Justice Delayed, Justice Denied, Justice Redeemed? The Unconstitutionality of Cherokee Nation v Georgia

The first effort on the part of the United States to promote democracy among a foreign people by more than the authority of example, and the persuasiveness of idealistic rhetoric, was horrific in its outcome. Writing to the Cherokees in 1796, President George Washington urged that they study with the advice and material assistance of a federal agent, "those things which are found good by the white people, and which your situation will enable you to adopt." He particularly emphasized intensive farming, but also mentioned the workings of the American government and stressed that "the experiment made with you may determine the lot of many nations. If it succeeds, the beloved men of the United States will be encouraged to give the same assistance to all the Indian tribes within their boundaries."[1] Washington was convinced that the security and economic interests of the United States and the Cherokee nation alike would be best served by the progress of civilization among both. In this he was expressing the gentler side of a harsh tradition, perhaps first articulated among the English in 1583 by the naval commander Christopher Carleill, which spoke of the alleged desirability of "reducing the savage people to Christianity and civility."[2]

The extraordinary renaissance that the Cherokees came to enjoy in the early nineteenth century was due overwhelmingly to their own efforts and creativity, but in decisive part to American civility as well.[3] By 1826, Elias Boudinot, soon to become the editor of a bilingual Cherokee and English newspaper could declare: "I can view my native country, rising from the ashes of her degradation, wearing her purified and

beautiful garments, and taking her seat with the nations of the earth."[4] The horrific end of this Cherokee renaissance, at the hands first of the state of Georgia and then of the federal government, is testimony to the incivility, and indeed the grotesque brutality, of which America has proved capable.

After stunning achievements on the part of the Cherokee nation—including the development of a written language, a written constitution, an elected principal chief, an elected bicameral legislature, a system of courts, and the adoption of intensive agriculture both for domestic use and for export, including, unfortunately, agriculture that relied on slave labor—the first American effort to promote democracy among a foreign people was repudiated. It was replaced by what was then called "removal"—an idea that in practice involved a forced march of the Cherokee nation, and their Indian neighbors, from the Southeast to what would eventually become Oklahoma, a march that cost the lives of perhaps a third of those making the journey along what became known as the Trail of Tears and Death.[5]

The fight against removal was a turning point both in American relations with American Indian nations, and in American politics and culture. And in some ways it was a very closely fought contest. The final vote on the "Removal Bill" in the House of Representatives in 1830 was 102 to 97. The heroes, villains, and arguments of that fight deserve to be remembered and their lasting influence better understood. The ascendancy of the pro-removal forces represented not only the repudiation of a previous policy, but a rejection of constitutional law and international law that continues to warp relations with the indigenous peoples of America to this day. The conflict involved a deepening of sectional and political antagonisms that had already flared up in the Alien and Sedition

Acts and, especially, in the Virginia and Kentucky resolutions with their articulation of a states' rights ideology.[6] If America could have coped better with the more extreme advocates of states' rights at this juncture, perhaps even the Civil War could have been avoided. The country divided largely along North - South lines on the question of removal and the North's defeat further diminished the moral authority of New England over the nation's character.[7] The ascendancy of the pro-removal forces hardened the racism in the nation's arteries by treating other peoples with novel brutality on grounds of race and by destroying the evidence of racial equality that Cherokee progress constituted. When it came to racist as opposed to economic assaults on the American union, the ideology of states' rights was in the ascendant in the 1830s.

Opposition to removal was the first in a series of mass mobilizations on behalf of social justice in the United States that have contributed to the emergence of what the contemporary philosopher Charles Taylor calls the modern moral order.[8] Even in defeat, as the historian Mary Hershberger has argued, opposition to removal contributed positively to the nation's politics by deepening the commitment to progressive reform, and sharpening the protest skills, of numerous activists who would go on to struggle for the abolition of slavery, and for women's rights, and other progressive causes.[9]

As Beriah Green, a prominent abolitionist, wrote of his friend and fellow abolitionist James Birney: "from the Indian to the Negro, the transition was easy and natural. He could hardly fail to see, when the wrong of the Indians had thoroughly aroused him, that the suffering of the Negro flowed from the same bitter fountain."[10] Harriet Beecher, the future author of *Uncle Tom's Cabin*, thrilled at the new world of political activity that her older sister Catherine inaugurated by launching the first national petition drive by

women. Addressed to "benevolent ladies of the United States," what came to be known as the Ladies' Circular urged both "prayers and exertions to avert the calamity of removal."[11] Promising that the circular was written and sent abroad solely by the female hand, it urged women to collective action: "Let every woman who peruses it, exert that influence in society which falls within her lawful province, and endeavour by every suitable expedient to interest the feelings of her friends, relatives, and acquaintances, in behalf of this people, that are ready to perish."[12]

The principles and aspirations of the path not taken—the path that a successful resistance to removal represented—still constitute a goal that beckons in our ongoing relations with the native peoples of America. These principles and aspirations are—to a considerable extent—those of the framers of our Constitution: principles and aspirations that were betrayed by the Supreme Court when the issue reached it in *Cherokee Nation v. Georgia* in 1831. The Supreme Court's decision in that case is at odds with the intentions of the framers of the Constitution and the "original meaning" of the text. In particular, it is at odds with the Constitution's provisions establishing that treaties are part of "the supreme law of the land" and that the Supreme Court has original jurisdiction in all cases arising under treaties.[13] And it is at odds with the democratic philosophy of law and sovereignty articulated by James Wilson—perhaps the most brilliant jurist among the framers—and with the requirements of international law, at least as far as those requirements can be identified through an examination of the legal positions articulated in the Congressional debate over the "Removal Bill" in 1830.[14] This Supreme Court decision is at the foundation of an entire system of jurisprudence—what the American

Bar Association calls "Federal Indian Law." The legitimacy and the legality of that system are open to doubt.

Any small "d" democrat repudiates the Supreme Court's decision in *Dred Scott v. Sandford,* in 1857, holding that "A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States."[15] The same repudiation should be directed toward the Supreme Court's decision in *Cherokee Nation v. Georgia* holding that "The Cherokee Nation is not a foreign state in the sense in which the term 'foreign state' is used in the Constitution of the United States."[16] And this for much the same reason: both decisions violate basic notions of equality and fairness that are intrinsic to America's deepest understanding of the country's Constitution and purposes. In both decisions, there was an attempt to change the meaning of a previously more inclusive term—"foreign state" or "citizen"—and on spurious grounds deny its applicability to those deemed inferior in an effort to deprive them of their constitutional rights. The American people are meant to be what Supreme Court Associate Justice James Wilson called "sovereigns without subjects."[17] No other philosophy of democratic sovereignty is persuasive. Government rests on the consent of the governed, and the Indian tribes have never consented to being governed by the United States. If we are to be true to our legal obligations we must reestablish a treaty making process with the native peoples and guide our conduct by our word as we have given it in our treaties.

Aspiring to an exclusive sovereignty for itself alone, the state of Georgia began to push for the "removal" of the Indians that it claimed were within its boundaries with novel aggression and violence in the 1820s. It engaged in an unconstitutional effort to

"extend," by state legislation, what its legislature claimed was Georgian sovereignty over Cherokee lands. "And be it further enacted," one Georgia law of 1829 read, "That after the first day of June next, all laws, ordinances, orders and regulations of any kind whatever, made, passed, or enacted by the Cherokee Indians, either in general council or in any way whatever, or by any authority whatever of said tribe, be, and the same are hereby declared to be null and void and of no effect, as if the same had never existed."[18] The constitutionality of Georgia's action was the substance of what was before the Supreme Court in *Cherokee Nation v. Georgia* in 1831, the substance that the court dodged addressing by claiming that the Cherokee Nation was not a foreign state and so did not have standing to sue the state of Georgia.

On 10 October 1998, an appeal of the decision in *Cherokee Nation v. Georgia* was argued before a group of Indian jurists taking the form of a Supreme Court of the American Indian Nations. The justices brought many laws to their bench—the laws and legal traditions they learned in American law schools, and the laws of their own nations. As that court's chief justice, Robert Yazzie, ruled: "We hold that the Indian Nations *within* (and not "of") the United States are nations and states…. We hold that Indian peoples have survived *as* Indians in communities, and they shall continue to do so in the future."[19] The present essay, informed by this ruling, and by the principles of international and constitutional law, and by the legal history and philosophy herein examined, may be considered as an appeal of the decision in *Cherokee Nation v. Georgia* to the American people.

Under both international law and American constitutional law, Cherokee territory was outside the jurisdiction of both the state of Georgia and of the United States. That

territory was guaranteed to the Cherokee nation by treaties with the United States whose very existence constituted recognition of the Cherokees' right to self-government, their right to their dominion. This right of indigenous nations to their dominion was explicitly recognized in international law as early as Bartolomé de Las Casas' writings against Spanish imperialism in the sixteenth century. In the midst of Charles V's empire, Las Casas publicly and persuasively argued that "war against the Indians, which we call in Spanish, *conquistas*, is evil and essentially anti-Christian.... war against the Indians is unlawful."[20] Pope Alexander VI could not have given dominion over the New World to Spain, Las Casas' argument implied, because the New World was outside of the Pope's jurisdiction; dominion there was in the hands of the Indian nations:

> The king of France does not pronounce sentence in Spain nor does the king of Spain dictate laws for France, nor does the Emperor himself, in his travels, use his imperial authority outside the borders of his empire. [In all these cases] there is a lack of that power and jurisdiction which in his indescribable wisdom the author of nature has prescribed within certain limits for each nation and prince so as to safeguard and preserve the common good of each. For this reason jurisdiction is said to be implanted in a locality or territory, or in the bones of the persons of each community or state, so that it cannot be separated from them any more than food can be separated from the preservation of life.[21]

In the United States in 1829 and 1830 the balance of public opinion was strongly opposed to Georgian aggression and to the "removal bill" in the Congress.[22] The lawyer and publicist Jeremiah Evarts was the principal leader of the opposition.[23] He succinctly stated the case in language that still carries great resonance:

> The people of the United States are bound to regard the Cherokees and other Indians, as *men*; as human beings, entitled to receive the same treatment as Englishmen, Frenchmen, or ourselves, would be entitled to receive in the same circumstances. Here is the only weak place in their cause. They are not treated as men; and if they are finally ejected from their patrimonial inheritance by arbitrary and unrighteous power, the

> people of the United States will be impeached and condemned for treating the Indians, not as men, but as animals.... In this matter, we cannot offer even the sorry plea of prescription in crime, as an extenuation of our guilt. The precedents, in our own country, are all against us. For two hundred years the Indians have been treated like other men, as to the acknowledgement of their rights and the interpretation of treaties made with them.[24]

Under the Constitution of the United States, the Cherokee nation had a right to sue the state of Georgia for its violations of their treaties with the United States. The fact that the Cherokee tribe had dominion should have sufficed for it to be seen as a foreign state in the sense of the Constitution and so possessed of this right. The Supreme Court's failure to so perceive it—to respect this dominion—was, to put it mildly, a serious injury to the Cherokee nation under both constitutional law and international law. A remedy for this injury, and for the subsequent injuries that have flowed from John Marshall's decision in *Cherokee Nation v. Georgia*, is long overdue. That decision was itself an act of aggression in international law and a violation of American constitutional law—an illegal effort to extend American jurisdiction over a foreign state in an attempt to deprive that state of its right under the Constitution to sue a state of the United States.

That all "a foreign state in the sense of the Constitution"[25] was to the framers was another state possessing dominion—and that the Indian tribes qualified as such—is clear from George Washington's successful appeal to the Senate of the United States in 1789 to establish the practice of ratifying treaties made with the Indian nations: "It doubtless is important that all treaties and compacts formed by the United States with other nations, whether civilized or not, should be made with caution and executed with fidelity."[26] The right of the Indian nations to their dominion was recognized explicitly by Thomas

Jefferson in unmistakable terms: "the Indian tribes possess entire and unlimited sovereignty as long as they chose to keep it, and this might be forever."[27]

For the framers, the treaties made by the United States with the Indian tribes were meant to be part of "the supreme law of the land,"[28] as binding upon the United States as any treaty with any European power. They were meant to be enforceable in the Supreme Court as against infractions by any state legislature. This was a matter of good faith with regard to the treaties the United States had made and anticipated making. Defending the Constitution in the Pennsylvania ratifying convention in 1787, James Wilson—who had served on the committee of detail in the constitutional convention—declared that: "This clause, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may."[29]

In *Cherokee Nation v. Georgia*, Marshall claimed that when "the term 'foreign state' is introduced [in the Constitution], we cannot impute to the [constitutional] convention the intention … to comprehend Indian tribes within it unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it."[30] In fact, a moment's reflection on why the framers granted foreign states the right to sue states of the United States will suffice to force precisely that construction. The intention was to improve the faith and credit that foreign nations could place in the United States to keep its word. It was a matter of virtue, honor, and a self-interest centering on the establishment of a new mechanism with which to contribute to prosperity, and to the maintenance of peace, by upholding established agreements and

resolving international controversies through the American judiciary. Wilson made this crystal clear in his remarks in the Pennsylvania ratifying convention.[31] Indeed Wilson—whom one may suspect on the warmth of his language to have been the principal author of this part of the Constitution—defended its purpose in his law lectures at the College of Philadelphia in 1790-1791 with particular enthusiasm: "What a beautiful and magnificent prospect of government is now opened before you! The sluices of discord, devastation, and war are shut: those of harmony, improvement, and happiness are opened! On earth there is peace and good will towards men!"[32]

It is joining in the bad faith of the advocates of Cherokee removal—who explicitly claimed in the debates in the Congress in 1830 that treaties with the Indian peoples were mere political expedients and that title rested on "discovery" and "conquest"[33]—to suggest that any nation with whom the United States had treaty relations was to be excluded from the use of this provision of the Constitution. Such exclusion was contrary to the framers' intentions. If the framers had wished to exclude the Indian tribes from the use of the Supreme Court, they would never have made treaties part of the supreme law of the land and never given the Supreme Court original jurisdiction in all cases arising under treaties. For them, if not for their successors, the treaties their country had made with the Indian tribes were meant to be worth the paper they were printed on. "And where is the authority, either in the constitution or in the practice of the government," as Supreme Court Associate Justices Smith Thompson and Joseph Story argued in their dissenting opinion in *Cherokee Nation v. Georgia*, "for making any distinction between treaties made with the Indian nations and any other foreign power?"[34]

The idea that the constitutional convention would not have acknowledged the right of an Indian tribe to sue a state of the United States is at odds with the evidence we have as to the intentions of the framers. Marshall, offering his opinion more than a generation after the founding, and after the relative military strength of the Indian tribes had declined precipitously, could claim that these nations should *not* be seen as "foreign to the United States."[35] The framers had no reason to doubt that the Indian tribes were foreign nations and would never have considered an appellation such as "domestic dependent nations."[36] They would have seen these tribes as sovereigns or dismissed them as subjects, but they would not have fashioned a compromise conception in which these tribes had treaty rights relative to the states but not the right to be treated as a foreign state—the position Marshall would eventually articulate in *Worcester v. Georgia* in 1832.[37]

The question, as the framers would have seen it, was: were treaties with the Indian tribes part of "the supreme law of the land," superior to anything in state constitutions or state laws? And the answer to that question would have been: yes. The campaign to suggest otherwise had not yet even begun in 1787. As late as 25 March 1825, the governor of Georgia would issue a proclamation warning that state's citizens from trespassing on Indian lands as the obligations of treaties that were the "supreme law" prohibited such trespass.[38] To the members of the constitutional convention who reflected on the question—and who did not share the states' rights prejudices of the later campaign against Indian rights—their affirmative answer would have been reinforced by the reflection that what was at stake was the word of the United States. It is true that there were some among the founding generation who maintained that the Indians were subjects and not sovereigns, but those who held such views were clearly in the minority

of the constitutional convention or the Indian commerce clause would have contained the same language to try to protect states' rights that the analogous clause had had under the Articles of Confederation.[39]

Article Nine of the Articles of Confederation read: "The United States, in Congress assembled, shall also have the sole and exclusive right and power of … regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own limits be not infringed or violated."[40] The language about "states' rights" in this clause was a legally meaningless attempt to modify the "sole and exclusive right and power" of the Congress without specifying the modification. It is conceivable that its intent was to assert some sort of claim of state sovereignty over the native peoples, but whatever its intent, in 1787, the constitutional convention simply deleted it. The convention dropped the problematic language dealing with the alleged "legislative right" of the states and gave to the Congress alone the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[41]

Here it may be helpful to remember the case against states' rights that James Wilson made to the constitutional convention on 8 June 1787:

> Among the first sentiments expressed in the first Cong^{s} one was that Virg^{a} is no more, that Mas^{ts} is no [more]. That P^{a} is no more &c. We are now one nation of brethren. We must bury all local interests & distinctions. This language continued for some time. The tables at length began to turn. No sooner were the State Gov^{ts} formed than their jealousy and ambition began to display themselves. Each endeavored to slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. Review the progress of the articles of Confederation thro' Congress & compare the first and last draught of it. To correct its vices is the business of this convention. One of its vices is the want of an effectual controul in the whole over its parts. What danger is there that the whole will

> unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?[42]

John Marshall's decision in *Cherokee Nation v. Georgia* effectively appeased the states' rights claims of the Georgians. Denying the Cherokee Nation the exercise of the rights it held under its treaties with the United States—and as a foreign state under Article 3, Section 2, of the Constitution—this decision made the Cherokees a juristic nonentity in the world of positive law. It made them a "ward" of the United States—and gave them the legal status of refugees in their own country. And it did the same to every other indigenous people as well. It was a brutal act of aggression on a par, and in its own way even worse, than Georgia's extension of its jurisdiction over Cherokee territory. In fact, it was an extension in the American collective self-consciousness of American jurisdiction over what had formerly been recognized as sovereign states, or, more comfortably to modern ears, as foreign powers. As Smith Thompson and Joseph Story noted in their dissent, the terms "nation" and "tribe" were frequently used indiscriminately in the journals of the old congress, and as importing the same thing.[43]

> Other instances occur in the constitution where different terms are used importing the same thing. Thus, in the clause giving jurisdiction to this court, the term "foreign states" is used instead of "foreign nations," as in the clause relating to commerce. And again, in article 1, section 10, a still different phraseology is employed. "No state, without the consent of congress, shall enter into any agreement or compact with a 'foreign power.'" But each of these terms, nation, state, power, as used in different parts of the constitution, imports the same thing and does not admit of a different interpretation.[44]

The framers of the Constitution recognized the Indian tribes as foreign powers. They recognized that their dominion meant that they were states. This former recognition—before Marshall's opinion in *Cherokee Nation v. Georgia* obscured everything—was

clear not only in the positions articulated by the opponents of removal in the debate in the Congress in 1830, but in the very language Marshall himself first embraced in that opinion before arguing that it be discarded as of no consequence in American law. A more insidious abuse of the language, and of the Constitution, is not easy to imagine. Marshall first conceded the fundamental truth of the situation, and then took that concession away with a linguistic sleight of hand rooted in a spurious question:

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts. A question of much more difficulty remains. Do the Cherokees constitute a foreign state in the sense of the constitution?[45]

Claiming that he was relying on American maps, geographical treatises, histories, and laws—and completely disregarding both international law and the Constitutional provisions that specified that treaties were part of the supreme law of the land and that the Supreme Court had original jurisdiction in any case arising under a treaty—Marshall claimed that the Indian territory was admitted to compose a part of the United States and maintained that the Indians were "within the jurisdictional limits of the United States."[46] Like the Georgians, Marshall had no difficulty in coming up with a novel legal theory to justify his position that ignored the import of numerous treaties and indeed ignored the very meaning of treaties in American constitutional law and in international law. Marshall recognized the illegality of Georgia's actions while mistakenly imagining that

the United States had a right to do what Georgia did not: to treat the Indian tribes "within" its boundaries as subjects rather than sovereigns.

Unable to face the truth of the Cherokee Nation's assertion that they were a foreign state that had a right to sue the state of Georgia for its violations of their treaty rights,[47] Marshall resorted to claiming that the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had, at the time of the framing of the Constitution, "perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government."[48] In fact, Marshall was quite mistaken in this—and in seeking to reason away the evidence of existing treaties—as Indians and Indian tribes had been using American courts since the seventeenth century.[49] Marshall placed great emphasis on the distinction, in the language of the commerce clause of the Constitution, between "foreign nations, the several states, and Indian tribes."[50] The Cherokees' lawyers had already shown how this distinction emerged from an effort to remove any doubt about the exclusive authority of the Congress to regulate commerce with the Indian tribes given the obscurities in the analogous section of the Articles of Confederation.[51] "This may be admitted," Marshall wrote, "without weakening the construction that has been intimated." And here we reach the heart of Marshall's argument: "We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term 'foreign nations;' not we presume because a tribe may not be a nation, but because it is not foreign to the United States."[52] That twisted piece of reasoning—presenting the geographical as if it were the political meaning of the word "foreign"—constituted the "perception" and the "presumption" on which Marshall's case that the Cherokee nation was not a foreign state in the sense of the Constitution rested.

With that, he denied that the Cherokees had a right to sue the state of Georgia for its violations of their treaty rights.

In his separate opinion in *Cherokee Nation v. Georgia*, Justice William Johnson maintained that what Georgia was doing by extending its jurisdiction over Cherokee territory was invading the Cherokee state: "This is war in fact; though not being declared with the usual solemnities, it may perhaps be called war in disguise."[53] The constitutional prohibition on states making war unless invaded, the unjust character of an unprovoked war of aggression in international law, and the unconstitutional violation of numerous treaties with the Cherokee Nation, seemed of no significance for Johnson who explicitly sided with Georgia. What John Marshall did in his opinion was essentially to launch an analogous "war in disguise" against every Indian nation that was "within" the boundaries of the United States. The claim of jurisdiction over those nations was a violation of both international law and of the Constitution and the beginning of a spurious system of jurisprudence toward the Indian nations. The injuries to these nations that have followed from this decision have been horrific.

In a broad perspective, the fight over removal was a fight between two visions of sovereignty at odds with each other: one a vision of sovereignty as involving the obligation to exercise one's ability to do the right thing before God and neighbor in accordance with the international moral and legal order under which Americans claimed their own rights, the other a vision of sovereignty as an excuse to lord it over those who were allegedly not sovereign, who were deemed inferior.[54] Writing the majority opinion for the Supreme Court in *Chisholm v. Georgia*, in 1793, James Wilson stressed the contrast between American ideas of sovereignty and European ones: "The same feudal

ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people, and they are truly the sovereigns of the country, but they are sovereigns without subjects … and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty."[55]

Consider the contrasting visions of sovereignty, in the debate in the Senate in 1830, between Georgia's Senator John Forsyth and Rhode Island's Senator Asher Robbins. Forsyth argued that, under the Constitution, the Congress was not intended to have any special authority over those Indians that were taxed and subjected to State laws, but rather only to regulate commerce with tribes of Indians not taxed, and contended that "If their separate existence as a tribe is destroyed by State legislative enactments, the control of the Government of the United States, even over the commerce with them is at an end." Forsyth then came to an equally twisted and equally essential part of his argument:

> That the President has made, with the advice and consent of the Senate, various contracts with Indians and called them treaties, is not to be denied. That various contracts have been made with Indians, by States and individuals, under the superintendence of the United States, is certain; they have been submitted, too, to the Senate, voted upon as, and have been called, treaties. What I assert is, that these instruments are not technically treaties, supreme laws of the land, superior in obligation to State constitutions and State laws. Can it be believed that the stern jealousy of the State Governments gave to the United States the power to use a miserable fragment of the population of a State, to extend, indefinitely, their authority, and narrow that of the State Government?... How, then, can a contract made with a petty dependent tribe of half starved Indians be properly dignified with the name, and claim the imposing character of, a treaty?[56]

Rhode Island's Senator Asher Robbins replied with a defense of Indian sovereignty rooted in international law:

> It is said … that the Indian is an inveterate savage, and incapable of civilization. Admitting this to be the fact, which I by no means do admit, what has it to do with the question, whether his nation is *sui juris*, and competent to make a treaty. Is the Indian right less a right because the Indian is a savage? Or does our civilization give us a title to his right? A right which he inherits equally with us, from the gift of nature and of nature's God. The Indian is a man, and has all the rights of man. The same God who made us made him, and endowed him with the same rights; for "of one blood hath he made all the men who dwell upon the earth." And if we trample upon these rights, if we force him to surrender them, or extinguish them in his blood, the cry of that injustice will rise to the throne of God and there, like the blood of Abel, will testify against us. If we should be arraigned for the deed before his awful bar, and should plead our boasted civilization in its defence, it would, in his sight, but add deeper damnation to the deed, and merit but the more signal retribution of his eternal justice. As to the civilization of the Indian, that is his own concern in the pursuit of his own happiness; if the want of it is a misfortune, it is his misfortune; it neither takes from his rights nor adds to our own.[57]

The debate in the Congress in 1830 shows one side perceiving the indigenous nations of America as sovereign states while the other side perceived them as subjects. For the opponents of removal, treaties with the Indian nations established binding obligations on the United States that were superior to the obligations of state laws and state constitutions. For the advocates of removal these promises were a mere mode of government and a form of conciliation. For the former, the good faith behind generations of treaties was at issue. For the latter, good faith was either taken for granted to be their possession given their paternalistic concern for Indian welfare, or its significance was denied. In a particularly twisted argument, the pro-removal report of the House Committee on Indian Affairs even concluded that one of the advantages of removal to the Indians would be that "stimulant, so powerful and important in its effects upon the white man, of a separate and exclusive property in lands, with the privilege of transmitting it to their children."[58] That the advocates of removal persuaded themselves that their cause

was just, and even that it would serve the interests of the Cherokees themselves, is an important reminder that evil often comes in the guise of a self-righteously professed benevolence.

Marshall himself, commenting on the Congressional debate in a private letter to Congressman Edward Everett of Massachusetts, on 5 June 1830, expressed astonishment that the opponents of removal had not persuaded the legislative branch. He certainly seemed to be persuaded in his comment to Everett:

> I have received your speech on the bill for removing the Indians from the East to the West side of the Mississippi, and have read it with the deepest interest. I do not think any subject ever discussed in Congress has drawn forth a more splendid display of talent in each house of the national legislature than this, or is more worthy of the deliberate consideration of the government and of the nation. The speeches with which I have been favored, which are indeed all on one side, abound in arguments which appear to me to be solid and conclusive, and which do very great honour to the heads and hearts of those who made them…. It has been to me matter of the greatest astonishment that, after hearing the arguments in both houses, Congress could pass the bill.[59]

The Cherokee Nation's refusal to accept the invitation to relocate contained in the removal bill led to mounting frustration in Georgia. Attempting to further coerce the Cherokees, Georgia began to survey Cherokee land assigning numbers to each plot for use in a lottery. By November 1832, "fortunate drawers" were swarming into the nation. As the historians Theda Perdue and Michael Green have observed, "This was theft authorized by state law, but theft nonetheless, of millions of acres of land."[60] Our people are being "robbed and whipped by the whites almost every day," John Ridge wrote to the elected principal chief of the Cherokee Nation, John Ross, in February 1833, "we all know, upon consultation in Council, that we can't be a Nation here, I hope we shall attempt to establish it somewhere else!"[61] Adding to the pressure, Georgia's Governor

Wilson Lumpkin wrote an open letter to Georgia's Senator John Forsyth in which he claimed that "before the close of the year it may become necessary to remove every Cherokee from the limits of Georgia, peaceably if we can, forcibly if we must."[62]

In 1834, Andrew Jackson presented to the Senate a treaty negotiated with Andrew Ross—the brother of the elected principal chief of the Cherokee Nation—that surrendered all Cherokee lands in the east for a twenty-four year annuity of twenty-five thousand dollars a year. For once, the Senate of the United States sided with the Cherokees and refused to ratify the fraudulent treaty. But when Jackson tried again the following year, with the equally fraudulent Treaty of New Echota, the Senate ratified it by one vote in May 1836. As Jackson's second fraudulent treaty came before the Senate, former President John Quincy Adams called it an "eternal disgrace upon the country."[63] It was in insisting on compliance with this second fraudulent treaty that the United States employed force and violence to coerce an unwilling Cherokee Nation onto the Trail of Tears and Death.

Arriving in Cherokee territory with two thousand soldiers in 1838, Brigadier General John E. Wool sought to encourage the Cherokees to enroll to move west: "Why not abandon a country no longer yours? Do you not see the white people daily coming into it, driving you from your homes and possessing your houses, your cornfields and your ferries?"[64] But he got nowhere with his efforts and reported that it was futile to talk with the overwhelming majority of Cherokees who were "almost universally opposed to the treaty and who maintain that they never made such a treaty."[65] Even his offers of food and clothing were refused because to accept them could be interpreted as accepting the

treaty. Ultimately, Wool requested a transfer as his duties violated his sense of honor.[66] General Winfield Scott replaced him.

Three days after the treaty's deadline, Scott's troops began to coerce the Cherokees into thirty-one forts, beginning what missionary Daniel Butrick described as "that work which will doubtless long eclipse the glory of the United States."[67] Making a claim for abandoned property in 1842, a widow named Ooloocha recounted her experience: "The soldiers came and took us from home. They first surrounded our house and then they took the mare while we were at work in the fields and they drove us out of doors and did not permit us to take anything with us not even a second change of clothes, only the clothes we had on, and they shut the doors after they turned us out."[68] Many who had been relatively well off were reduced to abject poverty overnight. Some had the shock of seeing Cherokee graves dug up by thieves in search of silver jewelry. Scott wrote later of how the Cherokees had "obstinately" refused to prepare for removal: "Many arrived [at the forts] half-starved, but refused the food that was pressed upon them. At length, the children, with less pride, gave way, and next their parents."[69] Conditions in the forts were terrible, and those in the camps that replaced them, much the same. American soldiers debauched and raped Cherokee women. And dysentery and fever, whooping cough and measles, led to premature deaths.[70]

Finally, in July 1838, the Cherokee National Council passed a resolution placing John Ross and his Washington delegation in charge of the removal effort. Scott readily agreed and gave Ross until November to get ready. Cherokee leadership made removal less vicious than it might have been, but it was still brutal beyond belief. Among those who died was Ross' wife, Quatie, having given her blanket, so the story goes, to another.[71]

Ross supervised the departure of 13,149 Cherokees, by his count. Arrivals in Indian Territory, as counted by an American official there, came to 11,504. The difference—the lower end estimate of 1,645 people who did not survive the journey—does not include those who died in the camps in the summer of 1838 or those who died among the groups removed by the army before Ross took over. Measured in contrast with at least 16,542 Cherokees in the east—the 1835 census figure—the upper end estimate for deaths is over five thousand.[72] As early as September 1831, Andrew Jackson had been specifically warned that without adequate preparations "great sufferings must be encountered upon the journey, and many will doubtless perish."[73]

As Marshall's biographer, Albert Beveridge noted more than a hundred years ago, Marshall "could easily have decided in favor of the wronged and harried Indians, as the dissent of Thompson and Story proves."[74] His failure to do so was a triumph of politics over law. It was a dismal performance analogous in some ways to the court's failure to end the internment of Japanese Americans during WWII in *Korematsu v. United States* in 1944, or its failure to uphold Myra Bradwell's rights in *Bradwell v. Illinois* in 1872.[75] If one is content with the Supreme Court denying Myra Bradwell the right to practice law because she was a woman, in spite of the clear language of the Fourteenth Amendment—then one is probably content with the Supreme Court's decision in *Cherokee Nation v. Georgia*—denying the Cherokee nation their right to sue the state of Georgia for violating their treaty rights, because the Cherokee nation was a "domestic" tribe and not a "foreign" state. But there is not the slightest reason to think that the framers would have agreed with such a view or that any small "d" democrat should do so. It is high time that the continuous brutality and ongoing aggression in American relations with the native

peoples of America begins to be ended with recognition that juridical equality with the United States is theirs by right and that, under the Constitution, they are entitled to all the rights of foreign states. If the United States is to obey constitutional law and international law in its relations with the native peoples, it must reopen a treaty making process with these nations and cease attempting to rule over them as if they were in any way subjects of the United States or subject to its jurisdiction.

The theft of the Cherokees' homeland, and their forced march along the Trail of Tears and Death, is part of a brutality that has been ongoing with greater or lesser harshness in American relations with American Indian nations ever since, and that has antecedents stretching back for centuries before.[76] It is remarkable that it can be met with the compassionate attitude conveyed in the following comment from the Cherokee citizen and jurist Steve Russell, who, after noting that an almost bottomless well of collective guilt "keeps the modern beneficiaries of genocide from finishing the job," later writes: "We know the colonists could not now go home if they were so disposed. Our lot is intertwined with the colonists as black South Africans are with the British and the Dutch. They have nowhere to go. While they have not historically been the best of neighbors, they are still our neighbors and we must do our best to civilize them."[77]

For American Indians, the failure of the United States to stand by its own Constitution, by its treaty commitments, and by its pledges of support for Cherokee democracy and civilization, in response to Georgia's aggression, marked the beginning of a new phase in their relations with the United States. This was a phase in which John Marshall's novel and vacuous term "domestic dependent nations"[78] was filled with what legal meaning it possesses and native peoples experienced such assaults in the name of

their own interests as removal, the radical increase and spread of the reservation system, the Dawes Act of 1887, and the Curtis Act of 1898. And so it has gone.[79] In 1978, in *Oliphant v. Squamish Indian Tribe*, the court took away the right of tribal courts to hear misdemeanors involving white people who have come to Indian land.[80] In 1989, in *Cotton Petroleum Corporation v. New Mexico*, the Supreme Court allowed states to tax what little the tribes have left by imposing a state severance tax to be added to a tribal severance tax on minerals removed from tribal land.[81] In 2005, in *City of Sherrill v. Oneida Indian Nation*, the Supreme Court held that Indian tribes cannot regain sovereignty over lands they once owned by purchasing those lands on the open market.[82] "The Indian wars are not in your historical rearview mirror if you are Indian," Russell comments, "You see what little you have being quietly chipped away every year."[83] As recently as 1978, in *United States v. Wheeler*, the Supreme Court went so far as to claim that tribal sovereignty "exists only at the sufferance of Congress, and is subject to complete defeasance."[84] This absurd position, so full of incivility, has yet to be officially repudiated.

Were the United States to recognize that the Indian tribes have all the rights of foreign states under the Constitution, the Supreme Court would be open for tribes to sue states of the United States for these states' violations of their treaty rights, and these tribes would be able to expect that the norms of international law would be employed by the Supreme Court in seeking to adjudicate controversies. That was, on the evidence we have, what the framers intended and, also, is the clear "original meaning" of the text of the Constitution. It would provide the foundation for a system of jurisprudence—in contrast with "Federal Indian Law"—that would be compatible with James Wilson's

philosophy of law and sovereignty. There would be implications, moreover, for the way past Congressional actions would be viewed. The theft of the Black Hills, for example, rather than being defended as a taking in exercise of a power of eminent domain over Indian property, would have to be seen as analogous to Russia's recent seizure of the Crimea from Ukraine in violation of its treaty commitments. Here it is worth stressing that the facts of the theft are not in dispute, merely the question of whether such theft is a violation of law as well as of morality. This is from the Supreme Court's syllabus in *United States v. Sioux Nation of Indians*, in 1980:

> Under the Fort Laramie Treaty of 1868, the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation (Sioux), and that no treaty for the cession of any part of the reservation would be valid as against the Sioux unless executed and signed by at least three-fourths of the adult male Sioux population. The treaty also reserved the Sioux' right to hunt in certain unceded territories. Subsequently, in 1876, an "agreement" presented to the Sioux by a special Commission but signed by only 10% of the adult male Sioux population, provided that the Sioux would relinquish their rights to the Black Hills and to hunt in the unceded territories, in exchange for subsistence rations for as long as they would be needed. In 1877, Congress passed an Act (1877 Act) implementing this "agreement" and thus, in effect, abrogated the Fort Laramie Treaty.[85]

Faced with centuries of American incivility, and its legacies of injustice and brutality, what can the native peoples do? In the absence of the rule of law—which for American Indian nations ended with the end of even the pretense of equal rights under the law in *Cherokee Nation v. Georgia* in 1831—Steve Russell has suggested that each tribe needs a well ordered militia: "Not a militia in the style of the Sons of Liberty but rather in the style of the Southern Christian Leadership Conference."[86] While Gandhian nonviolence should not be attempted over ordinary issues that can be negotiated, its power is evident in the history of the American labor and civil rights movements: "Willingness to die for

the truth always holds an advantage over willingness to kill for greed or for the sake of just following orders."[87] These nonviolent militias, if they are to succeed, must draw their strength from the peoplehood of each nation and this, in turn, will require traditions that are "smoldering" to catch fire.[88]

> For the American public to support Indian struggles, it must perceive Indian governments as governments. In American mythology, a government is a democratic government. Tribal executives must manage rather than dictate. Tribal councils must engage in robust debate and recognize all stakeholders before calling the question. Tribal courts must be seen as courts, where any litigant, Indian or non-Indian, can get a fair shake. In short, Indian governments must be for resident and visitor non-Indians everything the federal government has failed to be for Indians.[89]

Russell suggests the development of an all-tribal Bill of Rights and the establishment of an Indian Nations Supreme Court to uphold these rights.[90] He is well aware that the idea of an Indian "race" is a fraud at odds with the peoplehood of the individual Indian nations. But, he maintains, "if we cannot use that fraud to engage in horizontal relations with each other we shall all be crushed in our vertical relations with the United States. We must realize that while all Indians are not the same or even similar, they are similarly situated vis-à-vis the United States."[91] To this I would add that I have spent most of my career as an historian studying the influence of the American commitment to support and promote democracy and while that commitment cannot be relied upon, it has been a real component of American policy in the past—both for good and for ill—and perhaps someday some lasting good may finally come of it for the Indian nations.[92] If so, it will only be because tribal sovereignty is respected first.

The lawyer Felix Cohen wrote in 1953 that: "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise

and fall of our democratic faith."[93] My position is related, but somewhat different: the struggle for justice for the native peoples is at the heart of the struggle for democracy for all Americans—the heart of the struggle to be answerable to God for our conduct toward God, toward each other, and toward other peoples—to be genuinely self-governing.

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[1] George Washington, "Talk to the Cherokee Nation," 29 August 1796, https://millercenter.org/the-presidency/presidential-speeches/august-29-1796-talk-cherokee-nation. (accessed 24 July 2017).

[2] Quoted in J. H. Elliott, EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA, 1492-1830 (2006), 11.

[3] My thinking on civility is closely related to that of Edward Shils. By civility Shils means, as a first approximation, the virtue of the citizen—the virtue of concern for the common good. See Edward Shils, THE VIRTUE OF CIVILITY: SELECTED ESSAYS ON LIBERALISM, TRADITION, AND CIVIL SOCIETY (1997).

[4] Quoted in William McLoughlin, CHEROKEE RENASCENCE IN THE NEW REPUBLIC (1986), 288.

[5] Theda Perdue and Michael D. Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS (2007), 139-140. Steve Russell, SEQUOYAH RISING: PROBLEMS IN POST-COLONIAL TRIBAL GOVERNANCE (2010), 12. Similarly horrific estimates exist for the other nations expelled along what came to be known as the trail of tears and death: "Rough calculations concluded that one of every five Choctaw—perhaps more—died before reaching their new home. Some children had gone as long as six days with nothing at all to eat. Many others died of cholera when the floodwaters overflowed the banks of the Arkansas River.... A reporter from the *Arkansas Gazette* interviewed a Choctaw chief from one of the first wagons to reach Little Rock. Asked about his journey, the chief replied with a phrase that reverberated through the Northern press. It had been, he said, 'a trail of tears and death.'" A. J. Langguth, DRIVEN WEST: ANDREW JACKSON AND THE TRAIL OF TEARS TO THE CIVIL WAR (2010), 165-166.

[6] For the text of the Alien and Sedition Acts, and the Virginia and Kentucky resolutions, see http://avalon.law.yale.edu/18th_century/virres.asp (accessed 27 June 2016). According the Sedition Act of 14 July 1798: "That if any person shall write, print, utter or publish … scandalous and malicious writing or writings against the government of the United States … or act, or to aid, encourage or abet any hostile designs of any foreign nation against United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." The Kentucky Resolution of 3 December 1799 declared that state legislature's response: "That this commonwealth considers the federal union, upon the terms and for the purposes specified in the late compact, as conducive to the liberty and happiness of the several states…. That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy."

[7] See Marilynne Robinson, "What is Freedom of Conscience?" *The American Scholar* (Winter 2018), https://theamericanscholar.org/what-is-freedom-of-conscience/#.WlWVqZM-c0p (accessed 11 January 2016).

[8] Charles Taylor, A SECULAR AGE (2007), 371, 637.

[9] Mary Hershberger, *Mobilizing Women, Anticipating Abolition: The Struggle against Indian Removal in the 1830s*, 86 THE JOURNAL OF AMERICAN HISTORY, No. 1 (June 1999), 15-40.

[10] Quoted in Hershberger, *Mobilizing Women, Anticipating Abolition*, 39.

[11] Quoted in Hershberger, *Mobilizing Women, Anticipating Abolition*, 26.

[12] The excitement, Harriet Beecher hoped, "is but just begun. So 'great effects come from little causes.'" Quoted in Hershberger, *Mobilizing Women, Anticipating Abolition*, 26-28. Beecher's quote was the title of a then famous sermon, given on 13 September 1815, by Ebenezer Porter that stressed how much difference even a few committed people could make. Ebenezer Porter, GREAT EFFECTS RESULT FROM LITTLE CAUSES (1815).

[13] Article 6, and Article 3, Section 2, of the Constitution of the United States, (July 24, 2017) http://www.archives.gov/exhibits/charters/constitution_transcript.html. "Strangely absent from Chief Justice Marshall's opinion [in *Cherokee Nation v. Georgia*] is an explicit discussion of a related (but different) jurisdictional claim that one of the Cherokee's lawyers had made. The first paragraph of art. 3 says the 'judicial power of the United States' also shall extend to cases 'arising under… Treaties.' The Cherokees had argued that their case 'arises under a treaty.' Consequently paragraph one, they said, extended the federal judicial power to the case; paragraph two provides original jurisdiction in the Supreme Court. Chief Marshall did not describe the flaw, if any, in this jurisdictional logic." Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 87 *THE GEORGIA HISTORICAL QUARTERLY*, No. 3/4 (Fall/Winter 2003), 408, 416. See also the "Argument of Mr. Sergeant," reproduced in Richard Peters, THE CASE OF THE CHEROKEE NATION AGAINST THE STATE OF GEORGIA (1831), 56-57.

[14] See James Wilson, THE COLLECTED WORKS OF JAMES WILSON (Kermit L. Hall and Mark David Hall, eds., 2007). Charles Page Smith, JAMES WILSON: FOUNDING FATHER, 1742-1798 (1956). Hugh J. Schwartzberg, *One Founding Father, Invisible, with Liberty and Justice for All*, (Chicago Literary Club presentation, 28 April 1997), http://www.chilit.org, then search papers by author under "S." Nicholas Pederson, *The Lost Founder: James Wilson in American Memory*, 22 YALE JOURNAL OF LAW & THE HUMANITIES, No. 2, Article 3 (2010). (Aug. 8, 2016) http://digitalcommons.law.yale.edu/yjlh/vol22/iss2/3.

[15] *Dred Scott v. Sandford*, 60 U.S. 19 How. 393, 393 (1856).

[16] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 1 (1831).

[17] *Chisholm v. Georgia* 2 U.S. (2 Dall.) 419, 471 (1793).

[18] Section 7, Act of 19 December 1829, reproduced in Peters, THE CASE OF THE CHEROKEE NATION AGAINST THE STATE OF GEORGIA (1831), 283.

[19] Robert Yazzie, *The Cherokee Nation of Indians, et al., v. Georgia*, 8 KAN. J.L. & PUB. POL'Y (Winter 1999), 159, 171-172. Yazzie was joined in this decision by Mary Jo Brooks-Hunter, Cristine Zuni, Allen R. Toledo, Laura Soap, Anita Dupris, Mitchell Wright, and Russell A. Brien. I am grateful to Steve Russell for providing me with a copy of this decision.

[20] Bartolomé de Las Casas, IN DEFENSE OF THE INDIANS (trans. Stafford Poole, 1992), 355.

[21] Las Casas, IN DEFENSE OF THE INDIANS, 82-83.

[22] Cognizant of the depth of public opinion on the other side, Congressman Thomas Foster of Georgia sought to find a way to avoid its conclusions in his remarks: "We cannot shut our eyes to the fact that there is a strong and powerful feeling in favor of the Indians," he acknowledged, "which pervades an extensive portion of this country, the influence of which is very perceptible in this House." But it was "the very kind of feeling which is most calculated to mislead the judgment." Thomas Foster, 17 May 1830, United States House of Representatives, 21st Congress, 1st Session, REGISTER OF DEBATES, 1031.

[23] See John A. Andrew III, FROM REVIVALS TO REMOVAL: JEREMIAH EVARTS, THE CHEROKEE NATION, AND THE SEARCH FOR THE SOUL OF AMERICA (1992).

[24] Jeremiah Evarts, "What are the People of the United States bound to do in regard to the Indian question," 27 November 1830, text in Francis Paul Prucha, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984), 282-283.

[25] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 16 (1831).

[26] George Washington, *Message to the Senate of September 17, 1789 Regarding Treaties with Native Americans*, (Sep. 22, 2016) http://avalon.law.yale.edu/18th_century/gw006.asp.

[27] Quoted in Thomas Foster, 17 May 1830, United States House of Representatives, 21st Congress, 1st Session, REGISTER OF DEBATES, 1035.

[28] Article 6, The Constitution of the United States, (Sep. 24, 2017) http://www.archives.gov/exhibits/charters/constitution_transcript.html.

[29] James Wilson, *Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787*, in 1 THE COLLECTED WORKS OF JAMES WILSON, 246. It may be noted that Wilson's vision of judicial supremacy did not involve systematic deference to the executive branch over matters of foreign policy: the judiciary was to have its say as to the meaning of American treaty commitments.

[30] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 19 (1831)

[31] "The judicial power extends to all cases arising under treaties made, or which shall be made, by the United States. I shall not repeat, at this time, what has been said with regard to the power of the states to make treaties; it cannot be controverted, that, when made, they ought to be observed. But it is highly proper that this regulation should be made; for the truth is,—and I am sorry to say it,—that, in order to prevent the payment of British debts, and from other causes, our treaties have been violated, and violated,

too, by the express laws of several states in the Union. Pennsylvania—to her honor be it spoken—has hitherto done no act of this kind; but it is acknowledged on all sides, that many states in the Union have infringed the treaty; and it is well known that, when the minister of the United States made a demand of Lord Carmarthen of a surrender of the western posts, he told the minister, with truth and justice, 'The treaty under which you claim these possessions has not been performed on your part; until that is done, those possessions will not be delivered up.' This clause, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may." James Wilson, *Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787*, reproduced in 1 THE COLLECTED WORKS OF JAMES WILSON, 246.

[32] James Wilson, *Of Man, as a Member of the Great Commonwealth of Nations*, reproduced in 1 THE COLLECTED WORKS OF JAMES WILSON, 686-688. An argument has been made that this constitutional mechanism should be reclaimed, which, although it shows no awareness of Wilson's position, does do a persuasive job of criticizing the Supreme Court's decision in *Principality of Monaco v. Mississippi* 292 U.S. 313 (1934). See Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States against States*, 104 COLUMBIA LAW REVIEW, No. 7 (November 2004), 1765-1885.

[33] The House Committee on Indian Affairs, REMOVAL OF INDIANS, REPORT NO. 227, 24 February 1830, the House of Representatives, 21st Congress, 1st Session. According to page 8 of this report, the treaties made with turbulent and warlike bands of Indians were made because there was no way of governing them by regular law: "These treaties were, therefore, but a mode of government, and a substitute for ordinary legislation."

[34] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 60 (1831)

[35] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 19 (1831).

[36] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 17 (1831).

[37] *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832).

[38] "I have therefore thought proper to issue this my proclamation warning all persons, citizens of Georgia or others, against trespassing or intruding upon lands occupied by the Indians within the limits of Georgia, either for the purpose of settlement or otherwise, as every such act will be in direct violation of the provisions of the treaty aforesaid, and will expose the aggressors to the most certain and summary punishment by the authorities of the State and the United States. . . . All good citizens, therefore, pursuing the dictates of good faith will unite in enforcing the obligations of the treaty, as the supreme law," quoted by Supreme Court Associate Justice John McLean in his concurring opinion, *Worcester v. Georgia* 31 U.S. (6 Pet.) 515, 586 (1832).

[39] Timothy Joseph Preso has argued persuasively that the Supreme Court "has dismantled the Framers' work. Certainly, the Court has abandoned the Framers' understanding that the Indian Commerce Clause would serve as an independent barrier to the application of state law to Indian affairs. But the Court's failure to honor the Framers' plan goes even farther. The Framers saw the Indian Commerce Clause fundamentally as a remedy for the uncertainty that had pervaded Indian affairs under prior regimes—specifically, under the Articles of Confederation." See Timothy Joseph Preso, *A Return to Uncertainty in Indian Affairs: The Framers, the Supreme Court, and the Indian Commerce Clause*, 19 AMERICAN INDIAN LAW REVIEW, No. 2 (1994), 443, 444.

[40] Articles of Confederation, 1 March 1781, (Sep 24, 2016) http://avalon.law.yale.edu/18th_century/artconf.asp.

[41] Article 1, Section 8, Clause 3, The Constitution of the United States.

[42] Quoted in 1 THE COLLECTED WORKS OF JAMES WILSON, 92-93.

[43] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 63 (1831).

[44] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 64 (1831).

[45] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 16 (1831).

[46] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 17 (1831).

[47] "The Bill filed on behalf of the Cherokee Nation vs. The State of Georgia," in Peters, THE CASE OF THE CHEROKEE NATION, p. 3.

[48] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 18 (1831).

[49] See Katherine Hermes, *Law of Native Americans to 1815*, in Michael Grossberg and Christopher Tomlins, THE CAMBRIDGE HISTORY OF LAW IN AMERICA (2008), 32, 32-62.

[50] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 19 (1831).
[51] Peters, THE CASE OF THE CHEROKEE NATION, 47-49
[52] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 19 (1831).
[53] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 29 (1831).
[54] "[When] I say that, in free states, the law of nations is the law of the people; I mean that, as the law of nature, in other words, as the will of nature's God, it is indispensably binding upon the people, in whom the sovereign power resides; and who are, consequently, under the most sacred obligations to exercise that power, or to delegate it to such as will exercise it, in a manner agreeable to those rules and maxims, which the law of nature prescribes to every state, for the happiness of each, and for the happiness of all. How vast—how important—how interesting are these truths! They announce to a free people how exalted their rights; but at the same time, they announce to a free people how solemn their duties are." James Wilson, *Chapter IV. Of the Law of Nations*, 1 THE COLLECTED WORKS OF JAMES WILSON, 532
[55] *Chisholm v. Georgia* 2 U.S. (2 Dall.) 419, 471 (1793). The only exception Wilson admitted were "African slaves" who might be considered as subjects. Wilson believed not only in the equality of citizens under the rule of law but also in the equality of all mankind under the rule of nature: "At last, however, the voice of nature, intelligible and persuasive, has been heard by nations that are civilized: at last it is acknowledged that mankind are all brothers: the happy time is, we hope, approaching, when the acknowledgment will be substantiated by a uniform corresponding conduct." Nevertheless, he was willing to compromise over slavery in the constitutional convention. He may have thought that the Constitution's implicit grant of authority to the Congress to end the importation of slaves in 1808 (Article 1, Section 9, Clause 1) would bring slavery in the United States to a gradual end. James Wilson, *Chapter IV. Of the Law of Nations*, in Hall and Hall, editors, 1 THE COLLECTED WORKS OF JAMES WILSON, 545.
[56] 15 April 1830, United States Senate, 21st Congress, 1st Session, REGISTER OF DEBATES, 336.
[57] 21 April 1830, United States Senate, 21st Congress, 1st Session, REGISTER OF DEBATES, 376.
[58] The House Committee on Indian Affairs, *Removal of Indians*, REPORT NO. 227, 24 February 1830, 26, the House of Representatives, 21st Congress, 1st Session.
[59] John Marshall to Edward Everett, 5 June 1830, reproduced in 11 THE PAPERS OF JOHN MARSHALL, 378-379. The closest anyone in the debate in Congress came to Marshall's concept of "domestic dependent nations" was Edward Everett who quoted an 1814 letter from John Quincy Adams, James Bayard, Henry Clay, and Albert Gallatin, the American envoys then negotiating peace with Great Britain at Ghent. This letter represented perhaps the first official repudiation of the legal position of the Constitution's framers. In this letter, the envoys sought to respond to British charges that the United States was now, for the first time, claiming that the Indian peoples living within its lines of demarcation were its subjects living on sufferance on lands that it claimed an exclusive right to acquire: "If the United States had now asserted that the Indians within their boundaries, who have acknowledged the United States as their only protectors, were their subjects, living only at their sufferance on their lands, far from being the first in making that assertion, they would only have followed the example of the principles uniformly and invariably asserted in substance, and frequently avowed in express terms by the British Government itself… From the rigor of this system, however, as practised by Great Britain and all the other European powers in America, the humane and liberal policy of the United States has voluntarily relaxed. A celebrated writer on the law of nations, to whose authority British jurists have taken particular satisfaction in appealing, after stating, in the most explicit manner, the legitimacy of colonial settlements in America, to the exclusion of all rights of uncivilized Indian tribes, has taken occasion to praise the first settlers of New England and the founder of Pennsylvania, in having purchased of the Indians the lands they resolved to cultivate, notwithstanding their being furnished with a charter from their sovereign. It is this example which the United States, since they became, by their independence, the sovereigns of the territory, have adopted and organized into a political system. Under that system, the Indians residing within the United States are so far independent that they live under their own customs, and not under the laws of the United States; that their rights upon the lands where they inhabit or hunt are secured to them by boundaries defined in amicable treaties between the United States and themselves; and that, whenever these boundaries are varied, it is also by amicable and voluntary treaties, by which they receive from the United States ample compensation for every right they have to the lands ceded by them." Quoted by Congressman Edward Everett of Massachusetts, 19 May 1830, United States House of Representatives, 21st Congress, 1st Session, REGISTER OF DEBATES, 1059.
[60] Theda Perdue and Michael D. Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS (2007), 97-99
[61] Quoted in Perdue and Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS, 101-102.
[62] Quoted in Perdue and Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS, 104.

[63] Quoted in A. J. Langguth, DRIVEN WEST: ANDREW JACKSON AND THE TRAIL OF TEARS TO THE CIVIL WAR (2010), 239. Treaty with the Cherokees, 1835, 29 December 1835. | 7 Stat., 478. | Proclamation, 23 May 1836, http://digital.library.okstate.edu/kappler/Vol2/treaties/che0439.htm, accessed (17 February 2017).
[64] Quoted in Theda Perdue and Michael D. Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS (2007), 121.
[65] Quoted in Langguth, DRIVEN WEST, 244.
[66] Langguth, DRIVEN WEST, 255.
[67] Quoted in Langguth, DRIVEN WEST, 280.
[68] Quoted in Perdue and Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS, 123-124.
[69] Quoted in Langguth, DRIVEN WEST, 281.
[70] Perdue and Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS, 126-127.
[71] Steve Russell, SEQUOYAH RISING: PROBLEMS IN POST-COLONIAL TRIBAL GOVERNANCE (2010), 12.
[72] Perdue and Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS, 139.
[73] Lewis Cass to Andrew Jackson, September 1831, reproduced in 9 THE PAPERS OF ANDREW JACKSON (Daniel Feller, Laura-Eve Moss, Thomas Coens, and Erik B. Alexander, eds., 2013), 541
[74] Albert Jeremiah Beveridge, 4 THE LIFE OF JOHN MARSHALL (1916), 546. There were seven members of the Supreme Court in 1831. Gabriel Duvall, who in his long career on the court rarely disagreed with Marshall, was absent for the term. This left six men to decide *Cherokee Nation v. Georgia*: John Marshall, John McLean, William Johnson, Henry Baldwin, Joseph Story, and Smith Thompson. Appointed by Andrew Jackson in 1829, John McLean voted with Marshall both in *Worcester v. Georgia* and in *Cherokee Nation*. Absent Marshall's twisted reasoning in *Cherokee Nation*—McLean might well have supported the plaintiff in 1831. William Johnson, who had been more respectful of Indian sovereignty and rights to the soil in *Fletcher v. Peck*, reversed his earlier opinion, perhaps choosing to appease his fellow South Carolinians, and so must be considered as possible but unlikely to have been persuadable to support a different course. Appointed by Andrew Jackson in 1830, Henry Baldwin was perhaps the most hostile to Cherokee rights of any member of the court, although he did wind up authoring an opinion in *Mitchel v. United States* in 1835 that recognized Indian rights to the soil they had occupied since time immemorial. Joseph Story and Smith Thompson offered an interpretation of constitutional law that respected the law of nations and the intentions of the framers and so sided with the plaintiff in 1831.
[75] *Korematsu v. United States* 323 U.S. 214 (1944). *Bradwell v. The State of Illinois*, 83 U.S. (16 Wall.) 130 (1872).
[76] See Bernard Bailyn, THE BARBAROUS YEARS (2012).
[77] Russell, SEQUOYAH RISING, pp. 48, 148.
[78] *Cherokee Nation v. Georgia* U.S. 30 (5 Pet.) 1, 17 (1831).
[79] Francis Paul Prucha, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984). The "paternalism" whose importance Prucha stresses, might be considered as a compound of American civility with American racism, greed, fearfulness, ignorance, arrogance, indifference, self-centeredness, and desire to dominate.
[80] *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978). Russell, SEQUOYAH RISING, 155.
[81] *Cotton Petroleum Corporation v. New Mexico* 490 U.S. 163 (1989). Russell, SEQUOYAH RISING, 156.
[82] *City of Sherrill v. Oneida Indian Nation* 544 U.S. 197 (2005). Russell, SEQUOYAH RISING, 156
[83] Russell, SEQUOYAH RISING, 156-157.
[84] *United States v. Wheeler* 435 U.S. 313, 323 (1978). Russell, SEQUOYAH RISING, 170.
[85] *United States v. Sioux Nation of Indians*, 448 U.S. 371, 371 (1980).
[86] Russell, SEQUOYAH RISING, 170.
[87] Russell, SEQUOYAH RISING, 172.
[88] Russell, SEQUOYAH RISING, 88.
[89] Russell, SEQUOYAH RISING, 80.
[90] Russell, SEQUOYAH RISING, pp. 85-102.
[91] Russell, SEQUOYAH RISING, 104.
[92] One of the most important contributions the United States ever made to the cause of social justice in another country was its support for the postwar land reform in Japan. Rather than seek revenge on those who had attacked us in WWII, we sought to make allies of the Japanese people as against the militarist Japanese government that had betrayed them as well as the people of the United States. Steven Schwartzberg, *The "Soft Peace Boys": Presurrender Planning and Japanese Land Reform*, 2 THE

JOURNAL OF AMERICAN-EAST ASIAN RELATIONS, Number 2 (Summer 1993), 185-216. American assistance to other peoples in their pursuit of political liberty has often come through what I have called "civil interventions"—nonviolent efforts to decisively affect regime maintenance or regime change in another country that are informed by a commitment to democratic solidarity. In a book on the subject, I examined successful American civil interventions in Cuba in 1944, Brazil in 1945, Venezuela in 1946, Ecuador in 1947, and Costa Rica in 1948, as well as a civil intervention that ultimately proved counterproductive in Argentina in 1945-1946. Like all other successes in human affairs, the victories here, if they were to be sustained, had to be fought for continually and, unfortunately, only in Costa Rica did democracy survive intact from the 1940s to the present. Steven Schwartzberg, DEMOCRACY AND U.S. POLICY IN LATIN AMERICA DURING THE TRUMAN YEARS (2003).

[93] Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).