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BY TODD B. ADAMS

How the 1823 case *Johnson v. McIntosh*[1] affected the catastrophe befalling American Indians in the early Republic is a major, continuing issue in early American Indian law.[2] Some scholars argue that the U.S. Supreme Court placed American Indian national title on a "firm legal foundation" that it had previously lacked,[3] but others argue that that the justices adopted "the perfect instrument of empire" in it.[4] Deciding which argument is more accurate requires more than debating legal theory in the abstract.[5] It requires inquiring into the economic, political, and other effects of the decision.[6] It requires exploring alternatives to the choices that the justices made in other early American Indian cases.[7]

Some simple game theory will help to do so because the economics of the catastrophe were more complex than they may seem on first glance.[8] Some European Americans would pay more for American Indian lands than others, although none of them wanted to pay very much.[9] Furthermore, European Americans were fighting among themselves over who would gather the most surplus, and this deeply affected negotiations over price with

1. 21 U.S. 543 (1823).

2. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 WM. & MARY LAW SCHOOL SCHOLARSHIP REPOSITORY 67, 67 (2001).

3. THE PAPERS OF JOHN MARSHALL DIGITAL EDITION: EDITORIAL NOTE 282 (Univ. of Virginia Press, Rotunda 2014).

4. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325 (Oxford Univ. Press 1990).

5. James Willard Hurst, *Old and New Dimensions of Research in United States Legal History*, 23 AM. J. LEGAL HIST. 1, 15 (1979).

6. *See id.* at 16.

7. *Id.* at 13-15 (arguing that these types of questions are vital to understanding how law affects women and minorities).

8. *See Game Theory in Economics*, MBA CRYSTAL BALL ADMISSION CONSULTANTS, https://www.mbacrystalball.com/blog/economics/game-theory/ (last visited Mar. 13, 2020).

9. *See A Brief History of Land Transfers Between American Indians and the United States Government*, CLARKE HISTORICAL LIBRARY, https://www.cmich.edu/library/clarke/ResearchResources/Native_American_Material/Treaty_Rights/Pages/New-Section—-The-Land.aspx (last visited Mar. 13, 2020).

American Indian nations.[10] All of this varied across the continent and over several centuries, so a narrower focus is needed.[11] As this article is inquiring into the role of the Court in the catastrophe, it makes sense to center the inquiry on Georgia, from the adoption of the Constitution until 1838, when the federal government removed the Cherokee.[12] This time frame and geographic location provided the underlying facts in three of the four major early American Indian law cases.[13]

Narrowing the focus and using game theory results in a more complex, richer understanding of role of the Court in the catastrophe.[14] The justices acted circumspectly in early American Indian law because of constitutional and legal ideas about the role and function of a court.[15] These ideas prevented a majority from enforcing legal rules that might have stopped the catastrophe befalling the Creek and Cherokee in Georgia.[16] Some of these ideas about law and the Constitution have remained vital, and this means the study of early American Indian law can help in remedying the continuing oppression of American Indians, African Americans, and others in the United States today by showing better how it happened in the past.[17]

I. THE ROLE OF THE COURT AND GAME THEORY IN GEORGIA

Better understanding the role of the Court in the catastrophe requires doing more than examining doctrine and case histories.[18] The Court's adoption of a rule limiting American Indian national title and born in white supremacy in *Johnson* must be placed in the broader context of European-Americans and American Indians competition over the natural resources of North America.[19] So must all the Court's decisions affecting American Indians in the early Republic.[20] Bargaining game theory helps in

10. *See generally* History.com Editors, *The Oklahoma Land Rush Begins*, HISTORY (Nov. 16, 2009), https://www.history.com/this-day-in-history/the-oklahoma-land-rush-begins.

11. *See A Brief History of Land Transfers Between American Indians and the United States Government*, *supra* note 9.

12. *See id.*

13. *See* Fletcher v. Peck, 10 U.S. 87, 127 (1810) (noting the sale of American Indian national lands in Georgia's western land claims); Cherokee Nation v. Georgia, 30 U.S. 1, 16-17 (1831) (noting the authority of Georgia to impose its laws over Cherokee national lands within Georgia's borders); Worcester v. Georgia, 31 U.S. 515, 538-39 (1832) (noting the authority of federal government in Georgia).

14. One goal of a historian is to imagine "a verifiable world of interconnections, of relationships which together add up to a better picture of the whole—more comprehensible, deeper, closer to the grain of reality—than had been seen before." BERNARD BAILYN, SOMETIMES AN ART, NINE ESSAYS ON HISTORY 95 (2015).

15. *See Native Americans and the Federal Government*, HISTORY TODAY, https://www.historytoday.com/print/9935/ (last visited Mar. 13, 2020).

16. *See id.*

17. *See id.*

18. *See* Hurst, *supra* note 5, at 15.

19. *See* WILLIAMS, JR., *supra* note 4, at 325.

20. *See* Hurst, *supra* note 5, at 18.

this inquiry by highlighting the role of the Court in setting the rules of this competition and enforcing them.[21] So too must all the Court's decisions affecting American Indians in the early Republic. Bargaining game theory helps in this inquiry by highlighting the role of the Court in setting the rules of this competition and enforcing them.[22]

A. The General Situation

In August 1789, the Creek and Cherokee Nations still had a reasonable bargaining position.[23] European Americans had a weak one.[24] They faced the danger of war along their entire western frontier.[25] A brand new Congress was creating a federal government and lacked money and the legal resources to fight any war.[26] Great Britain still occupied the Northwest in violation of the Treaty of Paris that ended the Revolutionary War[27] and prevented Congress from converting American Indian national lands in the Old Northwest into needed cash.[28]

To the South, Spain controlled New Orleans and the Louisiana Territory, thereby controlling access to markets for western European American settlers.[29] The latter had often resisted central governmental control.[30] Georgia had also followed its own American Indian policy as will be discussed below.[31]

In this dangerous situation, the administration argued that the best approach was a peaceful and more just—at least by its lights—policy toward American Indian affairs.[32] Translating this into economic terms in a broad sense that includes human suffering, the Washington administration was arguing that all involved could share in the cooperative surplus created by a

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21. *See* WILLIAMS, JR., *supra* note 4, at 7 (noting the historical origins of the limitation on American Indian title).

22. *See* Bellal Ahmed Bhuiyan, *An Overview of Game Theory and Some Applications*, LIX-LX PHILOSOPHY AND PROGRESS 111, 114, 122 (2016).

23. C:\Volumes\Public\LawReviewStudents\Vol. 46 2019-2020\46-2\Adams\See*See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 129 (2009).

24. *See id.*

25. *See id.*; FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 43-44 (1970).

26. *See* WOOD, *supra* note 23, at 95-96.

27. *See id.* at 111-12.

28. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 115, 122 (1993) (noting how Alexander Hamilton used American Indian lands to finance the federal government).

29. *See* WOOD, *supra* note 23, at 112-14.

30. *See id.* at 120-21.

31. *See infra* Part II.C.

32. Washington had first advocated this approach in 1783. Letter from George Washington, *To James Duane, September 7*, *in* 27 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 133, 133-34 (John C. Fitzpatrick ed., 1938).

willing transfer of American Indian national lands to the federal government by American Indian nations.[33]

B. The Players

Deciding who the players are in the catastrophe that befell the Creek and Cherokee nations is not a trivial task.[34] Great Britain, Spain, and American Indian nations other than the Creek and Cherokee played roles.[35] As the United States was not one nation in 1789, there were many competing segments of the European American population involved.[36] These included North Carolina,[37] the unsuccessful state of Franklin,[38] and small groups of European Americans who settled in American Indian country contrary to treaties and law.[39] African Americans whose slave labor was essential to European Americans earning high profits from cotton could be a player. [40] The people of Georgia and the United States were also potential players as they were the ultimate sovereigns.[41] Each of these groups divided and re-divided—as did the Creek and Cherokee nations—into factions about various issues.[42] The number of players is nearly endless, but this article will use only six players: The Creek Nation, the Cherokee Nation, the state of Georgia, and the three branches of the federal government.[43] At times, I will group the three federal branches together as the federal government player for convenience.[44]

C. More-or-less Reasonable Assumptions about Players Using Game Theory

Many classical (non-evolutionary) game theory assumptions about players need to be modified because all six players are sovereigns.[45] The typical assumption that players know everything about the game, including a

33. *Id.* at 140 ("bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them" are part of the cost of an American Indian war).

34. *See* JOHN WALTON CAUGHEY, MCGILLIVRAY OF THE CREEKS 22, 33 (1938).

35. *Id.*

36. *See* WOOD, *supra* note 23, at 36, 39.

37. *See* CAUGHEY, *supra* note 34, at 22.

38. *See* SAMUEL COLE WILLIAMS, THE LOST STATE OF FRANKLIN 177 (1933) (discussing relationship).

39. *See* WOOD, *supra* note 23, at 129.

40. ROBERT PRESTON BROOKS, HISTORY OF GEORGIA 226-27 (1913).

41. Most famously in "We the People of the United States, in Order to form a more perfect Union." U.S. CONST. Preamble.

42. *See* CAUGHEY, *supra* note 34, at 21.

43. *See infra* Part II.C.

44. *See infra* Part II.C.

45. Gregg Walker, *Fundamentals of Game Theory and Negotiation*, OREGON STATE UNIVERSITY, https://oregonstate.edu/instruct/comm440-540/gametheory.htm (last visited Mar. 13, 2020).

list of players and the available strategies of each player, and have complete knowledge of previous rounds, applies fairly well.[46] Most importantly, the assumption that the rules are fixed does not apply because all the players are sovereigns or branches of sovereigns that set—or to try to set—the rules of either bargaining game unilaterally or in conjunction with another player.[47] Furthermore, it means that violence and even war could be legitimate bargaining strategies.[48] Not only was white supremacy endemic among European American voters, but they composed different sovereigns who had different payoffs from following the peace and justice policy.[49]

Each player having different payoffs meant that they all could be fully rational and oppose one another's goals.[50] In game theory, a rational player will attempt to achieve their goals in the most efficacious manner possible, or in game theory terms, maximize their payoff.[51] Scholars have long criticized the idea that people—let alone nations—rationally maximize their payoffs from a selection of alternatives,[52] and, in collective action problems such as voting, it is doubly doubtful.[53] It is a more reasonable assumption for individual justices, however, and it is a moderately useful assumption for the entire Court.[54]

Importantly, a player will never choose a strategy that allows other players to force it to accept a lower payoff than necessary.[55] This means game theory can show how two players, each acting rationally to maximize their payoffs, can arrive at a situation where both players have lower individual payoffs than they could achieve using other strategies.[56] Finally, the game can be cooperative in the sense that players can enforce an agreement to cooperate with one another, or a non-cooperative game.[57] In the latter game, the parties may reach an agreement, but they cannot appeal to a third party to enforce it.[58] What this meant for European-Americans and American Indians

46. Giovanni Sartor, *Doing Justice to Rights and Values: Teleological Reasoning and Proportionality*, *in* STUDIES IN THE PHILOSOPHY OF LAW: GAME THEORY AND THE LAW 28 (Jerzy Stelmach & Wojciech Zaluski eds., 2013).

47. *See* Walker, *supra* note 45.

48. WILLIAM SPANIEL, GAME THEORY 101: BARGAINING 5-6 (2014).

49. *See* WILLIAMS JR., *supra* note 4, at 325.

50. Sartor, *supra* note 46, at 15-16.

51. *Id.*

52. *See id.* at 28.

53. *See id.* at 28-29.

54. *See id.* at 15.

55. *See* Wojciech Zaluski, *A Game-Theoretic Analysis of Justice*, *in* STUDIES IN THE PHILOSOPHY OF LAW: GAME THEORY AND THE LAW 28 (Jerzy Stelmach & Wojciech Zaluski eds., 2013).

56. *See* Sartor, *supra* note 46, at 25.

57. Till Grune-Yanoff, *Game Theory*, THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://www.iep.utm.edu/game-th/#SH2f (last visited Mar. 13, 2020).

58. *See* Sartor, *supra* note 46, at 21.

in the early Republic was that all the players might act rationally in both games and still end up with lower payoffs than they might have otherwise.[59]

The assumption that players know that the other players are rational and will maximize their economic welfare is also problematic in early North America.[60] For example, many European Americans could—and likely did—mistakenly believe that American Indians were not fully rational because of racial stereotypes, and this would make the situation impossible for game theory to study.[61] Game theory can model the situation where players have different levels of information, including about payoffs to each other during a round.[62] This was an important bargaining advantage for the federal government and Georgia, as the Creek and Cherokee initially lacked knowledge about how much their national lands were worth to any of the European American players.

D. Strategies Available to the Court

As a court of law, the justices had two basic choices and several subsidiary ones.[63] The two basic ones are: 1. They could accept jurisdiction over an issue or not; and 2. They could either decide the issue or decline to decide it.[64] The subsidiary choices reflect the reasons they could give for their decision: a) constitutional; b) legal; and, perhaps not strictly a separate choice, c) to decide the issue by deferring to the decision made by a different authority.[65] The reasons given are important, as they determine what role the Court will play in any area of the law and how easily a legislature can change it.

As a player, however, the Court was not entirely in control of its plays because it had jurisdiction over only an actual case or controversy.[66] Congress also limited the Court's appellate jurisdiction and other powers through the First Judiciary Act.[67] The justices could and would use a specific American Indian law case as a vehicle to address broader legal issues about the relationship of American Indians to European Americans, but they did not have to do so.[68] The restrictions on the Court's jurisdiction and the justices'

59. *See* Grune-Yanoff, *supra* note 57.
60. *See* Sartor, *supra* note 46, at 28.
61. *See id.*
62. *See id.*
63. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 337 (2013) (stating a legal historian "cannot disregard the fact that he is concerned with a legal creation that needs to be understood in a legal way").
64. U.S. CONST. art. III, § 2.
65. *Id.*
66. *Id.*
67. *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 33 (2012) (discussing the limitations).
68. *See Fletcher*, 10 U.S. at 124.

choices meant that the Court would not address any American Indian national title until 1810.[69]

E. Solving the game mathematically if that were possible

Many reasons prevent even this simplified game from being solved mathematically,[70] but using a mathematical approach heuristically can help describe what happened. In particular, a Nash solution may prove useful.[71] This solution allows for questions of distributive justice to be considered in addition to questions of economic efficiency because it does not assume the player who can use the land most efficiently should reap all the benefits from doing so.[72] It also shows that a wealthier player will capture more of the cooperative surplus than a poorer player because the threat of the latter walking away from the bargaining table is less than it is in the reverse situation, even if the rules are fair and followed.[73]

II. THE FIRST ROUND OF THE GAME LEADING UP TO *FLETCHER V. PECK* IN 1810

Bargaining among the United States central government, Georgia, and the Creek Nation over the surplus from Georgia's western land claims formed the factual basis of the Court's decision in *Fletcher v. Peck*, and it had been ongoing since the Declaration of Independence.[74] The European American players relied on the Constitution, statutory law, and military force in their bargaining among themselves and with the Creek nation.[75] They lastly relied on force, European alliances, and negotiation tactics to maintain their independence and gain as much of the surplus as they could.[76] However, time was against them and the Washington administration's peace and justice policy.

69. *See id.*

70. There are too many players, too many strategies, and too many erroneous assumptions.

71. Wojciech Zaluski, *A Game-Theoretic Analysis of Justice as Mutual Advantage*, *in* STUDIES IN THE PHILOSOPHY OF LAW: GAME THEORY AND THE LAW 97 (Jerzy Stelmach & Wojceich Zalusiki eds., 2011) (explaining Nash solution).

72. *Id.* at 100.

73. *Id.*

74. FARRIS W. CADLE, GEORGIA LAND SURVEYING HISTORY AND LAW 73 (1991) (noting Georgia imposed treaties on Creek and Cherokee nations after victories in the Revolutionary War); ALBERT JAMES PICKETT, HISTORY OF ALABAMA AND INCIDENTALLY OF GEORGIA AND MISSISSIPPI, FROM THE EARLIEST PERIOD 372 (1878) (noting Georgia sent adventurers to settle a county it created near the Mississippi river).

75. *Fletcher,* 10 U.S. at 99.

76. *Id.* at 104.

A. The Washington Administration's Peace and Justice Policy

The Washington administration based its peace and policy toward American Indian affairs upon the federal government's increased constitutional powers over American Indian affairs and law.[77] Its near term goal was to force a cooperative game on European Americans in Georgia and entice the Creek and Cherokee nations into cooperating with the federal government by acting more justly towards them.[78] It proposed Congress pass a law declaring all American Indian nations "possess[ed] the right of the soil of all lands within their limits" until fairly conveyed by them, although this did not include selling to anyone other than the federal government.[79] The latter would buy those lands in a "fair and open" treaty process.[80] The administration argued that doing anything else would violate natural law and distributive justice.[81]

It would also pass strict laws governing the conduct of individual European Americans.[82] All traders must have a federal license to prevent disputes that might cause violence as well as the sale of alcohol to American Indians.[83] European Americans who crossed the boundary faced civil and criminal penalties designed to remove any economic incentive from doing so.[84] The U.S. Army would enforce these laws separating European Americans from American Indians.[85]

So far, so good, but the administration also sought to capture most of the cooperative surplus for itself by paying only the value of American Indian national lands as hunting grounds rather than their value to individual European Americans.[86] If American Indians wanted to more of the surplus, they would have to become "civilized," that is, adopt European American

77. More by subtracting loopholes that states used to ignore the Continental Congress's American Indian policy than by addition. PRUCHA, *supra* note 25, at 30. The peace and justice policy built on the promises of good faith and justice toward American Indians in the Northwest Ordinance. *See* An Ordinance for the Government of the Territory of the United States, North-west of the River Ohio, art. III., 32 J. CONT. CONG., 334, 340-41 (1787); 1 Stat. 50 Chap. 8, 1 Congress, Session 1, An Act: To provide for the government of the territory north-west of the river Ohio. (Aug. 7, 1789), Stat. 50 (continuing it in effect).

78. *See American State Papers: Indian Affairs* 1:52-54 (1789).

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* PRUCHA, *supra* note 25, at 67.

83. *Id.*

84. REGINALD HORSMAN, EXPANSIONISM AND AMERICAN INDIAN POLICY, 1783-1812 62 (1967) (strengthening the Trade and Intercourse Act); PRUCHA, *supra* note 25, at 192-93 (describing the changes made with regard to criminal laws).

85. *See, e.g.,* 4 ANNALS OF CONG. 775 (1794) (so stating).

86. *American State Papers: Indian Affairs* 1:52-54 (1789).

mores and became U.S. citizens.[87] Exactly how long the federal government would protect the Creek and Cherokee in their effort was unclear.

B. The Treaty of New York

The Washington administration's attempt to create a cooperative surplus met with limited success.[88] Georgia opposed many of the measures, and Congress never declared American Indians had a right of the soil.[89] The state defied federal authority over American Indian affairs and asserted its sovereignty over its western land claims by selling Creek national lands to European Americans before the Creek had ceded the land in December 1789.[90] It also increased demand for Creek and Cherokee national land by giving away free land to soldiers and heads of European American families.[91] Finally, it maintained several state treaties with a small segment of the Creek nation were valid.[92] The administration would have to exclude Georgia from the bargaining table in order to reach agreement with the Creek.[93]

The Creek Nation rejected these treaties and cleverly negotiated a better price by raiding European American settlements, threatening a more general war, and entering into treaties with Spain.[94] These tried-and-true bargaining strategies worked.[95] The federal government returned some Creek national land that Georgia had acquired through war and bad faith negotiations before ratification of the Constitution.[96] It acknowledged Creek sovereignty, guaranteed its ownership of its remaining national lands, and allowed the Creek Nation to remove any European American settlers on its lands.[97]

87. *Id.*

88. Treaty with the Creeks, A Treaty of Peace and Friendship, 7 Stat. 35, art. V-VII (1790).

89. Watkins Digest at 387, 389 (Dec. 21, 1789) (The Act itself is "[a]n Act for disposing of certain vacant lands or territory within this State.")

90. CHARLES HOMER HASKINS, THE YAZOO LAND COMPANIES 396-400 (1891); *see, e.g.,* Zachariah Cox, *Advertisement of the proprietors of the Tennessee company* (September 2, 1790), 4 ASP: IA, at 115 (advertising for adventurers and promising to pay in American Indian national lands). The Act itself is "[a]n Act for disposing of certain vacant lands or territory within this State." WATKINS, *supra* note 89, at 389 (1800).

91. CADLE, *supra* note 74, at 61. The scale of these grants and the resulting fraud was immense. *Id.* at 73, 85; David A. Nichols, *Land, Republicanism, and Indians: Power and Policy in Early National Georgia, 1780-1825*, 85 GA. HIST. QUARTERLY 199, 207 (2001). The federal government also gave away immense tracks of American Indian land to soldiers because it could not pay them in cash. Rudolf Freund, *Military Bounty Lands and the Origins of the Public Domain*, 20 AGRICULTURAL HISTORY 8, 8 (1946) (noting 70-100 million acres for Revolutionary War and War of 1812 alone). This caused severe political problems. *See, e.g.,* JAMES THOMAS FLEXNER, GEORGE WASHINGTON IN THE AMERICAN REVOLUTION (1775-1783) 514-15 (1968) (discussing Washington stopping a rebellion by soldiers dissatisfied with waiting for pay and land in 1783).

92. HORSMAN, *supra* note 84, at 28-31.

93. ULRICH BONNARD PHILLIPS, GEORGIA AND STATE RIGHTS 42 (1902).

94. CAUGHEY, *supra* note 34, at 35-38.

95. *Id.* at 44.

96. *Id.*

97. Treaty with the Creeks, A Treaty of Peace and Friendship, 7 Stat. 35, art. V-VII (1790).

Peace did not break out, however, as the Creek nation and Georgia continued to try to change the rules of the game.[98] They also worked to improve their respective bargaining positions through skirmishes and threats of war.[99] For a second time, Georgia sought to gain more of the surplus for itself in events that would form the specific factual basis for *Fletcher*.[100] Georgia sold much of Alabama and Mississippi near the Yazoo River to European American speculators, granting a fee simple to those who bought the still American Indian national land.[101] The speculators ensured the sale by giving land shares to most of the Georgia legislature and others, including a sitting U.S. Supreme Court Justice. [102]

Although the speculators gave away land to individual Georgians would share in the benefit, it was not enough to stop a political revolution.[103] The next Georgia legislature rescinded the Yazoo Land Act[104] after one prominent European American argued that that the Act sold the "birthright" of Georgians to their western land claims to northern speculators.[105]

The George Washington and later the John Adams administrations continued to protect the Creek and Cherokee nations by enforcing the bargaining rules against Georgia.[106] They also maintained the federal government's claim to Georgia's western land claims.[107] As a result of this and because of their own military power, the Creek and Cherokee ceded no more of their national lands before 1800.[108]

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98. *See* CAUGHEY, *supra* note 34, at 52.

99. *Id.*; PHILLIPS, *supra* note 93, at 44-45.

100. CHARLES F. HOBSON, THE GREAT YAZOO LANDS SALE 31 (2016).

101. WATKINS, *supra* note 89, at 557, 560, 563-64 ("An Act supplementary to an act, entitled "An act for appropriating a part of the unlocated territory . . .").

102. HASKINS, *supra* note 90, at 417.

103. *See id.* at 423.

104. WATKINS, *supra* note 89, at 577 ("An Act, declaring null and void a certain usurped act passed by the legislature of this State, at Augusta, on the seventh day of January, [1795], under the pretended title 'An act supplementary to an act entitled, an act for appropriating a part of the unlocated territory of this State . . . and for other purposes.").

105. *See* WILLIAM OMER FOSTER, JAMES JACKSON, DUELIST AND MILITANT STATESMAN 108-09 (1960) (arguing that the sale was a "confiscation Act . . . of your Children & mine, & unborn Generations . . . & two-thirds of Georgia will be owned by Residents in Philadelphia, in Six months").

106. *See Inaugural Address of John Adams, March 4, 1797*, *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 228, 231 (James Richardson ed., 1907) (noting Adams would follow peace and justice policy); HASKINS, *supra* note 90, at 31.

107. HASKINS, *supra* note 90, at 423. The act involved was: "[a]n Act for the amicable settlement of limits with the state of Georgia, and authorizing the establishment of a government in Mississippi territory." Act of May 10, 1800, ch. 50, 549 Stat. 70, § 10 (1800).

108. HASKINS, *supra* note 90, at 397; Act of May 10, 1800, ch. 50, 549 Stat. 70, § 10.

C. Georgia Changes Federal Policy and Gains the Surplus for Itself Alone

By 1800, Georgia was growing faster in population than the rest of the nation because of the cotton boom, and this increased its political clout.[109] Now firmly allied with Jefferson and the Republican Party, Georgia's long-term strategy of changing the rules in both bargaining games would succeed with Jefferson and a Republican winning the 1800 election.[110] Jefferson officially maintained the peace and justice policy toward American Indians that he helped to create, but his practice subverted much of it.[111] For example, he immediately reduced the army that patrolled the frontier because he had campaigned against the "bloated executiv[e], high taxes, oppressive debts and [a] standing arm[y]"[112] of the anti-egalitarian and monarchial Adams administration.[113] State militias would now be in charge of maintaining the boundary line and defending the frontier.[114] Predictably, a Cherokee delegation went to Washington, D.C. and complained that as soon as soon as the U.S. Army withdrew from the boundary line between their nation and North Carolina, European Americans killed two Cherokees.[115]

Second, the two federal political branches resolved the dispute over Georgia's western land claims in a manner that changed the bargaining game in favor of the state.[116] The latter ceded its western land claims to the federal government.[117] In return, the federal government ceded all of its claims and jurisdiction within the state to Georgia,[118] paid $1.25 million to the state, and extinguished American Indian national title at its own cost and for the use of Georgia "as early as [it could] be peaceably obtained, on reasonable terms" within Georgia's newly defined borders.[119] Without mentioning it by name,

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109. ADAM SEYBERT, STATISTICAL ANNALS EMBRACING VIEWS OF THE POPULATION, COMMERCE, NAVIGATION, FISHERIES, PUBLIC LANDS, POST-OFFICE ESTABLISHMENT, REVENUES, MINT, MILITARY AND NAVAL ESTABLISHMENTS, EXPENDITURES, PUBLIC DEBT AND SINKING FUND OF THE UNITED STATES OF AMERICA 13, 22 (1818).

110. *See* WOOD, *supra* note 23, at 276-77.

111. *See President Jefferson and the Indian Nations*, THOMAS JEFFERSON'S MONTICELLO, https://www.monticello.org/thomas-jefferson/louisiana-lewis-clark/origins-of-the-expedition/jefferson-and-american-indians/president-jefferson-and-the-indian-nations/ (last visited Mar. 12, 2020).

112. WOOD, *supra* note 23, at 277.

113. *Id.* at 256-57, 268, 292.

114. *Id.* at 292.

115. *See* WILLIAM G. MCLOUGHLIN, CHEROKEE RENASCENCE IN THE NEW REPUBLIC 46, 49, 50 (1986) (regarding Cherokee boundary line in North Carolina).

116. *Indian Removal*, KHAN ACADEMY, https://www.khanacademy.org/humanities/us-history/the-early-republic/age-of-jackson/a/indian-removal (last visited Mar. 12, 2020).

117. Enclosing articles of agreement and cession entered into with Georgia (Apr. 26, 1802), in 1 AMERICAN STATE PAPERS: PUBLIC LANDS 125 (1802) [hereinafter 1802 Compact].

118. *Id.*

119. *Id.*

the federal government also agreed to resolve the dispute over the Yazoo Land Act and its rescission.[120]

The state's new ally quickly finished negotiating a treaty with the Creek Nation in which the latter ceded some lands it had regained under the 1790 Treaty of New York.[121] When American Indians became reluctant to sell their national lands throughout the nation, the Jefferson administration adopted a general policy of running American Indians into debt to force them to cede lands.[122] As American Indians often became dependent on trade goods and wanted alcohol, traders had substantial leverage to force American Indians to cede lands to pay their debts.[123] Finally, Jefferson also encouraged the Creek and Cherokee to emigrate west of the Mississippi in order to buy their national lands.[124]

Nevertheless, Jefferson found these bargaining strategies did not always work.[125] The Creek Nation better understood the value of their national lands to European Americans than before.[126] This forced the Jefferson administration to pay ten to a hundred times more than it would pay elsewhere in the U.S., although price was still only two-and-a-half cents an acre.[127]

The Jefferson administration also faced a revolt in the game among European Americans after it negotiated a treaty with the Creek Nation for more rich cotton land in 1805.[128] When it sent the proposed treaty for ratification, senators argued that the proposed treaty would raise prices across the nation.[129] Senators also argued that the proposed treaty would delay buying American Indian lands elsewhere because there wouldn't be enough money in the federal treasury.[130]

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120. *Id.*; HOBSON, *supra* note 100, at 82-83.

121. Treaty with the Creek Nation of Indians (commonly known as the "Treaty of Fort Wilkinson"), 7 STAT. 68, art. I (June 16, 1802).

122. DANIEL LEWIS, THOMAS JEFFERSON AND THE EXECUTION OF THE UNITED STATES INDIAN POLICY 34 (2010).

123. Thomas Ivan Dahlheimer, *Alcohol Was Used to Commit Atrocities Against Native People*, https://www.towahkon.org/alcoholfurtrade.html (last visited Mar. 12, 2020).

124. *Indian Removal*, OKLAHOMA HISTORICAL SOCIETY, https://www.okhistory.org/publications/enc/entry.php?entryname=INDIAN%20REMOVAL (last visited Mar. 12, 2020).

125. *Id.*

126. STEVEN J. PEACH, "THE THREE RIVERS HAVE TALKED": THE CREEK INDIANS AND COMMUNITY POLITICS IN THE NATIVE SOUTH, 1753-1821 (2016).

127. *President Jefferson and the Indian Nations*, *supra* note 111.

128. Speech of Jackson (January 29, 1805), *in* WILLIAM PLUMER, WILLIAM PLUMER'S MEMORANDUM OF THE PROCEEDINGS OF THE UNITED STATES SENATE 256-57 (Everett Somerville Brown ed., 1923).

129. *See*, *e.g.*, Speech of Samuel Mitchill to Senate (January 29, 1805), *in* WILLIAM PLUMER, WILLIAM PLUMER'S MEMORANDUM OF THE PROCEEDINGS OF THE UNITED STATES SENATE 254-55; Speech of John Smith to Senate (January 29, 1805), *in* WILLIAM PLUMER, WILLIAM PLUMER'S MEMORANDUM OF THE PROCEEDINGS OF THE UNITED STATES SENATE at 260 (both so arguing).

130. Speech of Samuel Mitchill, *supra* note 129, at 260.

Georgia threatened war with the Creek if the proposed treaty were not ratified, but the Senate refused to do so.[131] Fearing war,[132] the Creek Nation agreed to a lower price[133] and an "indispensable road" to run through Creek national lands.[134] The road would protect U.S. security, but it also would allow European American settlers onto Creek national lands as everyone knew.[135] The Senate ratified it along with numerous other American Indian treaties ceding lands.[136]

D. Summary of the First Round from a Legal Perspective

State and federal constitutional law supported all aspects of the bargaining game among European Americans and their game with the Creek and Cherokee nations.[137] The two games were legally entangled with each other and not easily separated.[138] Some of this was apparent in 1810, but much of it was not because the Jefferson administration officially maintained the peace and justice policy.[139] Ameliorating the legal causes of catastrophe required, therefore, both foresight and power in many forms. The justices of the Supreme Court of the United States had only the Court's judicial power, still largely undefined and under siege by Georgia and the two federal political branches. [140]

III. THE COURT UNDERMINES THE BARGAINING RULES IN *FLETCHER V. PECK* IN THE NAME OF POPULAR SOVEREIGNTY

Remarkably, however, the legal causes of the dispute came before the Court in 1810 when two New England speculators brought a case arguing that Georgia violated the Constitution when it rescinded the Yazoo Land Act.[141] The Court could elucidate and enforce the rules in both bargaining games if it chose to do so, but a majority of the Justices would not, except to

131. Speech of Jackson, *supra* note 128, at 256-57.
132. Speech of Samuel Mitchill, supra note 129, at 260.
133. *Inaugural Address of John Adams, March 4, 1797*, *supra* note 106, at 390-91.
134. *Id.*
135. HOWARD ZINN, HISTORY IS A WEAPON: A PEOPLE'S HISTORY OF THE UNITED STATES 3 (1980).
136. Treaty with the Creek Nation of Indians (commonly known as "Treaty of Washington"), 7 Stat. 96 (Nov. 14. 1805).
137. *See* Brian Hicks, *The Cherokees vs. Andrew Jackson*, SMITHSONIAN MAGAZINE (March 2011), https://www.smithsonianmag.com/history/the-cherokees-vs-andrew-jackson-277394/.
138. *Id.*
139. *See* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 20 (1974).
140. *See id.* at 19-20 (noting the struggle between the Federalists and the Republicans over the Court); Doyle Mathis, *Georgia Before the Supreme Court*, 12 AM. J. LEGAL HIST. 112, 119-120 (1968) (noting Georgia's efforts to subvert the Court's power).
141. HOBSON, *supra* note 100, at 82-83.

state that Georgia could sell a fee simple in Creek national lands before the latter had ceded them to the federal government.[142] Additionally, the majority would limit its power to void state laws to protect popular sovereignty under a written fundamental document.[143] All these holdings reinforced rather than hindered the legal causes of the catastrophe, and Marshall's brief aside in which he stated all courts must respect American Indian national title until it was legitimately extinguished served little purpose.[144]

A. The Majority's Holding that Georgia could not Rescind the Yazoo Land Act

Marshall's opinion is famous for establishing the role of the Court under a Constitution based on popular sovereignty.[145] The Court would find a state law unconstitutional only if it violated a specific constitutional provision.[146] This implicitly rejected the use of natural law in constitutional interpretation because, as Justice James Iredell had written in 1798, it contained "no fixed standard."[147] As a result, "all that the Court could properly say . . . would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."[148] The legislature's opinion controlled.[149]

But this left the Creek and their national lands unprotected by the Constitution unless they became U.S. citizens and subjected themselves to hostile state law.[150] They also had to adopt European American mores and face hostile treatment from European Americans.[151] Very few would do so, and this meant they were not U.S. citizens.[152] The Constitution generally did not apply to them, and Congress had a free hand in relations with them.[153] An unintended consequence of protecting popular sovereignty for European

142. *Fletcher*, 10 U.S. at 134-35.

143. Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. OF POL. 51, 62 (1986).

144. *Fletcher*, 10 U.S. at 142-43.

145. Calder v. Bull, 3 U.S. 398, 399 (1798).

146. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 3 (1962) (noting the importance of a written Constitution).

147. *Calder*, 3 U.S. at 399.

148. *Id.*

149. *Id.* at 400-01.

150. R. ALTON LEE, INDIAN CITIZENSHIP AND THE FOURTEENTH AMENDMENT 199-200 (1974).

151. *Id.*

152. *Id.*

153. *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789: Relations with Native Americans*, LIBRARY OF CONGRESS, https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/about-this-collection/ (last visited Mar. 13, 2020).

Americans was, therefore, denying constitutional protections for American Indians.[154]

For legal reasons closely related to popular sovereignty, the majority in *Fletcher* refused to consider whether corruption had caused Georgia to pass the Yazoo Land Act because there was no legal principle that it would serve.[155] By this, Marshall seemed to mean that the Court would have to decide how much corruption was too much, and, therefore, reason could not decide it.[156] It was a question for the people to decide at the next election.[157] But legally, American Indians were not part of the people, and white supremacy—a virulent form of corruption—infected those who were.[158]

For quasi-constitutional prudential reasons, the majority also refused to "distur[b]" the compromise over "whether the vacant lands within the United States became a joint property, or belonged to the separate states."[159] This question had "threatened to shake the American confederacy to its foundation," and the majority would not decide it.[160] They would not describe the relationship between federal government and Georgia in any way, let alone enforce the peace and justice policy.

The holdings in *Fletcher* greatly limited the Court's power in American Indian affairs.[161] These limitations would prove devastating for the Creek and Cherokee because it meant the Court would act late and ineffectively. They also caused the Court to be ineffective in protecting American Indians and other oppressed peoples for centuries.

B. American Indian National Title

The danger to American Indian national title from holding that Georgia could sell a fee simple in lands still owned by American Indian nations was obvious. Accordingly, Marshall wrote that American Indian national title must be "respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the state."[162] Marshall did not explain this language further.

Nor did Marshall explain how Georgia could grant a fee simple—a common law term denoting the largest interest that a private person could

154. *Fletcher*, 10 U.S. at 129-30.
155. *Id.*
156. *Id.* at 130.
157. JOSEPH STORY, 1 COMMENTARIES OF THE UNITED STATES 346-47 (1833).
158. *Native American Citizenship: 1924 Indian Citizenship Act*, NATIONAL PARK SERVICE, https://www.nps.gov/jame/learn/historyculture/upload/Native-American-Citizenship-2.pdf (last visited Mar. 13, 2020).
159. *Fletcher,* 10 U.S. at 142.
160. *Id.*
161. *Id.* at 142-43.
162. *Id.*

own—to a person subject to a title that might prevent the person from ever entering the land, as Justice William Johnson observed. [163] The latter was reluctant to determine American Indian title because it was "more fitted for a diplomatic or legislative than a judicial inquiry."[164] It was a diplomatic inquiry because it "depend[ed] upon a just view of the state of the Indian nations," and these were "very various."[165] Cautiously filling in the blanks, Johnson was arguing that relations between Georgia and American Indian nations involved questions about sovereignty and relations between peoples that were not within the jurisdiction of a court of law or the Court under the Constitution.[166] Instead, the people had delegated these issues to the other two federal branches.[167]

It was a legislative inquiry because most Anglo-American jurists considered property rights to be a civil law matter by 1810. Indeed, Marshall had argued that to the Court in 1795.[168] Justice Chase had written that "the better opinion, that the right, as well as the mode, or manner of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; is regulated by civil institution, and is always subject to the rules prescribed by positive law."[169] It had been the opinion of Blackstone [170] and it would be that of future Justice Joseph Story.[171]

Instead, Johnson argued that at least some American Indian nations "retain[ed] a limited sovereignty, and an absolute proprietorship of their soil."[172] Absent a contrary treaty, the interest of Georgia was

> nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets. [173]

This description was contrary to the state's legal arguments outside the courtroom and would have remedied Congress's failure to declare that

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163. *Id.* at 146-47 (Johnson, J., dissenting).
164. *Fletcher,* 10 U.S. at 146 (Johnson, J., dissenting).
165. *Id.*
166. *Id.*
167. *See* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115-16 (2002) (arguing that the Constitution, as understood by the Framers, gave the executive and legislative branches sole authority over the Indian nations, but only with their consent).
168. Ware v. Hylton, 3 U.S. 199, 205-06 (1796).
169. *Calder*, 3 U.S. at 394.
170. WILLIAM BLACKSTONE, 1 COMMENTARIES L. ENG. 138-39 (J.B. Lippincott Co. ed., 1893).
171. John C. Hogan, *Three Essays on the Law by Joseph Story*, 28 S. CAL. L. REV. 19, 23 (1954).
172. *Fletcher*, 10 U.S. at 146 (Johnson, J., dissenting).
173. *Id.* at 147.

American Indian nations had a right of soil as proposed by the Washington administration.[174]

Congress could define American Indian national title.[175] So could American Indians and the two federal political branches through the treaty process if they had not already.[176]

C. How the Justices Might Have Protected the Creek and Cherokee Better

The role of law in the catastrophe was many and varied, but George Washington and John Adams' administrations had attempted to use it to protect American Indians, albeit for both selfish and just motives.[177] To a lesser extent, so did the Jefferson administration.[178] But enforcing the law against European Americans was difficult and uncertain for legal and constitutional reasons.[179] The majority's decision in *Fletcher* resolved none of those difficulties and created new ones. Their declaring the rules in both bargaining games in a manner that supported the federal government would have lessened the legal and constitutional uncertainties hindering enforcement of the peace and justice policy.

In retrospect, the majority could have clarified the rules in both games in ways that better protected American Indians. They could have ruled that American Indians had an absolute—or at least permanent—title to their national lands that they must voluntarily surrender. They might have also ruled that Georgia selling American Indian national lands prior to their being ceded violated the federal government's exclusive control over American Indian affairs and was contrary to its peace and justice policy by increasing the chance of war or that the Indian Trade and Intercourse Act prohibited the sale.[180] These rulings would have converted both games from non-cooperative to cooperative ones in which a third party—the Court—would enforce any agreement.[181]

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174. *See American State Papers: Indian Affairs*, *supra* note 78, at 1:53.

175. Clinton, *supra* note 167, at 116.

176. *Id.* at 115-16.

177. *See Inagural Address of John Adams*, *supra* note 106.

178. *See supra* Part II.C.

179. John Hayden Dossett, *Indian Country and the Territory Clause: Washington's Promise at the Framing*, 68 AM. U. L. REV. 205, 226 (2018) (quoting Letter from Thomas Jefferson to Edmond Pendleton (Aug. 13, 1776), https://founders.archives.gov/documents/Jefferson/01-01-02-0205) (citing Colin G. Calloway, THE INDIAN WORLD OF GEORGE WASHINGTON 193-94, 278-79 (2018); Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 30-31 (1964)).

180. Indian Trade and Intercourse Act, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138 (1790); Indian Trade and Intercourse Act, Pub. L. No. 2-19, § 8, 1 Stat. 329, 330 (1793).

181. Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CALIF. L. REV. 1281, 1284 (2003).

D. Conclusion

Marshall and the other justices likely found American Indian national title and other issues difficult.[182] They were novel questions, as were questions about the constitutional role of the Court in American Indian affairs.[183] A wrong decision could threaten disunion.[184] No doubt there were institutional concerns as well because Georgians and many other European Americans were challenging the Court.[185]

Nevertheless, Marshall and the majority refused to interfere in the dispute over Georgia's western land claims among European Americans, leaving the 1802 Compact undiscussed and Georgia's grant of a fee simple in American Indian national lands to European American speculators intact.[186] Although Marshall stated courts must respect American Indian national title until legitimately extinguished, he provided no hint of what that meant. This left the bargaining rules in both games in flux. Georgia would take advantage in the political debates that followed.

IV. GEORGIA WINS THE SECOND ROUND LEADING UP TO *JOHNSON V. MCINTOSH*

Fletcher was likely the best chance the justices had to use the power of the Court to slow or stop the catastrophe in Georgia. The state's non-American Indian population grew by a factor of three, from a little over 80,000 to over 250,000 from 1790 to 1810.[187] Of this total, 105,218 were African Americans,[188] and their cheap labor as slaves was essential to the large profits being made.[189] These changes in population and wealth improved the state's bargaining position versus the Creek and Cherokee as well as against their fellow European Americans.[190]

So did the War of 1812. The catastrophe befalling the Creek and Cherokee was well under way before the decade was over.[191] A national debate over the exact nature of American Indian national title and the fate of American Indians east of the Mississippi River also sprang up.[192] It also illustrated the difficulty that the Court had in intervening in the catastrophe:

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182. *Fletcher*, 10 U.S. at 142.
183. *Id.* at 128.
184. *Id.* at 142.
185. Clinton, *supra* note 167, at 141, 176.
186. *Fletcher*, 10 U.S. at 142-43.
187. SEYBERT, *supra* note109, at 13, 22.
188. *Id.*
189. BROOKS, *supra* note 40, at 213, 226-27.
190. *Id.*
191. CADLE, *supra* note 74, at 7 (citing Ulrich B. Philips, GEORGIA AND STATE RIGHTS (1902)).
192. Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1138 (2000).

It needed an actual case or controversy to come before it that raised the necessary issues.[193]

A. Conquest and Corruption

In the War of 1812, part of the Creek nation allied itself with Great Britain and were defeated by an army led by Andrew Jackson.[194] Contrary to the peace and justice policy, Jackson exacted a "huge cession" of land in Tennessee and Alabama from the Creek Nation.[195] He also expropriated land of many loyal Creeks, contrary to instructions.[196] His superiors were furious but not furious enough to refuse to submit the proposed treaty to the Senate for ratification and risk the political consequences.[197] Neither were others, and the Senate ratified the treaty and the President proclaimed it.[198] None of the Creeks had any recourse because they were not citizens.[199]

The Cherokee Nation remained neutral during the war,[200] and this prevented Jackson or Georgia from exacting a cession through a treaty. Instead, Jackson ran the line of the Creek cession in a way that caused the Cherokee to protest to the Madison administration that the line included their national lands.[201] The Cherokee protested by sending an experienced delegation of chiefs to Washington, D.C. to negotiate with the Madison administration. [202] The latter returned several million disputed acres to the Cherokee and provided federal help in developing iron ore resources.[203]

That did not end the pressure on the Cherokee to cede more land as Georgia complained the cession failed to comply with the 1802 Compact[204] and, as a result, the State began to develop a new bargaining strategy to keep the cooperative surplus.[205] Instead of becoming civilized, renouncing their

193. *Id.* at 1092-93 (citing *McIntosh*, 21 U.S. at 543-71; C. Peter Magrath, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC 5, 54-55 (1966); 1 Charles Warren, THE SUPREME COURT IN UNITED STATES HISTORY 147 (1926)) (arguing that *McIntosh* and *Fletcher* were test cases choreographed to address Indian title with no true case or controversy).

194. CADLE, *supra* note 74, at 204 (noting eight hundred Creek warriors were killed, and Creek military power destroyed); WOOD, *supra* note 23*,* at 687.

195. CADLE, *supra* note 74, at 204-06 (separating the Creek nation from potential allies in Florida and to the west).

196. WOOD, *supra* note 23*,* at 687.

197. CADLE, *supra* note 74, at 206-07.

198. Treaty with the Creeks, Articles of Agreement and Capitulation, 7 Stat. 120 (Aug. 9, 1814).

199. Congress has the exclusive power to "establish a uniform rule of naturalization." U.S. CONST., art. I, § 8, cl.4 (although perhaps it could also be done by treaty). *See also* Charles Gordon, *Racial Barrier to American Citizenship,* 93 U. PA. L. REV. 237, 238-39 (1945) (citing Naturalization Act of 1790, 1 Stat. 103).

200. WILLIAM G. MCLOUGHLIN, CHEROKEE RENASCENCE IN THE NEW REPUBLIC 191-95 (1968).

201. *Id.* at 198.

202. *Id.*

203. *Id.* at 198-99.

204. OLIVER H. PRINCE, DIGEST OF THE LAWS OF THE STATE OF GEORGIA 529 (1822).

205. *See* WOOD, *supra* note 23, at 397.

culture and nation, and joining the larger U.S. society as individuals, the Cherokee would keep their culture, homelands, and sovereignty under the federal protection as they learned European American mores.[206] Eventually, those who wanted to do so would become U.S. citizens at some indefinite date.[207] It was a lengthy, difficult, and sometimes internally divisive process before this strategy coalesced, but it provided some hope of staying and prospering in their traditional homelands. [208]

The Cherokee had long believed that the federal government had promised that they could maintain their traditional homelands in this way.[209] Their agent did not believe similarly,[210] and he argued to them that they were a conquered people who were mere "tenants-at-will" subject to removal for their own good.[211] He was also willing to use threats and bribes to persuade a few Cherokee chiefs to cede territory.[212] The price for these lands was three cents an acre,[213] even though rich cotton lands sometimes sold for $50 an acre elsewhere.[214] Over three hundred "heads of family" also agreed to become U.S. citizens.[215] The Cherokee Nation protested,[216] but the federal political branches ratified and proclaimed the treaty. [217] In response, the Cherokee passed its first constitution to better make its case to the European American public and to enforce group unity.[218]

In 1817, Andrew Jackson wrote to then President James Monroe that Congress should take more American Indian national land for the safety of the country through legislation, without the "absurdity" of negotiating a

206. *Id.* at 398.

207. ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 92 (Bruce E. Johansen ed., 2006).

208. WOOD, *supra* note 23, at 397.

209. *See* William G. McLoughlin, *Experiment in Cherokee Citizenship, 1817-1829*, 33 AM. Q. 3, 4 (1981).

210. Agents were critical to the success of the peace and justice policy. R. S. Cotterill, *Federal Indian Management in the South,* 20 MISS. VALLEY HIST. REV. 333, 345-46 (1933).

211. MCLOUGHLIN, *supra* note 200, at 202-4.

212. *Id.*

213. *Id.* at 210.

214. MALCOM J. ROHRBAUGH, THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789-1837 118-19 (1968). The average price was $5.35 an acre. *Id.* at 119. The prices were inflated by federal "Yazoo script" given to speculators as a result of the *Fletcher* decision. ADAM ROTHMAN, SLAVE COUNTRY: AMERICAN EXPANSION AND THE ORIGINS OF THE DEEP SOUTH 40, 171 (2005).

215. McLoughlin, *supra* note 209, at 3. Most of the Cherokee lost their land quickly as was foreseen. *Id.* at 4.

216. MCLOUGHLIN, *supra* note 200, at 211.

217. *Id.*; Treaty with the Cherokee, 7 Stat. 148 (1816).

218. MCLOUGHLIN, *supra* note 200, at 224-25.

treaty.[219] Congress would pay what it thought fair.[220] This was less of a substantive change than it appeared, as treaties had been unfair for some time from a distributive justice standpoint because of the federal government's bargaining advantage.[221]

Monroe was receptive to the approach, finding Jackson's view of American Indian national title to be "new but very deserving of attention."[222] He further agreed that "progress and just claims of civilized life" demanded that American Indians in the "hunter or savage state" become civilized for their own good and cede land to the federal government.[223] As civilizing the American Indians was difficult, Monroe stated that "[a] compulsory process seems to be necessary, to break their habits, and to civilize them."[224]

Eventually, Monroe rejected Jackson's approach.[225] Monroe's receptivity and Jackson's expropriation of Creek national lands and attempted expropriation of Cherokee national lands showed that the fate of these two nations in Georgia depended ultimately upon the good will of the federal government, which in turn responded to politics more than law.[226] The two nations would have to develop new bargaining strategies to ensure that the rules of the first bargaining game did not change even more to their disadvantage.

B. A National Crisis over the Fate of American Indians

By 1817, a national crisis over the fate of American Indians east of the Mississippi was brewing.[227] The exact nature of American Indian national title played a crucial role in this debate, as it would determine whether the federal government could remove American Indians against their will, and Marshall's opinion for the *Fletcher* majority had left the issue cloudy.[228]

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219. Letter from Andrew Jackson to James Monroe, March 4, 1817, THE PAPERS OF ANDREW JACKSON DIGITAL EDITION, (Daniel Feller ed., 1817), *available at* http://rotunda.upress.virginia.edu/founders/JKSN-01-04-02-0053.

220. *Id.*

221. DOROTHY JONES, LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA 57, 168, 170 (1982).

222. Letter from James Monroe to Andrew Jackson, October 5, 1817, CORRESPONDENCE OF ANDREW JACKSON (John Spencer Bassett ed., 1817), *available at* www.loc.gov/resource/maj.01045_0360_0366.

223. *Id.*

224. *Id.*

225. *Id.*

226. Alysa Landry, *James Monroe: Pushed Tribes off Lands, But Boosted Indian Education*, INDIAN COUNTRY TODAY (Feb. 2, 2016), https://indiancountrytoday.com/archive/james-monroe-pushed-tribes-off-land-but-boosted-indian-education-VV2lWNPpVkm9cM6CH6t_Ig.

227. TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 54 (2002).

228. *Id.* at 73-75, 118, 127.

Although the depth of the crisis was unknown, the catastrophe in Georgia continued to gain momentum.[229]

Throughout this period, the state demanded that the federal government extinguish all American Indian national title, as required by the 1802 Compact, by paying a higher price or involuntarily removing the Creek and Cherokee because they were mere tenants-at-will with no permanent legal title.[230] Despite being impoverished by paying for trade goods and other debts,[231] the Cherokee rejected two offers for their national lands.[232] Their federal agent responded by threatening to withdraw federal protection of Cherokee borders.[233]

The Creek fared worse because Georgia and the federal government had split their unity, and they could not restore it.[234] The two European American players convinced a small segment of the Creek to sign away five million acres of their national land in 1821.[235] Lacking wealth or other means to enforce group unity, the Creek Nation reiterated that selling its lands was a capital crime unless approved by it.[236]

The crises over the fate of American Indians east of the Mississippi also stretched all the way to New England, where U.S. Attorney General William Wirt issued an opinion over whether Massachusetts could grant a right to survey Seneca lands to a private person.[237] After refusing to speculate on the property rights of aborigines in the hunter state,[238] he opined that the "conquerors have never claimed more than the exclusive right of purchase from the Indians, and the right of succession to a tribe which shall have removed voluntarily, or become extinguished by death."[239] Furthermore, Wirt said the Washington administration acknowledged that the Seneca national lands were its "property" and continued by reviewing the history of the federal government's relations with the Seneca.[240] He mentioned *Fletcher* only to refer to the natural law authorities cited therein.[241]

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229. *Id.* at 57.

230. PRINCE, *supra* note 204, at 529-31; *see* S. Con. Res. 28, 17th Cong., § 2 (1823).

231. MCLOUGHLIN, *supra* note 200, at 243.

232. *Id.* at 243-44.

233. *Id.* at 244.

234. Kathryn Braund, *Creek War of 1813-14*, ENCYCLOPEDIA OF ALABAMA (Jan. 30, 2017), http://www.encyclopediaofalabama.org/article/h-1820.

235. Grace M. Schwartzman & Susan K. Barnard, *A Trail of Broken Promises: Georgians and Muscogee/Creek Treaties, 1796-1826*, 75 GA. HIST. Q. 697, 707-08 (1991).

236. *Id.* at 708.

237. *See* William Wirt, *The Seneca Lands*, *in* OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS, IN RELATION TO THEIR OFFICIAL DUTIES 466 (Benjamin F. Hall ed., 1852).

238. *Id.*

239. *Id.*

240. *Id.* at 465-67.

241. *Id.* at 466.

In 1822, a lower New York court held that land originally patented to an individual Oneida Indian could be sold to a European American without the approval of the New York State Legislature.[242] Relying on Blackstone, the lower court further ruled that the Oneida Indian had become subject to the state's laws by accepting the patent because an alien could have no permanent interest in land under New York law, and the legislature now had jurisdiction and "perfect control" over all Indians within the state.[243] They were state citizens except for their remaining lands over which the nation kept its sovereignty.[244]

The highest court in New York reversed this case on the same day that *Johnson v. M'Intosh* was decided in 1823.[245] Chancellor James Kent wrote the opinion and affirmed the independent, sovereign status of the Oneida and the power of the New York legislature to protect American Indians from European-Americans.[246] Wirt would later refer to a different opinion written by Kent that supported the Cherokee during oral argument before the Court in 1831.[247] Joseph Story was Kent's friend, [248] and future Justice Thompson had served as Kent's law clerk.[249] The two justices would join together in a memorable dissent in *Cherokee Nation*.[250]

Back in Georgia, the Cherokee's bargaining position was improving slightly as the asymmetrical knowledge about the value of their national lands to individual European-Americans began to equalize and they gained some wealth by adopting European American mores.[251] Nevertheless, only the Panic of 1819 likely saved the Cherokee from removal in that year.[252] The state continued to press for the federal government to comply with the 1802 Compact, however, in Congress and elsewhere.[253]

A well-known European American gazetteer and missionary would also publish a report on the prospects of civilizing American Indians that

242. Jackson v. Goodell, 20 Johns. 188, 193 (N.Y. Sup. Ct. 1822), *rev'd, sub nom*, Goodell v. Jackson, 20 Johns. 693 (N.Y. Sup. Ct. 1823).

243. *Id.* at 192-93.

244. *Id.* at 193.

245. *See* JAMES KENT, COMMENTARIES ON AMERICAN LAW 311 (1828) (noting the cases were argued at a concurrent point of time).

246. Goodell v. Jackson, 20 Johns. 693, 733 (N.Y. Sup. Ct. 1823).

247. RICHARD PETERS, THE CASE OF THE CHEROKEE NATION AGAINST THE STATE OF GEORGIA 3, 225 (1831).

248. R. KENT NEWMYER, SUPREME COURT JUSTICE: JOSEPH STORY STATESMAN OF THE OLD REPUBLIC 238 (1985).

249. *See* DONALD MALCOLM ROPER, MR. JUSTICE THOMPSON AND THE CONSTITUTION 6 (1987) (noting they differed on major issues).

250. PETERS, *supra* note 247, at vii.

251. Hicks, *supra* note 137.

252. MCLOUGHLIN, *supra* note 200, at 247.

253. *Id.* at 248.

illustrated the confusion over American Indian national title in 1822.[254] He would also invite the justices to serve as *ex officio* officers in a "[s]ociety for promoting the general welfare of the Indian tribes within the United States," an offer that Marshall declined.[255]

Although other reasons may have contributed,[256] the Supreme Court likely heard *Johnson v. McIntosh* because of this national crisis over the fate of American Indian nations east of the Mississippi. Marshall's opinion for the unanimous Court also showed that he knew about the criticism of his *Fletcher* opinion.[257] The Court could not wait for another actual case or controversy to come before them. This emphasizes the Court's institutional limitations in addressing the already ongoing catastrophe in Georgia. As before, no American Indian nation or individual appeared before the Court.[258]

V. THE COURT ANNOUNCES AND ENFORCES ONLY ONE BARGAINING RULE IN *JOHNSON V. MCINTOSH*

The Court received a second opportunity to set and enforce the rules in the bargaining game between European Americans and American Indians in *Johnson*, but they no longer wrote on a blank sheet.[259] The *Fletcher* majority held that Georgia could sell a fee simple in Creek national land before the latter ceded it, and it had refused to disturb the European American compromise over Georgia's western land claims.[260] Nor would it use natural law to decide constitutional questions, and the Court did not directly do so in *Johnson*. Instead, it applied U.S. civil law to hold that American Indians had "a legal as well as just claim to retain possession" of their national lands until they were conquered or they voluntarily sold the land.[261] As only private parties were before the Court, the justices enforced this rule and protected American Indians in *Johnson.*[262]

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254. *See* JEDIDIAH MORSE, A REPORT TO THE SECRETARY OF WAR ON INDIAN AFFAIRS 9-12, 23, 68 (1822) (discussing *Fletcher* and American Indian national title).

255. *See id.* at 75, 285-86; Letter from John Marshall to Jedidiah Morse, Feb. 21, 1822, VOLUME 9, CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS, JANUARY 1820–DECEMBER 1823 (Charles F. Hobson ed., 1822).

256. *See* LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 86-93, 96 (2005) (noting a controversy existed over the validity of Virginia military bounty grants at the same time).

257. *See Johnson*, 21 U.S. at 592 (noting where Marshall attempted to reconcile *Fletcher* and *Johnson*).

258. Patricia Engle, *The Origins and Legacy of Justice Marshall's "New Rule" of Conquest in Johnson v. M'Intosh*, THE LITERATURE OF JUSTIFICATION (January 2004), http://digital.lib.lehigh.edu/trial/justification/court/essay/.

259. *Johnson*, 21 U.S. at 592.

260. *Fletcher*, 10 U.S. at 142-43.

261. *Johnson,* 21 U.S. at 574.

262. *Id.*

A. The Agreed Upon Facts and a Unanimous Decision

The accepted facts were simple. One claimant for the land involved, Johnson, traced his title back to a purchase from the Illinois and Piankeshaw nations in 1773 and 1775, which was before the United States declared independence.[263] The other claimant, McIntosh, traced his title back to a federal patent based on a cession by the two American Indian nations to the federal government pursuant to a treaty.[264]

Rejecting the use of abstract principles or "private and speculative opinions of individuals" to determine the nature of American Indian title,[265] the Court relied on the "practice" of the British Crown in determining whether Johnson or McIntosh had valid title.[266] The British Crown had the "exclusive power to grant [lands under the doctrine of discovery] . . . [and] that . . . principle was as fully recognised in America as in the island of Great Britain,"[267] and it had "never . . . contended, that the Indian title amounted to nothing."[268]

Under British law, Marshall continued, "[American Indian nations] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it" even though their title had been considerably "impaired" by the Crown having a "complete ultimate title."[269] Specifically, American Indian nations could sell their land only with the approval of the British Crown or its successor, the state or federal governments.[270] Both states and the federal government had "unequivocally acceded to that great and broad rule [the doctrine of discovery] by which its civilized inhabitants now hold this country."[271]

He acknowledged that the restriction on American Indian nations were contrary to natural right and the practice of civilized nations among themselves, but European-Americans had settled the country using it.[272] This suggested that it was "adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice."[273] Accordingly, Johnson's title claim was invalid as originating from the Illinois and Piankeshaw nations without the approval of

263. *Id.* at 571-72.
264. *Id.* at 598.
265. *Id.* at 588.
266. *Johnson,* 21 U.S. at 594, 599.
267. *Id.* at 595.
268. *Id.* at 603.
269. *Id.* at 574, 603.
270. This was an element of the doctrine of discovery. *See* WILLIAMS, JR., *supra* note 4, 324-26.
271. *Johnson*, 21 U.S. at 587.
272. *Id.* at 591.
273. *Id.* at 592.

the British Crown, and McIntosh owned the disputed land because he held a patent from the federal government.[274]

B. Testing Marshall's Reconciliation of Fletcher with Johnson

Marshall argued that history showed that *Fletcher* and *Johnson* were consistent with each other.[275] He had little success, however, for several reasons. He never identified a match in common law for the title that American Indian nations held. He was also forced to retreat from his argument in *Fletcher* that the majority was not deciding who was the ultimate sovereign over Georgia's western land claims, but only refusing to disturb a compromise.[276] His analogy of American Indian national title to a "lease for years" was unconvincing. [277] Sooner or later, a lease for years ends. American Indian national title might never end.

C. Speculating as to why Marshall Mentioned the Right of Conquest

Explaining why Marshall mentioned the right of conquest as a basis for the federal government's title in *Johnson* is difficult. The peace and justice policy rejected it in theory, but the federal government had practiced it several times.[278] In 1821, Wirt had stated that right of conquest was one basis for European American title in his opinion on the Seneca lands.[279] Perhaps Marshall needed to reflect the consensus of the justices. Perhaps Marshall was emphasizing the right of conquest because it was the worst-case scenario for American Indian property rights and, even in that worst case, he wrote that "humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired."[280] Historical documents can be deeply ambiguous. [281]

D. The Court Enforced Only One Rule in the Bargaining Game between European Americans and American Indians

Marshall's opinion for a unanimous Court declared that American Indians had a permanent, legally enforceable title to their national lands.[282]

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274. *Id.* at 604-05.
275. *Id.* at 592.
276. *Compare Johnson,* 21 U.S at 592, *with Fletcher,* 10 U.S. at 142.
277. *Johnson*, 21 U.S. at 592.
278. Steve Newcomb, *Five Hundred Years of Injustice: The Legacy of Fifteenth Century Religious Prejudice*, INDIGENOUS LAW INSTITUTE (1992), http://ili.nativeweb.org/sdrm_art.html.
279. 1 Op. A. G. 465, 466 (1821).
280. *Johnson*, 21 U.S. at 589.
281. GEORG CAVALLAR, IMPERFECT COSMOPOLIS STUDIES IN THE HISTORY OF INTERNATIONAL LEGAL THEORY AND COSMOPOLITAN IDEAS 37 (2011).
282. *Johnson*, 21 U.S. at 574.

There the interpretative problems began, however, because his opinion was lengthy, digressed often, and consisted mostly of a historical dissertation on the international law doctrine of discovery that was based in white supremacy.[283] This made it difficult to determine whether the Court is adopting the doctrine directly or indirectly, or something else entirely, [284] but it was consistent with precedent and with Blackstone.[285] Advocates for the Cherokee would also argue that the Court adopted civil or municipal law, and this is the best interpretation of what the Court did.[286]

But this was only one of the bargaining rules in the peace and justice policy. Perhaps Marshall meant the lengthy digression to provide examples of how the federal political branches could legitimately extinguish American Indian national title, but he did so unclearly and seemed to approve the right of conquest. This was devastating to the Creek nation because Andrew Jackson had imposed a cession on it by right of conquest in 1814.[287] Less known, he, Georgia, and the two federal political branches had also secured land cessions from the Creek and Cherokee through corruption and fraud.[288] In this legal vacuum, Georgia forged ahead to near victory.

VI. AFTER *JOHNSON,* GEORGIA WINS THE THIRD ROUND

The Monroe administration immediately enforced the bargaining rule announced in *Johnson.*[289] Although it did not mention *Johnson* by name, the administration rejected Georgia's argument that the federal government could expel the two American Indian nations against their will, in part, because they retained a permanent title to their national lands.[290] Furthermore, the administration showed the importance of the bargaining game among European Americans by arguing that the federal government had complied with the 1802 Compact by offering a reasonable price.[291] Georgia seemed out of luck.

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283. *See, e.g.,* Kades, *supra* note 192, at 1068, 1095; William F. Swindler, *Politics as Law: The Cherokee Cases*, 3 AM. INDIAN L. REV. 7, 11 (1975) (describing the opinion's problems).

284. *See, e.g.,* MILLER, *supra* note 207, at 9-12 (stating this but perhaps also suggesting that the Court was defining the doctrine of discovery).

285. *See supra* III.B.

286. *See* WILLIAM WIRT, OPINION ON THE RIGHT OF THE STATE OF GEORGIA TO EXTEND HER LAWS OVER THE CHEROKEE NATION 15, 21 (1830); WILLIAM PENN, ESSAYS ON THE PRESENT CRISIS IN THE CONDITION OF AMERICAN INDIANS 79, 108 (1829).

287. *The Creek War 1813-1814*, AMERICAN HISTORY FROM REVOLUTION TO RECONSTRUCTION AND BEYOND (2012), http://www.let.rug.nl/usa/biographies/andrew-jackson/the-creek-war-1813-1814.php.

288. George R. Lamplugh, *Yazoo Land Fraud*, NEW GEORGIA ENCYCLOPEDIA (June 8, 2017), https://www.georgiaencyclopedia.org/articles/history-archaeology/yazoo-land-fraud.

289. Message from James Monroe to the Senate Concerning the Extinguishment of Indian Title to Lands in Georgia (March 30, 1824), 2 ASP:AI 460, 460.

290. *Id.*

291. Report of John C. Calhoun to James Madison (March 29, 1824), 2 ASP:AI 461.

However, there was little cost to Georgia from continuing the same bargaining strategies as before. It argued publicly for a change in the bargaining rules between European Americans and Americans while privately subverting them.[292] It negotiated another treaty with a small segment of the Creek nation through the connivance of a corrupt federal agent.[293] Monroe's Secretary of War knew of this but submitted the treaty to the Senate without informing it.[294] The treaty was duly ratified.[295] The Creek nation executed the primary chief involved as it had stated it would.[296]

When he became President, John Quincy Adams tried to re-establish and enforce all the bargaining rules in the peace and justice policy.[297] He was a Federalist that had placed second in the popular vote,[298] and he refused to enforce the treaty because it was invalid when the Creek nation appealed to him.[299] A new national crisis followed as Georgia sought to keep the cooperative surplus by ordering an immediate survey of the ceded lands contrary to the terms of the treaty.[300] When Adams threatened to send in U.S. marshals to arrest the surveyors, Georgia mobilized its militia in response.[301] Subsequently, Adams backed down and negotiated a modestly fairer treaty with the Creek.[302] Except for a small wedge of land, Georgia had expelled the Creek from their land.[303]

Only the Cherokee remained in Georgia, and their unity was still intact.[304] To break this unity, Georgia extended its state laws over them in 1828 in response to the Cherokee adopting a written constitution.[305] After it discovered gold within Cherokee national territory in 1829, Georgia surveyed their national lands and flooded them with European American miners and

292. Report of Select House Committee to House (April 15, 1824), at 495. The memorial and remonstrance of the Senate and House of Representatives of the State of Georgia to the President of the United States (December 18, 1823), in a communication from a House Committee to the Senate (April 5, 1824), at 490-91.

293. Schwartzman & Barnard, *supra* note 235, at 713-14.

294. *Id.* at 713-15.

295. Articles of a Convention (commonly known as "Treaty of Indian Springs"), 7 Stat. 237 (Feb. 12, 1825).

296. CHRISTOPHER HAVEMAN, RIVERS OF SAND 6 (2016).

297. Brian Hicks, *supra* note 137.

298. DAVID WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848 208 (2007). He placed second to Andrew Jackson. *Id.*

299. Christina Snyder, *Treaty of Indian Springs (1825)*, ENCYCLOPEDIA OF ALABAMA (Feb. 6, 2008), http://www.encyclopediaofalabama.org/article/h-1453.

300. Report of the Select Committee of the House of Representatives (July 11, 1825) at 276; The New Republic, *For Their Own Good*, THE NEW REPUBLIC (December 4, 2008), https://newrepublic.com/article/63490/their-own-good.

301. CADLE, *supra* note 74, at 263.

302. HAVEMAN, *supra* note 296, at 6; The New Republic, *supra* note 300.

303. Articles of Agreement (commonly known as "Treaty of Creek Agency"), 7 Stat. 307 (Nov. 15, 1827).

304. The New Republic, *supra* note 300.

305. RONALD N. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 3 (1975).

settlers.[306] When Andrew Jackson became President in 1829, Georgia was on the cusp of final victory.[307]

Game theory has shown that the main economic cause of the catastrophe befalling the Cherokee in Georgia was the European American desire to share little, if any, cooperative surplus from changing[308] over American Indian national lands to individual European American use with American Indians and each other as possible. The main structural cause was always the inability of the federal government to enforce its peace and justice policy effectively because of military bounty grants, headright laws, African American slave laws, and a fundamental document based on popular sovereignty.[309] This is only a partial list of the legal and practical reasons that hindered enforcement.

As a result, Georgia often subverted the peace and justice policy in practice.[310] Georgia also persisted in its political opposition until the two federal political branches proposed to change the peace and justice policy into a removal policy in 1830.[311] Officially, the bill required that the federal government secure the voluntary agreement of an American Indian nation in a treaty before removing them.[312] Skeptics rightly viewed this as illusory, and the national debate over the fate of American Indians east of the Mississippi reached a fever pitch.[313] The Cherokee Nation sought the Court's protection.[314]

VII. THE COURT DECLARES THE RULES OF BOTH BARGAINING GAMES BUT LEAVES THE CHEROKEE WITHOUT AN EFFECTIVE REMEDY

Justices Marshall and Story both sympathized with the Cherokee,[315] but they were also limited by the legal tools and ideas of their time. Those ideas

306. Carl J. Vipperman, *The "Particular Mission" of Wilson Lumpkin,* 66 GA. HIST. Q. 295, 303 (1982).

307. History.com Editors, *Andrew Jackson*, HISTORY (Oct. 11, 2019), https://www.history.com/topics/us-presidents/andrew-jackson.

308. Adam J. Pratt, *Regulating the Republic: Violence and Order in the Cherokee-Georgia Borderlands, 1820-1840*, 925 LSU DOCTORAL DISSERTATIONS i, 4 (2012) (stating frontier whites would stop at nothing, not even extermination, to get at Cherokee gold and land).

309. *Trail of Tears – The Indian Removals*, U.S. HISTORY, https://www.ushistory.org/us/24f.asp; Pratt, *supra* note 308, at 5.

310. *Remembering the Time Andrew Jackson Decided to Ignore the Supreme Court in the Name of Georgia's Right to Cherokee Land*, SUSTAINATLANTA (April 2, 2015), https://sustainatlanta.com/2015/04/02/remembering-the-time-andrew-jackson-decided-to-ignore-the-supreme-court-in-the-name-of-georgias-right-to-cherokee-land/.

311. Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (May 28, 1830).

312. "An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi." *Id.*

313. HOWE, *supra* note 298, at 348-351.

314. *Cherokee Nation*, 30 U.S. at 1.

315. *See, e.g.*, Letter from John Marshall to Joseph Story (October 29, 1828), (He "often . . . [thought] with indignation on our disreputable conduct (as I think it) in the affair of the Creeks of Georgia.").

were diverse, changing, and generally hostile to courts using equitable ideas about fairness to decide cases.[316] Those ideas might allow a court to substitute its opinion for that of the legislature as easily as using natural law would.

Neither they, nor any of the other Justices, could have any reasonable doubt about whether Georgia would obey the Court's orders after the state executed a Cherokee man contrary to an injunction issued by Justice Marshall in 1830.[317] It was also unlikely that they harbored many doubts about the willingness of Andrew Jackson to enforce the Court's orders against Georgia after his public statements on the Cherokee and American Indians generally.[318] But only Justice Story and Justice Thompson could find a way through the legal brambles to protect the Cherokee against a predatory Georgia that had the full support of the two federal political branches.[319]

A. Hard Cases and Cherokee Nation v. Georgia

After Georgia executed the Cherokee man for murder, the Cherokee Nation filed a complaint on its own behalf.[320] It was a hard case in that it involved the role of an unelected Court in a democracy at a time when there was no immediately relevant precedent.[321] It produced four separate opinions, including a dissent, and Marshall stated in his opinion that it was a difficult case to decide.[322] Marshall wrote the opinion of the Court, and the weaknesses of legal reasoning of the time were on full display. [323]

Justice Marshall first approached the question of whether the Constitution gave the Court jurisdiction over the Cherokee complaint from a definitional, deductive method.[324] He acknowledged that Article III gave the Court original jurisdiction over a complaint brought by a foreign state against Georgia.[325] He further acknowledged that a nation composed of aliens, or foreigners, was logically a "foreign state" within the meaning of Article III, and, therefore, the Court would seem to have jurisdiction.[326] If he had stopped

316. PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 171 (1965).

317. GARRISON, *supra* note 227, at 106; Stephen Breyer, *The Cherokee Indians and the Supreme Court,* 87 GA. HIST. Q. 408, 415-16.

318. *See* SATZ, *supra* note 305, at 12-13 (noting Jackson's known positions); *see* JOHN QUINCY ADAMS, MEMOIRS 343 (Charles Francis Adams ed., 1876) (noting federal executive is in league with Georgia as shown by Jackson administration newspapers).

319. *Cherokee Nation*, 30 U.S. at 59, 61-62.

320. *Id.* at 2-3.

321. Ronald Dworkin, *Hard Cases,* 88 HARV. L. REV. 1057, 1057 (1975).

322. *See Cherokee Nation,* 30 U.S. at 15, 20, 31, 50; *Id.* at 16 (stating that the other side of the argument is "imposing").

323. *Id.* at 16.

324. *Id.* at 15.

325. *Id.* at 15-16, 21.

326. *Id.* at 15-16.

there, his interpretation would have been consistent with the role of the Court under a written fundamental document.

He did not stop his analysis at that point. Instead, he applied his knowledge of the framers that allowed him to find a latent ambiguity in Article III: The framers had never considered whether American Indian nations were a foreign state.[327] As statesmen, the framers knew that American Indian nations only "appeal[ed] . . . to the tomahawk, or the government" in 1787.[328] He seemed unaware of the irony of his suggesting an appeal to the tomahawk instead of to the Court, and how appealing to the Court furthered the goals of the peace and justice policy.

Treatises stated that appealing to context was allowed to find a latent ambiguity,[329] and it was also the burden of a plaintiff to show jurisdiction,[330] but Justice Marshall's next step was problematical because it ignored the constitutional language entirely. He placed the burden on the Cherokee Nation to show that the framers "had . . . Indian tribes in view when [the framers] opened the courts of the union to controversies between a state or the citizens thereof, and foreign states" because they had never considered the issue.[331] As Marshall had already stated that the framers had not considered the issue, this was an impossible burden to meet. As a makeweight, Marshall argued that language in the commerce clause of Article I that gave Congress to regulate three classes—"foreign nations, among the several states, and with the Indian tribes"—was some evidence that the framers did not consider Indian nations to be a foreign state under Article III.[332]

In their dissent, Justices Smith, Thompson, and Story had an easier argument to make. The different language in Article III and Article I could have easily come from their being drafted by different committees,[333] and the framers used the terms state, nation, and tribe interchangeably.[334] The latter supported the Court having jurisdiction, but they would chiefly look to the "the practice of our own government" to decide the issue.[335] That practice was the Washington administration's peace and justice policy.[336]

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327. *Cherokee Nation*, 30 U.S. at 43.

328. *Id.* at 18.

329. *See* SAMUEL BAYARD, A DIGEST OF AMERICAN CASES ON THE LAW OF EVIDENCE: INTENDED AS NOTES TO PEAKE'S COMPENDIUM OF THE LAW OF EVIDENCE 78 (1810) (with contracts).

330. *See* Osborn v. Bank of the United States, 22 U.S. 738, 824 (1824) (noting plaintiff establishes jurisdiction based on the state of the things at the time she or he sues).

331. *Cherokee Nation*, 30 U.S. at 18.

332. *Id.*

333. *Id.* at 62-63 (Thompson, J., dissenting).

334. *Id.* at 63.

335. *Id.* at 54.

336. *Cherokee Nation*, 30 U.S. at 71 (Thompson, J., dissenting).

The federal executive department had made treaties with the Cherokee only after President Washington's great consideration, and with full advice and consent of the Senate.[337] Those treaties were made to "secure to it certain rights" and were "not gratuitous obligations assumed on the part of the United States."[338]

The dissent also took into account the Cherokee viewpoint.[339] Wars had not reduced the Cherokee to mere subjects, and they had always asserted their "distinct and separate national character."[340] Their inability to transfer "absolute title," their "progress . . . in civilization," and their physical location within the boundaries of Georgia did not change the fact that they were a different, foreign, jurisdiction of government.[341] The Court had jurisdiction.[342]

B. Worcester v. Georgia

Two European American missionaries from New England next served as the Cherokee Nation's surrogates after Georgia imprisoned them for violating state law.[343] The precise issue before the Court in *Worcester* was, therefore, whether a Georgia state law requiring all missionaries to the Cherokee to swear an oath to the Georgia Constitution under pain of imprisonment violated the federal supremacy clause.[344] It was not the rights of the Cherokee Nation.[345]

The justices were not directly considering the land and other rights of the Cherokee Nation,[346] but Justice Marshall and the two justices who had joined his opinion in full, now joined with the two dissenters in *Cherokee Nation*, declared the rights of the Cherokee nation in broad, sweeping terms.[347] The majority emphasized that the "actual state of things, and the practice of European nations," the states, the Continental Congress, and the federal government was to consider American Indians as independent nations and did not interfere in the internal affairs of American Indians and their nations

337. *Id.*
338. *Id.* at 58.
339. *Id.* at 54.
340. *Id.* at 54-55.
341. *Cherokee Nation*, 30 U.S. at 55 (Thompson, J., dissenting).
342. *Id.* at 69.
343. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 519- 20 (1969).
344. *Worcester,* 31 U.S. at 537-38; *see, e.g.*, Burke, *supra* note 343, at 528.
345. *Worcester*, 31 U.S. at 561.
346. *See id.* at 587 ("A full investigation of this subject may not be considered strictly within the scope of the judicial inquiry. . . .").
347. *Id.* at 596.

again.[348] Marshall's history was deficient by today's standards,[349] but it emphasized Cherokee independence and property rights.[350] Federal treaties and statutes, which were the supreme law of the land, recognized Cherokee independence which meant that any Georgia state law trying to regulate the Cherokee nation's internal affairs were void.[351]

C. A question of remedies

Unlike the other justices who considered the relief requested by the Cherokee to be political in nature, Thompson argued that when a state law involved "actual or threatened operation, upon rights" of property, then a court of law could act to protect those rights under the Constitution.[352] Even he, however, stated that "[n]o suit will lie against the United States upon . . . [a] treaty, because no possible case can exist where the United States can be sued."[353] He did not state the exact reason, but it was likely because the federal government had sovereign immunity from suit.[354] As the two federal political branches were actively subverting the peace and justice policy, this would leave the Cherokee nation without a remedy.[355]

When the Court ordered that the missionaries be released in *Worcester*,[356] Georgia ignored the order and the two federal branches did not enforce it.[357] Of equal importance to American Indians, the Cherokee cases left and continues to leave American Indians without an adequate remedy to federal action except as Congress allows.[358] In particular, American Indians cannot challenge the many corrupt and coerced treaties in which they transferred

348. *Id.* at 546-47.

349. Burke, *supra* note 343, at 522-23.

350. *Worcester*, 31 U.S. at 544.

351. *Id.* at 593. For arguments that the Justices decided the Cherokee cases for primarily non-legal reasons, *see* Swindler, *supra* note 283, at 15; Matthew L. Sundquist, *Worcester v. Georgia: A Breakdown in the Separation of Powers,* 35 AM. IND. L. REV. 239, 250 (2011). Some have also argued that Marshall and the other Justices gave tacit approval to removal. *See, e.g.*, JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS 102-03 (1996) (both so arguing); *but see* Arthur Corbin, *Hard Cases Make Good Law*, 33 YALE L.J. 78, 78 (1923) (arguing the Court sometimes undermines state law it cannot void by setting forth a contrary community standard).

352. *Cherokee Nation*, 30 U.S. at 75.

353. *Id.* at 59.

354. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence,* 35 GEO. WASH. INT'L L. REV. 521, 522 (2003) (noting an interesting discussion of federal sovereign immunity in the early Republic).

355. Story wrote ironically that "[t]he Court can wash their hands clean of the iniquity of oppressing the Indians, and disregarding their rights." Letter from Joseph Story to Mrs. Joseph Story (March 4, 1832) *in* LIFE AND LETTERS OF JOSEPH STORY 87 (William Whetmore Story ed., 1851). *But see* Sundquist, *supra* note 351, at 254; NEWMYER, *supra* note 248, at 215-16 (interpreting the words literally instead of in light of Pontius Pilate's words).

356. Burke, *supra* note 343, at 519.

357. *Id.* at 524-25.

358. Ronald A. Berutti, *The Fight to Save the Supreme Court and the Cherokee Indians*, 17 AM. INDIAN L. REV. 291, 306 (1992).

their national lands to the federal government and eventually to many individual European Americans.[359]

VIII. A WRITTEN CONSTITUTION, STRATEGIC BEHAVIOR, AND THE TREATY OF NEW ECHOTA

After *Worcester,* Georgia and the two federal political branches knew that the Court would not allow the Cherokee to sue.[360] They knew that it would rely on European American political processes—processes they controlled—to protect the Cherokee.[361] They could remove the Cherokee by open force if they chose, and the most the Court would do was to declare that it violated the rights of the Cherokee in a suit brought by a European American.[362]

Nevertheless, they did not.[363] The primary reason was probably political—they wanted to preserve appearances in light of the fierce opposition to the removal bill.[364] Game theory shows another reason: They were acting strategically to avoid any chance of review by state or federal courts.[365]

This was because the justices had proscribed a small role for the Court under the Constitution.[366] Why? Institutional and other concerns may have played a role, but legal ones were both necessary and sufficient for the justices' votes.[367] Filling in the blanks, the President was commander-in-chief of the armed forces and negotiated treaties.[368] The Senate checked this power through its power to ratify a treaty, and together with the House controlled appropriations for treaty negotiations.[369] Congress had the power to control commerce and over federal property and to set a uniform rule of naturalization, and the President checked Congress through his veto power and his control of the executive branch.[370]

This was the structure written into the Constitution and that the Court must follow in order to protect popular sovereignty.[371] Indeed, a court of law

359. William Bradford, *"With A Very Great Balme on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace With Justice*, 27 AM. INDIAN L. REV 1, 28-29 (2003).

360. *Cherokee Nation,* 30 U.S. at 20.

361. Berutti, *supra* note 358, at 306-08.

362. *Cherokee Nation,* 30 U.S. at 9.

363. Sundquist, *supra* note 351, at 253.

364. *See* SATZ, *supra* note 305, at 52 (noting Jackson advised Georgia to go slowly after the case).

365. *Cherokee Nation,* 30 U.S. at 10.

366. *Id.* at 75 (Thompson, J., dissenting).

367. *See Code of Conduct for United States Judges*, UNITED STATES COURTS, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b (last revised March 12, 2019); *Cherokee Nation,* 30 U.S. at 55, 57.

368. U.S. CONST. art. II, § 2, cl. 1-2.

369. *Id.*; U.S. CONST. art. I, § 9, cl. 7.

370. U.S. CONST. art. I, § 8, cl. 3, 4; U.S. CONST. art. IV, § 4.

371. U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

unrestricted by a written fundamental document might oppress the people.[372] More likely, the Court might allow the legislature or executive to tyrannize the people.[373] To prevent this, they grounded their interpretations of the Constitution in its words and the framers' intent, even when there was no intent as in *Cherokee Nation*.[374] It would not change easily.[375]

This presented a clear choice to Georgia and the two federal political branches.[376] They could remove the Cherokee by open force.[377] Although not immediately, a case might come before the Court that allowed the justices to enforce the *Johnson* bargaining rule by declaring that a European American title was invalid.[378] Indeed, a Georgia state court would try unsuccessfully to intervene in the removal.[379] It would also increase the political furor.[380]

Alternatively, Georgia and the two federal branches could avoid judicial review entirely by entering into a treaty with the Cherokee in which the latter purported to agree to remove.[381] This would secure European American title from judicial review and lessen political opposition.[382] It might delay removal, but Georgia already had effective control of the Cherokee national lands.[383] Further delay was unwelcome but not devastating.[384]

Game theory shows, therefore, that negotiating a treaty with the Cherokee was the better strategy for Georgia and the two federal political branches to follow.[385] It was well known that no court had ever reviewed a treaty,[386] and to do so the justices would have had to find a principle to void a treaty that

372. Saudi Arabia does not have a codified constitution and has allegations of violations of human rights. *See generally World Report 2019: Saudi Arabia*, HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2019/country-chapters/saudi-arabia (last visited Apr. 12, 2020).

373. RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 75 (2001).

374. *Cherokee Nation,* 30 U.S. at 19.

375. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 69 (2006).

376. This requires a more sophisticated analysis based on the beliefs that the parties had about the likelihood of all of these events before they played the game. Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49, 51-52 (2010).

377. *Cherokee Nation,* 30 U.S. at 20.

378. The only effective remedy that the Court could grant by itself was to declare a treaty void and unsettle European-American titles. *See* FEDERALIST NOS. 64, 332, 337 (John Jay) (2001) (arguing that a fraudulent treaty would be "null and void by the law of nations").

379. Davis, *supra* note 376, at 61.

380. *Id.* at 63.

381. *Id.* at 73.

382. *Id.* at 63-64.

383. *Id.* at 64.

384. Davis, *supra* note 376, at 69.

385. *Id.* at 52.

386. *Id.* at 61; *see Speech of Robert Y. Hayne (January 27, 1831)*, *in* THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION 169 (Herman Belz ed., 2000) (noting courts have never inquired into the formation or performance of treaties as they are political questions).

the Court and Constitution had declared the supreme law of the land.[387] The chance of this happening was surpassingly small, especially as the Cherokee were arguing that European Americans must honor their treaties with the Cherokee.[388]

Accordingly, Georgia and the two federal political players used bribery, threats, and isolation to secure a treaty four years later.[389] In it, three hundred Cherokee agreed for all sixteen thousand Cherokees that the Cherokee nation would voluntarily remove from Georgia.[390] The federal government paid five million dollars plus seven million acres west of the Mississippi for about ten million acres of Cherokee national lands east of the Mississippi.[391] Although it is difficult to know whether this was above the going rate for American Indian national lands at the time, it was far below the worth of those national lands to European Americans.[392] More importantly, the vast majority of Cherokees had not entered into the agreement willingly.[393]

The majority of Cherokees could only appeal to the public and the two federal political branches.[394] Despite a political furor over removal and the concomitant extension of African American slavery,[395] two-thirds of the Senators present ratified the treaty along party lines.[396] In a hurry, Georgia forced the Cherokee nation to remove at bayonet point despite a poor harvest,[397] and four thousand Cherokees would die on the way west.[398] Their graves form a terrible monument to how a dominant majority used a written fundamental document to oppress a minority in the name of popular sovereignty.[399]

CONCLUSION

Game theory has clarified and deepened our understanding of the catastrophe that befell the Creek and Cherokee in Georgia and the Court's

387. *Speech of Robert Y. Hayne (January 27, 1831)*, *supra* note 386, at 170.
388. *Cherokee Nation,* 30 U.S. at 2.
389. MCLOUGHLIN, *supra* note 200, at 449-50.
390. *Id.* at 450.
391. THOMAS VALENTINE PARKER, THE CHEROKEE INDIANS 42 (1878).
392. *Id.* The treaty itself is: Articles of a Treaty (commonly known as the "Treaty of New Echota"), 7 Stat. 478 (Dec. 29, 1835).
393. Bradford, *supra* note 359, at 28-29.
394. Davis, *supra* note 376, at 49.
395. *See* JOHN QUINCY ADAMS, SPEECH OF JOHN QUINCY ADAMS IN THE HOUSE OF REPRESENTATIVES, ON THE STATE OF THE NATION 9, 17-18 (1836) (linking white supremacy, extermination of American Indians in Georgia, African-American slavery, and the Mexican-American war); *Speech of Robert Y Hayne*, *supra* note 386, at 157 (linking the ratification of the Treaty of New Echota to expansion of African-American slavery).
396. HOWE, *supra* note 298, at 415.
397. Vipperman, *supra* note 306, at 315.
398. *Id.*
399. Davis, *supra* note 376, at 98.

role in it by showing how legal doctrine worked in practice to further or hinder the catastrophe.[400] The catastrophe happened because Georgia and the federal government, including the Washington administration, wanted to capture all the cooperative surplus from peace.[401] Broad swaths of statutory and constitutional law supported this many-sided game.[402] This created great political pressure on the two political branches of the federal government.[403] Nevertheless, the bargaining rules in the peace and justice policy might have protected the Cherokee from Georgia, if enforced.[404]

In the end, only the Court was left to enforce those bargaining rules, and the justices refused to do so because of how they understood judicial review under the Constitution and other legal principles designed to protect popular sovereignty.[405] Their interpretation left, however, the Creek and Cherokee Nations to the mercy of Georgia and the two federal political branches.[406] How Georgia accomplished this feat despite the peace and justice policy is an early exemplar of how European Americans used state law and the structure of the Constitution to subvert and change a federal policy designed to protect a minority.[407]

Understanding how the justices allowed the catastrophe to happen is, therefore, crucial to understanding constitutional development.[408] Albeit much modified, these legal ideas about judicial review continue to influence the rights of non-citizens and minorities within U.S. borders.[409] They raise profound questions about how much a written fundamental document should limit the justices' flexibility in responding to strategic behavior that oppresses minorities and others.[410] These questions force people to stop debating theoretical doctrine and focus on how a legal system works in practice to deprive minorities of their rights, land, and lives.[411] Nearly two centuries after Georgia expelled the Creek and Cherokee Nations, these questions remain all too relevant.[412]

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400. *See supra* Part VIII.
401. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 90 (6th ed. 2016).
402. Davis, *supra* note 376, at 56-57.
403. *Id.* at 84.
404. *Id.* at 100.
405. *Cherokee Nation,* 30 U.S. at 20.
406. Sundquist, *supra* note 351, at 239.
407. *Id.*
408. Davis, *supra* note 376, at 61-63.
409. Ilya Somin, *Immigration Law Defies the American Consitituion,* THE ATLANTIC (Oct. 3, 2019), https://www.theatlantic.com/ideas/archive/2019/10/us-immigration-laws-unconstitutional-double-standards/599140/.
410. *Id.*
411. *Id.*
412. *Id.*