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Robert J. Miller

BOOK REVIEW

A NEW PERSPECTIVE ON THE INDIAN REMOVAL PERIOD

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The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations. By Tim Alan Garrison.[1] U. Ga. Press, 2002. Pp. 331; $39.95 Hardcover.

Professor Garrison's well-written and thoughtful book sheds new light on the role of the southern state courts in what has always been considered a "federal" Indian policy: the removal of all the Indian tribes west of the Mississippi River.[2]

The federal removal policy was designed to provide, in essence, room for the United States to expand and grow its population while hopefully avoiding warfare with tribes. The removal period is generally considered to have started in 1828 with the election of President Andrew Jackson or, more specifically, in 1830 when Congress enacted the removal statute.[3] However, action to remove all tribes west of the Mississippi had long been considered the ultimate goal of the federal

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1. Professor Garrison is an Assistant Professor of History at Portland State University in Portland, Oregon.

2. Professor Garrison states that most scholars have quite naturally focused on the United States Supreme Court Indian law cases and have overlooked important southern state court decisions that helped to bring about the removal policy. Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* 6, 6 n. 11 (U. Ga. Press 2002) (citing several other commentators who have also discussed the southern cases).

3. *See* Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* 16, 17 n. 52 (Yale U. Press 1987). In his First Annual Message to Congress, President Jackson made it clear that the tribes were no longer welcome east of the Mississippi River. *See A Compilation of the Messages and Papers of the Presidents, 1789-1902*, at 456-59 (James D. Richardson ed., Bureau of Natl. Literature 1897); Garrison, *supra* n. 2, at 3; Pub. L. No. 105-06, 4 Stat. 411-12 (1830). The Removal Act was hotly contested and a major national issue. The bill divided the Congress and the nation on political and sectional lines. The bill ultimately passed the Senate by a twenty-eight to nineteen vote and barely passed the House after a long and acrimonious debate by a vote of 102 to ninety-seven. Garrison, *supra* n. 2, at 108. It gave the federal government authority to enter treaties for cession of more tribal lands and the removal of consenting tribes. *Id.* at 3.

government.[4] In fact, Commander-in-Chief George Washington wrote in 1783 to the Continental Congress Committee of Indian Affairs regarding his ideas on how to deal with the tribes. Washington felt that the United States could avoid conflicts with tribes by establishing a line over which American settlers were not to cross westward and Indians were not to cross eastward, except for trading purposes, and by the United States only acquiring Indian lands by purchase instead of by force.[5] Washington analogized Indians to the "Wild Beasts of the Forest" and theorized the United States would not need to fight wars with the tribes to ultimately take over their lands. Instead, Washington stated that the natural extension of American settlements would "certainly cause the Savage as the Wolf to retire . . . ."[6] Thus, just as the animals retreated to new areas due to the cutting down of the forests and the American settlement of the wilderness, Indians would similarly retreat from the growth and advancement of the American frontier.

As early as 1803, President Thomas Jefferson was also thinking of removing all Indians west of Mississippi.[7] At that time, Jefferson wrote to the territorial governor of Ohio that the Indian tribes will "in time either incorporate with us as citizens of the United States or remove beyond the Mississippi."[8] In addition, the Jefferson Administration planted the seed for the removal of the Southeastern tribes in the Compact of 1802 when Georgia ceded its claims to western lands to the federal government.[9] In this Compact, the United States promised that "it would extinguish the Indian title in the state [of Georgia] as soon as it could be 'peaceably obtained, and on reasonable terms.'"[10] Thus, it appears that the United States was committed to some form of removal policy, at least in Georgia, from the date of the 1802 Compact forward.

The intriguing new light Professor Garrison shines on the removal policy is the influence and importance of southern state courts in forcing removal on the United States and the tribes. In the words of the jacket cover, the book is a "the first to show how state courts enabled the mass expulsion of Native Americans from their southern homelands in the 1830s." Professor Garrison analyzes three

4. Wilkinson, *supra* n. 3, at 16 n. 51 (1987); R. Satz, *American Indian Policy in the Jacksonian Era* 6 (U. Neb. Press 1975) (discussing Thomas Jefferson's, James Madison's, and James Monroe's adoption of removal as the ultimate Indian policy); Walter Mohr, *Federal Indian Relations: 1774-1788*, at 171 (U. Penn. Press 1933) (quoting 1789 report by Henry Knox, Secretary of War, suggesting the removal of tribes west of the Mississippi). *See* Garrison, *supra* n. 2, at 20, 20 n. 12, 22, 53 (suggestions were made to drive the tribes west of the Mississippi in 1793 and 1797; the federal government entered a treaty with some Cherokees in 1808 and removed them to the Arkansas Territory; in 1817, a Senate committee advised relocation of the tribes; President Monroe adopted the idea).

5. Letter from George Washington to James Duane, in *Documents of United States Indian Policy* 1-2 (Francis Prucha ed., 2d ed., U. Neb. Press 1990).

6. *Id.*

7. Satz, *supra* n. 4, at 6; B. Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* 241-50 (W.H. Norton & Co. 1973). *See* Garrison, *supra* n. 2, at 13 (Jefferson alluded in 1776 to the need to drive the tribes west of the Mississippi).

8. Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* 201 (Alfred A. Knopf 1997).

9. Garrison, *supra* n. 2, at 20.

10. *Id.* at 20.

southern state court decisions to prove his thesis: *Georgia v. Tassels* (1830),[11] *Caldwell v. Alabama* (1831),[12] and *Tennessee v. Forman* (1835).[13] The chronological order in which Garrison analyzes these state cases in juxtaposition with the Marshall Trilogy of Indian law cases from 1823 to 1832 works very well, helping the reader to understand the import of the state cases, placing them in an historical setting, and contrasting how they both relied upon and completely ignored the current federal precedent on Indian law at different times.[14]

Garrison also analyzes how the United States Supreme Court, led by Chief Justice John Marshall, developed its Indian law jurisprudence in *Fletcher v. Peck*,[15] and over the nine-year period from *Johnson* in 1823 to *Worcester* in 1832.[16] Garrison claims that the law changed dramatically in this period, stating that *Worcester* was in effect a reversal of, or at least a major departure from, *Johnson*.[17] Garrison alleges that the southern courts used this evolving federal judicial Indian law to their advantage, relying on Supreme Court precedent and language that favored the southern desire for removal and yet ignoring the holding and analysis of Supreme Court cases, *Worcester* in particular, when it suited their purposes.[18]

I. *FLETCHER V. PECK* (1810)

Fletcher involved the sale by Georgia of lands that had originally belonged to the Choctaw, Cherokee, Creek, and Chickasaw tribes.[19] The state sale was fraudulent, and the new legislature attempted to nullify the sale.[20] In the Supreme Court, Chief Justice John Marshall used the Contracts Clause to strike down the state legislative act as a violation of contract and vested property rights.[21]

According to Garrison, however, Chief Justice Marshall also commenced the development of federal Indian law with his erroneous "obiter dictum" within *Fletcher*.[22] While *Fletcher* did not raise issues of tribal territorial or political rights, Marshall made the stray statement that "the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[23] In other words, Garrison states, "Marshall allowed that Native Americans held some vague possessory interest in their lands . . . [which might] be extinguished by

11. 1 Dud. 229 (Ga. 1830).
12. 2 Stew. & P. 327 (Ala. 1831).
13. 16 Tenn. 256 (1835).
14. *Worcester v. Ga.*, 31 U.S. 515 (1832); *Cherokee Nation v. Ga.*, 30 U.S.1 (1831); *Johnson v. McIntosh*, 21 U.S. 543 (1823).
15. 10 U.S. 87 (1810); Garrison, *supra* n. 2, at 73, 148.
16. *See* Garrison, *supra* n. 2, at 10, 179-80, 190.
17. *Id.* at 9-10; *see id.* at 190 n. 42, 185 n. 32 (quoting and citing numerous authorities).
18. *Id.* at 9.
19. *Id.* at 74.
20. *Id.* at 75.
21. Garrison, *supra* n. 2, at 73, 80.
22. *Id.* at 74.
23. 10 U.S. at 142-43.

unilateral state or federal action."[24] This language, Garrison argues, came back to haunt tribal rights in the southern state cases.

Garrison concludes that Marshall's "dangerous dicta . . . implied that the southern states could perhaps extinguish the Indian usufruct or alternatively, sell land in spite of the Indian title."[25] Garrison claims that this dicta invited southern politicians and judges to challenge Congress' authority over Indian land titles, to argue that tribal sovereignty was an infringement on Georgia's rights, and "allowed a states' rights boil to fester into what eventually became the crisis of the Indian Removal."[26]

II. *JOHNSON V. MCINTOSH* (1823)

In what is generally considered the Supreme Court's first Indian law opinion and, of course, the first case in the Marshall Trilogy of Indian law cases, the Supreme Court addressed the authority of Indian tribes to sell the lands they occupied and used. Garrison claims this case spawned further confusion about the nature of tribal rights because while the Court admitted that Indian nations possessed a right to occupy their lands and to use them, the Court also ruled "that the United States held political dominion over the Indian lands by virtue of the doctrines of discovery and conquest."[27] Marshall's unfortunate choice of words also reinvigorated "the outdated stereotype of native Americans as hunter-gatherers living in communities devoid of social and political institutions" and provided ammunition that the southern courts later exploited to justify dispossessing the Indian nations of their lands.[28]

The *Johnson* case involved the question of title between two different groups of purchasers of Indian lands. One group purchased the land directly from the tribe in 1773, while William McIntosh, the defendant, purchased his land from the United States in 1818.[29] The plaintiffs argued that the tribe possessed full sovereignty and held and possessed its land as the absolute owner.[30] McIntosh countered by claiming that the Indian tribes had fallen under the dominion of the French and British empires, were an inferior race under colonial and American law, were under the protection and pupilage of the United States, and did not use their lands for agriculture. Accordingly, he claimed that their territories were open to seizure "by a people of cultivators."[31]

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24. Garrison, *supra* n. 2, at 81.
25. *Id.* at 83.
26. *Id.* at 83-84, 86.
27. *Id.* at 87.
28. *Id.*
29. Garrison, *supra* n. 2, at 87-89.
30. *Johnson*, 21 U.S. at 545-50, 560-62.
31. *Id.* at 567-71. This argument and subsequent allegations in the southern court cases that Indian tribes were not cultivators of the soil were completely false, as the majority of Indian tribes in the United States and especially the southern tribes of the Cherokees and Creeks, for example, grew a very large percentage of their subsistence from agricultural pursuits. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 Or. L. Rev. 757, 767-70, 781-83 (2001).

Marshall and the Court relied on the law of the "courts of the Conqueror"[32] and held unanimously that title to Indian lands "must . . . depend entirely on the law of the nation in which they lie."[33] In *Johnson*, Marshall compromised between the two extreme conceptions of Native American rights put forward by the plaintiffs and the defendant. Marshall held that Indians were neither completely independent nations nor simply subjects of the American government.[34] *Johnson* held that Indians retained a right to occupy, possess, and use their lands, but that the doctrine of discovery granted the Europeans power to first discover the tribe and its lands as well as the sole right to purchase the lands from the tribe. The United States inherited this right from England through treaty and thus the subject Illinois tribe in the *Johnson* case had only the right to sell its land to the United States.[35]

According to Garrison, Marshall again made unnecessary statements that the southern courts later seized on in their decisions to approve state assumption of rights over Indian lands. Marshall stated that the character and religion of Indian people offered Europeans an excuse as "people over whom the superior genius of Europe might acclaim an ascendancy."[36] According to Marshall, discovery of America by the Europeans had necessarily diminished Indian rights to complete sovereignty and gave the discovering nation exclusive title and "ultimate dominion" over the lands.[37] Consequently, it followed that under the doctrine of discovery the United States gained authority over tribal land transactions and the Court held that the purchase of the disputed lands by the plaintiffs directly from the tribe was illegal, and null and void, and thus the defendant McIntosh was the rightful owner of the land in dispute.[38] As bad as Marshall's statements were regarding tribal ownership of their lands, the southern judges later suggested that the *Johnson* opinion stood for the fact that discovery gave the European nations complete sovereignty and title to the American continent.[39] Garrison alleges that the southern state supreme courts subsequently elevated Marshall's dicta to precedent and used it to sanction the expansion of even state jurisdiction over Indian nations.[40]

Garrison also argues that Marshall's thinking on Indian issues was confused or unformed at this time. Marshall clearly recognized that Indian nations were not parties to the development of the European doctrine of discovery and should not have been bound by its strictures while, on the other hand, Marshall declared that Indian title to land had been diminished to just a right of occupancy by

32. *Johnson*, 21 U.S. at 588.
33. *Id.* at 572.
34. Garrison, *supra* n. 2, at 91.
35. 21 U.S. at 584-88, 591.
36. *Id.* at 573.
37. *Id.* at 573-74, 590.
38. *Id.* at 576-80, 597-98, 604-05; Garrison, *supra* n. 2, at 93.
39. Garrison, *supra* n. 2, at 93.
40. *Id.* at 98.

discovery.[41] Garrison alleges that this was a first step in the development of Marshall's thinking on Indian law and cites scholars who have described *Johnson* as "somewhat embryonic," or "as part of an evolving doctrine of aboriginal rights in the Marshall Court."[42] Whatever his thinking, Marshall fused discovery and conquest into interchangeable and convenient excuses for American expansion onto Indian lands.[43]

Professor Garrison alleges that *Johnson* opened a Pandora's box for Native American people in the southeast because it limited Indian rights to their land and forever diminished a fundamental aspect of their national sovereignty—the right to control their national lands without interference.[44] Thus, Garrison charges that *Johnson* encouraged the southern states' efforts to take Indian lands by "implying that extinguishment of the Indian title was inevitable."[45] For southern politicians, *Johnson* became a powerful weapon to support removal, and became a powerful precedent for southern courts.[46]

III. *GEORGIA V. TASSELS* (1830)

In the late 1820s, Georgia began to seriously push the issue of removing the Cherokee Tribe and people from Georgia. The Tribe, on the other hand, perhaps as a political strategy, was moving closer and closer to an American form of government and in 1827 promulgated a republican constitution. This enraged those in Georgia who were interested in removing the Cherokee.[47] In addition, in 1827, gold was discovered in Cherokee territory, beginning the United States' first gold rush.[48]

The Georgia legislature responded by enacting several "state extension laws"—laws which extended state jurisdiction over Indian country. First, in 1827, the state extended the state's criminal jurisdiction over acts committed by or against white people within the Cherokee Nation.[49] Then, in 1828, Georgia extended its civil and criminal jurisdiction over the Cherokee Nation and annexed a large tract of Cherokee land into various Georgia counties. The legislature also declared that after June 1, 1830, all Cherokee laws would be null and void and abolished the Cherokee Constitution and courts.[50] Indians of Creek or Cherokee ancestry were prevented from being a party or a witness in any lawsuit in which a white man was involved.[51] In December 1830, the Georgia legislature passed a law annulling all contracts with the Cherokee, prohibiting the Cherokee from

41. *Id.* at 95.
42. *Id.* at 95 (quoting authorities).
43. *Id.*
44. Garrison, *supra* n. 2, at 101.
45. *Id.*
46. *Id.* at 101.
47. *Id.* at 103.
48. *Id.* at 120.
49. Garrison, *supra* n. 2, at 103.
50. *Id.* at 104.
51. *Id.*

assembling in groups (except for the purpose of signing a removal treaty), requiring all whites living in Cherokee territory to take an oath to the State of Georgia, mandating that they obtain a permit to reside in the Cherokee Nation, and providing for the survey, division, and sale of Cherokee lands.[52] Georgia also criminalized any action that discouraged the Cherokees from emigrating and applied it even to lawyers and Cherokee executive and judicial officers.[53] Moreover, Georgia's many years of lobbying Congress to enforce the Compact of 1802, in which the federal government had promised to remove Indians from Georgia, led the Senate Indian Affairs Committee in February 1830 to recommend the adoption of a General Removal Act.[54]

In this political climate, the case of *Georgia v. Tassels* arose. George Tassels, a Cherokee Indian, was charged with killing another Indian in Cherokee country but within an area recently annexed by the state. Tassels' attorney filed an interlocutory appeal on the legal question of the constitutionality of the state extending its jurisdiction over Cherokee territory.[55] The state attorney general relied on the confusion caused by *Johnson*, and also mischaracterized the analysis used in a New York state case, to argue that the Cherokees' rights could "be terminated by the state at any time."[56]

The Georgia judges relied on the states' rights theory and cited *Johnson* for the doctrine of discovery while disagreeing with Marshall's assertion that it is only the federal government that possessed the right to extinguish Indian title.[57] The court also relied on Marshall's dicta in *Fletcher* and interpreted it to mean that every acre of Cherokee land "is vested in fee in the State of Georgia."[58] The Georgia court erroneously or purposely misstated that Indian title and the rights of states to Indian lands had been the main issue in *Fletcher*. In fact, this was not even an issue in *Fletcher* and had been referenced in only one sentence of dicta in the opinion.[59] This is an example of how the state courts used the evolving federal precedent on Indian law that was available at the time they decided Indian rights cases.

The judges overruled Tassels' challenge to the trial court's jurisdiction and returned the case to the Georgia county court for trial. On November 22, 1830, a jury found Tassels guilty, and the judge sentenced him to hang on December 24th.[60] The Cherokee Nation appealed the case, and on December 12, 1830, the

52. *Id.* at 120.
53. *Id.* at 106.
54. Garrison, *supra* n. 2, at 107.
55. *Id.* at 111-12. A convention of superior court judges decided this question of law as Georgia did not yet have a supreme court. The case was decided by the newly formed semi-annual convention of state superior court (trial) judges to hear appeals of law. *Id.* at 112 n. 19. Georgia did not have a state supreme court until 1845. *Id.*
56. *Id.* at 113.
57. *Id.* at 115-16.
58. *Tassels*, 1 Dud. at 234.
59. Garrison, *supra* n. 2, at 116.
60. *Id.* at 119.

United States Supreme Court granted the appeal.[61] The governor and the legislature, however, declared that the Supreme Court did not have jurisdiction over Tassels' case. The Executive Department determined to disregard any Supreme Court order and a legislative committee passed a resolution supporting the governor's position to defy the Court's order.[62] Tassels was hung on December 24th.[63]

IV. *CHEROKEE NATION V. GEORGIA* (1831)

In direct response to Georgia's illegal hanging of Tassels, the Cherokee Nation filed *Cherokee Nation v. Georgia* on December 27, 1830. The Tribe sued Georgia in the United States Supreme Court under that Court's Article III original jurisdiction. The Tribe alleged that the Georgia extension statutes, expanding state civil and criminal jurisdiction into Indian country, violated the Constitution and the treaties of the United States. The case depended, however, upon the jurisdictional question of whether the Cherokee Tribe was a "foreign state" able to bring an original suit in the Supreme Court against Georgia.[64] As in *Tassels*, Georgia refused to file a response and did not appear for oral argument.[65]

In *Cherokee Nation*, the Court issued three decisions and split two-two-two. There is no majority opinion. Chief Justice Marshall's opinion is, however, denominated as the Court's opinion.[66] The Court decided four-to-two that the Cherokee Nation was not a "foreign state" and that it lacked standing to sue Georgia in the Supreme Court under original jurisdiction.[67] Thus, the case was dismissed.

Chief Justice Marshall, however, went on to discuss several principles, dicta really, that Garrison alleges became "disastrous for Indian rights."[68] Marshall set out the idea that tribes are "states" or political bodies but that they are "domestic dependent nations" in a "state of pupilage" with the United States and are so dependent on the protection of the federal government that they are in a "ward to . . . guardian" relationship with the United States.[69] These statements and principles would come back to haunt tribes in the southern state court cases.

V. *CALDWELL V. ALABAMA* (1831)

Removal fever spread to other states and led to the extension of state laws over tribes in many other states, including several northern states.[70] In the late 1820s, non-Indians began illegally settling in Creek territory in Alabama.

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61. *Id.*
62. *Id.* at 121.
63. *Id.* at 121-22.
64. *Id.* at 125-26; U.S. Const. art. III, § 2.
65. Garrison, *supra* n. 2, at 128-30.
66. 30 U.S. at 15.
67. *Id.* at 18-20.
68. Garrison, *supra* n. 2, at 10, 147.
69. *Cherokee Nation*, 30 U.S. at 17.
70. Garrison, *supra* n. 2, at 151, 228.

Naturally, the Creek Nation expected to be protected from these trespassers because in 1827, when they ceded their last lands in Georgia to the United States, the federal treaty commissioners promised tribal leaders that the United States would protect their remaining lands from the trespasses of white settlers.[71] When Creek Nation officials complained to the United States about the encroachment of whites, President Andrew Jackson told them that he could do nothing and that they should either move beyond the Mississippi River or prepare to fall under the jurisdiction of the state.[72]

As white trespassers literally stole tribal lands, conflicts arose and this very situation of unrest was used to incite public support for the removal of the Creek Indians. The Alabama Legislature responded to the "unrest" in the Creek Nation by expanding its civil and criminal authority over the Creeks.[73] The Alabama Legislature abolished and criminalized Creek and Cherokee laws in Alabama and annexed additional Creek territory into the state that had not been granted to Alabama in its state enabling legislation.[74]

In 1829, an Indian was killed in the part of the Creek Nation that had been annexed by Alabama. James Caldwell, a white farmer, was found guilty of the crime.[75] Caldwell appealed his conviction to the Alabama Supreme Court, challenging Alabama's jurisdiction over him since the crime occurred within the federally recognized borders of the Creek Nation. He also alleged that the extension of state jurisdiction into this area was unconstitutional.[76]

In *Caldwell*, the Alabama Justices held that the dispute over Creek sovereignty was a political issue and that it would defer to the will of the legislature because Indian communities were not independent sovereign nations and individual Indians were subject to the laws of the state.[77] However, the court went on at length to construct a legal justification for the removal of the Creeks. The court stated that the relationship between Indians and white Europeans quickly became one of white ascendancy due to the superior genius of European civilization, Christianity, and superiority in the art of war.[78] The court stated that Indians "were infantile, ignorant and incapable of protecting their own interests" and that they were not intelligent enough to lay claim to national sovereignty.[79]

The court also continued the ethnocentric misunderstanding or purposeful misstatement of Indian agricultural abilities that both the Georgia and later the Tennessee courts perpetuated. The court relied on legal authority of that time which alleged that societies had an obligation to improve or cultivate their land

71. *Id.* at 152.
72. *Id.* at 151.
73. *Id.* at 152.
74. *Id.* at 152-153.
75. Garrison, *supra* n. 2, at 154.
76. *Id.* at 155-156.
77. *Id.* at 157.
78. *Id.*
79. *Id.* at 158 (citing *Caldwell*).

and that no nation could appropriate more land that it could settle and develop.[80] The Alabama court claimed that since the Creeks and other Indians did not cultivate land and only used it nomadically for hunting, it provided an excuse for Europeans to move in and possess lands that were not in actual and constant productive use.[81] Garrison correctly states that the "the court intentionally ignored the significant place of agriculture in the lives of the Indians of the region."[82]

The judges' contempt for federal authority was demonstrated when one judge simply ignored the Indian Commerce Clause of the Constitution and stated that nowhere in the federal Constitution was authority granted to the United States to regulate trade or exercise sovereignty over Indian tribes.[83] The *Caldwell* court also ignored the very recent Supreme Court *Cherokee Nation* decision.[84] Brushing off the Supreme Court's positive comments about tribes and its holding that the Cherokee Tribe was a "state" as extraneous dicta that was not binding on the state court.[85] However, the court chose to follow other language in the *Cherokee Nation* opinion and used a "guardian and ward" analogy to suggest that the states were the true trustees of Indian interests.[86] Thus, according to this state court, the Creek Indians were in a pupilage situation with Alabama, and Alabama had the power to determine the future of the relationship.[87] Consequently, the court stated that until the Tribe removed itself from Alabama, individual Indians were subject to the state's civil and criminal jurisdiction.[88]

The conviction of Caldwell for a state crime committed in Creek territory was affirmed by the Alabama Supreme Court. An appeal to the United States Supreme Court was possible but it was perhaps intentionally mooted because the Alabama governor later pardoned Caldwell.[89] Thus the case extinguished the hopes for Creek national existence in Alabama.[90] There was no state judicial protection for Creek rights. Soon after *Caldwell*, the Creek Nation signed a treaty that allowed tribal lands to be assigned to individual Creeks and in 1836 the United States army marched over 14,000 Creek citizens west of the Mississippi.[91]

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80. Garrison, *supra* n. 2, at 160.
81. *Id.*
82. Garrison, *supra* n. 2, at 160; s*ee supra* n. 31.
83. Garrison, *supra* n. 2, at 163.
84. Garrison points out that the *Caldwell* court was not above misreading or ignoring prior cases to reach the result it wanted. *Id.* at 163 n. 31, 165 n. 36. In one instance it cited a lower New York court as authority without noting that the case was reversed on appeal; in another example, the court simply ignored Justice Marshall's opinion in *Cherokee Nation* and referred to Justice Baldwin's dissent as the official holding of the Court.
85. *Id.* at 165.
86. *Id.*
87. *Id.*
88. Garrison, *supra* n. 2, at 165.
89. *Id.* at 166-67.
90. *Id.* at 167.
91. *Id.* at 168.

VI. *WORCESTER V. GEORGIA* (1832)

As part of Georgia's continuing efforts to remove the Cherokee from the state, in 1830 the legislature required all white people entering Cherokee territory to obtain a permit from the governor.[92] For violating this law, Samuel Worcester was arrested in March of 1831 and sentenced to four years of hard labor.[93] Worcester filed an appeal with the United States Supreme Court in October of 1831.[94] The governor and the attorney general were served and ordered to appear but once again the state executive and legislative branches refused to participate in the case.[95]

In a six-to-one opinion, the Court issued a stunning victory for the Cherokee Tribe and Worcester by holding that Georgia's extension laws were "repugnant to the constitution, treaties, and laws of the United States."[96] The Court considered the Cherokees a sovereign nation separate from the United States. Indians were now defined as "a distinct people, divided into separate nations, independent of each other and the rest of the world having institutions of their own, and governing themselves by their own laws."[97] Thus, Georgia's laws "had no affect in Cherokee territory."[98] The *Worcester* decision clearly stated that there was no place for state authority or jurisdiction in Indian country. This holding contradicted directly the Georgia and Alabama courts' holdings in *Tassels* and *Caldwell*.[99]

Professor Garrison states that the *Worcester* decision was the final evolution of Marshall's Indian law jurisprudence and that he now abandoned the doctrine of discovery that he had adopted in 1823 in *Johnson* and "embraced a natural rights theory of inherent Native American sovereignty."[100] Garrison correctly points out that the *Worcester* decision discussed discovery and defined it as a European doctrine devised to apply to Europeans and that the doctrine granted the discovering nation only the "right of acquiring the soil [from the Indians] . . . [having] no impact on the national or individual rights of Native Americans."[101]

The Court's decision had little impact, however, on the opinion of the southern states. In fact, the governor of Georgia called the ruling a "usurpation" of the state's sovereignty and promised he would hang Worcester before submitting to the Court's opinion.[102] The state then ignored the Supreme Court's

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92. *Id.* at 170.
93. Garrison, *supra* n. 2, at 171, 174.
94. *Id.* at 176.
95. *Id.*
96. *Worcester*, 31 U.S. at 562-63.
97. *Id.* at 542-43, 559.
98. *"The Cherokee nation, then, is a distinct community occupying its own territory, . . . in which the laws of Georgia can have no force." Id.* at 561 (emphasis added).
99. Garrison, *supra* n. 2, at 184.
100. *Id.* at 178. *See id.* at 7, 9-10 (Garrison claims that in *Worcester* Marshall abandoned his thinking in *Johnson* and *Worcester* was a major departure from the Indian law principles previously explicated by the Court.).
101. *Id.* at 179-80; *Worcester*, 31 U.S. at 542-45.
102. Garrison, *supra* n. 2, at 191.

order to release Worcester from jail and the situation reached crisis proportions.[103] Ultimately, for political reasons having nothing to do with the Cherokee, it appears that President Jackson convinced Georgia officials that it was in everyone's best interest that Worcester be released. Subsequently, Worcester accepted a pardon from the governor and left the Cherokee Nation and Georgia.[104]

Garrison argues that *Worcester* went beyond what Georgia, the President, and a majority of Congress were willing to accept and, in essence, created a vacuum in American Indian law. He alleges that the law pertaining to Native American sovereignty was in fact what Georgia and Alabama had declared in *Tassels* and *Caldwell* and not what was stated by the Supreme Court in *Worcester*.[105] According to Garrison, "the state's right's removal ideology was emerging as the de facto law of the land."[106]

VII. *TENNESSEE V. FORMAN* (1835)

Tennessee and the Tennessee Supreme Court quickly supplied the answer whether the state governments would comply with the law as stated in *Worcester*. Conflicts within the Cherokee Tribe regarding removing west of the Mississippi River led to violence and civil strife in Cherokee territory in Tennessee. The state responded by enacting an 1833 statute that extended its criminal jurisdiction to Cherokee country. The subsequent fatal shooting of a Cherokee in Cherokee territory within Tennessee led to the arrest of two Cherokee suspects. Their attorney immediately challenged the validity of the Tennessee statute.[107]

The trial judge ruled in favor of the defendants and held that the Tennessee extension statute was unconstitutional and void.[108] The state appealed to the Tennessee Supreme Court and raised the issue whether the Cherokee people comprised a sovereign state.[109] It would appear that this question was already well answered by *Cherokee Nation* and *Worcester*. This federal precedent should have been decisive in this case. By comparison, in *Tassels*, for example, the Georgia judges had been relatively unencumbered by contrary federal precedent. In *Caldwell*, the Alabama state court had simply shrugged off the *Cherokee Nation* case.[110] The Tennessee Supreme Court, however, was squarely faced with dealing with *Worcester* and *Cherokee Nation*—cases which stated that the Cherokee Nation was a sovereign state.

Notwithstanding the then current federal precedent, the Tennessee Attorney General used Marshall's earlier opinions to avoid the application of *Worcester*. The state relied on the dicta in *Fletcher* that tribal land ownership was not

103. *Id.* at 192.
104. *Id.* at 192-96.
105. *Id.* at 197.
106. *Id.* at 197.
107. Garrison, *supra* n. 2, at 198-204.
108. *Id.* at 205.
109. *Id.* at 205-07.
110. *Id.* at 208.

contrary to state ownership in fee, and on the doctrine of discovery and conquest from *Johnson*.[111] The state argued that Marshall's *Worcester* opinion contradicted his earlier statements and that no one could reconcile *Worcester* with the prior opinions of *Fletcher* and *Johnson*. Thus, the state argued: There was no clear federal precedent for the Tennessee Supreme Court to follow![112]

It is no surprise then that the three Justices of the Tennessee Supreme Court wrote separate opinions and each embraced a different Marshall precedent.[113] The Chief Justice rejected Cherokee national sovereignty, upheld the Tennessee extension law, and maintained that *Johnson* was the controlling authority.[114] He completely repudiated the *Worcester* decision. A second Justice relied on *Cherokee Nation* and saw the Cherokees as a dependent nation and held that the civil strife that had developed among the Cherokees in Tennessee required Tennessee to extend its criminal jurisdiction over the Tribe's territory. The third Justice dissented from the court's opinion and would not have allowed Tennessee's jurisdiction to be extended over Cherokee territory. He viewed *Worcester* as the proper constitutional interpretation and would have held the Tennessee statute illegal and unconstitutional because the Cherokee Nation was an independent sovereign nation.[115]

The opinion of the Chief Justice of the Tennessee Supreme Court was denominated as the decision of the court. It confirmed the constitutionality of the state extension laws and blatantly rejected *Worcester*.[116] The Chief Justice held that the Cherokee were not citizens of a separate sovereign nation but were individual subjects of Tennessee. Thus the state had the right to extend its criminal jurisdiction over Cherokee territory.[117] The Chief Justice relied on *Johnson* and engaged in a broad reading of the doctrine of discovery. He embraced the opinion of the other southern judges and southern officials that discovery passed a superior right in tribal lands to the states from their European predecessors in title.[118] The Chief Justice alleged that *Worcester* was the anomaly and a departure from the doctrine of discovery, a doctrine recognized around the world.[119] The state supreme court ruled two-to-one that the Tennessee county court had jurisdiction and remanded the case for trial. Thus the state supreme court affirmed the Tennessee extension law and the removal proponents embraced the case as a victory for the states' rights interpretation of the Constitution.[120]

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111. *Id.*
112. Garrison, *supra* n. 2, at 209.
113. *Id.* at 211.
114. *Id.*
115. *Id.* at 211.
116. *Id.* at 6 (The Tennessee Supreme Court "repudiated Marshall's bold recognition of tribal sovereignty in *Worcester*.").
117. Garrison, *supra* n. 2, at 217.
118. *Id.* at 221.
119. *Id.*
120. *Id.* at 229.

Professor Garrison states that *Forman* "represented the final and fatal strike against the idea of Native American sovereignty for the Cherokees and the other Southeastern tribes."[121] According to Garrison, the southern judges intentionally misrepresented Native American social and political cultures, distorted the history of the United States/Indian treaty relationship, and ignored relevant precedent that might have led them to different results.[122] Hence, the southern state judiciary conformed itself to public sentiment and cleared the legal path for the forced removal of the Southeastern tribes.[123] The courts encouraged the state legislative and executive branches to ignore federal authority and especially the *Worcester* decision.[124] Garrison concludes that the three opinions of the courts of Tennessee, Georgia, and Alabama displaced the Supreme Court's decision in *Worcester* and the southern removal ideology became the law of the land.[125]

This last statement raises an inference that provides a plausible explanation for why the federal and state courts ignored the *Worcester* decision and its analysis of tribal sovereignty for over one hundred years and why a separate and hostile line of Supreme Court Indian law jurisprudence arose after *Worcester*.[126] Perhaps state influence in Indian affairs, the greed for Indian lands, and the three southern cases demonstrated a political triumph of one set of interests over tribal interests. Garrison warns that the struggle between states and tribes for sovereign authority has long been a part of our history and the southern state cases simply reflected the public opinion of the time, a theme which we have seen continue throughout time in court decisions and federal Indian policies. He concludes that even today Native American tribes "are by no means secure from the ghosts of *Tassels*, *Caldwell* and *Forman*."[127]

VIII. CONCLUSION

In conclusion, Professor Garrison's book is well worth close attention for its original viewpoints, for a new look at the Marshall Trilogy, and a first look for most persons at the southern state cases that had a major influence on the federal removal policy.

121. *Id.* at 217.
122. Garrison, *supra* n. 2, at 238.
123. *Id.*
124. *Id.*
125. *Id.* at 229.
126. *Compare* Wilkinson, *supra* n. 3, at 1, 56-59; *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *U.S. v. Kagama*, 118 U.S. 375 (1886); *U.S. v. McBratney*, 104 U.S. 621 (1881).
127. Garrison, *supra* n. 2, at 245.