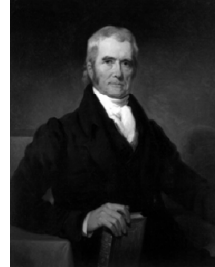


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**Indigenous Peoples and
International Law:**

The Marshall Decisions cont'd

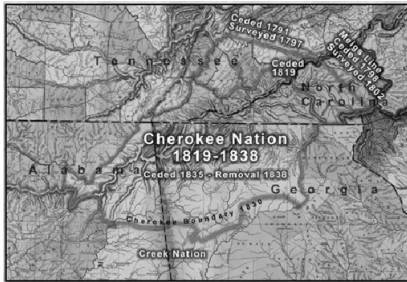
The Marshall Decisions



*Cherokee Nation
v
Georgia*

1831

The Cherokee Nation



The Cherokee Nation

- But then
 - Eastern seaboard starts to fill and population pressures for new land spread west
 - Louisiana Purchase opens up (less desirable) land west of Mississippi
 - Land in Georgia profitable for cotton
 - Gold found in Cherokee territory

Indian Removal Act

81st CONGRESS,
1st Session.

S. 102.

IN SENATE OF THE UNITED STATES,
FEBRUARY 23, 1839.

Mr. WHITE, from the Committee on Indian Affairs, reported the following bill; which was read, and passed to a second reading:

A BILL

To provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal West of the river Mississippi.

The Cherokee Nation

- Andrew Jackson, “Indian fighter,” elected President of United States in 1828
- Supports removal of Natives to “the west”
- Indian Removal Act gave him permission to negotiate treaties, land exchanges
- Georgia start creating Bills that impose laws on Cherokee; start taking land

Cherokee Nation v Georgia 1831

- The human question: What right does the State of Georgia have to impose its laws upon and create laws that result in the eviction of a sovereign treaty nation?
- The Cherokee decide to take their case to the US Supreme Court, stating they are a foreign state with a grievance against the State of Georgia for violating treaties that said they would be protected but self-governing

Cherokee Nation v Georgia 1831

- Their argument:
 - From time immemorial, the Cherokee nation has composed a sovereign and independent state
 - Masters of their territory, governed by their laws and customs; never rescinded
 - Right of discovery only gave a right of negotiation
 - Treaties reaffirm sovereignty
 - Treaties promise “patronage and neighbourhood” of US
 - Relationship is nation-to-nation, not nation-to-state
 - Georgia cannot impose its laws on the Cherokee

The Cherokee Nation

- Cherokee were among the most willing among Indigenous Peoples to assimilate
 - Adopt western dress
 - Give up hunting and gathering
 - Cultivate land; participate in market economy
 - Adopt Christianity
 - Create a written language; broadly literate
 - Codified laws; create formal constitution

Cherokee Nation v Georgia 1831

- US Constitution, Article III, Section 2, Clause 1:
 - **The Judicial Power shall extend to all Cases**, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and **foreign States, Citizens or Subjects**.

Cherokee Nation v Georgia 1831

- The legal question: Is the Cherokee Nation a foreign state in the sense **in which that term is used in the Constitution?**
- Court splits into three factions:
 1. Cherokee are “so low in the grade of organized society” that it is ridiculous to speak of them as a nation on a par with the US (**Johnson**)

Cherokee Nation v Georgia 1831

- **Johnson:**
 - “With the **morality** of the case I have **no concern**; I am called upon to consider it as **a legal question**.”
 - **Are the Cherokees a state?** Doubtful for, “a people so low in the grade of organized society as our Indian tribes most generally are.”
 - “**Right of discovery**” gave the Americans access; found a “**race of hunters;**” Americans sovereign, Cherokee not. Limited land rights; never accepted into “family of nations.”
 - “**Where is the rule to stop?** Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?”

Cherokee Nation v Georgia 1831

- The legal question: Is the Cherokee Nation a foreign state in the sense in which that term is used in the Constitution?
- Court splits into three factions:
 2. Because legislation elsewhere distinguishes between “foreign states” and “Indian Nations,” the two must be different (Baldwin)

Cherokee Nation v Georgia 1831

- Baldwin
 - The Indians ... contracted by putting themselves under the protection of the United States, ... accepted an allotment of hunting grounds, surrendered and delegated to congress the exclusive regulation of their trade and the management of all their own affairs, taking no assurance of their continued sovereignty, if they had any before
 - Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the government.
 - Baldwin adds that the Court’s findings apply to “all the tribes with whom the US has held treaties.”

Cherokee Nation v Georgia 1831

- The legal question: Is the Cherokee Nation a foreign state in the sense in which that term is used in the Constitution?
- Court splits into three factions:
 3. Cherokee are sovereign autonomous nations under the “protection” of the United States (Thompson, Storey)

Cherokee Nation v Georgia 1831

- Thompson, Storey:
 - de Vattel defines elements of a state and the Cherokee meet the definition; they govern themselves and merely putting yourself under the protection of another does not make you any less sovereign
 - they were always “foreign” When did they lose it?
 - they are not citizens, therefore must be “foreign”
 - right of occupancy; can only be deprived of it by consent. There are treaties.

Cherokee Nation v Georgia 1831

- Thompson, Storey:
 - “What is a treaty as understood in the law of nations? It is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties.”
 - The invasion of Cherokee territory by Georgia violates the treaties and an 1802 act of congress.
 - The injunction against the state of Georgia the Cherokee request should be issued

Cherokee Nation v Georgia 1831

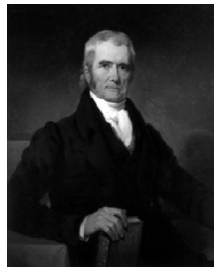
- The Majority Decision:
 - While the Cherokee may once have been an independent nation signing treaties, they lost it, having gone from “protection” to “dependence”
 - Now surrounded by the US; another country coming in would be an invasion
 - Cherokee now a “domestic dependent nation.” Relation to the US “resembles that of a ward to his guardian.”
 - “If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted.”

Legacy of Cherokee Nation v Georgia

- **Indian Tribes**

- Within the terms of Article III, an Indian tribe is not a foreign state and hence cannot sue in the courts of the United States.
- This rule was applied in *Cherokee Nation v. Georgia*, where Chief Justice Marshall conceded that the Cherokee Nation was a state, but not a foreign state, being a part of the United States and dependent upon it.
- Other passages of the opinion specify the elements essential of a foreign state for purposes of jurisdiction, such as sovereignty and independence.

The Marshall Decisions



Worcester v *Georgia*

1832

Worcester v Georgia 1832



- Samuel Worcester & Elizabeth Butler are missionaries living on Cherokee land
- Arrested for breaking a law that prohibits “white persons” from residing there without a license
- Worcester argues Georgia has no jurisdiction because Cherokee a foreign nation with own territory

Worcester v Georgia 1832

- **Doctrine of discovery again.** An agreement between nations to avoid conflict; gave title against other European governments which might be consummated by possession, i.e., gave right to negotiate.
- Cherokee had signed treaties; Georgia had no right to make laws that over-rode agreements between Cherokee and US
- Cherokee had rights of “possession, use and occupancy” but no sovereignty; had agreed to be under the “protection” of the US. Only US could create laws re the Cherokee
- Cherokee thrilled, Georgia perturbed, but not for long

Worcester v Georgia 1832



“John Marshall has made his decision; now let him enforce it.”

– President Andrew Jackson

