Daniel Webster was undoubtedly at ease when he walked through the short hallway leading to the United States Supreme Court chamber, then in the basement of the Capitol. There were, after all, several reasons for serenity as the forty-one-year-old lawyer-politician arrived to hear the Court's decision regarding Indian land rights in Johnson and Graham's Lessee v. McIntosh.

First of all, he was in familiar surroundings. Prior to Johnson, Webster had appeared in thirty-one cases before the Court. His first three Supreme Court cases had been argued in this room, located beneath the Senate chamber. When the British burned the Capitol in 1814, the Court had been compelled to meet elsewhere, including a cramped committee room described as "little better than a dungeon." Webster argued eight times there, including the case that gave him a national reputation: Dartmouth College v. Woodward.

Since February 1819, however, Webster had exhibited his oratorical skills in the courtroom he was now entering. The prominent architect Benjamin Latrobe had rebuilt the low-arched vaulted ceiling, which was supported by massive pillars. The slightly elevated mahogany desks of the seven justices were situated below three windows on the east wall, which provided insufficient light. In the back of the semicircular room was the plaster relief Justice, portraying a woman holding scales and a sword. To some observers, the room was splendid; to others, it had a "cellar-like aspect." One visitor remarked that Justice lacked the traditional blindfold because "it was too dark for her to see anyway."
Webster’s preeminent status was the second reason for his calm demeanor as he watched the justices don their black gowns. To be sure, there was a great deal at stake in this case. Johnson, Graham, and the other shareholders of the Illinois and Wabash Land Company were asking the Supreme Court to uphold private purchases, made in 1773 and 1775, of immense tracts of Indian land. On the eve of oral arguments, a lawyer for McIntosh exclaimed at a White House dinner that “sevent[y] millions of acres of land are in controversy.” Yet no constitutional provision was at issue, not the Contract Clause, as in *Dartmouth College*, or the Necessary and Proper Clause, as in *McCulloch v. Maryland*. An unfavorable decision in *Johnson v. McIntosh* would not affect Webster’s position as the unquestioned head of the Supreme Court bar.

Nevertheless, the Massachusetts congressman had done his best in a difficult case. On Saturday, February 15, Webster had endeavored to convince the five justices present—John Marshall, William Johnson,
Brockholst Livingston, Gabriel Duvall, and Joseph Story—that the Indians
had lawfully deeded the lands at issue. According to one observer, George
Rodney of Delaware, Webster “went into a discussion upon the origin
of property and managed it skilfully for a bad cause.” Rodney surmised
that the Court “will doubtless [be] against the grant.” Edward Ingersoll, a
shareholder in the Illinois and Wabash Land Company, expressed his de-
sire “to sell for present profits, [as] I calculate on an unfavorable decision.”

Webster settled himself as Marshall prepared to deliver the opinion.
Two Supreme Court justices—Bushrod Washington and Thomas Todd—
had not participated in the case. Justice Story had been absent on the
third day of arguments, either “from indisposition or ill will.” Webster
opened for the plaintiffs, and his co-counsel, Robert Goodloe Harper
of Baltimore, concluded the case. Henry Murray and William Winder
represented McIntosh. Both counsel and the audience awaited the Court’s
decision. There were no Indians in attendance.

John Marshall, age forty-seven, a Federalist from Virginia and a propo-
nent of a strong national government, began as follows: “The plaintiffs in
this cause claim the land . . . under two grants . . . by the chiefs of certain
Indian tribes, constituting the Illinois and the Piankeshaw nations; and
the question is, whether this title can be recognised in the Courts of the
United States?” The chief justice then proceeded to address the source
of law that would govern the Court’s decision: “It will be necessary . . . to examine, not singly those principles of abstract justice . . .; but those
principles also which our own government has adopted in the particular case,
and given us as the rule for our decision.”

This did not sound promising. The rights of Indians to own property
and to transfer title were natural rights in the view of the plaintiffs, based
on the principles of “abstract justice” that Marshall was subordinating to
the principles “our own government has adopted.” But which principles
did Marshall have in mind? The chief justice chose to emphasize the right
of discovery: “This principle was, that discovery gave title to the government
by whose subjects, or by whose authority, it was made, against all other
European governments, which title might be consummated by posses-
son. . . . Those relations which were to exist between the discoverer and
the natives, were to be regulated by themselves.”

Webster was familiar with Marshall’s circuitous reasoning. After de-
claring as determinative the principles adopted by the government, Mar-
shall turned to the doctrine of discovery—a doctrine of *international* law
that gave the discovering nation rights "against all other European governments." International law, however, should not have determined the validity of the deeds held by the Illinois and Wabash Land Company, as Marshall seemingly acknowledged when he stated that the relations between the discoverer and the Natives "were to be regulated by themselves." Marshall had come full circle, but he had not yet provided the answer. Would the Supreme Court uphold the Illinois-Wabash purchase? In the following passage, Marshall denied the right of Indians to convey legal title to the lands they occupy:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.5

Although eighty-two paragraphs were to follow, the fundamental question was answered: the 1773 and 1775 sales were invalid. The United States, in subsequent treaties, obtained a complete title to the lands at issue, which was thereafter transferred to William McIntosh. The shares in the Illinois and Wabash Land Company were worthless.

The outcome in Johnson v. McIntosh most likely did not upset Daniel Webster, who made no mention of the decision in his correspondence. After fulfilling his role, Webster lost interest in the proceedings. During the next day's argument he sent John Quincy Adams an extract of a letter stating that Adams "is gaining fast upon the affections of the people."6 Thus, while the fate of the Illinois and Wabash Land Company was before the Court, the outcome of the 1824 election was on the mind of Daniel Webster.

Robert Goodloe Harper was also on familiar ground as he listened glumly to Marshall's depiction of land law in America "from its discovery to the present day." The fifty-eight-year-old elder statesman of the Federalist Party had appeared in more Supreme Court cases than any other person between 1800 and 1815 and was considered one of the great lawyers of the era. Most notably, Harper had successfully contended, in Fletcher v. Peck, that a Georgia statute had impaired vested property rights in violation of the Contract
Clause. Typically dressed in a dark blue outercoat, buff waistcoat, and polished boots, Harper was viewed by many as a "dandy in dress" and "in some degree artificial." At the same time, contemporaries praised him as a gifted debater who possessed a first-rate command of the law.

Harper, like Webster, would end the day with his reputation intact. As the chief justice exclaimed that the 1763 Royal Proclamation constituted "an additional objection to the title of the plaintiffs," Harper may have reacted by reflecting on his military, political, and legal careers. At age sixteen, he had served during the Revolution under General Nathaniel Greene. When the British attacked Baltimore in 1814, Harper was "in the hottest of the fight" and commanded troops in the battle at North Point. At this time he attained the rank of major-general and was customarily addressed as "General Harper" for the rest of his life.

His political career had two phases, beginning as a Republican from South Carolina and ending as a Federalist from Maryland. From 1794 until 1801 Harper served as chairman of the House Committee of Ways and Means, supported the alien and sedition laws, and voted for Aaron Burr in the election of 1800. After moving to Baltimore, Harper was elected to the Senate in 1816, but he served less than a year due to the press of private concerns, not least his role in the Illinois and Wabash Land Company. In both 1816 and 1820 he received consideration as the Federalist candidate for vice president.8

Harper's legal career blossomed in Baltimore, where he opened a law office in 1799. Aside from Fletcher v. Peck, Harper's most celebrated achievement was his speech of seven hours made during the 1805 impeachment trial of Justice Samuel Chase. His abilities were unquestioned, and Edward Ingersoll informed a fellow shareholder that Harper's argument in Johnson "has been everything that could be desired; full, powerful and elegant."9 No one would dispute that Harper, like his co-counsel Daniel Webster, had done his best under discouraging circumstances.

There was one critical difference, however, between the two men: Robert Goodloe Harper was a shareholder in the Illinois-Wabash Land Company. As a young man Harper had developed an interest in western lands and invested in several unsuccessful ventures. For the remainder of his life the desire for wealth and the harsh reality of debt were constant companions. By retiring from Congress and moving to Baltimore, he had hoped not only to establish a lucrative law practice but also to wed Catherine Carroll, the daughter of one of the richest men in America.10
Charles Carroll of Carrollton initially opposed the match but eventually consented. During the course of their marriage “Kitty” received eighty-seven thousand dollars from her father, yet her husband had outstanding single debts as large as ten thousand dollars.\textsuperscript{11}

The Illinois-Wabash purchase beckoned as the means to a lavish, debt-free lifestyle. The primary investors were from Pennsylvania and Maryland, the two states where Harper had spent much of his adult life. In the 1790s he met Robert Morris and John Nicholson of Philadelphia, who both purchased shares in the Illinois and Wabash venture. He may also have had dealings with Supreme Court Justice James Wilson, who served as the company’s president. Harper’s subsequent involvement with the Illinois-Wabash purchase was likely sparked by the presence in Maryland of his father-in-law and other prominent shareholders, such as Governor Thomas Johnson and Supreme Court Justice Samuel Chase. By the time he argued \textit{Fletcher v. Peck} in 1809, Robert Goodloe Harper was spearheading efforts to obtain confirmation of the 1773 and 1775 sales.

Perhaps his ambitious nature caused Harper to overlook the fact that the company’s claims had been repeatedly rejected for over forty years. Harper himself crafted memorials in 1810 and 1816 that failed to persuade Congress. Only one alternative remained: litigation in the federal courts. When Illinois statehood in 1818 was followed by the death of Thomas Johnson in 1819, the final option was at hand. Largely stage-managed by Harper, litigation was commenced by Johnson’s heirs in order to confirm their right to lands purchased in 1775 from the Piankeshaws.

Because the stakes were so high, and possible fortunes so immense, Harper and his fellow shareholders convinced themselves that they had a chance. Harper maintained in 1810 that the claim “can be sustained in a court of Law,” and a shareholder noted in 1811 that “Mr. Harper is as sanguine as a reasonable person can probably be.” Three days after oral arguments concluded, Harper ignored prevailing sentiment and discussed the measures to be taken “should we obtain a favourable decision.”\textsuperscript{12} On Friday, February 28, 1823, in the basement chamber of the Supreme Court, Robert Goodloe Harper finally realized there would not be “a favourable decision” in the matter of the Illinois-Wabash purchase.

\textit{Johnson v. McIntosh} offers divergent rationales for its conclusion that Indians are mere occupants of their lands and thus “incapable of transferring the
absolute title to others.” Marshall vacillates between discovery (“discovery gave exclusive title”) and conquest (conquest “gives a title which the courts of the conqueror cannot deny”), yet acknowledges the “pretension of converting the discovery of an inhabited country into conquest.” The Court also concludes that the Virginia “sea to sea” royal charter and the 1763 Royal Proclamation divested the Illinois and Piankeshaws of their rights of proprietorship. On one hand, Marshall defends the result as supported by the “character and habits” of the Natives, the “superior genius” of the Europeans, and the “soundest principles of wisdom and national policy.”

On the other hand, he views the matter as a fait accompli, declaring that “however this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.”

Given such conflicting signals, it is not surprising that Johnson has been characterized as “one of the most misunderstood cases in the Anglo-American law.” Although the decision has been defended as “a brilliant compromise” that “poses little or no restriction on the tribes,” most commentators have criticized Johnson v. McIntosh and its endorsement of the doctrine of discovery. Robert Williams, Jr., characterizes Marshall’s opinion as an “abusive, anachronistic and racist vision of Indian status and rights.” Steven Newcomb posits that Johnson was premised on “a distinction between paramount rights of ‘Christian people’ and subordinate rights of ‘heathens’ or non-Christians.” The Supreme Court’s adoption of the doctrine of discovery, Lindsay Robertson points out, “led to political catastrophe for Native Americans.”

Maurice Baxter, a biographer of Daniel Webster, characterizes Johnson v. McIntosh as “a hopeless case from the beginning,” and describes the legal dispute as follows: “Did the Indians have such a title to their lands that they could sell to private individuals? And if so, was the sale legal in the face of the British Proclamation of 1763 and of subsequent Virginia legislation prohibiting these transactions? Webster elaborately maintained the affirmative to both questions. But the whole history of Indian relations was against him, and a decision in his favor would have caused a more chaotic situation than one could imagine.” Baxter overstates Webster’s role. For Daniel Webster, Johnson was just another case, a chance to earn a fee. It was not one
of the cases that defined him as the "Defender of the Constitution." The legal positions Webster "elaborately maintained" before the Court were based on arguments and theories that were crafted by others.

For Robert Goodloe Harper, however, *Johnson v. McIntosh* was not just another case: it represented the culmination of years of effort to confirm—and profit from—the Illinois-Wabash purchase. Harper devoted a considerable portion of his legal career to the issue of Indian land rights. His efforts, of course, were not expended on behalf of Indian tribes but rather for the benefit of private speculators who purchased Indian lands.

For John Marshall, the litigation provided an opportunity to legitimize the process of land acquisition in the United States. Marshall’s opinion defies succinct appraisal, but the central message of *Johnson v. McIntosh* is that "discovery" divested Indians of "their power to dispose of the soil at their own will, to whomsoever they pleased." Baxter asserts that "the whole history of Indian relations" led inexorably to this result, and Marshall justified his holding on the basis of "the actual condition of the two people." These statements are misleading: actual practices varied regarding the sale of Indian lands to private individuals, and the result in *Johnson*—while predictable—was not foreordained.

For the Illinois and Piankeshaw Indians, the result in *Johnson* had no direct impact. The tribes had twice sold their rights to the lands at issue; first by private sale, second by treaty. On February 28, 1823, the Illinois and Piankeshaws no longer inhabited their historic homelands. They had been removed to Missouri and would be removed again, to Kansas, and ultimately to the Indian Territory. In the process their separate identities were lost; but their descendants—now members of the Peoria Tribe of Oklahoma—remain.

For all Indians, the legacy of *Johnson v. McIntosh* continues to have a significant impact. The litigation is inextricably connected to the prevailing legal view of Native land rights in America. The right of Indians to their lands—to possess, use, exclude, own, and sell—was "one of the most intensely contested issues in the life of the early Republic." The historical process of buying America from the Indians has been largely concluded, but the legitimacy of America's conception of Indian land rights persists as one of the most important issues in Indian country and federal Indian law.