THE CHEROKEE NATION vs. GEORGIA

SUPREME COURT OF THE UNITED STATES
30 US 1
March 18, 1831

OPINION: Mr Chief Justice MARSHALL...This bill is brought by the Cherokee nation...**to restrain the state of Georgia** from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?

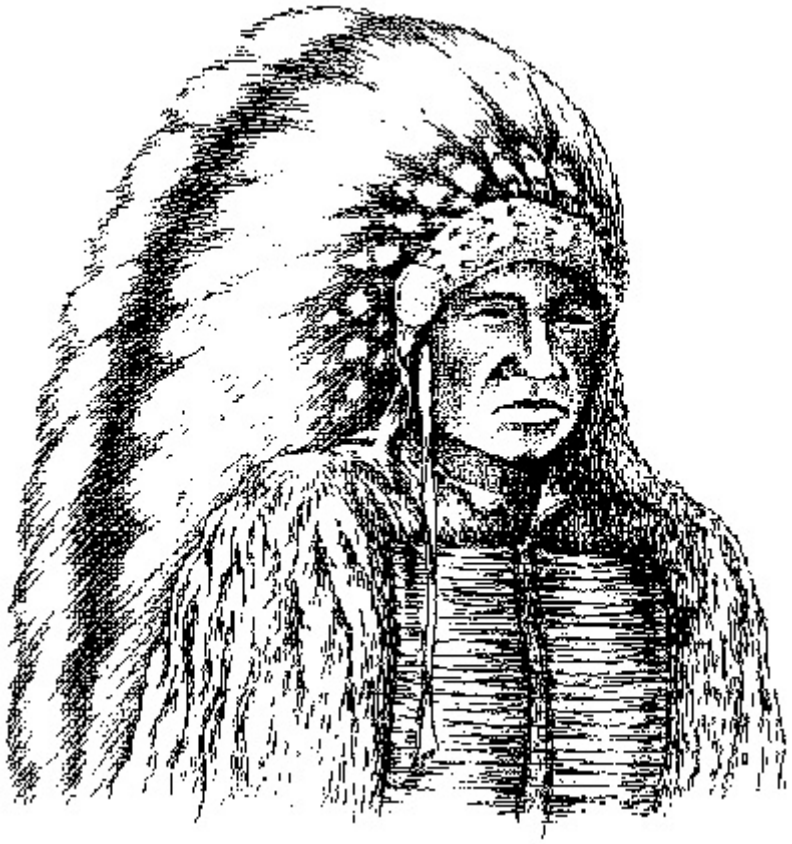
The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state or the citizens thereof, and foreign states, citizens, or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party. The party defendant may then unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee

nation a **foreign state** in the sense in which that term is used in the constitution?...

The counsel have shown conclusively that they are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign...

The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress."...

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated **domestic dependent nations**. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.



They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as

well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of **our** territory, and an act of hostility.

These considerations go far to support the opinion that the framers of our constitution had not the Indian tribes in view when they opened the courts of the union to controversies between a state or the citizens thereof and **foreign states**...

At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in consider-ing them as designated by the term foreign state, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to **"regulate commerce with foreign nations, and among the several states, and with the Indian tribes."**

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation...The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes -- **foreign nations**, **the several states**, and **Indian tribes**...

Had the Indian tribes been foreign nations,...Congress might have been empowered "to regulate commerce with foreign nations, **including** the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly...

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. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that **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.**

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise

of legislative power over a neighboring people, asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented. That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might perhaps be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. 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 savours too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

Let's be clear. Justice Marshall is merely raising questions for the future. Because he ruled that the Cherokee Nation was not a foreign state and, therefore, could not sue a State **originally** in the Supreme Court, he did not reach the answer to these questions.

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

DISSENT: Mr Justice JOHNSON...Besides having a cause of action, the complainant must bring himself within that description of parties, who alone are permitted, under the constitution, to bring an **original suit** to this court.

It is essential to such suit that a state of this union should be a party; so says the second member of the second section of the third article of the constitution: the other party must, under the control of the **eleventh amendment**, be another state of the union, or a foreign state. In this case, the averment is, that the complainant is a foreign state.

Two preliminary questions then present themselves.

1. Is the complainant a foreign state in the sense of the constitution?

2. Is the case presented in the bill one of judicial cognizance?

Until these questions are disposed of, we have no right to look into the nature of the controversy any farther than is necessary to determine them. The first of the questions necessarily resolves itself into two.

1. Are the Cherokees a state?

2. Are they a foreign state?...

If these Indians are to be called a state: then,

1. By whom are they acknowledged as such?

2.When did they become so?

3. And what are the attributes by which they are identified with other states.

As to the first question, it is clear, that as a state they are known to nobody on earth, but ourselves, if to us: how then can they be said to be recognized as a member of the community of nations?...If known as a state, it is by us and us alone; and what are the proofs? The treaty of Hopewell does not even give them a name other than that of the Indians; not even nation or state: but regards them as what they were, a band of hunters, occupying as hunting grounds, just what territory we chose to allot them. And almost every attribute of sovereignty is renounced by them in that very treaty. They acknowledge themselves to be under the sole and exclusive protection of the United States. They receive the territory allotted to them as a boon, from a master or conqueror; the right of punishing intruders into that territory is conceded, not asserted as a right; and the sole and exclusive right of regulating their trade and managing all their affairs in such manner as the government of the United States shall think proper; amounting in terms to a relinquishment of all power, legislative, executive and judicial to the United States, is yielded in the ninth article [of that treaty].

It is true, that the twelfth article gives power to the Indians to send a deputy to congress; but such deputy, though dignified by the name, was nothing and could be nothing but an agent, such as any other company might be represented by. It cannot be supposed that he was to be recognized as a minister, or to sit in the congress as a delegate...

And as to that article in the treaty of Holston, and repeated in the treaty of Tellico, which guaranties to them their territory, since both those treaties refer to and confirm the treaty of Hopewell; on what principle can it be contended that the guarantee can go farther than to secure to them that right over the territory, which is conceded by the Hopewell treaty; which interest is only that of **hunting grounds**. The general policy of the United States, which always looked to these Indian lands as a certain future acquisition, not less than the express words of the treaty of Hopewell, must so decide the question...

Their condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self government has never been taken from them; and such a form of government may exist though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self government may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty except as to their land and trade...**I think it very clear that the constitution**

neither speaks of them as states or foreign states, but as just what they were, Indian tribes ...nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state...

But had I been sitting alone in this cause, I should have waived the consideration of personal description altogether; and put my rejection of this motion upon the nature of the claim set up, exclusively.

Maybe they had a different concept of the meaning of a dissenting opinion, for Justice Johnson does not "dissent" from the majority **result**, just the reasoning.

I cannot entertain a doubt that it is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal. There is no possible view of the subject, that I can perceive, in which a court of justice can take jurisdiction of the questions made in the bill. The substance of its allegations may be thus set out.

Maybe that is the distinction. It appears that **if** the Cherokee Nation were properly before the Supreme Court, Justice Marshall would consider their plea. However, Justice Johnson would never do so because of his belief that Courts should not determine purely "political" questions.

[The Indians allege that from time immemorial they have been lords of the soil they occupy. That the limits by which they hold it have been solemnly designated and secured to them by treaty with the United States. That within those limits they have rightfully exercised unlimited jurisdiction, passing their own laws and administering justice in their own way. That in violation of their just rights so secured to them, the state of Georgia has passed laws authorizing Georgia to enter their territory and put down their leaders and have entered their territory with an armed force and put down all powers of the Indians.]

What does this series of allegations exhibit but a state of war, and the fact of invasion? They allege themselves to be a sovereign independent state, and set out that another sovereign state has...invaded their state and put down their authority...And the contest is distinctly a contest for empire...In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty of wrong is war and subjugation...

What these people may have a right to claim of the executive power is one thing: whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties, is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government; which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty...I vote for rejecting the motion.

CONCURRENCE: Mr Justice BALDWIN...[I]f one [of the Indian tribes with whom the United States has had a treaty] is a foreign nation or state, all others in like condition must be so in their aggregate capacity; and each of their subjects or citizens [would be] capable of suing in the circuit courts. This case then is the case of the countless tribes, who occupy tracts of our vast domain; who, in their collective and individual characters, as states or aliens, will rush to the federal courts in endless controversies, growing out of the laws of the states or of congress...

In 1781 a department for **foreign affairs** was established...In...1775, congress established a department of **Indian affairs**...It is clear then, that neither the old or new government did ever consider Indian affairs, the regulation of our intercourse or treaties with them, as forming any part of our foreign affairs or concerns with foreign nations, states or princes...

On the 15th March 1785, commissioners were appointed to treat with the Cherokees and other Indians...for the purpose of making peace with them, and of receiving them into the favor and protection of the United States...They were instructed to demand that all prisoners, **Negroes** and other property taken during the war be given up [and so on.]...

> Apparently, when warring Indians had victories over Americans who owned slaves, the Indians kept them as slaves. I most assuredly did not know that, did you?

A treaty was accordingly made...The word nation is not used in the preamble or any part of the treaty, so that we are left to infer the capacity in which the Cherokees contracted, whether as an **independent nation** or **foreign state** or a **tribe of Indians**..."The Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States." Article 3d. "The boundary allotted to the Cherokees for their hunting grounds between the said Indians and the citizens of the United States, within the limits of the United States, is and shall be the following..." "For the benefit and comfort of the Indians, and for the prevention of injuries and aggressions on the part of the citizens or Indians, the United States in congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they shall think proper." Article 9. "That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send a deputy of their choice whenever they think fit to congress." Article 12th.

...**[T]he stipulations are wholly <u>inconsistent</u> with sovereignty**; the Indians acknowledge their dependent character; hold the lands they occupy as an allotment of hunting grounds; give to congress the exclusive right of regulating their trade and managing all their affairs as they may think proper. So it was understood by congress as declared by them in their proclamation of 1st September 1788, and so understood at the adoption of the constitution...

To correctly understand the constitution, then, we must read it with reference to this well known existing state of our relations with the Indians; the United States asserting the right of soil, sovereignty, and jurisdiction, in full dominion; the Indians occupant, of allotted hunting grounds...

Note, below, that Justice Baldwin...
takes his constitutional responsibility **very seriously** and...
believes his power to be **very limited**.

In taking out, putting in, or varying the plain meaning of a word or expression, to meet the results of my poor judgment, as to the meaning and intention of the [Constitution], which alone imparts to me my power to act as a judge of its supreme injunctions, I should feel myself acting upon it by judicial amendments, and not as one of its executors. **I will not add...I will not take away from [its words]**; I will not impair the force or obligation of its enactments, plain and unqualified in its terms, by resorting to the authority of **names**; the decisions of **foreign courts**; or a reference to **books or writers**. The plain ordinances are a safe guide to my judgment. When they admit of doubt, I will connect the words with the practice, usages, and settled principles of this government, as administered by its fathers before the adoption of the constitution: and refer to the received opinion and fixed understanding of the high parties who adopted it; the usage and practice of the new government acting under its authority; and the solemn decisions of this court, acting under its high powers and responsibility: nothing fearing that in so doing, I can discover some sound and safe maxims of American policy and jurisprudence, which will always afford me light enough to decide on the constitutional powers of the federal and state governments, and all tribunals acting under their authority. They will at least enable me to judge of the true meaning and spirit of plain words, put into the forms of constitutional provisions, which this court in the great case of *Sturges* and *Crowninshield* say, "is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable." But the absurdity and injustice of applying the provision to the case must be so monstrous, that all mankind would without hesitation unite in rejecting the application...

Guided by these principles, I come to consider the third clause of the second section of the first article of the constitution; which provides for the apportionment of representatives, and direct taxes "among the several states which may be included within this union, according to their respective numbers, excluding Indians not taxed."...If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole free Indian population of all the states would be included in the federal numbers, coextensively with the boundaries of all the states, included in this union. The insertion of this clause conveys a clear definite declaration that there were no independent sovereign nations or states, foreign or domestic, within their boundaries, which should exclude them from the federal enumeration, or any bodies or communities within the states, excluded from the action of the federal constitution unless by the use of express words of exclusion.

...[T]he words used in this clause exclude the existence of the plaintiffs as a sovereign or foreign

state or nation, within the meaning of this section, too plainly to require illustration or argument.

The third clause of the eighth article[1] shows most distinctly the sense of the convention in authorizing congress to regulate commerce with the Indian tribes. The character of the Indian communities had been settled by many years of uniform usage under the old government: characterized by the name of nations, towns, villages, tribes, head men and warriors, as the writers of resolutions or treaties might fancy; governed by no settled rule, and applying the word nation to the Catawbas as well as the Cherokees. **The framers of the constitution have thought proper to define their meaning to be, that they were not foreign nations nor states of the union, but Indian tribes...**I cannot strike these words from the book; or construe Indian tribes in this part of the constitution to mean a sovereign state under the first clause of the second section of the third article. It would be taking very great liberty in the exposition of a fundamental law, to bring the Indians under the action of the legislative power as tribes, and of the judicial, as foreign states...

The only remaining clause of the constitution to be considered is the second clause in the sixth article: "All treaties made, or to be made, shall be the supreme law of the land."

[In these treaties, the Indians]...contracted by putting themselves under the protection of the United States, accepted of an allotment of hunting grounds, surrendered and delegated to congress the exclusive regulation of their trade and the management of all their own affairs, taking no assurance of their continued sovereignty, if they had any before, but relying on the assurance of the United States that they might have full confidence in their justice respecting their interests; stipulating only for the right of sending a deputy of their own choice to congress. **If, then, the Indians claim admission to this court under the treaty of Hopewell, they cannot be admitted as foreign states, and can be received in no other capacity...**

In the second article [of the Holston treaty,] the Cherokees stipulate "that the said Cherokee nation will not hold any treaty with any foreign power, individual state, or with individuals of any state." This affords an instructive definition of the words nation and treaty. At the treaty of Hopewell the Cherokees, though subdued and suing for peace, before divesting themselves of any of the rights or attributes of sovereignty which this government ever recognized them as possessing by the consummation of the treaty, contracted in the name of the head men and warriors of all the Cherokees; but at Holston in 1791, in abandoning their last remnant of political right, contracted as the Cherokee nation, thus ascending in title as they descended in power, and applying the word treaty to a contract with an individual: this consideration will divest words of their magic...

Foreign states cannot be created by judicial construction;...I find no acknowledgment of it by the legislative or executive power. Till they have done so, I can stretch forth no arm for their

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[1]Oops! Justice Baldwin did not mean the "third clause of the eighth article." There are only seven articles. No, he meant the "third clause of the eighth section of the first article," the "commerce clause."

relief without violating the constitution. I say this with great deference to those from whom I dissent; but **my judgment tells me, I have no power to act**, and imperious duty compels me to stop at the portal, unless I can find some authority in the judgments of this court, to which I may surrender my own.

Indians have rights of occupancy to their lands as sacred as the...title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the government...

If their jurisdiction within their boundaries has been unquestioned until this controversy; if rights have been exercised which are directly repugnant to those now claimed; the judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy...

I disclaim the assumption of a judicial power so awfully responsible. No assurance or certainty of support in public opinion can induce me to disregard a law so supreme; so plain to my judgment and reason. **Those who have brought public opinion to bear on this subject act under a mere moral responsibility; under no oath which binds their movements to the straight and narrow line drawn by the constitution. Politics or philanthropy may impel them to pass it, but when their objects can be effectuated only by this court, they must not expect its members to diverge from it, when they cannot conscientiously take the first step without breaking all the high obligations under which they administer the judicial power of the constitution. The account of my executorship cannot be settled before the court of public opinion, or any human tribunal. None can release the balance which will accrue by the violation of my solemn conviction of duty.**

DISSENT: Mr Justice THOMPSON...Much of the...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 the government. This court can grant relief so far only as the rights of person or property are drawn in question, and have been infringed...But believing as I do, that relief to some extent falls properly under judicial cognizance, I shall proceed to the examination of the case [as follows.]

1. Is the Cherokee nation of Indians a competent party to sue in this court?

2. Is a sufficient case made out in the bill, to warrant this court in granting any relief?

3. Is an injunction the fit and appropriate relief?

1. By the constitution of the United States it is declared (Art. 3, § 2), that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; &c. to controversies between two

or more states, &c. and between a state or the citizens thereof; and foreign states, citizens or subjects.

The controversy in the present case is alleged to be between a foreign state, and one of the states of the union; and does not, therefore, come within the eleventh amendment of the constitution, which declares that the judicial power of the United States, shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. This amendment does not, therefore, extend to suits prosecuted against one of the United States by a foreign state. The constitution further provides, that in all cases where a state shall be a party, the supreme court shall have original jurisdiction. Under these provisions in the constitution, the complainants have filed their bill in this court, in the character of a foreign state, against the state of Georgia; praying an injunction to restrain that state from committing various alleged violations of the property of the nation, claimed under the laws of the United States, and treaties made with the Cherokee nation.

That a state of this union may be sued by a foreign state, when a proper case exists and is presented, is too plainly and expressly declared in the constitution to admit of doubt; and the first inquiry is, **whether the Cherokee nation is a foreign state** within the sense and meaning of the constitution.

The terms state and nation...imply a body of men, united together, to procure their mutual safety and advantage by means of their union...**Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state...**It is sufficient...that...it must govern itself by its own authority and laws...[A] weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power...

Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state...They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same; yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self government over what remained unsold. And this has been the light in which they have, until recently, been considered from the earliest settlement of the country by the white people. And indeed, I do not understand it is denied by a majority of the court, that the Cherokee Indians form a **sovereign state** according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a **foreign state** within the meaning of the constitution.

Whether the Cherokee Indians are to be considered a foreign state or not, is a point on which we cannot expect to discover much light from the law of nations. We must derive this knowledge chiefly from the practice of our own government, and the light in which the nation has been viewed and treated by it.

That numerous tribes of Indians, and among others the Cherokee nation, occupied many parts of this

country long before the discovery by Europeans, is abundantly established by history; and it is not denied but that the Cherokee nation occupied the territory now claimed by them long before that period. It does not fall within the scope and object of the present inquiry to go into a critical examination of the nature and extent of the rights growing out of such occupancy, or the justice and humanity with which the Indians have been treated, or their rights respected.

That they are entitled to such occupancy, so long as they choose quietly and peaceably to remain upon the land, cannot be questioned. The circumstance of their original occupancy is here referred to, merely for the purpose of showing, that if these Indian communities were then, as they certainly were, nations, they must have been foreign nations, to all the world; not having any connection, or alliance of any description, with any other power on earth. And **if the Cherokees were then a foreign nation; when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?**

Don't you just love a good debate? Does he have a point? Did Marshall get this one wrong?

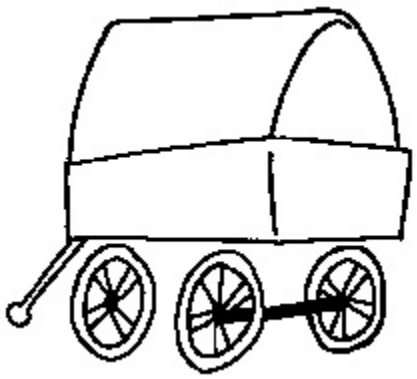
They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. When ever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character. And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves; the right of occupancy is still admitted to remain in them, accompanied with the right of self government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. **But the principle is universally admitted, that this occupancy belongs to them as matter of right, and not by mere indulgence.** They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent; or unless a just and necessary war should sanction their dispossession.

...[I]t is their political condition that constitutes their foreign character, and in that sense must the term foreign, be understood as used in the constitution. It can have no relation to local, geographical, or territorial position. It cannot mean a country beyond sea. Mexico or Canada is certainly to be considered a foreign country, in reference to the United States. **It is the political relation in which one government or country stands to another, which constitutes it foreign to the other.** The Cherokee territory being within the chartered limits of Georgia, does not affect the question. When Georgia is spoken of as a state, reference is had to its political character, and not to boundary; and it is not perceived that any absurdity or inconsistency grows out of the circumstance, that the jurisdiction and territory of the state of Georgia surround or extend on every side of the Cherokee territory. **It may be inconvenient to the state, and very desirable, that the Cherokees should be removed; but it does not at all affect the political relation between Georgia and those Indians...**

And what possible objection can lie to the right of the complainants to sustain an action? The treaties made with this nation purport to secure to it certain rights. These are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory. **And if they, as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny to them the right and the power to enforce such a contract.**

Perhaps this is a good opportunity to reinforce the idea of sound judicial "interpretation." I think no one would deny that, indeed, "it would seem a strange inconsistency to deny the right and the power to enforce a contract to any group who had the legal ability to enter into a contract." However, Justice Thompson, the threshold question has nothing to do with "inconsistency" or any other search for "right and wrong." It is very simple. If the Cherokee Nation is not a foreign state, the Constitution is clear — they do not have jurisdiction to bring an original suit in the Supreme Court against a state. That doesn't make it "just" or "right" and it may not "feel good." But, that is not the function of a Supreme Court Justice. After all, you may remember the case that caused Congress to immediately amend the Constitution with the Eleventh Amendment. Mr. Chisolm, not a resident of Georgia, sued Georgia for damages resulting from Georgia's breach of contract with Chisolm. The Eleventh Amendment was ratified to preclude any such suit by a resident of one state against another state. Is that just? No. Is it "constitutional"? Yes.

And where the right secured by such treaty forms a proper subject for judicial cognizance, I can perceive no reason why this court has not jurisdiction of the case. The constitution expressly gives to the court jurisdiction in all cases of law and equity arising under treaties made with the United States. No suit will lie against the United States upon such treaty, because no possible case can exist where the United States can be sued. But not so with respect to a state: and if any right secured by treaty has been violated by a state, in a case proper for judicial inquiry, no good reason is perceived why an action may not be sustained for violation of a right secured by treaty, as well as by contract under any other form. The judiciary is certainly not the department of the government authorized to enforce all rights that may be recognized and secured by treaty. **In many instances, these are mere political rights with which the judiciary cannot deal. But when the question relates to a mere right of property, and a proper case can be made between competent parties; it forms a proper subject for judicial inquiry.**



It is a rule which has been repeatedly sanctioned by this court, that the judicial department is to consider as sovereign and independent states or nations those powers, that are recognized as such by the executive and legislative departments of the government; they being more particularly entrusted with our foreign relations.

If we look to the whole course of treatment by this country of the

Indians, from the year 1775, to the present day, when dealing with them in their aggregate capacity as nations or tribes, and regarding the mode and manner in which all negotiations have been carried on and concluded with them; the conclusion appears to me irresistible, that they have been regarded, by the executive and legislative branches of the government, not only as sovereign and independent, but as foreign nations or tribes, not within the jurisdiction nor under the government of the states within which they were located. This remark is to be understood, of course, as referring only to such as live together as a distinct community, under their own laws, usages and customs; and not to the mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country: their national character extinguished; and their usages and customs in a great measure abandoned; self government surrendered; and who have voluntarily, or by the force of circumstances which surrounded them, gradually become subject to the laws of the states within which they are situated.

Such, however, is not the case with the Cherokee nation...What is a treaty as understood in the law of nations? It is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties. And where is the authority, either in the constitution or in the practice of the government, for making any distinction between treaties made with the Indian nations and any other foreign power? They relate to peace and war; the surrender of prisoners; the cession of territory; and the various subjects which are usually embraced in such contracts between sovereign nations...It will be sufficient, however, to notice a few of the many treaties made with this Cherokee nation.

The Treaty of Hopewell
(1785)

...Mutual stipulations are entered into, to restore all prisoners taken by either party, and the Cherokees stipulate to restore all Negroes, and all other property taken from the citizens of the United States; and a boundary line is settled between the Cherokees, and the citizens of the United States, and this embraced territory within the chartered limits of Georgia. And by the sixth article it is provided, that if any Indian, or person residing among them, or who shall take refuge in their nation, shall commit a robbery, or murder, or other capital crime on any citizen of the United States, or person under their protection, the nation or tribe to which such offender may belong shall deliver him up to be punished according to the ordinances of the United States. What more explicit recognition of the sovereignty and independence of this nation could have been made? It was a direct acknowledgment, that this territory was under a foreign jurisdiction. If it had been understood, that the jurisdiction of the state of Georgia extended over this territory, no such stipulation would have been necessary...

The Treaty of Holston
(1791)

[T]he eleventh article...provides, that if any citizen of the United States shall go into the territory belonging to the Cherokees, and commit any crime upon, or trespass against the person, or property

of any friendly Indian, which, if committed within the jurisdiction of any state, would be punishable by the laws of such state, shall be subject to the same punishment, and proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the state. Here is an explicit admission that the Cherokee territory is not within the jurisdiction of any state. If it had been considered within the jurisdiction of Georgia, such a provision would not only be unnecessary but absurd. It is a provision looking to the punishment of a citizen of the United States for some act done in a **foreign country**. If exercising exclusive jurisdiction over a country is sufficient to constitute the state or power so exercising it a foreign state, the Cherokee nation may assuredly with the greatest propriety be so considered.

The phraseology of the clause in the constitution, giving to congress the power to regulate commerce, is supposed to afford an argument against considering the Cherokees a foreign nation....The argument is, that if the Indian tribes are foreign nations, they would have been included without being specially named, and being so named imports something different from the previous term "foreign nations."

This appears to me to partake too much of a mere verbal criticism, to draw after it the important conclusion that Indian tribes are not foreign nations. But the clause affords, irresistibly, the conclusion, that the Indian tribes are not there understood as included within the description, of the "several states;" or there could have been no fitness in immediately thereafter particularizing "the Indian tribes."...The twelfth article of the treaty of Hopewell contains a full recognition of the sovereign and independent character of the Cherokee nation. To impress upon them full confidence in the justice of the United States respecting their interest, they have a right to send a deputy of their choice to congress. No one can suppose that such deputy was to take his seat as a member of congress; but that he would be received as the agent of that nation. It is immaterial what such agent is called, whether minister, commissioner or deputy; he is to represent his principal.

There could have been no fitness or propriety in any such stipulation, if the Cherokee nation had been considered in any way incorporated with the state of Georgia, or as citizens of that state. The idea of the Cherokees being considered citizens is entirely inconsistent with several of our treaties with them. By the eighth article of the treaty of the 26th December 1817, the United States stipulate to give 640 acres of land to each head of any Indian family residing on the lands now ceded, or which may hereafter be surrendered to the United States, who may wish to become citizens of the United States; so also the second article of the treaty with the same nation, of the 10th of March 1819, contains the same stipulation in favor of the heads of families, who may choose to become citizens of the United States; thereby clearly showing that they were not considered citizens at the time those stipulations were entered into, or the provision would have been entirely unnecessary if not absurd. And **if not citizens, they must be aliens or foreigners, and such must be the character of each individual belonging to the nation.** And it was, therefore, very aptly asked on the argument, and I think not very easily answered, **how a nation composed of aliens or foreigners can be other than a foreign nation...**

That is a good argument if it is true that a non-citizen must, by definition, be a foreigner.

And why should this court scruple to consider this nation a competent party to appear here?

Scruple : as a verb, "to hesitate on moral grounds"

Morality is not the issue, Justice Thompson. Morality is for Congress. Once Congress acts, your job is to interpret. What do you think?

...The next inquiry is, whether such a case is made out in the bill as to warrant this court in granting any relief?

I have endeavored to show that the Cherokee nation is a foreign state; and, as such, a competent party to maintain an original suit in this court against one of the United States. The injuries complained of are violations committed and threatened upon the property of the complainants, secured to them by the laws and treaties of the United States. Under the constitution, the judicial power of the United States extends expressly to all cases in law and equity, arising under the laws of the United States, and treaties made or which shall be made, under the authority of the same...

The complaint is for a violation, or threatened violation, of the possessory right. And this is a right, in the enjoyment of which they are entitled to protection...By the fourth article of the treaty of Hopewell, as early as the year 1785, the boundary line between the Cherokees and the citizens of the United States within the limits of the United States is fixed. The fifth article provides for the removal and punishment of citizens of the United States or other persons, not being Indians, who shall attempt to settle on the lands so allotted to the Indians; thereby not only surrendering the exclusive possession of these lands to this nation, but providing for the protection and enjoyment of such possession. And, it may be remarked; in corroboration of what has been said in a former part of this opinion, that there is here drawn a marked line of distinction between the Indians and citizens of the United States; entirely excluding the former from the character of citizens.

Again, by the treaty of Holston in 1791, the United States purchase a part of the territory of this nation, and a new boundary line is designated, and provision made for having it ascertained and marked. The mere act of purchasing and paying a consideration for these lands is a recognition of the Indian right. In addition to which, the United States, by the seventh article, solemnly guaranty to the Cherokee nation all their lands not ceded by that treaty. And by the eighth article it is declared, that any citizens of the United States, who shall settle upon any of the Cherokee lands, shall forfeit the protection of the United States; and the Cherokees may punish them or not as they shall please.

This treaty was made soon after the adoption of the present constitution. And in the last article it is declared that it shall take effect, and be obligatory upon the contracting parties as soon as the same shall have been ratified by the president of the United States, with the advice and consent of the

senate; thereby showing the early opinion of the government of the character of the Cherokee nation. The contract is made by way of treaty, and to be ratified in the same manner as all other treaties made with sovereign and independent nations; and which has been the mode of negotiating in all subsequent Indian treaties.

And this course was adopted by president Washington upon great consideration, by and with the previous advice and concurrence of the senate. In his message sent to the senate on that occasion, he states that the white people had intruded on the Indian lands, as bounded by the treaty of Hopewell, and declares his determination to execute the power entrusted to him by the constitution to carry that treaty into faithful execution; unless a new boundary should be arranged with the Cherokees, embracing the intrusive settlements, and compensating the Cherokees therefor. And he puts to the senate this question: shall the United States stipulate solemnly to guarantee the new boundary which shall be arranged? Upon which the senate resolve, that in case a new, or other boundary than that stipulated by the treaty of Hopewell shall be concluded with the Cherokee Indians, the senate do advise and consent solemnly to guaranty the same. In consequence of which the treaty of Holston was entered into, containing the guarantee...

And, again, in 1819, another treaty is made sanctioning and carrying into effect the measures contemplated by the treaty of 1817; beginning with a recital that the greater part of the Cherokees have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, of the 8th of July 1817, might without further delay be finally adjusted, have offered to make a further cession of land, &c. This cession is accepted, and various stipulations entered into, with a view to their civilization, and the establishment of a regular government, which has since been accomplished. And by the fifth article it is stipulated that all white people who have intruded, or who shall thereafter intrude on the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against according to the provisions of the act of 1802, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." By this act the boundary lines, established by treaty with the various Indian tribes, are required to be ascertained and marked; and among others, that with the Cherokee nation, according to the treaty of the 2d of October 1798...

[By the Act of 1802]...it is made an offence punishable by fine and imprisonment, for any citizen or other person resident in the United States, or either of the territorial districts, to cross over or go within the boundary line, to hunt or destroy the game, or drive stock to range or feed on the Indian lands, or to go into any country allotted to the Indians, without a passport, or to commit therein any robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian, which would be punishable, if committed within the jurisdiction of any state against a citizen of the United States; thereby necessarily implying that the Indian territory secured by treaty was not within the jurisdiction of any state. The act further provides, that when property is taken or destroyed, the offender shall forfeit and pay twice the value of the property so taken or destroyed. And by the fifth section it is declared, that if any citizen of the United States, or other person, shall make a settlement on any lands belonging or secured, or guarantied, by treaty with the United States to any Indian tribe;

or shall survey or attempt to survey, such lands, or designate any of the boundaries, by marking trees or otherwise; such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months...

That the Cherokee nation of Indians have, by virtue of these treaties, an exclusive right of occupancy of the lands in question, and that the United States are bound under their guarantee, to protect the nation in the enjoyment of such occupancy; cannot, in my judgment, admit of a doubt: and that some of the laws of Georgia set out in the bill are in violation of, and in conflict with those treaties and the act of 1802, is to my mind equally clear. But a majority of the court having refused the injunction, so that no relief whatever can be granted, it would be a fruitless inquiry for me to go at large into an examination of the extent to which relief might be granted by this court, according to my own view of the case.

I certainly, as before observed, do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights, secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief...

The laws of Georgia set out in the bill, if carried fully into operation, go the length of abrogating all the laws of the Cherokees, abolishing their government, and entirely subverting their national character. Although the whole of these laws may be in violation of the treaties made with this nation, it is probable this court cannot grant relief to the full extent of the complaint. Some of them, however, are so directly at variance with these treaties and the laws of the United States touching the rights of property secured to them, that I can perceive no objection to the application of judicial relief. The state of Georgia certainly could not have intended these laws as declarations of hostility, or wish their execution of them to be viewed in any manner whatever as acts of war; but merely as an assertion of what is claimed as a legal right: and in this light ought they to be considered by this court.

The act of the 2d of December, 1830 is entitled "an act to authorize the governor to take possession of the **gold and silver and other mines** lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee country, and those upon all other unappropriated lands of the state, and for punishing persons who may be found trespassing on the mines." The preamble to this act asserts the title to these mines to belong to the state of Georgia;...and it is made a crime, punishable by imprisonment in the penitentiary of Georgia at hard labor, for the Cherokee Indians to work these mines. And the bill alleges that under the laws of the state in relation to the mines, the governor has stationed at the mines an armed force who are employed in restraining the complainants in their rights and liberties in regard to their own mines, and in enforcing the laws of Georgia upon them. These can be considered in no other light than as acts of **trespass...It is not perceived on what ground the state can claim a right to the possession and use of these mines.** The right of occupancy is secured to the Cherokees by treaty, and the state has not even a reversionary interest in the soil. It is true, that by the compact with Georgia of 1802, the United States have stipulated, to

extinguish, for the use of the state, the Indian title to the lands within her remaining limits, "as soon as it can be done peaceably and upon reasonable terms." But until this is done, the state can have no claim to the lands...

[W]hatever complaints the state of Georgia may have against the United States for the non-fulfilment of this compact, it cannot affect the right of the Cherokees. They have not stipulated to part with that right; and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of the territory.

Again, by the act of the 21st December 1830, surveyors are authorized to be appointed to enter upon the Cherokee territory and lay it off into districts and sections, which are to be distributed by lottery among the people of Georgia; reserving to the Indians only the present occupancy of such improvements as the individuals of their nation may now be residing on, with the lots on which such improvements may stand, and even excepting from such reservation improvements recently made near the gold mines.

This is not only repugnant to the treaties with the Cherokees, but directly in violation of the act of congress of 1802; the fifth section of which makes it an offence punishable with fine and imprisonment, to survey or attempt to survey or designate any of the boundaries, by marking trees or otherwise, of any land belonging to or secured by treaty to any Indian tribe: in the face of which, the law of Georgia authorizes the entry upon, taking possession of, and surveying, and distributing by lottery, there lands guarantied by treaty to the Cherokee nation; and even gives authority to the governor to call out the military force, to protect the surveyors in the discharge of the duty assigned them...

These treaties and this law, are declared by the constitution to be the supreme law of the land: it follows, as matter of course, that the laws of Georgia, so far as they are repugnant to them, must be void and inoperative. And it remains only very briefly to inquire whether the execution of them can be restrained by injunction according to the doctrine and practice of courts of equity...

Every man is entitled to be protected in the possession and enjoyment of his property...Upon the whole, I am of opinion,

1. That the Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia.

2. That the bill presents a case for judicial consideration, arising under the laws of the United States, and treaties made under their authority with the Cherokee nation, and which laws and treaties have been, and are threatened to be still further violated by the laws of the state of Georgia referred to in this opinion.

3. That an injunction is a fit and proper writ to be issued, to prevent the further execution of such laws, and ought therefore to be awarded.

And I am authorised by my brother Story to say, that he concurs with me in this opinion.