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"The Significance of Jeremiah Evarts on John Marshall's federal Indian law decisions, *Cherokee Nation* (1831) and *Worcester* (1832)"

"The treaties and the laws assume, in the most unequivocal manner, that the Cherokees are not under the jurisdiction of Georgia*, nor of any other State, nor of the United States; that citizens of the United States have no right to enter the Indian country, except in accordance with treaty stipulations; that it is a high misdemeanor, punishable by fine and imprisonment, for any such citizen to attempt to survey Indian lands, or to mark trees upon them; and that the Indian title cannot be extinguished, except by the consent of the Indians, expressed by a regular treaty."* Jeremiah Evarts, "William Penn" (1829)

"The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." Chief Justice John Marshall, *Worcester* v. *Georgia* (1832)

In 1829 the influential New England reformer Jeremiah Evarts provided United States Supreme Court Chief Justice John Marshall the arguments he needed to establish the foundations of federal Indian law. Through recognizing Evarts' contribution, this paper reinterprets Supreme Court Chief Justice John Marshall's intentions behind *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832), foundational opinions establishing federal Indian law. Law historian Joseph C. Burke rightly asserts that Marshall's viewpoint was established and consistent in both opinions, convinced by the arguments of Cherokee advocate, Jeremiah Evarts' in his "William Penn" essays (1829). Burke, however, mistakenly suggests that Marshall primarily used the Cherokees, specifically through *Worcester,* to gain court power. Subsequent Marshall historians: G. Edward White, Charles F. Hobson and R. Kent Newmyer, emphasize that Marshall wanted to protect the Cherokees, because doing so sanctioned federal treaty law. Unlike Burke, however, they contrast these opinions as oppositional; the earlier decision restricted Cherokee sovereignty rights, while the later decision upheld them. Losing sight of Evarts, they suggest that Marshall's opinion was still evolving. This paper argues that Marshall intentionally refrained from giving his full opinion in *Cherokee Nation.* Politically astute,

Marshall understood that he needed a wider support base to protect successfully Cherokee sovereignty rights over Georgia's and President Andrew Jackson's Indian removal interests. *Worcester*, not *Cherokee Nation,* provided those much needed supports. Yet, Marshall also feared resurging Indian militarism. Therefore, in his 1831 decision, Marshall defined the Cherokee Nation as a "domestic dependent nation," fully under authority of the United States. Yet, this judgment reflected only half of Marshall's opinion; he went to unusual lengths to keep the controversy alive and prepared for further review. When the Georgia Guard subsequently arrested and manhandled missionaries to the Cherokees, Marshall used the political uproar to render the second half of his opinion on Cherokee sovereignty rights. According to treaty law, the Cherokees were a sovereign nation, but, according to the Doctrine of Discovery, they were also under United States' control. *Cherokee Nation* and *Worcester*, together, provide the balance of Marshall's intentions, in his eyes, a moral restraint based on positive law. These decisions do not conflict with one another as currently portrayed.

Federal Indian law historians have also missed the implications of Evarts' influence. Francis Paul Prucha, familiar with Evarts' arguments, still questions Evarts' influence on Marshall. Prucha suggests that although influential and widely-read, Evarts' arguments were too grounded in his "basic Christian view" to sway Marshall. Marshall, Prucha knows, consistently avoided using natural law arguments. However, Marshall's historians, particularly White, recognize that the chief justice comfortably coped with natural law since many of his legal contemporaries adhered to its principles. Religious and natural law dovetailed inextricably within some early nineteenth-century judicial decisions; one of Marshall's aims was to replace the vague ideologies of natural law doctrines with a morally responsible and explicit positive law. Another Indian law historian, Robert J. Miller does not consider Evarts' influence at all. He

effectively demonstrates that the American ideology of Manifest Destiny is rooted in the European Doctrine of Discovery, and that Marshall contributed to the legal translation of the Doctrine into expansion policies. Marshall most fully delineated the Doctrine in *Johnson* v. *McIntosh* (1823), and Miller claims that Marshall continued in this theme in the Cherokee cases. By understanding Evarts' influence, however, the Cherokee cases demonstrate that Marshall attempted soften the harsher implications of *Johnson.* Ultimately, Evarts' influence on Marshall's Cherokee cases elucidates Marshall's intentions towards Cherokee sovereignty rights, and further insight into the foundations of federal Indian law itself.

This essay reviews the current scholarship on John Marshall and the Cherokee cases, confirms Burke's recognition of Evarts' influence on Marshall's decisions as a consistent argument on behalf of Cherokee rights, and realigns current interpretations of Marshall's intentions regarding Cherokee sovereignty, and by extension, Native American Indian sovereignty rights. First, a review is provided of Jeremiah Evarts, Chief Justice John Marshall and historical background leading to the Cherokee decisions.

Georgia's conflict with the Cherokees festered with escalating intensity early in the nineteenth century. The remaining Cherokee territory was located primarily on lands claimed by Georgia. In 1802, in conflict with earlier treaties, Jefferson signed the Georgia Compact, in which Congress promised to purchase the remaining Creek and Cherokee lands in the southeast as soon it may do so "reasonably and peaceably." The conflict between federal Indian treaties and the Compact was largely due to intent. The treaties encouraged assimilation; the Compact promoted removal. In 1802 U.S. leaders expected little effective resistance from the eastern Native Americans to removal, thus any conflict at that time seemed immaterial. The Compact lay

dormant for two decades, but with its rapidly increasing white population, Georgia escalated pressure to remove all local Native Americans in the 1820s.[1]

The Cherokees were unexpectedly resistant, and in the 1820s "reasonable and peaceable" resolution hopes fizzled. Jackson's presidential predecessor, John Quincy Adams, tried to uphold both the Compact of 1802 and federal treaty laws protecting the southeastern Indians, pleasing no one. In 1827 the Cherokee Nation adopted their constitution, explicitly declaring independence from Georgia's control. Simultaneously, gold was discovered north of Gainesville, within Cherokee territory, precipitating the century's first gold rush. The Cherokees published a newspaper, the *Cherokee Phoenix*, promoting their rights and exposing their conflicts with Georgia globally. A divided Congress, however, conceded Jackson's Indian Removal Act in 1830. It granted the executive sole authority to remove Native Peoples and erased the legislative oversight that protected remaining tribal groups. This Act contradicted treaty law and, in response, the Cherokees turned to the Courts.[2]

Marshall's Cherokee decisions, *Cherokee Nation* and *Worcester*, were by no means inevitable, so Cherokee Principle Chief John Ross hired the influential and recently retired attorney general William Wirt to promote their cause. Before accepting, Wirt asked associate Dabney Carr to assess the Supreme Court's position. Marshall indicated sympathy, wishing that "both the Executive and legislative departments had thought differently on the subject." Wirt and Ross felt encouraged to pursue legal options. "If the Chief Justice had wished to avoid the case," Joseph Burke remarks, "surely he would have replied differently," to Carr's inquiries.[3]

Looking back over the course of emerging early republican law, Burke believes that Carr's inquiry created a momentous historical shift. Had Marshall through Carr indicated that recourse would be fruitless, Wirt believed the Cherokees "would sooner remove and die in the

wilderness" than subject themselves to antebellum Georgia's legal jurisdiction. The state defined the Cherokees as "free black persons," with dubious protections. Facing such options, the Cherokees would have departed their remaining territory in the early 1830s. In the eighteenth and nineteenth centuries, Indian removals were frequent and brutal; however, the Supreme Court's Cherokee support makes this removal unique. The Cherokees endured federal bayonet roundups, grueling detainments in removal forts, and their final winter crossings into Oklahoma, *after* being backed by the U.S. Supreme Court. Without the legal supports initiated by Marshall in the face of Cherokee removal, the foundations of federal Indian law would have been unimaginably different.[4]

John Marshall's Cherokee decisions reflect his longstanding effort to inject modified federalist principles into the emerging legal system. G. Edward White believes that Marshall used the Cherokee cases to dismantle natural rights as a source of law. Positive law replaced natural law and "the Constitution placed severe restrictions on the sovereignty of the states." Marshall served as Chief Justice of the Supreme Court from February 1801 until he died in July 1835. Appointed by President John Adams, at the eleventh hour of his presidency, Marshall became chief justice one month before Thomas Jefferson became president. Marshall is often associated with federalist elitism. "As late as 1829," Daniel Walker Howe notes, Marshall "endorsed property qualifications for voting." Historians argue voraciously over what was happening in the time period, so many conflicting ideologies appeared to hold sway. For instance, Bruce Laurie demonstrates increased disparities in wealth, and decreased political influence of non-whites and women, while Sean Wilentz establishes a burgeoning common man ethos. The political potency of Marshall's federalism waned with Jefferson and collapsed with Jacksonian democracy, towards the end of Marshall's tenure. Thus through much of his time as

chief justice, Marshall remained at odds with his concurrent presidents. Marshall worked effectively with this changing political climate, but also infused what he believed were the most important federalist principles within federal jurisprudence. He attempted to curb dangerous shifts towards regionalism and states' rights ideology. At a time when federal supremacy over state legal jurisdiction remained insecure, Marshall repeatedly upheld federal law over state law and Marshall's Cherokee decisions reflect this goal.[5]

Like Marshall, Jeremiah Evarts also believed that Cherokee sovereignty rights were a significant national concern.[6] Cosmopolitan and frail his whole life, Evarts was perpetually estranged from his yeoman father James, who never understood why his son avoided taking over the Vermont family farm. Evarts escaped to Yale as soon as possible and trained to practice law. By all accounts, Evarts was a capable attorney, but "out of step with the profession," according to biographer John Andrew III, because he refused to represent adequately clients he deemed unjust. Evarts' righteousness was uncompromising but highly respected. Like Marshall, he was politic in his own way, such that most admirers adopted his arguments while softening his tone. In 1812, Evarts helped to charter an influential new evangelical organization, the American Board of Commissioners for Foreign Missions (ABCFM). Cherokee historian William McLoughlin considers the ABCFM to be one of the most significant political backers for the Cherokees through its missions, schools, and publications. McLoughlin further notes that "some of the board's members were themselves congressmen." Evarts was treasurer of the ABCFM from 1812-1820, and led the organization as secretary from 1821 until he died ten years later.[7]

Therefore, through affiliation and training, Evarts was a recognized expert on Cherokee legal rights in the early nineteenth century. As Cherokee removal seemed imminent, pushed by the new President Andrew Jackson, Cherokee supporters urged Evarts to publish his arguments

against Georgia's efforts. From August to December in 1829, he published twenty-four articles in the Washington newspaper, the *National Intelligencer,* to instant acclaim. Under the alias "William Penn," he argued for Cherokee Nation's sovereignty rights to their southeastern homelands. Read altogether, Evarts's essays resemble a legal brief and presage Marshall's decision to uphold Cherokee sovereignty in *Worcester* v. *Georgia* (1832) written three years later. Republished widely and read by congressmen during the debates over Jackson's Indian Removal bill of 1830, Joseph Burke declares Evarts's essays to be "the holy writ, the reference work, and the legal brief of the many preachers, congressmen, and lawyers." Francis Paul Prucha believes that Evarts provided the "fullest and best" defense of Cherokee rights with his "tour de force of legal argumentation." Evarts apologized for his lengthy and detailed arguments, but he wanted to "enable every dispassionate and disinterested man to determine where the right of the case is."[8]

In his essays, Evarts delineated over twenty federal treaties with Native Peoples, giving particular attention to the treaties of Hopewell (1785) and Holston (1791-2). These treaties established specified boundaries for the Cherokee Nation recognized by the United States, the first under the Articles of Confederation and the second under the U.S. Constitution. The Cherokees were the first occupiers of their lands, Evarts noted; the U.S., by treaty, promised the Cherokees their remaining territory. Earlier presidents—Evarts mentions Washington and Jefferson specifically—encouraged Native Peoples to adopt civilization and Christianity. To force Cherokee removal, especially as the Cherokees became peaceful and industrious, would dishonorably refute past promises and demean the memory of the Founding Fathers. The Georgia Compact of 1802, for Evarts, represented not Georgian rights to Cherokee lands but demonstrates that the state had, in the past, accepted federal prerogative for treaty law. As

Evarts's "most important effort," the "William Penn" essays were, Prucha concludes, "the reservoir from which all the opponents of removal drew." Several legal and political leaders in the early nineteenth century defended Cherokee sovereignty rights. Yet when they argued, each one followed Evarts's basic formula, post-dating his publications sometimes by a mere few months. In 1830, Marshall admitted having followed the Cherokee debate "with profound attention and with deep interest." Although Marshall and Evarts traveled in different political circles, Marshall was attuned to contemporary legal discourse and undoubtedly knew Evarts's arguments.[9]

As Prucha explains, the "William Penn" essays were embedded with natural law dictates infused with religious imagery: Americans were a chosen people, endangered when reneging upon their ideals. "The Great Arbiter of Nations," Evarts warned, "never fails to take cognizance of national delinquencies."[10] Although Prucha is convinced that Evarts' religiosity repelled Marshall's interests, Edward White demonstrates Marshall's talent for upholding natural principles through positive law, comparing *La Jeune Eugénie* (1822) and *The Antelope* (1825) instructively. In circuit court, Joseph Story wrote the opinion for *La Jeune Eugénie,* and Marshall wrote for *The Antelope*. "In Story's analysis," White explained, "natural law had figured prominently as a substantive source of legal rules." Briefly, both cases involved the slave trade and international law; the ships concerned were slave ships. La Jeune Eugénie was built in the United States, but sold to French traders. The Antelope was Spanish. Story wove together religious and natural law imagery to determine that La Jeune Eugénie was involved illicitly in the slave trade. Such trade was "repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice." Marshall, alternatively, in *The Antelope* refused to judge the merits of the case based on

the "abhorrent" nature of the slave trade. "In other words," White explains, "Marshall declined to distinguish cases where slaves claimed freedom from other property cases." Story and Marshall's opinions "appeared to be irreconcilable" regarding the question of the legality of the slave trade by foreign nations, yet White determines that they were not. White contends, for instance, that *La Jeune Eugénie* and *The Antelope* "were not identical" cases but in neither decision was property expected to be forfeited. Comparing *La Jeune Eugénie* and *The Antelope* demonstrates Marshall's effort to support fellow jurists who used natural law and religious imagery, even though he personally avoided doing so himself. Therefore, the chief justice would have remained true to temperament if he extracted Evarts's reasoning from his moral exhortations.[11]

Robert J. Miller's reflections on Marshall's support for the Doctrine of Discovery are also noteworthy. *Johnson* v. *McIntosh* (1823) was Marshall's first major decision on Indian land ownership; thus Evarts's explicitly discussed *Johnson* in his "William Penn" arguments. Although not directly involving Native Peoples, the case centered on individual speculator's rights to purchase Indian land. Attorneys for *Johnson* asked the Court to decide whether or not Indians had the right to sell the lands they lived on. In a move that defined his judicial character, Marshall chose a middle path. He invoked the medieval idea of "doctrine of discovery," which confirmed the Native American right to sell land. Miller indicates that Marshall's view of the Doctrine remains consistent throughout its development from *Johnson* to *Worcester.* Yet Evarts' arguments indicate that Marshall's opinions on the Doctrine shifted subtly, but significantly, with explicit requirements that the federal government alone should make these purchases, a demarcation reasonably inferred from the U.S. Constitution. Jackson's Indian Removal Act of 1830, however, was dangerously close, in both Evarts and Marshall's eyes, to being unconstitutional, because it transferred property sales from Congress to the Executive. Evarts

argued vehemently against the Act; the decision was close, but ultimately, Jackson's bill for unilateral executive controls prevailed.

Miller delineates the Doctrine itself as "the legal authority for colonizing." He believes that the Supreme Court's use of the Doctrine remained intact through the Cherokee cases, "demonstrated its continued adherence," in a way that implies consistency from the earlier case, *Johnson*, from 1823. While Marshall believed that discovery indicated dominance "maintained and established," as Miller rightly insists, ""by the sword" as the "right of the strongest,"" Yet Evarts, and later Marshall, attempted to soften the arbitrariness of power through federal treaty law. In *Worcester,* Marshall supported federal government control over Indian sovereignty, but he did so in light of the 1830 Indian Removal Act, because Cherokee advocates believed that Congressional power would have given better protections. After rendering the Johnson decision, six years earlier, Hobson believes that Marshall became dismayed at seeing his opinion "cited in support of Georgia's pretensions," and used to continue stripping Native Peoples of their lands with impunity. Therefore, in his 1829 essays, Evarts, understanding Marshall's intent, effectively rescued *Johnson* by explaining it. The idea of discovery meant that Indians could not sell to individual speculators but only to the United States as a sovereign nation; therefore *Johnson* upheld treaty rights. Such rights, Evarts claimed and Marshall confirmed in *Worcester*, granted Native Peoples some protection.[12]

To demonstrate Burke's claim on behalf of Evarts' influence, and consequently Marshall's familiarity, it is useful to show how the essays thread continuously from the original publication in 1829 to Marshall's *Worcester* decision, three years later. Congressmen supporting the Cherokees, against the impending Indian Removal Act, were the first to use Evarts' arguments within months of their publication. New Jersey Senator Theodore Frelinghuysen and

Connecticut Representative William W. Ellsworth exemplify. While neither copied Evarts' arguments verbatim, they followed his reasoning. Like Evarts, they mentioned other treaties, but centered their attention on Hopewell and Holston. They invoked the honor of past presidents, Washington and Jefferson (Frelinghuysen added Madison and Monroe). They claimed, again like Evarts, that past Congresses brokered these treaties in good faith, expecting them to be sustained. They implored the United States to remain honorable before the international community by upholding its treaties. "We shall not stand justified before the world," Ellsworth declared, "in taking any step which shall lead to oppression." Georgia had no right, these congressmen claimed, to assert state sovereignty over the Constitutionally-granted federal relationship with Indians. "If these [treaty] defenses can be assailed and broken down," Frelinghuysen orated, "truth and honor have no citadel on earth," concluding ominously, "and the law of the strongest prevails." Although worded differently, the arguments were Evarts's, published a few months earlier. "Most certainly an indelible stigma will be fixed upon us, if," Evarts admonished, in "the plenitude of our power, and in the pride of our superiority, we shall be guilty of manifest injustice to our weak and defenseless neighbors." Evarts' biographer, Andrew, notes that, as secretary of the influential ABCFM, multiple letters between Evarts and sympathetic congressmen demonstrate that they worked closely together.[13]

Similarly, prosecuting attorneys John Sergeant and William Wirt used the arguments from Evarts's essays in their briefs for *Cherokee Nation*. Presciently worried that Marshall might not grant the Cherokees direct jurisdiction to the Supreme Court; Evarts, and later, Sergeant and Wirt deliberated in considerable detail that the Cherokees were a foreign state, as described in the Constitution, Article III, Section 2, with legal right to bring suit. All three attorneys used the treaties of Hopewell and Holston to bolster this claim. Some arguments Sergeant emphasized;

others Wirt presented in greater depth, but both representatives relied on Evarts' earlier deliberations.

Sergeant declared treaty law superior to state law. President Washington recognized the Cherokees as a nation, he claimed. The federal government had not revoked its treaties with the Cherokees. Washington and the senate gave a "solemn guarantee" concerning the boundaries of their nation. The Cherokees' increasing vulnerability did not invalidate their rights. "A state is still a state," Sergeant insisted, "though it may not be of the highest grade, or even though it may have surrendered some of the powers of sovereignty." Likewise, Evarts had wondered, "It remains to be seen whether a treaty will bind the United States to a weak and dependent ally." Evarts challenged, "whether force is to be the only arbiter in the case." To Sergeant, the United States owed allegiance to the Cherokees who had been "guided" by U.S. counsels toward adopting civilized lives. Like Evarts he claimed the Cherokees had rights as the original owners of their territory, as well as rights to self govern. Further, Georgia had overstepped itself, both in its violence towards the Cherokees and their denial of federal jurisdiction. Evarts had presented each of these arguments in his "William Penn" essays.[14]

William Wirt also recognized the Cherokees as an ancient people with rights associated with first occupancy, further substantiated by United States treaties. Wirt referred to eighteenth-century political philosopher Emmerich de Vattel's *Law of Nations*, as did Evarts. Wirt claimed that the Cherokees were a weakened nation, but not a conquered one, which, he argued, would have put them completely at the mercy of the United States. The Cherokees may have been "worsted in battle," Wirt explained, "but as a nation they have never bowed their necks to the yoke of a conqueror." Evarts avoided defining the Cherokees as either a conquered people or not, but he considered the merits of the question. Evarts concluded that even if the Cherokees were

conquered, the U.S. would appear ridiculous if it established treaty boundaries, then did not "respect the boundary" they established. Evarts claimed and Wirt later agreed that the Cherokees were not powerless; during treaty negotiations at Hopewell, the United States was "more desirous of peace than the Cherokees were." Regardless, Wirt may have chosen differently from Evarts to define the Cherokees as unconquered, but Evarts raised the original argument. As did Evarts, Wirt gave considerable attention to the treaty of Holston, and similarly attached Washington's honor to the United States' willingness to uphold it. Wirt noted that Holston was the first treaty ratified under the U.S. Constitution. "It was a measure taken with unexampled deliberation, by a great and wise man," Wirt concluded. Likewise, Evarts stated earlier that Washington and the senators "were doubtless peculiarly cautious on the first exercise of the treaty-making power."[15]

Softening Evarts' righteous anger, his allies still followed the "William Penn" arguments. Wirt suggested, for instance, that it would be shortsighted for Congress to acquiesce to a president who significantly diverged from his predecessors. What if Jackson's successor felt differently? "After the next election of President," Wirt reasoned, "you would probably have to retrace your steps." Alternatively, Evarts blasted any logic behind national inconsistency. "It is humiliating to be obliged to prove, that parties to a treaty are bound by it." He asserted, "To pretend the contrary is an utter perversion of reason and common sense."[16]

The Cherokees, however, lost their case. Justice Smith Thompson (with Joseph Story concurring) wrote the dissenting opinion of *Cherokee Nation.* As they favored Cherokee sovereignty as a foreign nation, they used themes already laid out by Evarts. Thompson wrote that the Cherokees were a legitimate foreign nation, as understood in the Constitution. Nations treated together for peace, and like his anti-removal predecessors, Thompson used treaties

Hopewell and Holston to confirm Cherokee nationhood, and resultant sovereignty rights. These rights verified Cherokee land claims, which they should be able to enjoy unmolested by Georgian settlers. Thompson agreed that Georgia, by presiding over the Cherokees, ignored U.S. treaties and overstated their legal bounds. "It is sufficient, if it be really sovereign and independent," Thompson concluded, the Cherokee Nation "must govern itself by its own authority and laws." Thompson's opinion, supported by Story, remained true to Evarts.[17]

Chief Justice Marshall disagreed, writing the majority opinion. *Cherokee Nation* v. *Georgia* denied that the Cherokee Nation could directly bring suit to the U.S. Supreme Court. Marshall believed that the Supreme Courts' jurisdiction in *Cherokee Nation* was disputable, and could be argued effectively in either direction. The Cherokees had significant public and legal supports, but, Marshall also knew they had powerful detractors, including members of his own court and the popular President Jackson. If Marshall were to grant the Cherokee Nation explicit rights and protections, he needed jurisdictional grounds unquestioned by the majority of his fellow jurists.[18]

Although *Cherokee Nation* denies Cherokee Nation sovereignty rights as a foreign nation, Marshall had taken the "middle road" of his time, barely holding majority opinion. In his introduction, Marshall claimed that he wanted to render a decision, but felt that he could not due to jurisdiction constraints. "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." Marshall restrained the bench's authority. "Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?" Within Marshall's denial, however, he went further than required, and created a new legal identity: domestic dependent nation. "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their

wants; and address the President as their great father." The Cherokees were "in a state of pupilage;" the United States held the responsibilities of a "ward to his guardian." Therefore, Marshall went further than denying suit; he also presumed the Cherokees had protections, although he remained vague as to what these protections would be.[19]

What, precisely, was the chief justice thinking? With or without Evarts's influence, the evidence seems conflicting. Why would Marshall appear to encourage suit through his correspondence with Dabney Carr, then reject their claim? After denying jurisdiction, Charles Hobson demonstrates that the chief justice simultaneously "played no small part in keeping the case alive." Fellow justices Henry Baldwin and William Johnson concurred when Marshall denied Cherokee jurisdiction, but as Marshall also expounded upon U.S. responsibilities, these justices felt compelled to write separate and less expansive opinions. Further, Marshall publicly expressed dissatisfaction with *Cherokee Nation*, claiming that he had no time "to consider the case in its various bearings." Yet his lack-of-time excuse, Hobson demonstrates, is curiously spurious. Wirt discovered that Marshall had searched extensively through state dockets, looking for possible cases that would grant jurisdiction, before rendering his *Cherokee Nation* decision. Marshall may have felt dissatisfied with his opinion, but it was unlikely due to time constraints or uncertainties over Cherokee rights. As concluding evidence of Marshall's implicit Cherokee support, even as he decided against them, he made an unusual political move for the early nineteenth century. Uncharacteristically, Marshall encouraged justices Thompson and Story to publish dissenting opinions through court reporter Richard Peters. "In terms of page count," and other such evidence of indirect support, Hobson believes that Peters' publication, approved by Marshall, "weighed heavily in favor of the Cherokees," thus encouraging the Cherokees to continue pursuing their cause beyond *Cherokee Nation*. With Evarts' arguments in the public

mind, the chief justice intentionally restricted himself from presenting his full opinion in *Cherokee Nation*, due to a lack of judicial and political support, *not* because he was uncertain.[20]

Yet *Cherokee Nation* also served one component of Marshall's interests. While he wanted to establish Cherokee sovereignty rights; simultaneously, he wanted these rights to be limited. Marshall had served under General Washington during the Revolutionary War, and he remembered violence perpetrated by still powerful tribal groups in his biography of the first president. "Unprovoked aggression had been made by the southern Indians," Marshall recalled of Washington's multiple wartime worries. "There was just cause for apprehension that the war would extend to [the southern Indians] also," Marshall reflected. *Cherokee Nation* may have been Marshall's stepping stone to his *Worcester* decision, but it was *not* a nascent exploration of Indian sovereignty rights, as White and Newmyer suggest. Marshall knew precisely what he wanted: to protect Cherokee sovereignty, *and simultaneously*, to prevent them from returning to a level of autonomy that might threaten U.S. interests. Neither, however, did Marshall support Georgia's violent misuse of his earlier decision *Johnson* v. *McIntosh* (1823). Marshall powerfully influenced the court, but he did not rule the other justices. William Johnson, Jefferson's first appointment, often checked Marshall's views; John McLean, Jackson's first appointment, could be swayed by Marshall, but not always. Even with Marshall's tight self-restrictions, *Cherokee Nation* was a divided opinion. It was also, for Marshall, incomplete. Therefore, with unprecedented effort, he promoted a continued public debate on Cherokee legal rights, encouraging the Cherokee Nation to persevere and pressuring his fellow justices to reconsider.[21]

Marshall's moment came the following year. Evarts died in May of 1831, a few months after Marshall submitted his *Cherokee Nation* decision. Earlier in February, however, Evarts sent

an intriguing piece of advice to ABCFM missionary to the Cherokees, Samuel Worcester. "If Georgia should carry some of you to prison," Evarts suggested, "the fact would rouse this whole country." In July of 1831, Samuel Worcester and Elizur Butler took Evarts's advice by refusing to submit to Georgia's dictates against the Cherokees, thereby precipitating Marshall's final decision. Georgia took the bait, deposited the white missionaries in jail, and thus provided the Cherokee Nation with Supreme Court access.[22]

Samuel Worcester published a running commentary on their arrest by the Georgia Guard. The missionaries were chained, forced to walk for miles, and eventually sentenced to hard labor. As Evarts had predicted, the American public was outraged and enough Supreme Court justices were sufficiently nudged. In *Worcester* v. *Georgia*, Marshall submitted the majority opinion on behalf of the missionaries. The Georgia laws, he announced, "have no force to divest the plaintiff [Samuel Worcester] in error of his property or liberty." Further, the state laws were "repugnant to the Constitution of the United States and the treaties and laws made under it." Georgia did not have the right to remove the missionaries from the Cherokee lands; the state's actions were void and unconstitutional. Marshall, however, did not simply free the missionary prisoners, he declared the Cherokee Nation sovereign. "The Cherokee nation is a distinct community occupying its own territory." Marshall declared, "The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States."[23]

As Burke states, and this essay delineates the linking arguments over the course of three years to prove, Marshall adopted the original frame of Evarts's argument. Evarts had set the methodological standard. None deviated significantly from Evarts's format including treaty analysis, national responsibilities, and sovereignty rights. Marshall may have refrained from

adapting Evarts's ideological exhortations, and certainly he heard later arguments from Congress and jurists, but as had everyone else, he based the *Worcester* decision supporting Cherokee sovereignty rights on Evarts' original arguments. Unleashed from jurisdictional doubts and with majority support in his court, Marshall finally responded to Evarts's question posed three years earlier: "*Have the Indian tribes*," Evarts asked, "*a permanent title to the territory, which they inherited from their fathers, which they have never forfeited nor sold, and which they now occupy?*" The treaties established by the United States of America, "acknowledge the said Cherokee Nation to be a sovereign nation," Marshall avowed, "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, in reference to acts done within their own territory." Marshall continued, "the whole of the territory now occupied by the Cherokee nation, on the east of the Mississippi, has been solemnly guaranteed to them; all of which treaties are existing treaties at this day, and in full force." The evidence of Evarts' influence on *Worcester* demonstrates that Marshall had a comprehensive set of arguments in mind when he wrote *both* decisions: *Cherokee Nation* and *Worcester*.[24]

The "William Penn" essays and *Worcester* compare in the following ways: Evarts and Marshall discussed the same treaties and congressional acts, such as the Treaties of Hopewell (1785), Holston (1791-2), and the Indian Civilization Act of 1819. They expressed similar ideas about Washington's intentions towards the Indians through these federal acts. They looked at the characteristics of Cherokee dependency on federal protection, as well as the nature of Cherokee sovereignty. They acknowledged Georgia's actions towards the Cherokees as a states' rights issue, but concluded that Georgia ultimately needed to support national interests. Evarts and Marshall reviewed presidential responsibilities, and finally, they discussed sovereignty rights in

terms of natural law. At times, Marshall expressed alternative views to Evarts's rationale. Yet whether agreeing with Evarts or not, a textual comparison reveals that Marshall used the logical order of the "William Penn" essays.

Despite fundamental similarities, *Worcester* is not simply the "William Penn" essays reframed. Since Marshall had rejected Cherokee jurisdiction in *Cherokee Nation*, the early sections of *Worcester* are devoted to jurisdictional reflections precipitated by the arrest of the missionaries, a situation which developed after Evarts' death, albeit at his suggestion. After Marshall declared the missionaries unlawfully imprisoned, he validated U.S. treaty rights on behalf of Cherokee sovereignty, with reasoning provided three years earlier by Jeremiah Evarts.

Joseph Burke, however, minimizes the role of the Cherokees in these Cherokee decisions. In spite of Marshall's sweeping pronouncements, and as Marshall most certainly expected, President Jackson did not enforce *Worcester* by demanding that Georgia free the missionaries. Burke, in "The Cherokee Cases," explains that both Marshall and Jackson knew that even if Jackson agreed with Marshall (which he did not), technically, the president could *not* free the missionaries from the Georgian prisons. Therefore *Worcester*, Burke reasons, provided Marshall with the moral justification he needed to increase Supreme Court power. The Judiciary Act of 1789, upon which Marshall based his jurisdiction for *Worcester* through Section 25, was flawed. Because the Georgia court did not refuse to comply in writing, but simply ignored the decision, the Supreme Court had no authority to enforce its rulings. Through his *Worcester* arguments, prosecuting attorney William Wirt exposed this deficiency, observing that even if he convinced the Court, "since the Georgia court never put its refusal [to submit to the *Worcester* decision] in writing, the Supreme Court could not have awarded execution in its next Term." Because Marshall was aware of this flaw, Burke concludes, he made his principled stand on behalf of the

Cherokees for an entity much closer to Marshall's judicial heart—the Supreme Court. Marshall deliberated over *Worcester* in 1832, the same year as Jackson's re-election campaign. This election, Burke claims, "was not simply a contest of parties but a battle for the Court and the Constitution." While *Worcester* did little for the Cherokees, Burke notes that it did much for the Court.

Thus, Burke argues that in the following year, in order to resolve the problem exposed by *Worcester*, Congress passed the Force Act of 1833 which, in addition to granting the Executive new powers, also enabled the Supreme Court to enforce opinions, as Marshall had sought.[25] Marshall's supposed risks on behalf of the Cherokees were not as risky as they seemed (since Jackson was not bound to enforce the decision anyway), and Burke decides, apparently not even about the Cherokees. Burke believes that Marshall's stand on behalf of the Cherokees was an "act," in which he only *appeared* to brave "the wrath of Georgia and Jackson and [risk] the prestige of the Court by declaring all of the recent Georgia Indian laws unconstitutional and ordering the missionaries released." Burke concludes, "The Marshall Court was moved by politics and morality in the Cherokee cases but it moved no farther than the law allowed."[26]

Actually, Marshall's *Worcester* decision may have gambled with congressional support for the Force Act. Historians such as William Freehling explain that the driving force behind the 1833 Force Act was Jackson's nullification controversy over South Carolina. While the new Vice-President Martin Van Buren encouraged diplomatic caution, Jackson wanted to make a show of federal strength against that recalcitrant state's effort to nullify federal law. Old time federalists such as Marshall and Daniel Webster found in the Act a chance to build federal power. Webster was a principal supporter of the 1833 Act, yet, contrary to Burke's argument, he pointedly disavowed that it had anything to do with the Court's earlier altercation with Georgia;

the reference was too politically charged. In other words, *Worcester*, which Burke argues facilitated the Force Act, is the same decision that contemporary proponents of the Act tried to ignore. William Wirt, the Cherokee attorney argued in *Worcester* that the Supreme Court needed enforcement laws, and did not have them. Supporters of the Act knew that the *Worcester* decision made the problem more visible, but tried to minimize any connection of the intended Act with that *Worcester* decision. In reality, Marshall risked Court prestige on behalf of the Cherokees, precisely what he had spent his career as chief justice trying to build and protect.

Burke misses essential components of Marshall's strategy when concluding that Marshall's deliberations on the Cherokee cases were, ultimately, not about the Cherokees at all. Subsequent historians, White and Newmyer, have accurately rejected Burke's conclusion that *Worcester* was more about Marshall's concern for Supreme Court power than about the Cherokees. Burke himself acknowledges that most of Marshall's opinion was "unnecessary to a decision resting on the conflict between federal and Georgia law." Why would Marshall make an unnecessarily "elaborate argument for Cherokee independence" if he felt no investment in their cause? Almost everyone involved in the *Worcester* decision risked significant social capital to promote the case. Missionaries Samuel Worcester and Elizur Butler chose prison on behalf of Cherokee rights. In their interests and despite Jacksonian press attacks on his credibility, Wirt argued *Worcester* on the broadest possible grounds which included Cherokee sovereignty, because it was these broad grounds that put the missionaries before the Court in the first place. Marshall, in turn, responded broadly by delineating "unnecessary" arguments on behalf of Cherokee sovereignty rights at great political risk. While Burke concludes that *Worcester*, in the end, had little to do with the Cherokees, the evidence he provides within his own detailed study invites the alternative conclusion that, indeed, *Cherokee Nation* and *Worcester* were centrally

about Cherokee Nation sovereignty rights. Finally, if Burke is correct that Marshall's ultimate purpose was for Supreme Court power with no real interest in Cherokee rights, it would expose him as uncharacteristically mean-spirited. Would Marshall intentionally encourage the Cherokees to incur great expense pursuing a Supreme Court decision that would give them no benefit?[27]

Later Marshall historians, White and Newmyer, recognize the genuine concern that Marshall brought to the Cherokee cases, unlike Burke, they conclude that *Cherokee Nation*'s restrictions deviate from *Worcester*'s sovereignty protections. The Evarts' thread elucidated in Burke's 1969 law review is lost by subsequent Marshall historians because while Burke acknowledges Evarts' influence, he attributes the dissenting opinion of Justice Smith Thompson in *Cherokee Nation*, to be Marshall's direct influence on the latter case. Thus, White and Newmyer have lost track of Evarts' connection, suggesting that the chief justice's opinion was still evolving during *Cherokee Nation*. Reviewing the lineage of the arguments, it should be clear that Marshall may have adopted Thompson's presentation of Cherokee sovereignty arguments for *Worcester*, but he was already familiar with these arguments made earlier by Evarts.

As a newspaper publication, Evarts' essays stand outside the normal purview of legal history documentation. Burke had stated Evarts' influence in his early but authoritative review, but had not made the case. It had been easy for later Marshall historians to lose track of Burke's acknowledgement, and therefore the implications of Evarts' timely influence. Yet the evidence shows that Evarts provided Marshall with a comprehensive legal position in 1829, three years before he decided *Worcester* and two years before *Cherokee Nation*. R. Kent Newmyer notes that "the mark of a good lawyer is to fashion his argument to the judge's liking." Although the

source of *Worcester* was atypical, Evarts's "William Penn" essays provided a judicial petition that Marshall could embrace.[28]

By overlooking the "William Penn" essays, these scholars have argued that Marshall's opinion was evolving through these two cases, even awkwardly uncertain. Although this paper argues otherwise, the "muddled-thinking" narrative of Marshall's decisions should be reviewed. White, for instance, avoids reflecting on Marshall's intentions for *Cherokee Nation*, but notes that the decision's "tone" contrasted with *Worcester*. Newmyer suggests that *Cherokee Nation* reads like an ill-considered decision created by a justice who had temporarily lost his mental acuity, but who regained it in *Worcester.* Marshall's "doctrinal improvisation" in the earlier case was, Newmyer put it bluntly, "insultingly paternalistic." The entire opinion, Newmyer continues, displayed hesitancy. "Its lack of supporting argument, conveyed the impression that the old chief justice was slipping." Later, when Newmyer discusses *Worcester*, he argues that Marshall wrote *that* decision with cogency and resolve. Aside from observing that *Worcester* brought new clarity to the issue of Cherokee sovereignty, by ignoring Evarts's direct influence on Marshall, these authors miss significant evidence that explains why Marshall's position *appeared* to shift, when in fact, it did not. Both Newmyer and Burke come closest to recognizing Evarts's influence, albeit indirectly. Newmyer, correctly, sees that "the two cases have to be considered in tandem"; *Cherokee Nation* was, therefore, "a bridge to *Worcester* v. *Georgia*." Yet Newmyer's reasoning falls short because he misses the significance of the "William Penn" essays. Newmyer suggests that the two decisions reflect a personal journey for Marshall. In the first case, Marshall was hesitant, rendering a judgment without supporting arguments. With the second, Newmyer concludes, Marshall was the principled old soldier, "ready to meet his enemy for the last time."

In light of Evarts's influence, Marshall was preparing the nation, not himself personally, for his upcoming decision.[29]

Marshall's political acumen and timing gave both *Cherokee Nation* and *Worcester* lasting judicial value as the foundations of federal Indian law. The United States and Native Americans continue to negotiate their precise legal relationship, which emanates from Marshall's original ideas: U.S. guardianship, Indian pupilage, and sovereign relationships. But, Marshall's own thoughts on Indian sovereignty rights and U.S. responsibilities ceased evolving after 1829 with the publication of Evarts's "William Penn" essays. Softening the harder Doctrine interpretations of *Johnson*, but still protecting United States interests, together, *Cherokee Nation* and *Worcester* reflect Marshall's consistent belief that the Cherokees should be simultaneously: fairly treated, non-threatening, and independent.

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[1] See Tim Alan Garrison, "United States Indian Policy in Sectional Crisis: Georgia's Exploitation of the Compact of 1802," Paul Finkelman and Donald R. Kennon, eds., *Congress and the Emergence of Sectionalism: From the Missouri Compromise to the Age of Jackson*, (Athens, OH, 2008), 97-124.
[2] See ibid.
[3] William Wirt to Dabney Carr, June 21, 1830, John Pendleton Kennedy, *Memoirs of the Life of William Wirt, Attorney-General of the United States*, (2 vols., Philadelphia, 1856), II: 254; John Marshall to Dabney Carr, June 26, 1830, *The Papers of John Marshall*, ed. Charles F. Hobson (12 vols., Chapel Hill, 1974-2006), 11: 381.
[4] Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review*, 21 (Feb., 1969), 510. See Garrison, "United States Indian Policy in Sectional Crisis," 97-124.
[5] Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848*, (New York, 2007), 121, 282. See: G. Edward White, *Marshall Court and Cultural Change, 1815-1835,* vols. III and IV, (New York, 1988); Hobson, *Papers of Marshall*, 12: 153-155. Bruce Laurie, *Artisans into Workers: Labor in Nineteenth-Century America*, (Urbana: University of Illinois Press, 1997). Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln*, (New York: Norton, 2005).
[6] From Evart's journal, we know that Marshall and he met at least once. Curiously, Evarts specifically related that Marshall and he *avoided* talking about the Cherokee Indians during that meeting. It was shortly before a congressional vote on Removal, and Evarts, at least, felt that such a conversation would have been inappropriate at that time. Francis Paul Prucha, ed., *Cherokee Removal: The "William Penn" Essays and Other Writings by Jeremiah Evarts*; E.C. Tracy, *Memoir of the Life of Jeremiah Evarts, Esq.*
[7] John A. Andrew III, *From Revivals to Removal: Jeremiah Evarts, the Cherokee Nation, and the Search for the Soul of America,* (Athens, GA, 1992); William McLoughlin, *Cherokees and Missionaries, 1789-1839,* (1984; rep., Norman, OK, 1995), 102-107.
[8] The *Daily National Intelligencer* published Evarts's essays from August 5 through December 19, 1829. The essays were subsequently reprinted in many other papers, predominantly from the northeast, with two notable exceptions: the *Richmond Inquirer*, from Virginia, and the *Southern Patriot* from South Carolina. Burke, "The Cherokee Cases," 505; Francis Paul Prucha, ed., *Cherokee Removal: The "William Penn" Essays and Other Writings,* (Knoxville, 1981), 8-11.

[9] Prucha, *Cherokee Removal,* 8-11, 51. John Marshall to Dabney Carr, June 26, 1830, Hobson, *Papers of Marshall*, 11: 381.
[10] Prucha, *Cherokee Removal*, 10-11, 39-51.
[11] White, *Marshall Court and Cultural Change,* IV: 697-702. *United States* v. *The La Jeune Eugénie,* 26 F. Cas. 832, 33 (1822); *The Antelope, The Vice-Consuls of Spain and Portugal, Libellants,* 23 U.S. 66, 6 L. Ed. 268, 10 Wheat. 66, 168, (1825).
[12] White, *Marshall Court and Cultural Change,* IV: 714-715; Hobson, *Papers of Marshall*, 12: 50. Evarts paraphrased Marshall, claiming "Chief Justice Marshall said, that the Indian title "is certainly to be respected by all courts, until it be *legitimately extinguished*."" (Prucha, *Cherokee Removal,* 120) Evarts's italics. He is referring to Marshall's statement, "the Court thought it necessary to notice the Indian title, which, although entitled to the respect of all Courts until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seisin in fee on the part of the State." *Johnson and Graham's Lessee* v. *William M'Intosh*, 21 U.S. 8 Wheat. 593 (1823). Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny*, (Lincoln: University of Nebraska Press, [2006] 2008), 12, 23, 54.
[13] Theodore Frelinghuysen and William W. Ellsworth, speeches before Congress, 7 April 1830 and 17 May 1830, *Speeches on the Passage of the Bill for the Removal of the Indians, Delivered in the Congress of the United States, April and May 1830*, (Boston, 1830), 14, 145; Andrew III, *From Revivals to Removal,* 208, 325n24; Prucha, *Cherokee Removal,* 49.
[14] Richard Peters, "Argument of Mr. Sergeant," *The Case of the Cherokee Nation against the State of Georgia; Argued and Determined at the Supreme Court of the United States, January term 1831*, (Philadelphia, 1831), 49-62; Prucha, *Cherokee Removal,* 81.
[15] Richard Peters, "Argument of Mr. Wirt," *The Case of the Cherokee Nation against the State of Georgia; Argued and Determined at the Supreme Court of the United States, January term 1831*, (Philadelphia, 1831), 74, 94; Prucha, *Cherokee Removal,* 64, 71.
[16] Peters, "Argument of Mr. Wirt," 150; Prucha, *Cherokee Removal,* 107.
[17] Richard Peters, "The Dissenting Opinion of Mr. Justice Thompson, concurred in by Mr. Justice Story," *The Case of the Cherokee Nation against the State of Georgia; Argued and Determined at the Supreme Court of the United States, January term 1831*, (Philadelphia, 1831), 197. See Burke, "The Cherokee Cases," 516, 522.
[18]Burke, "The Cherokee Cases," 514.
[19] *Cherokee Nation* v. *Georgia*, 30 U.S. 5 Pet. 15-18 (1831).
[20] Hobson, *Papers of Marshall*, Vol. XII, 53-56.
[21] Marshall published the final revisions of his Washington biography after the *Worcester* decision, indicating that he continued to remember Washington's difficulty in managing Indian violence during the Revolutionary War. John Marshall, *The Life of George Washington, Commander in Chief of the American Forces, During the War Which Established the Independence of his Country, and First President of the United States. Compiled Under the Inspection of the Honorable Bushrod Washington, from Original Papers Bequeathed to him by his Deceased Relative*, Second Edition, Revised and Corrected by the Author, Vol. II, (Philadelphia, 1836), 243. Andrew Denson in *Demanding the Cherokee Nation* (2004) indicates that Principle Chief John Ross understood Marshall's intent in *Cherokee Nation* precisely. Throughout the nineteenth century, the Cherokee leadership tried to live out the dictates of Marshall's earlier decision. They created a patterned response of resistance against further encroachments on their liberties by linking their nation's interests with the interests of the United States. They located intended violations to Cherokee rights onto isolated special interest groups who were attempting to blind, so they claimed, the larger American public. By alerting the American public to these attacks on the Cherokees, they pointed, repeatedly, to joint Cherokee and American interests. Henry Bedford considers the influence of the other justices of the Marshall Court, in particular, William Johnson. See Henry F. Bedford, "William Johnson and the Marshall Court," *South Carolina Historical Magazine*, Vol. 62, No. 3 (Jul., 1961), 165-171. For a breakdown of the judicial divisions of the *Cherokee Nation* decision, see David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law,* 5th ed. (St. Paul, MN: West Publishing Co., 2005), 110.
[22] Andrew III, *From Revivals to Removal,* 259.
[23] Jack Frederick Kilpatrick and Anna Gritts Kilpatrick, eds., *New Echota Letters: Contributions of Samuel A. Worcester to the Cherokee Phoenix*, (Dallas, 1968), 121-128; *Worcester* v. *Georgia*, 31 U.S. 6 Pet. 596 (1832).
[24] Prucha, *Cherokee Removal,* 52 (Evarts's italics); *Worcester* v. *Georgia*, 31 U.S. 6 Pet. 539 (1832).

[25] Burke implies Evarts's influence on Marshall indirectly through other jurists. Yet it is more likely to presume that Evarts inspired them all. Burke rightly correlates the dissenting opinions of Thompson and Story in *Cherokee Nation* with Marshall's later *Worcester* decision, although he misses Evarts as an earlier source. Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review*, Vol. 21, No. 3 (Feb., 1969), 526-531. See White, IV: 719; Newmyer, 446; Getches et al, 102; and Garrison, 279n18, 20.

[26] Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review*, Vol. 21, No. 3 (Feb., 1969), 500, 521-531.

[27] Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review*, Vol. 21, No. 3 (Feb., 1969), 521-531; Justice Henry Baldwin was the only dissenting judge concerning jurisdiction in *Worcester*, but he is generally recognized as appointed by President Jackson, not for judicial skill, but as a counterweight to whatever decision Marshall put forth. (R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, p. 406).

[28] Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 164.

[29] G. Edward White, *Marshall Court and Cultural Change, 1815-1835,* vols. III and IV, (New York: Macmillan Publishing Company, 1988) IV: 729-735. White's volumes are part of a larger series edited by Paul A. Freund and Stanley N. Katz, Gen. Eds., *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (12 vols., New York: Macmillan Publishing Company, 1971-2005); *The Papers of John Marshall*, ed. Charles F. Hobson (12 vols., Chapel Hill: University of North Carolina Press, 1974-2006) 12: 153-155. R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, (Baton Rouge: Louisiana State University Press, 2001), 449-452.