BALDWIN, J., Separate Opinion

SUPREME COURT OF THE UNITED STATES

**30 U.S. 1**

Cherokee Nation v. Georgia

Argued: --- Decided:

Mr. Justice BALDWIN.

As jurisdiction is the first question which must arise in every cause, I have confined my examination of this entirely to that point, and that branch of it which relates to the capacity of the plaintiffs to ask the interposition of this Court. I concur in the opinion of the Court in dismissing the bill, but not for the reasons assigned.

In my opinion there is no plaintiff in this suit, and this opinion precludes any examination into the merits of the bill or the weight of any minor objections. My judgment stops [p32] me at the threshold, and forbids me to examine into the acts complained of.

As the reasons for the judgment of the Court seem to me more important than the judgment itself in its effects on the peace of the country and the condition of the complainants, and as I stand alone on one question of vital concern to both, I must give my reasons in full. The opinion of this Court is of high authority in itself, and the judge who delivers it has a support as strong in moral influence over public opinion as any human tribunal can impart. The judge who stands alone in decided dissent on matters of the infinite magnitude which this case presents must sink under the continued and unequal struggle unless he can fix himself by a firm hold on the Constitution and laws of the country. He must be presumed to be in the wrong until he proves himself to be in the right. Not shrinking even from this fearful issue, I proceed to consider the only question which I shall ever examine in relation to the rights of Indians to sue in the federal Courts until convinced of my error in my present convictions.

My view of the plaintiffs being a sovereign independent nation or foreign state, within the meaning of the Constitution, applies to all the tribes with whom the Unites States have held treaties, for if one is a foreign nation or State, all others in like condition must be so in their aggregate capacity, and each of their subjects or citizens, aliens, capable of suing in the circuit Courts. This case then is the case of the countless tribes who occupy tracts of our vast domain; who, in their collective and individual characters as States or aliens, will rush to the federal Courts in endless controversies growing out of the laws of the States or of Congress.

In the spirit of the maxim *obsta principiis,* I shall first proceed to the consideration of the proceedings of the old Congress, from the commencement of the revolution up to the adoption of the Constitution, so as to ascertain whether the Indians were considered and treated with as tribes of savages, or independent nations, foreign states on an equality with any other foreign state or nation, and whether Indian affairs were viewed as those of foreign nations, and, in connection with this view, refer to the acts of the federal government on the same subject. [p33]

In 1781, 1 Laws U.S. 586 &c., a department for foreign affairs was established to which was entrusted all correspondence and communication with the ministers or other officers of foreign powers, to be carried on through that office also with the Governors and Presidents of the several States, and to receive the applications of all foreigners, letters of sovereign powers, plans of treaties, conventions, &c. and other acts of Congress relative to the department of foreign affairs, and all communications as well to as from the United States in Congress assembled were to be made through the secretary, and all papers on the subject of foreign affairs to be addressed to him. The same department was established under the present Constitution in 1789, and with the same exclusive control over all the foreign concerns of this government with foreign states or princes. 2 Laws U.S. 6, 7. In July, 1775, Congress established a department of Indian affairs, to be conducted under the superintendence of commissioners. 1 Laws U.S. 597. By the Ordinance of August, 1786, for the regulation of Indian affairs, they were placed under the control of the War Department, 1 Laws U.S. 614, continued there by the Act of August, 1789 (2 Laws U.S. 32, 33), under whose direction they have ever since remained. It is clear then, that neither the old or new government did ever consider Indian affairs, the regulation of our intercourse or treaties with them, as forming any part of our foreign affairs or concerns with foreign nations, States, or princes.

I will next inquire how the Indians were considered -- whether as independent nations or tribes with whom our intercourse must be regulated by the law of circumstances. In this examination it will be found that different words have been applied to them in treaties and resolutions of Congress -- nations, tribes, hordes, savages, chiefs, sachems and warriors of the Cherokees for instance, or the Cherokee Nation. I shall not stop to inquire into the effect which a name or title can give to a resolve of Congress, a treaty or convention with the Indians, but into the substance of the thing done, and the subject matter acted on, believing it requires no reasoning to prove that the omission of the words prince, State, sovereignty or nation, cannot divest a contracting party of these [p34] national attributes, which are inherent in sovereign power pure and self-existing, or confer them by their use, where all the substantial requisites of sovereignty are wanting.

The proceedings of the old Congress will be found in 1 Laws U.S. 597, commencing 1st. June, 1775, and ending 1st September, 1788, of which some extracts will be given. 30th June, 1775:

> Resolved, that the committee for Indian affairs do prepare proper talks to the several tribes of Indians. As the Indians depend on the colonists for arms, ammunition and clothing, which are become necessary for their subsistence. . . . That

> the commissioners have power to treat with the Indians; . . . to take to their assistance gentlemen of influence among the Indians. . . . To preserve the confidence and friendship of the Indians, and prevent their suffering for want of the necessaries of life, £40,000 sterling of Indian goods be imported. . . . No person shall be permitted to trade with the Indians without a licence; . . . traders shall sell their goods at reasonable prices, allow them to the Indians for their skins, and take no advantage of their distress and intemperance; . . . the trade to be only at posts designated by the commissioners.

Specimens of the kind of intercourse between the Congress and deputations of Indians may be seen in pages 602 and 603. They need no incorporation into a judicial opinion.

In 1782, a committee of Congress report that all the lands belonging to the six nations of Indians have been in due form put under the crown as appendant to the government of New York, so far as respects jurisdiction only; that that colony has borne the burthen of protecting and supporting the six nations of Indians and their tributaries for one hundred years, as the dependents and allies of that government; that the crown of England has always considered and treated the country of the six nations as one appendant to the government of New York; that they have been so recognized and admitted by their public acts by Massachusetts, Connecticut, Pennsylvania, Maryland and Virginia; that, by accepting this cession, the jurisdiction of the whole western territory, belonging to the six nations and their tributaries, will be vested in the United States, greatly to the advantage of the union [p. 606]. The cession alluded to is the [p35] one from New York, March 1st, 1781, of the soil and jurisdiction of all the land in their charter west of the present boundary of Pennsylvania (1 Laws U.S. 471), which was executed in Congress and accepted.

This makes it necessary to break in on the historical trace of our Indian affairs, and follow up this subject to the adoption of the Constitution. The cession from Virginia in 1784 was of soil and jurisdiction. So from Massachusetts in 1785, from Connecticut in 1800, from South Carolina in 1787, from Georgia in 1802. North Carolina made a partial cession of land, but a full one of her sovereignty and jurisdiction of all without her present limits in 1789. 2 Laws United States 85.

Some States made reservations of lands to a small amount, but, by the terms of the cession, new States were to be formed within the ceded boundaries, to be admitted into the union on an equal footing with the original States, of course, not shorn of their powers of sovereignty and jurisdiction within the boundaries assigned by Congress to the new States. In this spirit, Congress passed the celebrated Ordinance of July, 1787, by which they assumed the government of the Northwestern Territory, paying no regard to Indian jurisdiction, sovereignty, or their political rights, except providing for their protection, authorizing the adoption of laws

> which, for the prevention of crimes and injuries, shall have force in all parts of the district, and for the execution of process civil and criminal, the Governor has power to make proper division thereof.

1 Laws United States 477. By the fourth article, the said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States, subject to the Articles of Confederation, alterations constitutionally made, the acts and ordinances of Congress.

This shows the clear meaning and understanding of all the ceding States, and of Congress, in accepting the cession of their western lands up to the time of the adoption of the Constitution. The application of these acts to the provisions of the Constitution will be considered hereafter. A few more references to the proceedings of the old Congress in relation to the Indian nations will close this view of the case. [p36]

In 1782, a committee, to whom was referred a letter from the secretary at war, reported

> that they have had a conference with the two deputies from the Catawba Nation of Indians; that their mission respects certain tracts of land reserved for their use in the State of South Carolina, which they wish may be so secured to their tribe, as not to be intruded into by force, nor alienated even with their own consent -- whereupon, resolved, that it be recommended to the Legislature of South Carolina to take such measures for the satisfaction and security of the said tribe as the said Legislature shall in their wisdom think fit.

1 Laws United States 667. After this, the Catawbas cannot well be considered an independent nation or foreign state. In September, 1783, shortly after the preliminary treaty of peace, Congress, exercising the powers of acknowledged independence and sovereignty, issued a proclamation beginning in these words:

> Whereas, by the ninth of the articles of confederation, it is, among other things declared that the United States, in Congress assembled, have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians not members of any of the States, provided that the legislative right of every State, within its own limits, be not infringed or violated,

prohibiting settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving gifts of land without the express authority and directions of the United States in Congress assembled. Conventions were to be held with the Indians in the northern and middle departments for the purpose of receiving them into the favour and protection of the United States, and of establishing boundary lines of property, for separating and dividing the settlements of the citizens from the Indian villages and hunting grounds, &c.

> Resolved that the preceding measures of Congress, relative to Indian affairs, shall not be construed to affect the territorial claims of any of the States, or their legislative rights within their respective limits. Resolved, that it will be wise and necessary to erect a district of the western territory into a

> distinct government, and that a committee be appointed to prepare a plan for a temporary government until the inhabitants shall form a permanent Constitution **[p37]** for themselves, and as citizens of a free, sovereign, and independent State, be admitted to a representation in the union.

In 1786, a general ordinance was passed for the regulation of Indian affairs under the authority of the ninth article of the confederation which throws much light on our relations with them. P. 614. It closes with a direction that, in all cases where transactions with any Nation or tribe of Indians shall become necessary for the purposes of the ordinance which cannot be done without interfering with the legislative rights of a State, the superintendent within whose district the same shall happen shall act in conjunction with the authority of such State.

After accepting the cessions of the soil and jurisdiction of the western territory and resolving to form a temporary government and create new, free, sovereign, and independent States, Congress resolved, in March, 1785, to hold a treaty with the western Indians. They gave instructions to the commissioners in strict conformity with their preceding resolutions, both of which were wholly incompatible with the national or sovereign character of the Indians with whom they were about to treat. They will be formed in pages 611, &c. and need not be particularized.

I now proceed to the instructions which preceded the treaty of Hopewell with the complainants, the treaty, and the consequent proceedings of Congress. On the 15th March 1785, commissioners were appointed to treat with the Cherokees and other Indians southward of them, within the limits of the United States, or who have been at war with them, for the purpose of making peace with them, and of receiving them into the favour and protection of the United States, &c. They were instructed to demand that all prisoners, negroes and other property taken during the war be given up; to inform the Indians of the great occurrences of the last war; of the extent of country relinquished by the late treaty of peace with Great Britain; to give notice to the Governors of Virginia, North and South Carolina and Georgia that they may attend if they think proper; and were authorized to expend four thousand dollars in making presents to the Indians -- a matter well understood in making Indian treaties, but unknown at least in our treaties with foreign nations, princes [p38] or States, unless on the Barbary Coast. A treaty was accordingly made in November following between the commissioners plenipotentiaries of the United States, of the one part, and the headmen and warriors of all the Cherokees, of the other. The word nation is not used in the preamble or any part of the treaty, so that we are left to infer the capacity in which the Cherokees contracted, whether as an independent nation or foreign state or a tribe of Indians, from the terms of the treaty, its stipulations and conditions. "The Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States." Article 3d, 1 Laws U.S. 322.

> The boundary allotted to the Cherokees for their hunting grounds between the said Indians and the citizens of the United States, within the limits of the United States, is and shall be the following,

*viz.* (as defined in Article 4th).

> For the benefit and comfort of the Indians, and for the prevention of injuries and aggressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they shall think proper.

Article 9.

> That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send a deputy of their choice whenever they think fit to Congress.

Article 12th.

This treaty is in the beginning called "Article;" the word "treaty" is only to be found in the concluding line, where it is called "this definitive treaty." But article or treaty, its nature does not depend upon the name given it. It is not negotiated between ministers on both sides representing their nations; the stipulations are wholly inconsistent with sovereignty; the Indians acknowledge their dependent character, hold the lands they occupy as an allotment of hunting grounds; give to Congress the exclusive right of regulating their trade and managing all their affairs as they may think proper. So it was understood by Congress as declared by them in their proclamation of 1st September, 1788 (1 Laws U.S. 619), and so understood at the adoption of the Constitution. [p39]

The meaning of the words "deputy to Congress" in the twelfth article may be as a person having a right to sit in that body, as at that time it was composed of delegates or deputies from the States, not as at present, representatives of the people of the States; or it may be as an agent or minister. But if the former was the meaning of the parties, it is conclusive to show that he was not and could not be the deputy of a foreign state wholly separated from the union. If he sat in Congress as a deputy from any State, it must be one having a political connection with, and within the jurisdiction of the confederacy; if as a diplomatic agent, he could not represent an independent or sovereign nation, for all such have an unquestioned right to send such agents when and where they please. The securing the right by an express stipulation of the treaty, the declared objects in conferring the right, especially when connected with the ninth article, show beyond a doubt it was not to represent a foreign state or nation or one to whom the least vestige of independence or sovereignty as to the United States appertained. There can be no dependence so anti-national, or so utterly subversive of national existence, as transferring to a foreign government the regulation of its trade and the management of all their affairs at their pleasure. The nation or State, tribe or village, headmen or warriors of the Cherokees, call them by what name we please, call the articles they have signed a definitive treaty or an indenture of servitude; they are not by its force or virtue a foreign state capable of calling into legitimate action the judicial power of this union, by the exercise of the original jurisdiction of this Court against a sovereign State, a

component part of this nation. Unless the Constitution has imparted to the Cherokees a national character never recognized under the confederation; and which, if they ever enjoyed, was surrendered by the treaty of Hopewell, they cannot be deemed in this Court plaintiffs in such a case as this.

In considering the bearing of the Constitution on their rights, it must be borne in mind that a majority of the States represented in the convention had ceded to the United States the soil and jurisdiction of their western lands, or claimed it to be remaining in themselves; that Congress asserted as to the ceded, and the States as to the unceded territory, their right to the soil absolutely and the dominion in full sovereignty, [p40] within their respective limits, subject only to Indian occupancy, not as foreign states or nations, but as dependent on and appendant to the State governments; that, before the convention acted, Congress had erected a government in the Northwestern Territory containing numerous and powerful nations or tribes of Indians whose jurisdiction was continued and whose sovereignty was overturned, if it ever existed, except by permission of the States or Congress, by ordaining that the territorial laws should extend over the whole district, and directing divisions for the execution of civil and criminal process in every part; that the Cherokees were then dependants, having given up all their affairs to the regulation and management of Congress, and that all the regulations of Congress over Indian affairs were then in force over an immense territory, under a solemn pledge to the inhabitants that whenever their population and circumstances would admit, they should form constitutions and become free, sovereign and independent States on equal footing with the old component members of the confederation; that, by the existing regulations and treaties, the Indian tenure to their lands was their allotment as hunting grounds, without the power of alienation, that the right of occupancy was not individual; that the Indians were forbidden all trade or intercourse with any person not licensed or at a post not designated by regulation; that Indian affairs formed no part of the foreign concerns of the government; and that, though they were permitted to regulate their internal affairs in their own way, it was not by any inherent right acknowledged by Congress or reserved by treaty, but because Congress did not think proper to exercise the sole and exclusive right, declared and asserted in all their regulations from 1775 to 1788, in the Articles of Confederation, in the Ordinance of 1787 and the Proclamation of 1788, which the plaintiffs solemnly recognized and expressly granted by the treaty of Hopewell in 1785 as conferred on Congress to be exercised as they should think proper.

To correctly understand the Constitution, then, we must read it with reference to this well known existing State of our relations with the Indians -- the United States asserting the right of soil, sovereignty, and jurisdiction, in full dominion, the Indians occupant of allotted hunting grounds.

We can thus expound the Constitution without a reference [p41] to the definitions of a State or nation by any foreign writer, hypothetical reasoning, or the dissertations of the Federalist. This would be to substitute individual authority in place of the declared will of the sovereign power of the union in a written fundamental law. Whether it is the emanation from the people or the States is a moot question, having no bearing on the supremacy of that supreme law which, from a proper source, has rightfully been imposed on us by sovereign power. Where its terms are plain, I should,

as a dissenting judge, deem it judicial sacrilege to put my hands on any of its provisions and arrange or construe them according to any fancied use, object, purpose, or motive which, by an ingenious train of reasoning, I might bring my mind to believe was the reason for its adoption by the sovereign power, from whose hands it comes to me as the rule and guide to my faith, my reason, and judicial oath. In taking out, putting in, or varying the plain meaning of a word or expression to meet the results of my poor judgment as to the meaning and intention of the great charter, which alone imparts to me my power to act as a judge of its supreme injunctions, I should feel myself acting upon it by judicial amendments, and not as one of its executors. I will not add unto these things; I will not take away from the words of this book of prophecy; I will not impair the force or obligation of its enactments, plain and unqualified in its terms, by resorting to the authority of names, the decisions of foreign courts, or a reference to books or writers. The plain ordinances are a safe guide to my judgment. When they admit of doubt, I will connect the words with the practice, usages, and settled principles of this Government, as administered by its fathers before the adoption of the Constitution, and refer to the received opinion and fixed understanding of the high parties who adopted it, the usage and practice of the new government acting under its authority, and the solemn decisions of this Court, acting under its high powers and responsibility, nothing fearing that, in so doing, I can discover some sound and safe maxims of American policy and jurisprudence, which will always afford me light enough to decide on the constitutional powers of the federal and State governments and all tribunals acting under their authority. They will at least enable me to judge of the true meaning and [p42] spirit of plain words, put into the forms of constitutional provisions, which this Court in the great case of *Sturges and Crowninshield say*

> is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable.

But the absurdity and injustice of applying the provision to the case must be so monstrous that all mankind would without hesitation unite in rejecting the application. 4 Wheat. 202, 203.

In another great case, *Cohens v. Virginia,* this Court say,

> the jurisdiction of this Court then, being extended by the letter of the Constitution to all cases arising under it or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction must sustain the exemption they claim on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

6 Wheat. 379, 380.

The principle of these cases is my guide in this. Sitting here, I shall always bow to such authority, and require no admonition to be influenced by no other in a case where I am called on to take a part in the exercise of the judicial power over a sovereign State.

Guided by these principles, I come to consider the third clause of the second section of the first article of the Constitution, which provides for the apportionment of representatives, and direct taxes "among the several States which may be included within this union according to their respective numbers, excluding Indians not taxed." This clause embraces not only the old, but the new, States to be formed out of the territory of the United States, pursuant to the resolutions and ordinances of the old Congress, and the conditions of the cession from the States, or which might arise by the division of the old. If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole free Indian [p43] population of all the States would be included in the federal numbers, coextensively with the boundaries of all the States included in this union. The insertion of this clause conveys a clear definite declaration that there were no independent sovereign nations or States, foreign or domestic, within their boundaries which should exclude them from the federal enumeration, or any bodies or communities within the States excluded from the action of the federal Constitution unless by the use of express words of exclusion.

The delegates who represented the States in the convention well knew the existing relations between the United States and the Indians, and put the Constitution in a shape for adoption calculated to meet them; and the words used in this clause exclude the existence of the plaintiffs as a sovereign or foreign state or nation, within the meaning of this section, too plainly to require illustration or argument.

The third clause of the eighth article shows most distinctly the sense of the convention in authorising Congress to regulate commerce with the Indian tribes. The character of the Indian communities had been settled by many years of uniform usage under the old government, characterized by the name of nations, towns, villages, tribes, headmen and warriors, as the writers of resolutions or treaties might fancy, governed by no settled rule, and applying the word Nation to the Catawbas as well as the Cherokees. The framers of the Constitution have thought proper to define their meaning to be that they were not foreign nations nor States of the union, but Indian tribes, thus declaring the sense in which they should be considered under the Constitution, which refers to them as tribes only, in this clause. I cannot strike these words from the book, or construe Indian tribes in this part of the Constitution to mean a sovereign State under the first clause of the second section of the third article. It would be taking very great liberty in the exposition of a fundamental law to bring the Indians under the action of the legislative power as tribes, and of the judicial as foreign states. The power conferred to regulate commerce with the Indian tribes is the same given to the old Congress by the ninth article of the old confederation, "to regulate trade with the Indians." The raising the word "trade" to the dignity of commerce, [p44] regulating it with Indians or Indian tribes, is only a change of words. Mere phraseology cannot make Indians nations, or Indian tribes foreign states.

The second clause of the third section of the fourth article of the Constitution is equally convincing. "The Congress shall have power to dispose of, and make all needful regulations and rules respecting the territory of the United States." What that territory was, the rights of soil, jurisdiction, and sovereignty claimed and exercised by the States and the old Congress, has been already seen. It extended to the formation of a government whose laws and process were in force within its whole extent, without a saving of Indian jurisdiction. It is the same power which was delegated to the old Congress, and, according to the judicial interpretation given by this Court in *Gibbons v. Ogden,* 9 Wheaton 209, the word "to regulate" implied in its nature full power over the thing to be regulated; it excludes, necessarily, the action of all others that would perform the same operation on the same thing. Applying this construction to commerce and territory leaves the jurisdiction and sovereignty of the Indian tribes wholly out of the question. The power given in this clause is of the most plenary kind. Rules and regulations respecting the territory of the United States; they necessarily include complete jurisdiction. It was necessary to confer it without limitation to enable the new government to redeem the pledge given by the old in relation to the formation and powers of the new States. The saving of "the claims" of "any particular State" is almost a copy of a similar provision, part of the ninth article of the old confederation, thus delivering over to the new Congress the power to regulate commerce with the Indian tribes and regulate the territory they occupied, as the old had done from the beginning of the revolution.

The only remaining clause of the Constitution to be considered is the second clause in the sixth article. "All treaties made, or to be made, shall be the supreme law of the land."

In *Chirac v. Chirac,* this Court declared that it was unnecessary to inquire into the effect of the treaty with France in 1778 under the old confederation, because the confederation had yielded to our present Constitution, and this treaty had been the supreme law of the land. 2 Wheaton 271. I [p45] consider the same rule as applicable to Indian treaties, whether considered as national compacts between sovereign powers or as articles, agreements, contracts or stipulations on the part of this government, binding and pledging the faith of the Nation to the faithful observance of its conditions. They secure to the Indians the enjoyment of the rights they stipulate to give or secure, to their full extent, and in the plenitude of good faith; but the treaties must be considered as the rules of reciprocal obligations. The Indians must have their rights, but must claim them in that capacity in which they received the grant or guarantee. They contracted by putting themselves under the protection of the United States, accepted of an allotment of hunting grounds, surrendered and delegated to Congress the exclusive regulation of their trade and the management of all their own affairs, taking no assurance of their continued sovereignty, if they had any before, but relying on the assurance of the United States that they might have full confidence in their justice respecting their interests, stipulating only for the right of sending a deputy of their own choice to Congress. If, then, the Indians claim admission to this Court under the treaty of Hopewell, they cannot be admitted as foreign states, and can be received in no other capacity.

The legislation of Congress under the Constitution in relation to the Indians has been in the same spirit, and guided by the same principles, which

prevailed in the old Congress and under the old confederation. In order to give full effect to the Ordinance of 1787, in the Northwest Territory, it was adapted to the present Constitution of the United States in 1789, 2 Laws U.S. 33; applied as the rule for its government to the territory south of the Ohio in 1790, except the sixth article, 2 Laws U.S. 104; to the Mississippi territory in 1798, 3 Laws U.S. 39, 40, and, with no exception, to Indiana in 1800, 3 Laws U.S. 367; to Michigan in 1805, 3 Laws U.S. 632; to Illinois in 1809, 4 Laws U.S. 198.

In 1802, Congress passed the act regulating trade and intercourse with the Indian tribes in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations, 3 Laws U.S. 460, *et seq.* In the same year, Georgia ceded her lands west of her present boundary to the United States, and, by the [p46] second article of the convention, the United States ceded to Georgia whatever claim, right or title they may have to the jurisdiction or soil of any lands south of Tennessee, North or South Carolina, and east of the line of the cession by Georgia. So that Georgia now has all the rights attached to her by her sovereignty within her limits, and which are saved to her by the second section of the fourth article of the Constitution, and all the United States could cede either by their power over the territory or their treaties with the Cherokees.

The treaty with the Cherokees, made at Holston in 1791, contains only one article which has a bearing on the political relations of the contracting parties. In the second article, the Cherokees stipulate "that the said Cherokee Nation will not hold any treaty with any foreign power, individual State, or with individuals of any State." 1 Laws U.S. 326. This affords an instructive definition of the words nation and treaty. At the treaty of Hopewell, the Cherokees, though subdued and suing for peace, before divesting themselves of any of the rights or attributes of sovereignty which this government ever recognized them as possessing by the consummation of the treaty, contracted in the name of the headmen and warriors of all the Cherokees; but at Holston in 1791, in abandoning their last remnant of political right, contracted as the Cherokee Nation, thus ascending in title as they descended in power, and applying the word treaty to a contract with an individual, this consideration will divest words of their magic.

In thus testing the rights of the complainants as to their national character by the old confederation, resolutions and ordinances of the old Congress, the provisions of the Constitution, treaties held under the authority of both, and the subsequent legislation thereon, I have followed the rule laid down for my guide by this Court, in *Foster v. Elam,* 2 Peters, 307, in doing it according to the principles established by the political department of the Government.

> If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. However individual judges may construe them [treaties], it is the province of the Court to conform its decisions to the will of the Legislature, if that will has been clearly expressed.

That the existence of foreign states cannot be known to this Court judicially except by some [p47] act or recognition of the other departments of this

government is, I think, fully established in the case of *Palmer,* 3 Wheaton 634, 635; *The Pastora,* 4 Wheaton 63; and *The Anna,* 6 Wheaton 193.

I shall resort to the same high authority as the basis of my opinion on the powers of the State governments.

> By the revolution, the duties as well as the powers of government devolved on the people of [Georgia] New Hampshire. It is admitted that among the latter were comprehended the transcendent powers of Parliament, as well as those of the executive department.

*Dartmouth College v. Woodward,* 4 Wheat. 451, 454 Wheat. 192; *Green v. Biddle,* 8 Wheat. 98; *Ogden v. Saunders,* 12 Wheat. 254, &c.

> The same principle applies, though with no greater force, to the different States of America; for though they form a confederated government, yet the several States retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign.

*Buckner v. Findley,* 2 Peters 591. The powers of government which thus devolved on Georgia by the revolution over her whole territory are unimpaired by any surrender of her territorial jurisdiction by the old Confederation or the new Constitution, as there was in both an express saving, as well as by the tenth article of amendments.

But if any passed to the United States by either, they were retroceded by the convention of 1802. Her jurisdiction over the territory in question is as supreme as that of Congress over what the Nation has acquired by cession from the States or treaties with foreign powers, combining the rights of the State and general government. Within her boundaries, there can be no other nation, community, or sovereign power which this department can judicially recognize as a foreign state, capable of demanding or claiming our interposition so as to enable them to exercise a jurisdiction incompatible with a sovereignty in Georgia, which has been recognized by the Constitution and every department of this Government acting under its authority. Foreign States cannot be created by judicial construction; Indian sovereignty cannot be roused from its long slumber, and awakened to action by our fiat. I find no acknowledgement of it by the legislative or executive power. [p48] Till they have done so, I can stretch forth no arm for their relief without violating the Constitution. I say this with great deference to those from whom I dissent; but my judgment tells me I have no power to act, and imperious duty compels me to stop at the portal unless I can find some authority in the judgments of this Court to which I may surrender my own.

Indians have rights of occupancy to their lands as sacred as the fee simple, absolute title of the whites, but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the Government. 8 Wheaton 592. In *Fletcher v. Peck,* this Court decided that the Indian occupancy was not absolutely repugnant to a seisin in fee in Georgia, that she had good right to grant land so occupied, that it was within the State, and could be held by purchasers

under a law subject only to extinguishment of the Indian title. 6 Cranch 88, 142. 9 Cranch 11. In the case of *Johnson v. M'Intosh,* 8 Wheaton 543, 571, the nature of the Indian title to land on this continent, throughout its whole extent, was most ably and elaborately considered, leading to conclusions satisfactory to every jurist, clearly establishing that, from the time of discovery under the royal government, the colonies, the States, the Confederacy and this Union, their tenure was the same occupancy, their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction and sovereignty was in the government, subject only to such rights; that grants vested soil and dominion, and the powers of government, whether the land granted was vacant or occupied by Indians.

By the treaty of peace, the powers of government and the rights of soil which had previously been in Great Britain passed definitively to these States. 8 Wheat. 584. They asserted these rights, and ceded soil and jurisdiction to the United States. The Indians were considered as tribes of fierce savages -- a people with whom it was impossible to mix and who could not be governed as a distinct society. They are not named or referred to in any part of the opinion of the Court as nations or States, and nowhere declared to have any national capacity or attributes of sovereignty in their [p49] relations to the General or State governments. The principles established in this case have been supposed to apply to the rights which the nations of Europe claimed to acquire by discovery, as only relative between themselves, and that they did not assume thereby any rights of soil or jurisdiction over the territory in the actual occupation of the Indians. But the language of the Court is too explicit to be misunderstood.

> This principle was that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.

Those relations which were to subsist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

While the different nations of Europe respected the rights of the natives as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees subject only to the Indian rights of occupancy. The history of America from its discovery to the present day proves, we think, the universal recognition of these principles. 8 Wheat. 574.

I feel it my duty to apply them to this case. They are in perfect accordance with those on which the Governments of the United and individual States have acted in all their changes; they were asserted and maintained by the Colonies before they assumed independence. While dependent themselves on the Crown, they exercised all the rights of dominion and sovereignty over the territory occupied by the Indians, and this is the first assertion by them of rights as a foreign state within the limits of a State. If their jurisdiction within their boundaries has been unquestioned until this controversy, if rights have been exercised which are directly repugnant to those now

claimed, the judicial power cannot divest the States of rights of sovereignty and transfer them to the Indians by decreeing them to be a nation, or foreign state, preexisting and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our Government have acted for fifty-five years and force, by [p50] mere judicial power, upon the other departments of this Government and the States of this Union the recognition of the existence of nations and States within the limits of both, possessing dominion and jurisdiction paramount to the Federal and State Constitutions. It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and Union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown, unacknowledged by any department of the government, denied by all through all time, unclaimed till now, and now declared to have been called into exercise not by any change in our Constitution, the laws of the Union or the States, but preexistent and paramount over the supreme law of the land.

I disclaim the assumption of a judicial power so awfully responsible. No assurance or certainty of support in public opinion can induce me to disregard a law so supreme, so plain to my judgment and reason. Those who have brought public opinion to bear on this subject act under a mere moral responsibility -- under no oath which binds their movements to the straight and narrow line drawn by the Constitution. Politics or philanthropy may impel them to pass it, but when their objects can be effectuated only by this Court, they must not expect its members to diverge from it when they cannot conscientiously take the first step without breaking all the high obligations under which they administer the judicial power of the Constitution. The account of my executorship cannot be settled before the Court of public opinion, or any human tribunal. None can release the balance which will accrue by the violation of my solemn conviction of duty.