1975

Politics as Law: The Cherokee Cases

William F. Swindler
William & Mary Law School

POLITICS AS LAW: THE CHEROKEE CASES

*William F. Swindler**

"John Marshall has made his decision; now let him enforce it," is one of many aphorisms attributed to Andrew Jackson. The particular utterance was characteristic of Jackson's attitude toward the Supreme Court of the United States whenever it, or Congress, presumed to lay restraints upon the "imperial Presidency."[1] The words also reflected Jackson's attitude toward Indian rights as they amounted to restraints upon his notions of manifest destiny. "Old Hickory's" comment was provoked by the opinion of Chief Justice Marshall in *Worcester v. Georgia*,[2] the 1832 case which might have reopened the door that *Cherokee Nation v. Georgia*[3] had closed the year before, when Indian tribes sought to find a judicial remedy for unending encroachments upon their lands and steady compromising of their treaty rights.

Georgia land hunger had already indirectly involved that state in the 1810 case of *Fletcher v. Peck*,[4] an impairment-of-contract issue growing out of the notorious Yazoo land frauds on the banks of the Mississippi.[5] The Indian interest had been substantially compromised in the 1823 case of *Johnson v. McIntosh*,[6] when the Supreme Court, speaking through Marshall, ruled that the native Americans were not the original lords of the fee, or even tenants in fee. If the ruling in *Cherokee Nation* was thus foreshadowed, the unequivocal ruling against Georgia in *Worcester* could only be answered (as it was) by outright defiance of the Supreme Court by the state. The impunity with which Georgia could do so was reflected in Jackson's aphorism; a President who would not tolerate South Carolina's attempted nullification of the tariff did not intend to apply the same principle of federal supremacy to Indian land grabbing by another state. Yet, as the irony of political events would have it, the ultimate triumph of the constitutional principle in *Worcester*, as against *Cherokee Nation*, meant the ultimate self-destruction of the nullification doctrine—but did not, in the process, restore the Cherokees' rights.

The Cherokee interests litigated in 1831 and 1832 ultimately fell victim to both political and judicial confrontations, their sacrifice being the price of saving Marshall's constitutional doctrine from

* John Marshall Professor of Law, College of William and Mary. Author, *Court and Constitution in the 20th Century* (New York, 3 v., 1969-74).

state and federal political attack and fixing it permanently in constitutional practice. Thus, South Carolina's nullification effort, Georgia's bellicose plan to extinguish Cherokee titles, Jackson's challenge to Congress over the Second Bank of the United States, and several legislative attempts to reduce the powers of the Supreme Court itself were all part of the turbulent Jacksonian first term, which carried over into the second. It is worth noting that 1832, when *Worcester* was being decided, was the crucial political year, with Jackson's reelection the test of whether the bank and tariff issues, at least, would be pursued to their ultimate resolution.[7]

The tariff of 1828 had been enacted by Congress at the same time that Georgia had begun its legislative campaign to usurp federal authority over Cherokee lands within its borders. In the incoming federal administration, Georgia's power at the national level was ascendant; Jackson's new Attorney General would be Georgia's Senator John M. Berrien, who had already established himself as a vigorous advocate of his state's policies in extinguishing Creek title rights. He would be supported on the state sovereignty issue by Vice President John Calhoun of South Carolina; and, even after Calhoun resigned to lead his state's nullification fight, the President *pro tempore* of the Senate turned out to be an ally—Hugh L. White of Tennessee, another state with designs on Cherokee land. When Berrien himself was forced out of the Cabinet, a casualty of the Peggy Eaton affair,[8] Georgia's political power became even stronger. To hold Georgia in line when its traditional and logical interest lay in joining South Carolina on the nullification principle, Jackson let it be known that he was sympathetic to Georgia's state sovereignty claim on the Cherokee lands.[9]

The political scrambling for advantage was to involve and jeopardize the integrity of the Supreme Court itself. Once more, as so often in the course of Marshall's long Chief Justiceship, a congressional attack was being launched upon the Court's jurisdiction. In the second session of the Twenty-First Congress, the House Judiciary Committee reported out with favor a Georgia-inspired bill which proposed amendments to the jurisdictional provisions of the Judiciary Act of 1789;[10] the effect of the bill would be to review the Georgia legislation on the Cherokee question.[11] In 1831, when the first Cherokee case came on for argument, the Bank of the United States cast its shadow—most of the leading attorneys for the Cherokees were stockholders or other interested parties, and thus tarred with the Bank's brush so far as Jackson was concerned. The influence this factor had in determining executive policy toward carrying out a judgment in this original action remains hypothetical. By the time

the 1832 *Worcester* case was decided, an equally abrasive political factor had entered the picture: William Wirt, chief counsel for the Cherokees and a former Attorney General of the United States, was to be a candidate for the presidency (on the Anti-Masonic ticket), against Jackson.

All of this political activity was quite apart from the moral issues (to the extent that the law might consider such) of the Cherokee cases themselves.[12] These moral issues took on color of law (at least), from the prolonged vacillation of the United States regarding the provisions set out in the Cherokee treaty of 1791,[13] the conditions attached by Georgia to its cession of its western lands to the nation in 1802[14] which the United States had accepted, and the federal policy begun in 1819 of encouraging the Cherokees to believe that they were being assured of quiet possession and enjoyment of their lands in Georgia and elsewhere by settling permanently on their estates.[15] Even Georgia could make a case for injury to its interest in the failure of the United States, under the terms of the 1802 cession, to purchase lands from the Cherokees in the same proportions that it had made purchases of Creek and Chickasaw lands in other states; meanwhile, the Cherokees saw the federal policy as a recognition by the government of the fact that the Indian settlers in Georgia did not want to sell or move.[16]

Georgia's intransigence regarding its exclusive sovereignty in Indian affairs had been demonstrated in the autumn of 1830 in the *Corn Tassel* case, which had culminated in the execution of a young Cherokee tried and convicted of murder under state rather than Indian law.[17] Defense counsel had applied to the United States Supreme Court for a writ of error, but Governor William Gilmer had referred the writ, when received, to the state legislature, which by resolution directed "the Governor and every officer of the state to disregard any and every mandate and process that should be served upon them" in the matter.[18] Although the Georgia legislative action was clearly in defiance of the supremacy clause of the Constitution,[19] states' rightists were in power and heady with arrogance, declaring that the doctrine of nullification was now a practical accomplishment. With one of their own in the office of Attorney General, and a President who had clearly indicated on numerous occasions that he would not do anything to protect Indian interests under federal authority,[20] Georgia had little worry as to the policy of the national executive department. Even though the states' rightists did not dominate the judicial branch,[21] there was help in prospect from the Congress. In January, 1831, the judiciary bill was introduced and reported out in the House of Representatives,[22] less than a month after the

Supreme Court issued its subpoena to Governor Gilmer in the case of *Cherokee Nation v. Georgia.*[23]

Law, Politics, and Indian Titles

While the complex legal details of titles to Indian lands are beyond the scope of this present short paper, the Cherokee cases of 1831 and 1832 can best be understood in the context of the 1823 *Johnson v. McIntosh*[24] case, as well as in the unstable matrix of law, policy, and politics which characterized other government actions in Indian affairs up to that time. The 1823 case involved millions of acres in what are now the states of Illinois and Indiana, purchases of this land by agents of the Ohio Company of Virginia prior to the American Revolution, and the subsequent test of best title to the purchased tracts. In July, 1773, one of the purchases was made from the Illinois or Kaskaskia Indians, and the second was made in October, 1775, from the Wabash Indians—more than 5,000,000 acres eventually being involved.[25] In 1778, the new Commonwealth of Virginia established a County of Illinois[26] as the governing authority over the area and its French and Indian inhabitants, after it had been captured from the British by George Rogers Clark. In 1783, Virginia ceded to the United States all of the territory northwest of the Ohio River.[27]

The national government proceeded to organize the Northwest Territory and subsequently the Indiana Territory therefrom;[28] and, under the provisions of the federal statutes,[29] granted to William McIntosh a tract of 11,560 acres in fee simple. The heirs of Thomas Johnson, one of the grantees under the Ohio Company purchase of 1775, sought a writ of ejectment against McIntosh. The constitutional question was thus presented in classic terms of real property: what estate in the land did the Indians have to convey in 1773 or 1775?[30]

In *McIntosh,* as in *Cherokee Nation* which it foreshadowed, Chief Justice Marshall was to make a political determination at the outset: any finding of original title in the Indians, making them lords of the fee, would be unenforceable in the United States of 1823. It was now too late—two and a half centuries after the English had taken possession of lands in "Virginia" (North Carolina's coastal strips) in the name of Elizabeth I—to reverse or revise history.[31] The opinion, to the extent that it took Indian interests into account at all, aimed toward making the best accommodation possible for those interests; how good an accommodation it was may be read in the history of Indian land law in the ensuing century.

Marshall declared in essence that absolute title to New World estates vested in the European nations discovering and taking possession of the land, that the original inhabitants had a right to occupancy only, and that absolute title to the lands in question vested in Great Britain by right of conquest of New France (which had first acquired such title). This title in turn devolved from Britain to the United States in the Treaty of Peace in 1783 and the cession in that same year of the lands northwest of the Ohio by Virginia. In any case, the purchases of 1773 and 1775 were void, even if arguably the acts of agents of a British government (colonial Virginia), because they violated the Royal Proclamation of 1763 barring white settlement beyond a demarcation line setting aside Indian lands.[32]

The ambiguities in *McIntosh*[33]—Marshall spoke of the United States as having a right comparable to "seisin in fee" and the Indians as having an interest equivalent to a "lease for years"—were compounded by ambivalent and inconsistent federal policy as well. Under the Georgia cession of western lands in 1802,[34] the United States had undertaken to extinguish Indian claims to land within the state borders when and as this could be effected "peaceably" and on "reasonable terms." But, by the 1820's, the Cherokees and other tribes had accepted federal grants to convert themselves from a hunting economy to a permanent farming economy,[35] and in 1827 the Cherokees adopted a constitution declaring themselves independent and sovereign over their land. Despite having been put on notice by receiving copies of this constitution,[36] the federal government created further ambiguities which the Court would have to try to resolve in *Cherokee Nation.*

The First Cherokee Case

The opening of the Georgia legislative attack had begun with a resolution in December, 1827, declaring that the Cherokees permanently settled in the state were tenants at will, over whom the laws of the sovereign state extended and to which laws they were subject.[37] The legislature then proceeded to enact a series of statutes dividing the lands into counties and annulling "all laws, usages and customs" of the Indians, licensing the whites who were seeking residence in the area, and placing the newly discovered gold mines in Cherokee territory under state guard.[38]

The Georgia delegates in Congress furthered the state annexation strategy by introducing, and eventually winning enactment of, the first major removal statute in 1830.[39] Threatened by both state and federal legislation, the Cherokees somewhat belatedly resolved to

test their constitutional rights in the judiciary. They engaged William Wirt and John Sergeant, a well-known Philadelphia attorney, to seek an original action for injunction in the Supreme Court.[40] Wirt, in the light of the considerable political forces which had been generated by this time, took a step which today would be regarded as ethically questionable when he sought to find from Chief Justice Marshall whether it was worth the effort to attempt the action.[41] The Chief Justice replied, through a mutual friend—Judge Dabney Carr of Virginia—that he had "wished, most sincerely, that both the executive and legislative departments had thought differently on the subject." He added: "Humanity must bewail the course which is pursued, whatever may be the decision of policy."[42] His words could not be taken as reassuring.

Marshall was quite aware of the political forces lined up against his Court; not since the all-out campaigns of the Jeffersonians three decades before had the independence of the judiciary been so threatened. His close associate, Justice Joseph Story, saw in the proposed judiciary act "an extraordinary state of things; the government of the country was laboring to tread down the power on which its very existence depends" in that a limit on jurisdiction "would deprive the Supreme Court of the power to revise the decisions in the state courts and state legislatures, in all cases in which they were repugnant to the Constitution of the United States."[43] Justice Smith Thompson saw the legislative attacks on judicial independence as tending "to resolve the Government of the Union into the national imbecility of the old Confederation."[44]

The invitation to hale the sovereign state of Georgia into federal court was politically explosive in the highest degree. While it was predictable that Georgia would simply decline to appear, thus making a default judgment almost certain,[45] this would only compound the confrontation. What would happen if a United States marshal then undertook to execute the judgment? "Heretofore," wrote Story,

> the Court has met with the certainty that its orders, judgments and decrees would be carried into effect by the executive branch of the Government, however much they might conflict with the interests, prejudices, or preopossessions of the parties or of the states. It has now met with the full knowledge that the executive will not enforce its decisions, if they are counter to his views of constitutional law.[46]

William Wirt also recognized the practical problems in the closing portion of his oral argument for the Cherokees. "Shall we be asked (the question has been asked elsewhere) how this Court will

enforce its injunction, in case it shall be awarded? I answer, it will be time enough to meet that question when it shall arise."[47] This was easy enough for counsel to say, but Marshall, who had by now weathered 30 years of recurrent political attacks, could not help but discern the illusory element in Wirt's conclusion: "In pronouncing your decree you will have declared the law; and it is part of the sworn duty of the President of the United States to 'take care that the laws be faithfully executed'.... If he refuses to perform this duty, the Constitution has provided a remedy."[48]

The ailing, 75-year-old Chief Justice obviously sought to let the cup pass from his lips. "If it be true that wrongs have been inflicted, and that still greater are to be apprehended," he said at the conclusion of the Court's opinion denying jurisdiction, "this is not the tribunal which can redress the past or prevent the future."[49] The opinion had taken refuge in a strained line of reasoning: the Cherokee Nation was not a foreign nation in the sense that international law defined sovereign powers, and, hence, the Cherokees had no standing to bring the action in the Supreme Court.[50] It is striking that the man who had erected federal power on the cornerstone of the commerce clause, and had felt strongly enough on the consequent principle of the paramount nature of federal power to defend it in articles written in the popular press,[51] should now evade the basic issue. The commerce clause itself recognized the distinction, specifically providing that Congress had the power to regulate commerce respectively among "foreign nations," "the several states," and "Indian tribes."[52]

The 4-2 opinion of a badly divided Court—Justice Gabriel Duvall was absent, Justices William Johnson and Henry Baldwin wrote lengthy concurring opinions, and Justice Thompson wrote a dissent in which Story joined[53]—labored the commerce clause distinction between foreign nations and Indian tribes without reaching the fundamental fact that the clause vested exclusive control in the federal government over both. All too plainly, Marshall was concerned primarily with avoiding, even if only postponing, the ultimate political issue: "The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the Court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."[54]

Marshall, in fact, did leave an opening for a further attack on the Georgia usurpations: "the mere question of right to their lands might perhaps be decided by the Court in a proper case with proper parties," he had said in dictum.[55] This alternative was reiterated in

Thompson's dissent: "Relief to the full extent prayed by the bill may be beyond the reach of this court," he wrote in recognition of political realities. "Much of the matter therein contained by way of complaint would seem to depend for relief upon the exercise of political power; and as such appropriately devolving upon the executive, and not the judicial department of government. This court can grant relief so far only as the rights of person or property are drawn in question, and have been infringed."[56] Thompson then proceeded to discuss at length the legal standing of the Cherokees before the Court, and concluded that in his view (and Story's), the question in Marshall's dictum was already before the Justices: counsel had established "a direct and palpable infringement of the rights of property," and this required "a prohibitory writ to restrain a party from doing a wrong or injury to the rights of another," as the Court had already recognized in an injunction proceeding in a second Bank case.[57]

The whole business deeply troubled the Chief Justice; "[I]f courts were permitted to indulge their sympathies," he had said at the outset of his opinion, "a case better calculated to excite them can hardly be imagined."[58] Now that it was over—the Court's short winter term had ended—Marshall knew that he had only put off the inevitable, and in the fall of 1831 he was seriously considering resigning. "I cannot be insensible to the gloom that lours [*sic*] over us," he wrote to Story, acknowledging a combination of "circumstances which is almost invincible." He dreaded to end his career, he confessed, in a judicial process which would become "a mere inefficient pageant."[59] The prospect of losing Marshall from the Court had haunted others throughout the struggle; John Quincy Adams, noting such an expression from Wirt the previous winter, had worried that "some shallow-pated wild-cat, . . . fit for nothing but to tear the Union to rags and tatters, would be appointed in his place."[60] The Cherokee cases marked a low point in constitutional fortunes, in more ways than one.

The Second Cherokee Case

If *Cherokee Nation* was intended to buy time for the Court, it bought very little; the states' rightists did not intend to relax the pressure of their challenge. Accordingly, a writ of error issued from the Supreme Court October 27, 1831, to the Superior Court of the County of Gwinnett—one of the counties carved out of the Cherokee lands—in the case of *Worcester v. Georgia*.[61] Copies were duly served on the governor and attorney general of the state, referred again to the legislature for instruction, and dismissed by the state

with a resolution directing its officers to ignore the process. In February, 1832, Wirt and Sergeant again appeared for the petitioners, and again the state of Georgia was unrepresented. On March 3, 1832, the Chief Justice, for a 6-1 majority, held Georgia's laws bearing on the matter unconstitutional because exclusive jurisdiction over Indian affairs was vested in the United States.[62] Two days later, a mandate ordering the release of Worcester and his codefendant was directed to the Georgia officials. Unconsciously countering Andrew Jackson's aphorism, Story wrote: "The Court has done its duty. Let the Nation now do theirs."[63]

Samuel A. Worcester and Elizur Butler were two missionaries who had long lived among the Cherokees and counseled them to stand upon their rights under the treaties and the Constitution. It was this type of white settler that the Georgia legislature sought to exclude by its 1830 law requiring all whites living in Cherokee country to obtain a license and take an oath of allegiance to the state. When the missionaries, and several of their fellow workers, refused to seek the license or leave the area, they were arrested, convicted, and sentenced to four years' imprisonment. On writ of error, the defendants then sought review of their case in the Supreme Court.

In preparation for its case against the missionaries, Georgia had collected part of its political debt from President Jackson. The initial arrest of Worcester and Thompson had misfired; the trial court had released them, finding that as licensed clergymen empowered to dispense federal funds for "civilizing" and settling Indians, the defendants were presumably federal agents. Worcester, moreover, was postmaster of New Echota. Jackson, upon *pro forma* inquiry from Georgia officials, had denied that the missionaries *qua* missionaries were federal agents, and had removed Worcester from his postmastership. The prosecution began again, and in due course, the foregone conclusion of the outcome of the trials came on for review.[64]

Although Marshall found himself on firmer procedural ground—the question now was not one of standing to bring an original suit, but of appellate review of state actions trenching upon federal power—his opinion was essentially a retraction of much that had been central to the *Cherokee Nation* opinion. He accepted the premise of the earlier case, that an Indian nation stood in a special relationship to the United States; but now it was not a question of the Indian nation's right to sue but of federal government power, and the right of the Court to protect those entitled to rely on that power. The Chief Justice summarily rejected Georgia's challenge to the jurisdiction, reviewed in detail the history of European colonial powers' relations with Indians, and concluded—as the commerce clause provided—

that commercial relations with the Indians conclusively and exclusively descended from Great Britain to the United States. Georgia's laws, held the Court, "interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled provisions of our Constitution, are committed exclusively to the government of the Union."[65]

John Marshall had made his decision; now Andrew Jackson had to make his—or so it seemed. The Court, in fact, did not force the issue; it neglected to prepare a new mandate which federal marshals would presumably have been required to enforce. Accordingly, the President was not compelled as a matter of law to do anything. However, other events of 1832 not only subordinated the Cherokee cases as critical national issues, but, in the paradoxically reversing poles of politics, enabled Jackson himself to emerge at the end of the year as the champion of national power and the ardent advocate of judicial authority to enforce the power. In July, he sent to Congress his veto message on the bill to extend the charter of the Bank of the United States;[66] in November, South Carolina threw down a gauntlet in its Nullification Ordinance;[67] and in December, Jackson responded with his Proclamation Against Nullification.[68]

The South Carolina ordinance had gone several steps beyond the resolutions of the Georgia legislature instructing Georgia officials not to answer any federal process. It had forbidden any state courts to issue any copy of the record of a case for which the parties were seeking review in the Supreme Court and defined the attempt to seek review to be in contempt.[69] Jackson's response was in proportion to the state action; such action, said his Proclamation, was rebellion and treason, and he called upon Congress to draft legislation clarifying the power of the federal courts to visit criminal penalties on all state officers guilty of attempting to carry the ordinance into effect. The "force bill" of 1833[70] vested in the federal judiciary more statutory authority to establish paramount national power than the Marshall Court had ever asserted in any of its greatest decisions.[71]

The final irony was the fact that Georgia's nullification posture was undercut by South Carolina's overreaching ordinance. Jackson made it clear in his message to Congress that he would enforce any mandate the Supreme Court issued in cases where it held that a state was attempting to nullify a constitutional power of the national government. Once more, political realities determined the situation. With its extremism in nullification, South Carolina had destroyed the presidential chances of its own favorite son, John Calhoun; Jackson had defeated the Bank lobby, and his heir apparent, Martin

Van Buren, would carry on his program after 1836. The time had come to salvage what could be salvaged; accordingly, the Georgia governor issued a pardon to Worcester and Butler in return for their withdrawal of their original suit.[72]

In the end, it could be said that Samuel Worcester had won a moral victory, and it could similarly be said that John Marshall in *Worcester* had won a moral victory. In the latter instance, it was more a matter of luck—political luck—that converted the apparent flouting of the rule of law as represented in judicial review into the establishment of the principle as the capstone of constitutional government. Three decades before, at the start of his great career, Marshall had shown himself a consummate judicial politician in outwitting the Jeffersonians in *Marbury v. Madison*.[73] At the close of that career, in the Cherokee cases, he had, rather, been carried along by events. Yet, in historical perspective, the aftermath of the Cherokee cases, and especially *Worcester*, may be seen as the logical culmination of the Marshall Court's insistent doctrine of the supremacy of the powers expressed or reasonably derived from the Constitution.

The ultimate losers, of course—as throughout most of the history of the nation which flowered from the dust of their hopes—were the Cherokees. On the strength of the doctrine in the 1831 case, Georgia continued unabated expansion into the Cherokee lands. And within the decade that began with Marshall's valedictory opinions, the Cherokees themselves began the trail of tears.

NOTES

1. On Jackson, *cf.* A. SCHLESINGER, THE IMPERIAL PRESIDENCY, 37-40, 56-57, 157-58 (Boston, 1973). *Compare also* 2 WARREN, SUPREME COURT IN UNITED STATES HISTORY (Boston, 1926), at ch. 19 [hereinafter cited as WARREN]; M. JAMES, ANDREW JACKSON (Indianapolis, 1938) at ch. 34 [hereinafter cited as JAMES].

2. 31 U.S. (6 Pet.) 515 (1832).

3. 30 U.S. (5 Pet.) 1 (1831).

4. 10 U.S. (6 Cranch) 87 (1810).

5. By an act of the state legislature in 1795. Georgia authorized sale of 500,000 acres of its western lands, in what is now the state of Mississippi, to the Georgia Land Company. After evidence of widespread fraud in securing the legislative enactment, the state in 1796 rescinded the first law. Fletcher, a bona fide purchaser from the land company in the interim between the two acts, was sued by Peck on breach of covenant on the deed. Marshall, for the Court, held that the state by its second act could not impair obligations of contract incurred during the period when the first act was still in force. *Cf.* U.S. CONST., art. I, § 10, cl. 1.

6. Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). *Cf.* notes 25-32 *infra*.

7. WARREN, *supra* note 1, at ch. 19; JAMES, *supra* note 1, at 568, 608. *Cf.* C.

BOWERS, PARTY BATTLES OF THE JACKSON PERIOD (Boston, 1922), at ch. 9 [hereinafter cited as BOWERS].

8. Margaret (Peggy) O'Neal, daughter of a Washington tavernkeeper, married Secretary of State John Eaton after her first husband committed suicide. In the ensuing scandal, Cabinet wives and Washington social leaders snubbed her. Jackson demanded that she be "received," and most of the Cabinet members (under domestic duress?) resigned in protest. The resignations were actually abetted by Martin Van Buren as a means of enhancing his own position as Jackson's prospective successor and getting Calhoun men out of the Cabinet. *Cf.* BOWERS, *supra* note 7, at ch. 5.

9. Jackson recognized the unrelenting pressure on state and federal governments to oust Indians from their lands, and he personally sought to encourage tribes to move westward. On the eve of the *Cherokee Nation* case, he attended a council of several tribes and urged such a move. *Cf.* JAMES, *supra* note 1, at 549-51.

10. *Cf.* Act of Sept. 29, 1789. *Cf. also* H. REP. No. 43, 21st Cong., 2d Sess., Jan. 30, 1831. Similar Court-curbing proposals appeared sporadically over the next decade. *Cf.* WARREN, *supra* note 1, at 743n. Hugh L. White of Tennessee was a comrade-in-arms of Jackson in the Creek Indian War, and on the Senate committee on Indian affairs, was a vigorous advocate of removal. 20 DICT. AM. BIOG. 105-107.

11. The specific state laws includes an Act of Dec. 20, 1828, Ga. Laws 1828, 88, and Acts of Dec. 21-23, 1830, Ga. Laws 1830, 114-18, 127-46.

12. *Cf.* Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969) [hereinafter cited as Burke].

13. 7 Stat. 43.

14. 1 AM. STATE PAPERS, *Public Lands*, 126 (Washington, 1832).

15. *Cf.* note 48 *infra.*

16. *Cf.* note 49 *infra.*

17. *Cf.* Burke, *supra* note 12, at 512-13.

18. WARREN, *supra* note 1, at 733-34.

19. U.S. CONST., art. VI, cl. 2.

20. *Cf.* note 9, *supra.*

21. Jackson's only appointment to the Court at that date had been Congressman Henry Baldwin of Pennsylvania, a strong supporter of the tariff and a political foe of Calhoun, confirmed Jan. 6, 1830. Historically, Presidents have discovered that judicial appointees seldom conform to the political considerations which led to their coming onto the bench. For an example of Baldwin's independence of Jackson, *cf.* WARREN, *supra* note 1, at 783-84.

22. *Cf.* note 10 *supra.*

23. WARREN, *supra* note 1, at 745.

24. 21 U.S. (8 Wheat.) 543 (1823).

25. *Id.* at 551-57.

26. 9 Hening (Va.) 522 (1778).

27. 1 AM. STATE PAPERS, *Public Lands.*

28. Ord. of July 6, 1787, 32 J. CONT. CONG., 334; Act of May 7, 1800, 2 Stat. 58.

29. Land Act of May 10, 1800, 2 Stat. 73. *Cf.* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, 351-60 (Swindler, ed. New York, 1973).

30. 21 U.S. (8 Wheat.) 515, 572ff. (1823).

31. *Cf.* H. BAKER, JOHN MARSHALL, 730 (New York, 1974).

32. *Cf.* ANNUAL REGISTER 208-13 (London, 1763).

33. 21 U.S. (8 Wheat.) 515, 592 (1823).

34. 1 AM. STATE PAPERS, *Public Lands.*

35. *Cf.* discussion in Burke, *supra* note 12, at 503.

36. The Cherokee Constitution was incorporated into H.R. Doc. No. 67, 20th Cong., 1st Sess., Jan. 14, 1828.

37. Resolution of Dec. 27, 1827, Ga. Laws 1827, 249.

38. *Cf.* note 11 *supra.*

39. Act of May 28, 1830, 4 Stat. 411 *Cf. also* Abel, *The History of the Events Resulting in Indian Consolidation West of the Mississippi River*, 1 AM. HIST. ASS'N ANN. PROC., 381-407 (1906).

40. James Kent, Horace Binney, and Daniel Webster were among leaders of the bar who endorsed the Cherokees' contention that the Supreme Court had jurisdiction in their case. *Cf.* WARREN, *supra* note 1, at 731n.

41. Wirt to Dabney Carr, June 21, 1830 in 2 MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY GENERAL OF THE UNITED STATES, 253-58 (Kennedy, ed. 1849).

42. Marshall to Carr, June 26, 1830 in *id.*, 296-97.

43. Story to George Ticknor, Jan. 22, 1831 in 2 LIFE AND LETTERS OF JOSEPH STORY, 45, 48 (Story, ed. 1851).

44. J.Q. Adams, diary entry of Jan. 29-30, 1831, 8 MEMOIRS OF JOHN QUINCY ADAMS, 303f. (C.F. Adams, ed. Philadelphia, 1836).

45. Georgia had acted similarly early in Supreme Court history, in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), declining to appear in a suit brought by assignees of pre-Revolutionary claims against the state; a default judgement was entered.

46. 21 U.S. (8 Wheat.) 515 (1823). *Cf. also* the statement of Oliver Wendell Holmes: "I do not think the United States would come to an end if we lost our power to declare an act of Congress void; I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." COLLECTED LEGAL PAPERS, 295 (New York, 1920).

47. Quoted in WARREN, *supra* note 1, at 747-48.

48. *Id.* at 748.

49. 30 U.S. (5 Pet.) 1, 20 (1831).

50. *Id.* at 19.

51. *Cf.* Gunther, *"A Friend of the Constitution:" In Defense and Elaboration of McCulloch v. Maryland*, 21 STAN. L. REV. 449 (1969).

52. U.S. CONST., art. I, § 8, cl. 3.

53. The dissent appears to have been written after the critical reaction to the opinion of the Court. *Cf.* Burke, *supra* note 12, at 516-17.

54. 30 U.S. (5 Pet.) 1, 19 (1831).

55. *Id.* at 20.

56. *Id.* at 51.

57. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 128 (1824).

58. 30 U.S. (5 Pet.) 1, 15 (1831).

59. Marshall to Story, Oct. 12, 1831. MASS. HIST. SOC. PROC. (2d ser.), XIV.

60. J.Q. Adams, diary entry Feb. 13, 1831; 8 MEMOIRS OF JOHN QUINCY ADAMS, 315 (C.F. Adams, ed. Philadelphia, 1836).

61. 31 U.S. (6 Pet.) 515 (1832).

62. The Court was divided, 6-1, with Justice Baldwin dissenting.

63. 2 LIFE AND LETTERS OF JOSEPH STORY, 62 (Story, ed. 1851).

64. WARREN, *supra* note 1, at 750.

65. 31 U.S. (6 Pet.) 515, 562-63 (1832).

66. 3 COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 576 (J. Richardson, ed. Washington, 1896).

67. 1 Stat. 1 (S.C. 1836), at 329.

68. 3 COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 640 (J. Richardson, ed. Washington, 1896).

69. The state supreme court subsequently held this statute unconstitutional. State v. McCreardy, 2 Hill (S.C.), 1 (1834).

70. Act of Mar. 2, 1833, 4 Stat. 632.

71. *Cf.* §§ 5 and 7 of the Act. *Id.* at 634.

72. WARREN, *supra* note 1, at 776.

73. 5 U.S. (1 Cranch) 137 (1803).