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Anomaly Unknown: Supreme Court Application of International Law Norms on Indigenous Rights in the Cherokee Cases, An

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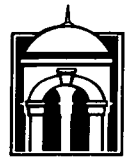

"AN ANOMALY UNKNOWN:" SUPREME COURT APPLICATION OF INTERNATIONAL LAW NORMS ON INDIGENOUS RIGHTS IN THE CHEROKEE CASES (1831-32)

> [I] think it very clear that the Constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.[1]

I. INTRODUCTION

The early theorists of international law, including Hugo Grotius and Emmerich de Vattel, attempted to answer the basic question, "How should nations behave toward one another?" This is a question of ethics. In defining the "law of nations" they were attempting to formulate an ethical code for nations. Given the fact that the language they used conceived of the state as a person (according to Grotius, "a perfect body of free men;"[2] for Vattel, "a moral person"[3]) the most obvious and logical approach was to transfer the ethical principles that controlled on the individual level to states. If the state is a "superperson," then the law of nations is ethics in macrocosm.[4] In developing

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1. Justice Johnson in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 27 (1831).

2. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 25 (Hyperion 1979) (1625).

3. EMMERICH DE VATTEL, THE LAW OF NATIONS 49 (T. & J.W. Johnson 1859) (1758) (This source is an edited work and therefore the page numbers correspond to the pagination of the present editor, not the original author).

4. "The 17th-century theories of international law grounded their principles upon the power of reason, morality, and natural law . . . . The Grotian vision of world order assumed the legitimacy of the emerging

their theories, these writers alternate between two methods of proof, logic and reference to authority, which are upon close examination, analytically imprecise and incompatible.

A. *Logic*

Trying to construct a logical diagram of their arguments is like trying to debone a jellyfish. The reasoning employed is weak and self-referential, ultimately producing the axiom: *This is the way it is, so this is the way it should be.* Cloaked in the language of objectivity, faulty induction masquerades as scientific analysis. However unintentional, the reasoning is circular and self-fulfilling. Similar analyses will arise in our examination of the Cherokee Cases.

B. *Authority*

The other approach is blanket reference to authority. Evidence that a theory of how people or nations should behave toward one another is correct comes either from "experience"[5] or "nature"[6] (the Enlightenment replacement for divine authority). Grotius frequently bolsters his conclusions with the seventeenth century forerunner of the string cite.[7] Either way, we are enclosed within a bubble of cultural subjectivity from which, inevitably, flow unfortunate consequences for those standing without.

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society of independent states and kingdoms. The hope was that the field of international relations could be regulated by universal principles." Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477, 492 (1982). This article traces the emerging concept of international relations from the 14th to the 17th centuries. For additional historical perspective, *see also* F.S. Ruddy, *International Law and the Enlightenment: Vattel and the 18th Century*, 3 INT'L LAW. 839 (1938).

5. For example, "Man is so formed by nature, that he cannot supply all his own wants, but necessarily stands in need of the intercourse and assistance of his fellow-creatures, whether for his immediate preservation, or for the sake of perfecting his nature, and enjoying such a life as is suitable to a rational being. *This is sufficiently proved by experience.*" VATTEL, *supra* note 3, at 55 (emphasis added).

6. "[N]ature has established a perfect equality of rights between independent nations." *Id.* at 232. "As these rules are founded on right reason, and are consequently approved and prescribed by the law of nature, every man, every sovereign, is obliged to admit and follow them." *Id.* at 345.

7. "Thus, for instance, to deprive another of what belongs to him, merely for one's own advantage, is repugnant to the law of nature, as Cicero observes in the fifth Chapter of his third book of offices; and, by way of proof, he says that, if the practice were general, all society and intercourse among men must be overturned. Florentinus, the Lawyer, maintains that it is impious for one man to form designs against another, as nature has established a degree of kindred amongst us. On this subject, Seneca remarks. . ." GROTIUS, *supra* note 2, at 18, 19.

II. GROTIUS AND VATTEL

A. *Backdrop of Modern Ethics*

Grotius and Vattel both define the "law of nations" as the "law of nature applied to nations."[8] A brief historical excursion into the "law of nature" is necessary in order to understand how this concept was imported into the law of nations and consequently applied, misapplied, or not applied at all in the Cherokee cases. This requires an examination of Thomas Hobbes's *Leviathan*, the cornerstone of modern western ethical theory. Although it was published in 1651, twenty-six years after Grotius's *Rights of War and Peace* and a century before Vattel's *Law of Nations*, it is a useful touchstone, a vantage point from which to look back at the one and forward to the other.

Hobbes (1588-1679) wrote at a time when society was becoming industrialized and secular. He was greatly influenced by Galileo, the founder of natural science.[9] It was Galileo who first developed the idea, axiomatic for us today, that observation and experiment are the principal criteria for scientific truth; that science is grounded in empiricism, not authority.

Hobbes attempted to place ethics on a scientific basis. He sought ethical standards not in religious authority but in human nature itself. For the early modern world, this was a seismic shift in ethical thinking; as a consequence, it was imperative to anchor morals in human nature. Once divine authority has been thrown out, there is no reason *antecedent* to the imposition of civil law why people or nations should behave benevolently toward one another. Morality must be grounded in the principles of human psychology, with the creation of human law flowing from it as a natural consequence. This is the motive force behind Hobbes' theory.

According to Hobbes, in the state of nature, prior to the creation of society, we are not rational but appetitive.[10] Natural appetite is the irrational striving after infinite power, which we seek because (unlike other animals) we can foresee future need.[11] In the state of nature no duties exist, only rights. The paramount human goal (the *summum bonum*, the greatest good) is self-preservation, and the right of nature is to take anything necessary for self-preservation.[12] But exercising this natural right inevitably brings us into conflict with others as we fight over the finite supply of nuts and berries in Hobbes's primitive state. This struggle creates a paradox: by exercising our natural right, we run the risk of self-destruction. The dawn of reason resolves this paradox. As we fulfill our natural appetites we come into combat with others. Locked in this mortal combat, the fear of violent death (the *summum*

8. GROTIUS, *supra* note 2, at 25; VATTEL, *supra* note 3, at 53.
9. RICHARD TUCK, HOBBES, 50, 104 (1989).
10. *See generally* FROM DESCARTES TO LOCKE 177-82 (T.V. Smith & Marjorie Grene eds., 1974).
11. *Id.* at 187.
12. *Id.* at 192-93.

malum, greatest evil) leads us to "natural reason."[13] This is the stage in which, although still residing in the state of nature, we become cognizant of the natural law: avoidance of self-destruction.[14]

Once aware of this natural law, however, we are powerless to fulfill it (to avoid self-destruction) while still in the state of nature. Our newly-attained reason, however, bridges the gap. It leads us to join together and create the Leviathan: an artificial man, a mortal god, a sovereign, a mutual covenant between reasonable people who give up a portion of their individual rights in order to guarantee individual security.[15] The concept of a faculty of "natural reason" and its function as a stepping stone are important elements in Hobbes's illustration of humankind's "upward progress" toward civilization. In humanity's primitive state, the "pure" state of nature, individuals do not substantially possess reason; nevertheless, reason of some sort (a kind of quasi-rational state) enters into human interaction before the establishment of society and civil law. Thus moral obligation exists in the state of nature and the Leviathan is created by the will of the people, not the decree of God; civil society is established on a secular basis.

Once we are imbued with "natural reason" we have entered a transitional state between primitive society, where we are fueled solely by our appetites and passions, and "civilized" society, where we are ruled by reason. This concept of a civilized society springing from the capacity to reason, and valuing individual rights and individual property ownership, shuts cultures not so organized out of the loop. It defines their peoples as irrational, primitive, and of lesser value. From such a world view emerges a bias against cultures with a more nomadic or more community-oriented social structure. Such bias is apparent in the writings of Grotius and Vattel and is echoed in the Cherokee Cases.

B. Grotius

Hobbes' attempt to distill fundamental scientific principles out of nature is somewhat foreshadowed in Grotius's *Rights of War and Peace*. Grotius (1583-1645) introduces a skeptical element into his ethical theory, and his frame of reference includes the concept of a state of nature in which all people exist, possessed of natural rights, including that of self-preservation.[16]

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13. *Id.* at 192.
14. *Id.* at 193.
15. *Id.* at 203.
16. TUCK, *supra* note 9, at 21.

1. Natural Law

Grotius begins his analysis with rational society, that is, society "established among rational creatures,"[17] not primitive society. Right is given a negative definition: "that which is not unjust."[18] Grotius further states: "[A]nything is unjust, which is repugnant to the nature of society."[19] The concepts of right and justice are equated, and then (despite the apparent objectivity of the language) defined through the cultural self-reference of common consensus. From this follows the principle of self-preservation. He paraphrases Seneca:

> [A]ll the members of the human body agree among themselves, because the preservation of each conduces to the welfare of the whole, so men should forbear from mutual injuries, as they were born for society, which cannot subsist unless all the parts of it are defended by mutual forbearance and good will.[20]

This is the utilitarian golden rule, Hobbes law of nature (although Hobbes would probably disagree that we are "born for society").[21]

While Grotius attempts to be scientific, he retains a religious slant. This makes his arguments confusing. In certain places he appears to equate natural law with divine law and to interchange "natural right" and "natural law" as though they were synonymous. Natural law seems to be the operation of instinct; yet, human law sets rules about concepts such as property, which did not exist in the state of nature. But underlying human law is the ultimate bedrock: divine law, the Ten Commandments. *Natural right* seems to be moral conscience, inherently and infallibly implanted in us by the divine. Yet Grotius defines it in Hobbesian terms as the "dictate of right reason."[22]

Despite the confusion, Grotius can still be considered as secularizing the natural law concepts. In the sixteenth century, these concepts were taken (religious underpinnings intact) into the consideration of indigenous peoples in the nascent framework of international law. Francisco de Vitoria, for example, used natural law concepts to criticize Spain's use of papal bulls to legitimize land claims in the New World (new to Europe, perhaps, but already inhabited and thus not *terra nullius*).[23] In his 1532 lectures *De India* and *De Jure Belli* he argued that according to the dictates of natural law Native Americans were

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17. GROTIUS, *supra* note 2, at 18.

18. *Id.*

19. *Id.*

20. *Id.* at 19.

21. "In Grotian and post-Grotian thought, law was grounded upon human sociability." Murphy, *supra* note 4, at 492. This is one of Grotius's most significant departures from Hobbes.

22. *Id.*

23. Spain and Portugal drew upon the authority of the Church to support their claims because Roman law allowed for legitimate conquest and occupation of *uninhabited* territory only. Sharon Lynn O'Brien, The Application of International Law to the Legal Status of Native Americans 13 (1978) (unpublished Ph.D. dissertation, University of Oregon).

the true owners of their lands, and a foreign nation could not claim title through discovery alone.[24] But natural law also dictated that indigenous peoples allow foreigners free travel, the right to trade, and proselytization efforts. Refusal would set the stage for a "just war," whereby the foreign nation if victorious could legitimately take title to the conquered lands.[25] Vitoria was the first to include indigenous peoples under the rubric of international law. By placing Christian and non-Christian on a plane of equality, Grotius set the stage for true recognition of the sovereignty of indigenous peoples (their right to own and control their own lands and negotiate treaties on a level with other more recognized and established foreign states).[26] Analysis of the Cherokee cases reveals that this recognition is arguably superficial. In this regard it is worthwhile noting S. James Anaya's comment that:

> [t]heorists eventually modified the law of nations to reflect, and hence legitimize, a state of affairs that consisted in the subjugation of indigenous peoples. Forgetting the origins of the discipline, theorists described the law of nations, or international law, as concerning itself only with the rights and duties of European and similarly "civilized" states and as having its source entirely in the positive, consensual acts of those states. Vitoria's admonishments concerning the American Indians were recast as statements of morality as opposed to law, international law moved to embrace what the "civilized" states had *done*, and what they had done was to invade foreign lands and peoples and assert sovereignty over them.[27]

2. Definition and attributes of sovereignty

Grotius defines the state as "a perfect body of free men, united together in order to enjoy common rights and advantages."[28] The state derives its authority from mutual consent. Correspondingly, the law between states derives its authority from the consent of most other states. The only law in common to every single nation is the law of nature.[29] The law of nature is a kind of common law between nations.[30]

The three main powers of a state are the right to make its own laws, the right to execute them in its own manner, and the right to appoint its own magistrates.[31] A sovereign power cannot be under the control of any other

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24. *Id.* at 14.

25. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 191, 195 (1990).

26. *Id.* at 195-97.

27. S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L. & COMP. L. 1, 3 (1991). *See also* GROTIUS, *supra* note 2 at 112.

28. GROTIUS, *supra* note 2, at 25.

29. *Id.*

30. *Id.*

31. *Id.* at 60-61.

power, and its actions cannot be annulled by anyone.[32] Therefore a state in subjugation to another state is not sovereign. Confederated states, however, still retain their individual sovereignty.[33]

3. Possession of unoccupied lands

Uninterrupted possession of "desert" lands cannot create express title. Such a right is the creation of civil law. Each state's civil law applies only within its own borders and cannot apply between two countries. So, as between two sovereign nations, boundaries are settled by treaty.[34]

To disturb anyone in the actual possession of territory is "repugnant to the general feelings of mankind."[35] However, an owner's silence may be taken by another party as a valid presumption that property is deserted if the owner's *silence is of his own free will and with knowledge of the other party's claim.*[36] This presumption is valid because it is improbable that anyone would allow another to take one's property without objecting.[37] This presumption has actually become a rule between nations, since they have subscribed to it for mutual convenience.[38]

4. Treaties and Treaty Interpretation

The roots of the theories of treaty interpretation merit close attention, since the various arguments in the Cherokee Cases rest heavily upon treaty interpretation.[39] Grotius divides treaties into two types: those based on the law of nature, and those based on man-made obligations.[40] Why do we need treaties based on the law of nature? Grotius regretfully remarks that before the Biblical flood, natural justice reigned on the earth, but after the flood, evil took hold, "

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32. *Id.* at 62.

33. *Id.*

34. *Id.* at 109-10.

35. This is supported by a full page of references to "holy writ," Greek and Roman history, Tacitus, and Cicero. *Id.* at 110.

36. *Id.* at 112.

37. *Id.* at 114.

38. *Id.*

39. Whether or not this is fair is quite another matter; Joseph C. Burke notes that:

> [i]n theory, the Government treated with the tribes as sovereign nations, purchasing only the lands they chose to sell and guaranteeing forever their title to the lands they chose to keep. In practice, the constant encroachment of white settlers, which the state governments would not and the federal government could not prevent, made a mockery of Indian sovereignty by forcing tribes to sell lands they wanted but could not peacefully keep. Written treaties that spoke of Indian nations, Indian boundaries, and Indian political rights remained on file, while time and the lack of records concealed the bribery, threats, and force that so often preceded their signing. Because the Indians, under pressure, usually sold the lands that the settlers demanded, the President, the Congress, and the Supreme Court could maintain the formal position that cession had been voluntary.

Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 501 (1969).

40. GROTIUS, *supra* note 2, at 168.

[s]o that one people's robbing and plundering another, even when no war had been commenced or declared, was deemed lawful."[41] Thus consensual agreements for mutual forbearance, formerly uncalled for, were rendered necessary.

Treaties can be made between unequal powers, and treaty obligations themselves can be equal or unequal.[42] For a superior power, an unequal obligation is one in which it gives something without getting anything in return.[43] For an inferior power, an unequal obligation is a suppression of privileges. This may or may not be attended with a diminution of sovereign power.[44] Just what exactly would lead to a diminution is not spelled out by Grotius. The only specific example he gives is that of a conditional surrender which would lead to an entire transfer of sovereignty.[45]

As to interpretation, words must be construed by their "common acceptation."[46] Ambiguity is resolved by looking at the context. Grotius particularly points to the consequences of a provision as furnishing an aid to interpretation, especially where a clause taken in its literal meaning would lead to consequences foreign or even repugnant to the intention of a treaty.[47] That is, ambiguities must be resolved in a way that will not lead to contradiction or absurdity.

C. *Vattel*

Emmerich de Vattel (1714-1767) published the *Law of Nations* in 1758, thereby becoming "one of the most important and controversial theorists in the history of international legal thought."[48] The first English translation was made in 1760 and became an authority in English-speaking countries. It made its way to the United States in 1775, when a Swiss publisher sent Benjamin Franklin a new translation.[49] Arthur Nussbaum notes that during this time, any information on foreign affairs was eagerly welcomed in the States since, as colonies, they had been outside of international intercourse. Vattel was cited frequently in court cases from 1789 to 1820.[50] Thompson makes specific reference to Vattel in his opinion in *Cherokee Nation*,[51] as does Marshall in *Worcester*.[52]

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41. *Id.* at 169.
42. *Id.* at 170.
43. *Id.* at 171.
44. *Id.*
45. *Id.*
46. *Id.* at 179.
47. *Id.*
48. Ruddy, *supra* note 4, at 839.
49. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 161 (1954).
50. *Id.* at 162.
51. *Cherokee Nation*, 30 U.S. (5 Pet.).
52. *See infra* note 119. Additionally, the influence of Grotius on Justice Marshall is noted by Edward Dumbauld: "Much of Marshall's learning in the realm of international law was derived from Thomas Rutherford's *Institutes of Natural Law*. This digest of Grotius was one of the few law books in Marshall's library. It was an influential treatise in that era, and Marshall relied extensively on its teachings." Edward

1. Natural Law

The basic principle of natural law for Vattel is that "all men inherit from nature a perfect liberty and independence, of which they cannot be deprived without their own consent."[53] A nation is an aggregate of persons, so it is itself a person—a moral person, possessed of rights and obligations - a society united to promote mutual safety and advantage.[54] Since nations are composed of persons who before the union are naturally free and independent, living in the state of nature, then it follows that nations themselves are persons living together in the state of nature.[55] Thus Vattel lifts the whole concept of the Leviathan to the international level.

The law of nations is divided into two areas: the necessary or natural law of nations[56] and the positive law of nations.[57] Natural law is based on the law of nature, the first principle of which is that "each individual should assist others when they need it as long as to do so does not harm the individual."[58] This philosophy is faithful to the Hobbesian ethical framework wherein a person's first duty is to himself. On the state level it suggests that each nation must do all it can to help other nations without harming itself.[59] The second principle of the natural law of the law of nations is that each nation should be left in peace to enjoy the freedom with which it has been endowed by nature.[60] Flowing from this is the rule that each nation has the right to judge for itself what its duty is.[61] To Vattel the necessary law of nations is self-justifying. Because its precepts spring from the law of nature, they are immutable.[62]

The other branch of the law of nations is positive law or law created by man. It consists of voluntary law, or the uniform practice of nations, which is founded on presumed consent; customary law, or custom, founded on tacit consent; and conventional law, the law of treaties, which is founded on express consent.[63]

2. Definition and attributes of sovereignty

For Vattel, self-government is the only criterion for sovereignty. Sovereignty only requires that a state "govern itself by its own authority and laws."[64] A weak state that unites itself with a more powerful state, in an

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Dumbauld, *John Marshall and the Law of Nations*, 104 U. PA. L. REV. 38, 40 (1955).

53. VATTEL, *supra* note 3, at 53.
54. *Id.* at 52.
55. *Id.*
56. *Id.* at 54.
57. *Id.* at 63.
58. *Id.* at 56.
59. *Id.* at 57.
60. *Id.*
61. *Id.* at 58.
62. *Id.* at 55.
63. *Id.* at 63.
64. *Id.* at 66.

unequal alliance, still remains sovereign as long as it governs itself.[65] The act of placing itself under the protection of a stronger state does not divest the state of its sovereignty.

3. Possession of unoccupied lands

In Book I, Chapter XVIII (*Of the Establishment of a Nation in a Country*), Vattel traces the development of civilization and property rights which at several points specifically address the situation of the indigenous peoples in North America.[66] God intended the earth to belong to all of mankind, to be their home and to supply them with food. Thus all men possess a natural right to inhabit the earth and to derive subsistence from it. In ancient times, cultivation became necessary because there was no longer enough growing wild to satisfy everyone's wants. Consequently, people could no longer be nomadic and possess all land in common. They had to establish themselves in particular places and take over particular lands so that they could cultivate enough for themselves without being disturbed. This is the origin of property rights.[67]

Since all of mankind has an equal right to things that have not yet fallen into the possession of anyone, and those things belong to the first claimant, nations may take possession of uninhabited countries. Simply claiming title by planting a flag or making a declaration is not enough. The nation must actually possess and use the "uninhabited" lands. The earth belongs to all people as a means of sustenance; therefore, no nation may appropriate more land than it can settle and cultivate.

It follows from this, Vattel maintains, that the Indian tribes in the new world cannot be said to truly possess the "immense regions" in which they live, so it is appropriately in conformance with nature to limit them to smaller territory.[68] Again in Book II, Chapter VII, he reiterates that while nomadic peoples do possess the land over which they wander, other nations may move in and settle on parts of it without injustice.[69] There is no injustice in this as long as there is enough space for all to supply their wants. If the newcomers teach the indigenous tribes to raise food through cultivation, then, since cultivation provides greater yield in less space, they can move in and settle on the land, free of any pangs of moral compunction. This is only justifiable, however, in cases of "necessity," a term which Vattel does not venture to define.[70]

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65. *Id.*

66. *Id.* at 172.

67. *Id.*

68. *Id.* at 175. Vattel has words of praise for the Puritans, who, though they had a charter to the land they settled, nevertheless also made the gesture of purchasing it from the Indians.

69. "The savages of North America had no right to appropriate all that vast continent to themselves; . . . If the pastoral Arabs would carefully cultivate the soil, a less space might be sufficient for them." *Id.* at 259.

70. *Id.*

4. Treaties and treaty interpretation

Treaties are equal or unequal.[71] Equal treaties embody equivalent promises.[72] Unequal treaties are those in which nations do not exchange reciprocal or equivalent promises.[73] These treaties do not necessarily impair sovereignty if the weaker party is merely consenting to a restriction.[74] However, the treaties do impair sovereignty if the weaker party agrees to refrain from a certain action. An example would be declaring war against a particular country without the consent of the stronger party.[75] Such an action would constitute a surrender of free will, one of the most important characteristics of a sovereign state.

Regarding treaty interpretation, Vattel tracks Grotius: language should be used in its common sense;[76] provisions should be given the meaning attached to them at the time of making by the parties;[77] ambiguities should be determined in context.[78] The consequences of an ambiguous provision must be examined in order to determine its meaning:

> It is not to be presumed that sensible persons, in treating together, or transacting any other serious business, meant that the results of their proceedings should prove a mere nullity. The interpretation, therefore, which would render a treaty null and inefficient, cannot be admitted. We may consider this rule as a branch of the preceding; for, it is a kind of absurdity to suppose that the very terms of a deed should reduce it to mean nothing. It ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory . . . .[79]

III. THE CHEROKEE CASES

A. Cherokee Nation v. Georgia

On December 19, 1829, Georgia passed an act adding Cherokee Territory to the state and extending jurisdiction over it, declaring Cherokee law null and void. The Cherokee Nation sought an injunction against the state of Georgia and all its officers and agents from executing and enforcing the laws of Georgia

71. *Id.* at 293.
72. *Id.*
73. *Id.* at 295.
74. *Id.* at 297.
75. *Id.*
76. *Id.* at 347.
77. *Id.* at 345.
78. *Id.* at 352.
79. *Id.* at 352-53 (emphasis omitted).

within Cherokee Territory. The narrow issue before the Supreme Court was whether the Cherokee Nation constituted a foreign state for purposes of Article III standing. The Court ruled against the tribe, denying the injunction on the grounds that the Cherokee Nation, while a state, was not a foreign state within the meaning of the Constitution and thus did not have standing. The Indian tribes were not foreign states but rather "domestic dependent nations."[80]

1. Marshall's opinion

In six concise pages Marshall gives two main reasons for concluding that the Indians are not foreign states for constitutional purposes. The first reason is that the Indians' imperfect land tenure denies them an important attribute of sovereignty: absolute dominion over their lands.[81] While the Indians have an undisputed right to occupy their lands, the United States possesses a title independently of their will which will in time become paramount.[82] So, despite the fact that their land right, such as it is, is unquestioned, the Indians live within the greater embrace of a larger power and are subject to it.

The second reason is international consensus. Since other nations view the United States as having sovereignty over the Indians, the government *does* have sovereignty over the Indians.[83] This repeats the circular argument: this is the way it is, so this is the way it should be. In Vattel's scheme, this would fall under the positive law category of customary law, which is founded on the tacit consent of all but the Native American tribes.

The only document Marshall draws upon to bolster his conclusion is the Indian Commerce Clause of the Constitution.[84] By referring separately to foreign nations and Indian tribes, he maintains, the clause differentiates between them. This reference may be appropriate, since the Court is trying to determine whether the tribes are states within the meaning of the Constitution, but it is also as self-referential as the justification of international consensus outlined above.[85]

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80. *Id.* at 17

81. *Id.*

82. *Id.*

83. *Id.* at 17-18.

84. *Id.* at 18.

85. O'Brien maintains that "[a] final point concerning Marshall's reliance on the commerce clause involves the propriety of using domestic law to decide a question of international law. The weakness of this approach was apparently well understood by the Chief Justice. At no point in the *Cherokee Nation* decision did Marshall state the Cherokees were not a sovereign state under international law. Instead, Marshall very carefully defines the Cherokees as not being a foreign state within the meaning of the Constitution." O'Brien, *supra* note 23, at 56. The existence of the Nation's Article III standing to sue was, however, the narrow issue before the court.

2. Johnson's opinion

Justice Johnson's opinion is much harsher: Indian nations do not qualify as states because they are not civilized.[86] He calls upon Vattel's customary law when he further asserts that tribes are not sovereign because they have never been recognized as such under international law.[87] The doctrine of discovery, he claims, gives absolute dominion to the discoverers.[88] The conditional language of the Treaty of Hopewell (1785) is "certainly the language of sovereigns and conquerors, and not the address of equals to equals;"[89] it effects a complete relinquishment of sovereignty. The provisions of Article IX, including those in which the Cherokees place themselves under the sole and exclusive protection of the United States and give the United States the exclusive right to regulate trade "amount . . . in terms to a relinquishment of all power, legislative, executive, and judicial to the United States."[90] This is contrary to the principles outlined by Grotius and Vattel, which hold that treaties can be made between unequal powers, and that such compacts do not automatically strip the "weaker" state of its sovereignty.[91]

Johnson maintains that the nature of the Indian's land right is essentially temporary. Originally the government intended to help them "progress" from hunter-gatherers to the more civilized agricultural state in order to incorporate them into Anglo-American culture, but this was "a policy which their inveterate habits and deep-seated enmity has altogether baffled."[92] Thus, their occupation of the land was meant only to last until they exhausted the game and moved out of the territory (at which point the United States' ultimate sovereign right over the land would be perfected).[93]

What Johnson is in essence saying is that the Indians' obstinate refusal to adhere to modern Western European theories of human social progress (from chaotic and primitive to civilized and rational state)[94] devalues them as humans, thereby justifying a dismissal of their rights. This is another example of the circular logic and cultural self-reference apparent in international law theory from its earliest beginnings:[95] *This is the way it is, so this is the way it should be*—and anything that is not this way does not count at all. Only in this context

86. "I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are." *Cherokee Nation*, 30 U.S. (5 Pet.) at 21.

87. *Id.* at 22.

88. *Id.* at 23.

89. *Id.*

90. *Id.* at 24-25. Justice Johnson blithely reasons further that since the treaty did not treat the Indians as sovereign and nothing after that served to grant them sovereign status, they are not sovereigns. *Id.* at 25.

91. *See* discussion *supra* parts II.B.4, II.C.3.

92. Cherokee Nation, 30 U.S. (5 Pet.) at 24.

93. *Id.*

94. *See* discussion *supra* part II.A.

95. *See* discussion *supra* part I.

can we even partially grasp Johnson's inability or unwillingness to consider the Indians as anything other than "an anomaly unknown."[96]

Johnson holds that the inability to control their own lands is an automatic negation of sovereign status for the Cherokees.[97] This emphasis on dominion over lands as the ultimate and sole criterion of sovereignty, also mentioned in Marshall's opinion, does not coincide with the theories of either Grotius or Vattel. As noted above, both theorists focus on government in their definitions of a state; for Grotius, a sovereign state is one which makes and executes its own laws and appoints its own magistrates;[98] for Vattel, one which "govern(s) itself by its own authority and laws."[99] Nothing could more completely reveal Johnson's inherent cultural bias than this fundamental inability to consider even the possibility that self-government could be compatible with lack of full territorial control.

3. Baldwin's opinion

Justice Baldwin's opinion introduces two new points. First, the Cherokee Nation is not a foreign state because the executive branch has never considered it as such; the fact that the Department of Indian Affairs was established separately from that of foreign affairs is conclusive proof.[100] This distinction is therefore a political matter, completely outside the scope of the Court.[101]

Secondly, Indian sovereignty would contravene the principle behind the Equal Footing Doctrine.[102] New states could not possibly enter the union on equal footing with existing states if they were deprived of sovereignty and jurisdiction over portions of their territory. Both these arguments are self-referential.

Baldwin then launches into an analysis of the Treaty of Hopewell which reiterates Johnson's main points. The treaty is not between equals: in it the Cherokees acknowledge their dependent character, hold their lands only as an "allotment" of "hunting grounds," and give Congress the exclusive right of managing their affairs.[103] In Article Twelve, Baldwin claims, the Cherokees obtain Congressional permission to send a diplomatic agent to Congress, something, he claims, a sovereign nation would not have to do.[104] These provisions turn the treaty into a contractual relinquishment of sovereignty, and having executed such a relinquishment the Cherokees cannot then attempt to

96. *Cherokee Nation*, 30 U.S. (5 Pet.) at 27.

97. *Id.* at 27.

98. *See* discussion *supra* part II.B.1.

99. *See supra* part II.C.1.

100. *Cherokee Nation*, 30 U.S. (5 Pet.) at 33.

101. *Id.*

102. *Id.* at 35.

103. *Id.* at 38. "There can be no dependence so anti-national, or so utterly subversive of national existence as transferring to a foreign government the regulation of its trade, and the management of all their affairs at their pleasure." *Id.* at 39.

104. "That the Indians may have full confidence in the justice of the United States respecting their interests, they should have the right to send a deputy of their choice whenever they think fit to Congress." *Id.* at 38.

claim entry to the courts as a foreign sovereign. But a treaty between two nations, in which one gives up its sovereignty, can no longer be a treaty between two nations. Nowhere in the Treaty of Hopewell do the Cherokees expressly relinquish sovereignty. Interpretations of the various provisions as indirectly relinquishing sovereignty ought to be reexamined in light of both Grotius's and Vattel's abjurations that ambiguous provisions must be interpreted in context, and in light of their consequences. Interpretations which result in absurdities or contradictions should not be admitted since they essentially nullify the treaty.[105]

4. Thompson's dissent

Thompson's opinion is framed squarely within the principles of Vattel. A state is "a body of men, united together, to procure their mutual safety and advantage by means of their union."[106] Any such state which governs itself is sovereign, regardless of whether it has formed an unequal alliance with another state: "a weak state that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power."[107] He further states:

> Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state. They have always been dealt with as such by the government of the United States . . . . They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same; yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self government over what remained unsold.[108]

He dismisses the fact of the Cherokee's imperfect land tenure as a denial of sovereignty.[109] By shifting the emphasis from land dominion to self-government, he recasts the concept of sovereignty as a political, not a territorial concept. This is more in line with Grotius and Vattel.[110]

As a matter of common sense, Thompson does not understand how the Cherokees can be treated as sovereign by the government but still not be considered a foreign state within the meaning of the Constitution.[111] He

105. *See supra* parts II.B.4, II.C.3.
106. *Cherokee Nations*, 30 U.S. (5 Pet.) at 52.
107. *Id.* at 53.
108. *Id.*
109. *Id.* at 55.
110. *See supra* part III.A.2. and part II.C.1.
111. *Cherokee Nation*, 30 U.S. (5 Pet.) at 54.

reverses Johnson's circular reasoning:[112] the Cherokees were here before we were and were not connected to any other power, therefore they were foreign nations as over against every other country in the world. Nothing can be found to revoke that status, therefore they remain foreign nations.[113]

In his treaty analyses, Thompson looks at the same provisions and comes to the opposite conclusions as Johnson and Baldwin. For example, he characterizes the "deputy to Congress" provision of Article Twelve of the Treaty of Hopewell as "a full recognition of the sovereign and individual character of the Cherokee Nation."[114] And he points to other provisions which support sovereignty: those which stipulate the restoration of prisoners taken by either side; those which draw a boundary line between the Cherokees and the United States which includes territory within the physical limits of Georgia; and those which stipulate that the Cherokees will turn over criminals to the United States who have taken refuge in their territory.[115]

> What more explicit recognition of the sovereignty and independence of this nation could have been made? It was a direct acknowledgement, that this territory was under a foreign jurisdiction . . . . The necessity for the stipulation must be, because the process of one government and jurisdiction will not run into that of another; and separate and distinct jurisdiction, as has been shown, is what makes governments and nations foreign to each other in their political relations.[116]

He also dismisses the issue of the Indian Commerce Clause as a "mere verbal criticism."[117] The clause was intended merely for commercial regulation. Here, unlike the other justices, he is interpreting the clause in context, and to avoid "absurdity," as both Grotius and Vattel would do.[118] The fact that the Constitution leaves this power in the hands of the federal and not state government is further proof that the Constitution considers the Indians tribes as separate jurisdictions, distinct from states.[119]

Finally, Thompson regards a treaty as a contract. If the Indians were considered competent to enter into contracts, it would be inconsistent to deny them the ability to enforce them.[120] This follows Grotius's and Vattel's treaty interpretation principles. Since "[t]he Constitution expressly gives the court jurisdiction in all cases of law and equity arising under treaties with the United

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112. *See* discussion *supra* III.A.2. and note 91.
113. *Cherokee Nation* 30 U.S. (5 Pet.) at 55.
114. *Id.* at 66.
115. *Id.* at 61.
116. *Id.*
117. *Id.* at 62.
118. *See supra* part III.A.3., II.B.4., and II.C.3.
119. *Cherokee Nation,* 30 U.S. (5 Pet.) at 64.
120. *Id.* at 59.

States,"[121] and Georgia has violated the treaty, the Supreme Court ought to hear the case.[122]

B. Worcester v. Georgia

On December 22, 1830, Georgia passed another act prohibiting any white person from living within Cherokee Territory without a permit from the government. Worcester and six others were indicted on July 15, 1831, for violating this act. Worcester argued that the Georgia statute was unconstitutional on the grounds of repugnance to the treaties between the federal government and the Cherokee Nation, still in force, which acknowledged the Territory as free of legislative interference by the states.[123] The Constitution gave regulation of intercourse with the Indians exclusively to the federal government; the state of Georgia, Worcester claimed, was unlawfully interfering with this.[124] The Supreme Court agreed, holding that exclusive authority to deal with the tribes lies with the federal government; though the Cherokee Nation is not foreign, it is still a nation, and sovereign within the domestic arena.[125] The Constitution will brook no state interference with the tribes.

In this case Marshall's opinion is a more thorough forty-one pages (as opposed to six in *Cherokee Nation*) which includes a treaty analysis along the lines of Thompson—that is, adhering more closely to the law of nations as laid out by Grotius and Vattel. First, he corrects Johnson's misinterpretation of the doctrine of discovery; it did not grant absolute sovereignty over the land, but merely gave the discovering nation the exclusive right to purchase lands from the natives as against all other nations.[126] This is an agreement among the European powers in order to avoid conflict, that is, a principle of customary law.[127]

Marshall then moves on to treaty analysis. He discusses three treaties: the first Treaty with the Delawares (1778), the Treaty of Hopewell, and the Treaty of Holston (1791). The first Delaware treaty "in its language, in its provisions, is formed as near as may be, on the mould of treaties between the crowned heads of Europe."[128] He stresses the language of equality, and the fact that trade is regulated in an equal manner.[129]

Moving to the Treaty of Hopewell, Marshall addresses the troublesome provision in the Third Article by which the Cherokees place themselves under

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121. *Id.*
122. *Id.*
123. *Id.* at 530.
124. *Id.* at 531.
125. *Id.* at 561.
126. *Id.* at 544.
127. *Id.* at 543.
128. *Id.* at 550.
129. *Id.*

the protection of the United States.[130] Adopting the reasoning of Thompson (and Vattel), he maintains that this does not constitute a relinquishment of sovereignty: "Protection does not imply destruction of the protected."[131]

He dismisses Johnson's and Baldwin's dissective analysis of specific treaty language as cavil. The Indians did not understand terms such as "allotted" and "hunting grounds" exactly as the United States did. These terms ought to be interpreted as the Native Americans would have understood them.[132] This is the genesis of the "canons of construction," in which Marshall is faithful to the principles of Grotius and Vattel: words should be used in their "common acceptation,"[133] and provisions should be given the meaning attached to them *at the time of making* by the parties.[134] Similarly, he examines the "managing their affairs" clause of Article IX in its context. His conclusion is that it has only to do with trade, and cannot not be interpreted as an intentional divestment by the Indians of their full sovereignty; this would go against the whole spirit of the treaty.[135] Marshall then goes through the provisions of the treaty of Holston, many of which are repetitions of those in the Treaty of Hopewell, and stresses their equal nature.[136]

By virtue of the fact that these treaties were made, and were adopted and sanctioned by the Constitution along with the treaties of all other nations, the tribes are placed on the same plane with those other nations.[137] The fact of these repeated treaties is itself proof of the Indians' right to self-government.

> The settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state . . . . 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government . . . [is] left in the administration of the state.'[138]

In his opinion in *Worcester*, Marshall decisively lifts tribal status beyond the sphere not just of state jurisdiction but state interference. By discarding the emphasis on dominion over land and underlining self-government as the primary criterion for sovereign status, Marshall adheres in this second case more closely to the principles of international law laid down by Grotius and Vattel and

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130. *Id.* at 551.
131. *Id.* at 552.
132. *Id.* at 552-53.
133. *See* discussion *supra* part II.B.4.
134. *See* discussion *supra* part II.C.3.
135. *Worcester*, 31 U.S. (6 Pet.) at 554.
136. *Id.* at 555.
137. *Id.* at 560-61.
138. *Id.*

prevents the further erosion of tribal rights by state encroachment which could easily have followed from the first Cherokee case.

IV. CONCLUSION

The law of nations began as an ethical code for nations. It set up standards for the mutual conduct of states, those larger bodies composed of individuals united together by common consent for the common good. Many of the ethical principles devised for the conduct of international relations are contradictory and self-serving when applied to non-European "uncivilized" peoples. They exhibit tension between moral conscience and a Eurocentric superior prerogative. Language of apparent objectivity and equality (not always sincere, sometimes patronizing) wars with self-interest evident in doctrines justifying the prevailing power structure. For example, following the seventeenth-century rationalist cue, Grotius secularized the foundations of international law by placing all the earth's inhabitants—"heathen" or otherwise—on a morally equal plane.[139] This was an indispensable first step toward recognition of the sovereignty of indigenous peoples. Yet he also countenanced the use of international consensus to legitimize the imperialistic European practice of claiming title to "unoccupied" lands (that is, unoccupied by other Europeans).[140]

This tension is also evident in Supreme Court application of these norms to the indigenous peoples of North America. Robert A. Williams, Jr. has written of this rationalization of the status quo in reference to *Johnson v. McIntosh*, the first case in the Marshall Trilogy (along with the Cherokee Cases it constitutes the foundation of federal Indian law):

> The dominant themes of Marshall's denial of Indian natural-law rights in *Johnson* are clearly established in those early evasions of judicial accountability for the positive law established by European-derived governments for acquiring lands in America. History and the decisions made and enforced by those Europeans who invaded America respecting Indian land rights determined the inescapable framework for Marshall's legal discourse. His judicial task was merely to fill in the details and rationalize the fictions by which Europeans legitimated the denial of the Indians' rights in their acquisition of the Indians' America.[141]

It was because of this prior agenda that the Supreme Court had to make of the Cherokee Nation an exception to the rules of international law. If the Indians

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139. *See* discussion *supra* part II.B.1.

140. *See* discussion *supra* part II.C.3.

141. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 312 (1990).

were measured by the norms of the law of nations regarding sovereignty, the court would have been forced to draw the inescapable conclusion that they possessed that status just as other foreign states did, and this would not have validated the continuing practices of the U.S. government in dealing with the tribes.

In the second Cherokee case, Marshall still had to rationalize an existing state of affairs, but he could no longer ignore the ethical dimensions of the situation. He executed almost a complete about-face, analyzing the question of sovereignty and the implications of various treaties with the Indians according to the principles of international law as outlined by Grotius and Vattel. The result was a holding that the Cherokee Nation was indeed sovereign, but could only exercise that sovereignty fully within the domestic context. This re-injection of ethics into the law of nations applied to the Indians itself illustrates how the more powerful nations both formulated and then applied or ignored these norms according to their own ends and purposes—and through a process in which, notably, the indigenous peoples themselves had no voice. Circular logic and cultural self-reference shut them out of it completely. Marshall's partial rehabilitation of tribal status in *Worcester v. Georgia* established a quasi-sovereign status for Native Americans which does in fact make of them an "anomaly unknown."

Helen W. Winston