LIMITS OF LEGAL ACTION: THE CHEROKEE CASES

Jill L. Norgren and
Petra T. Shattuck

Democratic theory of popular sovereignty as reflected in the U.S. Constitution and the structure of the political process assumes that major decisions regarding the allocation of resources will be determined—and determined for the best—by the popular, that is, the elective branches of government. The debates surrounding the framing and adoption of the Constitution clearly express the principle that the legislative branch must have primary responsibility for making the nation's rules. Reliance on the legislature was justified by the proposition that it would fully represent all different interests—those of minorities as well as majorities.[1]

Twentieth-century democratic theory continues to focus on access to the political system through the elective branches. Robert Dahl, for example, while accounting for the practical limits of information to be communicated through elections, states that the vote is an important source of citizen influence and elections crucial devices for controlling leaders.[2] The theory places considerable emphasis on the ability of political minorities to gain influence in a pluralist political system. Pluralist theory pays little attention, however, to the extent to which groups excluded from political representation can and do use the nonrepresentative judicial system to remedy grievances and overcome their exclusion from the political process.[3]

American Indians, Blacks, and other minorities have used this alternative. For them, litigation has been one of the most effective means for gaining access to the political process from which they were systematically excluded.[4] As courts have the constitutional function of protecting and safeguarding individual and minority rights, they can exercise their authority without majority consent. The availability of judicial procedures has, therefore, become a critical test of the ability of the American constitutional system to respond to minority grievances.[5] The Supreme Court itself has recognized that "under conditions of modern government litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[6] The rapid growth of legal offices and the expansion of litigation activities by legal public interest groups during the last several decades reflects the increasing reliance on the legal rather than the political process.[7]

It is not at all clear, however, whether courts can protect and guarantee the rights of a minority or achieve a viable and lasting improvement in the position of a politically powerless group. While courts can—and sometimes do—redress the past legally, they cannot on their own assure that judicial decisions become political facts. It is the purpose of this article to examine the limits of legal action in light of the experience of the Cherokee Nation in the nineteenth century. Their lawsuits, the cause of national controversy and ultimately detrimental to the Cherokee, raise questions about the effectiveness of litigation in solving divisive political conflict.

The Cherokee cases of 1831 and 1832, *Cherokee Nation* v. *Georgia* and *Worcester* v. *Georgia*, were the first and most important benchmarks in a long series of confrontations between Indian minorities and the political institutions of the new American nation.[8] Cherokee litigation ended an unsuccessful struggle to resist removal from tribal lands in Georgia. Its course and outcome indicate the limits of legal remedies in changing political realities. A clear decision of the Supreme Court at that time vindicated the rights of Indians to their land and political autonomy but prevented neither the taking of their land nor their oppression by superior force. Mr. Justice Marshall had ruled in favor of the Cherokee, but he could not enforce his decision.[9] Legal victory could not reverse the Indians' political position of powerlessness.

The Cherokee cases reflect, first, the inherent contradictions of the Indians' political and legal position, second, the bitter national conflict over the issue of states' rights, and third, the difficulty faced by courts in making decisions on political and economic issues. The contradictory and vacillating federal policy toward Indians led to many confrontations between state governments and federally protected Indians living within the boundaries of the states.

The sharp and bitter conflict between the state of Georgia and the Cherokee nation is of special importance, however, because it led to the most

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decisive legal test of the rights—political and economic—of American Indians. It was precipitated by Georgia. On December 20, 1828, the Georgia legislature enacted a statute expropriating Cherokee lands. As state law was extended over the Indians, the constitution and laws of the Cherokee nation were annulled. The statute made clear that Georgia was interested in the land but not its inhabitants. Indians were to go West; resistance to emigration was punishable by imprisonment. Lest Indians were tempted to stay, the law explicitly stated that they would be treated unequally.[10] But the Cherokees determined to remain on lands secured to them by the 1791 Treaty of Holston with the federal government.[11]

The Cherokee had compelling reasons to resist removal to the West. Alone among the Indian tribes of the East, they had decided early to adopt the economic and political institutions of the white majority. Well before American independence the Cherokee had begun to transform loosely linked tribes into a more cohesive and centralized "nation," a development accelerated by the need to defend themselves against white aggression often leading to enslavement of members of the tribes.[12] Throughout the eighteenth century the unceasing demand for land by English, French, and American colonists taught the Indians the value of organization. At the beginning of the nineteenth century the Cherokee possessed schools, churches, laws, a written language and had, for the most part, substituted farming for hunting. Their settlement was supported by agreements which encouraged the Cherokee "to become herdsmen and cultivators, instead of remaining in the state of hunters."[13] After the conclusion of the Holston treaty, the federal government assisted the Cherokee in establishing permanent and stable communities: Washington subsidized missionaries and teachers and sent agents to promote assimilation and settlement. Georgia, however, regarded this development as contrary to its own objective of removing the Indians from the state. While the adoption by the Cherokee in 1827 of a constitution modeled on that of the United States was the Indians' most important political act to ensure "stability and permanence," it led Georgia to break the fragile peace by imposing its own jurisdiction over the Cherokee.[14]

The State of Georgia based its claim to Cherokee land on an 1802 ordinance with the federal government. Georgia had ceded land for the incorporation of the states of Alabama and Mississippi in return for promises that the United States should, at her expense, extinguish existing Indian title to land within the boundaries of the state "as soon as it could be done peaceably and on reasonable terms."[15] In the opinion of the governor and legislature, Indian progress toward permanent settlement, "aided and abetted" by the federal government, was clearly contrary to the 1802 ordinance. The failure of the national government to remove the Cherokee from Georgia particularly incensed state officials as the policy of federal Indian removal had been actively promoted with respect to Indian tribes in other states.[16] Feeling betrayed by the national government, Georgia decided to solve the Indian problem on its own and enacted the 1828 statute invalidating the new Cherokee constitution and expropriating all Cherokee land.

Permanent settlement of the Cherokee was in accord with the provisions of the Treaty of Holston between the Indians and the United States but made impossible the fulfillment of the subsequent 1802 agreement between Georgia and the United States. By fully living up to the provisions of an agreement to which they were a party, the Cherokee stood in the way of an agreement to which they were not party. Legally they were faultless. But it was politics in disregard of the law which determined their ultimate defeat.

Certain of their rights, the Cherokee initially attempted to undo Georgia's arrogation of power through political action. They turned to the federal government for support since their rights were guaranteed by federal treaty and legislation. Despite these guarantees the likelihood of strong support from Washington was doubtful, particularly after the election of General Jackson who was not known for his sympathy to the Indian cause.

A Westerner, Jackson understood the enormous pressure of land-hungry settlers on state governments to oust Indians from their land; in the past he had personally encouraged tribes to move westward.[17] His strong support for Georgia's state sovereignty claims over Cherokee land was reflected by his withdrawal—at Georgia's insistence—of federal troops sent to protect the Indians. Secretary of War John Eaton informed the Cherokee in writing of the president's decision not to interfere with Georgia's incorporation of Cherokee lands and expressed the government's strong hope that they should leave.[18] Jackson's efforts to persuade the Indians to go were backed by administrative measures blocking the payment of federal annuities to which the tribe was entitled.[19] Given the executive's hostility it was not

surprising that the delegation sent to Washington by the Cherokee council was not even received by Jackson.

Several prominent members of Congress publicly attacked Georgia's actions and chastised Jackson for ignoring firm and binding treaty obligations. Although the Indians' supporters in Congress—Jackson antagonists Webster, Freylinghausen, Clay, and Judge Spencer—were powerful and articulate advocates of Cherokee's cause, they too failed in reversing demands for the expropriation of Indian land.[20] They were outnumbered and in 1830 a bill for removal passed by a close vote. The majority vote consisted of all those demanding Indian removal from the East and resulted from alliances among regional and economic pro-Jackson and anti-Bank elements.[21]

With the passage of the Removal Bill the Cherokee's hopes for political redress were defeated. There were no further channels for political pressure: the political branches of both state and federal governments had united against them. It was at this point that the Cherokee nation turned to the Supreme Court for help. Failure of political attempts to protect their rights left only two alternatives, war or the courts.[22] Unwilling to resort to force, reinforced by what they perceived to be the white man's respect for law, and encouraged to litigate by leading anti-Jackson statesmen, they chose to put their trust in the law.[23]

On the advice of Webster and others, the Cherokee hired William Wirt and John Sergeant to take their case before the Supreme Court.[24] The choice of legal counsel underlined the political significance of the case. Wirt as former Attorney General of the Adams administration and John Sergeant as the former head of the Bank of the United States were central figures of the anti-Jackson establishment which had chosen to support the Cherokee cause more for their own partisan reasons than out of sympathy for Indian rights.[25] For them the Cherokee case served to buttress their opposition to Jackson's narrow and restrictive view of the power of the national government. Although the Court was the last unexplored forum for the Indians, their law suit became merely an expedient means for the president's opponents to foil Jackson's policies and prevent his reelection.[26] Anti-Jackson partisans Wirt and Sergeant were more attentive to the potential contribution of the Indian litigation to their own political goals than to its vital importance for the survival of the Cherokee nation in Georgia. Indeed at the beginning of the Indian controversy Wirt had favored removal but was quickly persuaded that the Indians had a legal right to remain on their lands once Webster and others had convinced him that "a legal decision in favor of the Indians would embarrass the president politically."[27] Wirt and Sergeant therefore vigorously pursued the Indian litigation for several years despite the initial setbacks.

The Cherokee leaders apparently did not realize that they were but pawns in the political maneuvering of the anti-Jackson forces. In an enthusiastic letter to Cherokee leader Major Ridge, his son, John Ridge, reported from Washington that "we have strong, eloquent, and good men who feel for us, and are our friends." To another Cherokee leader, Elias Boudinot, he wrote "from private and public sources, we're induced to believe that Henry Clay is our friend and will enforce the treaties."[28] Overestimating personal and political gestures on their behalf, the Cherokee thought of these supporters as firmly committed to their cause.

The arrest and conviction of a Cherokee man, Corn Tassel, on the charge of murder by a Georgia court offered Wirt and Sergeant an immediate opportunity to raise the legal issues of Indian immunity from state law. The case was appealed to the United States Supreme Court which directed Georgia to show cause why a writ of error should not be issued against it. Georgia deliberately ignored the order contending that "the interference by the Chief Justice of the Supreme Court of the United States in the administration of the criminal laws of this state was a flagrant violation of her rights."[29] Corn Tassel was executed.

Whether Georgia's action was based on the state's long-standing objection to federal jurisdiction over state criminal law or whether it was meant to demonstrate Georgia's refusal to accept any federal interference with Indians within her boundaries, it effectively prevented federal courts from reaching the broader issue of the Indians' legal position and rights.[30] In the next case, *Cherokee Nation* v. *Georgia*, that issue could not be avoided. In this case the Cherokee sued as a sovereign and independent nation, thereby invoking the original jurisdiction of the Supreme Court. This strategy was dictated by Georgia's ability to ignore federal legal action on behalf of individual plaintiffs. Raising the sovereign nation claim would force the Court to clarify the legal and political status of Indian tribes.

A legal decision accepting the Cherokee's claim of sovereignty would establish once and for all

that states were barred from exercising authority over Indian tribes. A favorable decision moreover would strengthen the Indians' cause politically. By involving the Court directly, the Indian leaders saw the possibility not only of settling "who is right and who is wrong" but also of bringing to their side at least one branch of the national government, the judiciary, and its supporters. Elias Boudinot was elated that the controversy was no longer "before [*sic*] the great state of Georgia and the poor Cherokees, but between the U.S. and the State of Georgia, or between the friends of the judiciary and the enemies of the judiciary."[31]

In making the decision to follow the strategy of the claiming sovereign national status for the Cherokee, Wirt was mindful of the potential risks. Whereas a favorable decision on the jurisdictional question promised to end the Cherokee's problems, the Supreme Court's refusal to accept the case under the original jurisdiction provisions of Article III of the Constitution—thereby rejecting the Cherokee's claim to national sovereignty —heightened Indian vulnerability.

Wirt was not unaware of the possible problems of the case and did not decide on the more daring course until he had directed cautious inquiries to the Chief Justice himself, soliciting Marshall's views on the correct interpretation of legal precedents with respect to Indian rights and status. Writing to his friend Judge Carr, Wirt outlined his understanding that treaties regarded Indians "a sovereign nation within their own territory, under the *exclusive government* of their own laws, usages and customs" and that preceding cases established "the right of the Indians to govern themselves by their own lands, within their own territory."[32] Wirt implored Carr to converse with his "Brother" Judge Marshall to gather his impressions of the political character of this Indian people with respect to Indian autonomy over territory occupied by them.[33]

Although Wirt was conscious of the questionable nature of his confidential inquiry to the Chief Justice, he justified what today would be considered improper by pointing to the inordinate importance of avoiding a judicial defeat for the Cherokees. He wrote to Judge Carr that he would go on with the case unless advised that his interpretation and legal strategy in the Indian case were wrong. If so advised, Wirt declared, he would "as frankly draw off from these people and tell them why." An opinion from Marshall in a case not yet before the Court would "prevent embarrassment and mischief."[34] Wirt's efforts to insure himself of the Chief Justice's approval for his legal course of action failed, however, because Marshall refused to indicate "any opinion on the delicate and interesting question" suggested by Cherokee counsel. Wirt proceeded nevertheless.[35]

Wirt and Sergeant's first suit on behalf of the Cherokee was unsuccessful, but the Court's decision was ambivalent in many respects and the outcome was neither a complete defeat nor a complete victory. Marshall's opinion for the majority rejected the centerpiece of Wirt's case—the argument that the Cherokee nation was, and should legally be considered, a foreign nation. Instead Marshall reasoned that the relation of the Indians to the United States was unique, "perhaps unlike that of any other two people in existence."[36] Since an Indian tribe or nation within the United States was not a state of the union and could not possibly be an internal foreign state, it followed logically that Indians lacked standing to invoke the original jurisdiction of the Supreme Court under Article III of the Constitution.[37]

Although the dismissal of the Cherokee complaint on jurisdictional grounds denied them the immediate protection of the Court, Marshall's opinion left room for hope. In not considering the case on the merits, the Supreme Court had in no way supported or condoned Georgia's assertion of jurisdiction over the Cherokee. To the contrary, Marshall's opinion confirmed that the Cherokee nation was a state "capable of managing its own affairs and governing itself" and was plainly recognized as such by acts of the American government.[38]

Marshall further acknowledged the Indians' "unquestionable, and therefore unquestioned rights to the lands they occupy" subject only to *voluntary* cession.[39] Even if the Chief Justice's characterization of the Indians' "peculiar" relation to the United States as "that of a ward to his guardian" was problematic, it did establish the principle of federal and not state jurisdiction over Indian tribes.[40] In a case on the merits—"a proper case with proper parties"—Georgia's action could not withstand judicial scrutiny, Marshall's language suggested.[41]

These aspects of the Court's decision were especially encouraging in the light of Marshall's expression of moral support: "If Courts were permitted to indulge their sympathies," he said at the beginning of the decision, "a case better calculated to excite them can scarcely be imagined."[42]

If Marshall's decision is accepted as purely legal it would follow that "Wirt and Sergeant had erred as to the method of attacking that [Georgia's] legislation".[43] Yet there were other aspects of the

Court's decision which indicate the outcome was not determined on legal grounds alone. First, the dissenters, Justices Thompson and Story, were not stopped by jurisdictional hurdles from considering the complaint of the Cherokee on the merits. Their eloquent opinion makes a strong legal case in favor of judicial protection of the land and rights of the Indians. Second, Marshall's own opinion reflected political as well as legal considerations. Although the Court's asserted lack of jurisdiction made it unnecessary—even inappropriate—to reach the merits of the complaint, Marshall nevertheless expressed doubts on whether the case presented a "proper subject for judicial inquiry and decision." The appeal to courts to protect the possession of the Indians, Marshall stated, involved more than a mere decision on the title [to the land]. Instead it required the Court to control Georgia's legislature and "to restrain the exertion of its physical force." Such judicial action, the Chief Justice suggested, would savor "too much of the exercise of political power."[44]

This clear expression of judicial self-restraint by John Marshall, the initiator of judicial review and the powerful defender of the Court's obligation to insure compliance with the Constitution and its laws by the other political branches, reflects the cautious approach of a prudent Chief Justice fully aware of the explosive political nature of the case. It suggests that political as well as legal reasons were a central part of the majority's decision in *Cherokee* v. *Georgia*.

These elements of the Court's decision indicate that Wirt and Sergeant had not "erred" in their choice of legal strategy—as Beveridge asserts—but that they had erred politically in expecting Marshall to be willing to endanger the position of the Court on their or the Indians' behalf. In bringing the case Wirt himself had not been unaware of the potential risk that Jackson would continue to support Georgia's claim in spite of a Supreme Court decision favoring the Cherokee. However, he thought it *"possible* (though not very probable) that the President may have to bow to the decision of the Supreme Court and cause it to be enforced."[45] Seen from this perspective it is likely that Sergeant and Wirt's strategy was motivated largely by political calculations: The possibility of adding the weight of the Supreme Court's prestige to the Indians' cause would provide a powerful mechanism for exerting real pressure on Jackson to reverse his position on the Indian question. It would thereby provide the anti-Jackson establishment with an issue to defeat the president.

To bring the case directly before the Supreme Court made good sense, for it would force the nation's highest judicial tribunal to shoulder part of the burden of opposing Jacksonian politics. The flaw of that calculation lay not in faulty legal reasoning but in failing to anticipate the political dilemma of the Court—specifically that Chief Justice Marshall could not, and therefore would not, make a decision on the merits without estimating what the consequences of an anti-Jackson, anti-Georgia decision would be for the Court itself.

Dismissal of the Indians' claim for want of jurisdiction saved the Court not only from a political confrontation with a very hostile state but also avoided open conflict with a chief executive on whose support Marshall could hardly have placed great hopes. Though genuinely sympathetic to the Indians' cause, Marshall would not allow their plight to become a major threat to the position of the Court already under attack from Jacksonian quarters.[46] John Marshall who had often demonstrated his overriding concern for the protection of the constitutional structure and who was plainly critical of many of Jackson's policies would not fail to protect the Court's self-interest first. Against this background Marshall's conclusion that "this is not the tribunal in which those [Cherokee] rights are to be asserted" makes better political than legal sense.[47] Aware of the Court's real political position, Marshall warned the plaintiffs that the Court was not "the tribunal which can redress the past or prevent the future."[48]

For the Indians, Marshall's decision had important consequences. Indian hopes that a court decision could be used to rally political support for their cause proved illusory. Assertion of sovereign foreign nation status was barred from then on. On the other hand clear judicial support for Indian political and property rights in the Court's opinion and Marshall's emphasis on the special relation between the Indians and the federal executive enabled the Indians to continue to look to the Court for support against Georgia's intrusion on Indian rights and land. Justice Thompson's strong dissent, in particular, encouraged Cherokee hopes for judicial redress of the Indians' grievances.

The opportunity to bring questions of Indian land rights and immunity from state jurisdiction before the court again in *Worcester* v. *Georgia* arose out of events which occurred at the time the court was issuing the *Cherokee Nation* decision. While Wirt and Sergeant were using legal means to enjoin Georgia's statutes, their actual

enforcement over the Cherokee nation had met with resistance from white missionaries living with the Indians. Following the extension of Georgia's sovereignty over the Cherokees in 1828 many of the missionaries began an active "campaign" for the repeal of what they considered unlawful acts.

Apparently concerned with the pro-Indian support of the missionaries and other whites, in December of 1830 the Georgia legislature approved a law which would require all whites traveling within Indian territory to register with state authorities as of March 1, 1831. This new law caused most of the missionary organizations to withdraw their representatives.[49] Some of the missionaries, however, decided to remain with the Cherokee. Samuel Worcester, the spokesman for this faction, urged civil disobedience—that the missionaries remain but not register, an act in violation of Georgia law.

Worcester's argument was based upon several points. First, the Cherokee needed the missionaries' aid and example in their fight to retain Indian rights; second, missionary work throughout the United States would suffer if missionaries fled every time an adversity presented itself, and more pragmatically, mission property would be lost if Georgia's claims were upheld. Finally, in a statement of political-moral beliefs, Worcester indicated the importance of the citizen's duty to "save our country from the guilt of covenant-breaking and oppression and robbery."[50]

Jeremiah Evarts, head of the American Board of Foreign Missions, which sponsored Worcester, expressed strong support for the missionaries' stand on moral and religious grounds. He also stressed the potential political benefits of their civil disobedience rousing "this whole country, in a manner unlike anything which has yet been experienced."[51]

In a test of Georgia's commitment to these laws, the men remained but did not register. Between March 12 and 17, 1831, Worcester and two other missionaries, together with two white men married to Cherokee women, were arrested—one day before Marshall delivered the Court's decision in the *Cherokee Nation* case.

On March 26, 1831, the Georgia court, in an adroit move, released the missionaries as federal agents on jurisdictional grounds after having upheld the validity of Georgia's laws and claims.[52] It seems reasonable to conclude that Georgia tried to intimidate the missionaries and break their civil disobedience by arresting them first and then releasing them before a major public and legal controversy should arise.[53] Their tactic failed. Worcester returned to the Indians without registering.

The Georgia governor next moved against the missionaries by inquiring of Jackson and his Secretary of War, Eaton, whether the federal government still considered the missionaries its agents. When the government indicated they were no longer regarded as such, a denial which Worcester attributed to Governor Gilmer's influence, the governor ordered the men to comply with the law or leave the state within ten days.[54] At this point, three of the missionaries moved to Tennessee but Worcester and fellow missionary Elizur Butler remained and again were arrested. This time their trial before the superior court of Gwinnett county resulted in their conviction and they were sentenced to four years at hard labor. The missionaries were offered pardons by the governor but they refused and were imprisoned. It was this case which again challenged the legality of Georgia's extension of state sovereignty over the Cherokee nation before the Supreme Court.

Although the central issue of *Worcester* v. *Georgia* was still the constitutionality of Georgia's actions and the rights of Indians to be protected by the federal government, the legal posture of the case had changed significantly because of the different legal and political character of the parties now before the Court. As white citizens and residents of other states, Worcester and Butler clearly had standing to challenge the imposition of Georgia's statutes on them before the Supreme Court. Since the case came before the Court on a writ of error from Georgia's superior court, it did not raise the thorny issue of original Supreme Court jurisdiction. In other words, the Court now had before it "a proper case with proper parties."[55]

This time the Chief Justice saw no barrier to the acceptance of the case. "It was too clear for controversy." Marshall ruled that the Court had the power and the duty of exercising jurisdiction.[56] The fact that Worcester's case dealt with personal liberty rather than property rights did not alter the jurisdiction of the Court, for Worcester had no less an interest in Georgia's unconstitutional laws "than if they affected his property."[57] On the merits, the Supreme Court held that the missionary "was apprehended, tried and condemned under colour of a law which had been shown to be repugnant to the Constitution, laws and treaties of the United States."[58] The opinion of the Court also implicitly sanctioned Worcester's act of civil disobedience. Punishment, Marshall wrote, could not disgrace when inflicted on innocence.[59]

The Court's ruling should have sufficed to set Worcester free, and for this reason alone the decision was a victory for the missionary and his counsel. Marshall's opinion for the majority, however, went far beyond the narrower question of Worcester's unlawful imprisonment and, in holding Georgia's actions and laws null and void, served Worcester's larger goal of helping the Indians in their struggle to resist the state's encroachment on their rights and land. The Court decided that relevant treaties (i.e., the Treaty of Hopewell, 1785, and the Treaty of Holston, 1791) recognized explicitly the national character of the Cherokees as well as their right to self-government, guaranteed their lands, and imposed on the federal government the duty of protecting these rights.[60] Neither rights of discovery, nor the Indians' use of the land in ways different from that of the white settlers, nor the extension of English and later American protection over them, Marshall found, in any way diminished or detracted from the rights of the Cherokee nation to govern itself and to occupy its own lands for as long as it chose to.[61] Though not direct parties in the second round of litigation, the Cherokee had finally "won their case."

Victory for both the missionaries and the Indians depended on enforcement of the Court's decision. Here they both lost—the Indians with devastating results. Georgia simply disregarded what it considered an unwarranted outside interference with her Indian policy. If anything, the Court's sweeping decision confirming and protecting Indian rights and property so strengthened the state's resolve to resist that the governor threatened he would rather "hang the missionaries than liberate them under the mandate of the Supreme Court."[62] Georgia could disregard the Court's order, certain of no action by a president who had reacted to the Court's pro-Indian and anti-states' rights decision with the cynical suggestion that, having ruled, Justice Marshall should now enforce his own decision.[63]

By itself the Court's decision could not suffice to set Worcester, the principal party, free, nor was it effective in protecting the indirect parties—the Cherokee—from seizure of their land and violation of their rights. Judicial and executive officials in Georgia continued their stance of noncompliance with Supreme Court procedure. Efforts by Worcester's lawyers to make the Superior Court of Georgia follow the Supreme Court's mandate and set the missionaries free were foiled, first, by the judge's and then the governor's, deliberate refusal to create a formal written record of their noncompliance.[64] Without it no further action could be taken by the Supreme Court which had, in any case, adjourned on March 17, two weeks after handing down its decision in *Worcester* v. *Georgia*.

It was not until November, therefore, that Worcester could petition the Court for further legal process to overcome the technical-procedural barrier created by Georgia to block enforcement of the *Worcester* decision.[65] At that time the ringing legal victory of the missionaries and the Cherokee had produced no results. Worcester was still in jail; the Indians were still subjected to harassment and massive injustice imposed by superior force.[66] Thus the stage seemed to be set for another, even more important, confrontation. More was at stake now than Worcester's imprisonment or even the rights of the Cherokee nation. The survival of the very power of the Supreme Court was in doubt. The supporters and lawyers for the Indians, who accepted the Cherokee's case motivated by their opposition to Jackson, had indeed succeeded in bringing the third branch of the national government to their side.[67] Support for the Indian cause could now be equated with support for the judiciary, the rule of law, and the survival of the national constitutional structure.

If the judicial power could not give effect to the laws of the union, Justice McLean feared, "the existence of the federal government [would be] at an end."[68] The same sentiment was expressed more dramatically by Justice Story who, in a letter to George Ticknor, declared that "the Court has done its duty. Let the nation now do theirs. If we have a government, let its command be obeyed; if we have not, it is as well to know it at once, and to look to consequences."[69] The equation of the Court's own survival with the cause of the Indians should, therefore, have put the Indians in a more auspicious political position than ever before.

Much to the detriment of the Cherokee, however, the political situation in the country had changed dramatically by the end of 1832. Jackson, whose open support for Georgia had precipitated that state's aggression against Indians, had, for the first time, taken a strong position against independent states' rights. Forced by South Carolina's direct challenge to national authority through the enactment in November of its Nullification Ordinance, Jackson "astounded the country" with his Proclamation Against Nullification of December 1832.[70]

The decisive change in the position of their most powerful opponent should have benefited the Indians in their struggle to resist Georgia's

nullification of the Constitution and federal treaties—particularly now after the Supreme Court had left no doubt that the state's actions were indeed in violation of the laws of the United States. Instead the shift in Jackson's policy augmented the Indians' problems. The danger of civil war over the nullification issue—real or imagined—caused many of Jackson's former opponents to rally to his support. Reassured by the president's strong defense of national power, even the chief justice began to see merit in the chief executive whom only shortly before he had attacked bitterly.[71]

In the midst of this political crisis Georgia's position was of great importance. Somewhat surprisingly the state did not side with South Carolina's nullification move. Whatever the cause of Georgia's action—whether intimidated by Jackson's strong antinullification stand[72] or whether motivated by Machiavellian hopes that a high price could be exacted for support of the national government at this time—the consequences for the Indians were shattering. In comparison with South Carolina's aggressive nullification posture, Georgia's deliberate noncompliance with federal judicial process appeared moderate.[73] This permitted Jackson, who viewed South Carolina's act as treason and rebellion,[74] to distinguish his refusal to apply the principle of federal supremacy "to Indian land grabbing" from his application of that same principle against South Carolina's nullification of the tariff.[75]

At this crucial point the Indians had no influence over the course of events affecting them. To the extent that political support for the Cherokee's cause had been directly related to anti-Jackson sentiments and rejection of his pro-state policies, the change in the president's position brought about a regrouping of the Indians' friends and allies. If their opposition to Jackson had been based on the fear that Jackson would weaken the structure of the national government, then the president's strong stand against South Carolina made allies out of erstwhile opponents. Where support for the Indians had sprung from narrower concerns of political self-interest in Jackson's defeat, the president's overwhelming reelection victory over three opponents, one of whom was Wirt himself, had demonstrated the futility of continuing opposition.[76]

As pawns in political strategies not genuinely concerned with their cause, the Indians were helpless to exert influence on what proved to be a fateful change in the allegiance of political forces. As only indirect parties to Worcester's successful case, they were also left empty handed to pursue further legal action on their own. Their last hope, therefore, was their missionary allies—still sitting in jail, still committed to their cause. But this last hope also failed them.

Waiting in prison since the March Supreme Court decision for their release, Worcester and his lawyers announced in November that further legal action would be taken to force the Court to enforce its own ruling once it reconvened in January 1833. At this point Georgia let it be known that the continued legal action of the missionaries was the only obstacle in the way of the state's open support for Jackson and the national government.[77] The missionaries, who until then had steadfastly refused to accept a pardon, were now told that their continuing refusal could be the cause of a civil war. Pressed hard by representatives of the governor not to pursue their case, they were finally persuaded that nothing more could be won by further legal action. After all, the rights of the Indians had been vindicated, and now it was promised that an order for their own release would be issued if they withdrew their suit.[78]

Shaken in their determination, the missionaries wrote to their sponsor, the Prudential Committee of the American Board of Foreign Missions, stating their views and asking for advice. The Committee responded immediately communicating the "prevailing opinion" that "it was expedient for the missionaries to withdraw their suit."[79] The ready agreement by the Board of Missions to discontinue the litigation was apparently encouraged by a generous offer of aid made just at that time by the federal government.[80] On receipt of the Committee's letter (January 7, 1833), Worcester and Butler told their attorneys to drop their case. Informing the governor of this decision they emphasized that "[they had] not been led to the adoption of this measure by any change of views with regard to the principles on which [they] acted . . . but by the apprehension that the further prosecution of the controversy, under existing circumstances, might be attended with consequences injurious to our beloved country."[81] They accepted the pardon.

With this action the last tenuous bit of influence the Cherokee had over their legal fate disappeared. As indirect parties, however central, they were powerless to pursue their legal victory in the courts. In the political arena their fate was sealed by the cynical decision of opponents of South Carolina's nullification to allow Georgia's nullification of federal Indian law as a price for that state's support of the national government. From this point on the removal of the Cherokee

from Georgia was only a question of time. With nobody but the Indians themselves protesting, the state proceeded unhampered to take Indian land and violate Indian rights. The federal government assisted the state's take-over of Cherokee land by promoting factionalism in the nation through bribery and deceit.[82] Dissension among the Indian leaders over the proper course to follow—whether to remove "voluntarily" or to hold out to the last—added to the Cherokee's plight.

At the end of the decade which had begun with their sovereign challenge to the state of Georgia before the Supreme Court, a bitterly divided Cherokee nation was rounded up by federal troops and state militia and driven off to land the Cherokee called Arkansas; a third of the nation died during this brutal forced march over the "trail of tears."[83]

The negative legal and political results of the Indians' use of the legal process raise several questions. The outcome of Cherokee litigation indicates how problematic reliance on legal-judicial proceedings can be for a group barred from effective participation in the political process. The Cherokee cases are particularly revealing, for the resounding legal vindication of Indian rights in *Worcester v. Georgia* did not prevent their removal.

Resort to courts left the Cherokee worse off than before. Rejection for want of jurisdiction of their first case, *Cherokee Nation* v. *Georgia*, constituted more than just a lost case. It put the Supreme Court's legal imprimatur on a degrading of their constitutional status. The decision diminished Indian status—it created a precedent leaving Indian tribes in a weakened and ambivalent position: as corporate tribal entities they could not be foreign states; as individuals they could not be full citizens. The indirect legal victory in the second case, *Worcester* v. *Georgia*, proved illusory on several grounds. In a narrow technical sense it proved fatal that the resolution of the Indians' claims was left in the hands of a third party which—under strong political pressure—would not press the enforcement issue beyond the limits of its own interests and future concerns.[84] Although their rights were vindicated, the power to enforce them eluded the Indians.

Enforcement of the Court's decision in *Worcester* v. *Georgia* became a question for the political arena, as it does in most cases of constitutional adjudication. Yet in the political forum, the Cherokee's very reliance on the law and its magic healing powers had weakened their political position. Their legal victory became a political liability when it was evaded. Neither the Cherokee's attorneys, nor Congress, nor the Court itself was ready to take the necessary action to overcome Georgia's resistance to enforcement on the Court's order. However unique the circumstances of that final defeat of the Cherokee cause were, they point to the treacherousness of reliance on legal-judicial institutions.

In turning to legal-judicial institutions for help after political action and pressure had proved futile, the Cherokee demonstrated their continuing commitment to play by the rules of a political system controlled by the white majority. Faith in the ultimate victory of their cause, before institutions thought to be fair and neutral, let them forgo what might have been the only viable alternative open to them—to resist Georgia's aggression by force, and to enforce the laws with their own hand.[85] Possibly one of the most tragic aspects of Cherokee litigation is that it did not prevent the destruction of a people who had deeply internalized the myths of American constitutionalism: that everybody must act according to prescribed rules, that the rules are fundamental and that their violation will be punished regardless of the strength of the violator. It was their willingness to abide by the law which made them refrain from the use of force even in the face of the most egregious acts of violence and lawlessness by their Georgian tormentors. Their faith in the binding validity of legal rules kept them from understanding that legal rules and their enforcement are only as good as the political consensus backing them.

The Indians never realized that regardless of the strength of their legal rights they were, by 1830, no longer based on a political consensus. A nation of land-hungry, aggressive settlers, equipped with superior force, convinced of their own moral and racial superiority and determined to carry out their "manifest destiny" was not willing to respect agreed-upon fundamental ground rules with regard to less well-organized, weaker, and "less civilized" savages. Where white men wanted to make intensive use of the land, the Indians were not to stand in their way. "What is the right of the huntsman to the forest of a thousand miles over which he had accidentally ranged in quest of prey?" John Quincy Adams had asked in his famous Plymouth Address of 1802: "Have hundreds of commodious harbours, a thousand leagues of coast, and a boundless ocean been spread in the front of this land, and shall every purpose of utility to which they could apply be

prohibited by the tenant of the woods."[86] What was at stake in the Cherokee cases was the confrontation between the traditional moral and legal norms which had respected and protected Indian rights in the intercourse of white newcomers and the native inhabitants of the land, and the newer and more material values, unwilling to allow legal principle to disguise the relation of fundamental inequality between the two peoples. That the Cherokees "won" their second case in this setting must be attributed to the peculiarity of legal decision-making—guided by what happened before, directed by the principles of the past. Yet the past and its legal rules about Indian rights, as Georgia demonstrated, were no longer a guide for the future. Legal-judicial reconciliation of basic conflict must be illusory at times when values are deeply divided and power is shared unequally. At such times, courts rarely have power to impose equal justice on majorities determined to disregard minority rights. Marshall, of course, had well understood that basic principle of the legal order when he refused the onus and the burden of accepting the Indians' first appeal to the courts by reminding all that "this is not the tribunal which can redress the past or prevent the future."[87] Indeed, it could not, and *Worcester* v. *Georgia* proved how right Marshall had been.

What might have prevented the future—a century and a half of disenfranchisement, oppression and extermination—would perhaps have been determined resistance against aggression by force. The Cherokee, of all Indian nations, might have been well equipped to stand up to the white man's attack.[88] The federal military was not involved and, since Georgia did not initially try to seize Cherokee land through an organized military attack but rather encouraged individual aggression against Indians, determined, forceful resistance by the Cherokee could well have deterred incursions by whites. It is the final irony of the Cherokee litigation, however, that they were also ideologically the least likely to use force. They had accepted the mystique of the rule of law too thoroughly.

The recent legal victories of Indians may be the final vindication of the once so harshly disappointed faith of the Cherokee in the rule of law.[89] If this is so, the history of the American Indian will have reached a turning point. If the law can indeed redress the wrongs of the past and if the courts can indeed be tribunals forcefully protecting the legal rights of the parties before them, then Indians can no longer be treated as pesky irritants or as immature wards deserving of pity, but not respect.

All these potential developments, however, depend on the transformation of legal victories into political reality. The Cherokee's failure shows how great the distance is from one to the other. What makes their example relevant, even after a century and a half, is that the political imbalance of power which then invalidated the Indians' legal victory has by no means changed. To the contrary, Indians are weaker today; they are worse off economically and socially.[90] Indian tribes, therefore, do not appear to be in a stronger position than the Cherokee were to insure that gains of litigation, made in judicial forums not reflecting the allocation of power in the political system, will actually improve the political, economic, and social status of Indians.

It is no small irony, however, that *Worcester* v. *Georgia* has played a central role in the successful Indian litigation of the last decade. With historical innocence John Marshall's decision in favor of the Cherokee in 1832 is used as "direct authority"[91] to validate the claims of Indian tribes now—as if that legal victory had prevented political ruin. A century and a half later *Worcester* v *Georgia* holds the promise of vindication of Indian rights; at the same time reliance on this landmark case must be a reminder of the limits of legal action to realize minority claims.

NOTES

1. *The Federalist Papers*, Federalist no. 10 (New York: Mentor, 1961), pp. 77–84.
2. See Robert Dahl, *Who Governs?* (New Haven: Yale University Press, 1961), p. 164. Also, Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), p. 131. Polsby also supports this theoretical emphasis on democratic conflict resolution through representational structures. See, for example, Nelson V. Polsby, "The Institutionalization of the U.S. House of Representatives," *American Political Science Review* 62 (March, 1968): 144.
3. Robert Dahl only mentions reliance on judicial action briefly and then as a transitional mechanism to gain access to the elective political system which—once won—would guarantee that "the normal opportunities of the system" would become and remain open. Dahl, *A Preface to Democratic Theory*, p. 138. That proposition is problematic, however, particularly as applied to the example of Black voting which Dahl uses. Jim Crow laws disenfranchising Blacks were enacted in legislatures in which duly-elected Black representatives sat and in states where Black voter registration was a hundred times larger before the imposition of such laws than afterwards. Participation of Blacks in elective politics did not prevent their disenfranchisement. Jim Crow laws in Louisiana, for example, resulted in a decrease of registered Black voters from

130,334 in 1896 to 1,342 in 1904. In 1896 Negro registrants were in the majority in 26 Louisiana parishes; in 1900, in none. C. Vann Woodward, *The Strange Career of Jim Crow*, 3d ed. (New York: Oxford University Press, 1974), p. 85.

4. Edgar S. Cahn and Jean Camper Cahn, "Power to the People or the Profession?—The Public Interest in Public Interest Law," 79 *Yale Law Journal* 1005, 1044 (1970).
5. Samuel Huntington uses the capacity of political institutions to adapt to new demands as one criterion determining the "development or decay" of political systems. See "Development or Decay," *World Politics* 17 (April 1965): 386–430.
6. *NAACP* v. *Button*, 371 U.S. 415 (1963).
7. See, for example, "The New Public Interest Lawyers," 79 *Yale Law Journal*, 1069 (1970); Robert L. Rabin, "Lawyers for Social Change: Perspectives on Public Interest Law," 28 *Stanford Law Review*, 207 (1976); Jack Greenberg, "Litigation for Social Change: Methods, Limits and Role in Democracy." Benjamin N. Cardozo Lecture, The Association of the Bar of the City of New York (October 31, 1973). See also Clement E. Vose, *Constitutional Change* (Lexington, Mass.: D. C. Heath, 1972).
8. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).
9. President Jackson is said to have responded to the Court's decision in favor of the Cherokee: "John Marshall has made his decision, now let him enforce it." Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, and Co., 1922 and 1926), 1:759.
10. No Indian could testify in a court case involving a white man. The law was reiterated and extended on December 19, 1829; no one was to prevent an Indian from enrolling for westward migration; any Indian could sell or cede Indian lands. Henry Thompson Malone, *Cherokees of the Old South* (Athens: The University of Georgia Press, 1956), pp. 172–73.
11. In return for land cessions the Cherokees were given an annuity, were guaranteed all their remaining lands over which they would have full jurisdiction, and were promised United States aid to develop agriculture. Malone, *Cherokees of the Old South*, p. 35.
12. Marion L. Starkey, *The Cherokee Nation* (New York: Knopf, 1946), p. 12.
13. John Pendleton Kennedy, *Memoirs of the Life of William Wirt* (Philadelphia: Lea and Blanchard, 1849), 2:279.
14. Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes* (Norman: Univ. of Oklahoma Press, 1953), p. 20.
15. Kennedy, *Memoirs of William Wirt*, p. 279.
16. *Ibid.*, pp. 281, 284.
17. William F. Swindler, "Politics as Law: The Cherokee Cases," 3 *American Indian Law Review* 18 (Summer 1975); n. 9.
18. Foreman, *Indian Removal*, p. 232.
19. Jackson directed that the annuities traditionally paid to the Cherokee nation as a corporate entity, must be divided proportionately among the constituent members of the tribe and be payable only to individuals. When the Cherokees refused to accept a measure so destructive of their communal culture and government, the federal government withheld the funds completely. Failure to receive these funds caused further problems for the Cherokee who relied on this money to meet general expenses and pay the officials of their council. George D. Harmon, *Sixty Years of Indian Affairs: Political, Economic, and Diplomatic 1789–1850* (Chapel Hill: Univ. of North Carolina Press, 1941), pp. 187–88.
20. Kennedy, *Memoirs of William Wirt*, p. 291
21. Jackson's adversaries were eager to demean his triumph in securing the passage of the Removal Bill. They called the president's victory the result of "a corrupt juggle between the Executive and some of the members (of Congress) with regard to other bills, the Maysville Road Bill, the Baltimore Railroad Bill, etc." R. N. Satz, *American Indian Policy in the Jacksonian Era* (Lincoln: Univ. of Nebraska Press, 1974), p. 41.
22. Later Congressional attempts to repeal the Removal Bill and to demand federal protection of the Cherokees did not succeed. Satz, *American Indian Policy*, p. 46 and Foreman, *Indian Removal*, p. 233.
23. Starkey, *The Cherokee Nation*, pp. 26–28, 116–17.
24. Kennedy, *Memoirs of William Wirt*, p. 289.
25. As high-ranking members of the Adams administration and respected Congressional spokesmen, men like Wirt, Sergeant, Spencer, and Clay had previously supported Indian removal. In 1822, as chief justice of New York's Supreme Court, Spencer, for example, had unsuccessfully attempted to uphold the extension of state law over Indians living in New York, and he later served as New York's commissioner for Indian removal. Satz, *American Indian Policy*, p. 41, n. 6.
26. Satz, *American Indian Policy*, pp. 28, 39.
27. *Ibid.*, p. 41.
28. Thurman Wilkins, *Cherokee Tragedy: The Story of the Ridge Family and the Decimation of a People* (London: The Macmillan Co., 1970), p. 213.
29. *Ibid.*, p. 209.
30. During the first several decades of the nineteenth century, states had repeatedly objected to the exercise of federal judicial power over state court judgments. Although the Supreme Court had decisively affirmed the power of federal review of state court action in both civil and criminal cases [*Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816) and *Cohens* v. *Virginia*, 6 Wheat. 264 (1821)], state antagonism toward federal supervision continued unabated.
31. Edward E. Dale and Gaston Little, *Cherokee Cavaliers: Forty Years of Cherokee History as Told in the Correspondence of the Ridge-Watie-Boudinot Family* (Norman: Univ. of Oklahoma Press, 1939), p. 5.
32. Kennedy, *Memoirs of William Wirt*, pp. 294, 295. Emphasis in original.
33. *Ibid.*, p. 295.
34. *Ibid.*, p. 296.
35. *Ibid.*
36. 5 Peters, 16 (1831).
37. *Ibid.*, 20 (1831).
38. *Ibid.*, 16 (1831).
39. *Ibid.*, 17 (1831). Emphasis added.
40. *Ibid.*
41. *Ibid.*, 20 (1831).
42. *Ibid.*
43. Albert J. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin Co., 1919), 4:547.
44. 5 Peters, 20 (1831).
45. Kennedy, *Memoirs of William Wirt*, p. 293. Italics and parenthesis in text.
46. *Warren, The Supreme Court*, pp. 733–36. Early in 1831, for example, an effort was made to repeal the Court's appellate jurisdiction as described in Section 25 of the Judiciary Act of 1789. The Whigs saw this as a direct threat to the constitutional role of the judiciary. Jackson's supporters also sought to attack the Court by introducing a constitutional amendment so as to limit the term of office of federal judges.
47. 5 Peters, 20 (1831).

48. *Ibid.*
49. Before passage of this registration act Methodists, United Brethren, Baptists, and Congregationalists were working among the Indians in Georgia.
50. Letter from Worcester to David Green, June 26, 1831, cited in William G. McLouglin, "Civil Disobedience and Evangelism Among the Missionaries to the Cherokees, 1829–1839," *Journal of Presbyterian History* 51 (1973):124.
51. Althea Bass, *Cherokee Messenger* (Norman: University of Oklahoma Press, 1936), p. 141.
52. Judge Clayton ruled that Worcester as a postmaster was an agent of the federal government and that all the missionaries were agents of the United States as dispensers of the civilization fund. Joseph Tracy, *History of the American Board of Commissioners for Foreign Missions* (Worcester: Spooner and Howland, 1840), p. 215.
53. Starkey, *The Cherokee Nation*, pp. 137, 142–43.
54. Letter from Worcester cited in Bass, *Cherokee Messenger*, pp. 132–36.
55. 5 Peters, 20 (1831).
56. 6 Peters, 515–541 (1832).
57. *Ibid.*, 562 (1832).
58. *Ibid.*
59. *Ibid.*, 564 (1832).
60. *Ibid.*, 551–556 (1832).
61. *Ibid.*, 554 and 561 (1832).
62. Kennedy, *Memoirs of William Wirt*, p. 373.
63. Warren, *The Supreme Court*, p. 754.
64. Bass, *Cherokee Messenger*, pp. 154–55.
65. *Ibid.*, p. 158; Tracy, *History of the American Board*, p. 227.
66. Georgia was planning to distribute Cherokee land by lottery. Tracy, *History of the American Board*, p. 215.
67. Theodore Dwight in a letter to Webster, for example, suggested that as soon as Jackson came out in favor of Georgia against the Court, it would be "the duty of those who favour the Constitution and consider it worth preservation" to make an effort to rouse "as sufficient number of our countrymen . . . to the support of the Judiciary, and the discomfiture of the man [Jackson] and his myrmidons who are obviously bent on sacrificing both the Constitution and the Union." Warren, *The Supreme Court*, pp. 765–66.
68. Concurring opinion of Justice McLean [6 Peters, 570 (1832)]
69. Warren, *The Supreme Court*, p. 757.
70. Beveridge, *Life of John Marshall*, p. 552.
71. *Ibid.*, p. 563.
72. As suggested by Warren, *The Supreme Court*, p. 776.
73. South Carolina's nullification ordinance "forbade federal officers to collect customs duties within the state after 1 February 1833, and threatened instant secession if the federal government attempted to blockade Charleston or to use force. . . . Her legislature hurled defiance at 'King Jackson' and raised a volunteer force to defend the state from 'invasion.'" Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965), p. 436.
74. Warren, *The Supreme Court*, p. 774.
75. Swindler, "Politics as Law," p. 7.
76. Wirt received only 7 electoral votes and 101,051 popular votes compared with Jackson's 219 electoral and 688,242 popular votes. Although Clay was a more credible candidate with 49 electoral votes and 37.49% of the popular vote as opposed to Jackson's 54.50%, the latter's strength and popularity had proved indestructable. Svend Petersen, *A Statistical History of the American Presidential Elections* (New York: Frederick Unger Publishing Co., 1963), pp. 20, 21.
77. Tracy, *History of the American Board*, p. 238.
78. *Ibid.*
79. *Ibid.*, p. 239.
80. *Ibid.*
81. *Ibid.*
82. The government negotiated the terms of the removal treaty with a delegation led by John Ridge rather than with the official delegation of the tribe led by John Ross, the Cherokee Chief. Rachel Caroline Eaton, *John Ross and the Cherokee Indians* (1921), pp. 65–71. Privately published. Distributed by the University of Chicago Libraries, Chicago, Illinois.
83. Grace Steele Woodward, *The Cherokees* (Norman: University of Oklahoma Press, 1963), pp. 195–218.
84. Tracy, *History of the American Board*, p. 239.
85. The Cherokee had demonstrated great military skill, for example, in an 1814 campaign when, ironically, they had fought against the Creeks on the side of Jackson. As a reward for their bravery and courage, Jackson had awarded the title of major to the very men, The Ridge and John Ross, who subsequently led the Cherokee in their battle against removal and the extension of Georgia's sovereignty over them. Starkey, *Cherokee Nation*, pp. 23–25.
86. Lynn Hudson Parsons, "'A Perpetual Narrow Upon My Feelings': John Quincy Adams and the American Indian," *The New England Quarterly* 46 (September 1973):343.
87. 5 Peters, 20 (1831).
88. See note 85.
89. In 1975 two Indian tribes of Maine, the Passamoquoddy and the Penobscot, won an extraordinary legal victory before a Federal District Court. Judge Edward T. Gignoux had ordered a reluctant federal government to file suits against the state of Maine on behalf of Indian tribes claiming lands taken by the state nearly two centuries ago. When the lower court ruling was upheld by a unanimous decision of the First Circuit Court of Appeals later that year, it became clear that the Indians' efforts to seek judicial redress for past injuries had to be taken seriously. See *Joint Tribal Council of Passamoquoddy* v. *Morton*, 522 F. 2d 370 (1st Cir. 1975); The New York Times, December 31, 1975, and Petra T. Shattuck and Jill Norgren, "A Century of Pyrrhic Victories: Indian Lawsuits and White Power," *The Nation* (July 2, 1977):12–16.

    In Massachusetts, Rhode Island, Connecticut, New York, and South Carolina Indian lawsuits have established valid claims to millions of acres of land. Of equal importance, Western tribes have won judicial backing for tribal control over increasingly scarce water supplies and have reasserted the Indians' own power to collect taxes, to try white transgressors in Indian courts, and to be exempt from local and state licensing and regulations. See Robert McLaughlin, *"Who Owns the Land? A Native American Challenge," Juris Doctor* (September, 1976):17–25. See also the discussion of the increasing pace of Indian tribal land claims litigation in "Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial," 75 *Columbia Law Review* 655 (1975).
90. Their number, both in absolute terms and in relation to the total population is very small. According to 1970 U.S. Bureau of the Census figures, 793,000 persons identified themselves as American Indians. The Bureau of Indian Affairs estimates that about 500,000 Indians live on reservations. Sam A. Levitan and William B. Johnston, *Indian Giving* (Baltimore: Johns Hopkins University Press, 1975), p. 1. After a century and a half of federal tutelage, Indians have become greatly dependent on outside help and assistance. See also, for example, U.S. Commission on Civil Rights, *The Navajo Nation: An American Colony* (Washington, D.C., 1975).
91. Plaintiff's Motion for Enlargement of Time, *United States* v. *Maine*, Civil No. 1966-ND (February 28, 1977), 11.