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# Worcester v. Georgia: A Breakdown in the Separation of Powers

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# *WORCESTER V. GEORGIA*: A BREAKDOWN IN THE SEPARATION OF POWERS

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## *I. Introduction*

Thomas Jefferson believed that government could destroy liberty by "generalizing [and] concentrating all cares and powers into one body."[1] The founders thus balanced power between three branches of government owing obligations to one another.[2] The legislative branch writes laws and ratifies treaties,[3] the judicial branch interprets laws,[4] and the executive branch directs the government and enforces laws.[5] In this article, I examine the circumstances surrounding *Worcester v. Georgia*,[6] noting that each branch failed to uphold this balance-of-power framework: the President by ignoring a Supreme Court decision, the Senate by ratifying an illegitimate treaty, and the Supreme Court by failing to take steps to enforce a decision. The subsequent breakdown in governance reduced confidence in government and had dire consequences for the Cherokee Nation.[7]

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1. ROY J. HONEYWELL, THE EDUCATIONAL WORK OF THOMAS JEFFERSON 229 (Russell & Russell 1964) (1931).

2. *See* John A. Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 393 (1923) ("This tripartite system of governmental authorities was the result of a combination of historical experience and a political theory generally accepted in this country as a fundamental maxim in the latter part of the eighteenth century.").

3. U.S. CONST. art. II, § 2, cl. 2 (noting that two-thirds of the Senate must ratify a treaty).

4. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

5. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. II, § 1, cl. 7 (noting that the President must swear to "preserve, protect and defend the Constitution of the United States"); *see also* Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the [C]onstitution, and is entirely inadmissible.").

6. 31 U.S. (6 Pet.) 515 (1832).

7. *See generally* James R. Kerr, *Constitutional Rights, Tribal Justice, and the American*

Part II of this article describes the circumstances and events leading up to *Worcester v. Georgia*. Part III discusses the Court's decision and describes how the Court, Georgia, President Andrew Jackson, and the Cherokee Nation subsequently reacted. Part IV analyzes the ways in which each branch of government neglected its respective constitutional obligations.

## *II. Case Background*

In 1830, Georgia asserted sovereignty over lands occupied by Cherokees by passing a law requiring whites living on Cherokee lands to acquire a license and take an oath to support and defend Georgia's constitution.[8] Two missionaries, Samuel Worcester and Dr. Elizur Butler, opposed Georgia's claim and did not seek a license.[9] They were arrested and sentenced to four years of hard labor, but appealed to the Supreme Court.[10] The Court granted certiorari.[11] The narrow question before the Court was whether the missionaries committed a crime by failing to acquire a license.[12] The broader questions were whether Georgia law applied to Cherokee lands and whether the Cherokee Nation had sovereignty over its lands.[13]

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*Indian*, 18 J. PUB. L. 311, 311-12 (1969) ("Both Congress and the U.S. Supreme Court have played leading roles in contributing to the labyrinth of the constitutional status of the tribal Indian."); Torsten Persson et al., *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163, 1163 (1997) ("Political constitutions are incomplete contracts and therefore leave room for abuse of power.").

8. Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J. S. HIST. 519, 521 (1973); *see also* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 503 (1969). For a history of the Cherokee Nation, see HENRY THOMPSON MALONE, CHEROKEES OF THE OLD SOUTH: A PEOPLE IN TRANSITION (1956). For a history of Cherokee removal, see LOUIS FILLER & ALLEN GUTTMANN, THE REMOVAL OF THE CHEROKEE NATION: MANIFEST DESTINY OR NATIONAL DISHONOR? (1962); Wilcomb E. Washburn, *Indian Removal Policy: Administrative, Historical and Moral Criteria for Judging Its Success or Failure*, 12 ETHNOHISTORY 274 (1965).

9. *See* Miles, *supra* note 8, at 521.

10. *See id.* at 519.

11. *See* JILL NORGREN, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY 114 (2004) ("The Supreme Court agreed to hear the Worcester-Butler appeal in the winter of 1832.").

12. *Id.* at 114-15 ("Technically, the issue in the case, now titled *Worcester v. Georgia*, was whether the missionaries had been arrested, tried, and sentenced under a state law that violated the U.S. Constitution's commerce clause. . . . The appeal also asked the Court to rule whether the Cherokee Republic constituted a sovereign nation that was recognized by treaties with the United States and over which a state of the United States could have no jurisdiction.").

13. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 521 (1832) ("The legislative power of a state, the controlling power of the constitution and laws of the United States, the rights, if they

Both sides were supported by powerful political, legal, and cultural forces. Georgia had a powerful ally in President Andrew Jackson, who made his political fortunes leading expansion,[14] and "spent most of his life fighting on behalf of his country against Native Americans and foreign powers."[15] In his view, expanding American territory was "extending the area of freedom."[16] He commanded United States military forces in numerous battles against the tribes, and led negotiations in nine of the eleven treaties between the southern tribes and the United States.[17] Jackson signed the controversial Indian Removal Act,[18] in many ways staking his administration on it.[19] The Senate passed the bill on April 24, 1830; the House passed it on May 26, 1830.[20] In theory, the Act was designed to authorize the federal government to negotiate removal treaties. In practice, the government invoked the Act to justify exerting pressure on the tribes.[21]

Moreover, although the United States increased its holdings by signing a variety of treaties,[22] such as the Transcontinental Treaty in 1819,[23] Jackson's

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have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.").

14. *See* B. Donald Grose, *Edwin Forrest, Metamora, and the Indian Removal Act of 1830*, 37 THEATRE J. 181, 181 (1985) ("On the issues of westward expansion and Indian removal, Jackson forged a political career.").

15. Gerard N. Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487, 514 (2002).

16. JOHN WILLIAM WARD, ANDREW JACKSON: SYMBOL FOR AN AGE 136 (1955).

17. *Indian Removal*, PBS ONLINE, http://www.pbs.org/wgbh/aia/part4/4p2959.html (last visited May 8, 2010).

18. Ch. 148, 4 Stat. 411 (1830).

19. ROBERT V. REMINI, ANDREW JACKSON AND HIS INDIAN WARS 236 (2001) [hereinafter REMINI, JACKSON].

20. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 75 (abr. 1986).

21. *See* ALAN AXELROD & CHARLES PHILLIPS, WHAT EVERY AMERICAN SHOULD KNOW ABOUT AMERICAN HISTORY: 225 EVENTS THAT SHAPED THE NATION 93 (3d ed. 2008) ("In the face of Indian resistance, Jackson's government, both officially and unofficially, administered the removal policy ruthlessly and in bad faith.").

22. *See* Michelle Smith & Janet C. Newman, *Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions in Litigation Over Off-Reservation Treaty Fishing Rights*, 31 U. HAW. L. REV. 475, 486 (2009) ("Treaties signed between the United States and tribes usually had one main theme: tribes 'relinquished land to the United States' in exchange for certain promises. The purpose of these treaties was to confine tribes to delineated land reservations, thereby opening up more land for white settlers.").

23. The United States acquired Florida through this treaty. MEG GREENE, THE TRANSCONTINENTAL TREATY, 1819: A PRIMARY SOURCE EXAMINATION OF THE TREATY

election marked the realization of a more coordinated and centralized Indian removal initiative.[24] Neighboring territories had steadily added formerly Indian territory to their own,[25] and Georgia was eager to capitalize on the momentum and to access gold on Cherokee lands.[26]

The Cherokee's claim was also at odds with manifest destiny. Beginning with the American Revolution, the quasi-religious movement lasted roughly until the Civil War.[27] Adherents believed in America's virtue and felt a God-given duty to spread American institutions.[28] As John Quincy Adams explained, America could claim the entire continent.

> North America appears to be destined by Divine Providence to be peopled by one *nation*, speaking one language, professing one general system of religious and political principles, and accustomed to one general tenor of social usages and customs. For the common

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BETWEEN THE UNITED STATES AND SPAIN OVER THE AMERICAN WEST 5 (2006).

24. *See* GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 13 (1985) ("Indian removal, operated for some years in a haphazard manner, became established as a national policy with the election as president of its most powerful exponent, Gen. Andrew Jackson."); *see also* WARD, *supra* note 16, at 133-50; Robert M. Owens, *Jeffersonian Benevolence on the Ground: The Indian Land Cession Treaties of William Henry Harrison*, 22 J. EARLY REPUBLIC 405, 405 (2002) ("Justice, however, always proved secondary to the desire for America's constantly expanding 'Empire for Liberty.'"). *See generally* LLOYD C. GARDNER ET AL., CREATION OF THE AMERICAN EMPIRE: U.S. DIPLOMATIC HISTORY 139 (1973) (discussing "this wave of imperialism" and noting that "it was the consequence of a deliberate foreign policy that used calculated means to achieve specific, concrete ends").

25. ADAM ROTHMAN, SLAVE COUNTRY: AMERICAN EXPANSION AND THE ORIGINS OF THE DEEP SOUTH 168 (2005) ("The United States acquired vast amounts of Indian land in the five years after the defeat of the Red Sticks [in 1814], establishing in the process the pattern for Indian removal west of the Mississippi.").

26. Magliocca, *supra* note 15, at 522.

27. *See* RODNEY P. CARLISLE, MANIFEST DESTINY AND THE EXPANSION OF AMERICA xvii (2007) ("In the first sixty years of the nineteenth century, the United States expanded from its original boundaries between the Atlantic coast and the Mississippi River. . . . Borrowing a phrase from journalists, politicians asserted that the expansion of the United States was the fulfillment of its 'Manifest Destiny.'"); REGINALD STUART, UNITED STATES EXPANSIONISM AND BRITISH NORTH AMERICA, 1775–1871, at 255 (1988) ("Manifest Destiny has been used most often to characterize the whole of America's nineteenth-century expansionism."); JESSE JARNOW & J. T. MORIARTY, MANIFEST DESTINY: A PRIMARY SOURCE HISTORY OF AMERICA'S TERRITORIAL EXPANSION IN THE 19TH CENTURY 4 (2005) (discussing United States expansion from 1787 onwards and noting that "[m]ost of this territorial expansion occurred during the nineteenth century under the doctrine of Manifest Destiny").

28. WILLIAM E. WEEKS, BUILDING THE CONTINENTAL EMPIRE: AMERICAN EXPANSION FROM THE REVOLUTION TO THE CIVIL WAR 61 (1996).

> happiness of them all, for their peace and prosperity, I believe it is indispensable that they should be associated in one federal Union.[29]

Worcester and the Cherokee Nation also had allies and enjoyed a degree of public support.[30] Notably, Daniel Webster, who moved "from debating political issues in the Senate to arguing in the Supreme Court,"[31] and Henry Clay, the former Secretary of State known as the "Great Compromiser,"[32] both supported the Cherokee Nation,[33] as did Davy Crockett, a cultural icon and Congressman.[34] Webster advised the Cherokee delegation to hire William Wirt as counsel.[35] Serving as Attorney General under presidents Monroe and Adams, Wirt argued a total 174 Supreme Court cases,[36] including *McCulloch v. Maryland*,[37] *Gibbons v. Ogden*,[38] and *Cherokee Nation v. Georgia*.[39] Because Georgia refused to recognize the Court's authority and boycotted oral arguments, Wirt and his co-counsel, John Sergeant, would not argue against opposing counsel.[40]

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29. WALTER A. MCDOUGALL, PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776, at 78 (1997).

30. *See* Magliocca, *supra* note 15, at 523-24.

31. John G. Roberts, Jr., *2008 Dwight D. Opperman Lecture at Drake University Law School (Oct. 2, 2008)*, 57 DRAKE L. REV. 1, 5 (2008).

32. *See e.g.*, HOWARD WALTER CALDWELL ET AL., HENRY CLAY, THE GREAT COMPROMISER (1903).

33. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 446 (2007) ("Supporting Wirt and Sergeant informally with legal advice and moral support were Webster, Henry Clay, and the great legal scholar James Kent.").

34. DAVID BURNER ET AL., FIRSTHAND AMERICA: A HISTORY OF THE UNITED STATES 277 (3d ed. 1994) ("Georgia ignored the Court's ruling on the Cherokee case as well as the opposition of such powerful senators as Henry Clay and Daniel Webster and such congressman as the frontiersman Davy Crockett.").

35. THOMAS HART BENTON, THIRTY YEARS' VIEW; OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850, at 164-65 (1885); Burke, *supra* note 8, at 508.

36. Robert Aitken & Marilyn Aitken, *The Life and Death of George Wythe: "I Am Murdered"*, 31 LITIGATION 53, 64 (2005).

37. 17 U.S. (4 Wheat.) 316 (1819).

38. 22 U.S. (9 Wheat.) 1 (1824).

39. 30 U.S. (5 Pet.) 1 (1831); *see* 4 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 1657 (Leonard W. Levy & Louis Fisher eds.,1994) ("Wirt argued a number of important cases . . . [including] *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824)."); 1 ROBERT J. CONLEY, A CHEROKEE ENCYCLOPEDIA 265 (1996) ("In the case of *Cherokee Nation v. Georgia*, Wirt argued that the Cherokee Nation was a foreign nation and could not therefore be subject to the laws of Georgia.").

40. *See* Burke, *supra* note 8, at 521.

There were reasons to believe the Court might side with Worcester. Congress has the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"[41] yet it was unclear whether the tribes were a state, nation, or other unique entity. Also unclear was whether the Constitution conferred rights on the tribes. The Court partially clarified these issues, in a manner that seemed to favor Worcester, in *Cherokee Nation v. Georgia*. The Court, in an opinion penned by Chief Justice John Marshall, ruled that although the Cherokee Nation's sovereignty was necessarily diminished by its reliance on the United States, the tribe was a "denominated domestic dependent nation[]."[42] In addition to authoring the *Cherokee Nation* opinion, Marshall had voiced support for the Cherokee Nation in his correspondence. Marshall wrote,

> I have followed the debate in both houses of Congress . . . and have wished, most sincerely, that both the Executive and Legislative departments had thought differently on the subject. Humanity must bewail the course which is pursued, whatever may be the decision of policy.[43]

The Cherokee Nation assimilated with settlers for expediency, to convince observers that it could own and manage its lands, and to assuage criticisms that its members were incapable of leading civilized lives.[44] The Nation built toll-roads and ferries,[45] used large-scale farming and an alphabet, stopped hunting and fishing,[46] and owned slaves.[47] With the help of Samuel Worcester, the tribe published a newspaper, the *Cherokee Phoenix*.[48] By 1830, the Nation

41. U.S. CONST. art. I, § 8, cl. 3.

42. *Cherokee Nation*, 30 U.S. (5 Pet.) at 13.

43. Burke, *supra* note 8, at 510.

44. JAY P. KINNEY, A CONTINENT LOST, A CIVILIZATION WON: INDIAN LAND TENURE IN AMERICA 54 (1975).

45. TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 236 (2002).

46. Stephen J. Breyer, *Dwight D. Opperman Lecture: Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 8 (2005) ("Now, this tribe had given up hunting and fishing for better or for worse. They were farmers, they had an alphabet.").

47. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 79 (1975).

48. *See* Miles, *supra* note 8, at 520.

was producing surplus food.[49] Moreover, to strengthen its legal standing,[50] the Cherokee Nation wrote a constitution, modeled after the United States' Constitution, that drew territorial boundaries and created a General Council and judicial system.[51]

### *III. The Result and Response*

How the involved parties viewed the importance of the *Worcester* opinion explains their reactions. The Cherokees were prepared to accept the decision, trusting the Court as an institution.[52] Elias Boudinot, editor of the *Cherokee Phoenix*, editorialized, "We will merely say that if the highest judicial tribunal in the land will not sustain our rights and treaties we will give up and quit our murmurings."[53] Georgia Governor George Gilmer described the Cherokees' views in a letter to Jackson. Gilmer wrote, "[T]heir chiefs have used these [Supreme Court] opinions to convince them that their rights of self-government and soil were independent of the United States and Georgia, and would be secured to them through the Supreme Court."[54] By contrast, some thought Georgia intended to ignore the ruling as it had ignored oral arguments[55] and past orders,[56] and Whig newspapers suggested that Jackson

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49. David M. Wishart, *Evidence of Surplus Production in the Cherokee Nation Prior to Removal*, 55 J. ECON. HIST. 120, 120 (1995) ("[A] majority of Cherokee households produced surplus food before removal.").

50. DAVID EUGENE WILKINS, DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT: 1500S TO 1933, at 57 (2009) ("[T]he adoption of a secular national constitutional [] effectively supplanted the traditional Cherokee political system, which was based on clan structures, decentralized towns, and oral traditions. The constitution demonstrated the Cherokee's adaptive power and desire to resist the threats posed by local, state, and federal policymakers.").

51. The government was active. From 1808-1835, the counselors passed two hundred resolutions and 246 cases were brought to court. STRICKLAND, *supra* note 47, at 74.

52. *See id.* at 78 ("The 'rhetoric of reform' which the Cherokees formulated during the transformation of their legal system uniformly identified adoption of white-based laws with resistance of removal from ancient tribal lands. Supreme faith was placed in the operation of courts of justice.").

53. *Id.* (quoting Elias Boudinot, Editorial, CHEROKEE PHOENIX, Jul. 3, 1830).

54. *Id.* (quoting CHEROKEE ADVOCATE, Oct. 22, 1831).

55. *See* 2 JOHN P. KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY-GENERAL OF THE UNITED STATES 291 (1850).

56. *See* NEWMYER, *supra* note 33, at 447 ("Georgia in fact let the Court know exactly what it might expect when the state executed a Cherokee by the name of Corn Tassel in December 1830 in direct defiance of a writ of habeas corpus issued by the Supreme Court and signed personally by Marshall.").

had threatened to ignore the ruling.[57]

Marshall's majority opinion addressed "the political existence of a once numerous and powerful people,"[58] and whether Georgia had the authority to regulate the intercourse between citizens of its state and members of the Cherokee Nation.[59] The opinion had three important findings. First, the Court cleared Worcester of criminal charges, nullifying the lower court judgment.[60] Second, the Court declared Georgia's law unconstitutional, deeming "[t]he acts of Georgia [] repugnant to the constitution, laws, and treaties of the United States."[61] Third, the Court declared the Cherokee Nation "a distinct community occupying its own territory . . . in which the laws of Georgia can have no force" and where "the citizens of Georgia have no right to enter."[62] The Court then adjourned, opting not to order federal marshalls to enforce the decision.[63]

In response, Georgia declared that any individual who came to enforce the ruling would be hanged,[64] and Jackson stated, "The decision of the Supreme Court has fell still born . . . and they find that it cannot coerce Georgia to yield to its mandate."[65] Benjamin Butler, Jackson's future Attorney General, argued

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57. *See* Anton-Hermann Chroust, *Did President Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of Its Injunction Against the State of Georgia?*, 4 AM. J. LEG. HIST. 76, 76 (1960).

58. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 521 (1832).

59. *Id.* at 540.

60. *Id.* at 561 ("The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.").

61. *Id.* Marshall's opinion invoked language quite similar to the Judiciary Act of 1789, which states, "[W]here is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, . . . [the] Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States." Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-86. *See generally* HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835, 149-57 (1997); Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States--A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1 (1913).

62. *Worcester*, 31 U.S. (6 Pet.) at 561.

63. Ronald A. Berutti, Note, *The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians*, 17 AM. INDIAN L. REV. 291, 305 (1992).

64. *See* Breyer, *supra* note 46, at 9 ("The first thing the Georgia legislature did was pass a law that said anyone who comes to Georgia to enforce this ruling of the Supreme Court will be hanged.").

65. PAUL F. BOLLER & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FALSE QUOTES, MISQUOTES, & FALSE ATTRIBUTIONS 53 (1989) (noting that this statement is an accurate attribution, although he is often quoted as having said "John Marshall has made his decision;

that because the Court did not issue a remedial order mandating enforcement, Jackson had no grounds to interfere.[66] Ten months after the decision, the missionaries were released[67] after accepting a pardon that required Worcester not to work with the Cherokee Nation (though he likely returned).[68]

The Cherokees continued to be removed, and Chief John Ross, appointed in 1834 to head negotiations, knew that the Nation was losing bargaining power as its numbers depleted.[69] When negotiations dragged on, a subset of the Nation began side negotiations on a separate treaty, the Treaty of New Echota. This treaty received 114 votes, at most, out of thousands of votes at the National Council.[70] It was ratified by a subset of the Treaty Party, and forwarded to the Senate,[71] where Webster and Clay lobbied against it, pointing out that it was not legitimately endorsed by the Nation.[72] The Senate ratified the Treaty of New Echota by one vote.[73] The Treaty stipulated that the Cherokees be awarded five million dollars and move to Oklahoma within two years.[74] By 1838, about two thousand Cherokees had migrated, and at least

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now let him enforce it!").

66. Burke, *supra* note 8, at 527.

67. *See* Miles, *supra* note 8, at 519.

68. *Id.* at 531.

69. *See Cherokee in Georgia: Treaty of New Echota*, ABOUT NORTH GEORGIA, http://ngeorgia.com/history/cherokeehistory7.html (last visited May 9, 2010).

70. *See* DONALD B. COLE, THE PRESIDENCY OF ANDREW JACKSON 116 (1993). Others cite different numbers. *E.g.*, GARRISON, *supra* note 45, at 231 ("Though only seventy-five Cherokees out of a population of over sixteen thousand had approved the treaty.").

71. *See* REMINI, JACKSON, *supra* note 19, at 267-68.

72. Clay introduced the following Senate resolution:

> That the instrument of writing, purporting to be a treaty concluded at New Echota on the 29th of December, 1835, between the United States and the chiefs, head men and people of the Cherokee tribe . . . were not made and concluded by authority, on the part of the Cherokee tribe, competent to bind it; and, therefore, . . . the Senate cannot consent to and advise the ratification thereof, as a valid treaty.

BENTON, *supra* note 35, at 625.

73. *Id.*

74. Treaty of New Echota pmbl., U.S.-Cherokee, Dec. 29, 1835, 7 Stat. 478, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 439, 439 (Charles J. Kappler ed., 1904) [hereinafter KAPPLER].

> The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles.

*Id.* art. 1, *reprinted in* KAPPLER, *supra*, at 440. "It is hereby stipulated and agreed by the

sixteen thousand remained.[75] United States soldiers began to forcibly remove those who remained.[76] During the journey – called Nunna daul Tsuny in the Cherokee language, or "the trail where they cried"[77] – at least four thousand Cherokees died, and possibly twice that number.[78]

Not everyone approved of the government's actions. Davy Crockett resigned from Congress, saying, "I would sooner be honestly and politically damned, than hypocritically immortalized,"[79] and Ralph Waldo Emerson captured the sentiments of those who opposed the government in a letter to President Martin Van Buren. Emerson wrote,

> I write thus, sir, to inform you of the state of mind these Indian tidings have awakened here, and to pray with one voice more that you, whose hands are strong with the delegated power of fifteen millions of men, will avert with that might the terrific injury which threatens the Cherokee tribe.[80]

The relocation resulted in a "calamity of unparalleled proportions for the Cherokee psyche."[81] The Cherokees never fully recovered from the relocation, as they were forced to abandon plans for established political and diplomatic arrangements, a well-integrated economy, and a national academy for youth.[82] Had the Senate, Court, or President embraced its constitutional role, perhaps this tragic incident would have turned out differently.

### *IV. Resisting Encroachment*

The framers created a system that, used properly, was capable of preserving

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Cherokees that they shall remove to their new homes within two years from the ratification of this treaty." *Id.* art. 16, *reprinted in* KAPPLER, *supra*, at 446; *see also* MARK STEWART, THE INDIAN REMOVAL ACT: FORCED RELOCATION 10 (2007) ("Not until late October 1838 did the long journey westward begin.").

75. *See* GARRISON, *supra* note 45, at 231.

76. GEORGE WUERTHNER, GREAT SMOKY MOUNTAINS: A VISITOR'S COMPANION 30 (2003) ("In 1838, the army gathered up between 16,000 and 20,000 Cherokee at gunpoint and forced them to march from the Appalachian to the Oklahoma Territory.").

77. JAMES WALLER, PREJUDICE ACROSS AMERICA 205 (2000).

78. *See* 3 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1835, at 302-03 (1984) [hereinafter REMINI, DEMOCRACY].

79. ROBERT J. CONLEY, THE CHEROKEE NATION: A HISTORY 134 (2005).

80. SAUL K. PADOVER, SOURCES OF DEMOCRACY: VOICES OF FREEDOM, HOPE AND JUSTICE 268 (1973).

81. GARRISON, *supra* note 45, at 234.

82. *Id.* at 234-36.

the balance of power. To prevent a "gradual concentration" of power in one branch, they gave "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[83] Citizens can hold leaders accountable and "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall."[84] In the *Worcester* case, blame for the breakdown in the balance of power and the resulting tragedy should be shared. Jackson did not fulfill the executive branch's constitutional duties by seeing that the law was fulfilled.[85] The Senate and Court – each dependent on presidential direction in many matters, while "able to resist presidential direction in others"[86] – also failed to protect the rule of law.[87]

The President is required to "take [c]are that the [l]aws be faithfully executed."[88] The President may require the opinions of principal officers on the exercise of their duties.[89] Nevertheless, the President is not charged with interpreting or creating law,[90] as legislative power is delegated to Congress,[91]

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83. THE FEDERALIST NO. 51, at 286 (Alexander Hamilton) (E.H. Scott ed., 1898).

84. THE FEDERALIST NO. 70, at 388 (Alexander Hamilton) (E.H. Scott ed., 1898).

85. *See* GARRISON, *supra* note 45, at 238 ("Andrew Jackson disagreed vehemently with the *Worcester* decision, for he sought to end the federal practice of recognizing the tribes as sovereign nations. For this reason, and since it was politically unwise to ignore southern demands at the same time he was putting down the South Carolina nullification movement, he chose not to impose *Worcester* on Georgia."); *see also* ROBERT EWING CORLEW ET AL., TENNESSEE: A SHORT HISTORY 153 (1990) ("Jackson, however, refused to enforce the decision and permitted Georgia to continue to exercise its unconstitutional authority.").

86. Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583 (1984).

87. *See* GARRISON, *supra* note 45, at 237 ("Congress abided by Jackson's wishes, passed the Indian Removal Act of 1830, and ratified the illegitimate treaties, like New Echota, signed under the president's authority.").

88. U.S. CONST. art. II, § 3; *see also* Morrison v. Olson, 487 U.S. 654, 693 (1988) (noting that the President has both the authority and a "constitutional obligation to ensure the faithful execution of the laws").

89. The President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices." U.S. CONST. art. II, § 2, cl. 1.

90. *See* Peter Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703 (2007) ("From this perspective, as some (but not all) Attorneys General have concluded, when Congress creates duties in others, that act creates in the President constitutional obligations not only to oversee but also to respect their independent exercise of those duties.").

91. Congress has the authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

and judicial power to the judicial branch.[92] Purportedly based on these principles, Benjamin Butler claimed that Jackson lacked legislative authority to interfere in Georgia and should refrain from doing so.[93] Butler claimed that the Court's decision, though invoking support for the Cherokee Nation, did not enumerate specific judgments beyond overturning the Georgia law.[94] Both claims, especially after passage of the Force Act,[95] are dubious. First, just two days after Worcester's and Butler's release,[96] when North Carolina invoked nullification to justify not paying customs duties,[97] Jackson ensured that the law would be faithfully executed. He threatened to use military force,[98] and made a request to Congress to pass the Force Act to allow him to use coercive means to enforce the law.[99] He took no similar steps to enforce *Worcester*, even after the Bill was passed. Second, the Court's decision did enumerate specific principles: it specified that treaties between the federal government and Cherokee Nation were valid, as was the stipulation that the United States "restrain their citizens from trespassing" on Cherokee land.[100] Georgia, concluded the Court, had violated these pledges.[101] Jackson could have, and should have, enforced the decision by enforcing treaties and protecting Cherokee land, as federal troops did in North Carolina and Tennessee.[102] To

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92. U.S. CONST. art. III, § 1; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (Black, J.) (arguing that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

93. For a discussion of this speech and Butler's reasoning, see Burke, *supra* note 8, at 527 ("A long speech on October 8, 1832, by Benjamin Butler, later Jackson's Attorney General, indicates that he too was aware of the procedural problems attending the *Worcester* case and the importance of the Indian question in the campaign of 1832. Butler attempted to answer the charge that Jackson had violated the Constitution by refusing to enforce the *Worcester* decree.").

94. *Id.*

95. Act of Mar. 2, 1833, ch. 57, 4 Stat. 632 (authorizing Supreme Court Justices to issue writs of habeas corpus to state courts).

96. Miles, *supra* note 8, at 541.

97. *See* Breyer, *supra* note 46, at 9.

98. 1 MICHAEL KAZIN ET AL., THE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 437 (2010) ("Jackson threatened military action to restore federal supremacy, arguing that the state's actions were an intolerable rejection of majority rule.").

99. Miles, *supra* note 8, at 541.

100. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561-62 (1832) ("[T]he acts of Georgia . . . interfere forcibly with the relations established between the United States and the Cherokee nation. . . . They are in direct hostility with treaties.").

101. *Id.*

102. *See* Alfred A. Cave, *Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830*, 65 HISTORIAN 1330, 1330 (2003) ("While virtually all historical accounts of the Jackson

legitimately oppose the decision, he could have called for legislation,[103] authored executive policies,[104] or mobilized interest groups.[105]

The Senate should have rejected the Treaty.[106] Instead, Jackson's supporters held a super-majority[107] and ratified the Treaty despite the minority's claim that the Treaty was as "fraud," enforced through government power.[108] John Ross, the duly appointed head of the Cherokee National Council, vehemently opposed the Treaty, calling it a "false paper," and a "forgery . . . by a knot of unauthorized individuals."[109] He delivered to the Senate a petition signed by

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era, both scholarly and popular, devote some space to the relocation of Indian inhabitants' of the eastern United States to an Indian territory west of the Mississippi, very few acknowledge that the process as it was carried out by the Jackson administration violated guarantees contained in the congressional legislation which authorized removal."); *see also* STRICKLAND, *supra* note 46, at 5 ("The election of Andrew Jackson to the presidency, passage of the Indian Removal Bill, and extension of Georgia law over the Cherokee Nation climaxed the Cherokee crisis."). *See generally* Rennard Strickland & William Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111 (1994).

103. In reaction to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), President Barack Obama signed the Lilly Ledbetter Fair Pay Act of 2009, to "restore the law to where it was before the Supreme Court's decision." Macon Phillips, *Now Comes Lilly Ledbetter*, THE WHITE HOUSE BLOG, (Jan. 25, 2009, 1:48 PM), http://www.whitehouse.gov/now-comes-lilly-ledbetter.

104. *See generally* Terry Moe & William G. Howell, *The Presidential Power of Unitary Action*, 15 J. L. ECON. & ORG. 132 *passim* (1999).

105. *See, e.g.*, Mark A. Peterson, *The Presidency and Organized Interests: White House Patterns of Interest Group Liaison*, 86 AM. POL. SCI. REV. 612, 615 (1992).

106. The President is invested with the "[p]ower, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. Rejecting the treaty would not have been without precedent, as the Senate had previously rejected treaties negotiated by the Executive. *See generally* JON ALLAN REYHNER, TEACHING AMERICAN INDIAN STUDENTS 37 (1992) ("From the first treaty in 1788 till 1871, when treaty making with Indian tribes was ended, the United States entered into almost 400 treaties."). For the history and role of the Senate in treaty ratification, see Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257 (1983); Richard E. Webb, *Treaty-Making and the President's Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations*, 31 OHIO ST. L.J. 490 (1970).

107. Magliocca, *supra* note 15, at 552.

108. *See id.* (quoting 12 REG. DEB. 4565 (1836) (statement of Rep. Calhoun) ("[Jackson's protestors] did not regard this as a treaty at all, and would not vote this appropriation under any consideration. Should it be said that the Government, because it had the power, should force this fraud upon the Cherokee nation?")).

109. SEAN MICHAEL O'BRIEN, IN BITTERNESS AND IN TEARS: ANDREW JACKSON'S DESTRUCTION OF THE CREEKS AND SEMINOLES 233 (2003).

sixteen thousand Cherokees who opposed the Treaty,[110] which contrasted sharply with the vote on the Treaty that received at most 114 votes out of thousands.[111] Nonetheless, the Senate ignored that it was an illegitimate treaty and allowed negotiators to abuse the rift in the Cherokee leadership,[112] allowing removal to continue. The Senate ought to have demanded a legitimately ratified treaty, based on principles President Washington articulately explained. Washington said,

> It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers, as final and conclusive until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians.[113]

To understand why the Court bears responsibility, we can contrast *Worcester* with *Cooper v. Aaron*,[114] a decision released to enforce *Brown v. Board of Education*.[115] In *Cooper*, the Court took a firm stance against nullification. The opinion explained that "[n]o state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it,"[116] and concluded that "the constitutional rights of children not to be discriminated against . . . [and] can neither be nullified openly and directly by state legislators or state executive or judicial officers."[117] President Eisenhower, who deployed the National Guard to enforce the Court's decision, did not display Jackson's hostility to the Court.[118]

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110. *Id.*

111. Because of the illegitimacy of the process, many Cherokees had boycotted the vote. *See* REMINI, DEMOCRACY, *supra* note 78, at 299.

112. *See* O'BRIEN, *supra* note 109, at 233 ("The split in the Cherokee political leadership caused a bitter power struggle. . . . [F]ederal negotiators moved quickly to exploit the rift.").

113. THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 19 (1857).

114. 358 U.S. 1 (1958).

115. 347 U.S. 483 (1954).

116. *Cooper*, 358 U.S. at 18.

117. *Id.* at 17. *See generally* TONY A. FREYER, LITTLE ROCK ON TRIAL: COOPER V. AARON AND SCHOOL DESEGREGATION (2007); Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387.

118. *See* Breyer, *supra* note 46, at 10 ("At that point, President Eisenhower said, 'I will send troops to Arkansas – the paratroopers – but they will not go to thwart the law, they will go to

Nonetheless, change, and enforcement of the Court's decision (as seen in *Brown*), required an enforcement opinion. Yet the Court took only the first step in *Worcester*, eschewing enforcement,[119] and providing tacit consent for removal.

The Court pursued this course of action notwithstanding obvious warning signs: Georgia's boycott of oral arguments, a ten-month delay in Worcester's release, and the well-known possibility that the opinion might be ignored.[120] The Court, likely intentionally, preserved the precedent, but allowed Georgia to continue removal.[121] Why did the Court not pursue the case or enforce the decision? Likely, for practical and political reasons. Practically, doing so could have required the Court to expand its docket and hear a flood of Indian cases.[122] Issuing an order required a unanimous vote from the Court, and corralling the justices' votes may have been difficult.[123] The Georgia state court strategically chose not to respond to the decision in writing; lacking a lower court ruling to reverse complicated the Court's task of issuing a remedial order.[124]

The Court was also hesitant to delve into political questions.[125] Opposing public opinion[126] and a popular president representing American views (e.g., expansionism and manifest destiny) could be highly unpopular.[127]

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enforce the law.' And those paratroopers went to Arkansas, they took the black children by the hand, and they marched with those black children into the white school. That is progress.").

119. Magliocca, *supra* note 15, at 544 ("Simply put, the Court did not have to worry about enforcing its decision because it adjourned almost immediately after Worcester was handed down. Prior to adjourning, the Court issued its mandate reversing the judgment and ordered the state court to release the missionaries.").

120. *See id.* at 545 ("But if the state court refused to obey, then the Court could upon application order federal marshals to free the missionaries.").

121. *See generally* Clifford Lytle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country*, 8 AM. INDIAN L. REV. 65, 69 (1980).

122. *See* Magliocca, *supra* note 15, at 532.

123. *See generally* Burke, *supra* note 8, at 526-27.

124. Miles, *supra* note 8, at 528.

125. The opinion in *Cherokee Nation v. Georgia* stated that the Tribes' status "savours too much of the exercise of political power to be within the proper province of the judicial department." 30 U.S. (5 Pet.) 1, 20 (1831).

126. *See* GARRISON, *supra* note 45, at 240 ("[T]he majority view of American lawyers and legislators and, indeed, the white American public . . . was that the tribes were not sovereign nations. *Worcester*, in sum, though a decision that represented judicial courage and clarity, was a revolution with few adherents.").

127. Mark S. Hurwitz et al., The Influence of Public Opinion on Supreme Court Decision Making, Revisited, Prepared for Delivery at the 2004 Annual Meeting of the American Political Science Association 2 (Sept. 2004) ("[T]he proposition that Supreme Court decisions largely

Scholars have suggested that Marshall anticipated that the *Worcester* opinion might be ignored and authored it as a political attack on Indian removal, rather than as an answer to the questions presented.[128] The opinion could serve a political purpose, raising Indian removal as an election issue, while ignoring the consequences for the Cherokee Nation if the opinion were unenforced.[129] And finally, less than thirty years after *Marbury v. Madison*,[130] perhaps Marshall and his colleagues were nervous that if enforcement efforts were unsuccessful, it would cause institutional damage to the Court.[131]

Regardless of the reasoning, the Court issued an opinion, and then abandoned the case. Justice Story captured the Court's sentiments, saying, "Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights."[132] Neither the Court, nor any government branch, should look for opportunities to avoid the duty to protect the rule of law. Yet, it appears the Court did so, notwithstanding that the Court had the means to do more. The Court could have instructed that the orders issued to Georgia – which mandated Worcester's and Butler's release and directed the Georgia court to reverse its decision – be delivered to the

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follow public opinion has been widely embraced."); JEFFREY SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 424 (2002) ("Supreme Court decisions by and large correspond with public opinion.").

128. *See* Magliocca, *supra* note 15, at 537 ("Thus, the target of *Worcester* was not the State of Georgia; it was Jackson's removal policy."). Those who support this view note that the twenty-eight page opinion does not discuss Worcester until the second to last page. Burke, *supra* note 8, at 523 ("His 28 page decision did not reach Worcester and his predicament until the next-to-last page.").

129. *See* Magliocca, *supra* note 15, at 545 ("*Worcester v. Georgia* was one of the most partisan opinions ever issued by the Court. It was all about rallying voters against Jacksonian Democracy.").

130. 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, the Court established the doctrine of judicial review, and, as in *Worcester*, avoided conflict with the executive, presumably avoiding a risk of institutional damage while still asserting authority. *See* STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY 143-44 (2010) ("As he had done in *Marbury v. Madison*, Marshall walked a fine line in the Indian cases that protected the Court's independence and authority while avoiding conflict with the more dynamic force of the executive. . . . In short, Marshall, as usual, stood firmly for national supremacy but refused to put the Court into a head-to-head fight with the executive branch.").

131. *See* Magliocca, *supra* note 15, at 546 ("Consequently, the Court could hide behind legalisms and avoid the institutional damage that would surely result from a futile effort to enforce its order.").

132. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 757 (2d ed. 1926).

court by a federal marshal.[133] If Georgia failed to act and the lower court continued to avoid signing a decision, the Court could have issued another order.[134] In the coming years, the Court could have issued further opinions requiring that white settlers be expelled from Cherokee lands – well within the purview of the Court after passage of the Force Act of 1833.[135] The Court could have monitored lower courts instead of washing its hands of the case and permitting southern state courts to sidestep *Worcester* and continue to ignore tribal sovereignty.[136]

William Wirt pointed out that "[i]n a land of laws, the presumption is that the decision of courts will be respected; and, in case they should not, it is a poor government indeed, in which there does not exist power to enforce respect."[137] Citizens, and in this case the Cherokee Nation, ought to be confident that in a land of laws, the President will respect and enforce the Court's opinions, the Senate will negotiate in good faith, and the Court will monitor lower court and state actions, and, when necessary, issue remedial orders to enforce the law. In *Worcester*, this was not the case. Failures in the balance of power undermine the confidence we place in government and the rule of law. As Samuel Worcester explained,

> Who will hereafter venture to place any reliance on the Supreme Court of the United States for protection against laws however unconstitutional . . . if we now yield through fear that the decision of the court will not and cannot be executed?[138]

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133. Wirt recommended Worcester take these steps, though he felt the Court would be unable to do so. *See* Burke, *supra* note 8, at 524-26.

134. *See* Miles, *supra* note 8, at 528 ("President Jackson could not be called upon directly to enforce the decision until after a final order had been issued by the Supreme Court at its January 1833 term."). *See generally* Burke, *supra* note 8, at 525-27 ("[T]he required second decree would go to the federal marshal, who was authorized by the Militia Act of 1795 to enforce the orders of the Court.").

135. Force Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633-34 (authorizing Supreme Court Justices to issue writs of habeas corpus to state courts).

136. *See* GARRISON, *supra* note 45, 238-39 ("In the years between *Worcester* and the removal of the Cherokees in 1838, dozens of Indians in the Southeast were arrested, convicted, and imprisoned by the state courts. In 1834 . . . Georgia hanged another Cherokee to prevent him from appealing his murder conviction to the United States Supreme Court. Every one of those arrests and convictions was a repudiation of *Worcester*.").

137. *See* KENNEDY, *supra* note 55, at 336.

138. *See* Miles, *supra* note 8, at 532.