. 341–58.)

Watson might profitably have given more attention to the political context in which *Johnson* was decided. The idea that Indians enjoyed fee-simple ownership

of their land had been weakened by a series of events in the late eighteenth century. Among other things, most Indians had allied with the British during the War of the Revolution and were thus on the losing side. The victorious colonists began to see the conflict as in part a war of conquest. The blunt fact is that Marshall and his colleagues were circumscribed by the political realities of the day. It is instructive to recall that Marshall's defense of Indian sovereignty in *Worcester v. Georgia* (31 U.S. 515 [1832]) was ineffective and did not halt the Jacksonian policy of Indian removal. That sad episode made clear the sharp limits on federal judicial power. In fact, the outcome in *Johnson* was congruent with the era's prevailing legal opinion. As Stuart Banner points out, "In the American legal culture as of 1823, Marshall's conclusions were not surprising" (*How the Indians Lost Their Land* [Cambridge, Mass.: Harvard University Press, 2005], p. 183).

Watson similarly should have considered how radically different conceptions of land ownership and use may have informed *Johnson*. After brief experiments with communal property, the English colonies adopted the practice of granting land to individuals in fee simple. Such ownership entitled the title holder to develop the tract, to maintain exclusive possession, and to treat it as a commodity for purposes of sale. Settlers typically enclosed the premises, plowed fields, and introduced domestic animals. In marked contrast, Indian land was held by a community and shared by tribal members. Land, valued in large part for hunting, was not enclosed. This lack of individual rights, coupled with apparent underdevelopment as judged by European standards, could well have made it more difficult for the European settlers to conceive of Indians as owners rather than mere occupants. To further complicate matters, land claims by various tribes were vague and overlapping and gave rise to frequent intertribal conflict.

Notwithstanding these reservations, this readable book contains a wealth of information about the significant *Johnson* case and the extinguishment of Indian land claims. It is a worthy addition to the scholarly dialogue on the contested history of the dispossession of the Indians of North America.

JAMES W. ELY JR.  
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