


# The Cherokees and the Constitution

Rebecca Marianne Lund 

## Introduction

The United States Constitution had existed for only 40 years when the first serious discussions about Native American removal took place. The new generation of politicians who emerged in the 1820s had not been directly involved with the formulation of the Constitution, and some of their views, therefore, differed from the past generation's views on issues like Indian removal. Past administrations had treated the Native Americans as sovereigns, but the election of Andrew Jackson as President in 1828 marked a break with this tradition. Jackson's removal policy and the Cherokee Nation's resistance to the same ignited a fiery debate. This article argues that that debate evolved into a political and legal dispute over the balance of power between the three branches of government and revealed fundamental tensions existing between the federal government and the individual states, and that this influenced the success of the Cherokee Nation's resistance to removal in Georgia. For this purpose, I will first explain the main reasons why removal was viewed as a necessity at the end of the 1820s. Secondly, I will examine the arguments made against removal during the debate concerning the Indian Removal Act of 1830. Lastly, I will analyze two court cases brought before Supreme Court by the Cherokee Nation against Georgia.

## Reasons for removal

The idea of Native American removal had existed since 1803 (Perdue and Green 16) but was not seen as a necessity until the 1820s. By that time, political turmoil plagued the United States, and a new political outlook emerged with President Andrew Jackson, who placed removal of the Native Americans at the top of his agenda. There are several factors for this change in Indian policy.

Firstly, the population almost doubled from 7.2 million in 1810 to 12.9 million in 1830 (*Returns of the Fifth Census* 47) but in the states of Ohio, Tennessee, and Georgia, all of which had land belonging to Native Americans, the population trebled from 745,000 to over two million (Perdue and Green 15). Population growth, increased demand for cotton exports to Great Britain,

and the discovery of gold in the southern states added pressure to the acquisition of the Native American tribes' fertile land in the South (Meacham 91).

Secondly, the attitude towards the Native Americans changed. In the United States' first Indian policy, the Natives' "inferiority" was viewed as being cultural, not racial. Indians, therefore, were fully capable of becoming 'civilized' and assimilating into American society as functioning citizens" (Perdue and Green 10). This view dominated Indian policy until the 1820s, when it changed into a focus on race, exemplified by Senator Henry Clay's statement that "it was impossible to civilize Indians; that there never was a full-blooded Indian who took to civilization. It was not in their nature ... They were not an improvable breed, and their disappearance from the human family will be no great loss to the world" (Meacham 94). The new Indian policy emphasized that removal was the only means by which the Native Americans could survive and retain their distinct cultures. Furthermore, removal to a federally controlled territory increasingly became the only way for the government to shield the tribes from "unscrupulous traders, whiskey vendors, gamblers, prostitutes, and others who continuously fleeced them of their annuities in the East. Government officials warned that they could not protect the Indians from such people in areas where states claimed jurisdiction" (Satz 253).

Finally, the question of national security was raised by unrest in the South. Southern slave-owners feared for the survival of their way of life. They believed that the presence of nearby tribes provided a refuge for fugitive slaves, which threatened the white communities, as the slaves and tribes might conspire against them. At the same time, the slave-owners felt threatened by an increasing abolitionist agitation from the northern states. According to the South, a way to remedy this situation was by controlling the tribes through an extension of state law over their land. This expansion would

enable the region to increase its representation in Congress, thereby helping to offset northern antislavery votes ... Some southerners warned that if the federal government could defend the existence of Indian 'nations' within states it could also interfere in the internal affairs of the slave states and emancipate slaves (Satz 4).

President Jackson agreed with this line of reasoning and stated that it would "add much [to the security of the South] in a state of war" (*The Papers of Andrew Jackson, 1825-1828* 200). He feared an alliance between the tribes and the United States' enemies, Spain and Britain, "the sooner these lands are brought to market, [the sooner] a permanent security will be given to what I deem the most important, as well as the most vulnerable, part of the union" (Meacham 95).

A different security matter was generated by the rise of the nullification theory caused by strong southern opposition to a tariff introduced in 1828. Nullification posed the question “whether the states had the right to declare federal law invalid within their boundaries (and, if necessary, to secede from the Union) in order to protect their rights” (Remini 240). Nullifiers were present in many states, but it was primarily South Carolina that led the fight. President Jackson was anxious to stop a spread of nullification, as he believed it would result in federal law, and thereby the Union, essentially becoming void. This would, in his opinion, lead to “civil war and bloodshed” (Remini 239). Jackson argued that the continued existence of tribal land within the individual states would require “the presence of sizeable military forces to protect Indians from white intruders and whites from Indian depredations.” This military presence would “impede economic development, increase the possibility of federal-state conflict, and endanger the existence of the Union” (Satz 55).

To stop the spread of nullification, Jackson tried to isolate South Carolina and avoid antagonizing the other southern states, especially Georgia. Georgia had been dissatisfied with the federal government for many years. This discontent arose from a Compact between Georgia and the federal government in 1802. Georgia agreed to cede the territory that became Alabama and Mississippi to the federal state in exchange for the federal government acquiring for Georgia the territory within the state’s boundaries inhabited by the Cherokees. However, the acquisition of the Cherokee territory proved complicated as the U.S. could not force the Cherokees to sell. The U.S. “recognized Indian tribes as sovereign nations” and all relations between the tribes and the federal government, therefore, had to be conducted through treaties (Perdue and Green 71). After two decades of waiting for the federal government to fulfill its part of the Compact, Georgia grew frustrated (Norgren 258). Relations between the federal government and Georgia and between the Cherokees and Georgia deteriorated when the Cherokee National Council announced in 1823 that it would not cede more land (*American State Papers: Indian Affairs* 468-469), and with the creation of the Cherokee constitution in 1827. The Cherokee constitution stated that “the sovereignty and Jurisdiction of this Government shall extend over the country within the boundaries [of the Cherokee land]” (Perdue and Green 61). Georgia believed that the Cherokees’ claim of sovereignty violated the U.S. Constitution, specifically Article IV section 3, which stated that “no new state shall be formed or erected within the jurisdiction of any other state ... without the consent of the legislatures of the states concerned as well as of the Congress” (Nye 294). Georgia demanded that the Cherokees’ constitution be denounced by President John Quincy Adams, who had encouraged the Cherokees to create said constitution (Newmyer 81). However, “Adams insisted that, as an

instrument of local government, the constitution did not change the Cherokee Nation's relationship with the federal government and refused to act" (Perdue and Green 59).

With Andrew Jackson's election in 1828, Georgia decided to take matters into its own hands. Jackson was a different president compared to his predecessors. He was the first president to not be directly associated with the Founding Fathers (John Quincy Adams being the son of John Adams), he spent most of his youth on the frontier and he was a renowned Indian fighter. Jackson believed that the previous decades of Indian policy had failed and therefore worked to ensure the removal of the Native Americans west of the Mississippi River (Remini 189). His new Indian policy included a break with "the negotiation of treaties that recognized the sovereignty of the nations of Native Americans" and the commitment "to helping them preserve and protect that status" (Perdue and Green 98). Jackson had always made his views on the status of the tribes known, "absolute independence of the Indian tribes from state authority can never bear an intelligent investigation, and a quasi independence of state authority when located within its Territorial limits is *absurd*" (Remini 219).

Needless to say, Georgia felt confident in the new president's support when it passed two laws in 1828 and 1829 with the aim of coercing the Cherokees to relinquish their territory. The laws annulled the Cherokees' constitution and extended Georgia's laws over Cherokee territory (*Cherokee Nation vs. The State of Georgia* 7). Furthermore, after the passing of the Indian Removal Act of 1830, Georgia declared it illegal for anyone to "prevent any Indian ... from enrolling as an emigrant or actually emigrating" (Perdue and Green 76). The Cherokees believed the laws violated existing treaties between the U.S. and the Cherokees, specifically the Treaty of Holston (1791), which established that the Cherokees were under the federal government's protection (Kappler 29). Furthermore, by violating the treaties, Georgia violated the Constitution, as Article VI stated that "all treaties made ... shall be the supreme law of the land" (Nye 294), and thereby superior to state law. The Cherokees turned to President Jackson and demanded he protect their treaty rights. However, Jackson "refused to interfere, arguing that Georgia had a sovereign right to govern all the territory within its borders" and that he could only protect them from individual citizens and not sovereign states (Perdue and Green 18). Jackson's refusal was driven by his wish to "hold Georgia in line when its traditional and logical interests lay in joining South Carolina on the nullification principle, [therefore] Jackson let it be known that he was sympathetic to Georgia's state sovereignty claim on the Cherokee lands" (Swindler 8). As the President declined to help them, the Cherokees turned to the Supreme Court in 1831. However, problems arose for the Cherokees when they submitted their case as a foreign nation. This raised the question of their,

and indeed all Native American tribes', legal status, a question that had been debated passionately the previous year during the passing of the Indian Removal Act in 1830.

## **The Indian Removal Act**

The Indian Removal Act authorized the president to exchange land west of the Mississippi with tribal land east of the river through treaties with the Native Americans. Removal was to be voluntary, but if the tribes refused to move, they would have to submit to state jurisdiction (Satz 20). The supporters of the Act focused on the fact that "by virtue of conquest, and out of respect for the sovereignty of the Southern states, the Cherokee had ... no legal right to remain as a sovereign body within states like Georgia" (Smithers 99). The Opposition not only disagreed with the Act but denounced it as being unconstitutional.

Firstly, they found it unconstitutional as it defied Native American sovereignty recognized through treaties, which could only be made between sovereign powers.

Secondly, it was argued that removal was unnecessary as the Opposition believed that coexistence with tribes like the Cherokees was possible, as they had begun to emulate the Anglo-Americans' practices (Berutti 294), and it was believed that "if left alone they can and will complete the process toward a 'civilized life'" (Remini "The Trail of Tears: Andrew Jackson and the Indian Removal Act").

Thirdly, the Opposition worried about the voluntary nature of removal. The Opposition feared that Native Americans who declined to remove would be vulnerable to pressure in the form of manipulation, intimidation, and federal negligence, which was already happening in Georgia, where officials had started surveying Cherokee land (Satz 22-23). This fear increased when the Senate rejected an amendment to the bill, which provided that "until the tribes decided whether or not to remove, the federal government should respect their political and property rights" (Burke 507).

A fourth point made by the Opposition was that the Act was contradictory, as it stated that individual tribesmen would be economically compensated by the government for improvements made "on the land they might relinquish in the East" (Satz 29), while also guaranteeing that only tribes and not individual tribesmen could decide whether they wanted to emigrate. This raised the question asked by Representative Hemphill "if consent is not given by the tribe or nation, is it intended to go to individuals and purchase from A, B and C?" (Satz 29).

Lastly, the Opposition pointed out that the Act would affect the relationship between the Legislature and the Executive in relation to Indian policy. The Jackson administration's Indian policy rested on the new notion that the Native American tribes were not sovereign and that all

dealings with them, therefore, had to go through Congress. However, section 7 of the Act stated that “nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes” (Perdue and Green 118). This clearly stated that the federal government recognized the validity of the treaties and, therefore, the sovereignty of the tribes. As Senator Asher Robbins stated, section 7 raised two problems. Firstly, if the tribes’ sovereignty was recognized, the Act was unnecessary as the Constitution already allowed the Executive to enter into treaties with sovereigns. Secondly, if the tribes were sovereign, then the proposed law was “unconstitutional; for it is to make a treaty by the Legislature, which can only be made by the Executive and Senate” (Satz 23) as stated in Article II, section 2 of the Constitution. Furthermore, the Act was seen as an example of “King Andrew” seizing more power since he had decided to end previous decades of Indian policy “without the slightest consultation with either House of Congress - without any opportunity for counsel or concert, discussion or deliberation, on the part of these co-ordinate branches of the government” (Meacham 143). Jackson’s administration had not discussed whether the U.S. should change its Indian policy with Congress but had moved straight to legislating and implementing a new policy. In the end, the Indian Removal Act was passed by a narrow majority of 102 to 97 votes in the House and 28 to 19 in the Senate, revealing the controversial nature of the bill (Perdue and Green 115). The fundamental disagreements about the distribution of power revealed by the debate were soon exemplified in the two lawsuits *Cherokee Nation v. The State of Georgia* from 1831 and *Worcester v. The State of Georgia* from 1832, both of which were brought by the Cherokee Nation against Georgia and decided by the Supreme Court, thus involving the last of the three branches of government.

## The Cherokee cases

The first case, *Cherokee Nation v. The State of Georgia*, precipitated the “first full-blown constitutional rights litigation in American constitutional history” (Newmyer 78). With the case, the Cherokees’ attorneys, former Attorney General William Wirt and John Sergeant, sought to cement the Cherokee Nation’s status as “a sovereign and independent foreign nation ... [and] sought an injunction against enforcement of Georgia’s jurisdiction laws on the ground that the legislation violated treaties between the Cherokee Nation and the United States, as well as laws of the United States” (Norgren 281).

At the time of the two Cherokee cases, Supreme Court’s authority was under attack. Firstly, nullification was on the rise, which claimed the right to interpret the Constitution for the states, thus diminishing the Supreme Court’s role. Secondly, a bill was being debated in Congress

concerning an amendment to the Judiciary Act of 1789, which would “deprive the Supreme Court of the power to revise the decisions in the state courts and state legislatures” (Berutti 300). Thirdly, President Jackson would not allow the Supreme Court to have final authority in interpreting the Constitution, as he believed it was undemocratic for only four people to decide on what was constitutional and what was not on behalf of the whole nation (Remini *The Life of Andrew Jackson*, 305). Lastly, Georgia had recently shown contempt for the Supreme Court in the *Tassel* case, where Georgia trespassed on Cherokee jurisdiction by trying and executing the Cherokee George “Corn” Tassel (Swindler 9). It was therefore unsurprising when Georgia refused to appear before Court when summoned for the *Cherokee Nation* proceedings.

William Wirt, who had also represented the Cherokees in the *Tassel* case, sought to bring the new case immediately before the Supreme Court to avoid it being handled by the Georgia courts. To do this, Wirt had to bypass the Eleventh Amendment, which “barred individual tribe members from suing Georgia in federal court” (Banner 219). He therefore claimed that the Cherokees constituted a foreign state, thereby falling under the original jurisdiction of the Supreme Court, and were able to sue Georgia under Article III, section 2 of the Constitution (Nye 292-293). Wirt’s main arguments for the case therefore revolved around the Cherokees’ status. He stated that the Cherokees’ “character as ‘a sovereign and independent state’ as well as the title to their territory, had ‘been repeatedly recognized, and still stands recognized by the United States, in the various treaties subsisting between their nation and the United States’” (Newmyer 83). Because the Cherokees had been recognized as a sovereign nation Georgia’s laws were unconstitutional, as they “violated federal treaties and laws, regulated a subject belonging exclusively to the federal government, and impaired the obligation of many contracts made by both the federal and the state governments with the Indians” (Burke 509). Furthermore, Wirt touched upon the power struggle between President Jackson and Supreme Court. Firstly, he argued that since the upholding of treaty rights was a central issue, the President was directly involved in the case, as he was bound by oath to uphold treaties. Secondly, he stated that although President Jackson refused to allow the Supreme Court to have the final say in interpreting the Constitution, it nevertheless rested solely with the Supreme Court and that the president was required to carry out this interpretation (Burke 514). The main issue of the case was therefore the “executive power versus the rule of law” (Newmyer 83).

However, before the merit of the case could be considered Supreme Court had to decide whether it accepted the Cherokees’ claim of constituting a foreign nation. Although Chief Justice John Marshall was sympathetic to the Cherokees’ cause, he declined “to declare them subject nations and leave them at the mercy of the states, or to pronounce them foreign nations and free

them from federal control” (Burke 514). Instead, Marshall ruled that the Cherokeees constituted a “distinct political society’ but its status was that of ‘domestic dependent nations” (Smithers 106). With their claim to be a foreign nation rejected, the Cherokeees lacked standing, and their case was dismissed by the Supreme Court (Swindler 13). By throwing out the case, Marshall avoided a collision with Congress and President Jackson. If the Cherokeees had won, Congress would have been given the push needed to pass the amendment to the Judiciary Act. Without the power to make judicial reviews the Supreme Court, and by extension, the federal government, “would be rendered powerless in the face of state incursions on federal law” (Berutti 299). Furthermore, given Georgia’s previous behavior of defying Supreme Court, President Jackson was likely to be called upon to enforce the Supreme Court’s decision, which would have pushed Georgia closer to joining South Carolina and the cause of nullification, something Jackson was anxious to avoid. However, if the President refused to enforce the Court’s decision, it would, first of all, establish a precedent whereby a Supreme Court decision could be vetoed by a president (Berutti 306). Secondly, if the nullification of the laws by Georgia was sanctioned, it would reduce the Union to “a tottering fabric, which will soon fall and crumble into atoms” (Perdue and Green 132-133). However, if the Cherokeees had lost the case, it would effectively have allowed nullification, as it would have accepted Georgia breaching treaties and thus breaking the law. This would again threaten the Union. Marshall and the Supreme Court were therefore in a precarious position, and in order to save the Supreme Court and thereby the federal government, they sacrificed the Cherokeees’ case (Berutti 302). Although Marshall dismissed the case, he acknowledged that the Cherokeees’ claim of sovereignty had merit and intimated that the “Court might rule differently in a future case” (Burke 530-531) if they could find a “proper case with proper parties” (Swindler 13).

That case appeared the following year in *Worcester v. The State of Georgia*. After the passing of the Indian Removal Act in 1830, Georgia passed a bill preventing white people from settling in Cherokee territory, as the state believed that the missionaries living among the tribe were aiding them in their legal struggle for their land (Swindler 15). The law required white people residing with the Cherokeees to apply for “a residence permit from Georgia, and swear an oath of allegiance to the state and her laws” (Norgren 286-287). Samuel A. Worcester and Elizur Butler were two of the missionaries who refused to obey the new law, as they believed it violated treaties guaranteeing the Cherokeees’ rights. They were convicted for breaking Georgia law and appealed to Supreme Court, which issued a writ of error on the grounds that the law was “an unconstitutional infringement of the exclusive control over Indian affairs vested in the federal government by ... the Constitution” (Oberg 317). Georgia defied Supreme Court by refusing the writ of error, and the court proceedings began.



Although the immediate issue in *Worcester* was about the legality of the missionaries' arrest and Georgia's new law (Norgren 290), the fundamental issue was exactly the same as in *Cherokee Nation*: Georgia's right to extend jurisdiction over Cherokee affairs depended on the status of Cherokee sovereignty. Yet again, a Cherokee case involved protecting the federal government and the Constitution from encroachments from a state while simultaneously preserving the state's rights (Oberg 317; Norgren 291). This balancing act was easier in *Worcester* than in *Cherokee Nation* because there was no question about standing in *Worcester*, which meant that the Supreme Court could finally weigh the merits of the Cherokees' claim to sovereignty. In his decision, Marshall elaborated on his ruling from *Cherokee Nation*. He argued that the Cherokees were a sovereign nation because relations between the U.S. and the Cherokees had always been conducted through treaties. He therefore ruled that "the whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States" and the Georgia law infringing upon the federal government's rights was "repugnant to the Constitution, treaties, and laws of the United States" (Perdue and Green 82). The process of both court proceedings revealed that the "Indian rights were playing a supporting role" and that the core issues were "conflicting interpretations of the power and authority of the Supreme Court and of the proper relationship between the states and the federal government" (Oberg 314).

Although Marshall ruled for the Cherokees and ordered the release of the missionaries, the ruling was never carried out due to loopholes in federal law. According to the law, the federal government "could not send United States marshals to free the prisoners until the state judge refused in writing to comply with the Court's order" (Satz 49). Georgia conveniently neglected to put their refusal in writing, and the Supreme Court went on recess before anything could be done. As a result, President Jackson was not "constitutionally required to act on the decision" (Berutti 306). This meant that, as with *Cherokee Nation*, the Supreme Court potentially avoided a precedent of the president vetoing a Court decision from being set, but more crucially, it meant that *Worcester* could set a precedent for future decisions (Berutti 306). Despite this assertion of their sovereignty, the Cherokees' situation worsened. They succumbed to the pressure for removal with the signing of the Treaty of New Echota (1835) and underwent what would later be known as the "Trail of Tears."

## Conclusion

The debate concerning Cherokee removal was influenced by political upheaval taking place at the time. Two new interpretations of the Constitution and the balance of power between the federal government and the states emerged with the election of Andrew Jackson as President in 1828 and

with the rising support for nullification in the South. These political viewpoints clashed not only with each other but also with the old policies of the Founding Fathers, as Jackson's idea of a strong Executive challenged the established balance between the three branches of government. This was exemplified by the fierce debate concerning Cherokee removal and Jackson's Indian policy, which sought to break with decades of treaty-making based on the recognition of Native American sovereignty. The debate focused on the authority of the different branches of the federal government and that of the states in dealing with the tribes.

This issue was fundamentally about Native American sovereignty, which was at the heart of two court cases concerning Georgia and the Cherokee Nation. Georgia was frustrated with the federal government not acquiring Cherokee territory for Georgia as stipulated in the Compact of 1802. With the election of Jackson and the passing of the Indian Removal Act Georgia believed it had support for its new laws coercing the Cherokees to move out. The court cases were influenced by a realignment of power, as the Supreme Court struggled to retain its authority from encroachments by the President, Congress, and nullifiers. To avoid confrontation, the Supreme Court dismissed the first case *Cherokee Nation*, as the Cherokees sued as a foreign nation. The Supreme Court stated that they were, in fact, a domestic dependent nation and therefore did not have standing. Because the case was dismissed, Jackson was not placed in a position where he might have had to enforce a decision that would have pushed Georgia closer to the nullifiers and, potentially, a dissolution of the Union. In *Worcester*, standing did not pose a problem as it was a missionary suing Georgia, and the Court could, therefore, examine the question of Cherokee sovereignty. It ruled that the Cherokees were a sovereign nation and that Georgia's laws were unconstitutional. With this verdict, the Supreme Court asserted Cherokee sovereignty and also its own authority as the ultimate interpreter of the Constitution by rejecting Jackson and Congress' attempt to limit the Supreme Court's power.

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