The Cherokee Cases: Motivation and Morality

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At the beginning of the nineteenth century, morality and humanitarian thought became an increasingly important agenda in the lives of Americans. Every state legislature in the North had abolished slavery by the end of the first decade, and abolitionist newspapers, detailing the horrors of slavery, began to be printed and read throughout New England. The South, in an effort to preserve its economic livelihood, passed laws in order to maintain a tight grip on the bondage of Africans. Similarly, theories of racial inferiority were introduced into intellectual thought. These laws and theories, however, were not limited to Africans as acts pertaining to American Indians passed through southern legislatures as well. Georgia, in particular, passed many laws that claimed jurisdiction over lands that were occupied by the Cherokee Indians.

The reasons for Georgia ultimately passing these laws derived not from an isolated incident, but from a long history of economical and racial motives. In an effort to curb this aggression by Georgia, the Cherokees brought two cases before the United States Supreme Court in a clash that is today called the Cherokee Cases. Specifically, the Supreme Court in Cherokee Nation v. Georgia denied an injunction by the Cherokees due to the Cherokee Nation not being a sovereign and independent nation. A year later, the Court sided with the Cherokees in Worcester v. Georgia, claiming the laws against the Cherokees unconstitutional. In deciding these cases, the justices of the Supreme Court struggled not with only the mere legal questions of the cases, but also with difficult moral ideologies surrounding the issue. ¹

Long before the laws in question were to be tried before the highest court in America, Georgia, along with the rest of the South, experienced a huge economical change. Before the Industrial and Transportation Revolutions, products such as rice, tobacco, and indigo were staple crops of the South. Many factors, such as the flooding of the tobacco market and an exhaustion of previously fertile land, led plantation owners of the South to look for a new yet profitable product. When Eli Whitney and Phineas Miller perfected the cotton gin and began to sell this revolutionary product in 1793, cotton soon became the popular money making crop of the Deep South. Soon, many plantation owners began to plant cotton exclusively and abandon traditional cash crops. As production increased, many farmers began to move west to clear new lands.² To this end, the plantations pushing west to use this new land along with the invention of the cotton gin brought about “a period of favorable economic change in the South.”³

While the economy of the area was improving, the population of the South also began to expand. The populations of Alabama and Mississippi exploded from 40,000 in 1810 to 200,000 in 1820 as they were admitted into the union in 1817 and 1819, respectively.⁴ Older states, such as Tennessee, Ohio, and Georgia, also increased in size from 750,000 people in 1810 to over two million in 1830. But unlike Alabama and Mississippi, the previously established Indian Territory borders prohibited the states of Georgia and Tennessee from expanding westward. ⁵ Therefore, Georgia coveted the land of the
Cherokees because a growing population was creating a demand for more space. Furthermore, the land that the Indians occupied was amazingly fertile and perfect for growing high yields of cotton. The discovery of gold and the potential for a port on the Tennessee River added to the economic motives of Georgia. In July 1829, gold was discovered on land that was inhabited by the Cherokees. Rumors spread of huge deposits, and men from several states illegally invaded Cherokee borders to claim their fortune. Georgia, now craving this wealthy land, chided both Cherokees and whites from other states as they passed laws that declared mining for gold in these deposits illegal. Interestingly, this law was challenged in a Georgia court and the law was struck down, “but executive ignored the ruling of the court of his own state.” The desire for wealthy land remained so intense that even the different branches of Georgia’s government quarreled. Equally important, the Cherokee Indians occupied land that bordered the Tennessee River, which connected to the Ohio and Mississippi rivers. Georgia wanted this land to build a port in order to increase its domestic trade with the other states. Economic theorists of the time “argued that Georgia’s full potential could never be reached until it could tap that vast inland market.” Politicians of the state wanted to build railroads that connected the agricultural inland of the state to a proposed port on the Tennessee, “But nothing could be done as long as the Cherokees remained in place.”

Strengthening the institution of slavery, which was critical to the plantation economy of Georgia, marks another possible motive for laws claiming jurisdiction over Cherokee lands. As stated earlier, the abolitionist movement was gaining support as every state in the North abolished slavery by 1804. Trying to keep a majority of votes in Congress was one of the ways the South reacted to these abolitionist sentiments. If Georgia could replace the Cherokees with white voters, southern representation would increase in the House of Representatives. By expanding pro-slavery influence in Congress, Georgia and the South could check the increasingly liberal northerners in the House and maintain a strong hold on the institution. New, increasingly rigid views of race and inferiority also contributed to Georgia’s passing of laws against the Cherokees. This new ideology of Indians and blacks being inferior to the white race was closely connected to the economic expansion of the Cotton Kingdom in the Deep South. Historian Reginald Horsman contends that hope gave way to despair due to present social conditions as he writes:

The political rhetoric of 1800 was permeated with optimism for the human race and a belief in racial improbability; that of 1850 with pessimism for inferior races. Part of this change was simply a product of the incredible material success of the “Anglo Saxons,” the failure to assimilate Indians, and the continued enslavement of blacks.

Indeed, the population of slaves grew as the Cotton Kingdom expanded. In 1790 there had not even been 700,000 slaves in the United States; by 1830 there were over two million. This increase of the number of blacks in America refined and increased the racial rhetoric of the South. Plantation owners relied more on slave labor for their economic livelihood at the first half of the nineteenth century more than any other time in American history. Moreover, the growing popularity of the abolitionist movement in the North continually forced southern intellectuals to polish philosophies of racial inferiority.
While this may be true, racist ideology was not limited to Africans. Before major assimilation attempts of the Cherokees and other Indian tribes were made by the United States, Indians were thought to be culturally, rather than racially inferior. But in trying to justify slavery by claiming that the white race was superior to all other races, many southerners began to consider that the Cherokees were also an inferior race. Although historians still debate on whether or not assimilation of the Cherokees was ultimately successful, the politicians of Georgia insisted that assimilation attempts had failed. John Forsyth, a Senator for Georgia argued Indians were “a race not admitted to be equal to the rest of the community… treated somewhat like human beings, but not admitted to be freemen…and probably never will be entitled to equal civil and political rights.” Wilson Lumpkin, a Georgia Representative, contended that mix-blooded Cherokees—those with both Cherokee and white heritage—were racially superior to full-blooded Cherokees as he explained:

The principal part of these enjoyments [schools, houses, Christianity] are confined to the blood of the white man, either in whole or in part. But few, very few of the real Indians participate largely in these blessings. A large portion of the full blooded Cherokees still remain a poor and degraded race of human beings…. From what I have seen, I can readily concluded that but a very small portion of the real Indians are in a state of improvement, whilst their lords and rulers are white men, and the descendents of white men…upon which they foster, feed, and clothe the most violent and dangerous enemies of our civil institutions.

Lumpkin, like other Georgians, concluded that Cherokee assimilation had failed because Indians were an inferior race incapable of being equal in intelligence and in culture to the white man. With these economic and racial ideologies in mind, the state legislature of Georgia passed a continuous series of laws in 1829 and 1830 that claimed sovereignty over Cherokee lands. Some of the laws, which were to go into effect throughout 1831, were aimed at encouraging migration westward while other laws openly stated that the Cherokees would be treated as unequal. For example, an Indian could no longer testify against a white man in Georgia State court, nor could chiefs of tribes meet or attempt to meet in the addressed territory.

Although the persisting economical and racial factors were at play, Georgia justified the actual seizing of Cherokee land merely on an 1802 ordinance with the United States government. In this ordinance, the federal government would remove all Indians within boundaries claimed by Georgia “as soon as it could be done under peaceably and reasonable terms,” while Georgia agreed to cede land to the future states of Alabama and Mississippi. According to the Georgia governor and legislature, the United States government had not only failed to carry out its end of the deal, but had also “aided and abetted” permanent settlement by encouraging Cherokee assimilation.

The legal pressure that Georgia asserted on the Cherokees was not only very harsh, but also too late. A principle intention of assimilation was to “civilize” the Cherokees while at the same time “release countless thousands of acres of ‘surplus’ land for white occupation.” Successful attempts of assimilation backfired, however, as the “civilized” Indians became involved in the plantation economy of the South and “knew
the true value of their lands and refused to part with them.”

The Cherokee Constitution, which was molded from basic principals that appear in the United States Constitution, reaffirmed the Cherokees refusal to leave the land as it declared current boundaries “shall hereafter remain unalterably the same” and “lands herein are, and shall remain, the common property of the [Cherokee] Nation.”

So many Cherokees practiced agriculture, it was nearly impossible to find an Indian that followed the traditional hunter-gatherer lifestyle. Regarding Indians who hunt for a living, the missionary Samuel Worcester wrote, “I certainly have not found them, not even heard of them, except from the floor of Congress, and other distant sources of information.”

Because assimilation grew so rapidly, many new aspects of Cherokee life mirrored a white southern lifestyle. Consequently, the Indians, who were attached to European ways and fertile land, refused to leave.

The Cherokees, who were certain their rights were being violated, turned to the federal government for help. It was soon clear however, that they would receive no help from the new president Andrew Jackson. A famous Indian fighter, Jackson viewed the issue as a feud between Georgia and the Cherokees and asserted the federal government “could not prevent the states from extending their jurisdiction over Indian Territory.”

Hoping for intervention by the Supreme Court, the Cherokees hired lawyers William Wirt and John Sergeant. These famous Cherokee lawyers immediately questioned the legality of Georgia’s legislation when an Indian named Corn Tassel was accused of murdering a fellow Indian and was arrested by Georgia authorities. Wirt and Sergeant challenged the validity of Georgia law by claiming Tassel was illegally arrested because only Cherokee law could be applied to the accused. Appealing to the United States Supreme Court, Wirt and Sergeant applied for a writ of error, which was granted. Georgia openly condemned the order reporting that “the interference by the Chief Justice of the Supreme Court of the United States in the administration of criminal laws of this state was a flagrant violation of her rights” and Tassel was executed.

With the criminal case of Tassel moot, Wirt and Sergeant tried another strategy to get Georgia’s laws to the Supreme Court. Three days after the death of Tassel, Wirt and Sergeant made motions for a subpoena of the Governor and attorney general of Georgia, along with an injunction to declare the laws of Georgia that extended jurisdiction over the Cherokees void. The Cherokees sued Georgia contending they were a foreign nation and, therefore, owed no allegiance to the United States or Georgia. Afraid that the Court would refuse to hear the case, Wirt sought Chief Justice John Marshall’s opinion on the matter before bringing the injunction. Wirt wrote a letter to his best friend, Judge Dabney Carr of the Virginia Court of Appeals, asking Carr to converse with Justice Marshall on the issue. Although refusing to give an official opinion, Marshall stated that he “wished, most sincerely, that both the Executive and Legislative departments had thought differently on the subject.” “Humanity,” Marshall noted, “must bewail the course which is pursued, whatever may be the decision of policy.”

Hearings for Cherokee Nation v. Georgia began on March 5, 1831, and the Cherokee lawyers raised questions of jurisdiction and morality in their argument. While Georgia refused to send legal counsel, Wirt and Sergeant exhaustingly argued the Court’s jurisdiction alleging “that from time immemorial the Cherokee nation have composed a sovereign and independent state,” and then gave several examples of the United States
government treating the Cherokees as a foreign nation. The Cherokee lawyers also knew that the question of enforcement laid heavily on the minds of the Justices due to fear that President Jackson would disregard a ruling that declared Georgia’s laws void. Near the end of the hearing, Wirt addressed this anxiety and pleaded with the Court not to let this question interfere with a just decision as he concluded:

In pronouncing your decree you will have declared the law; and it is part of the sworn duty of the President of the United States to ‘take care that the laws will be faithfully executed.’… If he refuses to perform his duty, the Constitution has provided a remedy. But is this Court to anticipate that the President will not do his duty, and to decline a given jurisdiction in that anticipation…. I believe that if the injunction shall be awarded, there is a moral force in the public sentiment of the American community, which will, alone sustain it and constrain obedience.

Even though they had thoroughly illustrated the legal basis for the case, Wirt and Sergeant hoped that by raising the issue of morality, the Justices would disregard the threat of President Jackson, feel sympathy for the Cherokees, and rule in their favor. When the opinions were read, the Supreme Court had ruled against the Cherokee nation, and although the official verdict was four to two, three separate pairs of opinions had emerged. Chief Justice Marshall wrote an ingenious decision that was reminiscent of the famous Marbury v. Madison opinion. Like Marbury, Marshall denied jurisdiction while criticizing a popular president. Writing for the majority of the Court, Marshall commented on the moral complications of the case as he wrote, “If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.” Truly, the Chief Justice felt compassion for the Cherokees explaining “this is not the tribunal which can redress the past.” Nevertheless, Marshall refused to abandon his construction of the Constitution as he tagged the Cherokees “domestic dependent nations” and denied authority in the matter. At the same time, the Chief Justice asserted that the wrong legal precedent had been brought to the Court by the Cherokee lawyers and suggested that the Court could hear another case, brought on different legal principles. Justices William Johnson and Henry Baldwin both wrote concurring opinions but disagreed sharply with Marshall’s majority opinion. Due to the stress on state rights and moral consideration, Johnson “found the case wholly political” and, therefore, “inappropriate for judicial consideration.” Johnson also speculated that if the Cherokees were a foreign nation, “the acts of the Georgia legislature were acts of war not to be settled by courts.” Justice Baldwin complained that Marshall’s “reasons for the judgement…seem to me more important than the judgement itself.” Worried that the Chief Justice’s opinion relied on ethics rather than legal reasoning, Baldwin warned, “The opinion of this court is of high authority in itself; and the judge who delivers it has a support as strong in moral influence over public opinion, as any human tribunal can impart.” Baldwin disagreed with Marshall’s sympathetic view to the point that he titles himself as a dissenting judge. The final pair of Justices, Smith Thompson and Joseph Story, dissent on the legal basis that the Cherokees did in fact represent a foreign nation, but humanitarian factors may have played a role in the writing of the Thompson’s dissent. When the Court rose on
the eighteenth of March, Thompson’s opinion had not been read, nor had it even been written. Marshall, who was angered that the Jacksonian Press had praised Cherokee Nation, “encouraged the dissenters, Thompson and Story, to write an opinion.”

Thompson explored many topics that Marshall had not addressed in the majority opinion, and the rhetoric answered arguments that were pointed out in both Johnson’s and Baldwin’s opinions.

Feeling pity for the Cherokees’ complex problem, Thompson stated, “Relief to the full extent prayed by the bill may be beyond the reach of this court.” Although no opinion was written by Justice Story, he later commented on the ethical difficulties of the case as he observed, “The subject touches the moral sense of all New England. It comes home to the religious feelings of our people; it moves their sensibilities, and strikes to the very bottom of their sense of justice.”

Georgia, with support from President Jackson and the Supreme Court’s denial of jurisdiction, continued to hold the Cherokees under tight legal pressure. Throughout 1831, several missionaries that resided in Cherokee lands were arrested. Georgia justified these arrests by pointing to section seven of an 1830 legislature act that stated:

That all white persons residing within the limits of the Cherokee nation, on the first day of March next [1831], or anytime thereafter, without a license or permit, from his Excellency the Governor…and who shall not have taken the oath [of allegiance to Georgia] hereinafter required, shall be guilty of an high misdemeanor, and upon conviction thereof, shall be punished by confinement in the Penitentiary at hard labor, for a term not less than four years.

Samuel Worcester, among others, was indicted under this law and went to trial at the Gwinnett County Superior Court in Lawrenceville, Georgia on September 15, 1831. In his defense, Worcester pleaded that the Georgia Court had no jurisdiction in the matter. Summarily, the missionaries were found guilty, jailed, and all but Worcester and Elizur Butler took an oath of allegiance to Georgia in return for a pardon.

The conditions surrounding the issue remained hostile as Worcester turned to William Wirt, who was preparing an appeal to the United States Supreme Court in an effort to bring the question of Indian sovereignty before the Court once again. The Supreme Court issued a writ of error to the County Superior Court in Georgia, and when the Governor of Georgia, Wilson Lumpkin, received the writ he proclaimed, “Any attempt to reverse the decision of the Superior Court…will be held by this State as an unconstitutional…interference in the administration of her criminal laws.”

Meanwhile, Americans who supported the Cherokees called the imprisonment of Worcester and Butler a “inhuman and unconstitutional outrage.” Under this high level of public consciousness, the Supreme Court began to hear arguments Worcester v. Georgia, and Wirt professed the merits of the case while an element of moral concern permeated throughout the courtroom. Again, Georgia refused to send counsel. An observer of Wirt’s argument wrote, “Several Cherokees…were present; and the deep solicitude depicted in their countenances must have moved the sympathy of every one present whose heart was not as hard as adamant.” Justice Story, who was impressed with Wirt’s plea, wrote, “I confess that I blush for my country when I perceive that such legislation, destructive of all faith and honor towards the Indians, is suffered to pass with…the present Government of the United States.”
Chief Justice Marshall again wrote the majority opinion and this time the Court sided with the Cherokees as he said jurisdiction was “too clear for controversy.” In an effort to establish Indian sovereignty, Marshall presented several instances in which the government had made treaties with the Cherokee and other Indians and then concluded:

The very term “nation,” so generally applied to them, means “a people distinct from others.” The constitution [sic], by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

The Chief Justice then declared the Cherokee Nation as “a distinct community occupying its own territory,” and, consequently, ruled “the act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.” Although Marshall offered a different outcome than in 1831, much of the ethical reasoning of Worcester did not differ greatly from that of Cherokee Nation. No longer feeling reserved due to a lack of jurisdiction, the Chief Justice could extensively discuss the merits of the case. Many aspects of Worcester, in fact, are “borrowed freely from Thompson’s dissenting opinion in Cherokee Nation.” One could suggest that Wirt’s argument was more convincing to Marshall in 1832 than it was in 1831. In fact, Judge Story reported that “Judge Marshall was affected to tears by the eloquent peroration of Wirt.”

Perhaps Marshall felt a greater urgency to “indulge his sympathies” in Worcester due to the change in the composition of the Court. Judge Gabriel Duvall, who sided with the Cherokees, had returned while Justice Johnson, an opponent of the Indian sovereignty, was now absent. In any event, the majority of the court agreed with the Cherokee counsel partially from moral, rather than legal, reasoning.

Narrowly defining Indian sovereignty, Justice McLean wrote a concurring opinion explaining “the exercise of the power of self-government by the Indians, within a State, is undoubtedly contemplated to be temporary.” Justice Baldwin, although officially dissenting on a technicality, wrote the merits of the case were the same as in his opinion in Cherokee Nation.

Tragically, the Supreme Court could only declare Georgia’s laws void; they could not, however, enforce the decision. Knowing that the Court had made the right decision, Justice Story wrote, “The Court has done its duty, now let the nation 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 at the consequences.” These fears were not unfounded as Georgia refused to change its policy toward the Cherokee and President Andrew Jackson would not interfere in the matter. In 1935, Jackson exploited factions within in the tribe and signed a treaty, which agreed to westward migration, with an unpopular minority of the Cherokees.

With the signing of this treaty, the Cherokee Nation began the infamous “Trail of Tears” death march into Indian Territory west of the Mississippi River. Although Jackson
deserves blame for the execution of the treaty, the Trail of Tears has its roots in the economic structure and increased racial tension in Georgia and the rest of the South. As cotton became the dominating cash crop, the South adopted increasingly rigid views of race. The laws of Georgia that claimed jurisdiction over the Cherokees, a product of these economical and racial factors, were challenge by the Wirt and Sergeant in the United States Supreme Court. After denying jurisdiction in Cherokee Nation, the Marshall Court ruled in Worcester that the Georgia laws that curbed the freedom of the Cherokees, who were a distinct and sovereign tribe, were unconstitutional. Although they based their opinions on legal precedent, the justices were clearly affected by their own moral virtues and the ethic ideology surrounding the Cherokee Cases.

Notes
3Ibid.
4Ibid., 126.
6Ulrich Bonnell Phillips, “The Expulsion of the Cherokees” in Louis Filler and Allen Gutman, eds., The Removal of the Cherokee Nation: Manifest Destiny of National Dishonor? (Boston: D.C. Heath and Company, 1962), 5-6. The State of Georgia created these laws that prohibited mining under the premise that the land was part of Georgia and not owned, but inhabited by the Cherokee Indians.
7Thomas V. Parker, The Cherokee Indians, With a Special Reference to Their Relations with the United States Government (New York: Grafton Press, 1907), 21.
8Purdue, The Cherokee Removal, 59.
9Ibid., 59-60.
10William Lee Miller, Arguing about Slavery: The Great Battle in the United States Congress (New York: A.A. Knopf, 1996), 17. “Vermont in 1777, on becoming a state, was by its own constitutional prohibition the first state without slavery; Massachusetts, by constitutional interpretation, was next, in 1781. In most other states, emancipation was gradual. New Jersey, in 1804, enacted the last emancipation act of a northern state.”
11Ibid., 60. Purdue argues that the South’s fear of an anti-slavery dominated Congress came from the Missouri Compromise of 1821. This anxiety, however had origins long before the Missouri Compromise and, for example, can be seen in the debates of the Constitutional Convention and in the debates of Congress. For discussions of this see Miller, Arguing about Slavery.
13Franklin, From Slavery to Freedom, 139.
14The United States Congress granted funds to stimulate Cherokee assimilation. For example, “In 1792 Congress appropriated funds for the agricultural portion of the thrust, and for teaching Indian women the domestic arts.” Also, “In 1798…the federal government gave Cherokees three hundred plows, thirty pairs of cotton cards, and any

15Purdue, The Cherokee Removal, 15.


3730 U.S. 20.

3830 U.S. 17.

3930 U.S. 20; Burke, “A Study in Law, Politics, and Morality,” 515; Purdue, The Cherokee Removal, 68.


4230 U.S. 32.

43Ibid.


45 Roper, Mr. Justice Thompson, 245.

46Burke, “a Study in Law, Politics, and Morality,” 516.

47Ibid.

4830 U.S. 51.

49Warren, The Supreme Court, 750. Story did not offer an opinion, but Thompson wrote “I am authorised [sic] by my brother Story to say, that he concurs with me in this opinion.” 30 U.S. 80.


52Ibid., 371.

53Warren, The Supreme Court, 754.


55Warren, The Supreme Court, 755.

56Ibid.


5831 U.S. 559-560.

5931 U.S. 561.

60Burke, “A Study in Law, Politics, and Morality,” 522.

61Warren, The Supreme Court, 756.

62Roper, Mr. Justice Thompson, 245.

6331 U.S. 593.

6431 U.S. 597.

65Warren, The Supreme Court, 757.
