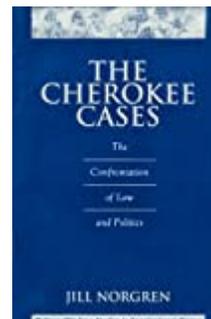




Jill Norgren. *The Cherokee Cases: The Confrontation of Law and Politics.* New York: McGraw-Hill, 1996. x + 212 pp. \$13.75 (paper), ISBN 978-0-07-047191-7.



Reviewed by Carol Chomsky (University of Minnesota Law School)

Published on H-Law (June, 1996)

The Cherokee Cases: The Confrontation of Law and Politics

In *The Cherokee Cases*, author Jill Norgren describes in welcome detail the extraordinary story of *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, two of the foundational cases in federal American Indian law decided by the Marshall Court in the nineteenth century. The book is part of a series of volumes exploring important Supreme Court cases to place them in the social, political, and economic context that shaped and help to explain them. The goal of the series is a laudable one, and it is particularly appropriate when applied to these cases, for there is no doctrinal area that has been as affected by external influences—most especially by the changing winds of politics—as has federal American Indian law.

In addition to telling us much about the relationship between the United States and the Indian nations, *Cherokee Nation* and *Worcester* also provide a window into other significant historical developments of the time. As Norgren discusses, the cases were decided against the backdrop of the emergence of Jacksonian democracy and the decades-long battle over the proper relationship between the states and the federal government in the relatively new American republic, and the judgments and

opinions are a reflection of that history (and can be understood only in that broader context). Moreover, Norgren suggests, Chief Justice John Marshall “used” *Cherokee Nation* and *Worcester* to establish the jurisprudence of an American law of United States-Native American relations as part of his campaign to establish “an American law developed by American jurists attending to American needs” (p. 7). These cases, coming near the end of Marshall’s tenure as Chief Justice, must therefore also be understood as part of the history of the Supreme Court itself in its formative years. In this slim volume—a mere 150 pages of text—Norgren has admirably condensed this complex story into a readable and compelling narrative.

Norgren argues persuasively that *Cherokee Nation* and *Worcester* are significant not only as a reflection of important historical events and themes, but also because of what the cases and their history say about the uses and impact of law in and on history. The litigation culminating in these opinions was part of a conscious strategy by the Cherokee themselves to use American law to challenge American aggression against them—aggression that was carried out by the government and people of Geor-

gia under the aegis of law. The appeals thus “represented a planned, sustained effort in the courtroom to resolve fundamental issues of power and rights, contentious issues that had not lent themselves to resolution in other forums—private or public” (p. 5). And the Supreme Court, she concludes, “using complex, obfuscating, and sometimes incorrect interpretations” of law and history, issued judgments that “permit[ted] the United States to view itself as a nation under the rule of law while continuing its quest to control the continent” (p. 6).

This theme—the manipulative use of law to legitimate an otherwise raw exercise of power—is one that Norgren has sounded before, in her book (with Petra T. Shattuck) describing the doctrinal developments in federal Indian law in the post-Marshall era. (See *Partial Justice: Federal Indian Law in a Liberal Constitutional System*, 1991.) As she there noted, Alexis de Tocqueville commented on this tendency only a few years after the Supreme Court pronouncements, describing Americans’ “singular attachment to the formalities of law” in their dealings with the American Indians, and their pursuit of Indian extinction and deprivation of rights “with a singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity” (quoted in *Partial Justice*, p. 78). The point may have particular salience when applied to federal American Indian law, but the idea of using law to legitimate acts of power, whether consciously or unconsciously, is a powerful descriptor of many interactions of law and society, especially as they implicate the relations between the majority and outsider groups.

As Norgren herself documents, however, the story of the Americans’ use of law against the Cherokee is complicated by the inability of the judicial branch to enforce its judgments without the support of legislative and executive officials. When the U.S. Supreme Court finally handed the Cherokee a legal victory in *Worcester*, the practical effect of the victory was annulled by President Andrew Jackson’s refusal to implement it. Though it is nonetheless true that most American aggression against the American Indians was rationalized as being within the law, the aftermath of *Worcester* demonstrates that “law” is more than just legal doctrine and judicial judgments. Moreover, understanding the political limitations on Court authority that were so overt in *Worcester* suggests that similar political and ideological pressures helped shape the decisions less accommodating to American Indian interests.

Norgren’s narrative begins with the arrival in Georgia of the people whose descendants are the Cherokee, and the later arrival of the Spanish, French, and English “newcomers,” the explorers, soldiers, missionaries, traders, and settlers who would constitute the non-Indian community in the state of Georgia. At first, the Georgia colony dealt respectfully with the Cherokee, desiring to establish mutually beneficial alliances and trading relationships. In the late eighteenth century, however, a surge of new settlers interested primarily in land acquisition arrived and took control of Georgia politics. These individuals viewed the Cherokee as obstacles, not as partners, and they began the process of challenging Cherokee control and land ownership (pp. 16-26).

The Georgians’ commitment to expanding the state’s land base, and the consequent need for destruction of Cherokee sovereignty and land control, initially put the state on something of a collision course with the United States, which was seeking peaceful coexistence with the Indian nations. In 1802, however, Georgia managed to get agreement from the federal government to oversee the extinguishment of Cherokee and Creek title to Georgia lands in exchange for Georgia’s cession of western lands to the U.S. government. By 1820, the national government policy as a whole changed to one favoring removal, in agreement with Georgia’s aims (pp. 28-40).

Meanwhile, the Cherokee were not passive observers to the changing state and national winds. Rather, according to Norgren, they “sustained themselves culturally and politically in those years by taking control of, rather than yielding to, the process of transformation” (p. 33). They maintained many of their own traditions and beliefs while selectively incorporating and adapting non-Cherokee ideas and institutions to their own usages. One of the changes that prepared the Cherokee for developing their particular strategy of resistance to American encroachment was the establishment of a representative national government for themselves that bore striking resemblances to both state and federal governments in the United States. Ironically, the degree of acculturation and assimilation demonstrated by the Cherokee government was feared by the Georgians, who saw the possibility that the Cherokee would now be able to defend their land holdings more effectively and with more support from the federal government (pp. 40-46).

It was the state of Georgia that first attempted to use law to resolve the political and economic conflict between itself and the Cherokee. It did so by passing a series of state laws directly challenging Cherokee

sovereignty: extending the jurisdiction of Georgia courts over crimes by or against Georgia citizens committed in the Cherokee Nation; declaring the Cherokee as merely tenants at will on their land; making all white people living in the Cherokee Nation subject to Georgia's laws; and declaring all Cherokee laws and customs null and void as of June 1, 1830. At the same time, state officials authorized the Georgia Guard militia to conduct a campaign of violence against the Cherokee to increase pressure on them to give up their land and move west. President Andrew Jackson did not respond to Cherokee petitions for assistance from the federal government, believing that Georgia's actions were lawful and justified and that removal to the west was the best result to be hoped for (pp. 46-48, 63-86).

Having received no response to its political appeals, faced with congressional passage in 1830 of the Indian Removal Act, and knowing that it had the support of neither the president nor a majority of Congress, the Cherokee Nation decided to turn to the federal courts for redress. Before this time, the major pronouncements from the U.S. Supreme Court regarding the status of American Indian tribes—in *Fletcher v. Peck* and *Johnson v. McIntosh*—dealt only with Indian land ownership as it affected the title of subsequent non-Indian purchasers of the land, and came in cases in which no Indian nation appeared as litigant (pp. 49-53, 87-95). Thus, the Cherokee litigation would be the first major effort by an American Indian tribe to bring its sovereignty claims directly to the federal courts for resolution.

The outlines and outcomes of the ensuing litigation are well known. The Cherokee Nation was first forced to defend its sovereignty in Georgia's state courts when the state kidnapped several Cherokee citizens, and then tried and convicted them in state court for crimes against other Cherokee in Cherokee territory. Not surprisingly, the inhospitable Georgia courts ruled that Georgia had complete sovereignty over inhabitants within its borders and rejected as invalid any treaties the United States had entered into with the Cherokee declaring otherwise (*State v. Corn Tassels*). When the U.S. Supreme Court issued a writ of error in the case of *Corn Tassels*, calling for Georgia to appear to defend its judgment, the state simply ignored the order and executed the defendant nine days before the scheduled court appearance (pp. 60-62, 95-98).

Next, the Cherokee petitioned the U.S. Supreme Court to enjoin Georgia's enforcement of its statutes, claiming jurisdiction for the suit under the federal Constitution's provision for original jurisdiction in the

Supreme Court for suits between a state (Georgia) and a foreign state or its citizens (the Cherokee). In *Cherokee Nation v. Georgia*, the Supreme Court concluded that the Cherokee were not a foreign nation for the purposes of this constitutional jurisdictional phrase but were instead a "domestic dependent nation," and declined to decide the merits of the Cherokee suit (pp. 98-111).

The Supreme Court finally issued a judgment on the Cherokee claims of sovereignty in *Worcester v. Georgia*, an appeal from the criminal conviction of Samuel Worcester and several other ministers for disobeying another of Georgia's laws denying Cherokee sovereignty, this one requiring white persons to get the state's permission to live in Cherokee Nation territory. Although the resulting Supreme Court opinion did not recognize full sovereignty for the Cherokee, it confirmed that Georgia had overstepped the bounds of its power in prosecuting Worcester and affirmed that tribal nations "had significant national political and property rights that were owed the highest respect by the United States" (p. 121). The opinion appeared to mark a significant shift in Justice Marshall's, and the Court's, understanding of American Indian sovereignty status.

But the Cherokee victory was short-lived, since Georgia—which had declined to appear at the Supreme Court to defend itself in either *Cherokee Nation* or *Worcester*—refused to comply with the Supreme Court mandate, President Jackson refused to intervene, and the Court itself adjourned its session, making further enforcement efforts difficult. Worcester and the other convicted ministers chose to accept pardons rather than remain in prison, given the uncertain future of the challenge to their convictions (and the fuel they might thereby add to the nullification controversy simmering in the southern states). Although the Cherokee later won several important state court judgments invalidating state exercise of criminal jurisdiction over Cherokee citizens and state seizure of Cherokee land, the continued intransigence of Georgia and the absence of support on the national political scene doomed the Cherokee efforts to vindicate their claims through the legal system. Eventually the Cherokee, like so many other American Indian nations, were forced from their land. The Cherokee journey west, aptly named by them *Nunna daul Isunyi*, the Trail of Tears, was especially harsh (pp. 112-141).

But Norgren's book is not just a rehashing of the outline of these cases and their outcomes. Norgren provides fascinating details of the decision making involved in litigating these suits and the political events that created

the context for the Supreme Court's judgments and for Georgia's response. One of the significant points made repeatedly by Norgren is that the Cherokee played a primary role not only in the decision to use the law and the selection of their attorney, but also with regard to the particular strategies used—how to fashion the test cases, where to bring them, and how to argue them. This stands in marked contrast to much litigation conducted on behalf of American Indians until recent years, when well-meaning attorneys often took control of such decision making without fully attending to, understanding, and representing the interests of their clients.

The extensive correspondence between Chief John Ross of the Cherokee and William Wirt, the tribe's lead attorney, provides support for Norgren's description of the "sophisticated nature" of the relationship between Wirt and his client. Ross "demanded" detailed information from Wirt, including analyses of alternative legal strategies, and he presented Wirt with specific legal questions about their circumstances. Wirt, it appears, acted under instructions from Ross and the Cherokee National Council (pp. 56, 58). Norgren also documents the deterioration of the relationship between the Cherokee and many of their lawyers in the aftermath of *Worcester*, when the lawyers "went over to a party whose encroachments they had covenanted to resist" and "served the United States against the 'constituted authorities' of the Cherokees," in the words of Chief Ross. Unlike these others, Wirt remained true to the Cherokee cause until his death in 1834; Ross described him as "the most faithful and effective friend of the Cherokees" and as one "who never betrayed his trust" (pp. 139, 140).

Although many of Norgren's claims about Cherokee control and involvement are thus well-documented, occasionally she reaches conclusions that seem less warranted by her sources. When she describes the Cherokee decision to press its legal challenge to Georgia's land claims, for example, she says that Ross "hoped that a persuasive argument could be made to the Supreme Court so that state laws meant to limit Indian sovereignty could be enjoined and defeated," and that he "knew that the federal courts were the Cherokee's only hope while Jackson remained in office." Ross, she says, "trusted in the law and believed that the Americans respected the laws as a source of social and commercial order. For these reasons, with some confidence," the Cherokee made the final decision to challenge Georgia's laws before the Supreme Court (p. 86). Unfortunately, there is no authority cited for any of these statements or conclusions. It may be that the sentiments described are expressed in letters between

Wirt and Ross, but it would have been helpful to have that confirmed.

The absence of citations for the quoted statements is indicative of a somewhat pervasive problem with *The Cherokee Cases*. Despite fifteen pages of endnotes documenting the sources from which Norgren has derived her story, the book too often leaves the reader wondering whether the information Norgren discusses and the conclusions she reaches are her own or are drawn from other histories of these events. (Perhaps I betray here my own training in law review-style footnoting, which historians tend to find excessive. I think, however, that Norgren errs too much on the other end of the spectrum.) My impression is that, aside from the detailed discussion of the progress of the Cherokee litigation and the relationship between the Cherokee and their lawyers, the book is a compilation of information and analysis derived from other historians' narratives—albeit an extremely valuable one—but the sometimes sparse footnoting leaves that unclear.

Moreover, although the endnotes and list of suggested readings Norgren includes in the book demonstrate her familiarity with the rich literature on the Cherokee Cases, the text would have benefited from more direct examination of the ideas and discussions contained in such materials. For example, Norgren's analysis of the opinions in *Cherokee Nation* and *Worcester* would have been enriched by a comparison with the analysis of other legal scholars who have considered these opinions in the context of the doctrinal development of federal American Indian law. Norgren's depiction of the ineffectiveness of the law to protect Cherokee interests would have been enhanced by the inclusion of contemporary American Indian voices reflecting on the impact of law on American Indian history. And her description of the politics surrounding the nonenforcement of *Worcester* would have been strengthened by reference to competing visions of those historical events.

Despite these flaws, however, *The Cherokee Cases* effectively tells the fascinating story of the Cherokees' ultimately unwarranted devotion to American law as a shield against unlawful aggression by the state of Georgia. As Norgren notes, "It is the ultimate irony that the Cherokee...described by the *Tassels* court as a people 'incapable of complying with the obligations which the laws of civilized society imposed,' maintained their faith in the rule of law—even an enemy's law—and its promise of justice" (p. 98). After describing the many ways in which American law (and politics) failed the Cherokee, how-

ever, and noting the very mixed legacy of *Cherokee Nation* and *Worcester*, Norgren concludes that the American betrayal of the Indians “should not detract from the Cherokee’s faith in the power of law or the possibility that the United States might still, like Australia, begin to decolonize its federal Indian law in the twenty-first cen-

ture” (p. 153). The book she has written provides little comfort for such an optimistic prospect.

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Citation: Carol Chomsky. Review of Norgren, Jill, *The Cherokee Cases: The Confrontation of Law and Politics*. H-Law, H-Net Reviews. June, 1996.

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