# IN THE ABSENCE OF JUSTICE: ABORIGINAL CASE LAW AND THE ETHNOCENTRISM OF THE COURTS

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**Abstract / Resume**

Between 1810 and 1832, the United States Supreme Court established legal precedent on issues of Aboriginal rights with decisions frequently referred to as the "Marshall Cases." Since then these cases have consistently been cited as definitive statements providing legal justification for the alienation of land and sovereign rights from Indigenous peoples. One goal of this paper is the examination of how culture, as an ethnocentric force, has influenced the interpretation of law in a manner that has helped to maintain a colonial control over Indigenous North Americans.

Entre 1810 et 1832, la Cour Suprême des Etats-Unis établit un précédent légal sur les problèmes des Autochtones en se référant fréquemment à ce qu'on disait les "Marshall Cases." Depuis ce temps-là, on cite ces cas comme déclarations décisives fournissant la justification légale d'aliener les terres et les droits souverains des peuples indigènes. Un des buts de cet article est d'examiner comment la culture, en tant que force ethnocentrique, influença l'interprétation de la loi d'une manière qui aida à maintenir le contrôle colonial sur les Indigènes de l'Amérique du Nord.

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## Introduction

When examining legal perspectives, as they pertain to the rights of Aboriginal peoples, crucial to those perspectives are several 19th century United States Supreme Court cases, some times referred to as the Marshall decisions.[1] While these decisions have stood as model cases for interpreting Aboriginal rights issues, they have also served to legally define and interpret Indigenous people[2] through the world view perspective of "Anglo" culture. The Marshall cases have had far reaching effects, influencing many other case decisions pertaining to the rights of Indigenous peoples in both the United States and Canada. Observations of Marshall's decisions, specifically with regard to the Cherokee cases, have concluded that the case decisions contained

> 'intrinsic' evidence that the court was at times most doubtful of the soundness of its reasoning... but, impressed and compelled by the magnitude of the interest in litigation,—bowed to expediency rather than to right (Bryan, 1924:91).

Irrespective of whether Aboriginal rights cases have dealt with land titles, personal liberties, or treaty rights, all seem to be closely bounded by a general legal attitude held by Anglo-Europeans toward Indians within a particular period of history (Washburn, 1973).

One of the goals of this paper is to explore how differences in legal and political attitudes, with regard to Aboriginal rights issues in the United States and Canada, can be interpreted from two very different perspectives. These are ethnocentrism, or the tendency to judge foreign peoples, groups, and other cultures by one's own cultural standards, thereby implying their inferiority, and cultural relativism. With regard to cultural relativism, William Haviland explains that "because cultures are unique, they can be evaluated only according to their own standards and values" (1991:301). Bearing this in mind, the primary focus of this paper is to examine, from an anthropological perspective, specific Supreme Court cases that have shaped the development of Indian policy and legislation in North America with the aim of exploring the influence that culture can have upon legal opinion.

It should be noted that this paper does not necessarily follow standards of Western legal analysis, with all of its underpinnings. What the paper does present is an anthropological analysis that reflects the work of a person writing from a cultural perspective of a people who have been colonized, as opposed to the cultural perspective of a people who have been the colonizer, and it is on the basis of this analysis that perhaps one will discover the paper's merit.

Historically, from an Indigenous perspective, when Anglo-European cultures came in contact with Aboriginal cultures, Anglo-European laws appeared to mold justice to suit the attitude, behavior and needs of Anglo culture. One such occurrence of how Anglo justice seemed to be molded to suit the needs of Anglo culture, came at a time when it was a punishable crime for certain North American Indians to be caught outside the confines of their respective Reserves or Reservations.[3] Another example of this type of Anglo judicial behavior came with the official outlawing of Indigenous people from practising their non-European religions. In Canada one example of this type of juridical justification occurred in the 1920s, when Aboriginal people were jailed for the crime of participating in a potlatch ceremony. During more recent times this style of legally sanctioned supremacy was observed under the laws of an Afrikaaner government that served to suppress the Indigenous peoples of South Africa.

In any given situation biases are usually more apparent to the outside observer than those caught up in the events of the time. An analyst, as an outside observer looking back through history at various reports and records, should theoretically stand in a better position to objectively analyze events and elements, such as Supreme Court decisions, than the decision-makers themselves. The objectivity of analysis thereby rests upon the analyst being removed from the events of the period, as opposed to those decision makers who, caught up within the events of their own period, theoretically may not realize the same degree of objectivity. Thus, unlike the actual decision makers, whose culture and culture group members may in fact be better served by outcomes founded upon biased decisions, the analyst's observations in this case have no effect upon the actual events of the period under study.

When interpreting legal history a critical aspect deserving attention is the effect that culture has played upon judicial opinion. It would be a serious error to believe that European settlers, after being separated from their homeland by a vast ocean, left the elements of their culture back in Europe and assumed a completely different culture upon their arrival in North America. Instead, when confronted by an alien environment and people much different than themselves, those Anglo-Europeans who chose to immigrate to North America also chose to cling that much more strongly to the manners and traditions which they found most familiar. For this reason it should not be surprising to find that the legal systems developed under colonial regimes displayed little sensitivity to issues of cultural equality. In fact, many Indigenous people are of the opinion that with the passage of time, Anglo-European styled governments in North American have displayed increased insensitivity to the cultural needs and welfare of Aboriginal

peoples. Thus, in a land where Aboriginal cultures once lived under their own laws and system of governance, Anglo-European governments moved in and began a process which methodically alienated Indigenous peoples from Aboriginal lands, Aboriginal governance and Aboriginal culture.

## The Ethnocentrism of Imperialism

After the signing of the Treaty of Utrecht in 1713, the English Crown claimed dominion over much of eastern America. In the two and a half centuries that followed, governments, in true Imperial form, moved to decide the political fate of Indigenous North Americans politically, and created in the process a body of Indian law and policy often without the knowledge of Indigenous people and most frequently against their will. It is thus ironic that many of America's early legislators of Indian policy were themselves a part of a revolution against a government deemed unjust in its creation and use of laws and policy without the representation of its citizens. Regardless of whether such actions are fuelled by a British government or an American government, the operative word in either case is imperialism. For this reason it should not be surprising to note that the political dogma which continues to diminish the inherent sovereign rights of Indigenous North Americans was birthed in the soil of colonial imperialism. Likewise, it should come as no surprise that the United States Supreme Court, which has played a central role in Native rights issues, has also provided its government with the legal justification to support the continuation of this political dogma (Ball, 1987). Lending added support to this is the fact that the Supreme Court was endowed with judicial power over;

> ...all cases in law and equity arising under [the] Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority... to controversies to which the United States shall be a party; to controversies between two or more states, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects (Small, 1964:47).

In its incipient design, the Supreme Court was chartered to protect the constitutionality of the nation. Safeguards, guarantees and protection of the rights of Indigenous peoples, if ever an issue of genuine concern among the framers of the Constitution, were only so under a moral obligation of the United States to honor its treaties, an area in which the United States has failed miserably. It is also relevant that at the time of American confederation, and at least to 1835, the end of Marshall's tenure as Chief Justice of

the Supreme Court, the numerous Indigenous populations inhabiting America had never been incorporated into the American State.[4] Since the time of its violent nascence, the United States government has maintained a vested interest in the acquisition of Aboriginal land and resources, and a demonstrated obligation to its citizens, as witnessed by the language of the Constitution and noted powers of the Supreme Court. With respect to the government's fulfilment of its obligations, Indigenous North American populations represented an obstacle to national interests in the first instance, the acquisition of Aboriginal land and natural resources, and stood outside the relationship of State citizens in the second instance.[5] These facts could not help but lead to strong cultural biases in favor of the needs of a young nation and against the needs of Indigenous nations. Thus when it came to actually dealing with Aboriginal nations, the actions of the Court at times proved to be self-serving and ethnocentric, often creating the conditions that fostered Indian dependency.

> Since the time of John Marshall, the independence of the Indian tribes... has decreased, and their dependency has increased... As the United States has expanded, it has repeatedly broken its treaties, has taken the Indians' land by force, has repeatedly imposed new and more restrictive treaties upon them... and has reduced them to the status of dependent wards of the government (Washburn, 1971:182-183).

Ample evidence exists to support claims of ethnocentrism on the part of federal jurists who have sat in judgment of Aboriginal rights cases (see, for example, Ball, 1987; Barsh and Henderson, 1980; Levy, 1941; Ziontz, 1975). For this reason there should be little doubt that judges and jurists, even when grounded in the best of intentions, are not immune to the influences and biases of the culture that governs them.

> Federal judges charged with the duty of responding to Indian litigants are often handicapped by ignorance of, or insensibility to the operative standards of Indian political and personal relationships, by ethnocentrism, or by simple prejudice... Even with the best of intentions, judges have the difficult and often impossible task of preventing their own personal beliefs concerning individual rights influencing their judgments. Anglo-Saxon standards of fairness in group life are derived from a wholly different historical and social context (Ziontz, 1975:48-49).

Thus, against the backdrop of a rapidly expanding nation, possessed with self-serving interests, a Congressional Act of 1789 created one Supreme

Court to protect and uphold the laws of an infant nation, a nation in which Indigenous North Americans were not recognized as legitimate members.

In its formative years from 1801 to 1835, the United States Supreme Court came under the seemingly domineering leadership of its Chief Justice. It was during this period that case issues pertaining to the rights of Indigenous people began to enter into the Court and fall before the jurisdiction of its Chief Justice, John Marshall. "The result...was that the Chief Justice appeared to be the whole court and to make history single handedly" (Newmyer, 1968).

## Aboriginal Title, Discovery Rights and the Actions of the Marshall Court

The question of Aboriginal title continues to be a theoretical issue of political and legal consequence that threatens to remain unresolved, irrespective of the fact that the courts in North America have attempted to bring forth a solution for more than a century and a half. Inherent within Marshall's opinion, that Aboriginal title was merely a right of occupancy, are biases shaped by the standards of Marshall's culture. These biases notably stand in contradiction to the fact that many of the early treaties between Anglo-European governments and Indigenous nations were negotiated as a result and affirmation of the military strength and political status possessed by Indigenous nations.

European political actions and decisions with regard to the rights of Indigenous people, have historically functioned on ethnocentric principles. More specifically, European political assertions have functioned on an overbearing belief that the Christian cultures of Europe were superior to the Indigenous cultures of North America. Driven by a desire to obtain new lands and wealth, Europeans grabbed at whatever logic they could in order to justify their actions. Albert Weinburg observed that the American Declaration of Independence was followed by a war not just for independence, but also for its own extension of power. As a result,

> America's affirmation of equality and the foundation of government on consent was mocked in less than three decades by the extension of its rule over an alien people without their consent...[Thus], the very peoples who had drunk most deeply of the new humanitarian nationalism succumbed most readily to the expansionist intoxication which led into the age of imperialism (Weinburg, 1935:11-12).

It was within this growing sense of national superiority that Supreme Court Chief Justice John Marshall presided over the case of *Fletcher* v. *Peck*.[6]

*Fletcher* v. *Peck*, though generally regarded as feigned, was brought before the Chief Justice in 1810 by land speculators as a test case of land rights laws. In 1795, by virtue of a legislative act to appropriate land for the purpose of payment to Georgia State troops, a patent had been issued to the Georgia Company. Although it was argued that Georgia possessed the right to convey property rights to the land company, the merits of the case moved on uncertain ground as a result of both Spanish and Indigenous claims of sovereignty over a considerable part of the disputed territory.[7] The case could not have found a better advocate to test it as both John Marshall and his father stood to gain 10,000 acres in land grants west of the Appalachians (Baker, 1976:80). Churchill writes: "His first foray into land rights law thus centered in devising a conceptual basis to secure title for his own and similar grants" (1992:42). Irrespective of Marshall's conflict of interest, the case represented the first time that the Court was called to deliberate on the question of absolute title to soil existing apart from "Indian ownership" rights to the land. In addressing the question of land rights, the Court, holding true to the culture that gave it birth, subsumed Indigenous cultural concepts regarding land under English cultural concepts of land tenure.

In the Court's attempt to assign a legal definition to Aboriginal title, the Court maintained that Aboriginal title could only reflect a right to occupy land for the purpose of hunting. Noting that Aboriginal concepts did not resemble European concepts of land tenure, the Court was easily led by arguments from John Quincy Adams and Robert Goodloe to not hold any regard for the intrinsic values of Indigenous culture. Using arguments which reflected an overriding belief that the values of Euro-American culture stood superior to the cultural values embraced by Indigenous people, the defense stated "they have no idea of a title to the soil itself. It [the land] is overrun by them, rather than inhabited..." (10 US [6 Cranch, 1810], at 121) and asserted that any underlying claim of Aboriginal title to the land could not represent a true and legal possession.

It should be noted that this opinion took the liberty of overlooking the fact that when European settlers first landed in America, they encountered innumerable stretches of open cultivated fields, some of which were reported to be almost two hundred acres.[8] Accounts given by Major-General John Sullivan, regarding an American war campaign against the Iroquois, reported Newtown, as being "...a large, scattered settlement, abounding with extensive fields of the best corn and beans; so extensive and numerous as to keep the whole army this day industriously employed in destroying..."[9] Also relevant are accounts from Lieutenant Colonel James Grant's invasion of fifteen Cherokee Middle towns, where he documented his troops had

destroyed 1,500 acres of Cherokee crops. Even by late 20th century standards this would attest to the fact that these Indigenous peoples were obviously accomplished in the skills and attributes required for farming.

In the Court's address of what would become an issue of crucial importance, legal arguments exhibited distortion and error. For instance the defense, which stood on a position that Indians had no idea of property in the soil but only a right of occupation, unwittingly acknowledged the national character possessed by Native peoples as "[a] right not in the individual, but *national* (10 US [6 Cranch, 1810], at 122, *emphasis mine*). Arguing that only nations can gain title to land through conquest, they erroneously proclaimed,

> All the treaties with the Indians were the effect of conquest, all the extensive grants have been forced from them by successful war. The conquerors permitted the conquered tribes to occupy part of the land, until it should be wanted for the use of the conquerors (*Ibid.*).

The defense even credited William Penn with having obtained Quaker land under the right of conquest.[10]

Although the Court ruled that Georgia was empowered with a fee-simple title in the land, the soundness of the decision was challenged by the dissenting opinion of Justice Johnson. In Johnson's opinion "the interests of Georgia...amounted to nothing more than a mere possibility..." (10 US [6 Cranch, 1810], at 146).

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

In delivering the opinion of the Court, Chief Justice Marshall never mentioned Indian title until after he had already affirmed that Georgia did indeed possess the power of disposing land within the limits of its borders in whatever manner its judgment saw fit. Withholding his comments on Indian title until the very end Marshall stated:

> The majority of the court is of the opinion that the nature of the Indian title, which is certainly to be respected by the court, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State (10 US [6 Cranch, 1810], at 142-143).

In delivering this statement, pertaining to a seisin in fee, Marshall paralleled Indian title to a possession of real property under claim as a freehold estate. Though Marshall delivered the Court's opinion, dissenting Justice Johnson delivered the most clear and straight forward statements pertaining to Indian title offered. Johnson argued that the correctness of the Court's opinion depended upon a just and unbiased view of the state of the Indian nation. Pointing out that the innumerable treaties formed with the North American Indian acknowledged them to be an independent people, Johnson was persuaded by evidence he believed clearly indicated that the Indians held an absolute right to the soil for themselves and their heirs.

> In fact, if the Indian nations be the absolute proprietors of the soil, no other nation can be said to have the same interest in it. What, then... is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what it was assumed at the first settlement of the country... a right of conquest or of purchase, exclusive of all competitors, within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets... (*Ibid.*, at 146-147).

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

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

## *Johnson* v. *McIntosh*; Establishing the Ethnocentrism of the Court

In the decision of *Johnson* v. *McIntosh*, Chief Justice John Marshall's opinion rested on a fragile premise of European discovery rights over an already inhabited continent. Marshall's opinion has historically been interpreted as having validated his theory of conquest but, as Henderson (1977) has observed, the case in and of itself did not validate a theory of conquest, but merely noted a potential for conquest theory to be applied in law. Marshall went on to claim that, however extravagant and pretentious the idea might appear, if the principle had been asserted and sustained, and if a country were acquired and held under that principle, then it became the law of the land and could not be questioned.[12] "So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants... deemed incapable to transferring the absolute title to others" (21 US [8 Wheaton, 1823], at 591). It is apparent that even Marshall doubted the strength of these claims, as observed by his following statement. "However this restriction may be opposed to natural right, and the usages of civilized nations,... if it be indispensable to that system under which the country has been settled... it *may, perhaps* be supported by reason..." (*Ibid.*, emphasis mine). There should be no doubt that such a philosophy was indispensable to the system under which the United States had been settled, for the system was so biased by its own ethnocentrism that settlers guilty of committing crimes against Indigenous peoples were consistently defended and rewarded by an American government which held little regard for breaking its own supposed sacred laws and pledge of the American Nation.

On February 17, 1823, the Supreme Court met to deliberate upon a land title controversy, this time resulting from a group of competing land speculators who had directly acquired lands from the Illinois and Piankeshaw Indian nations. Although no Indian nation was directly involved in this court battle, Marshall used the case as an opportunity to advance a theory of sovereignty by virtue of discovery and conquest. Choosing to ignore an extensive body of literature pertaining to the rights of non-European people, Marshall based the first part of this theory upon the argument that "discovery gave exclusive title to those who made it" (21 US [8 Wheaton, 1823] at 574). By Marshall's reasoning, the "discovery principle" was only extended to European nations, and only conferred an exclusive right to determine which European nation could acquire Indian land through either purchase or conquest. Marshall claimed that the act of discovery created a relationship between the discoverer and those discovered which, according to the Chief

Justice, limited the extent of their sovereignty. Upon closer analysis, Marshall's theory, when put into practice, translated into a denial of Indigenous people's freedom of will and freedom of choice, a matter of no small concern, considering that when European peoples were denied these freedoms they were often excited to revolution.

To support his position, Marshall cited the examples of Nova Scotia being ceded to England by the treaty of Utrecht, 1713; Florida being ceded to England by Spain; Louisiana being ceded to Spain by France, through a secret treaty, and then retroceded back to France; all of which happened while still in the possession of Indians (*Ibid.*:584). With the kind of enlightened relevance that only ethnocentrism can bring, Marshall argued that the validity of titles given by the British, and latter by the government of the United States, had always been exercised uniformly over Indian territory, and had never been questioned within the American courts (*Ibid.*:587-588). Delivering a statement which not only protected his theory, but also both the country and the United States Supreme Court, Marshall claimed: "Conquest gives a title which the *courts* of the *conqueror* cannot deny, whatever the private and speculative opinion of individuals may be, respecting the original justice of the claim which has been successfully asserted (*Ibid.*; emphasis mine). With this artfully constructed statement Marshall strategically protected the basis of his opinion from possible refutation by other courts. To add flesh to this skeleton of a theory Marshall craftily mixed fact with fancy by asserting that the British government, after claiming title to all Indian occupied lands, also asserted a limited sovereignty over them:

> These claims have been maintained and established as far west as the river Mississippi, by the sword. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it... The title by conquest is acquired and maintained by force. The conqueror prescribes its limits (*Ibid.*:588-589).

What Marshall had alluded to as *claims being established and maintained by the sword as far west as the river Mississippi,* was Britain's conquest over the French. Any other conquest referred to would have been the American War of Independence, which was won from the Crown of England, and not from any Indigenous Nations. The United States controverted the defeat of the British as a defeat of Indigenous North Americans. The Six Nations and Western Confederacy, on the other hand, made it quite clear that the British had been defeated and not themselves. The bias of the conquest theory can be exposed if we momentarily deviate from our present course, to consider a different situation.

In 1778 France had signed a treaty of alliance with America. If we consider a hypothetical situation in which the American revolution had ended with the Americans having lost the revolution, and then have *Britain* proclaim that because America had been defeated, France as America's ally had also been defeated, we may see the difficulty in accepting the idea that with Britain's defeat, the Iroquois, as the Crown's ally, had also been defeated.

America's political leaders must have also realized that France would not accept so ill-formed a notion, as made evident by a discussion among members of the Continental Congress. It was debated that if the United States were to lose their struggle for independence and reconcile their differences with England, then it was conceivable that "a British fleet and army, united with an American fleet and army... might in a subsequent war conquer the French, all the French Islands in the West Indies..." and in only a short period of time destroy all their marine and commerce (Journals of the Continental Congress, 1905, VI:1073). From this discussion it is easy to deduce that an American defeat did not automatically equate to a defeat and subjugation of her French ally.

With regard to Marshall's claim that the act of discovery gave exclusive title to the discoverer, and created a relationship whereby the sovereignty of those discovered was limited by the discoverer, in light of the fact that the English discovery of Japan did not bring the Emperor of this nation under English sovereignty, Marshall's discovery principle should be viewed for what it really was: nothing more than political theory. Accepting the fact that Marshall's application of the discovery principle was mere political fancy, it nevertheless should be pointed out that up to that period it was a standard practice for European powers to use whatever political ploy best suited their designs, and to continue to use it until such time as they were forced to shift to some other method. Marshall, not ignorant of this, merely acted within the guidelines of what was culturally acceptable, and put standard procedure to practice, "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted... and sustained... [and] a country has been acquired and held under it... it becomes the law of the land" (21 US [Wheaton, 1823] at 591). In this way Marshall was able to transform a tenuous principle of discovery into a gossamer theory of conquest. The opinion thus rendered, *Johnson* v. *McIntosh* provided the government with the needed legal justification to exercise the forced extinguishment of Indigenous possessed lands. Thus where battles had not yet been fought to have ever been won or lost, through an illusionary idea of a conquest west of the Mississippi

Aboriginal title was undermined, land acquired, and American sovereignty secured.

## *The Cherokee Nation* v. *The State of Georgia:* The Scales of Justice that Never Balanced

In seeking to identify an element common to both Indigenous American and Euro-American perspectives in the Cherokee cases, arguments made by both municipalities hinged upon which culture group possessed what particular "rights" over the other culture group, and whose authority, or power, was in force to protect and guarantee those rights. The immediate issues and circumstances which brought *Cherokee Nation* v. *The State of Georgia* before the Supreme Court stemmed from Georgia's Governor legislating of a series of Acts intended to first annexed Cherokee land to several counties within the State, and then coerce the Cherokee into emigrating out of Georgia. The Governor justified his actions on the basis of a land cession the State had made to the federal government in 1802. The land cession had been backed by the government's promise that as soon as the Cherokee were persuaded to peacefully give their land up, the Indian's title would be extinguished and the Cherokee would then be removed outside the borders of Georgia (see Georgia Cession, April 26, 1802, in *American State Papers: Public Lands* 126). The issue of getting the Cherokee to give up their land was far from being a simple matter.

Throughout its relationship with Indigenous peoples, the government made continued efforts to "civilize the Indians" by converting them over to an agricultural based subsistence economy. The Cherokee, who had long been successful in their agricultural pursuits, boldly stated that their claim to their land was based upon more than the mere occupancy rights to which an alien Euro-American culture claimed Indians were limited. It had long been assumed that as a hunting people, Indigenous North Americans had no sense of propriety in the soil. The United States government, which maintained a constant position to assimilate and move Indigenous people toward an Anglo-American concept of civilization, continually urged Native people to abandon their hunting subsistence economies for agricultural based economies, in spite of the fact that the Cherokee had been successfully farming long before De Sota first encountered them in 1540. In the 1820s the United States government decided to provide funding for the Cherokee, along with a number of other southern tribes, to help them adopt an agricultural lifestyle.

During this time period an advancement made by the Cherokee included the invention and implementation of a written language. This

achievement brought literacy to the Indian nation in an astonishingly short period of time and was a significant factor in establishing schools for their children. Literacy in their own language also proved to be instrumental when the Cherokee formulated a government. The Cherokee, in modelling their government after the United States government, included a code of civil and criminal laws, courts and a legislature, and a formal Constitution.[13] Having become plantation styled agriculturists, herdsmen and mechanics, the Cherokee, by their own admission, could now claim the same sense of ownership and attachment to the land as claimed by Euro-Americans (see Cherokee letter to United States Commissioners in *American State Papers, Indian Affairs*:468).

The State's leadership, focusing its efforts to acquire Cherokee land, persuaded Commissioners from Washington to travel along with the state's own Commissioners on October 4, 1823 to a council meeting at Newtown, the Cherokee Nation capital, to try and coerce the Cherokee into a treaty of cession. In spite of the Commissioner's coercive and threatening language, the Indians had reached an unalterable decision to cede no more land (Royce, 1975). Without variation Cherokee representatives repeatedly responded, "We beg leave to present this communication as a positive and unchangeable refusal to dispose of one foot more of land" (see Cherokee letter to United States Commissioners in *American State Papers, Indian Affairs*).

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

Acting within an ideology of a divided sovereignty, Gilmer legislated a series of acts which gave Georgia the last word in regulating all laws regarding Indians within the boundaries of the state (see *The Cherokee Nation* v. *The State of Georgia*). This legislation asserted Georgia's right of title to Cherokee lands, made null and void all Cherokee customs and laws, and declared it illegal for any Indian to testify in court cases in which Anglo-Americans were involved. Gilmer also charged that any person, or group, discovered aiding any Cherokee who intended to remain within their home and ancestral land would be punished under Georgia State law. To further the State's efforts to take possession of Cherokee lands Gilmer

declared that, whether by force or negotiation, the United States was bound to extinguish Indian title, and,

> ...as the United States have failed in their engagements, Georgia has a right to take the matter into her own hands.
>
> As a consequence of these doctrines... if other means fail she will resort to violence in support of her claims; and that as she wants the Cherokee lands, *she will have them* (*Speeches on the Passage of the Bill for the Removal of the Indians*, 1973:iv-v, emphasis mine).

Gilmer maintained his stance, taking the position that he was asserting the rights of sovereign and independent states, and neither the United States nor any other state had a right to demand that he justify the reasons behind his conduct when it concerned matters of governing the state's population, or any class of persons residing within the state's limits (*Ibid.*). Acting within the power of its new legislation, in September 1830, the state brought to trial George Tassels, a Cherokee Indian, for the murder of another Indian within the territory occupied by the Cherokee Nation. In the case *The State* v. *George Tassels,*[14] Georgia made arguments that placed the sovereignty of the state above that of the federal government: "the relations existing between the Cherokee Indians and the State of Georgia were those of pupillage. No treaty between the United States and the Cherokees could change that relationship, could confer upon them the power of independent self-government" (*Ibid.*:235). The state's indictment of George Tassel would prove to be the means through which the Cherokee would attempt to bring a test case before the Supreme Court.

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

In response to Gilmer's adverse legislation, the Cherokee initiated a series of counter actions to seek protection of their rights. In the spring of 1829, a Cherokee delegation was sent to the district of Washington to discover whether Presidential support for their cause could be expected. After listening to the President's inaugural address the delegates concluded that the President would offer no assistance to their nation (see Jackson's first inaugural address in Richardson, 1907). The delegation's visit was followed up by a letter from John Eaton, newly appointed Secretary of War,

in which he outlined the President's views on the "Indian problem." The message, far from hopeful, stated among other things that the Cherokee had *no right* to set up an independent nation within the State of Georgia. Eaton advised the Cherokee to either submit to Georgia's laws, or withdraw from the state entirely.[15] The cultural bias of this assertion is clear as it blatantly fails to acknowledge that the state of Georgia had been created within the traditional territory of the previously existing Cherokee nation.

The Cherokee, placing a greater significance upon the honor that binds nations through its treaties, next petitioned Congress, December of 1829, to uphold the United States' treaty-sworn pledge as a protector of the Indian Nation. Congress however, left the petition pending long enough to allow a bill for the removal of the Cherokee to be introduced upon the floor of the United States Congressional sessions.[16] During these Congressional sessions, Davey Crockett's speech represented the voice of "more voters than any [other] member of Congress, except Mr. Duncan of Illinois."[17] The Cherokee and supporters of their cause made the "Indian question" perhaps the most important, and probably the most contested, business introduced at the 1st session of the United States 21st Congress. The two Indian Affairs Committees, located in each House of Congress, echoed President Jackson's sentiments "that each state was empowered with full control over the land and people within their chartered limits, and recommended that the best course of action would be for the Cherokee to emigrate west of the Mississippi" (see Burke, 1969:505-506). Once removed outside the borders of Georgia, it was argued, the Cherokee could then govern themselves free of any impositions created by White encroachments upon their rights.

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

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

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

In 1778, the United States entered into three treaties with France, one of Amity and Commerce, another of Alliance, and the Secret Treaty. James Scott, addressing the nature of these treaties, has stated,

> The spirit of the treaties is remarkable... History affords few, if any examples of such frankness, straightforwardness and generosity of a great Power to a weak and struggling ally. The States were, according to M. Gerard's instructions to be treated upon a footing of equality, with no advantage to be taken of their...weakness (Chinard, 1928:xviii).

It is certain that the Europeans had historically based their claims of dominion upon whatever theory or principle that they could most appropriately use to best support their interests. If one is to accept the rationale that the dependency of a weaker nation upon a stronger ally is enough to justify the alienation of the weaker nation's sovereignty, then one should consider at least this one aspect of the American-French alliance. Had France, as the more powerful nation in the alliance with the newly formed American government, embraced the kind of tactics that in later years the United States would enforce upon Indigenous nations, then the French government might have declared standards upon a war-weakened and struggling United States and asserted self-imposed rights to limit sovereignty of the young American nation. Another point to consider is that Indigenous people, at the time of the Cherokee cases, had neither been politically nor legally incorporated into the American confederated government of United States.[18]

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

> the Court has bestowed its best attention on this question, and...the majority is of an opinion that an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and can not maintain an action in the Courts of the United States.[19]

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

> It has...been said, that the same words have not necessarily the same meaning...when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. This may not be equally true with respect to..."Foreign nations"...the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article in which a power is given to be exercised in regard to foreign nations generally, and Indian tribes particularly, they are mentioned as separate in terms clearly contra distinguishing them from each other. We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term "foreign nations,," not we presume because a tribe may not be a nation, but because it is not foreign to the United States (30 US [5 Peters, 1831] at 19).

The weakness of the above logic is evident because when the United States negotiated treaties with Indigenous nations, they were treated as distinct political bodies that existed outside the institutions and government of the United States. If Marshall's claim that the Cherokee did not constitute a foreign state is accepted, then our attention must be drawn to the fact that Marshall himself acknowledged that the Cherokee did indeed constitute a state. "The acts of our government plainly recognize the Cherokee nation as a state, and the Courts are bound by those acts" (*Ibid.*, at 16). Based upon Marshall's own admission, then the Court's claim of non-jurisdiction could be challenged on the basis of a states' constitutional right to bring another state before the Supreme Court.

In the early delivery of the Court's opinion, Chief Justice Marshall expressed the prerequisite of first examining whether the Court had jurisdiction before the merits of the case could be looked at. Marshall answered this rhetorical question by drawing attention to the second section of the Constitution's third article.

> The second section closes [with] an enumeration of the cases to which it is extended, with "controversies" "between a state or the citizens thereof, and foreign states, citizens, or subjects" (*Ibid.*, at 15 [brackets mine]).

Here it must be noted that although Marshall acknowledged that the Cherokee did constitute a state, albeit not a state that was actually incorporated into the American union of states, he was careful not to include in his enumeration that part of the section which declares that all cases in law and equity arising under the Constitution, are also extended to *treaties* made, as well as those yet to be made, and to "... controversies between two or more states, between a State and citizens of another State, [and] between citizens of different States..." (emphasis and brackets mine) (Small, 1964:47).

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

The Cherokee, as well as numerous other Indigenous nations, had long employed standards to govern themselves and, as a sovereign people, had existed long before any European colony had ever been established in North America. To further expose the temerity of Marshall's opinion, the Cherokee had held American prisoners of war, a matter of such significance that it was the subject of Article I in the first treaty with the Cherokee negotiated at Hopewell in 1785.

> The Head-Men and Warriors of all the Cherokee shall restore all the prisoners, citizens of the United States, or subjects of their allies, to their entire liberty. They shall also restore all the Negroes, and all other property taken during the late war from the citizens to such persons, and at such time and place, as the Commissioners shall appoint (Kappler Treaties, 1903:9).

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

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

which citizens of the United States have captured from them (*Ibid.*:29).

The above mentioned articles speak of acts of war and illustrate that the Cherokee as an Indigenous nation had never yielded their right to declare war upon the United States, or any one of the existing states. Bearing this in mind, the fact remains that as Britain could not be tried for her actions within the American courts, neither were any one of the Indian nations tried within the American courts for their acts of war against the United States.[20] It should be further noted that John Marshall himself would defend this principle in *Worcester* v. *Georgia*.

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

1. Up to and including the time period that Marshall served as Chief Justice for the Supreme Court, the United States historically conducted all business matters regarding the affairs of Indigenous peoples out of its War Department. The fact that the central government did not deal with any of its states in this way suggests that if Indigenous nations were not foreign to the formation of United States, and indeed stood as a member of the Union, then they would not have been dealt with in a manner distinctly different from any of the states within the American Union.
2. The treaties themselves helped to maintain the existence of distinct self-governing Indian nations and societies separate from the states of the United States.
3. A number of the earlier treaties negotiated between the United States and Indigenous Nations included the stipulation that all non-Indian people were to obtain a passport before moving onto or through Indian country. Article IX of the second treaty with the Cherokee, signed at Holston in 1791, specifically states that "no citizen or inhabitant of the United States, shall hunt or destroy the game on the lands of the Cherokees; nor shall any citizen or inhabitant go into the Cherokee *country,* without a *passport...*" (emphasis mine) (Kappler Treaties, 1903:30).

Unquestionably the issuance of passports has always been recognized as a condition extended for travel through foreign nations. Certainly no state within the American Union has ever claimed passport requirements upon citizens of any other state, and yet for an American citizen to enter onto or travel through the lands of certain Indigenous nations they were required

to possess a passport. All this attests to the fact that in all matters the two cultures were indeed foreign to each other, and the only reason Marshall's position could be sustained was because it upheld the political and ethnocentric will of a dominant faction of Anglo-American culture. Thus, based upon the arguments of Justice Baldwin, drawn from *Johnson* v. *McIntosh*, coupled with those from Justice Johnson, Supreme Court Chief Justice John Marshall conveniently chose to evade several pertinent points and acquiesced to the situation. Marshall did, however, allude to the possibility that Cherokee rights might be protected in some future case.

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

## *Worcester* v. *Georgia:* Forcing the Hand of Justice

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

> ...the Cherokee nation, do acknowledge themselves...to be under the protection of the said United States of America, and of no other sovereign whosoever, and they also stipulate that the said Cherokee nation will not hold any treaty with any foreign power, individual state, or with individuals of any state" (*Ibid.*:29).

In the eighth treaty, the fourth to be ratified while John Marshall served as Supreme Court Chief Justice, Article 5 asserts that all former treaties between the Cherokee Nation and the United States were to continue in full force. Article 5 of the ninth treaty, 1819, also asserts that any White person who had intruded or were at some future time to intrude upon Cherokee land would be removed by the United States, "...and proceeded against according to the provisions of the act passed the thirtieth of March, eighteen

hundred and two, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers" (*Ibid.*:179). Based upon these several treaties, which guaranteed to protect Cherokee land and their right to remain an independent and sovereign people, the Cherokee appealed to the President, the Congress of the United States, some of the country's finest lawyers, citizens, and finally the Supreme Court of the land, to protect them against the unjust and inhumane laws of Georgia. In all efforts they found no relief from the "...overbearing and cruel edicts,...evidently designed to exterminate [them] from the earth" (see Cherokee Memorials).

The Worcester case represented the Marshall Court's final effort to formulate a doctrine on Aboriginal rights. The case came before the Court as a result of two missionaries, Samuel Worcester and Elizer Butler. These two missionaries had worked among the Cherokee in defiance of an 1829 Georgia Act which prohibited Whites from entering Cherokee territory without first taking an oath of allegiance to the state and obtaining a permit from the Governor (Story, 1971). On March 21, 1831, four days after the Supreme Court had refused jurisdiction in the *Cherokee* v. *Georgia* case, Worcester and several other missionaries were imprisoned by the state of Georgia. The trial went before the Gwinnett County Superior Court on March 26. The Nile's *Weekly Register* reported that although the missionaries had refused to acknowledge themselves as federal officials, the Court nevertheless released them because they had received federal support, which the Gwinnett County Superior Court recognized as having made the missionaries employees of the federal government. In an effort to get a suitable case before the Supreme Court, Worcester and Butler refused to leave Cherokee territory. Governor George Gilmer, who apparently had the favor of United States President Andrew Jackson, persuaded the President to deny that the missionaries were federal employees, and to remove Worcester from his duties as Postmaster at New Echota (Burke, 1969).

Once the President had complied with Governor Gilmer's request, the Governor had Elizer Butler, Samuel A. Worcester, James Trott, Samuel Mays, Surry Eaton, Austin Copeland, and Edward D. Losure indicted for "residing in that part of the Cherokee nation attached by the laws of said state...without a license or permit...and without having taken the oath to support and defend the Constitution and laws of the State of Georgia..." (*Worcester* v. *Georgia*, 31 US [6 Peters, 1832] at 529). On September 15, 1831, the Gwinnett County Superior Court tried and sentenced them all to four years of hard labor. Nine of the missionaries accepted pardons. Worcester and Butler's refusal of a pardon however enabled the Cherokee cause to once again be presented before the Supreme Court.

Worcester petitioned the Supreme Court for a writ of error on the grounds that he had entered the territory of the Cherokee nation under the authority of the President and as a missionary of the American Board of Commissions for Foreign Missions.

Lawyers for the plaintiff opposed the constitutionality of Georgia's legislation on the basis that the several treaties entered into between the United States and the Cherokee nation clearly acknowledged the Cherokee as an independent sovereign nation

> ...authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America...and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect..." (*Ibid.*:530-531).

Worcester's lawyers also charged that because Georgia's laws interfered with and attempted to regulate the affairs of the Cherokee nation, they were repugnant to the United States Trade and Intercourse Act of 1802.

On February 20, 1832, the Court began its proceedings in the Worcester case. Once again the Governor, who had publicly vowed to disregard any decision the Supreme Court might make that did not favor the State's position, refused to have the State appear before the Court.[21] Where in the case of *Cherokee* v. *Georgia* Sergeant and Wirt had argued their case upon narrow grounds, in the case of *Worcester* v. *Georgia* the two lawyers realized that in order to bring the question of Cherokee rights before the Court they would have to argue the case upon the widest grounds possible.

It is a safe assumption that with the absence of Justice Johnson from the Court and the presence of Justice Duval, John Marshall was well aware the dynamics of the Court had been favourably changed in support of Cherokee rights. In writing an opinion that represented the decisions of Thompson, Story, and Duval, the Chief Justice borrowed freely from both Thompson's earlier dissenting opinion, written for *Cherokee* v. *Georgia*, and arguments delivered by Wirt and Sergeant (Burke, 1969). Ironically, the same arguments that Marshall had rejected from Wirt, Sergeant and Thompson, as cause for establishing original jurisdiction in *Cherokee Nation* v. *Georgia*, Marshall now brought forth in the Worcester case to declare that Georgia's legislation regarding the Cherokee was "repugnant to the Constitution, laws, and treaties of the United States..." (31 US [6 Peters, 1832] at 562-563). This has helped to give an enigmatic appearance to the opinion delivered by Marshall in *Worcester* v. *Georgia*, especially when compared to the opinion he delivered in *Cherokee* v. *Georgia.*

Arguments presented by Marshall in the Worcester case, which supported protecting the Cherokee from the unconstitutional acts of Georgia,

in many respects contravened many of the arguments he used only a year earlier to refuse jurisdiction in the Cherokee Nation case. Once again Marshall discussed his principle of discovery, but in the Worcester case his thoughts, as reflected by his opinion, had altered considerably.

> It is difficult to comprehend the position that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the preexisting rights of its ancient possessors (*Ibid.*:543).

Marshall now questioned the validity of the discovery principle.

> Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged... a rightful property in the soil, from Atlantic to Pacific; or a rightful dominion over the numerous people who occupied it (*Ibid.*).

This was more than questioning, however, as Marshall now challenged the very fabric of the Discovery principle. Marshall asserted that the principle merely suggested that discovery gave title, and that this was acknowledged by European nations because it was in their best interest to do so. Marshall also affirmed that a discovery principle could not annul the previous rights of those who had not agreed to it. Marshall now moved from challenge to attack:

> These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth, that these grants assert a title against Europeans only and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not *conquest* (*Ibid.*:546 [italics mine]).

Continuing with his assault Marshall asked

> did the Cherokees come to the seat of the American government to solicit peace; or did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give" then, has no real importance attached to it *(Ibid.*:551).

Repeatedly Marshall stressed the fact that Indigenous nations were considered as distinct, independent political communities, completely separated from that of the states, and clarified that the relationship between the

Indian nations and the United States was that of a nation receiving the protection of a more powerful nation, and not of individuals having to abandon their national character or, as subjects, having to submit themselves to the laws of a master.

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense (*Ibid.*:559-560).

While Justice Baldwin's dissenting opinion was not delivered to the court reporter, Justice McLean, the only other judge to deliver an opinion, concurred with Marshall. McLean raised several points pertaining to the national character of the Cherokee that Marshall had not addressed, two of which are worth mentioning. First, McLean had viewed Indigenous nations to be on the same footing as foreign nations by virtue of the Constitution having empowered Congress to regulate trade and commerce among the Indian tribes. "This power must be considered as exclusively vested in Congress as the power to regulate commerce with foreign nations, to coin money... and to declare war. It is enumerated in the same section, and belongs to the same class of powers" (*Ibid.*:580-581). McLean also pointed out that the government had recognized that Indian nations possessed the right to make war upon the United States. "No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation..." (31 US [6 Peters, 1832] at 583).

Although the Worcester case was a decisive victory for the recognition of Aboriginal rights, in the final analysis, the biases of a dominant Euro-American culture held the Court's ruling in check. After being subpoenaed by the United States Court, Georgia refused to appear and would not acknowledge the Court's decision which mandated the State to annul its unconstitutional laws over the Cherokee. While the Governor of Georgia continued to assert the state's laws upon the Cherokee, the federal government moved ahead with its plans to bring about the removal of the Cherokee. After three years the government had forced the issue of Cherokee removal through the treaty of Echota. For the Cherokee, the effect of this mockery labelled as treaty was to convert a triumphant 1832 Supreme Court decision into a defeat: as if the Court had never ruled in favor of them.

## Summary Remarks

One of the objectives of this part of the paper has been to examine the role of the United States Supreme Court as arbiter of Aboriginal rights issues in America. What has been observed in the precedent-setting cases discussed is a Court that has repeatedly interpreted the issue of these cases through the ethnocentric views of Anglo-European culture. When, in the *Worcester* case, the Court rendered a decision to uphold the rights of the Cherokee nation, an anomaly arise that appears to refute this supposition. This anomaly fades when, upon closer analysis, the Court is discovered not to be protecting the sovereign rights of an Aboriginal peoples, but to be protecting the sovereign rights of the federal government. When it is realized that during the time period of the Marshall decisions, the country was in turmoil over Constitutional nullification, the Court's decisions become more clear. The question to consider then is whether the decisions of the United States Supreme Court, with regard to the issues of Aboriginal rights, are more a reflection of the time period, or the ethnocentrism of a dominant Anglo culture. In an effort to address this question I will turn in a future paper to a discussion to the struggle of Indigenous peoples in Canada for the recognition of their inherent rights, and the role that the Canadian Supreme Court has played as arbiter in issues that have come before the Court. The fact that the Supreme Court of Canada did not have to face the issue of Aboriginal rights until the 1970s will allow us to explore whether temporal and geographic differences can be said to contribute to any fundamental difference in the Court's decisions, and whether ethnocentrism borne from cultural differences can be considered to have had any impact on these decisions.

### Notes

1. In *Johnson* v. *McIntosh*, Chief Justice John Marshall claimed conquest gave an immutable title that even the courts of the conqueror could not deny, and that the justice of this was not a valid issue to concern the Court. Interestingly, this principle must not be operational when conqueror and conquered are representatives of Anglo-European culture, as demonstrated with the creation of East Germany after World War II.

2. The word "Indian", erroneously applied by Columbus who mistakenly believed he had reached an island off the coast of India, has been received with mixed emotions by the original inhabitants of North America. In Canada Native, with a capital "N" is most commonly used: This however has also been received with mixed feelings. While internationally, "indigenous" has been applied with growing acceptance, I have chosen to use "Indigenous", with an upper case "I", much along the same lines as Canadians distinguishes between

"native" when referring to being of a place, and "Native" when referring to the particular peoples indigenous to Canada before European contact. I have also used "Aboriginal" with some frequency when referring to groups, populations, or cultures at an early period in history. Although my preference is toward the use of Indigenous, because of the widespread usage of "Indian", certain situations have at times compelled me to acquiesce to its usage herein.

3. In Canada the term Indian Reserve is applied to what is commonly called an Indian Reservation in the United States.

4. For a comprehensive discussion on the question of Indigenous incorporation see Ball, 1987.

5. The American Indian was naturalized through the passage of the *Citizen Act* of 1924. "Citizenship was conferred to benefit the government, not the tribes" (Barsh and Henderson, 1980:96).

6. Frederick C. Brightly, Editor, *Fletcher* v. *Peck* 10 US (6 Cranch, 1810). Reported by Cranch, 1904.

7. For a more detailed account, see Haines, 1960:309-323.

8. Hawke, 1988. Because the majority of settlers coming over from Europe were merchants, tradesmen, and seekers of fortune, possessing little or no knowledge of an agrarian lifestyle, many colonists had to rely upon the knowledge and skills of the Indigenous people for instruction in the manner of planting, culling out the best seed, observing "the fittest season, keeping distance for hoes and fit measure for hills, to worm... and weed... and prune... and dress..." as occasion required (*Ibid.*:13).

9. Amory, 1968:124. With each town that Major-General John Sullivan destroyed in the Revolutionary War he noted the extensiveness of the Natives' fields and crops.

10. It is highly unlikely that the celebrated Quaker actually claimed land under a right of conquest, as, in de Vattel (1758), he praised Penn for purchasing lands from the "savages" (see 209, page 86, Book II).

11. Frederick C. Brightly, Editor, Johnson and Graham's *Lessee* v. *William McIntosh* 21 US (8 Wheaton, 1823). Reported by Wheaton, 1903.

12. 21 US (8 Wheaton, 1823) at 591. Henderson has felt that Marshall's statements have been here misconstrued as validating a conquest theory. See Berman, 1878:644.

13. See Constitution of the Cherokee Nation. For a compilation of Laws of the Cherokee see *The Constitution and Laws of the American Indian Tribes—Volume V Laws of the Cherokee: Adopted by the*

*Council at Various Periods* (Wilmington, Delaware: Scholarly Resources Inc., 1973).

14. *The State* v. *George Tassels*, Dudley, Georgia (1830). In *American State Reports Prior to the National Reporter System* (Dobbs Ferry: Trout-Media Publishing, 1972). Microfilm reel 232 (Georgia).

15. For a copy of Eaton's letter, see *Nile's Weekly Register* April 18, 1829.

16. For arguments against this bill, see the speeches of Senators Frelinghuysen, New Jersey; Peleg Sprague, Maine; Asher Robbins, Rhode Island; Representatives Isaac Bates, Massachusetts; William Elsworth, Connecticut; George Evans, Maine; Edward Evert, Massachusetts; and Tennessee's representative Davey Crockett, before the United States 21st Congress, 1st session 1829-1830, in *Speeches for the Passage of the Bill for the Removal of the Indians* (Boston: Perkins and Marvin, 1830; New York: Kraus Reprint Co., 1973).

17. *Ibid.*, at 253.

18. See Ball (1987) and Barsh and Henderson (1980) on incorporation. The idea of incorporating Native nations into the American Union was first addressed by the United States government within the Delaware treaty of 1778. In this treaty the United States suggested that an Indian state might be formed with the Delaware nation at its head. The idea of an Indian state continues to be discussed and debated within political circles until 1878. See Abel (1908).

19. *Cherokee Nation* v. *The State of Georgia*, 30 US (5 Peters, 1831) at 20. The Court was actually split: on the issue of jurisdiction four to two stood against the Cherokee, on the merits, which could not officially be addressed, four to two in favor of the Cherokee cause. Burke (1969) has also drawn attention to the fact that Marshall, although ostensibly speaking for the Court majority, was actually speaking only for himself and Justice McLean.

20. In 1760, during the French and Indian War, the Cherokee won a decisive battle against British Colonel Archibald Montgomery and his army of 1,600 troops who were burning the lower towns of the Cherokee. The British chose to recognize Cherokee complaints and attempted to halt the westward expansion of their settlers by prohibiting settlement beyond the Appalachian Mountains.

21. The message of Governor William Lumpkin was reported in the October 29 issue of *Nile's Weekly Register* (1831) at 174, column I.

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