THE ANGLOCENTRIC SUPREMACY OF THE MARSHALL COURT[1]

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INTRODUCTION

From the period of 1810 to 1835 legal precedent was established on issues pertaining to the rights of Indigenous peoples by the United States Supreme Court through its decisions in what frequently is referred to as the "Marshall Cases."[2] From this period on, Justice Marshall's rulings have consistently been cited as representing definitive statements that provide legal justification for the alienation of Indigenous peoples' land and sovereign rights.[3] One of the goals of this article was to examine how culture, as an ethnocentric force, influenced both laws and their interpretation in a manner that has helped maintain a colonial control over Indigenous North Americans. Embedded within this goal was examining the role the United States Supreme Court played in its early stages as arbiter of Indigenous rights issues. What has been observed in the precedent-setting cases discussed is a Court that repeatedly interpreted the issue of these cases through the ethnocentric views of Anglo-European culture. When, in the Worcester case, the Court rendered a decision to uphold the rights of the Cherokee nation, an anomaly seemed to arise that appeared to refute this supposition.[4] This anomaly fades when, upon closer

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[1] A much shorter and considerably less developed version of this article appeared in Vol. 17 No. 1 of the Canadian Journal of Native Studies.

[2] *See* Gray O'Dwyer, *Protecting Sacred Ground: The San Manuel Ruling and Implications for Indian Cultural Resource Preservation*, 18 UDC-DCSL L. REV. 302, 305,306 (2015).

[3] *See* Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253, 305 (2012).

[4] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal India Law*, 107 HARV. L. REV. 381, 405 (1993).

analysis, the Court is discovered not necessarily protecting the sovereign rights of an Indigenous people, but rather protecting and elevating the rights of an infant federal government over the rights of its individual States.[5] When it is realized that during the time period of the Marshall decisions, the country was in turmoil over Constitutional nullification, the Court's decisions become clearer.[6] The question then under consideration was whether the decisions of the United States Supreme Court, with regard to the issues of Indigenous rights, were reflections of the time period, the ethnocentrism of a dominate Anglo culture, or a combination of both. It should also be noted that this article does not necessarily follow standards of Western legal analysis. What it does present is an anthropological analysis that reflects the work of a person writing from a perspective of a people who have been colonized, as opposed to the perspective of a people who have been the colonizer, and it is on the basis of this analysis that the merit of the article stands.

When examining early legal and political perspectives as they pertain to the rights of Indigenous peoples, several nineteenth century United States Supreme Court rulings, often referred to as the Marshall decisions, remain crucial in understanding case perspectives. While these decisions have stood as models for setting the standards when interpreting Indigenous rights issues, they have also served to legally define and interpret Indigenous people through a worldview perspective of Anglo-European culture.[7] The impact of the Marshall cases have had far reaching influence upon many other case decisions that have pertained to the rights of Indigenous North Americans. Observations of Marshall's decisions, specifically as they pertained to the

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[5] *See id.*at 408.

[6] *See* Matthew J. Franck, PhD, *John Marshall: The Great Chief Justice*, THE HERITAGE FOUNDATION (January 21, 2016), http://www.heritage.org/research/reports/2016/01/john-marshall-the-great-chief-justice.

[7] When Columbus mistakenly believed he had reached an island off the coast of India, he erroneously applied the word "Indian" to the people he encountered that subsequently was used to refer to all Indigenous peoples of the western hemisphere. While internationally, "indigenous" has been applied with growing acceptance, when "Indigenous" is used to refer to a people it is not being used as an adjective and as such grammatically should be written with an upper case "I", much along the same lines as when writing, she was "native" to North American versus, he was a "Native" American Indian. I have also used "Aboriginal" with some frequency when referring to groups, populations, or cultures at an early period in history. Although my preference is toward the use of Indigenous, because of the widespread usage of "Indian" certain situations have at times compelled me to acquiesce to its usage herein.

Cherokee cases, concluded that these decisions contained "'intrinsic' evidence that the court was at times most doubtful of the soundness of its reasoning—but, impressed and compelled by 'the magnitude of the interest in litigation,' bowed to expediency rather than to right."[8] Irrespective of whether Indigenous rights cases have dealt with land titles, personal liberties, or treaty rights, all seem to be culturally bounded by a general attitude held by whites toward Indians within a particular period of time.[9]

Another goal of this article was to explore how differences in legal and political attitudes, with regard to Indigenous rights issues in the United States can be interpreted from two very different perspectives; 1. ethnocentrism, or the tendency to judge foreign peoples, groups, and other cultures by one's own cultural standards, thereby holding "[t]he belief that one's own culture are the only proper ones"[10], and 2. cultural relativism, or "[t]he attitude that a society's customs and ideas should be viewed within the context of that society's problems and opportunities."[11] With regard to cultural relativism, William Haviland explains; "because cultures are unique, they can be evaluated only according to their own standards and values."[12] Bearing these aspects in mind, then this article has examined, from an anthropological perspective, specific Supreme Court cases that have shaped the development of Indian policy and legislation in North America with an objective to explore the influence that culture can have upon legal opinion. Concomitant with this goal underlies a derivation of Alfred Kroeber's "Superorganic". According to Alex Golub, Kroeber saw the organic and the mental as being very closely connected. "But if the organic causes the mental, the mental does not, then, cause the cultural. Rather, culture operates on its own level of determination."[13] By extension, it is from out of this level of operation that I use a

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[8] GEORGE BRYAN, THE IMPERIALISM OF JOHN MARSHALL: A STUDY IN EXPEDIENCY 91 (Stratford Company, 1924).

[9] *See* WILCOMB E. WASHBURN, RED MAN'S LAND WHITE MAN'S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 185 (University of Oklahoma Press, 2nd ed., 1971).

[10] WILLIAM A. HAVILAND ET AL., CULTURAL ANTHROPOLOGY; THE HUMAN CHALLENGE 401 (Aileen Berg et al. eds., 14th ed., 2013).

[11] CAROL R. EMBER, MELVIN EMBER, & PETER N. PEREGRINE, ANTHROPOLOGY 612 (Dickson Musslewhite et al. eds., 14th ed., 2015).

[12] WILLIAM HAVILAND, CULTURAL ANTHROPOLOGY 323 (Holt, Rinehart and Winston, Inc., 7th ed., 1994).

[13] Alfred Kroeber, *The Superorganic, in* SAVAGE MINDS OCCASIONAL PAPERS NO. 1 , Intro 5 (Alex Golub ed., 2013).

variant of Kroeber's Superorganic to represent highly structured cultural organizations and institutions, such as corporations and legal institutions.[14] Once birthed, a Superorganic entity begins to take on a life of its own; nurtured and maintained by individual organic organisms born of a culture from which the Superorganic was created, it grows to govern and become culturally greater than its individual organic parts.[15]

Historically, from an Indigenous perspective, when Anglo-European cultures came in contact with Indigenous cultures, Anglo-European laws gave shape to a body politic to suit the attitude, behavior, and needs of Anglo culture. An example of this were British, American, and Canadian governments creating reservations to contain Indigenous peoples as a result of their own citizens constantly encroaching on Indigenous lands and resources.[16] A second example was the United States and Canada endorsing official policies outlawing Indigenous people from practicing non-Christian native religions.[17] In any given situation biases often can be more apparent to an outside observer than to those individuals caught up in the time of their own current events. That being the case an analyst looking back through history at various reports and records should theoretically be in a better position to objectively analyze events and their various aspects than the decision-makers themselves. The objectivity of such analysis thereby rests upon the analyst being removed from the events of the time period, as opposed to those decision makers who caught up within the events of their own time period theoretically may not have realized the same degree of objectivity. Thus unlike the actual decision makers, who in sharing a common culture may in fact have been better served by outcomes founded upon biased decisions, the analyst's observations in this case has no impact upon the outcome of events within the period under study.

When interpreting legal history, an aspect deserving attention

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[14] *See id.* at 1.

[15] *See id.*

[16] Katja Göcke, Note, *Protection and Realization of Indigenous Peoples' Land Rights at the National Land International Level*, 5 GOETTINGEN J. INT'L L. 87, 110 (2013).

[17] Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. L. REV. 253, 275 (2012) ("The aim of the government's Indian policy was civilization leading to assimilation, and civilization was a package deal. It entailed conversion to Christianity . . . ").

is the effect that culture may have played upon judicial opinion. It would be a serious error to believe that Anglo-European settlers, after being separated from their homeland by a vast ocean, left the elements of their culture back in Europe and assumed a completely different culture upon their arrival in North America. Instead, when facing an alien environment and people much different than themselves, those Anglo-Europeans who chose to immigrate to North America clung more closely to the manners and traditions they found most familiar. For this reason there should be no surprise in finding that the legal systems developed under colonial regimes displayed little sensitivity to issues of cultural relativism. Thus, in a land where Indigenous cultures once existed under their own system of governance, Anglo-European governments moved in and began a process that methodically alienated Indigenous peoples from lands, resources, and culture.

When viewing America's formative legal and political years, a document that held leading importance, to a degree where some scholars believe it represented a cornerstone upon which America's Indian policy was built, is the Royal Proclamation of 1763.[18] Because of the frequency with which the Royal Proclamation has been used to support and deny the existence of Aboriginal rights arguments it is well justified to begin with an examination of this document.

I. THE ROYAL PROCLAMATION OF 1763

The purpose of the Proclamation was to consolidate British sovereignty after defeating the French.[19] The British, cognizant that its policies toward Indians had almost resulted in England losing the war to France, issued its Proclamation of 1763 on the heels of the Royal Proclamation of 1761.[20] These need to be adjusted to superscript. Also check numbering fonts size of cited at page bottom as they are inconsistent.

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[18] William F. Maton, *The Royal Proclamation*, http://www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.html (last HTML revision Feb. 20, 1996) (full text of The Royal Proclamation of 1763).

[19] *See* Anthony J. Hall, *Royal Proclamation of 1763*, HISTORICA CANADA, (Feb. 7, 2006), http://www.thecanadianencyclopedia.ca/en/article/royal-proclamation-of-1763/ (last edited Jul. 23, 2015).

[20] *See* Kenneth Munro, *The Proclamation of 1763: Britain's Approach to Governing in the New World*, LAW NOW, (Aug. 30, 2013), http://www.lawnow.org/the-royal-proclamation-of-1763-Britains-approach/.

> We have thought [it] fit . . . to publish and declare to all our loving Subjects, that we have . . . to erect, within the countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments . . . called by names of Quebec, East Florida, West Florida and Grenada, and *limited* and *bounded* as follows . . .[21]

The document goes on to explicitly describe the territorial boundaries encompassing each of the four governments named. The last several paragraphs of the Proclamation address certain rights and instructions pertaining to the manner in which British subjects were expected to interact with those Indigenous peoples with whom the British had established relations.[22] Referring to the governments of East Florida, West Florida, and Grenada, it is stated that all the lands and territories not included *within* the *limits* of the three newly designated colonial governments of Britain, "or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West . . ."[23] were, by order of Royal Proclamation, reserved under the sovereignty, protection and dominion of Britain, for the exclusive use of the Indians.[24]

A casual non-contextual reading usually leaves one with an impression that through the force of the Royal Proclamation all the lands upon which Indigenous people had lived from "time immemorial" now belonged to the British government, through whose benevolent will Indigenous people were allowed to continue their residence on the land. When the Proclamation is placed in context, however, with certain events and conditions that existed during the period, a very different impression emerges. A momentous event, that should not be overlooked when considering a potential cause and effect relationship upon the final drafting of the Proclamation, occurred in the spring of 1763.

During the month of May, warfare erupted along the frontier

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21 Maton, *supra* note 18.
22 *See id.*
23 *Id.*
24 *See id.*

and a fighting force of Indigenous people, under the leadership of Ottawa Chief Pontiac, captured Sandusky and Fort St. Joseph.[25] Toward the beginning of June, with the capture of Forts at Miami, Outanon, Michilimackinac, Presque Isle, LeBoeuf, and Venango, the British were under siege and eventually fled L'Abre Croche on the south shore of Mackinac.[26] With the exception of Forts Ligonier and Pitt, the Indigenous nations of the Western Confederacy were largely successful in regaining control over their traditional lands in the upper Great Lakes region.[27] From May until October, Confederacy warriors maintained an effective offensive posture. By the fall of 1763, Indigenous nations of the Confederacy had either captured or destroyed every post west of Detroit.[28] It was not the superiority of the British military that eventually contained the Indigenous war effort, but the spread of a smallpox epidemic that finally enabled Superintendent of Indian Affairs Sir William Johnson to arrange a truce.[29] The fact that the effects of this resistance have largely gone unaccredited as having any significant impact upon the final drafting of the Royal Proclamation of October 17, 1763, further illustrates how the level of European's ethnocentrism has colored the writing of history to further perpetuate a myth of dominion and the superiority of Anglo-European political structures. To attempt to unravel the myth requires a deeper probing into the factors that had to be contended with on a day-to-day basis.

Within the territory lying between the colony of Quebec and Florida, which the king's royal document alleged to be the dominion of England, also existed colonies of the Dutch, the Swedes, Spanish, and French, all of whom were independently conducting business with independent sovereign Indigenous nations.[30] Not one colony of these European nations could convincingly force or mandate the Indians to attach their business to any one specific colony to the exclusion of any other

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[25] *See* Rosie Tanambe, *Chief Pontiac*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/p/index.php?title=Chief_Pontiac&oldid=969197 (last visited October 13, 2016).

[26] *Id.*

[27] *Id.*

[28] See Edwin G. Higgins, and the Whitefish Lake Indian Reserve No. 6, Whitefish Lake Ojibwa Memories (Ontario: Highway Bookshop, 1982).

[29] Stephen Greymorning, *Culture and Language: The Political Realities to Keep Trickster at Bay*, THE CAN. J. OF NATIVE STUD. 185, (2000).

[30] *See Exploration of North America*, HISTORY.COM, (2009), http://www.history.com/topics/exploration/exploration-of-north-america.

colony. The reality of the situation dictated that the laws and governments of the colonial powers only had force upon their own citizens within the limits of the British colonies. The following passage, taken from a treaty with the Wyandot, illustrates that the Americans had openly acknowledged the extent of Aboriginal jurisdiction:

> If any citizens of the United States, or other person not being an Indian, shall settle on any lands allotted to the Wyandot and Delaware nations in this treaty, except upon the lands *reserved* to the United States . . . such persons shall forfeit the protection of the United States, and the Indians may punish him as they please.[31]

This type of disclaimer continued to be included within a number of treaties up until 1794.[32] The fact that the government declared that all non-Indians entering the lands of Indian peoples would forfeit the protection of the United States, demonstrates that once a person left the territorial limits of a colony, or state, they were considered to have entered "Indian country", where the protection of Anglo law ceased to operate and Indigenous jurisdiction was in effect. Also noting the phrase "lands reserved to the United States" coupled with the actual state of affairs, the Proclamation of 1763 in and of itself could not possess any real enforceable power over any of North America's Indigenous people, and represented nothing more than a voice of what was hoped to be shouting in a wilderness and hearing itself echo back. In reality the Crown could only govern those people who voluntarily subjected themselves to British rule. In the absence of willing subjects, British rule could only extend as far as it could be applied by force. As logic would thus direct, where force could not prevail British law could not exist. Therefore, British rule could only exist within the limits of its own colonies, and its dominion could only extend as far as it could exert the force of its own rule. Where the force of British rule could not be exerted, Indian people were left to govern themselves in accordance to their own

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[31] Treaty of Fort McIntosh, BEAVER AREA HERITAGE FOUNDATION, http://www.beaverheritage.org/treaty_of_fort_mcIntosh.html (last accessed Oct. 13, 2016) (emphasis added).

[32] *See id.* at 42.

laws, as customs dictated. This was classically demonstrated in 1736, when the British colonial government of South Carolina sent a commissioner to arrest Gottlieb Priber, a Jesuit Priest who had been living among the Cherokee and working for French interests.[33] The commissioner, and the military personnel who accompanied him, were forced to return to South Carolina under Cherokee escort. As long as Priber remained within Cherokee territory all the "lawful" demands of the English were of no consequence. The incident served to illustrate that Indian laws and governance had full force within the limits of "Indian country."

The section of the Proclamation which addresses the topic of Indigenous people and the Crown's relationship to them also serves to illustrate yet another point. The official document proclaims: "And whereas it is just and reasonable, and *essential* to our *Interests* and the *Security* of our Colonies, that the several Nations or Tribes of Indians with whom *We are connected* . . . should not be molested or disturbed . . . in the possession of . . . their Hunting Grounds."[34] Given the fact that the Iroquois represented a powerful military and political force, it is not difficult to interpret the underlying message within this statement. First, as stated, anyone who molested or disturbed the Indians in the possession of their grounds would be jeopardizing the security of the *colonies*. The inclusion of this statement within the Proclamation acknowledges that the Crown respected the fact that the Indians represented an independent military power capable of threatening the security and survival of the Crown's planted colonies. This observation is most sharply supported by the Royal Proclamation's predecessor, the Proclamation of 1761. This document explicitly states that the peace and security of Britain's North American colonies and plantations greatly depended upon the goodwill and alliance with the several Indian Nations bordering the colonies.

"We therefor [sic] taking this matter into our Royal consideration, as also the fatal effects, which would attend a discontent amongst the Indians in the present situation of affairs, and being upon all occasions to support and protect the said

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[33] *See* Knox Mellon Jr., *Christian Priber's Cherokee "Kingdom of Paradise,"* THE GEORGIA HISTORICAL QUARTERLY, Fall 1973, at 319.

[34] W.P.M. KENNEDY, DOCUMENTS OF THE CANADIAN CONSTITUTION 1759–1915 20 (1958) (emphasis added).

Indians in their just Rights and Possessions."[35]

An important inclusion addressed by the 1763 proclamation can be found in the section which states it was the *colonies* that were connected to several "Nations or Tribes" of Indians. Because language has been given such importance before the law, and in light of the fact that the Crown was concerned about the security of its colonies, this passage leaves little doubt that the colonies sought to connect themselves to the several Nations or tribes of Indians for their own protection and security because it was within their best interest for them to do so. As the language embodied within the Proclamation suggests that an *allied* relationship existed between the colonies and the Indigenous Nations with whom they were connected, it can be noted that when two bodies are politically connected through an alliance they stand in a relationship which presupposes a mutual responsibility that binds the actions and promises of each toward the other.

An aspect of considerable importance, with regard to the treatment of Indian land also finds its nascence in the 1763 proclamation is the British government's restriction of individuals from purchasing Indian land. The section reads as follows:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians . . . We do, with the Advice of our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement . . .[36]

It should be noted that as a result of frauds committed upon the Indians due to the moral character of English settlers, the Proclamation placed its restriction upon *English* settlers to keep them from purchasing *Indian lands*.

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[35] PETER CUMMING & NEIL H. MICKENBERG, NATIVE RIGHTS IN CANADA 285 (Kevin R. Aalto, Lawrence R. Fast, John A Kazanjian & Garry E. Wong eds., 2d ed. 1972).

[36] *Id.* at 291.

The Proclamation as formulated, primarily concerns itself with conditions that affected the British colonies and the Indians who were connected to those colonies. The restriction of purchase by individuals was qualified to exist only "within those parts of our Colonies where, *we* have thought proper to allow Settlement."[37] This wording is very specific. It does not refer to future colonies yet to be settled, nor does it refer to some nebulous territory. It refers to a restriction placed upon a specific people, Anglo-Europeans, within specifically designated areas already under British settlement and, as a result of this, it leaves open for interpretation the conditions, assumed or real, that could actually be placed upon those people who existed outside the territorial limits of the colonies of Great Britain.

The Royal Proclamation of 1763, as made obvious by its opening line, "We have thought it fit . . . to publish and declare to all our loving Subjects,"[38] was targeted to the subjects of the British Crown. As the official voice of the Crown of England, there exists no doubt that British subjects were bound by the Proclamation. Sufficient ambiguity does exist, however, to question whether the Royal Proclamation held any power over the sovereignty of Indigenous North Americans, and in its wording made no pretentious claims over the independence of Indigenous peoples.

II. THE ETHNOCENTRISM OF IMPERIALISM

"After the signing of the Treaty of Utrecht, 1713, the English Crown claimed dominion over much of eastern America."[39] In the two and a half centuries that followed, governments, in true Imperial form, moved to decide the political fate of Indigenous North Americans, and created in the process a body of Indian law and policy often without any real the knowledge of the Indigenous people that originally settled in North America and most frequently against their will. It is thus ironic that many of America's early legislators of Indian policy were themselves a part of a revolution against a government deemed unjust in legislating laws and policy without the representation of its

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[37] *Id.* (emphasis added).

[38] THE AVALON PROJECT, *The Royal Proclamation by the King George R. – October 7, 1763*, (2008), http://avalon.law.yale.edu/18th_century/proc1763.asp.

[39] Stephen Greymorning, *In the Absence of Justice: Aboriginal Case Law and the Ethnocentrism of the Courts,* 17 CAN. J. OF NATIVE STUD. 1, 4 (1997).

citizens. Regardless of whether such actions are fueled by a British government or an American government, the operate word in either case is imperialism. For this reason, it should not be surprising to note that the political dogma that diminished the inherent sovereign rights of Indigenous North Americans was birthed in the soil of colonial imperialism. Likewise, it should also come as no surprise that the United States Supreme Court, which played a central role in Indigenous rights issues, also provided its government with the legal justification to support the continuation of this political dogma.[40] Thus a United States Supreme Court was endowed with judicial power over,

[A]ll 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 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.[41]

In its incipient design, the Supreme Court was chartered to protect the constitutionality of a young nation of Americans. Safeguards, guarantees and protection of the rights of Indigenous peoples, if ever an issue of genuine concern among the framers of the Constitution, were only so under a moral obligation of the United States to honor its treaties, and to this regard its treaties with Indigenous North Americans has been an area in which the United States has not fared well. It is also relevant that at the time of American confederation, and at least up to 1835, marking the end of Marshall's tenure as Supreme Court Chief Justice, there existed Indigenous populations living within boundaries identified by a rebellious government, a.k.a. The United States of America, that had not been incorporated into the American State.[42]

Since the time of its nascence, the United States government maintained a vested interest in the acquisition of Aboriginal lands and resources, and has maintained a demonstrated obligation to its non-Indigenous citizens. With respect to the

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[40] *See* Milner S. Ball*, Constitution, Court, Indian Tribes*, 12 AM. B. FOUND. RES. J. 1, 4 (1987).

[41] U.S. CONST. art. III, § 2, cl. 1.

[42] *See* Ball, *supra* note 40, at 29.

government's fulfillment of its obligations, Indigenous peoples in America represented an obstacle to national interests in the first instance, which historically resulted with acquiring land and natural resources, and in the second instance stood outside the relationship of State citizens.[43] These facts could not help but lead to strong cultural biases that ran in favor of the needs of a young nation and often ran in opposition to the needs of Indigenous nations. Thus when it came to actually dealing with Indigenous nations, the actions of the Court at times proved to be self-serving in ways that created conditions fostering Indian dependency.

> [S]ince the time of John Marshall, the independence of the Indian tribes . . . has decreased, and their dependency has increased . . . As the United States has expanded, it has repeatedly broken its treaties, has taken the Indians' land by force, has repeatedly imposed new and more restrictive treaties upon them . . . and has reduced them to the status of dependent wards of the government.[44]

Ample evidence exists to support claims of ethnocentrism on the part of federal jurists who sat in judgment on rights of Indigenous people.[45] For this reason there should be little doubt that judges, even when believing they have the best of intentions, are not immune to the influences and biases of the culture that governs them.

Federal judges charged with the duty of responding to Indian litigants are often handicapped by ignorance of, or insensibility to the operative standards of Indian political and personal relationships, by ethnocentrism, or by simple prejudice . . . Even with the best of intentions, judges have the difficult and often impossible task of preventing their own personal beliefs

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[43] *See* RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 96 (University of California Press, 1980) (The American Indian was naturalized through the passage of the Citizen Act of 1924. "Citizenship was conferred to benefit the government, not the tribes.")

[44] Washburn, *supra* note 9, at 182–183.

[45] *See* B.H. LEVY, OUR CONSTITUTION: TOOL OR TESTAMENT 284–285 (1941); *See* Ball, *supra* note 40, at 42; Alvin J. Ziontz, *In Defense of Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 47 (1975).

concerning individual rights influencing their judgments.[46] "Anglo-Saxon standards of fairness in group life are derived from a wholly different historical and social context."[47]

"Thus, against the backdrop of a rapidly expanding nation, possessed with self-serving interests, a Congressional Act of 1789 created one Supreme Court to protect and uphold the laws of an infant nation, a nation to which Indigenous North Americans were recognized as obstacles to its growth and development."[48]

"In its formative years, 1801 - 1835, the United States Supreme Court came under the seemingly domineering leadership of its Chief Justice."[49] It was during this period that cases pertaining to the rights of Indigenous people began to enter into the Court and fall before the jurisdiction of its Chief Justice, John Marshall. "The result . . . was that the Chief Justice appeared to be the whole court and to make history single-handedly."[50]

III. DISCOVERY RIGHTS, ABORIGINAL TITLE AND AN UNRULY MANNER OF AN ANGLO-CENTRIC COURT

The question of Aboriginal title remains an issue of political and legal weight that continues to draw considerable attention and discussion. Inherent within Marshall's case decision, that Aboriginal title was merely a right of occupancy, are biases shaped by the standards of an Anglo-centric culture during Marshall's tenure as Chief Justice. These biases notably stand in contradiction to the fact that many of the early treaties between Anglo-European founded governments and Indigenous nations were negotiated as a result and affirmation of a military strength and political status demonstrated by Indigenous nations such as that encountered by the Mohawk, Cherokee and Seminole peoples.

European political actions and decisions, with regard to the rights of Indigenous people, have historically functioned on ethnocentric principles. More specifically, European political

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46 Ziontz, *supra* note 45, at 47.

47 *Id.* at 48–49.

48 Greymorning, *supra* note 39, at 5–6.

49 *Id.*

50 R. Kent Newmyer, *The Supreme Court under Marshall and Taney, in* THE AMERICAN HISTORY SERIES, 19, (John Hope Franklin & Abraham S. Eisenstadt eds., 1968).

assertions initially functioned on a belief that the Christian cultures of Europe were superior to the Indigenous cultures of North America.[51] Driven by a desire to obtain new lands and resources, Europeans grabbed at whatever logic they could in order to justify their actions. Albert Weinburg observed that the American Declaration of Independence was followed by a war not just for independence, but also for its own extension of power. As a result,

> America's affirmation of equality and the foundation of government on consent was mocked in less than three decades by the extension of its rule over an alien people without their consent . . . [Thus], the very peoples who had drunk most deeply of the new humanitarian nationalism succumbed most readily to the expansionist intoxication which led into the age of imperialism.[52]

It was within this growing sense of national superiority that Supreme Court Chief Justice John Marshall presided over the case of *Fletcher v. Peck*.

IV. *FLETCHER V. PECK*; A CASE FOR A FEIGNED CONTROVERSY

Fletcher v. Peck, generally regarded as a feigned case, was brought before the Chief Justice in 1810 by land speculators as a test case of land rights laws.[53] In 1795, by virtue of a legislative act to appropriate land for the purpose of payment to Georgian State troops, a patent had been issued to the Georgia Company.[54] Although it was argued that Georgia possessed the right to convey property rights to the land company, the merits of the case moved on uncertain ground as a result of both Spanish and Indigenous claims of sovereignty over a considerable part of the

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[51] Symposium, *The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, The United Nations, and The Organization of American States: The International Law Of Colonialism: A Comparative Analysis,* 15 LEWIS & CLARK L. REV. 847 (2011).

[52] ALBERT K. WEINBERG, MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY, 11–12 (First Encounter ed., Quadrangle Books 1963) (1935).

[53] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 146 (1810).

[54] *Id.* at 88.

disputed territory.[55] The case could not have found a better advocate to test it as both John Marshall and his father stood to gain 10,000 acres in land grants west of the Appalachians.[56] Churchill writes: "His first foray into land rights law thus centered in devising a conceptual basis to secure title for his own and similar grants."[57] Irrespective of Marshall's conflict of interest, the case represented the first time that the Court was used to deliberate on the question of absolute title to soil existing apart from "Indian ownership" rights to the land. "In addressing the question of land rights the Court, holding true to the culture that gave it birth, subsumed Indigenous cultural concepts regarding land under English cultural concepts of land tenure."

In the Court's attempt to assign a legal definition to Aboriginal title, the Court maintained that Aboriginal title could only reflect a right to occupy land for the purpose of hunting. Stating that Aboriginal concepts did not resemble European concepts of land tenure, the Court was easily led by arguments from John Quincy Adams and Robert Goodloe to not hold any regard for the intrinsic values of Indigenous culture.[58] Using arguments reflecting an overriding belief that the values of Euro-American culture stood superior to the cultural values embraced by Indigenous people, the defense stated, "they have no idea of a title to the soil itself. It [the land] is overrun by them, rather than inhabited . . ."[59] and asserted that any underlying claim of Aboriginal title to the land could not represent a true and legal possession.

It should be noted that this opinion took an ethnocentric liberty to overlook the fact that when European settlers first landed in America, they encountered innumerable stretches of open cultivated fields, some of which were reported to be almost two hundred acres.[60]

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55 *See* CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, 309–323 (The Regents of the U. of Cal., Russell & Russell, Inc. 1960) (1944).

56 *See* LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW, 80 (Macmillan Pub. Co., Inc. 1974).

57 WARD CHURCHILL, STRUGGLE FOR THE LAND: INDIGENOUS RESISTANCE TO GENOCIDE, ECOCIDE AND EXPROPRIATION IN CONTEMPORARY NORTH AMERICA, 42 (Common Courage Press 1993).

58 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 123 (1810).

59 *Id.* at 121.

60 DAVID FREEMAN HAWKE, EVERYDAY LIFE IN EARLY AMERICA, 12–13 (Harper & Row 1988), *reprinted in* (Perennial 2003) (Because the majority of settlers coming over from Europe were merchants, tradesmen, and seekers of fortune,

Accounts given by Major-General John Sullivan, regarding an American war campaign against the Iroquois, reported Newtown, as being " . . . a large, scattered settlement, abounding with extensive fields of the best corn and beans; so extensive and numerous as to keep the whole army this day industriously employed in destroying . . . "[61] Also relevant is Bruce Trigger's account of the Huron being so adapt at farming that they not only were able to feed a population in excess of 20,000, but also were able to use their surplus to trade for meat rather than hunt,[62] and accounts from Lieutenant Colonel James Grant's invasion of fifteen Cherokee Middle towns, where he documented his troops had destroyed 1,500 acres of Cherokee crops.[63] Even by twenty-first century standards these accounts attest to the fact that these Indigenous peoples were obviously accomplished in the skills and attributes required for farming.

In the Court's deliberation on what would become an issue of crucial importance, legal arguments exhibited distortion and error. For instance the defense, which posited a position that Indians had no idea of property in the soil but only a right of occupation, unwittingly acknowledged the national character possessed by Indigenous people as "[a] right not [in the] individual, but *national*."[64] Arguing that only nations can gain title to land through conquest, the Court, possibly with intent, erroneously proclaimed: "All the treaties with the Indians were the effect of conquest. All the extensive grants have been forced from them by successful war. The conquerors permitted the conquered tribes to occupy part of the land, until it should be wanted for the use of the conquerors."[65] The defense even credited William Penn with having obtained Quaker land under

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possessing little or no knowledge of an agrarian lifestyle, many colonists had to rely upon the knowledge and skills of the indigenous people for instruction in the manner of planting, culling out the best seed, observing "the fittest season, keeping distance for hoes and fit measure for hills, to worm . . . and weed . . . and prune . . . and dress . . . " as occasion required. *Id at 13.*)

61 THOMAS C. AMORY, THE MILITARY SERVICES AND PUBLIC LIFE OF MAJOR-GENERAL JOHN SULLIVAN, OF THE AMERICAN REVOLUTIONARY ARMY, 124 (Kennikat Press, Inc. 1968) (With each town that Sullivan destroyed he noted the extensiveness of the Native's fields and crops).

62 *See* BRUCE TRIGGER, THE HURON FARMERS OF THE NORTH 30–32, 42–43 (Holt, Rinehart and Winston, Inc., 2nd ed. 1990).

63 James Grant, *The Journal of Lieutenant-Colonel James Grant, Commanding and Expedition against the Cherokee Indians, June-July, 1761*, 12 THE FLA. HIST. SOC'Y Q. 25, 35 (July 1933).

64 *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 122 (1810) (emphasis added).

65 *Id.*

the right of conquest.[66] Rather than acquisition by conquest, the infamous "Walking Treaty" was conducted more accurately as an acquisition by marathon, the result of three white runners who having trained three months in advance of their day and a half marathon acquired 66 miles of property.[67]

Although the Court ruled that Georgia was empowered with a fee-simple title in the land, the soundness of the decision was challenged by the dissenting opinion of Justice Johnson. In Johnson's opinion "the interests of Georgia . . . amounted to nothing more than a mere possibility . . . ."[68]

> If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was anything more than a mere possibility, it certainly was reduced . . . when the state of Georgia ceded to the United States, by constitution, both the power of pre-emption and of conquest . . . [69]

In rendering the opinion of the Court, Chief Justice Marshall never mentioned Indian title until after he had already affirmed that Georgia did indeed possess the power of disposing land within the limits of its borders in whatever manner its judgment saw fit. Withholding comments on Indian title until the very end Marshall stated: "The majority of the court is of the opinion that the nature of the Indian title, which is certainly to be respected by the court, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[70] In delivering this statement Marshall paralleled Indian title to a possession of real property under claim as a freehold estate.[71] Though Marshall delivered the Court's opinion, dissenting Justice Johnson delivered the most clear and straightforward statements pertaining to Indian title offered.

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66 *Id.*

67 *See* WILLIAM A. HUNTER, THE WALKING PURCHASE 1–3 (Louise M. Waddell ed., Pa. Hist. and Museum Comm'n 2006).

68 *Fletcher,* 10 U.S. (6 Cranch.) at 146.

69 *Id.* at 147.

70 *Id.* at 142–43.

71 *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 592 (1823).

Johnson argued that the correctness of the Court's opinion depended upon a just and unbiased view of the state of the Indian nation.[72] Pointing out that the innumerable treaties formed with the North American Indian acknowledged them to be an independent people, Johnson was persuaded by evidence he believed clearly indicated that the Indians held an absolute right to the soil for themselves and their heirs.[73]

> In fact, if the Indian nations be the absolute proprietors of the soil, no other nation can be said to have the same interest in it. What, then . . . is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what it was assumed at the first settlement of the country . . . a right of conquest or of purchase, exclusive of all competitors, within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets . . .[74]

The Court's reluctance to clearly articulate a legal definition of Aboriginal title was perhaps more an indication of its own caution. Conceivably, this could have stemmed from a realization that if Indian nations were legally acknowledged to possess an absolute title to the land the United States would be hindered by additional obstacles as it pursued its course toward national expansion.[75]

By 1823, thirty-four years had passed since the American government reorganized itself under the American Constitution. For all the rhetoric regarding ultimate sovereignty, there still existed numerous groups of Indigenous peoples that had never been confronted by the United States government to sign a treaty and still existed in absolute sovereignty upon their ancestral lands. In forty-five years of treaty making with Indigenous North Americans the treaty had proven to represent the most effective method of acquiring Native land. The decision rendered in *Johnson v. M'Intosh* however, would add a new dimension to the

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[72] *Fletcher*, 10 U.S. (6 Cranch.) at 146.
[73] *Id.* at 147.
[74] *Id.*
[75] *See generally Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823).

method in which imperialistic governments could acquire Indigenous peoples' lands.[76]

V. *JOHNSON V. M'INTOSH*: DISCOVERING THE RULES OF MARSHALL'S COURT

Chief Justice John Marshall's opinion in *Johnson v. M'Intosh* rested on an assertion of European discovery rights over an already inhabited continent. Marshall's opinion has historically been interpreted as having validated his theory of conquest but, as Henderson observed, the case in and of itself did not validate a theory of conquest, but merely noted a potential for a conquest theory to be applied in law.[77] Marshall went on to claim that, however extravagant and pretentious the idea might appear, *if* the principle had been asserted and sustained, and *if* a country were acquired and held under that principle, then it became the law of the land and could not be questioned.[78] Marshal further stated, "So too, with respect to the concomitant principal that the Indian inhabitants are to be considered merely as occupants . . . deemed incapable to transferring the absolute title to others."[79] It is apparent that even Marshall doubted the strength of these claims, as observed by his following statement: "However this restriction may be opposed to natural right, and the usages of civilized nations . . . *if* it be indispensable to that system under which the country has been settled . . . it *may, perhaps* be supported by reason . . ."[80] There should be no doubt that such a legal premise was to be indispensable to the system under which the United States had been settled. The system was so biased by its own ethnocentrism that settlers guilty of committing crimes against Indigenous peoples were consistently defended and rewarded by an American government that held little regard for breaking its own supposed sacred laws and pledge of the American Nation.

On February 17, 1823, the Supreme Court met to deliberate

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[76] *See id.* at 591.

[77] James Y. Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75, 92 (1977) (Henderson has felt that Marshall's statements have here been misconstrued as validating a conquest theory). *See also* Howard R. Berman, *The Concept of Aboriginal Rights in the Early History of the United States*, 27 BUFF. L. REV. 637, 644 (1978).

[78] *Johnson*, 21 U.S. (8 Wheat.) at 591 (1823).

[79] *Id.*

[80] *Id.* at 591–92 (emphasis added).

upon a question of land title resulting from a group of competing land speculators who had directly acquired lands from the Illinois and Piankeshaw Indians. Although no Indian nation was directly involved, Marshall used the case as an opportunity to advance a theory of sovereign rights by virtue of discovery and conquest. Choosing to ignore an extensive body of literature pertaining to the rights of non-European people, Marshall based the first part of this theory upon the argument that "discovery gave exclusive title to those who made it."[81] Marshall further reasoned that the principle of "discovery" could only be extended to European nations, and only conferred an exclusive right to determine which European nation could acquire Indian land through either purchase or conquest. Marshall claimed that the act of discovery created a relationship between the discoverer and those discovered, which according to the Chief Justice, limited the extent of their sovereignty. Upon closer analysis, Marshall's theory when put to practice translated into a denial of Indigenous people's freedom of will and choice, a matter of no small concern considering that when European people have been denied these freedoms, history shows they were agitated to the point of revolution, as observed with the French revolution, Spanish revolution, Russian revolution, America revolution.[82]

To support his position, Marshall cited the examples of Nova Scotia being ceded to England by the treaty of Utrecht in 1713; Florida being ceded to England by Spain; Louisiana being ceded to Spain by France, through a secret treaty, and then retro-ceded back to France; all of which happened while the land was still in the possession of Indians.[83] With the kind of enlightened relevance that only ethnocentrism can bring, Marshall argued that the validity of titles given by the British, and later by the government of the United States, had always been exercised uniformly over Indian territory, and had never been questioned within the American courts.[84] Logically, should a thief to ever create a court, would such a court ever question the actions of the hand that crafted it? Delivering a statement, which not only protected his theory, but, also the political actions of the

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[81] *Id.* at 574.

[82] *See generally* Michael E. Newton, ANGRY MOBS AND FOUNDING FATHERS: THE FIGHT FOR CONTROL OF THE AMERICAN REVOLUTION 3–4 (2011) (Explaining that British limitation on colonialist freedoms led to rebellion).

[83] *Johnson*, 21 U.S. (8 Wheat) at 583–84.

[84] *Id.* at 587–88.

American government and the United States Supreme Court, Marshall claimed:

"Conquest gives a title which the *courts* of the *conqueror* cannot deny, whatever the private and speculative opinion of individuals may be, respecting the original justice of the claim which has been successfully asserted."[85] With this artfully constructed statement Marshall strategically protected the basis of his opinion from possible refutation by other courts. To flesh out his theory, Marshall craftily mixed fact with fancy by asserting that the British government, after claiming title to all Indian occupied lands, also asserted a limited sovereignty over them.

> These claims have been maintained and established as far west as the river Mississippi, by the sword . . . . It is not for the courts of this country to question the validity of this title, or to sustain one, which is incompatible with it . . . . The title by conquest is acquired and maintained by force. The conqueror prescribes its limits.[86]

What Marshall had alluded to as "claims being established and maintained by the sword as far west as the river Mississippi," was Britain's conquest over the French.[87] Any other conquest referred to would have been the American War of Independence, which was won from the Crown of England, and not over any Indigenous Nation. The United States' assertion that the defeat of the British was a defeat of Indigenous North Americans, was refuted by the Six Nations, and Western Confederacy who made it quite clear that the British had been defeated and not the Iroquois.[88] The bias of the conquest theory can be exposed if we momentarily deviate to consider a different situation. In 1778, France had signed a treaty of Alliance with America.[89] If we consider a hypothetical situation in which the American revolution had ended with the Americans losing to the British, and then have *Britain* proclaim that because the Americans had

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[85] *Id*. (emphasis added).

[86] *Id*. at 588–89.

[87] *See* COLONIALISM: AN INTERNATIONAL SOCIAL, CULTURAL, AND POLITICAL ENCYCLOPEDIA 458–59 (Melvin E. Page & Penny M. Sonnenberg ed., 2003) [hereinafter COLONIALISM].

[88] Greymorning, *supra* note 39, at 11.

[89] COLONIALISM, *supra* note 87, at 458.

been defeated, France as Americas ally had also been defeated, we may then see the difficulty in accepting an idea that with Britain's defeat, the Iroquois as their ally had also been defeated.

America's political leaders must have also realized that France would not accept so ill-formed a notion, as made evident by a discussion among members of the Continental Congress. It was debated that if the United States were to lose their struggle for independence and reconcile their differences with England, then it was conceivable that "a British fleet and army, united with an American fleet and army . . . might in a subsequent war conquer the French, all the French Islands in the West Indies . . ." and in only a short period of time destroy all their marine and commerce.[90] From this discussion it is easy to deduce that an American defeat would not automatically equate to a defeat and subjugation of her French ally.

With regard to Marshall's claim that the act of discovery gave exclusive title to the discoverer, and created a relationship whereby the sovereignty of those discovered was limited by the discoverer, in light of the fact that the English discovery of Japan did not bring the Emperor of that nation under English sovereignty, Marshall's discovery principle should be viewed for what it really was: nothing more than political theory. Accepting the fact that Marshall's application of the discovery principle was mere political fancy, it nevertheless should be pointed out that up to that period, it was standard practice for European powers to use whatever political ploy best suited their designs, and to continue to use it until such time as it was accepted or they were forced to shift to some other manner that could support their position. Marshall, not ignorant of this, merely acted within the guidelines of what was culturally acceptable, and put standard procedure to practice: "However *extravagant the pretension* of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted . . . and . . . sustained . . . [and] a country has been acquired and held under it . . . it becomes the law of the land . . . ."[91] Here Marshall's use of the words "extravagant pretension" is revealing in itself with the realization that the Oxford English Dictionary defines pretension as:

"An allegation or assertion the truth of which is not proved or

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90 *See* Greymorning, *supra* note 39, at 12.

91 *Johnson*, 21 U.S. (8 Wheat) at 591.

admitted, *esp.* an unfounded or false one, or one put forward to deceive or serve as an excuse; (hence) an excuse, a pretext; a pretence."[92]

As a result of such carefully crafted statements Marshall was able to transform a tenuous principle of discovery into a theory of conquest. With the opinion rendered, *Johnson v. McIntosh* provided the government with the needed legal justification to exercise the forced extinguishment of Indigenous possessed lands. Thus where battles had yet to be fought, and to have neither been won nor lost, through an illusionary idea of conquest, west of the Mississippi Indigenous title was undermined, land was acquired, and American imperialism was secured.

VI. *THE CHEROKEE NATION VS. THE STATE OF GEORGIA*: THE SCALES OF JUSTICE THAT NEVER BALANCED

In seeking to identify an element common to both the Indigenous American and the Euro-American perspectives in the Cherokee cases, arguments made by both hinged upon which culture possessed what particular "rights" over the other culture, and whose authority, or power, was in force to protect and guarantee those rights. The immediate issues and circumstances which brought *Cherokee Nation vs. The State of Georgia* before the Supreme Court stemmed from Georgia's Governor legislating a series of Acts, intended to first annex Cherokee land to several counties within the Georgian state, and then coerce the Cherokee into emigrating out of Georgia.[93] The Governor justified his actions on the basis of a land cession the State had made to the federal government in 1802.[94] The land cession had been backed by an American government promise that as soon as the Cherokee were persuaded to peacefully give their land up their title would be extinguished and the Cherokee would then be removed outside the borders of Georgia.[95] The issue of getting the Cherokee to give up their land, however, was far from being a simple matter.

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92 Oxford English Dictionary, accessed at http://www.oed.com.weblib.lib.umt.edu:8080/view/Entry/150953?rskey=WNdPjs&result=1#eid, (August 7, 2016).

93 *See* Cherokee Nation v. State of Georgia, 30 U.S. (5 Pet.) 1, 11 (1831).

94 CHARLES RUSSELL LOGAN, THE PROMISED LAND: THE CHEROKEES, ARKANSAS AND REMOVAL, 1794-1835, ARK. HISTORIC PRESERVATION PROGRAM 2, 22.

95 *See Georgia Cession*, *in* I AMERICAN STATE PAPERS: DOCUMENTS LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES IN RELATION TO THE PUBLIC LAND 113, 114 (1834).

Throughout its relationship with Indigenous peoples, the government made continued efforts to "civilize" the Indians by converting them over to an agricultural based subsistence economy.[96] The Cherokee, who had long been successful in agricultural pursuits, boldly stated that their claim to their land was based upon more than the mere occupancy rights that an alien Euro-American culture proclaimed Indians were limited to. The United States government, in maintaining its position to assimilate and move Indigenous people toward an Anglo-American concept of civilization, continually urged Native people to abandon their hunting subsistence economies for agricultural based economies, in spite of the fact that the Cherokee had been successfully farming long before De Sota first encountered them in 1540.[97]

During the 1820's the United States government decided to provide funding for the Cherokee, along with a number of other southern tribes, to help them adopt an agricultural lifestyle. During this time period a Cherokee advancement came with Sequoia's creation and implementation of a written language. This achievement brought literacy to the Indian nation in an astonishingly short period of time and was a significant factor in establishing schools for their children. Literacy in their Native language also proved to be instrumental when the Cherokee formulated a new government. In modeling their government after the United States government, the Cherokee included a code of civil and criminal laws, courts and a legislature, and a formal Constitution.[98] Having become plantation styled agriculturists, herdsmen and mechanics, the Cherokee by their own admission, could now claim the same sense of ownership and attachment to the land as claimed by Euro-Americans.[99]

Georgia's leadership, focusing its efforts to acquire Cherokee land, persuaded Commissioners from Washington to travel along with the state's own Commissioners on October 4, 1823 to a council meeting at Newtown, the Cherokee Nation's capital, to try and coerce the Cherokee into a treaty of cession. In spite of the Commissioner's coercive and threatening language, the Cherokee

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96 *Cherokee Nation,* 30 U.S. (5 Pet.) at 5–6.

97 *Id.* at 6–7.

98 *See* Constitution of The Cherokee Nation, § 2 (July 1827) (For a compilation of various Cherokee Laws *See* LAWS OF THE CHEROKEE NATION, (Scholarly Resources Inc., 1973)).

99 *See Indian Affairs, in* 2 AMERICAN STATE PAPERS 471 (1824).

had reached an unalterable decision to cede no more land.[100] Without variation Cherokee representatives repeatedly responded; "We beg leave to present this communication as a positive and unchangeable refusal to dispose of one foot more of land."[101]

Demonstrating principles consistent with those professed by the American Colonies' 1776 Declaration of Independence, in 1827, the Cherokee formulated a Constitution, which mirrored the United States' own Constitution, and declared themselves a sovereign nation with an absolute proprietorship to the soil.[102] The Cherokee declaration of independence proved to make Georgians very uneasy about the state of affairs regarding the Indian question. In 1828, when rumors began to spread about the discovery of gold on Cherokee land Georgia's Governor George Gilmer took matters into his own hands.[103]

Acting within an ideology of a divided sovereignty, Gilmer legislated a series of acts, which gave Georgia the last word in regulating all laws regarding Indians within the boundaries of the state.[104] Governor Gilmer's legislation asserted Georgia's right of title to Cherokee lands, made null and void all Cherokee customs and laws, and declared it illegal for any Indian to testify in court cases in which Anglo-Americans were involved. Gilmer also charged that any person, or group, discovered aiding any Cherokee who intended to remain within their home and ancestral land would be punished under Georgia State law.[105] To further the State's efforts to take possession of Cherokee lands Gilmer declared that, whether by force or negotiation, the United States was bound to extinguish Indian title, and "as the United States have failed in their engagements, Georgia has a right to take the matter into her own hands. As a consequence of these doctrines . . . if other means fail she will resort to violence in support of her claims; and that as she wants the Cherokee lands, *she will have them*."[106]

While it is interesting how such a position would not be viewed as a statement reflecting treason, Gilmer nevertheless

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100 CHARLES C. ROYCE, THE CHEROKEE NATION OF INDIANS (1975).

101 *Indian Affairs*, *supra* note 99, at 471.

102 *See* Constitution of the Cherokee Nation, § 2 (July 1827).

103 LOGAN, *supra* note 94, at 22.

104 *See id.*

105 *Id.* at 23.

106 SPEECHES ON THE PASSAGE OF THE BILL FOR THE REMOVAL OF THE INDIANS, iv-v (Perkins and Marvin eds., 1830).

maintained his stance upon the position that he was asserting the rights of sovereign and independent states, and neither the United States nor any other state had a right to demand he justify the reasons behind his conduct when it concerned matters of governing the state's population, or any class of persons residing within the state's boundaries.[107] Acting within the power of its new legislation, in September 1830, the state brought to trial George Tassels, a Cherokee Indian, for the murder of another Indian within the Cherokee Nation's occupied territory.[108] In the case *The State vs. George Tassels*,[109] Georgia made arguments that placed the sovereignty of the state above that of the federal government, "the relations existing between the Cherokee Indians and the State of Georgia were those of pupilage. No treaty between the United States and the Cherokees could change that relationship, could confer upon them the power of independent self-government."[110] The state's indictment of George Tassel would prove to become a means through which the Cherokee would attempt to bring a test case before the Supreme Court.

In addition to Gilmer's actions representing a direct threat upon Cherokee sovereignty, his legislation also represented a potential threat to the United States government by attempting to give individual states the power to rise above federal law. It is of interest to note that in spite of Gilmer's treasonous threat and the impact his actions could have had upon the sovereign powers of the federal government, newly elected President Andrew Jackson, a celebrated Indian fighter, chose to ignore the Georgian Acts.[111]

In response to Gilmer's adverse legislation, the Cherokee initiated a series of counter actions to seek protection of their rights. In the spring of 1829, a Cherokee delegation was sent to the district of Washington to discover whether Presidential support for their cause could be expected. After listening to the President's inaugural address the delegates concluded that the President would offer no assistance to their nation.[112] The

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107 *Id.*

108 *The State v. George Tassels*, 1 GA. REP. ANNOTATED 478, 478 (1830).

109 *Id.*

110 *Id*. at 481.

111 *See* 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 436–38 (Government Printing Office 1896) [hereinafter SPEECHES].

112 *See id*.

delegation's visit was followed up with a letter from newly appointed Secretary of War John Eaton, in which he outlined the President's views on the "Indian problem."[113] The message ethnocentrically stated that the Cherokee had *no right* to set up an independent nation within the State of Georgia. Eaton advised the Cherokee to either submit to Georgia's laws, or withdraw from the state entirely.[114] Given the cultural bias of this assertion, and it blatantly ignoring the fact that the state of Georgia had been created within the traditional territorial boundaries of the previously existing Cherokee nation, one would not have to reflect long on how America and Georgia would have responded had the Cherokee propped up a declaration of independence fifty years earlier and asserted that America had *no right* to set up an independent state within the territorial borders of the Cherokee Nation.

The Cherokee next petitioned Congress in December of 1829 to uphold the United States' treaty-sworn pledge as a protector of the Indian Nation. Congress however, left the petition pending long enough to allow a bill for the removal of the Cherokee to be introduced upon the floor of the United States Congressional sessions.[115] During these Congressional sessions, Davey Crockett's speech represented the voice of "more voters than any [other] member of Congress, except Mr. Duncan of Illinois."[116]

The Cherokee and supporters of their cause made the "Indian question" perhaps the most important, and probably the most contested business introduced at the 1st session of the United States 21st Congress. The two Indian Affairs Committees, located in each House of Congress, echoed President Jackson's sentiments; that each state was empowered with full control over the land and people within their chartered limits, and recommended that the best course of action would be for the Cherokee to emigrate west of the Mississippi.[117] Once removed outside the borders of Georgia, it was ethnocentrically argued the Cherokee could then govern themselves free of any "*impositions*" created by *white encroachments upon their rights*.

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113 John H. Eaton, *The Secretary of War to the Cherokee Delegation*, 12 NILES' WEEKLY REGISTER 258–59 (1829).

114 *Id.*

115 *See generally* SPEECHES, *supra* note 106 (for arguments against this bill).

116 *Id.* at 253.

117 *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 505–06.

Upon the advice of several prominent National Republicans in Congress, the Cherokee sought the expertise of William Wirt to try to get their case before the Supreme Court. The merits of the Cherokee claims were quite clear to Mr. Wirt; the problem, however, was the best method of fashioning a case such that those merits would be properly and most formidably presented before the Supreme Court.

In spite of the underlying merits of *Cherokee Nation v. The State of Georgia*, Chief Justice John Marshall refused jurisdiction on the basis of his opinion that the Cherokee did not constitute a foreign state within the United States.[118] More appropriately, however, the logic behind the Court's decision can be viewed as a reflection of Marshall's own decision to avoid involving the Court too deeply in a politically explosive situation. Bearing this in mind, the weakness of the Court's logic becomes more apparent by raising the following question. If the Cherokee people were not considered a foreign entity within the body politic of the United States, was it because they were considered a part of the confederation of United States?

The political status of Indigenous North Americans could obviously not be based upon a premise that Indian tribes became a part of the confederation of United States as a result of the United States defeating the British, which in turn resulted with Indigenous North Americans becoming a conquered people. This could not be the case because at the time of Marshall's ruling, there existed numerous Indigenous nations the United States had never encountered to ever bring about a universal claim of conquest over Indigenous people. Additionally, one could also question whether such a notion would have been applied to all of Europe had Hitler claimed such a theory of conquest after his successful campaigns against Austria and Czechoslovakia? Certainly not! Obviously to believe that Indians were not foreign to the United States because they had agreed to place themselves under the protection of the United States is also erroneous because other peoples have been protected by more powerful nations without forfeit to their national character or sovereignty. In fact for a brief period in history the United States itself represented a nation who sought the protection of more powerful nations.

In 1778, the United States entered into three treaties with

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118 *Cherokee Nation*, 30 U.S. (5 Pet.) at 27.

France, one of Amity and Commerce, another of Alliance, and the Secret Treaty. James Scott, addressing the nature of these treaties, has stated:

> The spirit of the treaties is remarkable . . . History affords few, if any examples of such frankness, straightforwardness, and generosity of a great Power to a weak and struggling ally. The States were, according to M. Gérard's instructions to be treated upon a footing of equality, with no advantage to be taken of their . . . weakness.[119]

It is certain that the Europeans had historically based their claims of dominion upon whatever theory or principle could most appropriately be used to best support their interests. If one is to accept the rationale that the dependency of a weaker nation upon a stronger ally is enough to justify the alienation of the weaker nation's sovereignty, then one should consider at least this one aspect of the American-French alliance. Had France, as the more powerful nation in the alliance with the newly formed American government, embraced the kind of tactics that in later years the United States would enforce upon Indigenous nations then the French government might have declared standards upon a war weakened and struggling United States and asserted self-imposed rights to limit the sovereignty of the young American nation. Another point to consider is that Indigenous people, at the time of the Cherokee cases, had neither been politically nor legally incorporated into the American confederated government of the United States.[120]

In delivering the opinion of the Court, Chief Justice John Marshall noted:

> The Court has bestowed its best attention on this question, and . . . the majority is of an opinion that

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[119] G. Chinard ed., The Treaties of 1778 and Allied Documents (Baltimore: The John Hopkins Press, 1928) xviii.

[120] *See* Milner Ball, *supra* note 40; Barsh & Henderson *supra* note 43 on incorporation. The idea of incorporating Native nations into the American Union was first addressed by the United States government within the Delaware treaty of 1778. In this treaty the United States suggested that an Indian state might be formed with the Delaware nation at its head. The idea of an Indian state continued to be discussed and debated within political circles until 1878.

> an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the Courts of the United States.[121]

Marshall, however, never offered any supportive evidence as to why the Cherokee did not constitute a foreign state.[122] Instead he indulged himself in the following semantic word play in an effort to shelter the Court from a politically sensitive situation.

> It has . . . been said, that the same words have not necessarily the same meaning . . . when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. This may not be equally true with respect to . . . "Foreign nations" . . . the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article in which a power is given to be exercised in regard to foreign nations generally, and Indian tribes particularly, they are mentioned as separate in terms clearly contra distinguishing them from each other. 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.[123]

The weakness of the above logic is evident because when the United States negotiated treaties with Indigenous nations, they were treated as distinct political bodies that existed outside the institutions and government of the United States. If Marshall's claim that the Cherokee did not constitute a foreign state is

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[121] *Cherokee Nation*, 30 U.S. (5 Pet.) at 20. (The Court was actually split: On the issue of jurisdiction four to two stood against the Cherokee, on the merits, which could not officially be addressed, four to two in favor of the Cherokee cause.); *See also* Burke, *supra* note 117, at 500–05 (drawing attention to the fact that Marshall, although ostensibly speaking for the Court majority, was actually speaking only for himself and Justice McLean).

[122] *See generally id.*

[123] *Id.* at 19.

accepted, then our attention must be drawn to the fact that Marshall himself acknowledged that the Cherokee did indeed constitute a state: "The acts of our government plainly recognize the Cherokee nation as a State, and the courts are bound by those acts."[124] Based upon Marshall's own admission, then the Court's claim of non-jurisdiction could be challenged on the basis of a states' constitutional right to bring another state before the Supreme Court.

In the early delivery of the Court's opinion, Chief Justice Marshall expressed the prerequisite of first examining whether the Court had jurisdiction before the merits of the case could be looked at. Marshall answered this rhetorical question by drawing attention to the second section of the Constitution's third article. "The second section closes [with] an enumeration of the cases to which it is extended, with 'controversies' 'between a state or the citizens thereof, and foreign states, citizens, or subjects.'"[125] Here it must be noted that although Marshall acknowledged that the Cherokee did constitute a state, albeit not a state that was actually incorporated into the American union of states, he was careful not to include in his enumeration that part of the section which declares that all cases in law and equity arising under the Constitution, are also extended to *treaties* made, as well as those yet to be made, and to " . . . controversies between two or more states, between a State and citizens of another State, [and] between citizens of different States . . . ."[126]

In truth, the only way that a person could support Marshall's logic would be to first observe that Indian tribes, as Indigenous peoples, were not foreign to the Continent of America. After accepting this fact, the United States must then equate itself as being synonymous with the American Continent. In attempting to substantiate such a position one must be mindful of the fact that the thirteen colonies did not an entire continent make.

The Cherokee, as well as numerous other Indigenous nations, had long employed standards to govern themselves and had existed as a sovereign people long before any European colony had ever been established in North America.[127] To further expose

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[124] *Id.* at 16.

[125] *Id.* at 15.

[126] NORMAN J. SMALL, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 47 (Government Printing Office 1964) (emphasis added).

[127] Curtis G. Berkey, *International Law and Domestic Courts: Enhancing*

the temerity of Marshall's opinion, the Cherokee had held American prisoners of war, a matter of such significance that it was the subject of Article I in the first treaty that was negotiated with the Cherokee at Hopewell in 1785.

> The Head-Men and Warriors of all the Cherokee shall restore all the prisoners, citizens of the United States, or subjects of their allies, to their entire liberty: They shall also restore all the Negroes, and all other property taken during the late war from the citizens to such persons, and at such time and place, as the Commissioners shall appoint.[128]

It is apparent that this first treaty had little impact upon the conditions of peace and perpetual friendship, as made evident by Article III of the 1791 treaty with the Cherokee.

> The Cherokee nation shall deliver to the Governor of the territory of the United States of America, south of the river Ohio . . . all persons who are now prisoners, captured by them from any part of the United States: And the United States shall . . . restore to the Cherokee, all prisoners now in captivity, which citizens of the United States have captured from them.[129]

The above-mentioned articles speak of acts of war and illustrate that the Cherokee as an Indigenous nation had never yielded their right to declare war upon the United States, or any one of the existing states. Bearing this in mind, the fact remains that as Britain could not be tried for her actions within the American courts, neither were any one of the Indian nations tried within the American courts for their acts of war against the United States.[130] It should further be noted that John Marshall

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Self-Determination for Indigenous Peoples, 5 HARV. HUM. RTS. J. 65, 66 (1992).

128 Greymorning, *supra* note 39, at 19.

129 *Id.*

130 *Id.* at 20 (In 1760, during the French and Indian War, the Cherokee won a decisive battle against British Colonel Archibald Montgomery and his army of 1,600 troops who were burning the lower towns of the Cherokee. The British chose to recognize Cherokee complaints and attempted to halt the westward

himself would defend this principle in *Worcester v. Georgia.*[131]

Although it was argued that the Cherokee were not foreign to the United States, the following observations lend support to the fact that the Colonies, and later the several states which comprised the United States, were in all aspects foreign to the people, societies and nations that were Indigenous to North America:

> 1. Up to and including the time period that Marshall served as Chief Justice for the Supreme Court, the United States historically conducted all business matters regarding the affairs of Indigenous peoples out of its War Department.[132] The fact that the central government did not deal with any of its states in this way, suggests that if Indigenous nations were not foreign to the formation of United States, and indeed stood as a member of the Union, then they would not have been dealt with in a manner distinctly different from any of the states within the American Union.
> 2. The treaties themselves helped to maintain the existence of distinct self-governing Indian nations and societies separate from the states of the United States.
> 3. A number of the earlier treaties negotiated between the United States and Indigenous Nations included the stipulation that all non-Indian people were to obtain a passport before moving onto or through Indian country. Article IX of the second treaty with the Cherokee, signed at Holston in 1791, specifically states that "no citizen or inhabitant of the United States, shall hunt or destroy the game on the lands of the Cherokees; nor shall any citizen or inhabitant go into the Cherokee *country*, without a *passport* . . ."[133]

Unquestionably the issuance of passports has always been

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expansion of their settlers by prohibiting settlement beyond the Appalachian Mountains).

131 Worcester v. Georgia, 31 U.S. 515, 583 (1832).

132 Greymorning, *supra* note 39, at 20.

133 *Id.*

recognized as a condition extended for travel through foreign nations. Certainly no state within the American Union has ever subjected passport requirements upon citizens of any other state, and yet for an American citizen to enter onto or travel through the lands of certain Indigenous nations they were required to possess a passport to do so.[134] All this attests to the fact that in all matters the two cultures were indeed foreign to each other, and the only reason Marshall's position could be sustained was because it upheld the political and ethnocentric position of a dominant faction of an American Anglo-centric culture. Thus, based upon the arguments of Justice Baldwin, drawn from *Johnson v. McIntosh*, coupled with those from Justice Johnson, Supreme Court Chief Justice John Marshall conveniently chose to evade several pertinent points and acquiesced to the situation. Marshall did, however, allude to the possibility that Cherokee rights might be protected in some future case.

Cherokee Nation v. Georgia had an interesting anomaly, of particular relevance, which occurred after its conclusion. Marshall requested that dissenting Justices Thompson and Story write and deliver their opinions to Richard Peters, the Court's reporter. Marshall's request is significant when viewed in relation to his established practice of always delivering a single opinion for the Court, the effect of which created the appearance of an undivided Supreme Court.[135] By including the strong dissenting opinions of his two colleagues, the perennially cautious Marshall left a glimmer of hope that the Cherokee might, at some future time, find redress within the halls of the Court.

VII. *WORCESTER V. GEORGIA*: FORCING THE HAND OF JUSTICE

By the time *Worcester v. Georgia* came before the Court, 1832, the Cherokee had witnessed the ratification of nine treaties between themselves and the United States government.[136] In the first two of these treaties, 1785 and 1791, Articles 3 and 2, respectively, spelled out that the Cherokee acknowledged themselves to be under the protection of the United States government. Article 2 of the second treaty reads as follows:

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134 *Id.* at 20–21.
135 *Id.* at 21.
136 *Id.*

> [T]he Cherokee nation, do acknowledge themselves . . . to be under the protection of the said United States of America, and of no other sovereign whosoever; and they also stipulate that the said Cherokee nation will not hold any treaty with any foreign power, individual state, or with individuals of any state.[137]

In the eighth treaty, the fourth to be ratified while John Marshall served as Supreme Court Chief Justice, Article 5 asserts that all former treaties between the Cherokee nation and the United States were to continue in full force.[138] Article 5 of the ninth treaty, 1819, also asserts that any white person who had intruded or were at some future time to intrude upon Cherokee land would be removed by the United States, " . . . and proceeded against according to the provisions of the act passed the thirtieth of March, eighteen hundred and two, entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.'"[139] Based upon these several treaties, which guaranteed to protect Cherokee lands and their right to remain an independent and sovereign people, the Cherokee appealed to the President, the Congress of the United States, some of the country's finest lawyers, citizens, and finally the Supreme Court of the land, to protect them against the unjust and inhumane laws of Georgia. In all efforts they found no relief from the "[O]verbearing and cruel edicts, . . . evidently designed to exterminate [them] from the earth."[140]

The Worcester case represented one of the Marshall Court's final efforts to formulate a doctrine on the rights of Indigenous peoples. The case came before the Court as a result of two missionaries, Samuel Worcester and Elizer Butler. These two missionaries had worked among the Cherokee in defiance of Georgia's legislated 1829 Act, which prohibited whites from entering Cherokee territory without first taking an oath of allegiance to the State and obtaining a permit from the

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137 *Id.*

138 Greymorning, *supra* note 39, at 21.

139 *Id.* at 22.

140 Cherokee Phoenix Vol. III, no. 18, CHEROKEE PHOENIX FROM HUNTER LIBRARY (Sept. 11, 1830), http://www.wcu.edu/library/DigitalCollections/CherokeePhoenix/Vol3/no18/3no18_p2-c5A.htm.

Governor.[141] On March 21, 1831, four days after the Supreme Court had refused jurisdiction in the *Cherokee v. Georgia* case, Worcester and several other missionaries were imprisoned by the state of Georgia. The trial went before the Gwinnett County Superior Court on March 26. The Nile's Weekly Register reported that although the missionaries had refused to acknowledge themselves as federal officials, the Court nevertheless released them because they had received federal support, which the Gwinnett County Superior Court recognized as having made the missionaries employees of the federal government.[142] In an effort to get a suitable case before the Supreme Court, Worcester and Butler refused to leave Cherokee territory. Governor George Gilmer, who apparently had the favor of United States President Andrew Jackson, persuaded the President to falsely deny that the missionaries were federal employees, and then have Worcester removed from his duties as Postmaster at New Echota.[143]

Once the President accepted such an ethnobiased position and complied with Governor Gilmer's request, the Governor had Elizer Butler, Samuel A. Worcester, James Trott, Samuel Mays, Surry Eaton, Austin Copeland, and Edward D. Losure indicted "for residing in that part of the Cherokee *nation* attached by the laws of said state . . . without a license or permit . . . and without having taken the oath to support and defend the Constitution and laws of the State of Georgia. . . ."[144] It is also worth noting the State's use of the word nation and Gilmer placing the position of the State of Georgia above that of a Nation: Could the state of New York have ever held such a claim over the Nation of Canada or the Providence of Ontario simple because they shared a common border? The only counter response would be that this was something different because the Georgia was dealing with Indians who he held were not really a Nation, even though a response of not being a nation was untrue and has already been shown to be inaccurate through treaties and the language reflected by that of the Supreme Court itself. On September 15, 1831, the Gwinnett County Superior Court tried and sentenced them all to four years of hard labor.[145] "Nine of the missionaries

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141 *See* WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 84 (William W. Story ed., Boston: Charles C. Little and James Brown Vol. II, 1851).

142 Greymorning, *supra* note 39, at 22.

143 *Id.*

144 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 563 (1832).

145 *Id.* at 536.

accepted pardons."[146] Worcester and Butler's refusal of a pardon however enabled the Cherokee cause to once again be presented before the Supreme Court.

Worcester petitioned the Supreme Court for a writ of error on the grounds that he had entered the territory of the Cherokee nation under the authority of the President and as a missionary of the American Board of Commissions for Foreign Missions. Lawyers for the plaintiff opposed the constitutionality of Georgia's legislation on the basis that the several treaties entered into between the United States and the Cherokee nation clearly acknowledged the Cherokee as an independent sovereign nation, "[A]uthorised to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America . . . and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect. . . ."[147] Worcester's lawyers also charged that because Georgia's laws interfered with and attempted to regulate the affairs of the Cherokee nation, they were repugnant to the United States Trade and Intercourse Act of 1802.[148]

On February 20, 1832, the Court began its proceedings in the Worcester case. Once again the Governor, who had publicly vowed to disregard any decision the Supreme Court might make should it not favor the State's position, refused to have the State appear before the Court.[149] Where in the case of *Cherokee v. Georgia*, Sergeant and Wirt had argued their case upon narrow grounds, in the case of *Worcester v. Georgia*, the two lawyers realized that in order to bring the question of Cherokee rights before the Court they would have to argue the case upon the widest grounds possible.

It is a safe assumption that with the absence of Justice Johnson from the Court, and the presence of Justice Duval, John Marshall was well aware the dynamics of the Court had been favorably changed in support of Cherokee rights. "In writing an opinion that represented the decisions of Thompson, Story, and Duval, the Chief Justice borrowed freely from both Thompson's earlier dissenting opinion, written for *Cherokee v. Georgia*, and

146 Greymorning, *supra* note 39, at 22.
147 Worcester, 31 U.S. (6 Pet.) at 537–40.
148 *See id.* at 539.
149 Greymorning, *supra* note 39, at 23.

arguments delivered by Wirt and Sergeant."[150] Ironically, the same arguments that Marshall had rejected from Wirt, Sergeant and Thompson, as cause for refusing jurisdiction in *Cherokee Nation v. Georgia*, Marshall now brought forth in the Worcester case to declare that Georgia's legislation regarding the Cherokee was "repugnant to the Constitution, laws, and treaties of the United States . . . ."[151]

Marshall's reversal of opinion helped to give an enigmatic appearance to his opinion delivered in *Worcester v. Georgia* when compared to the opinion he delivered in *Cherokee v. Georgia*.

"Arguments presented by Marshall in the Worcester case, which supported protecting the Cherokee from the unconstitutional acts of Georgia, in many respects contravened many of the arguments he used only a year earlier to refuse jurisdiction in the Cherokee nation case."[152] Once again Marshall discussed his principle of discovery, but in the Worcester case his thoughts, as reflected by his opinion, had altered considerably.

> It is difficult to comprehend the position that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.[153]

Marshall now questioned the validity of the discovery principle. "Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged . . . a rightful property in the soil, from Atlantic to Pacific; or a rightful dominion over the numerous people who occupied it?"[154] "This was more than questioning, however, as Marshall now seemed to be challenging the very fabric of the Discovery principle."[155] Marshall asserted that the principle merely "suggested" that discovery gave title, and that

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150 *Id.*
151 *Id.*
152 *Id.* at 23–24.
153 Worcester, 31 U.S. (6 Pet.) at 543.
154 *Id.*
155 See Greymorning, *supra* note 39, at 24.

this was acknowledged by European nations because it was in their best interest to do so. Marshall also affirmed that a discovery principle could not annul the previous rights of those who had not agreed to it. Marshall now moved to challenging the principle's premises.

> These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth that these grants assert a title against Europeans only and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not *conquest*.[156]

Continuing with this challenge Marshall asked, "[D]id the Cherokees come to the seat of the American government to solicit peace; or did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give" then, has no real importance attached to it."[157] Repeatedly Marshall stressed the fact that Indigenous nations were considered as distinct, independent political communities, completely separated from that of the states, and clarified that the relationship between the Indian nations and the United States was that of a nation receiving the protection of a more powerful nation, and not of individuals having to abandon their national character or, as subjects, having to submit themselves to the laws of a master.

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.[158]

While Justice Baldwin's dissenting opinion was not delivered

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156 Worcester, 31 U.S. (6 Pet.) at 546 (emphasis mine).
157 *Id.* at 551.
158 *See id.* at 559-61.

to the court reporter, Justice McLean, the only other judge to deliver an opinion, concurred with Marshall.[159] McLean raised several points pertaining to the national character of the Cherokee that Marshall had not addressed, two of which are worth mentioning. First, McLean had viewed Indigenous nations to be on the same footing as foreign nations by virtue of the Constitution having empowered Congress to regulate trade and commerce among the Indian tribes.[160] "This power must be considered as exclusively vested in Congress as the power to regulate commerce with foreign nations, to coin money . . . and to declare war. It is enumerated in the same section, and belongs to the same class of powers"[161] McLean also pointed out that the government had recognized that Indian nations possessed the right to make war upon the United States. "No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation . . . ."[162]

Although the Worcester case was a decisive victory for the recognition of the rights of Indigenous peoples, in the final analysis the biases of a dominant Anglo-centric American culture held the Court's ruling in check. After being subpoenaed by the United States Court, Georgia refused to appear and would not acknowledge the Court's decision, which mandated the State to annul its unconstitutional laws over the Cherokee.[163] While the Governor of Georgia continued to assert the state's laws upon the Cherokee, the federal government moved ahead with its plans to bring about the removal of the Cherokee. After three years the government had forced the issue of Cherokee removal through the treaty of Echota. For the Cherokee, the effect of this mockery labeled as treaty was to convert a triumphant 1832 Supreme Court decision into a defeat, as if the Court had never ruled in favor of them. A side bar to Marshall's decision is the commonly quoted quip from then President Andrew Jackson; "John Marshall has made his decision, now let him enforce it."[164] While

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159 *Id.* at 563.
160 *Id.* at 581.
161 *See id.* at 580–81.
162 *Worcester*, 31 U.S. (6 Pet.) at 583.
163 Greymorning, *supra* note 39, at 25.
164 Jeffrey Rosen, *The First Hundred Years*, PBS: SUPREME COURT HISTORY, http://www.pbs.org/wnet/supremecourt/antebellum/history.html, (last visited Oct. 24, 2016).

one might ask, could Marshall have petitioned to have his decision enforced, what is of interest is Jackson's response in the same year to South Carolina's declaration that it could nullify any federal law that it disagreed with. Here with the shift of focus from an issue of the rights of Native peoples to that of State rights versus Federal rights, Jackson issued a proclamation supporting the Supreme Court's ultimate power to rule on constitutional questions and that these rulings had to be obeyed.[165] In returning to the question, while Marshall may have struggled with the question of Native rights, for Marshall to have moved to have enforce his ruling on Native rights, which a number of states viewed as inferior to the rights of the State, would have weakened one of the objectives of the Supreme Court; to strengthen the federal government's position over the various states that constituted the United States of America.

VIII. THE TILTED JUSTICE OF *MITCHELL V. UNITED STATES*

Three years after Worcester, the Court had an opportunity to add clarity to its position on the rights of Indigenous peoples and the land when the case of *Mitchel v. United States* came before the Court.[166] In the Mitchel case, though the Court gave deference to Indians owning their lands as common property from generation to generation by a perpetual right of possession, and that their habits, modes of life, and hunting grounds were as much in their possession as the fields cleared by whites,[167] this, much like *Worcester v. Georgia*, seemed secondary to a more pressing matter.

Blake Watson states, "when *Mitchel* was argued, the Supreme Court was at a crossroads regarding the meaning of the controversial "discovery" doctrine."[168] As a result of Justice Baldwin choosing not cite Worcester but rather side with the *Johnson v. McIntosh* ruling, "most Indian law scholars have concluded that *Mitchel* affirmed the *Johnson* version of the discovery doctrine."[169] The Mitchell case came about as a result

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165 *See id.*

166 *See Mitchel v. United States*, 34 U.S. 711 (1835).

167 *See id.* at 730.

168 Blake A. Watson, *From War and Removal to Resurgence: The Legal and Political History of Florida Tribal Governments: Buying West Florida from the Indians: the Forbes Purchase and Mitchel v. United States (1835)*, 9 FIU L. REV. 361, 361 (2014).

169 *Id.* at 362.

of the Forbes Purchase, which resulted from William Bowles, a British loyalist born in Maryland, leading a small party of Indians to rob St. Marks store in 1792 and 1800 as a British plot to break up Panton, Leslie and company's trading monopoly. The success of this brought about Panton, Leslie and Company changing hands and becoming John Forbes and Company in 1801. In Justice Baldwin's opinion he states,

> among the losses sustained . . . was a large amount due by the Seminole Indians prior to 1800; and for robberies of their stores in 1792 and 1800, by members of that tribe, headed by the celebrated adventurer Bowles, exceeding in all 60,000 dollars; of which they were unable to procure any payment from the Indians, but who had expressed a willingness to make compensation by a grant of their lands.[170]

Bowles theft of St. Marks store resulted with the Seminole being pressed to cede their land to John Forbes and Company, which amounted to 1.4 million acres being acquired; a substantial profit from an initial registered loss of approximately $18,735 on the part of St. Marks store.[171]

The Mitchell case has several interesting points when compared to other cases and events; the first of which involves adventurer Bowles. Bowles, born William Augustus Bowles in Maryland in 1763, enlisted in the British army at the age of 13. By the age of 18 he was advocating for the creation of an Indian state, an idea first presented in the 1778 treaty with the Delaware by the United States. Although Bowles proclaimed himself and was accepted as Chief of Creeks and Cherokee Nations by King George III, this was just the kind of ruse that would prove to serve the United States' Indian removal efforts from the southeast while solidifying and expanding their land holdings.

In 1773 and 1775 a small group of individuals purchased lands from the Illinois Confederacy and Painkesaw Indians. Some fifty years after the purchase Supreme Court Chief Justice John

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170 Mitchel v. United States, 34 U.S. 711, 727 (internal citations omitted).

171 See American State Papers: Documents of the Congress of the United States, Volume 4, (Washington: Gales & Seaton 1859) p. 159–69

Marshall ruled in *Johnson v. McIntosh* that when Europeans "discovered" America, Indians were automatically divested of the power to dispose of the soil at their own will, to whomever they pleased.

In 1818, General Andrew Jackson wrote President Monroe telling him he was invading Spanish ruled Florida. Jackson's invasion led to Florida becoming a U.S. territory in 1822, and the Seminole as an obstacle that needed to be removed. The United States' quest for the removal of all eastern Indians west led to the Indian Removal Act in 1830.[172] Given U.S. ambitions, it is quite possible that the land identified under the Forbes purchase, once in the hands of a U.S. citizen, served the role of creating a substantial area from which Indians by U.S. standards could legally be removed. General disagreement among the Seminole over the Forbes purchase and the Court's ruling to uphold the purchase resulted with Seminole tensions running high. Brent Weisman writes:

> The Indian policies of Britain and Spain stressed favorable trade relations, non-coercion, and negotiated mutual interest. The Florida Seminoles thrived in this environment, increasing their numbers tenfold, gaining wealth in livestock (horses and cattle); and in property . . . . They had vested interests in cultivated land and in dependable hunting territories.
> The Americans would regard the Seminoles very differently . . . The Americans wanted the land and they wanted their slaves back. Their only interest in Indian policy was to control and contain.[173]

In an effort to contain the Seminole, Florida's territorial Governor William Duval's plan to obtain Seminole approval to move onto a reservation in the southern interior of Florida was thrown back at him by Neamanthia.

> Do you think . . . I am like a bat, that hangs by its claws in a dark cave, and that I can see nothing of

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172 Indian Removal Act, ch. 148, 4 Stat. 411, 412 (1830).

173 Brent R. Weisman, *The Background and Continued Cultural and Historical Importance of the Seminole Wars in Florida*, 9 FIU L. REV. 391, 399–400 (2014).

> what is going on around me? Ever since I was a small boy I have seen the white people steadily encroaching upon the Indians, and driving them from their homes and hunting grounds . . . I will tell you plainly, if I had the power, I would tonight cut the throat of every white man in Florida.[174]

The United Sates interests to control and contain, however, would be thwarted by a Second Seminole War, eleven months after the Court ruled on the Mitchel case. Aspects of the second Seminole war present an interesting point for discussion, especially when considering what was expended and then comparing that with the actions of the United States in its war to gain independence from Britain.

In writing on the Seminole Wars, Florida's Department of State notes the following:

> The campaigns of the Second Seminole War were an outstanding demonstration of guerrilla warfare by the Seminole. The Micos Jumper, Alligator, Micanopy and Osceola, leading less than 3,000 warriors, were pitted against four U.S. generals and more than 30,000 troops. The Second Seminole War (1835-1842), usually referred to as the Seminole War proper, was the fiercest war waged by the U.S. government against American Indians. The United States spent more than $20 million fighting the Seminoles. The war left more than 1,500 soldiers and uncounted American civilians dead . . . .
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> As the hostilities dragged on, frustrated U.S. forces increasingly turned to desperate measures to win the war. For example, Osceola was captured and imprisoned when he met with U.S. troops who had called for a truce and claimed to want to talk peace. With Osceola in prison, the United States was confident the war would end soon. But it did not. Although Osceola died in prison in 1838, other

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174 *The Seminole Wars of Florida*, FLORIDA HISTORY INTERNET CENTER http://floridahistory.org/seminoles.htm (last visited July 21, 2016) (emphasis in original).

Seminole leaders kept the battle going.[175]

The result of continued breaches of trusts and treaties skirmishes eventually led to the outbreak of the third Seminole War (1855-1858).[176] Combined past events and politics involving the "Indian issue" would not have been oblivious to members of the Court.

The *Mitchel* case first appeared before the Superior court of middle Florida in October 1828, and on November 2, 1830 the petition was dismissed by the judge of that court. On January 1831 petitioners appealed to the Supreme Court only to have the case postponed to January 1834, and then postponed a second time to be heard a year later. The transcript of the Court's proceedings reveals lengthy discussions on the validity of grants acquired from Indians, stating, "after a long possession of Indian lands [by a claimant,] the law will presume that [his claim] was founded on an Indian deed duly confirmed"[177] which casts some confusion when taking into account later statements made that concluded:

> 9. There is no proof that the governors-general of Louisiana
> authorized or approved the purchases in question.
> 10. The original acts of confirmation of the Indian sales, by
> governor Folch, to the house of Panton, Leslie & Co., and to the
> house of John Forbes & Co., have not been produced by the
> petitioners, nor their absence satisfactorily accounted for. There is no evidence then, that any formal titles were given by governor Folch, to the grantees, for the land in question.
> 11. Governor Folch had no power to ratify and confirm the Indian

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175 *The Seminole Wars*, FLA. DEP'T OF ST., http://dos.myflorida.com/florida-facts/florida-history/seminole-history/the-seminole-wars/ (last visited August 1, 2016).

176 Some scholars believe that when combined the three Seminole wars amassed a national debt that would have rivaled the cost of the Vietnam War.

177 Mitchel v. United States, 34 U.S. (9 Pet.) 711, 760, 1835 U.S. LEXIS 369, 102 (1835).

> cessions in question:
>
> (1.) Because the power to ratify such cessions was not within the scope of his general authority; nor had he any special authority to ratify the same.[178]

In spite of Justice Baldwin's observations, he would rule to reverse the ruling of the lower court and uphold the land transaction.[179] When taking into account the United Sates presidential and government's attitude toward Indians, with its passage of the 1830 Indian removal Act, Seminole unrest, uprisings and resistance to being removed, it is not difficult to see how the Court would favor steps that would clear Indians from Florida.

CONCLUDING COMMENTS AND OBSERVATIONS

As much as those within the Halls of Justice would like to believe in the blind objectivity and balanced scales of Justitia, the laws of every country are as much a cultural abstraction as the languages from out which laws have been fashioned. As a result of this, those who served the Court in its early years did so through a worldview perspective formed out of the culture from which they were born. It was thus to this end that the Court, when dealing with matters that have concerned Indigenous peoples, more often than not have served the interests of its citizens through cases and political legislation such as the Major Crimes Act, and the Lone Wolf case, that have defined and limited the original political independence of Indigenous peoples in America.[180] In the Ex parte Crow Dog case that lead to the Major Crimes Act, Justice T. Stanley Mathews, in delivering the opinion of a unanimous court, stated: "It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives . . . one which measures . . . by the maxims of the white

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178 Mitchel, 34 U.S. (9 Pet.) at 711; 1835 U.S. LEXIS at 24–25.

179 *Id.* at 763.

180 *See* Joseph William Singer, *Lone Wolf, or How to Take Property by Calling it a "Mere Change in the Form of Investment*, 38 TULSA L. REV. 37, 39, 44 (2002).

man's morality."[181] Of the Major Crimes Act, Larry Echo Hawk would state that it "was a direct assault on the sovereign authority of tribal government over tribal members."[182] Perhaps the tipping of the scales of justice was best espoused by Supreme Court Justice John Marshall himself, who in *Johnson v. M'Intosh* stated that conquest gave an immutable title which the courts of the conqueror cannot deny, and the *justice* of a claim that had been successfully asserted was not an issue of concern to the court, a perspective that has been seen to carry into 21st century decisions.[183]

[181] *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883).

[182] Larry Echo Hawk, Review, *Justice for Native Americans Requires Returning to Our Constitutional Origins Vine Deloria, Jr. & David E. Wilkins Tribes, Treaties, and Constitutional Tribulations*, 4 GREEN BAG 2d 101, 105 (2000) (the Major Crimes Act was the result of Congress' reaction to the Supreme Court ruling in Ex Parte Crow Dog that it had no jurisdiction over crimes committed on Indian lands).

[183] *Johnson*, 21 U.S. at 588 (This perspective can be noted when in 2004 the Delaware Nation filed suit against the state of Pennsylvania seeking to restore 314 acres to the Nation on the grounds that the acquisition of their land was fraudulently acquired. Although the court acknowledged that the acquisition of their lands was the result of fraud, in the end the Court ruled that even in the case of fraud the Delaware's claim of extinguishment was nonjusticiable and the case was dismissed. *Del. Nation v. Commonwealth*, 2004 U.S. Dist. LEXIS 24178, *19).