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THE CHEROKEE REMOVAL AND THE FOURTEENTH AMENDMENT

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ABSTRACT

This Article recasts the original understanding of the Fourteenth Amendment by showing how its drafters were influenced by the events that culminated in The Trail of Tears. A fresh review of the primary sources reveals that the removal of the Cherokee Tribe by President Andrew Jackson was a seminal moment that sparked the growth of the abolitionist movement and then shaped its thought for the next three decades on issues ranging from religious freedom to the antidiscrimination principle. When these same leaders wrote the Fourteenth Amendment, they expressly invoked the Cherokee Removal and the Supreme Court's opinion in Worcester v. Georgia *as relevant guideposts for interpreting the new constitutional text. The Article concludes by probing how that forgotten bond could provide the springboard for a reconsideration of free exercise and equal protection doctrine once courts begin exploring the meaning of this Cherokee Paradigm of the Fourteenth Amendment.*

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> The legislative power of [Georgia], the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a [missionary], are all involved in the subject now to be considered.[1]
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> Worcester v. Georgia (Marshall, C.J.)

> Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can . . . ever repeat the example of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament . . . .[2]
>
> Congressman John Bingham

Seven score years after Gettysburg, the meaning of the Fourteenth Amendment still preoccupies constitutional law. While no legal text provokes sharper disagreement in the courts, there is a growing consensus that two paradigm cases drove its Framers during Reconstruction. The first of these canonical history lessons says that the Fourteenth Amendment was crafted in response to the Black Codes, which were enacted by the Southern states and imposed brutal discrimination on the newly freed slaves.[3] The second teaches us that the Amendment flowed from an abolitionist ideology that began developing in the 1830s and had as its centerpiece the incorporation of the Bill of Rights against the States.[4] Naturally, these two

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1. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536 (1832) (Marshall, C.J.).

2. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

3. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS 162 (1998) (postulating that Congress drafted the Fourteenth Amendment to prevent a restoration of the South's racial caste system during Reconstruction); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION 1865–77, at 138 (1965) (recognizing that the Fourteenth Amendment was enacted as a de jure race equalizer in the face of the Black Codes); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 (2002) ("There is general agreement that the central, original purpose of the Equal Protection Clause, indeed of the entire Fourteenth Amendment, was to protect African-Americans against the Black Codes."). For more on the Fourteenth Amendment, see generally 2 JAMES G. BLAINE, TWENTY YEARS OF CONGRESS 145 (1884); W.R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865–1867 (1963); and ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960).

4. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 6–9 (1986) (labeling the Fourteenth Amendment a product of antislavery constitutional interpretation); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI.

paradigms exert significant influence over doctrine and provide a way of evaluating the legitimacy of judicial action.[5]

In spite of all the attention that the Fourteenth Amendment receives, this shared understanding of its roots emerged only after a difficult journey. The critical role of African Americans in the thinking of the Reconstruction Framers was recognized almost immediately.[6] Their equally fervent desire to incorporate the Bill of Rights against the States, however, was ignored for nearly a century. Indeed, when Justice Hugo Black revived this line of argument in his famous dissent in *Adamson v. California*,[7] most scholars initially scoffed at his claims.[8] Yet subsequent research has vindicated Justice Black and shifted the conventional wisdom on incorporation.[9] With this better-late-than-never recognition of a second interpretive paradigm, the tale of the Amendment's birth seemed complete.

This Article contends that there is still an important chapter missing from the original understanding of the Fourteenth Amendment. The evidence shows that the Reconstruction Framers were also influenced by the discrimination against the Cherokees, which burned itself into the national consciousness in the 1830s when

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L. REV. 1, 20–21 (1954) (arguing that Republican constitutional and racial ideology influenced the drafting of the Fourteenth Amendment).

5. *See* Warner v. Goltra, 293 U.S. 155, 158 (1934) (stating the principle that "statutes must be read in the light of the mischief to be corrected and the end to be attained"); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178–95 (2001) (arguing that the mischief that motivated the creation of a constitutional provision ought to guide its interpretation). I am not saying that judges are always conscious of these interpretive paradigms. Nevertheless, they are deeply embedded in our assumptions about the text's meaning. For example, equal protection law still focuses on remedying the type of discrimination imposed by the Black Codes, even though this cannot reach other troubling forms of unequal treatment. *See infra* Part V.B.

6. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873) (stating that the Reconstruction Amendments had "one pervading purpose . . . the freedom of the slave race"). This Article uses the term "Reconstruction Framers" to distinguish the authors of the Fourteenth Amendment from the Framers of the 1787 Constitution.

7. Adamson v. California, 332 U.S. 46 (1947); s*ee id.* at 71 (Black, J., dissenting) (asserting that the Fourteenth Amendment incorporated the Bill of Rights against the States).

8. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 139 (1949) ("In [Black's] contention that Section I [of the Fourteenth Amendment] was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against him.").

9. *See, e.g.*, AMAR, *supra* note 3, at 163–214 (noting the strength of the textual argument for incorporation); CURTIS, *supra* note 4, at 26–170 (chronicling the Fourteenth Amendment's historical development to support the incorporation argument).

Andrew Jackson undertook their forced removal from Georgia.[10] That dramatic event led to the famous decision in *Worcester v. Georgia*,[11] where the State's imprisonment of federally funded missionaries proselytizing in Cherokee lands led to Chief Justice Marshall's doomed effort to reverse these convictions and protect the Tribe.[12] Today that failure is remembered mainly for Jackson's alleged comment that "Marshall has made his decision. Now let him enforce it."[13] But *Worcester* also symbolized the triumph of a new constitutional regime committed to limited federal power and virulent racism that reached a climax in *Dred Scott v. Sandford*.[14]

What the traditional narrative misses is that the abolitionist movement was largely born from the ashes of *Worcester*. A fresh examination of the primary sources demonstrates that it was the injustice of the Cherokee Removal that helped convince a generation of activists to become abolitionists and expand human rights.[15] Those same sources also establish that when these abolitionist leaders eventually wrote the Fourteenth Amendment, that text reflected their belief that *Worcester*'s concepts were a relevant guidepost for analysis. Thus, in my view the Fourteenth Amendment should be construed in light of the principles derived from *Worcester* and from the fight against Removal. Indeed, this was the view of none other than John Bingham, the author of Section 1 of the Amendment.[16]

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10. Jackson's removal policy was implemented only after the Tribe was subjected to harsh state laws that anticipated the Black Codes by more than three decades. *See infra* notes 51–62 and accompanying text; *see also infra* note 351.

11. 31 U.S. (6 Pet.) 515 (1832).

12. *See generally* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969) (setting forth a comprehensive analysis of the issues surrounding Removal).

13. Bush v. Gore, 531 U.S. 98, 158 (2000) (Breyer, J., dissenting); WILLIAM SUMNER, ANDREW JACKSON 227 (1882); *see also, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 28 (1990).

14. 60 U.S. (19 How.) 393 (1857). Much of this history is described in two prior works that provide the foundation for this Article. *See* Gerard N. Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487 (2002); Gerard N. Magliocca, *Veto!: The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205 (1999). For ease of reading, I will not cite to them in recounting the events that they cover in greater detail.

15. *See, e.g.*, Mary Hershberger, *Mobilizing Women, Anticipating Abolition: The Struggle Against Indian Removal in the 1830s*, 86 J. AM. HIST. 15, 35–40 (1999) (demonstrating that the Cherokee Removal decreased the attractiveness of slavery solutions less radical than abolition).

16. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham) (citing Cherokee removal by Georgia, along with state deprivations of African Americans' rights, as a justification for the Fourteenth Amendment); CONG. GLOBE, 34th

Recasting the original understanding of the Fourteenth Amendment is an ambitious project that should be greeted with skepticism. Three questions must be answered to overcome this burden. First, what were the principles involved in the Cherokee Removal and in *Worcester*? Second, what evidence is there that the Fourteenth Amendment incorporated these concepts? Third, what relevance might those ideas have for current doctrine? By answering these questions, the analysis shows how the desperate pain of one Native American tribe paved the way for a new birth of freedom for all Americans.

Part I of this Article recounts the traumatic developments that culminated in the *Worcester* opinion. Part II explores how this crisis played a substantial role in creating the abolitionist movement and shows how its leaders repeatedly linked Native-American and African-American rights. Part III reveals the hidden roots of the Fourteenth Amendment by focusing on the 1846 Cherokee Treaty and on the relationship between *Worcester* and *Dred Scott*. Part IV looks at Reconstruction and reaffirms that the principles derived from *Worcester* were absorbed into the new constitutional text. Finally, Part V suggests how this Cherokee Paradigm of the Fourteenth Amendment could sweep free exercise and equal protection doctrine in a new direction.

I. THE CHEROKEES AND THE COURT

Looking back on the Cherokee Removal, Martin Van Buren wrote that "unlike histories of many great questions which agitate the public mind in their day [this issue] will in all probability endure . . . as long as the government itself, and will in time occupy the minds and feelings of our people."[17] He was half right. The Framers of the Fourteenth Amendment did deeply ponder the meaning of these events. Subsequent generations, however, did not keep the flame alive. This Part revisits that turbulent era and explains how the

Cong., 3d Sess. app. at 139 (1857) (statement of Rep. Bingham) (explaining that *Worcester* stood in direct opposition to the issues in *Dred Scott*); CINCINNATI DAILY COMMERCIAL, Aug. 10, 1866, at 1 (reporting the remarks of Rep. Bingham upon accepting nomination for another term in Congress); *see also* Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881, 881–82 (1988) (describing Bingham's contributions to the Fourteenth Amendment).

17. 2 JOHN C. FITZPATRICK, THE AUTOBIOGRAPHY OF MARTIN VAN BUREN 275–76 (1920). Van Buren was Andrew Jackson's key political advisor and succeeded him in the White House. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 141 (1997).

Cherokee struggle for freedom became a seminal moment in American law.

A. Missionaries among the Cherokees

Among the urgent issues facing George Washington's first administration was how to handle relations with Native Americans. That task fell to Secretary of War Henry Knox, who responded with a "civilization" strategy designed to introduce the Tribes to Western culture in the hope that this would keep the peace.[18] Knox's view, which remained official policy until Jackson became President, was partly based on a belief that the Tribes possessed sovereign rights.[19] In particular, Knox felt that Native Americans had a limited right of self-government and could not be forced to sell their land.[20]

The linchpin of this civilization plan was that missionaries "of excellent moral character, should be appointed to reside in the [Indian] nation."[21] Knox saw these missionaries as more than spiritual guides; they were government agents who would act as "instruments to work on the Indians" and encourage assimilation.[22] To support this undertaking, the War Department gave missionary organizations direct financial aid in the form of surplus goods and technical

18. *See, e.g.*, WILLIAM G. MCLOUGHLIN, CHEROKEES AND MISSIONARIES 1789–1839, at 33–34 (1984) (outlining the agricultural, domestic, and religious hallmarks of Washington's Native American policy); ANTHONY F.C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS 168 (1999) ("Such a [civilization] plan, although it might not fully effect the civilization of the Indians, would most probably be attended with the salutary effect of attaching them to the interest of the United States.").

19. *See* WALLACE, *supra* note 18, at 167 (arguing that requiring states to respect Native American territorial rights and purchase their lands instead of seizing them was evidence of tribal sovereignty).

20. *See* MCLOUGHLIN, *supra* note 18, at 27 (noting that federal agents tried to make lucrative land deals with tribes because they "admitted that the Indians had the right to refuse [land] cessions"); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 145 (1997) ("Their lands . . . were to be purchased, not confiscated . . . . Knox supported this measure of respect for tribal property claims by attributing to them the Lockean natural rights of man."); WALLACE, *supra* note 18, at 169 ("Knox went on to sketch a new philosophy of Indian relations . . . that included a formal recognition of the Indian right of soil . . . ."). Although the official policy was benevolent, the reality was often ugly. Federal agents sometimes resorted to bribery and tricks to get the tribes to sell their land. *See* Burke, *supra* note 12, at 501 (arguing that "voluntary" land treaties gave tribes a mere semblance of sovereignty and disguised the pressures that whites brought to bear on the tribes to "coax" them into selling).

21. MCLOUGHLIN, *supra* note 18, at 34 (describing Knox's policy).

22. *Id*.

assistance to build schools and housing.[23] Furthermore, Congress appropriated substantial funds for Native American education and simply handed the money over to religious groups working in the tribal areas.[24] In exchange for this largesse, missionaries were required to provide regular progress reports to federal bureaucrats.[25] Though this commingling of state and church raises questions under the modern view of the Establishment Clause, there were virtually no contemporary objections to the policy on this ground. Even the Baptists, who had faced discrimination in states with established churches, supported this federal endeavor and snapped up public monies.[26]

The largest missionary group receiving federal aid was the American Board of Commissioners for Foreign Missions.[27] Founded by Massachusetts Congregationalists in 1810, the Board's zeal to save Native American souls quickly gained support from New England's commercial and political elite.[28] Though proselytizing was the main focus, its missionaries did more than provide religious instruction. Indeed, most of their civilization efforts involved secular education and vocational training.[29] To publicize its work and garner more support, the Board published a journal that soon achieved one of the largest circulations of any periodical at the time.[30]

While the Board worked with many tribes, its showcase project was the mission led by Samuel Worcester in the Cherokee Nation.[31] From their home in Georgia, the Cherokees became known as "[t]he

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23. *See id.* at 106 (discussing the written contract between the War Department and missionaries to civilize the Southern tribes).

24. *Id.*; 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 151–52 (1984). Most federal aid for the missionaries did not come until after the War of 1812, although Knox recognized the need for this support from the beginning. *See* MCLOUGHLIN, *supra* note 18, at 33–34 (noting that twenty-seven years elapsed before Congress provided the funding to bring Knox's civilization plan to fruition).

25. MCLOUGHLIN, *supra* note 18, at 106.

26. *Id.* at 34, 154. For a detailed account of anti-Baptist discrimination, see PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE 156 (2002).

27. MCLOUGHLIN, *supra* note 18, at 101–02.

28. *Id.* at 102–03; 1 PRUCHA, *supra* note 24, at 145.

29. MCLOUGHLIN, *supra* note 18, at 138–39.

30. *Id.* at 102; Hershberger, *supra* note 15, at 18.

31. *See* MCLOUGHLIN, *supra* note 18, at 103 ("[T]he Congregationalists of the American Board set out to coordinate, direct, systematize, and control the elevation of the aborigines of the southern states, beginning with the Cherokees.").

most civilized tribe in America."[32] Eagerly soaking up the instruction of missionaries, the Tribe abandoned much of its traditional economic and political culture and even ratified a constitution modeled on the U.S. Constitution.[33] News of the Cherokees' progress spread throughout the nation and seemed to herald a new era of tolerance towards Native Americans. The Board's missionaries proclaimed that the Cherokees "are rapidly adopting the laws and manners of the whites. They appear to advance in civilization just in proportion to their knowledge of the gospel."[34] The Tribe's leadership was even more optimistic, telling John Quincy Adams that their civilization efforts would soon end white prejudice against them.[35] Indeed, one Cherokee convert on a national lecture tour opined that "[a] period is fast approaching when . . . [we] will be admitted into all the privileges of the American family."[36]

B. The Cherokee Codes of Georgia

Not everyone was thrilled with the missionaries' work. From its inception, Knox's policy of peaceful intercourse with the Tribes drew fierce criticism from frontier whites.[37] Adhering to the view that "[y]ou can't tame a savage," they wanted to drive Native Americans out and seize their land.[38] Knox came down hard against this kind of local adventurism, arguing that the federal government should have exclusive authority over the Tribes.[39] This view was codified in a series

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32. *Id.* at 124.

33. *See id.* at 124–25 (measuring acculturation by the Cherokee adoption of white religion, agriculture, economics, and government); 1 PRUCHA, *supra* note 24, at 189 (claiming complete sovereignty through American-modeled constitution).

34. MCLOUGHLIN, *supra* note 18, at 125.

35. *See id.* at 143 ("For the sake of civilization and the preservation of existence, we would willingly see the habits and customs of the aboriginal man extinguished, the sooner this takes place the [sooner the] great stumbling block, [white] prejudice, will be removed." (quoting Elias Boudinot, An Address to the Whites (1828))).

36. *Id*.

37. *See* WALLACE, *supra* note 18, at 178 ("[R]esponsible men in government regarded the undistinguished, Indian-hating frontiersmen as the principal obstacle to peaceful purchase and settlement of the west.").

38. MCLOUGHLIN, *supra* note 18, at 3; *see also* WALLACE, *supra* note 18, at 178 (noting that white frontiersman acted inconsistently with the peaceful intercourse policy).

39. *See* WALLACE, *supra* note 18, at 166–67, 169 ("[T]he sword of the republic only, is adequate to guard a due administration of justice, and the preservation of peace [on the frontier].").

of acts regulating Native American commerce and in treaties between individual tribes and the United States.[40]

The clash between the federal government's liberal approach and the racism on the frontier was exemplified by Georgia's troubled relationship with the Cherokee Nation.[41] In part, these difficulties stemmed from the sheer size of the tribal settlements (about 6.2 million acres), which carved a big hole in Georgia's sovereignty.[42] Another aggravating factor was that, as part of an 1802 compact, the United States had agreed to extinguish the Cherokee title through reasonable means in exchange for Georgia's relinquishment of its claims in the western territories.[43] Federal authorities, however, did little to carry out this promise even after the State held up its end of the bargain.[44]

Increasingly irritated by this stalemate, Georgia focused its ire on the missionaries and other whites living within the Nation who encouraged the Tribe to maintain its independence. Congressman Wilson Lumpkin described these people as "the fanatics . . . from these philanthropic ranks, flocking in upon the poor Cherokees, like the caterpillars and locusts of Egypt."[45] In 1824, the Georgia delegation forced Congress to open an inquiry into whether the missionaries should continue to receive federal funding.[46] The

40. *See id.* at 169–70 (explaining that the 1790 Creek treaty and the First Trade and Intercourse Act conformed to the conciliatory policy).

41. Of course, Knox's policy was liberal only in the sense that it did not advocate the use of force to solve the problem posed by the Tribes' presence. Native Americans were not given the option of maintaining their traditional way of life and staying where they were. They had to accept Western culture or else.

42. *See* MCLOUGHLIN, *supra* note 18, at 245:

> Did a handful of Indian Christians and farmers have the right to monopolize 6,200,000 acres of corn, cotton, timber, and mineral land in the sovereign state of Georgia just because a few missionaries . . . supported by public funds claimed that the Cherokees were the most civilized tribe in America?

43. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 583 (1832) (McLean, J., concurring); Burke, *supra* note 12, at 503.

44. *See* 2 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822–1832, at 220–22 (1981) ("Georgia wanted *all* Indian titles extinguished within its borders. To achieve this goal the state formed an agreement with the federal government as early as 1802 in return for which Georgia ceded its western land claims to the United States. But nothing happened."); SMITH, *supra* note 20, at 237 ("Georgians had long complained that the federal government had never 'extinguished' Native American claims within the state . . . .").

45. MCLOUGHLIN, *supra* note 18, at 252.

46. *Id.* at 239.

Committee on Indian Affairs, however, issued a report praising the program and Congress declined to change course.[47]

Matters came to a head in the late 1820s. As part of the Cherokee Constitution of 1827, the Tribe declared its independence and claimed absolute sovereignty within its borders.[48] This provocative move, combined with the discovery of gold deposits on tribal land, convinced the Georgia legislature to take drastic action.[49] Over the next few years, it passed a series of measures aimed at forcing the Cherokees to accept second-class status or leave the State. Since these "Cherokee Codes" laid the groundwork for *Worcester* and the removal of the Tribe, they deserve careful attention.[50]

The legislation was designed to end the Cherokee Nation's independence and to annex the Tribe's land. In case this was unclear, one of the pertinent state laws was entitled "An act to add the territory . . . now in the occupancy of the Cherokee Indians, to the counties of [Georgia], and to extend the laws of this state over the same, and to annul all laws and ordinances made by the Cherokee nation."[51] To show that the State meant business, a subsequent statute made assisting a meeting of the Cherokee government a crime punishable by four years in jail.[52] Furthermore, the Governor was authorized to raise a militia to "protect" the gold mines on tribal land and arrest suspects.[53] That same militia would assist in a survey of Cherokee lands, which was the prelude to a lottery that would redistribute the area to whites.[54]

If the end of tribal independence and the confiscation of its property were not bad enough, the Cherokee Codes also sought to inflict as many disabilities as possible on the State's newest subjects so that they would want to leave. For example, one law provided that "no Indian or descendant of any Indian . . . shall be deemed a competent witness in any court of this state to which a white person

47. *See id.* at 240 (commenting that "the law was 'judicious,' 'benevolent,' and reflective of the 'high sense of moral duty' which Americans felt toward civilizing the Indians").

48. Burke, *supra* note 12, at 503.

49. *Id*.

50. I will refer to these Georgia statutes as the "Cherokee Codes" to emphasize their similarity to the Black Codes that triggered the proposal of the Fourteenth Amendment.

51. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 525 (1832).

52. *Id.* at 521–22.

53. *Id.* at 524.

54. MCLOUGHLIN, *supra* note 18, at 246–47; Letter of S.C. Stambaugh and Amos Kendell to the Secretary of War (Dec. 26, 1845), *reprinted in* S.R. 29-298, at 48–49 (1846).

may be a party."[55] Another statute voided all contracts between Cherokees and whites.[56] More broadly, the application of Georgia law to the Tribe meant that its members were now considered "people of color" and therefore could not vote or serve in the militia.[57] Finally, the State took special steps to deter anyone from impeding the land redistribution or from helping the Tribe resist these outrages. Legislation provided that anyone who tried to prevent a Cherokee from emigrating or to stop a tribal chief from negotiating an agreement to leave was subject to a lengthy prison term.[58] And any person who killed someone seeking to emigrate would receive a mandatory death sentence.[59]

In a final effort to facilitate the land lottery and grease the skids for a Cherokee departure, Georgia sought to drive out sympathetic whites. The new laws provided that all white males who wanted to live within the tribal area had to swear an oath recognizing Georgia's sovereignty and then obtain a license from the Governor.[60] At the time this statute was enacted, there were approximately fifty-six whites living in the Cherokee Nation, of whom about eighteen were pastors while the rest were farmers, teachers, and mechanics who supported Cherokee independence and were giving them secular instruction.[61] Georgia's hope was that these whites would refuse to take the required oath and either leave or give the State an excuse to expel them.[62] This loyalty oath would ignite a national firestorm.

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55. *Worcester*, 31 U.S. (6 Pet.) at 528.

56. Letter of S.C. Stambaugh and Amos Kendall, *supra* note 54, at 49. Eventually, this bar was extended to the employment of Native Americans by whites. *Id.* at 50.

57. MCLOUGHLIN, *supra* note 18, at 246.

58. *Worcester*, 31 U.S. (6 Pet.) at 522–23, 526–27 (citing the Georgia statute at issue).

59. *Id.* at 527–28. This provision was targeted at extremist Cherokees who were threatening to use violence to stop any tribal migration out of Georgia.

60. *Id.* at 523. The oath went as follows: "I do solemnly swear (or affirm, as the case may be) that I will support and defend the constitution and laws of the state of Georgia, and uprightly demean myself as a citizen thereof, so help me God." *Id.*

61. MCLOUGHLIN, *supra* note 18, at 248–49.

62. The licensing requirement had a similar objective, but that part of the law never became an issue because the missionaries refused to take the oath that was deemed a predicate for obtaining a license. *See, e.g.*, 8 REG. DEB. 2010–11 (1832) (explaining that the missionaries were imprisoned "for no other offence than a refusal to take an oath of allegiance to the State"). Of course, the oath law also gave the State a basis for excluding all whites who wanted to enter the tribal area in the future to support the Cherokees.

C. Constitutional Transformation and the Rise of Jackson

The simmering conflict between Georgia and the Cherokees must be evaluated in the context of the arrival of Jacksonian Democracy on the national scene. After spending years in the political wilderness, Andrew Jackson of Tennessee was elected President in 1828 on a platform that included reining in federal authority and ending the quasi-independent status of the Tribes.[63] Achieving these objectives in the face of strong opposition in Congress also forced Jackson to embark on a major expansion in the prerogatives of the Presidency.

Though known for championing the cause of the common man, Jackson also came into office with a serious constitutional agenda. With respect to Native Americans, the President's position was that Knox's views were misguided. Instead of considering the Tribes as semi-autonomous sovereigns that could not be regulated by the States, Jackson argued that they were aliens who had no rights and could be governed by the States.[64] This position was emblematic of the deep racism that pervaded the Jacksonian movement. In addition, the President's insistence that the States could run tribal affairs fit within his broader goal of limiting federal authority. While Jackson was a steadfast Unionist who saw secession as treason, he opposed a broad reading of implied federal power.[65] Indeed, the number one goal of Jackson's supporters was to overthrow Chief Justice Marshall's construction of congressional authority in *McCulloch v. Maryland*.[66]

Initially, Jackson's war against tribal rights and for states' rights focused on Congress rather than the Court. For much of his presidency, opposition forces led by the triumvirate of Henry Clay,

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63. For a discussion on the development of Jacksonian ideology, see ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 8–29 (1945).

64. *See* ROBERT V. REMINI, THE LEGACY OF ANDREW JACKSON: ESSAYS ON DEMOCRACY, INDIAN REMOVAL, AND SLAVERY 48–49 (1988) ("The several tribes were now subject to the authority of [the United States] . . . . [T]hey were not independent. . . . They were not sovereign.").

65. *Compare* Andrew Jackson, Proclamation (Dec. 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 640, 643 (James D. Richardson ed., 1899) (outlining Jackson's opposition to South Carolina's attempt to nullify the tariff), *with* Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra*, at 576, 581–82 [hereinafter Bank Veto] (rejecting Marshall's reasoning upholding the Second Bank of the United States).

66. 17 U.S. (4 Wheat.) 316 (1819); *see* 13 REG. DEB. 387 (1837) (statement of Sen. Benton) (noting the Jacksonian commitment to minimizing federal authority over the states).

Daniel Webster, and John C. Calhoun controlled the Senate.[67] In contrast to Jackson, they gave a broad reading to federal authority and supported generous grants for internal improvements backed by a strong national bank.[68] Complicating Jackson's effort to overturn this constitutional philosophy was the fact that before his arrival Congress was considered the central institution of government and the most authentic representative of the popular will.[69]

Taking up this challenge with relish, Jackson's first innovation involved the veto power, which was a shield that he fashioned into a sword. The early Presidents saw the veto as a relatively narrow tool that was constrained by legislative precedent.[70] Over howls of protest, Jackson rejected this conception in a flurry of vetoes against internal improvements and the Second Bank of the United States.[71] He argued that a President could ignore legislative precedent and pursue his own constitutional agenda.[72] This radical claim was justified with the argument that the President was the only official elected by all of the people and was therefore a better representative of the popular will than Congress.[73]

Jackson's other daring idea was that the President controlled the Cabinet. The main event here was his decision to fire two Secretaries

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67. *See, e.g.*, MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY 26 (1999); SKOWRONEK, *supra* note 17, at 148 (noting that Clay and Calhoun led the opposition against Jackson).

68. *See, e.g.*, MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY AND CALHOUN 68–84 (1987) (describing the political opposition to Jackson); SCHLESINGER, *supra* note 63, at 9–11 (same). Granted, Calhoun did not agree with all of these policies, but he remained a staunch political foe of the President for most of the 1830s.

69. *See, e.g.*, SKOWRONEK, *supra* note 17, at 92 (explaining that the Presidency had less power than Congress because Jefferson "renounced Federalism as a tyranny of executive power"); Letter from Joseph Story to Hon. Ezekial Bacon (Mar. 12, 1818), *in* 1 LIFE AND LETTERS OF JOSEPH STORY 310, 311 (William W. Story ed., 1851) (noting the decline in the influence of the executive branch).

70. *See, e.g.*, James Madison, Veto Message (Jan. 30, 1815), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 65, at 555 (accepting the constitutionality of a National Bank because of repeated congressional findings in support of its validity).

71. *See, e.g.*, 8 REG. DEB. 1231–32 (1832) (statement of Sen. Webster) ("[The President] asserts a right of individual judgment on constitutional questions, which is totally inconsistent with any proper administration of the Government or any regular execution of the laws.").

72. *See* Bank Veto, *supra* note 65, at 581–82 ("The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution.").

73. *See* Andrew Jackson, Removal of the Public Deposits (Sept. 18, 1833), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 65, at 5, 7 ("Whatever may be the opinions of others, the President considers his reelection as a decision of the people against the bank.").

of the Treasury who refused to carry out his order to withdraw federal deposits from the Bank.[74] When the President eventually found a loyalist—Roger B. Taney—to implement his policy, Jackson's foes were enraged by what they considered an unconstitutional exercise of executive power.[75] They argued that Cabinet officers were accountable to Congress, not the President, because executive departments were created by statute.[76] In addition, they maintained that Jackson had no right to fire a Cabinet Secretary for refusing to follow an illegal instruction (i.e., removing deposits from the Bank chartered by Congress).[77] This dispute led to one of the most celebrated episodes of Jackson's administration, as the Senate censured his conduct and he responded with a formal Protest.[78] Although the Censure Resolution was designed to shift public opinion against the President, Jackson reiterated in his Protest that the Cabinet was responsible to him alone because he was "the direct representative of the American people."[79]

In the court of history, Jackson's position on executive authority ultimately prevailed. Yet these same battles would be fought again during Reconstruction, with the Framers of the Fourteenth Amendment taking the place of Clay and Webster while another Tennessee Democrat—Andrew Johnson—stood in Jackson's shoes.

D. The Removal Act of 1830

Georgia's undeclared war against the Cherokee Nation gave Jackson a perfect opportunity to initiate his constitutional transformation. In fact, the Georgia legislature waited until Jackson's election was assured before it passed the first part of the Cherokee

74. WILFRED E. BINKLEY, PRESIDENT AND CONGRESS 76 (1947); SKOWRONEK, *supra* note 17, at 149.

75. SCHLESINGER, *supra* note 63, at 65; SKOWRONEK, *supra* note 17, at 149.

76. 3 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY 126 (1984).

77. BINKLEY, *supra* note 74, at 77; NORMA LOIS PETERSON, THE PRESIDENCIES OF WILLIAM HENRY HARRISON & JOHN TYLER 14 (1989); SKOWRONEK, *supra* note 17, at 150–51.

78. 10 REG. DEB. 58 (1833) (illustrating that the resolution of censure, proposed by Senator Clay, charged that the President had "assumed the exercise of a power over the treasury of the United States, not granted to him by the constitution and laws, and dangerous to the liberties of the people"). Censure was used because the Democrats controlled the House of Representatives and could block any article of impeachment. 13 REG. DEB. 433–44 (1837) (statement of Sen. Clay).

79. 10 REG. DEB. 1333 (1834) (protest of President Jackson).

Codes.[80] The President's solution was to propose a bill authorizing the federal government to assist the Tribe's move from Georgia if it refused to submit to state law.[81] As Van Buren explained, "Jackson staked the success of his administration upon this measure . . . . [yet] a more persevering opposition to a public measure has scarcely ever been."[82]

At the forefront of the opposition to this Indian Removal Act were the missionaries of the American Board. The Board's secretary, Jeremiah Evarts, penned a pamphlet condemning Removal that was the most widely read political work since Thomas Paine's *Common Sense*.[83] Evarts was also instrumental in organizing large anti-Removal protests that led to the first national petition drive against a specific piece of legislation.[84] Petitions denouncing Jackson's policy soon came pouring into Congress from college campuses, women's groups, and town meetings with such intensity that one contemporary remarked that "[t]he tables of the members (of Congress) are covered with pamphlets devoted to the discussions of the Indian question."[85]

The Board's work against the Removal Act was part of a broader fight against Jackson's plan by faith-based groups. Religious periodicals and pulpit sermons across the country attacked Removal and lionized the Cherokees.[86] The most biting comments, however, were reserved for Georgian officials and the discriminatory Cherokee Codes. One paper explained that the State's proposed annexation of tribal land "awaken[s] our indignation and lead[s] us almost to wish that the Cherokees had the power to vindicate their rights."[87] The *Missionary Herald* argued that "now is the time when every Christian,

80. MCLOUGHLIN, *supra* note 18, at 246; 1 PRUCHA, *supra* note 24, at 192.

81. *See* 1 THOMAS HART BENTON, THIRTY YEARS' VIEW 164 (1854) (quoting Jackson's view that the Tribe's "attempt to establish an independent government would not be countenanced by the Executive of the United States" and his advice to the Tribe "to emigrate beyond the Mississippi, or submit to the laws of [the] States").

82. Hershberger, *supra* note 15, at 16.

83. MCLOUGHLIN, *supra* note 18, at 251; Hershberger, *supra* note 15, at 25. It is estimated that more than 500,000 people read Evarts's pamphlet by the summer of 1829. Hershberger, *supra* note 15, at 24.

84. MCLOUGHLIN, *supra* note 18, at 252; Burke, *supra* note 12, at 505; Hershberger, *supra* note 15, at 24.

85. Hershberger, *supra* note 15, at 22, 24; *see also* 6 REG. DEB. 1129 (1830) (statement of Rep. Wayne) (commenting on "exciting public opinion").

86. 2 REMINI, *supra* note 44, at 259; Burke, *supra* note 12, at 505; Hershberger, *supra* note 15, at 18, 20–21.

87. Hershberger, *supra* note 15, at 21 (quoting the *Journal of Commerce*).

every philanthropist and every patriot in the United States ought to be exerting themselves to save a persecuted and defenceless [*sic*] people from ruin."[88] Another paper simply held that the Cherokees were "living monuments of the white man's wrongs."[89]

The President and his supporters were vexed by this fierce opposition. Democrats in Congress blamed the missionaries and denounced their activities as "the wicked influence of designing men veiled in the garb of philanthropy and Christian benevolence."[90] Jackson thought that the missionaries' battle against Removal stemmed from their fear of losing federal subsidies.[91] Thus, he ordered the Secretary of War to impound all funds appropriated to the American Board and other religious groups.[92] The Secretary said this was retaliation pure and simple, because "the Government by its funds should not extend encouragement and assistance to those who . . . employ their efforts to prevent removals."[93]

Amid this charged atmosphere, debate on the Indian Removal Act began in April 1830.[94] Supporters argued that Jackson's policy was the humanitarian approach because it would save the Cherokees from the growing encroachments of frontier whites.[95] In addition, they stressed that any decision by the Tribe to remove would be voluntary.[96] Opponents mocked these friendly pretensions, contending that this removal would be just the first of many that Native Americans would have to endure to avoid a white onslaught.[97] Indeed, the leader of the opposition, Senator Theodore

88. *Id.* (quoting *Critical State of the Cherokees*, 25 MISSIONARY HERALD 375 (1829)).

89. *Id.* (quoting *Lo, the Poor Indian!*, HAMILTON (Ohio) INTELLIGENCER, June 30, 1829, at 2).

90. MCLOUGHLIN, *supra* note 18, at 252 (quoting Rep. Wilson Lumpkin from Georgia, who would later become Governor of that state).

91. *Id.* at 263; Hershberger, *supra* note 15, at 33.

92. MCLOUGHLIN, *supra* note 18, at 252–53.

93. *Id.* at 253 (quoting Secretary of War John Eaton); *see* RONALD N. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 252 (1975).

94. REMINI, *supra* note 64, at 62.

95. *See, e.g.*, ROBERT V. REMINI, ANDREW JACKSON AND HIS INDIAN WARS 280–81 (2001) ("To his dying day on June 8, 1845, Andrew Jackson genuinely believed that what he had accomplished rescued these people from inevitable annihilation."); Burke, *supra* note 12, at 507 ("Humanity and reason dictated removal, for west of the Mississippi they could govern themselves on their own land without the demoralizing influence of intruding whites."); Hershberger, *supra* note 15, at 16 ("[F]or their own survival, southeastern Indians had to move across the Mississippi away from white encroachment.").

96. Burke, *supra* note 12, at 507.

97. 6 REG. DEB. 319 (1830) (statement of Sen. Frelinghuysen).

Frelinghuysen of New Jersey, asserted that the Tribe's choice was no choice at all: if the Cherokees refused to relocate, then they would have to submit to the new Georgia statutes that left them as little more than chattel.[98]

Foes of Removal also questioned the legality of Jackson's effort to reorganize the constitutional principles governing the Tribes. For instance, they claimed that Georgia had no right to pass laws with respect to the Cherokees because that power was lodged exclusively with Congress.[99] Moreover, Frelinghuysen's allies contended that treaties between the Cherokees and the United States guaranteed the integrity of the tribal homeland and barred a coerced removal.[100] As a result, they said the President's position that the Tribe had to accept Removal or submit to state law was invalid.

Though the Jacksonians had a strong legal reply, they also sneered at the whole idea of "Indian rights."[101] Supporters of Removal responded that state regulation of the Tribes was commonplace in the North and hence could not be unconstitutional.[102] On the issue of whether treaties protected tribal territory, the Democrats pointed to language indicating that the Tribe's right of self-government was subject to the plenary power of Congress.[103] Yet they also asserted more broadly that the Cherokees did not have any rights because they were not "equal to the rest of the community."[104] One congressman explained that the civilization plan proved that the Cherokees were subhuman because its whole object was to reform "their barbarous laws and customs" and "miserable . . . superstitions."[105] Although this was a gross mischaracterization of the

98. DONALD B. COLE, THE PRESIDENCY OF ANDREW JACKSON 72 (1993).

99. *See, e.g.*, 6 REG. DEB. 314 (1830) (statement of Sen. Frelinghuysen).

100. *Id.* at 315 (citing the Treaty of Holston). Furthermore, they argued that the practice of making treaties with the Tribes meant that they were sovereigns akin to foreign nations that could not be ordered about by the President. *Id.* at 349 (statement of Sen. Sprague).

101. *See* 2 REMINI, *supra* note 44, at 260 (notin that Senator Adams of Mississippi "insisted that everyone living within the boundaries of a particular state is subject to the laws of that state. Otherwise chaos reigns.").

102. 6 REG. DEB. 325 (1830) (statement of Sen. Forsythe). The issue turned on whether Native Americans in the North had lost their tribal cohesion and hence could be subjected to state law. *Id.*

103. *Id.* at 326.

104. COLE, *supra* note 98, at 72 (quoting former Jacksonian governor John Forsyth of Georgia).

105. 6 REG. DEB. 1103 (1830) (statement of Rep. Lumpkin).

Cherokee Nation, the broader point was clear—racism justified removal.

The Cherokee Crisis is often characterized as an unavoidable tragedy, but that assertion is belied by the close vote on the Removal Act.[106] Although the bill won by a significant margin in the Senate, things were much tighter in the House of Representatives.[107] In fact, it was so close that the President held back his first great veto on internal improvements until after the House vote on Removal out of fear that the veto would cost him vital support.[108] When a last-minute substitute was introduced that sought to delay action and turn the Cherokee problem over to an independent commission, that motion was defeated by just one vote.[109] Like a Roman Emperor at the gladiatorial games, one congressman's thumbs-down would deprive an entire nation of its homeland.

E. Civil Disobedience in Georgia

Following this defeat, the Tribe tried to develop a test case challenging the Cherokee Codes and the Removal Act. Its first attempt involved a Cherokee who was tried by the State for murder in a context where tribal courts should have had jurisdiction.[110] When the defendant sought a writ of error to the Supreme Court, however, Georgia short-circuited the appeal by executing him before the Court could grant review.[111] A second suit was then brought in the Court's original jurisdiction.[112] While that case was pending, Jackson's partisans moved a bill to repeal section 25 of the Judiciary Act and deprive the Court of its power to review judgments from state

106. *See* 2 REMINI, *supra* note 44, at 263 (commenting that the Removal Act "was harsh, arrogant, racist—and inevitable" and that "[i]t was too late to acknowledge any rights for the Indians").

107. COLE, *supra* note 98, at 72; REMINI, *supra* note 95, at 235–36.

108. Hershberger, *supra* note 15, at 30; *see also* Andrew Jackson, Veto Message (May 27, 1830), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 65, at 483, 485 (vetoing the Maysville Road project).

109. COLE, *supra* note 98, at 73; REMINI, *supra* note 95, at 236.

110. 1 BENTON, *supra* note 81, at 166. For a complete discussion of this case, see TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 103–24 (2002).

111. 1 BENTON, *supra* note 81, at 166; Burke, *supra* note 12, at 512.

112. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15–16 (1831).

courts.[113] Though this effort failed, a clear message was sent to the Justices that they interfered with the President's constitutional agenda at their peril. Faced with this looming threat and a weak case for original jurisdiction, Chief Justice Marshall shied away from a confrontation for the time being and dismissed the suit without reaching the merits.[114]

Attention shifted back to Georgia as the missionaries considered their dwindling options. With the deadline for complying with the loyalty oath drawing near, Worcester and his colleagues decided that "taking an oath of allegiance is out of the question."[115] Their objections were not religious in nature; they just believed that Georgia's extension of jurisdiction "was an invasion of the rights of the Cherokees and highly unjust and oppressive."[116] Moreover, their arrest would create the test case that Jackson's opponents wanted.

The inevitable showdown came one Sunday morning following church services. Three of the Board's missionaries, along with other whites living in the Cherokee homeland, were arrested for refusing to take the loyalty oath.[117] When they were brought to trial, however, a state court anxious to avoid a confrontation ruled that, due to the congressional subsidies they received, the defendants were federal employees and fell under an exemption in the oath statute.[118] In particular, the court observed that Samuel Worcester, who was among the arrested men, was the federal postmaster to the Cherokee Nation.[119] Although the missionaries wanted a test case and refused to raise their federal connection as a defense, the court ordered their release anyway.[120]

The Governor of Georgia, who was spoiling for a fight, then wrote a revealing letter to the Postmaster General. He began by arguing that the missionaries were exerting "extensive influence over the Indians and [have] been very active in exciting their prejudices

113. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 955–56 (1988). This would not have altered the Court's potential original jurisdiction over the Tribe's case, but the threat to the Court as an institution was clear.

114. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20.

115. MCLOUGHLIN, *supra* note 18, at 258 (quoting Worcester's letter to the Prudential Committee).

116. *Id*.

117. *Id.* at 259; Burke, *supra* note 12, at 519.

118. MCLOUGHLIN, *supra* note 18, at 259; Burke, *supra* note 12, at 519.

119. MCLOUGHLIN, *supra* note 18, at 259.

120. Burke, *supra* note 12, at 519–20.

against the Administration of both the General and State Governments."[121] Accordingly, the Governor explained that

> The object of this communication is to request that you dismiss Samuel Worcester from the office of postmaster. If Worcester is not now removed, he will, without doubt, consider himself authorized to conduct his seditious conduct . . . . It is due to the State, however, that those who, under the cloak of religious ministry, teach discord to our misguided Indian people and opposition to the rulers, should be compelled to know that obedience to the laws is both a religious and civil duty.[122]

This was the clearest statement of the intent behind the oath law. Although Georgia wanted to get rid of whites within the tribal homeland in order to proceed with the planned land redistribution, it also clearly sought to remove people who expressed political views that were anathema to the State. Shortly after the Governor's letter was sent to the Postmaster General, Worcester was dismissed from his post and the President declared that the missionaries were no longer federal employees.[123]

Faced with ten days to take the oath or get out, eleven whites who remained defiant were arrested and beaten.[124] Swiftly convicted this time and sentenced to four years at hard labor, the defendants were offered a suspended sentence if they took the oath.[125] Nine of the eleven accepted this deal. But Worcester and his colleague, Elizur Butler, refused and applied for a writ of error to the Supreme Court.[126] The stage was now set for *Worcester v. Georgia*.

F. Three Lessons from Worcester

In assessing this lonely landmark of the Marshall Court, three points are relevant for interpreting the Fourteenth Amendment. First, contemporaries saw the jailing of the missionaries as a flagrant violation of religious freedom. Second, the opinion was a last-gasp attempt by the Court to stop Jackson's constitutional transformation by codifying Federalist doctrine and influencing public opinion against the President. Third, the Court's decision made Native

121. MCLOUGHLIN, *supra* note 18, at 260.
122. *Id*.
123. *Id.*; Burke, *supra* note 12, at 520.
124. MCLOUGHLIN, *supra* note 18, at 262.
125. *Id.*; Burke, *supra* note 12, at 520.
126. MCLOUGHLIN, *supra* note 18, at 262; Burke, *supra* note 12, at 520.

Americans a paradigmatic group for analyzing equality issues. Each of these strands in *Worcester* became a touchstone for the Reconstruction Framers.

1. *A Free Exercise Paradigm.* While religious groups were opposed to the removal of the Cherokees, they quaked with outrage at the attacks on religious freedom in Georgia. Van Buren recalled that "it is scarcely possible now . . . to realize the extent to which many of our religious societies were agitated and disturbed by the imprisonment of those missionaries."[127] A typical view was offered by the *Boston Daily Advertiser*, which saw the jailing of the missionaries as a direct threat to religious liberty and asked whether "the Christian people of the United States [would] give their sanction . . . to the conduct of a President who treats the ministers of the Christian religion with open outrage . . . [and] commits them in defiance of law like common criminals to the penitentiary."[128] Opponents of Georgia's action stressed that the prisoners were ministers engaged in what Worcester described as "preaching the gospel to the Cherokee Indians, and . . . translating the sacred Scriptures into their language."[129] Even the keynote address at the convention that nominated Clay to run against Jackson for President pounded on the religious angle, stating that "[f]ew examples can be found, even in the history of barbarous communities, in which the sacred character of a minister of religion has furnished so slight a protection against disrespect and violence to the persons invested with it."[130]

These comments expressed a view that became an article of faith for liberals and abolitionists alike, which was that *Worcester* was a major case about the free exercise of religion. In particular, the opposition saw the imprisonment of ministers who were proselytizing as an attack on religious expression.[131] As one paper said, the case was equivalent to a past struggle that asked whether "England had a right

127. Hershberger, *supra* note 15, at 32.

128. Burke, *supra* note 12, at 528 (quoting PITTSBURGH GAZETTE, Oct. 26, 1832, at 2); *see also* SATZ, *supra* note 93, at 51 (explaining that opposition papers described Jackson as "the persecutor of the missionaries").

129. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 529 (1832).

130. Burke, *supra* note 12, at 520–21.

131. Though most people focused on the free exercise rights of the missionaries, there were also suggestions that Native Americans had a right to receive religious instruction. *See infra* note 295 and accompanying text (quoting Bingham's view that they had a right to know the New Testament).

to make laws forbidding ministers to preach the gospel."[132] Even Worcester thought he was fighting for religious freedom, accepting that the missionaries were "martyrs in the cause of *liberty*. If we are not suffering for the sake of righteousness, let us yield the contest."[133]

What is interesting about this Biblical take on Worcester's case is that it had no connection to Georgia's reasons for promulgating the oath law. There is no evidence that the State gave any thought to the religious consequences of the law or cared about stopping proselytizing. Instead, the oath statute was about ending the political activities of whites who encouraged Cherokee resistance and clearing them out so that the land lottery could occur. Opponents argued, however, that the oath provision infringed on free exercise principles because it had an adverse impact on religious conduct. And this was so even though the requirement applied generally and did not target religion.[134]

Although the religious implications of *Worcester* were profound, this facet of the case went unmentioned by the Court's opinion. That omission happened for one simple reason—the First Amendment did not apply to the States at that time.[135] Yet when the Framers of the Fourteenth Amendment moved to correct this deficiency, they remembered *Worcester* as a paradigmatic free exercise violation that should never be repeated.[136]

2. *A Preemptive Opinion. Worcester* is often praised as a model of judicial integrity for reversing the missionaries' conviction in the teeth of intense political pressure. If one looks a little closer, however, the opinion has feet of clay. Specifically, Chief Justice Marshall's ruling decided several unnecessary issues in a broad and unusual

132. Duane King & Raymond Evans, *History in the Making: Cherokee Events as Reported by Contemporary Observers*, 4 J. CHEROKEE STUD. 53, 86 (1979) (quoting N.Y. SPECTATOR, Jan. 3, 1832); *see also* 8 REG. DEB. 3105 (1832) (statement of Rep. Pendleton) ("Is this a question of religious enthusiasm, or of personal rights? I hesitate not to affirm that civil liberty owes as much to ecclesiastics as she owes to lawyers.").

133. MCLOUGHLIN, *supra* note 18, at 239 (emphasis added).

134. This is important for evaluating the Supreme Court's controversial decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See infra* Part V.A.

135. Although there was no holding then about the applicability of the Bill of Rights to the States, it was widely accepted that the Bill limited only the federal government. As a result, Worcester and Butler did not bother to raise a First Amendment defense. One year later, the Court did formally reject what we now call incorporation. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833).

136. *See infra* notes 295–300 and accompanying text.

fashion that violated professional norms. That flawed analysis cannot be understood without placing the case against the backdrop of Jackson's efforts to bring about a constitutional transformation. Confronted by this menacing threat to the established legal order, the Court used *Worcester* as a vehicle to turn Federalist assumptions into doctrine and swing public opinion against the President in an act that I call a "preemptive opinion."

a. A Close Look at Worcester. Reading *Worcester* for the first time, its most striking feature is Marshall's disregard for the issues on appeal. Although the case was about the oath law, the Chief Justice focused his effort—more than twenty pages of dicta—on making "an elaborate argument for Cherokee independence."[137] Only at the end of the opinion did Marshall add a few paragraphs addressing the missionaries' plight.[138] Yet in that brief analysis, he managed to hold all of the Cherokee Codes—not just the oath law—unconstitutional.[139] Moreover, the Court used this as a *third* ground for reversal after concluding that the state laws were preempted by federal statutes and by treaties with the Tribe.[140]

Even more troubling was the fact that Marshall decided these issues in a sweeping fashion that could not be squared with precedent. For instance, the Court stated that the regulation of Native American affairs was "committed exclusively to the government of the Union."[141] This was the broadest assertion ever made by a Court that was always eager to proclaim federal supremacy.[142] Holding that Congress had exclusive power over commerce with the Tribes was reasonable. Expanding that rationale to cover all interactions with Native Americans, however, was suspect. Marshall's contemporaries pointed out that the Commerce Clause, which was the only fount of constitutional authority available, could not give Congress power

137. Burke, *supra* note 12, at 523; *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542–61 (1832).

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

139. *Id*.

140. *Id.* at 560–61.

141. *Id.* at 561.

142. *See, e.g.*, WHITE, *supra* note 113, at 959 (quoting BOSTON STATESMAN, Mar. 19, 1832, which called *Worcester* "the boldest . . . [o]f all the attempts made at a 'Federal' consolidation," and "the least credible to the intellectual character of the Court") (alterations in original).

over noncommercial affairs with Native Americans when it did not grant such a police power elsewhere.[143]

The Chief Justice's dictum on Cherokee rights was similarly expansive and distorted. Indeed, the Court later explained that *Worcester* laid down "platonic notions of Indian sovereignty" that did not correspond with reality.[144] In his opinion, Marshall argued forcefully that the Tribes were almost totally independent.[145] Once again, the modest argument that the Tribes had some autonomy was well within established law. The Court's position, however, was not—in part because the history of tribal relations and of the Cherokee treaties did not support Marshall's interpretation.[146] Thus, his reading of tribal autonomy was rejected at the time and never gained much support.[147]

Worcester is best understood as a weapon that the Court forged for its fight against Jacksonian Democracy.[148] By 1832, the Justices

143. *See* United States v. Bailey, 24 F. Cas. 937, 940 (C.C.D. Tenn. 1834) (No. 14,495) (holding Congress had no power to punish a murder involving a Cherokee on tribal land unless the crime had a commercial aspect); *see also* 6 REG. DEB. 1114–15 (1830) (statement of Rep. Lamar) (making a similar argument).

144. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 257 (1992) (quoting McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973)).

145. *See Worcester*, 31 U.S. (6 Pet.) at 559 (using the word "nation" to attribute the independence of the "other nations of the earth" to the Cherokee nation). The only exceptions were that the tribes could not make treaties with or sell land to anyone other than the United States. *See id.*

146. For example, Marshall ignored substantial evidence that the Tribes relinquished sovereignty to their European conquerors. *Compare Worcester*, 31 U.S. (6 Pet.) at 544 (dismissing this claim as "absurd"), *with* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 22–24 (1831) (Johnson, J., concurring) (setting forth extensive evidence showing that the Europeans did acquire such sovereignty). The Court's take on this history has been roundly criticized. *See, e.g.*, Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 396–405 (1993) (presenting and critiquing Marshall's interpretive method in *Worcester*).

147. For a contemporary decision that rejected Marshall's analysis, see *State v. Foreman*, 16 Tenn. (8 Yer.) 256, 277 (1835). Even the Reconstruction Framers, who later used *Worcester* as a paradigm case and restored much of its authority, never endorsed the full breadth of its interpretation about tribal sovereignty. Likewise, modern courts that look to *Worcester* for guidance on tribal issues stop well short of endorsing Marshall's very expansive vision of Native American autonomy. *See supra* note 144 and accompanying text.

148. Marshall's political motives were on full display in the previous case involving the Cherokees. Though his opinion in *Cherokee Nation* dismissed the Tribe's suit for want of jurisdiction, two of his colleagues concurred only in the result and rejected the claim on the merits, *Cherokee Nation*, 30 U.S. (5 Pet.) at 31 (Johnson, J., concurring); *id.* at 49–50 (Baldwin, J., concurring). Concerned about press reports that characterized the decision as hostile to the Cherokees, Marshall took the extraordinary step of asking Justice Thompson to write a

viewed the President's constitutional ambitions with growing alarm. John Marshall freely admitted that he kept close tabs on the progress of the Removal Act through Congress.[149] And Justice Story argued that the efforts to repeal Section 25 of the Judiciary Act and "the recent attacks in Georgia [were] but parts of the same general scheme, the object of which is to elevate an exclusive State sovereignty upon the ruins of the general Government."[150] Indeed, things looked so bad that Marshall told Story he was "yield[ing] slowly and reluctantly to the conviction that our Constitution cannot last."[151]

Yet there was still time to stop this revolution. The Democrats did not yet have firm control of Congress, as demonstrated by the close vote on Removal and Jackson's need to veto legislation. New elections were coming in a few months, and they would be fought partly on the issues raised by Worcester's appeal. In fact, the National Republicans made the "recent inhuman and unconstitutional outrages committed under the authority of Georgia" a major theme of Clay's presidential campaign.[152] Given Jackson's powerful position, however, this election represented the last realistic chance to save the old constitutional order.

b. The Application of a Preemptive Analysis. This rare set of conditions can lead to a preemptive opinion, which, as I explain in greater detail elsewhere, sits at the intersection of constitutional regimes or generations.[153] When a rising political movement launches a broad critique on settled constitutional law, the Supreme Court often defends the status quo by launching a preemptive strike against

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dissent—after the decision had already come down—supporting the Cherokees. That dissent now appears in the reports as if it were a conventional opinion. *See id.* at 50 (Thompson, J., dissenting).

149. *See* Burke, *supra* note 12, at 510 ("I have followed the debate in both houses of Congress with profound attention, and with deep interest, and have wished, most sincerely, that both the Executive and Legislative departments had thought differently on the subject." (quoting Letter from John Marshall to Dabney Carr (June 21, 1830), *in* 2 JOHN PENDLETON KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY GENERAL OF THE UNITED STATES 253–58 (1849))).

150. Letter from J. Story to J. Ashmun (Jan. 30, 1831), *in* 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 69, at 47, 47–48.

151. Letter from J. Marshall to J. Story (Sept. 22, 1832), *in* 14 PROC. MASS. HIST. SOC'Y 351–52 (1901), *quoted in* WHITE, *supra* note 113, at 960.

152. Burke, *supra* note 12, at 520 (quoting James Barbour, Address to the National Republican Convention (Dec. 24, 1831)).

153. *See supra* note 14.

the insurgents. This type of preemptive action usually has two objectives. First, the Justices try to turn unstated assumptions of their legal world into broad and permanent doctrine before it is too late. Second, the Court seeks to defeat the opposition at the polls by declaring an important part of its agenda unconstitutional.

Preemptive opinions occur because every group of Justices bears some allegiance to the constitutional priorities of its political party and does not want to see them overturned. Although the strength of this assumption varies with each appointment, a majority of the Court is usually friendly to the fundamental principles of the dominant political coalition. When a major political shift is at hand, therefore, constitutional conservatives frequently perceive the situation as a crisis that requires extraordinary action to save the Constitution from destruction. Indeed, there is no more regular pattern in American law than the sky-is-falling lament that occurs whenever one generation is about to take over from another.[154] And the action that these conservatives, who are usually represented by the Supreme Court, often take in these moments is to issue a preemptive opinion.

Preemptive cases are few in number, but they rank as some of the most famous and controversial decisions because of their volatile mix of principle and partisanship.[155] To achieve their sweeping goals, preemptive opinions display three unusual characteristics. First, they reach out to decide every possible issue in the case rather than avoiding ones that are unnecessary. Though this is not how courts normally operate, the Justices usually need to go beyond the narrow questions presented by litigants if they wish to make a major statement. Second, preemptive decisions grossly inflate the principles

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154. This point, like so many others, was best described by Justice Robert H. Jackson:

> The judiciary is thus the check of a preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being. This conservative institution is under every pressure and temptation to throw its weight against novel programs and untried policies which win popular elections.

ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 315 (1941).

155. *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 570 (1895) (declaring an income tax unconstitutional as applied to certain income streams), *modified on reh'g*, 158 U.S. 601 (1895) (striking down the entire income tax act), *overruled by* U.S. CONST. amend. XVI (granting Congress the right to tax incomes without apportionment); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (withholding United States citizenship from African Americans and declaring the Missouri Compromise invalid), *overruled by* U.S. CONST. amend. XIV (granting citizenship to "all persons born or naturalized in the United States," *id.*); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (invalidating the Cherokee Codes); *cf.* Bush v. Gore, 531 U.S. 98 (2000) (showing many traits common to the preemptive cases).

of the existing constitutional regime in a way that hurts the political opposition. By giving an expansive interpretation to these favored tenets, the Court gives them every chance to survive in a Court with Justices of a different persuasion who may be reluctant to overrule precedent. Meanwhile, by directing this broad articulation against its electoral foes, the Court does its best to influence voters and thereby prevent constitutional change at the polls. Rendering an opinion with the breadth required to accomplish these objectives, however, is difficult because precedent does not usually support those outcomes. Thus, the third component of a preemptive case is the development of some new theory of equality or fairness that can overcome contrary authority and insulate the opinion from attack by appealing to first principles.[156]

Worcester was the Supreme Court's first preemptive opinion, and within that framework, Marshall's strange performance finds a home. His decision to resolve the questions of tribal autonomy and the constitutionality of the Cherokee Codes was necessary to give the opinion a stinging political impact.[157] The breadth of Marshall's opinion was part of an attempt to deepen Federalism's doctrinal legacy regarding the need for a strong federal government and respect for tribal rights. Lastly, the Court's rejection of Jackson's

156. The thoughtful criticism of this analysis could take two forms. First, some might wonder whether the traits cited above really define a distinct category. In other words, many Supreme Court cases share these characteristics and thus the contention that there is something special about them is incorrect. Second, one could make the contrary suggestion that the slender number of preemptive cases simply cannot support the generalizations made in the text.

On the first point, the preemptive opinion category is well defined if the relevant factors are applied correctly. Clearly, there are many Supreme Court cases that decide unnecessary issues in a broad fashion. And many, though not all, of those decisions rely on novel ideas of fairness or equality. Yet, and this is the important part, very few of them are directed at a major facet of the opposition agenda in a way that targets their electoral prospects. Once that limiting principle is recognized, the cases that remain shrink to a small yet robust set that provides useful insights when analyzed as a whole.

As for the second observation, it is true that this framework draws from a small number of data points. In part, that is because there are just not that many preemptive cases. Another factor, however, is that analyzing whether an opinion fits within the model requires a detailed reconstruction of the political context surrounding each case that cannot be accomplished all at once. Over time, I hope to increase the number of data points and to refine the hypothesis through an examination of the Populist period, the Reagan Revolution, and other eras of our constitutional history where preemptive opinions are present.

157. This also explains Marshall's manipulation of the remedy in *Worcester*. Even though the Court was well aware that Georgia would refuse to obey an order releasing the missionaries, the Justices adjourned the term immediately after the mandate was issued and hence could not issue a subsequent order to enforce the decision. Put another way, *Worcester* was an advisory opinion.

agenda gave his electoral opponents a powerful campaign argument that Democratic policies were dangerous and contrary to the traditions of the Republic. In a moment, we will see how *Worcester* met the final prong of the preemptive model by formulating a new understanding of equality to shore up its shaky analysis.

The key point to take away is that *Worcester* was a powerful symbol of the transition from Federalism to Jacksonian Democracy. As a leading articulation of pluralism and federal supremacy, the Court's opinion also stood ready to be redeemed by any political movement that wanted to overturn the contrary philosophy imposed by the Democrats. That redemption, both explicit and implicit, would be an important aspect of Reconstruction.

3. *A Tribal View of Discrimination.* While many saw *Worcester* as a case about religious freedom or about stopping Jacksonian Democracy, others viewed it through the lens of wrongful discrimination. The aggrieved minority group in question, of course, was Native Americans. Though all of the disabilities imposed by the Cherokee Codes were obnoxious, the provision that drew the most criticism was the one barring Native American testimony in cases involving whites. As Senator Frelinghuysen said, this meant that "a gang of lawless white men may break into the Cherokee country, plunder their habitations, murder the mother with the children, and all in the sight of the wretched husband and father, and no law of Georgia will reach the atrocity."[158] In his view, this "shut [the Cherokees] out of the protection of Georgia laws" and "stripped these people of the protection of their government."[159] The invocation of the language and spirit of equal protection is suggestive. And what it suggests is that the opponents of Removal thought about equality for Native Americans in a manner similar to how the Reconstruction Framers would view discrimination against African Americans.[160]

Marshall's opinion confirmed the observation that Native Americans were a paradigmatic group for evaluating issues of equality, though not in the way one might expect. Senator

158. 6 REG. DEB. 318 (1830) (statement of Sen. Frelinghuysen).

159. *Id.*

160. State laws that barred African Americans and Native Americans from testifying would again become a major concern during Reconstruction and form the basis of a famous manifesto for equality by Senator Charles Sumner. *See infra* notes 337–342 and accompanying text (discussing Sumner's congressional efforts to secure the right to testify in court for all Americans).

Frelinghuysen's comments show how the Cherokee Codes and the Removal Act discriminated against the testimonial rights of individual Cherokees. Furthermore, the state statutes almost certainly violated the Contracts Clause by voiding contracts between Cherokees and whites.[161] Yet Marshall was unconcerned with these types of individual rights arguments.

Instead, the Chief Justice's opinion developed a new form of equality analysis that focused on comparing the rights held by the United States as a sovereign entity to those held by the Tribe as a group.[162] Over and over again the Court emphasized that the treaties between Native Americans and the United States as collective entities dealt in the "language of equality."[163] Marshall relied on the first treaty ever made with a tribe—the Delawares—and explained

161. *See supra* note 56 and accompanying text (stating that the Cherokee Codes voided all contracts between Cherokees and whites); *cf.* U.S. CONST. art. I, § 10, cl. 1 (prohibiting any state from passing a law impairing a contractual obligation). The Marshall Court was not always so shy about using the Contracts Clause. *See, e.g.*, Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 518 (1819) (voiding a law that significantly altered the charter granted by the State to Dartmouth College); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136–39 (1810) (voiding a Georgia law which nullified the passage of an estate "into the hands of a purchaser for valuable consideration").

162. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549–62 (1832) (exhibiting the Chief Justice's application of this analysis to treaties executed by the Tribes to date). Another aspect of *Worcester* lends support to the view that a new equality reading drove the analysis. A tough problem facing the Court's argument that the Tribe enjoyed substantial sovereignty was that the leading Cherokee treaty contained provisions indicating that their rights were granted by Congress and could be revoked. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 22–25 (1831) (Johnson, J., concurring). For example, one clause stated that Congress had the "exclusive right of regulating [the Tribe's] trade and managing all their affairs in such manner as [Congress] shall think proper." *Id.* at 24 (Johnson, J., concurring) (referencing the Treaty of Hopewell); *id.* at 38 (Baldwin, J., concurring) (same). Although this language and other phrases like it counseled strongly against Cherokee sovereignty, one commentator explained that "[r]ather than approach the interpretive questions as normatively neutral exercises, Chief Justice Marshall found some reason to work hard to counter the ordinary textual meaning of the treaty." Frickey, *supra* note 146, at 402.

The Court's solution was to assert that Native Americans were a disadvantaged class. Marshall asked, "[i]s it reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish" one term from another? *Worcester*, 31 U.S. (6 Pet.) at 552. Indeed, he said it was "probable the treaty was interpreted to them" and that "it may very well be supposed that they might not understand" what the language meant. *Id.* at 551, 553. As a result, the Court concluded that the problematic provisions should not be construed against the Tribe. *Id.* at 553–54. Since the Cherokees were one of the most sophisticated tribes and certainly the equal of some foreign states, Marshall's notion that they could not understand the treaty's provisions is dubious. But the idea that discrimination against Native Americans as a class should receive greater scrutiny made sense and was a portent of the future.

163. *Worcester*, 31 U.S. (6 Pet.) at 549.

that its language "evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States" that Native American tribes were sovereign nations.[164] In addressing the specific Cherokee treaties, Marshall went point by point through the reciprocal duties and rights in these agreements and stressed that they were virtually the same for each side.[165] From these observations, the Court ruled that "[t]he only inference to be drawn . . . is, that the United States considered the Cherokees a nation."[166] Accordingly, he concluded that the Tribe must have sovereignty akin to that of the United States and, therefore, it could not be subjected to the discrimination imposed by the Georgia statutes.[167] This focus on Native Americans and group rights for evaluating discrimination issues would continue long after *Worcester* was decided.[168]

G. Banishment

Although *Worcester* broke new ground in a number of respects, as an attempt to defeat Jacksonian Democracy or prevent discrimination it was a dismal failure. Both Georgia and the President rejected the Court's decision, and following a bitter campaign, Jackson won a resounding victory in the fall election. Shortly thereafter, the country was presented with a new crisis when South Carolina attempted to nullify the federal tariff.[169] In opposing this effort, Jackson prevailed upon the Governor of Georgia to pardon Worcester and Butler in order to tamp down states' rights sentiments at a time when the President needed to rally support for the Union.[170]

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164. *Id.*; *see also id.* at 550 (noting that the fifth article of this treaty "regulates the trade between the contracting parties, in a manner entirely equal").

165. *See id.* at 551 (noting that the Treaty of Hopewell provided for an equal exchange of intruders); *id.* at 555 (explaining the reciprocal rules for punishment of intruders); *id.* at 556 (stating that the Treaty of Holston provided for a "perfectly equal" exchange of prisoners); *id.* at 556 ("The remaining articles [of the Treaty of Holston] are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.").

166. *Id.* at 553.

167. Although Marshall's opinion implied that the Removal Act was invalid, he did not specifically address the issue. But Justice McLean, who concurred in *Worcester* on narrower grounds, did conclude that the Removal Act illegal. *Worcester*, 31 U.S. (6 Pet.) at 596 (McLean, J., concurring).

168. *See infra* notes 269–272 and accompanying text (discussing the relationship between *Worcester* and *Dred Scott*).

169. COLE, *supra* note 98, at 154–58.

170. *See* 2 REMINI, *supra* note 44, at 277–78 (noting that the actions taken by Jackson to remedy Georgia's defiance were taken amidst the South Carolina tariff clash).

With their acceptance of the pardons, the missionaries passed out of history and the constitutional clash reached its tragic conclusion.

The Cherokees were now prey caught in the open. Though most of the Tribe continued to resist Removal, by 1835 factional infighting had broken out and Jackson negotiated a treaty with a pro-Removal splinter group.[171] When the full tribal assembly voted down this agreement, Georgia responded by jailing the Tribe's leadership and imposing a form of martial law.[172] Under these unhappy circumstances, a rump assembly of pro-Removal delegates signed Jackson's Treaty of New Echota.[173] Though outnumbered opponents of Removal fought this fraud in the Senate, the Treaty of New Echota—like the Removal Act—passed by a single vote.[174] In 1838, General Winfield Scott informed the Tribe that "[t]he President of the United States has sent me, with a powerful army" to enforce the treaty.[175] State and federal troops swarmed in, and "[w]ith rifles and bayonets, they flushed the Indians out of house and cabin and locked them in stockades specially erected for the purpose."[176] The Tribe was then marched out of Georgia west of the Mississippi on "The Trail of Tears" that killed thousands and remains one of the worst human rights abuses in American history.[177]

Worcester followed the Cherokees into exile. Its principles received no hearing in the halls of government, and the Taney Court refused to cite the case as it rendered Native American opinions in accord with Jacksonian principles.[178] Yet this would be an exile to

171. COLE, *supra* note 98, at 116.

172. *Id.* (noting that Lumpkin sent in the Georgia Guard to "terrorize the anti-treaty Indians").

173. *Id*.

174. *See* 1 BENTON, *supra* note 81, at 625 (quoting Clay's resolution in the Senate condemning "the instrument of writing, purporting to be a treaty concluded at New Echota on the 29th of December, 1835"). As this was a treaty, the fact that it prevailed by one vote meant that two-thirds of the Senate concurred, rather than the majority in the House of Representatives that passed the Removal Act.

175. Major General Winfield Scott, Address to the Cherokees (May 10, 1838), *in* 3 J. CHEROKEE STUD. 145, 145 (1978).

176. 3 REMINI, *supra* note 76, at 302; *see also* SATZ, *supra* note 93, at 101 (quoting a Georgia militiaman who said that "I fought through the civil war and have seen men shot to pieces and slaughtered by thousands, but the Cherokee removal was the cruelest work I ever knew").

177. For a chilling account of the brutality of the United States Army during the Removal, see STANLEY W. HOIG, THE CHEROKEES AND THEIR CHIEFS: IN THE WAKE OF EMPIRE 167–69 (1998).

178. *See, e.g.*, United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846) (holding that the tribes were subject to congressional and state authority).

Elba rather than St. Helena. The ideals set forth by *Worcester* and by the opponents of Removal were still alive for one fringe group of radicals—the Abolitionists.

II. ABOLITIONISM AND REMOVAL

The abolitionist experience is a critical source of evidence for interpreting the Fourteenth Amendment. Since the Reconstruction Framers rose to prominence as agitators against slavery, that movement's ideology provides some of the best guidance about what the Amendment meant. This Part shows how the Cherokee Removal played a significant role in creating the abolitionist movement and remained a part of its thought until the Civil War.

A. Baptism under Fire

Although there were abolitionists from the day that the first slave arrived on our shores, there is a consensus among historians that the abolitionist movement did not become a significant force in American life until the 1830s.[179] Prior to that time, the opponents of slavery were poorly organized and generally endorsed the far more limited approach of colonizing (i.e., deporting) slaves to Africa.[180] In fact, virtually all of the great abolitionist leaders of the 1830s supported colonization during the 1820s.[181] Yet in the span of just a few years, the antislavery community became a highly disciplined force that espoused immediate abolition. As Ronald G. Walters explains, the post-1830 attack on colonization by its old supporters is so inexplicable that it "haunts everything written on the subject."[182]

Though many theories have been offered to explain this sudden turnaround, the abolitionist leaders themselves provided a crucial part of the answer—the Cherokee Removal fundamentally changed their view of human freedom. Explaining why these developments are

179. *See, e.g.*, CURTIS, *supra* note 4, at 6 (citing 1830 as the beginning of "the crusade against slavery"); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 117–20 (1978) (attributing the rise of "radical abolitionism" to the launch of Garrison's *The Liberator* in 1831); SMITH, *supra* note 20, at 231, 246–47 (describing the origins of abolitionism over the decade).

180. *See* SMITH, *supra* note 20, at 246–47 (identifying the tenuous mix of ideologies behind the antislavery forces).

181. *See* Hershberger, *supra* note 15, at 35 (identifying the 1830s immediatists, including Vaux, Grimke, and Garrison, as supporters of colonization.).

182. RONALD G. WALTERS, THE ANTISLAVERY APPEAL: AMERICAN ABOLITIONISM AFTER 1830, ix (1976).

related is easy when one considers the similarities between Removal and colonization. In both instances, the argument was that the best way to resolve a racial or cultural conflict was by shipping the minority off to another area instead of dealing with the underlying prejudice. Furthermore, colonization and Removal were both coercive policies that did not recognize the autonomy of individuals who wanted to stay where they were. Although this form of segregation seemed beneficial in theory, when colonization supporters were confronted with the brutal reality of a removal proposal they saw that slavery could only be resolved by changing attitudes and ending prejudice. Indeed, the common thread linking those who abruptly abandoned colonization for abolitionism in the early 1830s was their active opposition to the Removal Act. This group includes an honor roll of the leading lights in the abolitionist movement, such as Roberts Vaux, Angelina Grimke, Arthur Tappen, Lydia Maria Child, Benjamin Lundy, William Lloyd Garrison, Charles Storrs, Beriah Green, Elizur Wright, James Birney, and Theodore Weld.[183]

One example of how the Cherokee Crisis sparked the growth of abolitionism comes from the career of William Lloyd Garrison, who is perhaps the most famous antislavery activist. As late as 1829, Garrison expressed support for colonization in a Fourth of July address.[184] When Jackson proposed the Removal Act, however, Garrison was outraged and wrote several critical articles.[185] He praised Frelinghuysen's effort on the Cherokees' behalf, explaining that "[i]f the dominant party in the Senate had not [had] hearts more impenetrable than polar ice, his speech would have . . . rescued the American name from eternal infamy."[186] Following the Removal debate, Garrison modified his position on slavery to the radical abolitionist bent that is familiar to us. Denouncing colonization in the strongest terms, Garrison now argued that slaves were "as unanimously opposed to a removal to Africa, as the Cherokees from

183. *See* Hershberger, *supra* note 15, at 35–40 (describing the role of protest against the Removal in these abolitionists' efforts); Linda Kerber, *The Abolitionist Perception of the Indian*, 62 J. AM. HIST. 271, 272–73 (1975) (describing the activities of these individuals against the Cherokee Removal prior to their abolition efforts).

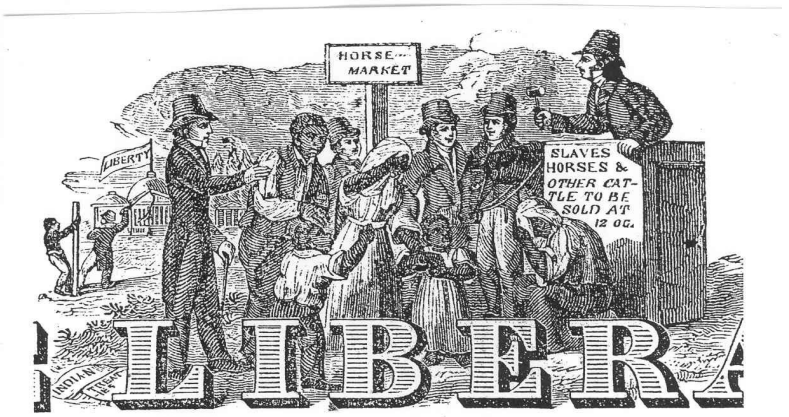
184. Hershberger, *supra* note 15, at 35.

185. *See id.* at 36 (describing Garrison's "strong denunciations of removal" published in the *Genius of Universal Emancipation*).

186. *Id.* at 37 (quoting a poem written by Garrison in his cell during imprisonment for libel in April 1830).

the council-fires and graves of their fathers."[187] Likewise, he said proslavery attitudes were "answerable" for the Removal, asserting that both were the fruit of "this wicked distinction of color in our land."[188]

Garrison's view that there was an explicit link between Removal and abolitionism was made clear in the pages of his new paper—the *Liberator*. Responding to the Supreme Court's dismissal of the Tribe's first attempt to challenge the Cherokee Codes, Garrison changed the *Liberator*'s plain masthead into the famous engraving of a slave auction being conducted on top of trampled sheets of paper entitled "Indian treaties."[189] While the *Liberator* became legendary for its uncompromising pursuit of abolition, Garrison's mouthpiece



Detail from the revised *Liberator* as it appeared on April 23, 1831, following the passage of the Indian Removal Act.
Courtesy the Library Company of Philadelphia.

187. HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 138 (1998) (quoting Garrison's work "Thoughts on African Colonization: or An Impartial Exhibition of the Doctrines, Principles and Purposes of the American Colonization Society, together with the Resolutions, Addresses and Remonstrations of the Free People of Color").

188. *Id*. (quoting the same).

189. Hershberger, *supra* note 15, at 37; ROBERT WINSTON MARDOCK, THE REFORMERS AND THE AMERICAN INDIAN 8 (1971). The illustration from the *Liberator* and the caption describing the image are taken from Mary Hershberger's article. The credit for locating and describing this image, therefore, belongs entirely to her.

also continued to focus attention on the plight of the Cherokees and on the relationship between that issue and slavery.[190]

James Birney, an antislavery firebrand who helped to develop the framework behind the Fourteenth Amendment, agreed with Garrison that Removal was the catalyst for abolitionism.[191] Birney once supported colonization, but in the early 1830s he resigned from the Colonization Society of Kentucky and explained in an open letter that the Cherokee Crisis had changed his mind.[192] He pointed out the "very great resemblance [colonization] bears, in its most prominent features, to that of the Indians, who have been moved upon, in nearly the same manner to 'consent' to leave their lands."[193] After comparing the two issues, Birney concluded that both assumed "it was easier to remove from the country those who were the subjects of this degradation, than to successfully combat and overthrow the prejudices and false principles which produced it."[194] A contemporary explained that Birney understood that "[f]rom the Indian to the Negro, the transition was easy and natural . . . . He could hardly fail to see, *when the wrong of the Indians had thoroughly aroused him*, that the sufferings of the Negro flowed from the same bitter fountain."[195]

The experiences of Garrison and Birney were part of a broader trend within activist circles. One of the best illustrations of the Removal's impact can be seen in the founding meeting of the American Anti-Slavery Society, which was held a year after *Worcester* was decided.[196] All of the top officials of this new abolitionist organization had supported colonization just a few years earlier.[197] In the interim, they all agitated against Removal and switched their

190. *See* Hershberger, *supra* note 15, at 37–38 (noting that the *Liberator* "continued to carry the latest news on the [Cherokee] removal crisis").

191. *Id.* at 38; *see also* Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 6–7 (1954) (explaining Birney's influence).

192. Hershberger, *supra* note 15, at 38.

193. Letter from James Gillespie Birney, Late Vice-President, Kentucky Colonization Society, to Reverend Thornton J. Mills, Corresponding Secretary, Kentucky Colonization Society (1834), *in* NEW YORK OFFICE OF THE ANTI-SLAVERY REPORTER, 1834, at 25, 30 (1838), *quoted in* Hershberger, *supra* note 15, at 38.

194. BERIAH GREEN, SKETCHES OF THE LIFE AND WRITINGS OF JAMES GILLESPIE BIRNEY 17 (1844).

195. *Id.* at 10.

196. Hershberger, *supra* note 15, at 39.

197. *Compare id.* (listing Green, Tappan, Garrison, Wright, and Vaux as founding members of the American Anti-Slavery Society), *with id.* at 35 (listing the same individuals as supporters of colonization in the 1820s).

views on slavery. And most important, many of them were thrilled by Marshall's opinion and saw it as a beacon of freedom for the future.[198]

In sum, the Cherokee Removal was an important force in shaping the abolitionist movement. From the injustice of that act and its uncomfortable proximity to colonization, antislavery activists found the resolve to confront prejudice. Since the principles involved in the Cherokee Crisis were embedded in abolitionism from its inception, they have a role to play in interpreting the Fourteenth Amendment.

B. Tribal Rights and the Promise of Abolition

The bond between African-American and Native American rights did not weaken after the 1830s. Throughout the ante-bellum years, leaders in the battle against slavery made it clear that they thought the discrimination against both groups was connected. In making that point, abolitionists often harkened back to the Cherokee Removal and to Marshall's landmark-in-exile.

Even though the abolitionists naturally focused more attention on the evils of slavery, "[f]ew comments are more common in their speeches than that their goal was that both blacks and Indians be secured in their rights as men."[199] Lydia Maria Child, editor of the *National Anti-Slavery Standard*, argued in the 1840s that "when either of the races come in contact with us, they must either consent to be our beasts of burden, or be driven to the wall, and perish!"[200] Only a new emphasis on equality, Child believed, could end slavery and restore tribal rights.[201] Likewise, in the 1850s William Lloyd Garrison was still fighting what he called "the stain on our national escutcheon . . . that is the blood of the almost exterminated Indian tribes, and of millions of the descendants of Africa."[202]

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198. *See id.* at 32 (citing the reactions of Arthur Tappen and Lyman Beecher).

199. Kerber, *supra* note 183, at 290.

200. L. MARIA CHILD, LETTERS FROM NEW YORK, SECOND SERIES 160–61 (New York, C.S. Francis & Co. 1849), *quoted in* MARDOCK, *supra* note 189, at 9. For more on how Child linked the Native American and slavery issues, see Kerber, *supra* note 183, at 272–73.

201. MARDOCK, *supra* note 189, at 9.

202. Letter from William Lloyd Garrison to Louis Kossuth (Feb. 1852), *in* IV THE LETTERS OF WILLIAM LLOYD GARRISON: 1850–1860, at 97, 100 (Louis Ruchames ed., 1975); *see also* MARDOCK, *supra* note 189, at 12 (stating John Beeson's view that slavery was "an extension of the unneighborly, unChristian, and destructive practice which for generations has been operating against the Aborigines"); Letter from Horace Greeley to Salmon P. Chase (April 16, 1852), *in* THE SALMON P. CHASE PAPERS: CORRESPONDENCE, 1823–1857, at 346, 347 (John Niven et al. eds., 1993) (stating his view that the proslavery annexation of Texas and the

This duality in abolitionist thinking was reflected in the debates within the civil institutions they created. Complementing the approach that Garrison took in the *Liberator*, abolitionist publications often linked Native American and African-American issues.[203] A leading example was the *Pennsylvania Freeman*, which pounded on that analogy under the leadership of John Greenleaf Whittier.[204] As he explained, "[t]he same despotic, cruel, and diabolical spirit that oppresses the African race, acts in all its unearthly force and virulence against the poor Indians."[205] Complementing these attitudes in the media, Quaker meetings during this era commonly juxtaposed the fight against slavery with tribal issues.[206] And in the Philadelphia lyceums where liberals gathered, the two main questions were often abolitionism and Native American freedom.[207]

Indeed, when the Massachusetts Anti-Slavery Society issued its annual report in 1838, the opening chapter was about the Removal rather than slavery.[208] Reflecting on The Trail of Tears, the report argued that "[t]he primary object of the South, through the instrumentality of the national government, is doubly atrocious: first, to get forceful possession of [Cherokee] lands—and the next upon these lands to establish slavery."[209] This argument—that Native American discrimination was motivated in part by a desire to further slavery—would be a common refrain in the coming years.[210] After watching congressional debate on appropriations for Removal in 1838, Charles Francis Adams wrote that "[i]t is slavery that is at the bottom of this. I am more satisfied of the fact every day I live."[211]

Cherokee Removal were both examples of a "[m]ight makes [r]ight" principle that was at the core of Jacksonian Democracy).

203. *See* Kerber, *supra* note 183, at 273–74 (describing Quaker abolitionist publications' linkage of the issues).

204. *See id.* at 273–74 (describing Whittier's treatment of the issues in the paper).

205. John Greenleaf Whittier, *Letter from the Editor*, PA. FREEMAN, May 10, 1838, at 2.

206. *See id.*

207. MARDOCK, *supra* note 189, at 9.

208. Kerber, *supra* note 183, at 277–78.

209. *Id.* at 278 (quoting the SIXTH ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE MASSACHUSETTS ANTI-SLAVERY SOCIETY 2–4 (1838)).

210. *See, e.g.*, Letter from James Birney to Joshua Levitt (Jan. 10, 1842), *in* LETTERS OF JAMES GILLESPIE BIRNEY 1831–1857, at 645, 650 (Dwight L. Dumond ed., 1938) (emphasizing that removal was "[i]nstigated by the slaveholding States"). However, just because the abolitionists saw these issues as linked does not mean they viewed them as identical. There are distinctions between these ideas that are relevant for construing the Fourteenth Amendment.

211. 8 DIARY OF CHARLES FRANCIS ADAMS 50 (Aida Donald & David Donald, eds. 1964).

Even during the Civil War, the abolitionist John Beeson maintained that supporters of slavery had controlled the Indian Bureau and advanced Southern interests by treating the Tribes in a manner "as secret and as cruel as was the Inquisition in the dark ages."[212]

Moving into the public square, the connection between slaves and tribes remained a powerful theme for reformers.[213] Perhaps the best demonstration of the public policy link between tribal issues and abolition involved the "gag rule" against congressional debate on slavery. In response to the increasing number of antislavery petitions coming from the new abolitionist movement, Congress adopted a rule—at the behest of the Southerners—that all petitions concerning slavery be tabled without discussion.[214] In response to this challenge of the First Amendment's right of petition, abolitionist members—led by John Quincy Adams and Joshua Giddings of Ohio—decided to attack the gag rule by introducing petitions on Removal and Native American rights. Their view was that these issues were tied to slavery and thus would allow debate on the substance of abolition while avoiding the bar of the gag rule.[215] Throughout his long career, Giddings continued to focus attention on tribal issues and use them as a platform to attack slavery and argue for equal rights.[216] In his later years, he became the chief mentor of another Ohio Congressman who would link the Cherokee Crisis with the Fourteenth Amendment—John Bingham.[217]

During this period, one case that remained a significant part of abolitionist lore was *Worcester*. In the 1840s, Salmon P. Chase, the antislavery lawyer and future Chief Justice, attended a Sunday service where the pastor "asked for the deliverance of the land from Slavery

212. MARDOCK, *supra* note 189, at 13.

213. When James Birney was considering the Liberty Party's presidential nomination in 1844, he wrote in an open letter that "[w]e have so long practiced injustice . . . in the treatment of the colored race, both negroes and Indians, that we begin to regard injustice as an element—a chief element—the chief element in our government." Letter from James Birney to Joshua Levitt, *supra* note 210, at 652.

214. RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 139 (1999).

215. Kerber, *supra* note 183, at 278; *see, e.g.*, CONG. GLOBE, 26th Cong., 1st Sess. 185 (Feb. 13, 1840).

216. Kerber, *supra* note 183, at 278. For more on Giddings' role as the leader of the abolitionist cause in the House, see Aynes, *supra* note 16, at 927–29.

217. *See* GEORGE W. JULIAN, THE LIFE OF JOSHUA R. GIDDINGS 398–99 (1892) ("[Bingham] loved [Giddings] as devotedly as any son could love his own father; and no one could witness the amnities of their intercourse without thinking better of his kind."); Aynes, *supra* note 16, at 929 (stating that Bingham referred to Giddings as his counselor); *id.* ("Bingham and Giddings were also associated together in the public mind.").

among other sins & evils & in Sermon spoke of the imprisonment of Butler & Worcester in Geo[rgia] Penitentiary."[218] And on the eve of the Civil War, an abolitionist pamphlet summarized the case and offered this conclusion:

> Georgia's resistance to the appellate jurisdiction of the supreme court first sprung from jealousy of interference with the "peculiar institution" . . . . And I think I shall be borne out by the memories of those who remember the controversy, that the legislation of Georgia on that occasion, although ostensibly for another purpose, was in fact to prevent the civilization and christianizing of the Cherokee Indians, whom . . . [Georgia] could not otherwise enslave and make subservient to the propagation of slaves.[219]

This passage reaffirmed the abolitionist view that tribal oppression and slavery were both important considerations for the movement going forward.[220]

So as Van Buren prophesied, the Cherokee Removal and *Worcester* did not fade into the history books. Instead, they sparked the rise of abolitionism and continued to influence its leaders. In time, these activists would graft the legacy of The Trail of Tears onto Section 1 of the Fourteenth Amendment.

III. THE FOURTEENTH AMENDMENT'S HIDDEN ORIGINS

This Part moves beyond the abolitionist experience and examines the ante-bellum roots of the Fourteenth Amendment. After looking at the links between Section 1 of the Amendment and the Cherokee Treaty of 1846, the discussion turns to the relationship

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218. Diary Entry of Salmon P. Chase (July 2, 1843), *in* THE SALMON P. CHASE PAPERS: JOURNALS, 1829–1872, at 169, 169 (John Niven et al. eds., 1993).

219. Ableman v. Booth, 11 Wis. 498, 529 (1859). This pamphlet was attached as an appendix to the second decision of the Wisconsin Supreme Court in the famous *Booth* case. In its initial ruling, the Wisconsin Court held that a state writ of habeas corpus could issue against a person tried by federal commissioners under the Fugitive Slave Act, 9 Stat. 1850 (repealed 1864). *In re* Booth, 3 Wis. 13, 54 (1854). The U.S. Supreme Court reversed, holding that state habeas corpus did not lie against a judgment by a federal adjudicative body. Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1859). On remand, the Wisconsin Supreme Court wrote a lengthy opinion responding to this order. 11 Wis. at 529.

220. Although the pamphlet could be read as suggesting that the oath law targeted religion, that interpretation is meritless. *See supra* note 122 and accompanying text. The sham neutral purpose the author was talking about was the State's claim that the Cherokee Codes were necessary to protect gold mines within the tribal area. *See Booth*, 11 Wis. at 529 (appended pamphlet) ("[T]he motive of the law was not alone—as expressed in its preamble—to protect the *gold mines*.").

between *Dred Scott* and *Worcester*. An inquiry into these cases shows that they form a "yoked pair" such that the repudiation of one implies support for the other. As a result, the Fourteenth Amendment's rejection of *Dred Scott* can be read as an endorsement of *Worcester*'s contrary principles.

A. Equal Protection and the Cherokee Treaty of 1846

The people who had a sudden conversion to abolitionism because of the Cherokee Crisis were also instrumental in developing the ideas behind Section 1 of the Fourteenth Amendment. Scholars trace that text's tripartite structure—Privileges or Immunities, Due Process, and Equal Protection Clauses—to the work of James Birney and Theodore Weld.[221] Drawing support mainly from Ohio and western Pennsylvania, the Birney-Weld school launched its attack on slavery in the 1830s with pamphlets that demanded action to guarantee fundamental rights to all Americans.[222] Support for privileges or immunities, due process, and equal protection was the mantra of Birney-Weld thought and influenced many of the leaders who would put that formula into the Fourteenth Amendment, such as Thaddeus Stevens and John Bingham.[223] Indeed, Bingham's hostility to slavery can be traced to his exposure to the Birney-Weld arguments when he was a college student in Ohio during the mid-1830s.[224]

The contribution that Bingham and the Birney-Weld group made to our constitutional lexicon was equal protection. While privileges or immunities and due process were taken almost verbatim from the Constitution, the phrase equal protection was not in the original

221. *See, e.g.*, Graham, *supra* note 191, at 5–6. As was discussed earlier, Birney and Weld were colonization supporters who shifted their stance after the removal debate. *See supra* notes 183, 191–195, and accompanying text.

222. Graham, *supra* note 191, at 6.

223. *Id.* at 6–7, 7 nn.21–22. Other adherents of the Birney-Weld school included Justin Morrill, who served on the Joint Committee on Reconstruction, Salmon P. Chase, who was recruited to the abolitionist cause by Birney, the aforementioned Joshua R. Giddings, who was converted by Weld, and Benjamin Wade, who was Giddings' law partner. *Id.* at 6–7, 6 nn.18–19, 7 n.20.

224. Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 610, 623–24. Granted, Bingham did not become an abolitionist until some years later, and he was always more open to compromise than his colleagues. Nevertheless, Bingham's arguments against slavery and his draft of the Fourteenth Amendment drew heavily on Birney-Weld ideas.

document.[225] This creates an interesting distinction within the Fourteenth Amendment. Courts trying to ascertain the original understanding of privileges or immunities and due process can find guidance in the case law construing their companion clauses in the 1787 Constitution. The Reconstruction Framers certainly had their own vision of what these concepts meant, but even they relied on existing case law to define them.[226] No such ante-bellum case law defined equal protection.

Given the centrality of equal protection in constitutional law, it is surprising how little attention is given to the source of this term. The first analogous reference comes from the Massachusetts Constitution of 1780, which stated that "every denomination of Christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law."[227] Ironically, the next important text that referred to equal protection was Jackson's Veto of the Second Bank. In his message, the President argued that aristocratic interests wanted special privileges instead of "equal protection."[228] Though these references are interesting, neither of them tells us much about what equal protection meant to the Reconstruction Framers.

Yet just as there is a connection between abolitionism and the Cherokee Crisis, so there is also a link between equal protection and the Tribe's removal. Part of that relationship was illustrated by Senator Frelinghuysen's comment that the statute barring Native American testimony "shut them out of the protection of Georgia's laws . . . [and] stripped these people of the protection of their government."[229] In effect, he was equating the want of protection under law with discrimination against the Cherokees. A more complex thread that binds equal protection and Removal, however, involves the civil war within the Cherokee Nation that was caused by the Treaty of New Echota.

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225. Of course, in the 1787 Constitution the phrase was "privileges *and* immunities," U.S. CONST. art. IV, § 2, cl. 1 (emphasis added), but that difference was insignificant.

226. CONG. GLOBE, 39th Cong., 1st Sess. 1089–91 (1866) (statement of Rep. Bingham); *id.* at 2765–66 (statement of Sen. Howard).

227. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131, 138 n.35 (1950) (quoting MASS. CONST. OF 1780 pt. 1, art. III (amended 1833)).

228. Bank Veto, *supra* note 65, at 590 (stating that "every man is equally entitled to protection by law," the Government should "confine itself to equal protection," and "[m]any of our rich men have not been content with equal protection and equal benefits").

229. *See supra* notes 158–159 and accompanying text.

The schism within the Tribe that allowed Jackson to negotiate a removal treaty soon ripened into a conflict characterized by discrimination and murder. Most Cherokees, led by Chief John Ross, considered the people who supported the treaty traitors for their role in facilitating Removal.[230] After the Tribe was removed from Georgia, this factional feud became violent as followers of Ross assassinated several leaders of the so-called "Treaty Party" in 1839.[231] Relations between the two groups deteriorated rapidly as each set up a government that refused to recognize the other.[232] Fear ruled for the next few years as countless tribesmen were killed for their political views.[233] One observer noted that "the knife is in daily use, the stabber is the lord of the country; [and] peaceable Indians are shot down in the fields by an unseen and unanswerable foe."[234] By the mid-1840s, President Polk concluded that only a division of the Cherokee Nation into two territories could end these "horrid and inhumane massacres."[235]

Just in the nick of time, the dueling factions agreed to heal their rift through a new framework that would end this lawless violence and unequal treatment within the Tribe. Put into the form of a treaty between the two Cherokee groups and the United States, Article 2 of the agreement laid down the new constitutional formula:

> *Laws shall be passed for equal protection, and for the security of life, liberty, and property*; and full authority shall be given by law, to all or any portion of the Cherokee people, peaceably to assemble and petition their own government, or the government of the United States, for the redress of grievances, or to discuss their rights . . . . No one shall be punished for any crime or misdemeanor, except on conviction by a jury of his country, *and the sentence of a court duly authorized by law to take cognizance of the offense*.[236]

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230. HOIG, *supra* note 177, at 191.

231. *Id.* at 192–93.

232. *Id.* at 194.

233. *Id.* at 196–203.

234. *Id.* at 203.

235. *Id.* Describing the situation to Congress, President Polk wrote that "[f]or years unprovoked murders have been committed, and yet no effort has been made to bring the offenders to punishment. Should this state of things continue, it is not difficult to foresee that the weaker party will be finally destroyed." Letter from President Polk to the Senate and House of Representatives (April 13, 1846), *in* 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 65, at 430.

236. Treaty with the Cherokees, Aug. 6, 1846, art. 2, 9 Stat. 871, 871 (emphases added).

This language, which is not in any other tribal treaty, bears more than a passing resemblance to Section 1 of the Fourteenth Amendment.[237]

Indeed, the similarities between the 1846 Cherokee Treaty and Section 1 are quite interesting. Both documents provided the legal framework to end a civil war. In both cases, the main goal was ending vigilante and state violence based on a sensitive criterion (i.e., politics for the Cherokees, race for the Reconstruction Framers).[238] More important, both promoted that objective by securing a familiar trilogy of fundamental rights. Beyond the obvious parallel in their guarantee of equal protection, they both secured basic liberties found in the Bill of Rights. While the Cherokee Treaty used the phrase "life, liberty, and property" instead of "privileges or immunities" to express this idea, those terms mean virtually the same thing. That interpretation is confirmed by the Treaty's recitation of specific provisions in the Bill as being part of what constituted life, liberty, and property. The Reconstruction Framers used a similar technique to define privileges or immunities.[239] Furthermore, the leading ante-bellum opinion interpreting the Privileges and Immunities Clause in the original Constitution held that it was primarily about "the enjoyment of life and liberty, with the right to acquire and possess property of every kind."[240] The last part of the trilogy shared by the Treaty and Section 1 is the guarantee of due process, which was expressed in the former by saying that no court could pronounce a sentence unless it was "duly authorized by law."[241]

This all leads to the observation that Article 2 of the 1846 Treaty can be a useful tool for interpreting Section 1 of the Fourteenth Amendment. Indeed, the Treaty is the only authoritative ante-bellum

237. The equivalent language of the Fourteenth Amendment states that no state "shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

238. The difference in emphasis between political discrimination in the Treaty and racial discrimination in the Amendment provides an important clue about how a Cherokee Paradigm may shift the meaning of equal protection. Race is seen as an immutable characteristic, but political and cultural views are seen as a matter of choice. *See infra* Part V.B.

239. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham) (listing the first eight amendments to define privileges or immunities); CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (statement of Sen. Howard) (same).

240. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

241. Treaty with the Cherokees, Aug. 6, 1846, art. 2, 9 Stat. 871, 871. Admittedly, this is not as broad as the due process guarantee in Section 1, but it states the same basic concept. At least one historian has opined that the 1846 treaty "guaranteed due process of law" within the Tribe. HOIG, *supra* note 177, at 204.

text that uses equal protection in a similar context. It is also the only such text that fully replicates the tripartite structure of Section 1. Moreover, the Reconstruction Framers and subsequent commentators often used Native American legal instruments as guidance for construing Section 1 and related statutes.[242] The question is what, if anything, do the textual and contextual parallels between the Treaty and Section 1 tell us about how the latter should be read? To my mind, the best answer is that the history of the Cherokee Removal, which after all caused the split that the 1846 Treaty was trying to heal, is relevant for interpreting both the Treaty and its companion language in the Fourteenth Amendment. This observation, of course, coheres with the evidence already adduced about the relationship between the Cherokee Crisis and the sources underlying Section 1.[243]

B. Dred Scott *and* Worcester *in Tandem*

The next fruitful source of ante-bellum guidance on the Fourteenth Amendment comes from the Supreme Court's opinion in *Dred Scott v. Sandford*.[244] Since the Amendment was written to overrule that decision, one interpretive approach involves viewing *Dred Scott* as a mischief that the Reconstruction Framers were acting

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242. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull) (quoting the language of the Stockbridge Tribe Act on privileges and immunities during debate on the Civil Rights Act of 1866); AMAR, *supra* note 3, at 167–68, 167 n.* (citing a number of tribal treaties to construe Section 1).

243. One question that arises is the causal connection between abolitionist thought, the 1846 Treaty, and Section 1. Put another way, did abolitionist ideology influence the text of the Treaty, and did that treaty, in turn, influence the Reconstruction Framers? While these are interesting questions, I do not yet have any clear answers.

On the first point, there is scant evidence about the negotiations behind the Treaty. Unfortunately, the drafting history of tribal treaties is often not well preserved. Unless the similarity between the treaty and the work of Birney-Weld is a coincidence, my hypothesis is that the language came from missionaries who remained with the Tribe after its removal. Many of them were abolitionists and would have been aware of Birney-Weld writings. At present, though, I cannot prove this theory.

As for the influence of the Treaty on the Amendment, I have not found any references to the Treaty in the legislative debates. Further investigation is warranted, however, into other primary sources from that time. The lack of a specific causal nexus, however, would not be that relevant. When construing ambiguous legal phrases, one common assumption is that the language should be read according to its previous usage in related texts. The 1846 Treaty and Section 1 of the Fourteenth Amendment do share this common context and hence the former can shed light on the latter.

244. 60 U.S. (19 How.) 393 (1857).

against.[245] This Section adopts that strategy and begins by showing that the case was a preemptive opinion in support of Jacksonian Democracy. Next, the analysis demonstrates the symmetry between *Dred Scott* and *Worcester*. Lastly, the inquiry points out how this connection again brings *Worcester* and the Cherokee Removal into Fourteenth Amendment analysis.

1. *The Second Preemptive Opinion.* Chief Justice Taney's signature decision is one of the most infamous and misunderstood cases in our jurisprudence. The dispute involved a suit by a Missouri slave who claimed that his stay on free soil in Illinois and then in a territory governed by the Missouri Compromise made him a free man.[246] Ruling against Scott, the Missouri Supreme Court held that Missouri law governed his status.[247] This was consistent with a decision of the United States Supreme Court the same year, which ruled that each state could apply its own choice-of-law rule to slaves.[248] So Scott brought a second suit—this time invoking federal diversity jurisdiction—that repeated the claims from his state case.[249] Unless the Supreme Court decided to reverse course, Scott's federal suit presented a relatively easy issue that could be resolved by applying existing precedent.

This was not how the Justices saw the matter, however, and their analysis defied convention in a familiar way. Rather than address the limited issues presented by Scott's appeal, Taney argued that the case raised broad questions about (1) whether any African American could be a United States citizen, and (2) whether the Missouri Compromise barring slavery in the northern territories was constitutional.[250] To frame the issues in this sweeping fashion, the Court ignored several narrow grounds for decision—a willful act that

245. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3031–33 (1866) (statement of Sen. Henderson); AMAR, *supra* note 3, at 170–71; CURTIS, *supra* note 4, at 42; FEHRENBACHER, *supra* note 179, at 580–81; *see also supra* note 3 and accompanying text.

246. *Dred Scott*, 60 U.S. (19 How.) at 400.

247. Scott v. Emerson, 15 Mo. 576, 586 (1852).

248. Strader v. Graham, 51 U.S. (10 How.) 82, 93–94 (1852).

249. *Dred Scott*, 60 U.S. (19 How.) at 401.

250. *Id.* at 400; Stuart A. Streichler, *Justice Curtis's Dissent in the* Dred Scott *Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509, 509–10 (1997).

led the dissent and subsequent commentators to protest this disregard for professional norms.[251]

On the merits, the Court's analysis of these issues proceeded at a towering level of generality that brushed aside all contrary authority. In rejecting the proposition that African Americans become citizens,[252] the Court turned our tradition of racism into a principle far stronger than the competing strands of the American experience. Most famously, Taney said that African Americans were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[253] In challenging this conclusion, the main dissent established that there were free African Americans at the time of the Founding and that many of them voted in the elections that selected delegates to the state conventions that ratified the Constitution.[254] Yet the Court responded that the presence of these free African Americans was irrelevant because "[t]he number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free."[255]

The breadth and distortions in the Court's discussion only worsened when the focus turned to the Missouri Compromise. In striking down this Act, the Chief Justice read the implied power of

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251. *See Dred Scott*, 60 U.S. (19 How.) at 602–14 (Curtis, J., dissenting) (naming several alternative grounds for decision); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 49 (1996) ("One of the notable features of the case was that far from deciding only those issues that were necessary for disposition, the Court decided every issue that it was possible to decide. If the Court had wanted to do so, it could have avoided the controversial issues entirely.").

For instance, the Court could have relied on the Missouri decision holding that Scott was not a state citizen and summarily dismissed his attempt to invoke diversity jurisdiction between citizens of different states. Though Scott's master did not assert res judicata, the Court still could have relied on the state decision in its *sua sponte* analysis of the jurisdictional issue. *Dred Scott*, 60 U.S. (19 How.) at 492–93 (Daniel, J., concurring). Or the Justices could have cited their precedent regarding choice-of-law principles and rejected Scott's claims on the merits. *Id.* at 458 (Nelson, J., concurring); *id.* at 518 (Catron, J., concurring). In any event, the Court certainly did not need to reach out for an independent constitutional ground to deny Scott's freedom by examining the legality of the Missouri Compromise.

252. *Dred Scott*, 60 U.S. (19 How.) at 407.

253. *Id*.

254. *Id.* at 572–73, 582 (Curtis, J., dissenting).

255. *Id.* at 411.

Congress narrowly and held that barring slavery in the territories was beyond its scope.[256] The majority ignored *McCulloch* and its now-canonical view of the broad discretion vested in Congress to exercise its implied power.[257] Furthermore, the Court evaded another Marshall decision that said "in legislating for [the territories], Congress exercises the combined powers of the general, and of a state government."[258] Finally, the Chief Justice gave Congress's powers over the territories a stingy reading even though there was no other government that could legislate there—a ruling that made little sense and was at odds with established practice.

Given these problems and the lack of any precedent that could explain why banning territorial slavery was beyond congressional authority, the Court ended up defending its position by developing the brand new concept of substantive due process.[259] Taney argued that the Missouri Compromise "could hardly be dignified with the name of due process of law" because it was unfair to deprive slave owners of their property when they traveled into a territory.[260] The opinion did not, as is often assumed, rule that the Missouri Compromise violated the Fifth Amendment. Instead, the Chief Justice used the express prohibitions in the Bill of Rights as a tool to construe Congress's implied powers. The Court reasoned that the Due Process Clause counseled "against any inroads which the General Government might attempt, under the plea of implied or incidental powers" to limit property rights.[261]

Though Taney's performance was bizarre from an orthodox legal perspective, the case bears all the hallmarks of a preemptive opinion. The decision came down in the shadow of the spectacular rise of the Republican Party, which in the space of four years grew from nothing into the second largest political party.[262] A central plank in its platform was that Congress should prohibit slavery in the territories.[263] Leading Jacksonian Democrats instantly recognized that

256. *Id.* at 442.

257. *Id.* at 542 (McLean, J., dissenting); *id.* at 614–15 (Curtis, J., dissenting).

258. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). Taney spent several paragraphs trying to distinguish this contrary case. *See Dred Scott*, 60 U.S. (19 How.) at 442–45.

259. *Dred Scott*, 60 U.S. (19 How.) at 450.

260. *Id*.

261. *Id.* at 451.

262. JAMES L. SUNDQUIST. DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES 73–81 (1983).

263. FEHRENBACHER, *supra* note 179, at 202.

the Republicans posed a major threat to their constitutional regime on the issues of race and federal power.[264] In fact, they argued that "Republicans posed a particular threat to the nation's safety . . . . As such, they had no legitimacy, posed a massive danger to the Union, and had to be put down."[265] This cry of alarm should sound familiar; it was analogous to the sentiments expressed by Marshall about the dire consequences of a Jacksonian takeover.[266]

A close examination of Taney's opinion shows that it was indeed a full-throated attempt to defend Jacksonian Democracy and strike at the oncoming Republican hordes. First, as in other preemptive cases, the opinion reached out to decide unnecessary issues because of their political impact. Second, in ruling broadly against African-American citizenship and against the implied power of Congress, *Dred Scott* fit the preemptive pattern by seeking to perpetuate the doctrinal legacy of Jackson's regime while campaigning against the Republican Party.[267] As one Democratic paper explained, the decision "at a single blow, shiver[s] the anti-slavery platform of the late great Northern Republican party into atoms."[268] Finally, the sweep of this case and its inevitable collision with precedent forced this opinion to invent a new concept of fairness to reinforce the judgment.

In sum, *Dred Scott* was the second great preemptive decision. Its statement of Jacksonian principles was the broadest ever put forward by the Taney Court. The ruling also came at a point of maximum political danger for Jacksonian Democracy and was targeted at the heart of the Republican Party. Yet *Dred Scott*, like *Worcester*, failed to halt the onrush of constitutional change.

2. *The Link With* Worcester. The obvious connection between *Worcester* and *Dred Scott* is that both were preemptive opinions, but

264. *Id.* at 197.

265. 1 THE AMERICAN PARTY BATTLE: ELECTION CAMPAIGN PAMPHLETS 1828–1876, at 36 (Joel H. Silbrey ed., 1999).

266. *See supra* notes 150–151 and accompanying text.

267. This was summarized by Benton's statement that *Dred Scott* was "both the child and champion of party, and itself a touchstone of party." THOMAS HART BENTON, AN EXAMINATION OF THE DRED SCOTT CASE 123 (1857) (photo reprint 1969).

268. Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 285 (1997) (quoting an unnamed source). The preemptive aspect of Taney's decision was denounced during Reconstruction. *See* CONG. GLOBE, 41st Cong., 2d Sess. 1513 (1870) (statement of Rep. Nye) ("[The Justices] were throwing a breastwork around a corrupt and tottering party; it was a legal breastwork thrown around [President James] Buchanan and his administration.").

the critical point is that their actions were diametrically opposed. *Worcester* tried to stop Jacksonian Democracy; *Dred Scott* sought to prolong that regime. Chief Justice Marshall laid down a broad doctrine expanding federal power and minority rights; Chief Justice Taney gave a narrow reading of federal authority and civil rights. These cases, therefore, are mirror opposites that mark the beginning and end of Jackson's reign.

Beyond this general symmetry, *Worcester* and *Dred Scott* have specific links with respect to Native Americans and group rights that reinforce their inverse relationship. When Taney undertook his analysis of whether African Americans could be citizens, he started by looking at the status of the Tribes:

> The situation of [African Americans] was altogether unlike that of the Indian race . . . . [T]hey were yet a free and independent people, associated together in nations or tribes, and governed by their own laws . . . . It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary . . . to legislate to a certain extent over them and the territory they occupy. But they may, without doubt . . . be naturalized by the authority of Congress.[269]

With a nod toward the Cherokee Removal and *Worcester*—described with the innocuous phrase "the course of events"—Taney argued that the past autonomy of the Tribes distinguished them from African Americans who had, in his view, never been free in the United States.[270] As a result, he concluded that Native Americans could be citizens, but African Americans could not.[271]

The irony in the relationship between *Worcester* and *Dred Scott* was that they used group rights to reach very different conclusions. While Marshall took that approach to combat wrongful treatment, Taney relied on group rights to erect a caste system. That was the thrust of *Dred Scott*'s analysis comparing the collective status of Native Americans with the collective lack of status for African Americans. With this move, the Court created a racial hierarchy based on the freedom each group had when it first encountered Europeans on these shores. Furthermore, the Court embraced the

269. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–04 (1857).

270. *Id.* at 407.

271. *Id.*; *see also* United States v. Ritchie, 58 U.S. (17 How.) 525, 540 (1854) (upholding the extension of citizenship to tribes living within territory ceded by Mexico).

most pernicious form of group-rights thinking when it stated that the existence of free African Americans during the Founding was irrelevant because most members of that group were slaves. In effect, *Dred Scott* held that group membership alone defined a person. So in a way the Court mouthed the abolitionist mantra that the freedom of Native Americans and African Americans was linked.[272] The difference was that Taney used this parallel to reinforce disabilities rather than to expand rights.

The most important contemporary observer who saw a positive connection between *Dred Scott* and *Worcester* was John Bingham. Shortly before the Court handed down its ruling in 1857, he commented on the Missouri Compromise issue.[273] Bingham was irked by the assertion that slave owners brought the law of their states with them when they entered a territory:

> [I]t is useless to dwell upon a proposition so absurd; it has no sanction in the Constitution or in reason. The extra-territorial legislative power of every State is limited to its own citizens and subjects. That is the decision of the Supreme Court, in the great case of Worcester *vs.* the State of Georgia . . . . I conclude, therefore, that the Territories are not under the dominion and sovereignty of the States *severally* . . . . The Constitution is based upon the EQUALITY of the human race.[274]

This passage is pregnant with implications. First, Bingham's reading of *Worcester* as an antislavery case is consistent with the construction put on the opinion by the broader abolitionist movement. Second, the author of Section 1 of the Fourteenth Amendment was drawing an explicit link between *Dred Scott* and *Worcester*; an observation that rings true given all of the similarities between the two cases.[275] Third,

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272. Other representatives of the Jacksonian regime linked African-American and Native-American rights in this negative fashion. *See* 7 Op. Att'y Gen. 746, 751 (1856) (offering an opinion on Native American citizenship).

273. CONG. GLOBE, 34th Cong., 3d Sess. app. at 135–40 (1857) (statement of Rep. Bingham). Bingham was commenting on President Pierce's Annual Message, which argued that the exclusion of slavery from the territories was illegal. *Id.* at 135.

274. *Id.* at 139. This speech was reproduced in full by major contemporary newspapers and received wide praise from abolitionists. C. Russell Riggs, The Ante-Bellum Career of John A. Bingham: A Case Study in the Coming of the Civil War 203 (1958) (unpublished Ph.D dissertation, New York University) (on file with the *Duke Law Journal*).

275. This assertion is sound even though *Dred Scott* came down after the speech was made. Bingham observed in his talk that the territorial issue was *sub judice* and suggested that antislavery advocates expected a bad outcome. CONG. GLOBE, 34th Cong., 3d Sess. app. at 137 (1857) (statement of Rep. Bingham).

the bond between these landmarks was reinforced by an assertion that a key issue underlying them was equality, which laid the foundation for Bingham's subsequent work.

3. *Yoking the Pair with the Fourteenth Amendment.* In evaluating the parallels between *Worcester* and *Dred Scott*, I have used terms like "mirror opposite" and "inverse relationship." The best way of capturing the significance of these cases, however, is through the idea of a yoked pair.[276] This concept establishes that the Fourteenth Amendment's action in overruling *Dred Scott* should be read as an implicit incorporation of *Worcester*'s principles.

A yoked pair expresses the idea that many legal texts are defined against related texts that state a contrary viewpoint. The most familiar example is the relationship between the majority opinion and a dissent in a given case. Lawyers commonly use dissents as a resource to understand the breadth of the principle articulated by the majority's holding because both texts are focused on the same issues. A more subtle aspect of this inverse relationship is that opposing one part of a case strongly implies support for the other part. While it is possible to defend a dissent without opposing all aspects of the majority's reasoning, that becomes more improbable as the competing viewpoints get starker. Thus, the description of a dissent and a majority opinion as a yoked pair is often apt because they are related in such a way that one cannot be considered without thinking about the other.

Yet the idea of texts existing in pairs goes beyond a specific case. For instance, different cases can form a yoked pair if they take opposing perspectives on similar issues. One fine example is the pairing between *Brown v. Board of Education*[277] and *Plessy v. Ferguson*.[278] It is hard to think of one without contemplating the other and impossible to oppose one without supporting the other. This is true even though *Brown* and *Plessy* were separated by many decades and did not address precisely the same question—*Brown* was about schools while *Plessy* concerned railroads.[279] Yet both were clearly

276. *See generally* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 252–64 (1998) (developing the concept of a yoked pair).

277. 347 U.S. 483 (1954).

278. 163 U.S. 537 (1896).

279. *See Brown*, 347 U.S. at 483; *Plessy*, 163 U.S. at 537.

about racial segregation and expressed deeply theorized and contrary views on that subject.[280]

The key insight gained by classifying two texts as a yoked pair is that their positions can be reversed. At any given time, one half is authoritative and the other half is not. If the values underlying this arrangement change, the Court or another actor can reshape the law by flipping the pair. This not only turns the old anti-canonical text into binding law, but it also makes the old authoritative case into a negative reference point for interpreting the new legal order.[281] For example, *Brown* did not merely relegate *Plessy* to the legal junk heap. Instead, the opinion turned *Plessy* into a vivid representation of what the Fourteenth Amendment was now fighting against.

Drawing upon these ideas, it follows that *Worcester* and *Dred Scott* are a yoked pair because they have similarly structured yet opposing positions on the substance of Jacksonian Democracy. Of course, in the Jacksonian era *Dred Scott* was the authoritative side of the pair while *Worcester* languished as the anti-canonical expression of disfavored values. Admittedly, this pushes the concept a little further to cover texts that are not about precisely the same issue and do not address each other. Yet this is fully consistent with the idea when articulated at a slightly higher level of generality.[282] Given all of the reverse parallels between *Worcester* and *Dred Scott*, characterizing these cases as a yoked pair is appropriate.

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280. *See Brown*, 347 U.S. at 495 ("[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."); *Plessy*, 163 U.S. at 548 ("[W]e think the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws.").

281. Primus, *supra* note 276, at 257.

282. *See id.* at 256 ("Texts are paired not because each was written for the express purpose of opposing the other but because there exists a clear dialectic of opposition between them and because the Court (or some other constitutional actor) judged the contest between their rival positions . . . .").

The insight that justifies the assertion in the text is that a constitutional regime (i.e., the web of substantive and institutional arrangements that define a particular era in our history) can be a basic unit of analysis akin to a case or a particular legal issue. That is one of the major contributions of Bruce Ackerman's work, which supplies many of the building blocks for this analysis. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 59 (1991) ("The basic unit of analysis should be the *constitutional regime*, the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life.").

The next link in the chain is that Section 1 of the Fourteenth Amendment and *Dred Scott* also form a yoked pair. That relationship is more obvious. Taney's decision was a negative reference point for the Amendment because that text specifically overruled his opinion much as a majority opinion rejects a dissent. Each member in this pair, just like the coupling of *Worcester* and *Dred Scott*, represents a sharply different view on Jacksonian Democracy. In this instance, however, Section 1 represents the canonical view while *Dred Scott* stands with the anti-canon.

Put these two observations together and the structural relationship between the Fourteenth Amendment and *Worcester* comes into sharp relief. Both of these texts are linked to *Dred Scott* in a yoked pair. By overruling *Dred Scott*, Section 1 not only created a pairing with that opinion, it also reversed the authority of the coupling between *Dred Scott* and *Worcester.* Thus, in one sense *Worcester* and the Fourteenth Amendment are connected because the latter was the instrument that restored *Worcester*'s implicit authority. There is another link, however, that is grounded in basic tenets of logic. Using *Dred Scott* as a negative reference point for reading Section 1 requires a definition of *Dred Scott*'s contrapositive. Ordinarily, this involves a difficult process of reasoning. In this instance, however, much of the contrapositive comes in an easy-to-open package called *Worcester*. Since those cases form a yoked pair, *Worcester* is helpful in assessing the meaning of "not *Dred Scott*."[283] Marshall's opinion, therefore, can be a useful tool for construing the Fourteenth Amendment from this perspective as well.

If this seems like a stretch, consider a similar example that is widely used today. Just as *Brown* and *Plessy* form a yoked pair, the majority opinion in *Plessy* also forms a coupling with Justice Harlan's famous dissent in that case.[284] When people contemplate what *Brown* means, they often look to the dissent in *Plessy* (i.e., the statement that "[o]ur Constitution is color-blind"[285]) for guidance.[286] This approach is

283. I am not saying that *Worcester* defines the entire contrapositive of *Dred Scott*. Obviously, the dissents in *Dred Scott* are also relevant. One difference between these texts and *Worcester*, however, is that the latter was a broad articulation of the position against Jacksonian Democracy, while the *Dred Scott* dissents were relatively narrow critiques. In my view, this makes *Worcester* a better starting point for evaluating the Fourteenth Amendment.

284. Primus, *supra* note 276, at 255.

285. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

valid because the dissent is strong evidence of *Plessy*'s contrapositive and because *Brown* was the case that changed Harlan's opinion from an anti-canonical text into an authoritative one. This is the same double yoked pair structure that connects *Worcester* with Section 1, yet we have not looked at Marshall's opinion for guidance on the Fourteenth Amendment. That interpretive inconsistency is problematic because it deprives courts of important resources and insights.

Thus, both text and structure from the ante-bellum period support a Cherokee Paradigm of the Fourteenth Amendment. Though the Treaty of 1846 and *Dred Scott* may appear far removed from the Removal and Reconstruction, they are, in fact, useful missing links between these two eras.

IV. RECONSTRUCTION AND *WORCESTER*'S RETURN

The themes running through the ante-bellum years were still alive and well when the generation that came of age with the failure of *Worcester* took up the formidable task of Reconstruction. This Part reaffirms the relationship between these two events by looking at the direct evidence and the subtle clues that illustrate the link between them. Then the analysis pauses to consider some objections to a Cherokee Paradigm of the Fourteenth Amendment.

A. Direct Evidence of the Removal's Impact

To deepen the connection already established between Removal and Reconstruction, the best starting point involves the explicit ties between these periods. This section considers three categories of proof: (1) John Bingham's statements, (2) other comments in Congress, and (3) the Senate Judiciary Committee Report on the Fourteenth Amendment and Native Americans.

1. *John Bingham—The Author Speaks.* This examination begins with the views of the best authority on Section 1—John Bingham.[287]

286. *See* Romer v. Evans, 517 U.S. 620, 623 (1996) ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among its citizens.'" (quoting Plessy, 163 U.S. at 559 (Harlan, J., dissenting))).

287. Bingham's views are not dispositive in Fourteenth Amendment analysis. Nevertheless, they are entitled to deference because he wrote most of Section 1. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. at 83–84 (1871) (statement of Rep. Bingham); *see also* Adamson v. California, 332 U.S. 46, 74 (1947) (Black, J., dissenting) (describing Bingham as the "Madison of

He was last heard arguing that *Worcester* and the issues in *Dred Scott* were linked by their contrasting views on equality. A decade later he was the drafter of the text that overruled *Dred Scott* and reversed this yoked pair.

In 1871, Bingham went to the well of the House and made his most comprehensive remarks on what the Fourteenth Amendment was intended to accomplish. He began by explaining that one important objective was the incorporation of the Bill of Rights.[288] Bingham said that before drafting Section 1 he reviewed "the great decision of Marshall"[289] in *Barron v. Baltimore*,[290] which held that "the first eight amendments were not limitations on the power of the States."[291] After "reexamining that case," he drew upon Marshall's statement that if the Framers had wanted the Bill of Rights to limit the States they would have used the "No State shall" language from Article 1, Section 9 that framed the powers forbidden to the States.[292] Bingham said that "[a]cting upon this suggestion I did imitate the framers" by using "No State shall" as the predicate for the guarantees in Section 1.[293] To remove any doubt about his intentions, he then defined the Privileges or Immunities Clause by listing the first eight amendments and repeating that they were now binding on the States.[294]

While this portion of Bingham's remarks receives lavish attention, just a few paragraphs later there is an equally important passage that gets no attention at all. The congressman told his colleagues that

> Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can . . . ever repeat the

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the first section of the Fourteenth Amendment"). Although some have derided Bingham's abilities, *see* CURTIS, *supra* note 4, at 120–21 (summarizing the scholarly attacks on Bingham), the weight of academic opinion and my own review of his public statements show that this assessment is without foundation.

288. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

289. *Id*.

290. 32 U.S. (7 Pet.) 243, 250 (1833).

291. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

292. *Id*.

293. *Id*.

294. *See id.* ("These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment."). The Supreme Court has never accepted the idea that the entire Bill of Rights was incorporated by the Fourteenth Amendment, though the Justices have applied virtually all of the Bill's provisions to the States on a selective basis.

> example of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament, to know that new evangel, "The pure in heart shall see God."[295]

This is a description of *Worcester*, though Bingham did not refer to it by name. There is no other example of Georgia sending Native American missionaries to jail, and we know that the abolitionists were aware of the religious implications of the case. Just as Bingham once used *Worcester* as a touchstone for thinking about equality, he was now using it to define the content of the Bill of Rights.

Thus, Bingham's statement is powerful evidence that *Worcester* was a paradigm case behind Section 1 of the Fourteenth Amendment. More specifically, Bingham was saying that the Free Exercise Clause of the newly incorporated First Amendment would prevent another *Worcester* from occurring. Yet this explicit discussion of the relationship between *Worcester* and the Fourteenth Amendment has been overlooked until now.

One weakness in relying on Bingham's 1871 speech is that it came after the Fourteenth Amendment was ratified. It is important to note, however, that he made the same point during the 1866 campaign as an argument for ratification. Accepting renomination for his congressional seat, Bingham issued this challenge to his constituents:

> If you rally at the fall . . . depend upon it that every State South will rally to the lead of Tennessee, and ratify the Amendment. Is not that worth striving for? *Then hereafter, in Georgia, men shall not be imprisoned, as in the past, for teaching the lowly to read in the New Testament of another and a better life*.[296]

Once again, Bingham was linking the facts of *Worcester* with the Fourteenth Amendment, but this time it was in a direct appeal to the electorate. Although this was a little less specific than the 1871 reference, there is no doubt that they were both tying the case to the new constitutional text.[297]

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295. *Id.*

296. CINCINNATI DAILY COMMERCIAL, Aug. 10, 1866, at 1 (emphasis added).

297. That conclusion is sound because there was no other well-known event in Georgia involving the denial of religious freedom. Moreover, it is unlikely that Bingham would refer to different Georgia incidents to construe the same text.

Bingham's use of *Worcester* as a paradigm case for the Fourteenth Amendment is no surprise given his background. The Birney-Weld school, whose founders were inspired by the Cherokee tragedy, shaped Bingham's abolitionist views.[298] He was exposed to these teachings during college at a time when the Treaty of New Echota and The Trail of Tears dominated the national discussion.[299] Lastly, Bingham's political mentor, Joshua Giddings, was known for his belief in the connection between African-American and Native-American rights.[300]

Accordingly, the author of Section 1 made it clear that he had *Worcester* in mind when he wrote the text. The fact that this was ignored for so long is unfortunate because it has stunted the development of constitutional thought.

2. Worcester *in Congress.* One of the striking things about Bingham's comments that may explain why they were overlooked is that they presume a familiarity with *Worcester*. In other words, he discussed its facts rather than describing the case by name. This assumption of familiarity was not misplaced; it simply shows how deeply etched the Removal was in the minds of the Reconstruction generation. This Section provides examples of other contemporary statements about the Removal and its link to the Fourteenth Amendment.[301]

Congressional awareness of the sad legacy of the Cherokees was demonstrated often during these critical years. One member explained that "[e]very student of American history must remember the excitement which this treaty [of New Echota] produced throughout the country and the influence it exerted upon our national politics."[302] Another observed that "[t]here are men here who can certainly recollect twenty-five or thirty years ago when the whole country rang with moral indignation against the treatment of those

298. *See supra* notes 221–224 and accompanying text.

299. *See supra* note 224 and accompanying text.

300. *See supra* notes 215–217 and accompanying text.

301. I must caution that my research cannot be described as exhaustive. This is an article and not (yet) a book. For instance, I have not yet reviewed the state ratification debates on the Fourteenth Amendment or newspaper accounts from these years. Nor have I canvassed the papers of many Reconstruction Framers, papers that would undoubtedly yield additional insights.

302. CONG. GLOBE, 40th Cong., 3d Sess. app. at 142 (1869) (statement of Rep. Burleigh); *see also id.* (summarizing the history of the treaty); CONG. GLOBE, 41st Cong., 2d Sess. 4137 (1870) (statement of Rep. Davis) (same).

Indians by citizens of Georgia."[303] When Thaddeus Stevens took a brief break from debate on the Civil Rights Act of 1866, he reminded his colleagues about the Cherokee injustice and its implications:

> I remember, sir, when a law was passed by the State of Georgia extending the jurisdiction of that State over the Indian lands within the State . . . . In a short time, under those State laws, a system of persecution was carried on against those Indians . . . . [The first] case was carried to the Supreme Court of the United States, and when that tribunal was about to reverse the decree of the State court, the [petitioner] was hanged, and that ended the case. That is the manner in which the Indians are treated whenever they are put out of the protection of the United States, and placed under the control of the State laws. I trust that we shall never disgrace the national legislation by any act which will give the sanction of law to such an outrage as I have cited.[304]

Although Stevens made this argument in a discussion about tribal rights, the statement shows that he was well aware of the Cherokee litigation and its importance as a paradigm case going forward.[305] And as another disciple of the Birney-Weld school, he probably saw the connection between these events and African-American rights.[306]

While these statements were made outside of the Fourteenth Amendment context, there are other examples of how the familiarity with *Worcester* and the Removal permeated the new constitutional text. For instance, the case was specifically discussed during debate on the Civil Rights Act of 1866,[307] which is widely recognized as an important antecedent to Section 1.[308] Later in that debate, Senator Lyman Trumbull relied on a provision of the Treaty of New Echota that gave some Cherokees citizenship to argue that Congress could make African Americans citizens without a constitutional amendment.[309]

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303. CONG. GLOBE, 41st Cong., 2d Sess. 1671 (1870) (statement of Rep. Maynard).

304. CONG. GLOBE, 39th Cong., 1st Sess. 1684 (1866) (statement of Rep. Stevens).

305. *See supra* notes 109–111 and accompanying text.

306. *See supra* note 223 and accompanying text.

307. The case was first raised by Reverdy Johnson, a Democrat, and led to a debate with Republicans Trumbull and Sumner about the status of Native Americans. *See* CONG. GLOBE, 39th Cong., 1st Sess. 505–06 (1866).

308. *See* AMAR, *supra* note 3, at 168–69 (discussing the link between the Civil Rights Act and Section 1).

309. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1756 (1866) (statement of Sen. Trumbull) ("My opinion is that all native-born persons not subject to a foreign Power are by virtue of their birth citizens of the United States. But some dispute this; and hence for greater certainty it is

A more complex example of *Worcester*'s influence on Reconstruction comes from President Andrew Johnson's impeachment trial. The impeachment was brought in large part to end the President's opposition to the ratification of the Fourteenth Amendment.[310] As the trial proceeded, however, Johnson ceased that resistance and pleaded with the Senate for an acquittal.[311] Here is the argument of his counsel seeking to reassure the Reconstruction Framers that the President was now on board with their constitutional program:

> I knew a case where the State of Georgia undertook to make it penal for a Christian missionary to preach the gospel to the Indians. . . . And I knew the great leader of the moral and religious sentiment of the United States [Theodore Frelinguysen], who, representing in this body . . . the State of New Jersey, tried hard to save his country from the degradation of the oppression of the Indians at the [insistence] of the haughty planters of Georgia. The Supreme Court of the United States held the law unconstitutional and issued its mandate, and the State of Georgia laughed at it and kept the missionary in prison . . . . But the war came, and as from the clouds from Lookout Mountain swooping down upon Missionary Ridge came the thunders of the violated Constitution of the United States, and the lightnings of its power over the still home of the missionary Worcester, taught the State of Georgia what comes of violating the Constitution . . . .[312]

This paean to *Worcester* is a wonderful illustration of the connection between the Cherokee Removal and the Fourteenth Amendment. While an agent of a leading conservative made this particular argument, that was part of a deliberate attempt to persuade a jury stocked with hostile Republicans by appealing to one of their favorite cases. Counsel's argument was largely directed at Senator Frederick

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proper to pass this law"). That debate was mooted when Congress passed the Fourteenth Amendment to resolve the citizenship issue.

310. The fascinating background of the President's impeachment is described in BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 207–30 (1998).

311. *See id.* at 228 ("Not only did [Johnson] cease all serious acts of resistance, he made more affirmative gestures as the Senate's climactic vote of May 16 came closer." (footnote omitted)).

312. 2 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 357–58 (1868) [hereinafter TRIAL].

Frelinghuysen, the Republican nephew of the "great leader" who fought so passionately against Removal.[313]

One final example comes from the debate on the legislation designed to enforce Section 1. Commenting on the proposed Ku Klux Klan Act, a representative explained that "[t]he principal danger that menaces us to-day is from the effort within the States to deprive considerable numbers of persons of the civil and equal rights which the General Government is endeavoring to secure to them."[314] He then drew this analogy:

> The history of the Indian tribes within our jurisdiction is an instructive lesson. It is a history of violence, injustice, [and] rapine, committed often under the direct authority of the States. Whatever resistance, feeble and impotent as it has been, has been made to all this has been by the United States. *In the famous case of the Georgia Indians, the judiciary of the nation went to the extreme of its power in protecting the rights of the weak and defenseless.*[315]

These remarks demonstrate another vital parallel between Removal and Reconstruction. In both periods, the problem was the abuse of minority rights by the States. Likewise, in each era the main source of protection for those groups was the federal government. And the paradigmatic ante-bellum example of federal intervention on behalf of minority rights was *Worcester*. More important, the speaker made the argument that this "famous" case was a model for the Ku Klux Klan Act, which would enforce the Fourteenth Amendment. Once again, Section 1 cannot be fully understood without looking at the Cherokee Removal.

3. *The Senate Judiciary Committee Report.* Although there are many direct links between the Removal and the Fourteenth Amendment, that is not the only relevant consideration. If *Worcester* was a touchstone for Reconstruction, we should also expect to see the case restored to a position of authority during this period. It would be odd to argue that the Reconstruction Framers relied on *Worcester* to

313. *Id.*

314. CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871) (statement of Rep. Hoar). The Ku Klux Klan Act created strong remedies to combat civil rights violations and was a key contemporary interpretation of the Fourteenth Amendment. CURTIS, *supra* note 4, at 161–64. Indeed, Bingham's 1871 speech cited earlier was about the Ku Klux Klan Act. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. at 83 (1871) (statement of Rep. Bingham).

315. CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871) (statement of Rep. Hoar) (emphasis added).

construe Section 1 if they totally ignored its doctrines about Native Americans. Fortunately, the evidence shows that *Worcester* was, in fact, recalled from exile and intended to be an important part of the law governing the tribes. The main source for this claim is the Senate Judiciary Committee Report on the application of the Fourteenth Amendment to Native Americans, which was issued in 1870 and contains the most significant statement on the post-bellum status of the tribes.[316] This text must be approached with great care because it represents a complex effort to integrate *Worcester* into the new constitutional order. For now, the focus will be on its commentary about Marshall's opinion.

Although most of the Report is a history of tribal relations, the central point of interest is its declaration that *Worcester* was "the unquestioned law of the court to-day."[317] The importance of this statement is easy to miss unless one is aware of the constitutional transformation of the 1830s. Remember that after Andrew Jackson swept his political opponents from the field, Marshall's opinion was ignored. The Taney Court never cited it for any substantive proposition and instead held that Congress and the States had the right to govern the tribes as they wished.[318] Yet *Worcester* was never formally overruled. Thus, the Report's assertion that Marshall's decision was sound law seems insignificant unless one looks closely.[319] The clue that reveals what was really going on is that the Senate Report totally ignored the Taney Court's tribal jurisprudence.[320]

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316. S. REP. NO. 41-268 (1870).

317. *Id.* at 7.

318. United States v. Rogers, 45 U.S. (4 How.) 567, 572–73 (1846).

319. At the same time, this phenomenon was also at work for *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Like *Worcester*, *McCulloch* was also a dead letter during the reign of Jacksonian Democracy. Like *Worcester*, *McCulloch* was never overruled. And shortly before the Judiciary Committee's resuscitation of *Worcester*, the Supreme Court proclaimed for the first time that *McCulloch* was the standard governing the scope of Congress's implied powers. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 614 (1870). The significance of this decision is overlooked for the same reason; it looks like a simple restatement of existing law. But it was not. In fact, the *Hepburn* decision and the Senate Report were both trying to synthesize the constitutional traditions of the past with the tenets of Reconstruction. I will explore the implications of this process in a forthcoming work on the implied powers of Congress.

320. *See* Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 568 (2000) ("The report ignored *Rogers* in its review of the legal background of the issue; instead . . . the report asserted that members of Native American tribes were not subject to the jurisdiction of the United States within the meaning of section one . . . .").

By contrast, in the new Republican constitutional regime *Worcester* was showered with praise. The Senate Judiciary Committee quoted from the "prose of the 'greatest of our Chief Justices'" at length and explained that "in his clear and masterly style," Marshall had concluded that the Tribes retained substantial autonomy and that the States had no authority over them.[321] This was a ruling that "no man acknowledging the authority of reason can gainsay."[322] The Report also demonstrated its fidelity to *Worcester* by replicating much of Marshall's analysis. For instance, both the Report and the opinion focused on the treaty between the United States and the Delawares to show that each side held equivalent rights.[323] In the end, the Senate made it clear that *Worcester* was again the king of the hill with respect to most tribal issues.

Thus, there is significant direct evidence that connects the Cherokee Removal with the Fourteenth Amendment and supplements the ante-bellum parallels between these milestones. John Bingham highlighted the link, other Reconstruction leaders relied on it, and the Senate Judiciary Committee completed the job by restoring *Worcester*'s luster.

B. Inferences and Implications

Next, the discussion looks at the indirect evidence supporting the conclusion that Section 1 was shaped by the principles from the fight against Removal. This analysis breaks down into two parts: (1) the similarities between the presidencies of Andrew Jackson and Andrew Johnson; and (2) the continuing connection between African-American and Native American rights.

1. *Jackson/Johnson.* While Section 1 may incorporate *Worcester*'s concepts transitively because both are bound to *Dred Scott* in a yoked pair, there is another way to make the same argument. If the Reconstruction Framers saw their fight against President Johnson as a repetition of the Jacksonian era, this would suggest that the landmarks of the era were on their minds when the

321. S. REP. NO. 41-268, at 6–7.

322. *Id.* at 6.

323. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549 (1832) (stating that the treaty "evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States"); S. REP. NO. 41-268, at 2–3 ("This treaty is quoted from at considerable length . . . because it is believed to illustrate the relations which the Government has always claimed to maintain toward the Indian tribes.").

Fourteenth Amendment was drafted.[324] Upon review, the evidence shows that contemporaries did recognize the rich parallels between the two Andrews.

One would expect to see similarities between these two administrations because they represented the same party. Indeed, Andrew Johnson was named after Andrew Jackson; he spent his political life representing Jackson's home state of Tennessee; and Jackson was his political hero.[325] Like Jackson, he supported states' rights but was a strong Unionist.[326] In particular, Johnson was the only Southern Senator who remained loyal to the Union during the Civil War.[327] Like Jackson, Johnson also supported white supremacy and opposed efforts to expand civil rights.[328] And like Jackson, Johnson fought to preserve the President's authority against the encroachments of Congress.[329] As Johnson's counsel told the Senate: "Who is the President of the United States? A democrat of the straightest of strict constructionists; an old Jacksonian . . . ."[330]

More important, the Reconstruction Framers also saw Johnson as Jackson's political reincarnation. James G. Blaine, a Republican

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324. Thus, the argument that Section 1 incorporates *Worcester*'s principles by implication does not require the assumption that *Worcester* and *Dred Scott* are preemptive opinions. Nor does it require the conclusion that they are connected texts. All this Section says is that *Worcester* was directed against Jacksonian Democracy and that there are links between the battle waged by the Reconstruction Framers against Johnson and the fight between Jackson and his foes.

325. *See* MCKITRICK, *supra* note 3, at 90 n.10 (providing Johnson's full name as "Andrew Jackson Johnson"); STAMPP, *supra* note 3, at 50 (calling Johnson "The Last Jacksonian"); *id.* at 54–55 (describing Johnson's background in Tennessee).

326. For a summary of Johnson's views and his reliance on Jackson, see Andrew Johnson, Second Annual Message (Dec. 3, 1866), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 65, at 445, 448–50.

327. BROCK, *supra* note 3, at 30.

328. *See* Andrew Johnson, Veto Message (Jan. 5, 1867), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 65, at 472, 472–83 (vetoing a bill extending the franchise to African Americans in the District of Columbia); Andrew Johnson, Veto Message (Mar. 27, 1866), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 65, at 405, 405–13 [hereinafter Civil Rights Veto] (vetoing the Civil Rights Act).

329. *Compare* Andrew Johnson, Veto Message (Mar. 2, 1867), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 65, at 492, 492–98 (vetoing the Tenure of Office Act), *with* 2 TRIAL, *supra* note 312, at 26 (asserting congressional supremacy by emphasizing limitations imposed on executive powers).

330. 2 TRIAL, *supra* note 312, at 123; *see also* BROCK, *supra* note 3, at 35 (stating that Southerners probably saw Johnson "as a new Andrew Jackson"); 1 TRIAL, *supra* note 312, at 332 (quoting a spectator during an 1866 Johnson speech who remarked, "Here's a second Jackson").

member of Congress and later the party's presidential nominee, described his colleagues' view "that one of [Johnson's] especial weaknesses was an ambition to be considered as firm and heroic in his Administration as General Jackson had proved in the Executive chair thirty years before."[331] One Republican actually mocked the President by reciting a poem that made the same point:

> Where Jackson stood now doth another stand—
> The favored ruler of our favored land.
> With heart as pure and patriotism as great,
> A second Andrew steers the ship of state. . . .
> . . . .
> Entwined in laurel wreaths two names shall be
> Together joined as champions of the free—
> The name of Andrew Jackson men shall find
> With that of Andrew Johnson closely twined . . . .[332]

The fact that the Reconstruction Framers saw Jackson and Johnson as "closely twined" suggests that they viewed their task as the repudiation of Jacksonian Democracy's negative legacy. Chief among those negative landmarks, of course, was the Cherokee Removal and the failure of *Worcester*.

Finally, the circumstances behind Johnson's impeachment reinforce the relationship with Jacksonian Democracy. During the 1830s, it was Jackson's dismissal of two pro-Bank Secretaries of the Treasury that led to his censure by the Senate.[333] Reconstruction was like a bloated Hollywood sequel of this event. For Andrew Johnson, the problem was his alleged violation of a statute barring him from firing Cabinet officers without congressional approval.[334] Specifically, he dismissed Secretary of War Stanton for supporting efforts to encourage the Southern states to ratify the Fourteenth Amendment.[335] Only this time Congress did not stop at censure; it brought up the heavy guns of impeachment to destroy Jacksonian Democracy. The parallels between Jackson's actions and Johnson's behavior were

331. 2 BLAINE, *supra* note 3, at 241; *see also id.* at 308 ("[I]n many features of [Johnson's] career [he] has been suspected of an attempted imitation of Jackson . . . .").

332. CONG. GLOBE, 39th Cong., 2d Sess. 1524 (1867) (statement of Rep. Schenck).

333. *See supra* notes 74–79 and accompanying text.

334. 2 ACKERMAN, *supra* note 310, at 222–23.

335. *Id*.

often invoked during the Senate trial.[336] As the Reconstruction Framers contemplated their most important decision, therefore, Jackson's precedents were front-and-center in their thoughts.

2. *Native American Rights.* Another key theme from the ante-bellum era was that there was a connection between the crusade against slavery and the battle for tribal rights. Though this link bent during Reconstruction, it did not break. The continuing strength of this bond again suggests that the memory of the Cherokee Removal clung to the Reconstruction Framers and influenced their handiwork.

That connection began taking concrete form when Senator Charles Sumner's committee issued a report on "[a] bill to secure equality before the law" that would guarantee the right of all Americans to testify in federal court.[337] At the time, state law governed federal testimonial rights, and many state statutes barred nonwhites from giving evidence in cases involving whites.[338] Sumner analyzed these laws and emphasized that they discriminated against both African Americans and Native Americans.[339] Writing in support of the bill, the Chief Justice of the Maine Supreme Court asked "[i]f the black man or the Indian is to have his rights as against the white man, is he not entitled to the same witnesses against the white man which the latter has against the former?"[340] Then, in an echo of Frelinghuysen's attack on the Cherokee Codes, the Chief Justice denounced these laws because "a white man may commit any and all conceivable outrages upon the persons and property of the negro and Indian . . . with entire impunity."[341] Or as Sumner said, these state statutes left minorities "without legal protection of any kind."[342]

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336. *See, e.g.*, 2 TRIAL, *supra* note 312, at 36–37 (summarizing the Deposit Crisis); *id.* at 161 (stating that the issue "was discussed and learnedly discussed; and yet [Jackson] persevered in his determination"); *id.* at 314 (describing "the great party exacerbations between the democracy, under the lead of General Jackson, and the whigs").

337. S. REP. NO. 38-25, at 1 (1864).

338. *Id.* at 1–2.

339. *See id.* at 3 (quoting the Virginia law stating that "a negro or Indian" could not be a witness when whites were parties); *id.* at 4 (describing the Kentucky law providing that "a slave, negro, or Indian" could not testify against whites); *id.* (discussing statutes of North Carolina and Tennessee); *id.* at 4–5 (stating that South Carolina's exclusions included "free Indians and slaves"); *id.* at 4–6 (describing the practice in Georgia, Alabama, and Texas).

340. *Id.* at 24 (quoting Letter from Hon. John Appleton, Chief Justice of Maine, to Hon. Charles Sumner (Jan. 24, 1864)).

341. *Id.* at 26; *see also supra* notes 158–159 and accompanying text.

342. S. REP. NO. 38-25, at 17; *see also supra* note 159 and accompanying text. Although Sumner could not get his bill through the 38th Congress, the essence of his proposal was

As Reconstruction picked up steam, strong sentiments were expressed in and out of Congress that the Tribes should be protected from discrimination. As the *National Anti-Slavery Standard* explained, one of the "good results of the abolition of chattel slavery, and of the increasing recognition of the equal rights of the victims of that iniquitous system, [is] that a more just policy is now sought and recommended in relation to the Indians."[343] Elaborating on this theme, members of Congress filled the *Congressional Globe* with statements wrapping Native-American and African-American rights together.[344]

The more important point is that Congress and the States took actions confirming that these rights were related. For instance, while Massachusetts was removing legal disabilities from African Americans, it was also declaring all Native Americans "'citizens of the Commonwealth . . . entitled to all the rights, privileges and immunities' of citizenship."[345] And at the same time that the Joint Special Committee on Reconstruction in Congress was investigating

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codified in the Civil Rights Act of 1866. *See* CURTIS, *supra* note 4, at 71 (quoting the Act's provision that discrimination against giving evidence was barred).

343. MARDOCK, *supra* note 189, at 14–15 (quoting NAT'L ANTI-SLAVERY STANDARD, Apr. 10, 1869, at 2); *see also id.* at 15 (citing Lydia Maria Child's post-Civil War efforts on behalf of Native Americans because "'[t]heir wrongs'. . .'have been almost equal to those of the black race'" (quoting Letter from Lydia Maria Child to John Greenleaf Whittier (1865), *reprinted in* LYDIA MARIA CHILD, LETTERS TO JOHN GREENLEAF WHITTIER, 1857–76)); *id.* at 48 (citing the abolitionist Wendell Phillips, who said in 1869 that the "great poison of the age is race hatred . . . . We must see the man, not the negro, the man and not the Indian, the man and not the Chinaman" (quoting WENDELL PHILLIPS, CHRISTIANITY A BATTLE, NOT A DREAM 14–15)).

344. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 801 (1869) (statement of Rep. Mullins) ("Why, when all are treated alike, should the Indians not be included?"); *id.* at 21 (statement of Rep. Garfield) (alluding to *Dred Scott* by attacking the idea that the tribes "shall be confined to reservations and not have any rights which white men are bound to respect"); CONG. GLOBE, 40th Cong., 2d Sess. 1956 (1868) (statement of Rep. Broomall) (refuting the doctrine "that black men and red men have no rights whatever except by the grace and favor of the white men"); CONG. GLOBE, 39th Cong., 1st Sess. 154 (1866) (statement of Rep. Morrill) (comparing the tribes to the freedmen and stating that "[t]he Indian is a man, and he is entitled to protection, and I never will consent to legislate on any other theory than that"); CONG. GLOBE, 38th Cong., 2d Sess. 260 (1865) (statement of Rep. Rollins) (rejecting the idea "that the Declaration [of Independence] was applicable alone to white men, and not to the black man, the red man, or any other than the white man").

Granted, there were also prejudiced statements made about Native Americans by some Republicans. In my view, however, these scattered comments are not a sound basis for interpreting Reconstruction because they do not cohere with abolitionist ideology or with the numerous actions taken to further Native American rights.

345. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 165 (2000).

the conditions of the freedmen and proposing the Fourteenth Amendment, an analogous Joint Committee on the Indian Tribes was looking into their appalling treatment and proposing fundamental change.[346] Like their Reconstruction Committee counterparts, the Tribal Joint Committee gathered testimony that exposed the rampant corruption in the Indian Bureau that was inflicting misery on many Native Americans.[347] The Committee's Report led to a major reform in 1871, which among other things barred government agents with commercial interests from negotiating treaties with the Tribes and required tribal agreements to be approved by the House of Representatives.[348] Furthermore, President Grant removed these corrupt bureaucrats and—in a move that invoked *Worcester* again—replaced them with missionaries from religious denominations.[349] With Jackson's policies now in full retreat, Congress renewed appropriations to these groups in a move that one commentator calls "the most extensive state and church interlocking at the federal level in the nation's history."[350]

Accordingly, the ante-bellum evidence and the direct statements showing that a Cherokee Paradigm was part of the Fourteenth Amendment are supported by broader comparisons between Reconstruction and Jacksonian Democracy.[351] As the Reconstruction

346. Majority Report of the Joint Committee on Reconstruction, *reprinted in* THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 86–88 (Edward McPherson ed., 1880); S. REP. NO. 39-156 (1867).

347. *See, e.g.*, S. REP. NO. 39-156, at 1–4; *see id.* at 8 ("The committee are satisfied that these evils are sometimes greatly aggravated, not so much by the system adopted by the government in dealing with the Indian tribes, as by the abuses of that system."); SMITH, *supra* note 20, at 318 (explaining that the use of patronage appointees to administer treaties with the tribes was a problem); *see also* CONG. GLOBE, 41st Cong., 1st Sess. 166 (1869) (statement of Rep. Axtell) (describing this corruption).

348. 16 Stat. 566 (1871). The President and the tribes still negotiated agreements, but after 1871 they needed the approval of a majority of both houses of Congress rather than a supermajority of the Senate. MARDOCK, *supra* note 189, at 105. The relationship between this Act and *Worcester* is explored Part IV.C., *infra*.

349. SMITH, *supra* note 20, at 318–19.

350. *Id.* at 318. Another action that reinforced the structure binding African-American and Native-American freedom involved the Thirteenth Amendment. When the core meaning of that provision was applied for the first time, Congress focused mainly on the Tribes rather than on the freedmen. Specifically, the Senate began investigating the peonage system in New Mexico in order "to prevent the enslavement of Indians." CONG. GLOBE., 39th Cong., 2d Sess. 239–41 (1867) (statement of Sen. Sumner) (offering a resolution to this effect). After concluding that inquiry, the Senate passed a bill that attempted to abolish peonage. *Id.* at 1571–72.

351. A final insight that links the Amendment with Removal is the analogy between the Black Codes and the Cherokee Codes. In order to maintain control over the freedmen after the Civil War, the Southern States enacted a set of laws denying their fundamental rights. Among

Framers were contemplating their actions, they were surrounded by vivid reminders of their political youth.

C. The Leading Counterarguments

Let us now pause and consider some objections to this new interpretation of the Fourteenth Amendment. This Section looks at three of the strongest responses to the idea that the Removal and *Worcester* are pertinent to the meaning of Section 1.

1. *Objection #1: The Fourteenth Amendment Draws a Distinction between African Americans and Native Americans.* Perhaps the best argument against this thesis is that Section 1 distinguishes the freedmen from the Tribes. That text made all African Americans citizens, but did not make all Native Americans citizens.[352] This could suggest that the Reconstruction Framers dissolved the abolitionist link between these two groups or that the Cherokee past was irrelevant to their thinking. A close examination, however, drains the power from this objection and instead illustrates the difficulties involved in synthesizing the logic of *Worcester* with the new constitutional amendment.

There is widespread agreement that the Reconstruction Framers did not want to grant citizenship to tribes that maintained treaty relations with the United States or were at war with the federal government.[353] That was the goal of Section 1's declaration that only "persons born or naturalized in the United States, *and subject to the jurisdiction thereof*" were citizens.[354] The jurisdictional clause was a

other things, these statutes (1) reaffirmed the testimonial bar that Sumner described, (2) imposed severe restrictions on the right to contract or seek employment, and (3) barred them from owning guns and serving in the militia. *See* AMAR, *supra* note 3, at 264–65 (discussing the threats Southern blacks faced under the Black Codes); STAMPP, *supra* note 3, at 80 (outlining prohibitions imposed by the Black Codes). Georgia imposed these same restrictions on the Cherokees three decades before. *See supra* notes 55–57 and accompanying text. Furthermore, the origin of many provisions in the Black Codes of Georgia can be traced back to the same legislative session that passed the anti-Cherokee statutes. *See* United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151) (noting that Georgia's original act barring anyone from teaching a slave to read or write was passed in 1829).

352. U.S. CONST. amend. XIV, § 1.

353. *See, e.g.*, S. REP. NO. 41-268, at 10 (1870) ("[T]hose who framed the fourteenth amendment . . . understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, 'and subject to the jurisdiction' . . . .").

354. U.S. CONST. amend. XIV, § 1 (emphasis added).

term of art designed to exclude these tribes.[355] Some members of Congress complained that this language was inexact because statutes already regulated aspects of tribal life and subjected their members to national jurisdiction in a certain sense.[356] The language remained, however, because nobody could find a better alternative.[357]

The first observation about Section 1's distinction between the freedmen and Native Americans is that it was limited to tribal members. In the debate on the Civil Rights Act of 1866 and on the Fourteenth Amendment, the Reconstruction Framers took great pains to emphasize that Native Americans who did not belong to tribes were now citizens and had the same rights as everyone else.[358] When the Senate rejected an effort by radical Republicans to make all Native Americans citizens, it led to this revealing exchange:

> MR. HENDERSON. One word in reply. It used to be supposed that this Government was made exclusively for the white man, and it was so decided. We are deciding to-day that it was made for the white man and the black man, but that the red man shall have no interest in it.
>
> MR. TRUMBULL: We are not deciding any such thing.[359]

It is easy to dismiss Trumbull's response and to minimize the importance of Section 1's extension of citizenship to nontribal members, but that was not how contemporaries viewed the issue. When President Johnson vetoed the Civil Rights Act, he thought giving birthright citizenship to many Native Americans was important enough to mention as a specific objection to the bill.[360] From the

355. *See* S. REP. NO. 41-268, at 9 ("[T]he Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term *jurisdiction* is employed in the fourteenth amendment to the Constitution."); CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard) ("Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States."); SMITH, *supra* note 20, at 308–09 (explaining that "[t]he jurisdiction clause was meant to signal the tribes' special status as persons who were not fully subject to the U.S. because they had another primary political allegiance").

356. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2895–96 (1866) (statement of Sen. Doolittle); *id.* at 2893–94 (statement of Sen. Johnson); *id.* at 2894–95 (statement of Sen. Hendricks).

357. For a sample of this debate, see *id.* at 2894–97.

358. Elk v. Wilkins, 112 U.S. 94, 118 (1884) (Harlan, J., dissenting); *see also id.* at 120 (Harlan, J., dissenting) (quoting Cooley's treatise that said a Native American outside of a tribe had the same rights "as that of any other native born inhabitant").

359. CONG. GLOBE, 39th Cong., 1st Sess. 574 (1866).

360. Civil Rights Veto, *supra* note 328, at 405.

opposite viewpoint, Justice Harlan stressed that the Act was "the first general enactment making persons of the Indian race citizens of the United States."[361]

Moreover, the distinction made in Section 1 between Native Americans and African Americans was fuzzy because the Reconstruction Framers indicated that a tribal member could become a citizen simply by renouncing his or her tribal affiliation. The Senate Judiciary Committee Report discussed earlier said that individual "members of such tribes, while they adhere to and form a part of the tribes to which they belong," were not citizens.[362] Yet the Report also held that "when the members of a tribe are scattered, they are merged in the mass of our people, and [they] become equally subject to the jurisdiction of the United States."[363] This implies that Section 1 made individuals who left their tribe citizens if they so desired, because they would no longer adhere to or form a part of their tribe and would instead become part of the general population. Thus, the Framers appear to have left the force of the distinction between the freedmen and Native Americans up to the choice of individual tribal members.[364]

Nevertheless, the Fourteenth Amendment created a distinction that must be explained. Members of Congress offered three reasons for their conclusion that some Native Americans should not be citizens. First, many were troubled at the prospect of giving citizenship to tribes that were at war with the United States. Senator Trumbull thought this was obvious, telling his colleagues that "[o]f course we cannot declare the wild Indians who do not recognize the Government of the United States at all . . . to be the subjects of the United States in the sense of being citizens. They must be excepted."[365] That was a reasonable conclusion which did not discriminate between people who wanted citizenship. Put another way, there was no analogous group of African Americans who refused to recognize federal authority, and therefore some distinction had to be made between the Tribes and the freedmen.

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361. *Elk*, 112 U.S. at 112 (Harlan, J., dissenting).

362. S. REP. NO. 41-268, at 10–11 (1870).

363. *Id.* at 11.

364. The Supreme Court's analysis of this problem is discussed shortly. *See infra* notes 376–379 and accompanying text.

365. CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866) (statement of Sen. Trumbull).

Second, there was a concern that granting the Tribes citizenship would abrogate the treaties between them and the United States and destroy the special privileges granted by those treaties. The Senate Judiciary Committee argued that such a unilateral action would be unfair:

> To maintain that the United States intended, by a change of its fundamental law, which was not ratified by these tribes . . . to annul treaties then existing between the United States as one party, and the Indian tribes as the other parties respectively, would be to charge upon the United States repudiation of national obligations, repudiation doubly infamous from the fact that the parties whose claims were thus annulled are too weak to enforce their just rights . . . .[366]

Many also had conceptual problems with the idea that the United States could make treaties with people who were also citizens. Senator Trumbull distilled this thought into a simple aphorism: "We cannot make a treaty with ourselves; it would be absurd."[367]

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366. S. REP. NO. 41-268, at 11.

367. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull). In 1871, however, Congress abolished the treaty system and held that the tribes could be governed by statute. *See supra* note 348 and accompanying text. Did this mean that they were now subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment? Some members of Congress thought so and argued that the logical consequence of this change was full Native American citizenship. *See*, *e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 5587 (1870) (statement of Rep. Thurman).

Yet this did not happen for at least two reasons. First, the 1871 reform stated that while no more treaties would be made with tribes, all existing treaties remained in force. *See* CONG. GLOBE, 41st Cong., 3d Sess. 1811 (1871) (statement of Rep. Sargent) (quoting from the Act "[t]hat nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe"). As a result, many of the arguments advanced against tribal citizenship in 1866 were still valid after 1871. Second, the abolition of the treaty system was largely a battle over who would set tribal policy rather than a statement about tribal status. The 1871 Act was the product of a long campaign by the House of Representatives to end the Senate's monopoly over Native American policy. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 2517 (1870) (statement of Sen. Sumner) (arguing in favor of adopting a resolution to appoint a joint committee on Native American policy); SMITH, *supra* note 20, at 319 (explaining that in the early 1870s, "the House sought more control over Indian affairs"). That struggle culminated in the House's decision to stop appropriating funds for all tribal treaties until the Senate agreed to make those agreements subject to approval by both houses. Indian Appropriations Bill, H.R. 1169, 41st Cong. (1870) (statement of Rep. Sargent). That story, which is the best precedent for the modern executive-congressional agreement, is worthy of further exploration.

This cannot, however, explain the denial of Native American citizenship well into the twentieth century. That requires a broader discussion of what went wrong following Reconstruction. *See infra* notes 372–384 and accompanying text.

Finally, the Reconstruction Framers thought that the tribal right of self-governance articulated in *Worcester* was in tension with giving the Tribes citizenship and subjecting them to the law of the land. For instance, the Senate Report followed its discussion of Marshall's opinion by concluding "that an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void."[368] As a result, federal law could cover the Tribes only to the extent that it was "consistent with [the Tribes'] character as separate political communities or states."[369] Indeed, a reasonable interpretation of *Worcester* was that it mandated special treatment for tribes that was inconsistent with equal citizenship.

This last point illuminates the tricky problem of folding *Worcester*'s principles into the Fourteenth Amendment. Up until now, the discussion has proceeded on the assumption that the fit between these two milestones is seamless. But great legal texts from different eras rarely mesh perfectly. In some respects one can easily integrate John Marshall's opinion with John Bingham's amendment, but in other areas they are not compatible. While *Worcester* based its equality analysis on group rights, Section 1 focused on individual rights. Likewise, Marshall reasoned that the Tribes possessed special sovereign rights, while the Fourteenth Amendment proclaimed that all Americans should be treated alike in their basic rights. The Reconstruction Framers, wisely or not, resolved these inconsistencies by holding that the Tribes were not entitled to the citizenship granted by Section 1.[370] Thinking through the best way to join the lessons from the 1830s with those from the 1860s is the central task for courts seeking to apply the Cherokee Paradigm of the Amendment.

Accordingly, the distinction between the freedmen and the Tribes within Section 1 does not undermine a Cherokee reading of the text. Not only was this distinction quite limited, but the line in

368. S. REP. NO. 41-268, at 9. Of course, the tribes could be allowed to retain some sovereignty and be citizens at the same time. Indeed, that is how tribes are treated today. But it is anachronistic to assume that the Reconstruction Framers would have seen that solution.

369. *Id.* at 9–10.

370. Given the powerful objections to tribal citizenship, the remarkable thing is that many Republicans still fought for full citizenship and upheld the abolitionist position that tribal rights were inextricably linked to African-American freedom. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 1670 (1870) (statement of Rep. Paine); CONG. GLOBE, 41st Cong., 2d Sess. 125–26 (1869) (statement of Rep. Niblack); CONG. GLOBE, 41st Cong., 1st Sess. 560 (1869) (statement of Rep. Butler); CONG. GLOBE, 39th Cong., 1st Sess. 571 (1866) (statement of Sen. Henderson).

question was actually drawn out of respect for the reasoning of the *Worcester* decision.

2. *Objection #2: The Fourteenth Amendment Did Not Prevent Another Removal.* A second line of attack is that Section 1 does not prohibit another banishment of a tribe. If that were true, the argument that the Removal was a paradigm case for the Fourteenth Amendment would be undermined. After all, if a legal act does not attempt to bar a certain injustice, then it is hard to maintain that the injustice motivated the law or should guide its interpretation. This Section shows that Section 1 did, in fact, render another Trail of Tears virtually impossible.

The key observation here is that the Cherokee Removal was spawned by a combination of state and federal action that was barred after 1868. In restoring much of *Worcester*'s authority and asserting federal supremacy through the Fourteenth Amendment, the Reconstruction Framers made it clear that the States lacked authority over the Tribes.[371] Yet neither the Removal Act nor the Treaty of New Echota would have succeeded without the heavy hand of state coercion that began with the Cherokee Codes and ended with the use of the Georgia militia to roust the Tribe from its homes. As a result, the argument that Section 1 did not prevent another Removal is based on a false premise that these events were the sole responsibility of Congress.

One can still argue that the federal government alone could undertake a Removal and not run afoul of the Fourteenth Amendment, but that objection proves too much. It is true that Section 1 did not bind Congress's actions over the Tribes, but the text also allowed Congress broad discretion to discriminate on the basis of race. That is the consequence of the Reconstruction Framers' decision not to apply the Equal Protection Clause to Congress. Yet nobody thinks that this means that the ante-bellum discrimination faced by African Americans, much of which was inflicted by Congress, is not a reference point for interpreting Section 1. While Congress could still do some terrible things to the freedmen and to the Tribes, this parade of horribles does not shed any light on what the Fourteenth Amendment means.

371. *See, e.g.*, S. REP. NO. 41-268, at 9 (stating that the tribes were "exempt from the operation of State laws").

3. *Objection #3: Why Haven't I Heard about This Before?* This is an obvious (though often unasked) question about any new argument based on history. Granted, one could also ask why it took so long for scholars to embrace Justice Black's argument that Section 1 incorporated the Bill of Rights. Though the answers fall within a twilight zone of speculation, there is a mix of considerations that may explain why the link between the Removal and the Fourteenth Amendment sank from view after the 1870s.[372]

One culprit is the late nineteenth-century Supreme Court, which did a rather poor job of preserving the intent of the Reconstruction Framers. Though the Court's performance during this era is widely criticized, nobody has offered a persuasive explanation for why the Justices erased so much of the Fourteenth Amendment's meaning.[373] Yet there is no doubt that this happened. While the Court was ignoring incorporation, it was busy restricting Congress's power to protect the freedmen.[374] What is less appreciated is that this same stingy approach was applied to Native Americans.

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372. There is one tantalizing exception that also came from Justice Black, a man who saw the Fourteenth Amendment more clearly than anyone else. In a case about State power over the tribes decided a few years after *Brown*, Justice Black gave one of the lengthiest descriptions of *Worcester* ever offered by the Court. *See* Williams v. Lee, 358 U.S. 217, 218–19 (1959). At the end of this passage, Black concluded that "[d]espite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law." *Id.* at 219 (footnote omitted). When the draft opinion was circulated, Justice Frankfurter picked up on its hidden meaning and said "I agree with every word, especially your essay on *Brown v. Board of Education*." ROGER K. NEWMAN, HUGO BLACK 483 (1994); Interview with Guido Calabresi, Judge, United States Court of Appeals for the Second Circuit, in New Haven, Conn. (Dec. 27, 2001).

373. Part of the answer, however, lies with the influence that the "threat" posed by the Populist movement had on the Supreme Court in the 1890s. That era saw a set of preemptive opinions, *see, e.g.*, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 586 (1895) (striking down the federal income tax as unconstitutional), and led to a dramatic turn away from the incorporation of the Bill of Rights and from African-American equality, *see, e.g.*, Maxwell v. Dow, 176 U.S. 581, 604–05 (1900) (holding that the Fourteenth Amendment did not oblige a state to maintain a defendant's "right to be proceeded against only by indictment, and the right to a trial by twelve jurors"); Plessy v. Ferguson, 163 U.S. 537, 540, 542, 550–51 (1896) (finding that state law mandating separate but equal accommodations on public conveyances did not violate the Thirteenth or Fourteenth Amendments).

374. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 25 (1883) (invalidating sections of the Civil Rights Act of 1875 guaranteeing equal accommodations in inns, public conveyances, and places of amusement, because their application to the States was not authorized by either the Thirteenth or Fourteenth Amendments); United States v. Cruikshank, 92 U.S. 542, 559 (1876) (invalidating a federal statute used to convict defendants for "banding" and "conspiring" "to injure, oppress, threaten, and intimidate" two U.S. citizens of African descent); United States v. Reese, 92 U.S. 214, 216, 221 (1875) (holding that Congress did not have authority under the Fifteenth Amendment to pass a law providing punishment of election inspectors who refused to

Elk v. Wilkins[375] presented the issue of whether a tribal member who renounced his tribe became a citizen automatically under Section 1.[376] Without considering the legislative history of the Civil Rights Act or the Fourteenth Amendment, the Court held that former tribal members could only become citizens if they were naturalized by an act of Congress.[377] In a distinct echo of the Court's African-American jurisprudence, Justice Harlan dissented. He argued for a liberal reading of Section 1 and said that the debate over the Civil Rights Act showed "that the bill, as passed, admitted, and was intended to admit, to national citizenship Indians who abandoned their tribal relations, and became residents of one of the States or Territories."[378] Harlan also relied on the Senate Judiciary Committee Report and concluded that the majority was mangling both the text and the intent of the Fourteenth Amendment.[379]

A second possible explanation for the Cherokee Paradigm's disappearance is that Section 1's distinction between the freedmen and the Tribes had the unintended consequence of driving a wedge between these groups. Over time, the generation weaned on the injustice of Removal faded from the political scene. Sadly, they did not leave behind many records that preserved their experience for future generations. When lawyers and judges confronted the Fourteenth Amendment in subsequent decades, they did not see the bond between African Americans and Native Americans that mesmerized the abolitionists and the Reconstruction Framers. Instead, all they saw was the text's separation of these two groups. Consequently, the law governing them gradually evolved in different directions. By the late twentieth century, cases addressing African Americans were a central part of the constitutional canon, while Native-American doctrine was reduced to "a tiny backwater of law inhabited by impenetrably complex and dull issues."[380]

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receive and count votes cast by qualified voters regardless of "race, color, or previous condition of servitude").

375. 112 U.S. 94 (1884).

376. *Id.* at 99; *see also supra* notes 361–364 and accompanying text.

377. *Elk*, 112 U.S. at 102.

378. *Id.* at 114 (Harlan, J., dissenting).

379. *See supra* notes 362–363 and accompanying text. In a telling passage, Harlan accused the Court of construing Section 1 to say that "[a]ll persons born subject to the jurisdiction of, or naturalized in, the United States" were citizens. *Elk*, 112 U.S. at 121 (Harlan, J., dissenting). In fact, the actual text of Section 1 says that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof" are citizens. U.S. CONST. amend XIV, § 1.

380. Frickey, *supra* note 146, at 383.

The types of cases that the Court confronted in its initial encounters with the Fourteenth Amendment also contributed to the rupture between the two beleaguered minorities. In the first few decades after Reconstruction, when memories of the Cherokee Removal were not beyond the power of recall, the discrimination cases coming to the Justices mainly involved African Americans or groups with similar characteristics.[381] In other words, the cases facing the Court were squarely within the heartland of the other paradigms in Section 1—the fight against slavery and the Black Codes. It was only much later when cases arose where the Cherokee Paradigm might have provided the more relevant set of analogies.[382] By the time those appeals arrived, however, the bond between the Removal and the Fourteenth Amendment had been forgotten.

Finally, reformers made the mistake of taking a different approach toward African Americans and Native Americans in the years following Reconstruction, which ended up leaving them both in a difficult position. During the Gilded Age, policymakers concluded that they should put their focus on civilizing the Tribes rather than on giving them more legal rights.[383] Consequently, resources were poured into building institutions, from the Indian Bureau to missionary organizations, that provided economic assistance to the Tribes. This strategy failed. Without the legal rights that other Americans possessed, the Tribes could not achieve real equality. By contrast, the Reconstruction Framers made heroic efforts to give the freedmen full legal equality, but created no permanent institutions to enforce these rights and did little to alleviate their poverty.[384] That approach also

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381. *See supra* note 373 and accompanying text.

382. *See, e.g.*, Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) (invalidating a Texas statute criminalizing private and consensual sodomy); Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding an order excluding U.S. citizens of Japanese ancestry from areas of the West Coast); *see also infra* note 420 and accompanying text.

383. *See, e.g.*, MARDOCK, *supra* note 189, at 36 ("After a time . . . most reformers concluded that civilization should precede citizenship, and . . . education and Christianization of the Indians should be the basis of government policy."); Letter from Carl Schurz to Edward Atkinson (Nov. 28, 1879) at 481, 486, *in* III SPEECHES, CORRESPONDENCE, AND POLITICAL PAPERS OF CARL SCHURZ 486 (Frederic Bancroft ed., 1969):

> [W]hile the establishment of some general principle with regard to the rights of the Indians by judicial decision may be useful in some respects, I consider practical measures for the improvement of the Indians, fitting them for the struggles of civilized life and the responsibilities of citizenship, of far greater importance.

384. *See* BROCK, *supra* note 3, at 301 ("When Radical enthusiasm withered away it left behind it no such institutional bulwarks . . . to carry out those obligations to citizens of the United States of which so much had been heard.").

failed. Without the support of strong organizations or robust economic aid, the legal rights given to African Americans by Section 1 were basically worthless.

This demonstrates a final irony in the relationship between the freedmen and the Tribes. During the ante-bellum era, both groups were tied together and that bond helped to expand the rights of all Americans. When abolitionists and their reform-minded allies divorced their policies toward these minorities, this worked to the detriment of all Americans. In particular, by downplaying the importance of Native American rights after the Civil War, reformers diminished the ability of lawyers to see the link between Removal and Reconstruction. The treatment of African Americans and Native Americans each held one-half of the answer to the problem of inequality. If those approaches had remained married and given both groups legal rights and economic empowerment, perhaps the dream of equality would have been realized much sooner.

Thus, none of the major objections to a Cherokee Paradigm withstand scrutiny. The Reconstruction years confirm that the battle against Removal and the *Worcester* opinion were a factor in the development of the Fourteenth Amendment.

V. A NEW FOURTEENTH AMENDMENT

This Part begins exploring the doctrinal implications of the relationship between Section 1 and the Cherokee Removal.[385] I say "begins" because only another article can provide a comprehensive treatment of the issues that may be shaped by the prior historical analysis. Nevertheless, the discussion here offers some preliminary thoughts that (1) provide a fresh perspective on the holding in *Employment Division v. Smith*,[386] and (2) suggest a new path for equal protection doctrine.

385. The analysis in this Part approaches constitutional doctrine from an originalist perspective. One should expect no less from a law and history article. Of course, some will find this method more persuasive than others. Instead of debating interpretive presumptions that are, to my mind, more a matter of instinct than logic, I suggest that those who do not believe that history is a valid tool for resolving legal disputes may still find the following discussion useful for advocating outcomes that they support for other reasons.

386. 494 U.S. 872 (1990).

A. Rethinking Religion

One fundamental issue raised by the events in *Worcester* was the relationship between church and state. The jailing of the missionaries and the response to that act contain important lessons for interpreting the incorporated Free Exercise Clause.[387] This Section explains that assertion and shows how that paradigm undermines the Supreme Court's decision in *Smith*.

1. *The Free Exercise Clause Renewed.* John Bingham told the House of Representatives that one purpose of the Fourteenth Amendment was to ensure that the religious abuses underlying *Worcester* would never happen again.[388] This statement was part of a broader analysis on how the new constitutional text changed the Bill of Rights.[389] Before exploring how the Cherokee Paradigm reshapes free exercise law, this section explains why the views of the Reconstruction Framers matter in this area.

The key insight here is that the decision to incorporate the Bill of Rights can be seen as an independent ratification that modified its meaning. In other words, the Reconstruction Framers did not take the Bill of Rights as it was understood in 1791 and simply extend it to the States. Instead, they developed their own understanding of these provisions in response to the infringements of basic liberties in the ante-bellum South.[390] As a result, the Bill should be interpreted by blending the views of the 1791 Framers with the views of the Reconstruction Framers.[391] Just as the Fourteenth Amendment's incorporation of *Worcester*'s principles requires an integration of the

387. Though the focus here is on the Free Exercise Clause, other provisions of the Bill of Rights may also be influenced by the connection between the Cherokee Removal and the Fourteenth Amendment. For instance, the fact that the missionaries who were held up as the symbols of religious freedom received federal funding could reshape the Establishment Clause and provide a deeper rationale for erasing some limitations on state aid to religious groups. *Cf.* Zelman v. Simmon-Harris, 536 U.S. 639, 644 (2002) (upholding vouchers used in parochial schools).

388. *See supra* note 295 and accompanying text.

389. *See supra* notes 288–294 and accompanying text.

390. AMAR, *supra* note 3, at 231–83; CURTIS, *supra* note 4, at 26–56; *see also* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1133–37 (1994) (describing the restrictions on religious freedom that influenced the Reconstruction Framers).

391. *See, e.g.*, AMAR, *supra* note 3, at 215–30 (setting forth a model of "refined incorporation"). This method is also more consistent with the case law, which often does not adhere to the understanding of the Bill of Rights in 1791.

1830s with the 1860s, so the Amendment's incorporation of the Bill of Rights requires an integration of the 1790s with the 1860s.[392]

Bingham's comments also show that the developments of the 1830s exerted a major influence on the incorporated Free Exercise Clause. This is not inconsistent with the assertion that interpreting the Bill of Rights involves a blending of the 1790s with the 1860s. Instead, it underscores the pivotal role that Jacksonian Democracy played in shaping the attitudes that the Reconstruction Framers brought to fruition in the 1860s. Thus, while the politics of the 1830s no longer have much independent relevance, understanding that era is still important because of the shadow it casts on the law that emerged from Reconstruction.

2. *Recasting the Debate on* Smith*.* The remaining question is how courts should construe Bingham's admonition that another *Worcester* should never occur. At present, the most contentious issue in free exercise doctrine is whether a law that is not intended to discriminate against religion nonetheless violates the First Amendment if it has an adverse impact on religious conduct. Until 1990, the cases appeared to say that this type of statute raised a constitutional problem if it was not narrowly tailored and did not serve a compelling state interest.[393] The Supreme Court changed course in *Smith*, however, and fashioned a more restrictive test for that category of free exercise claims.[394] The Cherokee Paradigm casts doubt upon that conclusion in a way that courts and commentators have not considered.

a. The Opinion in Smith*.* In *Smith*, the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes)

392. This does not mean that these historical periods are the only relevant reference points. Every generation puts its distinctive stamp on constitutional law and each must be considered to achieve a sound interpretive conclusion. The 1860s and the 1790s, however, were the two eras in which the Bill of Rights as a whole received the most attention.

393. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–10 (1990) ("In its language, [the free exercise doctrine] was highly protective of religious liberty. The government could not make or enforce any law or policy that burdened the exercise of a sincere religious belief unless it was the least restrictive means of attaining a particularly important ('compelling') secular objective.").

394. Employment Div. v. Smith, 494 U.S. 872, 907 (1990).

conduct that his religion prescribes (or proscribes).'"[395] The case involved a claim by two Native Americans who sought to ingest peyote, a banned hallucinogen, in an indigenous religious ceremony.[396] Respondents contended that the state law barring peyote use violated the Free Exercise Clause because no exception was made for religiously motivated use of the drug.[397] Justice Scalia, writing for the Court, was not persuaded that "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice."[398] In addition, the majority said that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[399]

On the other hand, the Court conceded "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . involv[ing] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[400] Though the Justices did not elaborate on this "hybrid situation,"[401] the best reading of *Smith* is that a neutral and general statute is invalid if it imposes a significant burden on religious conduct and on another constitutional right.[402] This limitation on the majority's holding was necessary because the Court had previously struck down neutral and generally applicable laws that unduly burdened religion.[403] Most of these cases, however, at least

395. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

396. *Id.* at 874.

397. *Id.* at 876. Respondents were state employees who were fired after their peyote use was discovered. *Id.* at 874. The State's justification for the dismissal was that the conduct was illegal. *Id.* at 875.

398. *Id.* at 878.

399. *Id.* at 878–79.

400. *Id.* at 881.

401. *Id.* at 882.

402. *See id*. Although some of the hybrid cases cited by the Court involved the actual violation of another constitutional right, *id.*, the principle of *Smith* must require less, *id.* at 881 & n.1. A law that violates another right is void anyway and does not require an examination of its religious implications.

403. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) ("[T]he First and Fourteenth Amendments prevent [Wisconsin] from compelling [the Amish] to cause their children to attend formal high school to age 16."); Sherbert v. Verner, 374 U.S. 398, 410 (1963) ("South Carolina may not constitutionally apply the eligibility provisions [of the South Carolina Unemployment Act] so as to constrain a worker to abandon his religious convictions respecting the day of rest."); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (invalidating a Connecticut anti-solicitation statute as applied to the activities of three Jehovah's Witnesses).

touched on a "communicative activity or parental right"[404] and thus could be characterized as hybrid holdings.[405]

Justice O'Connor's concurrence rejected the majority's analysis of the precedents and its newly minted hybrid exception.[406] She pointed out that the Court had expressly rejected the rule laid down by *Smith* in an earlier case by stating that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[407] Responding to the majority's contention that this statement and others like it were dicta from hybrid holdings, O'Connor argued that "there is no denying that [many of these] cases expressly relied on the Free Exercise Clause" and nothing else.[408] Accordingly, she concluded that these decisions were not hybrids and that *Smith*'s analysis was flawed.

Smith is one of the Rehnquist Court's most controversial holdings, and the Justices are still sharply divided on the issue.[409] When the Court struck down Congress's effort to reverse *Smith* through a statute, Scalia and O'Connor resumed their interpretive debate by focusing on the original understanding of the Free Exercise Clause rather than on the case law.[410] Although that discussion was

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404. *Smith*, 494 U.S. at 882.

405. *Id.* at 881–82. The exception was *Sherbert v. Verner*, 374 U.S. 398 (1963), and its progeny, which applied the narrow tailoring and compelling state interest test to the denial of unemployment benefits based on a person's refusal to work under conditions prohibited by his or her faith. *Id.* at 410; Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987). The Court declined to extend these cases beyond the unemployment context. *Smith*, 494 U.S. at 884; *see also* McConnell, *supra* note 393, at 1123 ("[T]his is not a very persuasive distinction.").

406. *Smith*, 494 U.S. at 895–96 (O'Connor, J., concurring in the judgment).

407. *Id.* at 896 (O'Connor, J., concurring in the judgment) (quoting *Yoder*, 406 U.S. at 219–20); *see also* McConnell, *supra* note 393, at 1120 (noting that according to the *Yoder* court, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" (quoting *Yoder*, 406 U.S. at 215) (alteration in original)).

408. *Smith*, 494 U.S. at 896 (O'Connor, J., concurring in the judgment). The majority answered by asserting that these cases did discuss, albeit briefly, the alternative right involved. *Id.* at 881 n.1. What this debate leaves unresolved is whether these statements were dicta (O'Connor's view) or whether the statements about a general and neutral law being invalid if it burdened religion were dicta (the Court's view).

409. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) (arguing that *Smith* should be reexamined); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559–77 (1993) (Souter, J., concurring in part and concurring in the judgment) (criticizing *Smith* and indicating that he wanted to revisit the issue).

410. *See Boerne*, 521 U.S. at 536 (invalidating the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)); *id.* at 537 (Scalia, J., concurring in part) ("The [historical] material that the dissent claims is at odds with *Smith* either has little to say

inconclusive, most scholars have concluded that the Framers in 1791 did not think that the Free Exercise Clause mandated religious exemptions from neutral and general statutes.[411] This finding supports *Smith* and suggests that its reading of the precedents is more consistent with the basic principles underlying free exercise doctrine. The historical inquiry, however, should not end there. *Worcester* and its impact on the Reconstruction Framers still need to be considered.

b. Worcester *and* Smith. Once *Worcester* is restored to its proper place in Fourteenth Amendment law, it becomes clear that the case is instructive for *Smith* because *Worcester* also involved a neutral and general statute that imposed a substantial burden on religion. The sovereignty oath that the missionaries refused to take was neutral because it did not target religious conduct. Instead, the law's purpose was to clear the tribal homeland of sympathetic whites and end their political opposition to Jackson's policies.[412] Furthermore, the oath was part of a general criminal law. It is true that the provision applied only to white males, but that was effectively general because only white males participated in Georgia's political life at the time.[413] Like the respondents in *Smith*, the claim made by liberals and abolitionists about *Worcester* was that this general and neutral law nonetheless violated religious freedom.[414] Finally, both *Worcester* and *Smith* involved the religious liberty of Native Americans. Given these parallels and Bingham's explicit incorporation of the religious aspect

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about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause."); *id.* at 549 (O'Connor, J., dissenting):

> The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence.

411. *See, e.g.*, AMAR, *supra* note 3, at 255 ("[T]he First Amendment has no textual tools for distinguishing among various possible claims of religious exemption from general secular laws."); *id.* at 327 n.96 ("[A]rguments on behalf of the view that the original free-exercise clause created a right to an exemption from general, secular, nonpretextual congressional laws . . . fail."); Lash, *supra* note 390, at 1111–18 ("At the very least . . . the evidence is ambiguous regarding the Founders' intent to provide for exemptions from generally applicable laws.").

412. *See supra* notes 121–123, 133–134, and accompanying text.

413. *See supra* note 60 and accompanying text.

414. *See supra* notes 130–133 and accompanying text. This claim must have relied on the assumption that the oath requirement was tantamount to an order for pro-independence whites to stay out of the Tribe's homeland. After all, this was the source of the burden on religious practice. Taking the oath itself did not impose such a burden because there were no religious objections to its content. *See supra* note 116 and accompanying text.

of *Worcester* into the Fourteenth Amendment, the case should be a focal point for analyzing *Smith*. Yet neither the Court nor anyone else has ever examined this analogy.

As with most legal precedents, the application of *Worcester* to the issues raised in *Smith* provides some support for both sides in the debate. Opponents could argue that the widespread condemnation of the missionaries' conviction contradicts the rule in *Smith*. According to this view, since the Reconstruction Framers and their predecessors saw a neutral and general law that burdened religious conduct as a paradigmatic free exercise violation, that set of conditions cannot possibly insulate a statute from free exercise scrutiny. On the other hand, supporters of *Smith* can point to the fact that *Worcester* looks like a hybrid case because it involved burdens on multiple rights. There is no doubt that the oath law burdened free speech within the tribal territory by forcing many whites to take an oath with which they disagreed. Moreover, the statute was intended to suppress pro-Cherokee speech by driving whites out of the tribal homeland. Thus, one could say that *Worcester* does not affect *Smith* because it fits within the hybrid exception set forth by Justice Scalia's opinion.[415]

In my view, the former interpretation that casts doubt on *Smith* is more persuasive. Almost every reference to the missionaries' plight described it as a violation of religious freedom and not as a free speech issue.[416] In drawing a conclusion from this fact, a distinction must be made between case analysis and the examination of the original understanding behind a constitutional provision. When courts look at judicial precedents, they are concerned with what the opinions

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415. The discussion accepts for the sake of argument that the hybrid-rights category is valid, even though some commentators believe this aspect of *Smith* is incoherent. *See, e.g.*, Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 187–93 (2002) (setting forth a comprehensive critique).

416. The only source I can find that supports a contrary interpretation is John Norton Pomeroy's treatise, which was written during Reconstruction. He introduced *Worcester* by explaining that the Cherokee Codes barred

> any *communication* by white persons with [the] Indians except in the manner authorized by those statutes. Two missionaries, deeming this legislation to be . . . null and void, did have *communication* with the Indians in the prosecution of their calling as religious teachers. For this offence they were tried by Georgia courts . . . .

JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 88 (New York, Houghton, Mifflin & Co. 1888) (emphases added). The characterization of the state law and of the missionaries' activities as communicative rather than religious suggests a broader free speech understanding of the case consistent with the hybrid concept in *Smith*. This lone reference, however, is simply not enough to justify the conclusion that the *Worcester* paradigm supports *Smith*.

say rather than what the judges that wrote them intended. As a result, *Smith* may have been correct to characterize ambiguous free exercise decisions as hybrid holdings. When the focus turns to the original understanding, however, ascertaining intent is the main objective. In that context, what the Reconstruction Framers and their predecessors both said and did not say about *Worcester* matters.[417] And because they said virtually nothing to support the hybrid interpretation and plenty to support the pure free exercise (i.e., O'Connor's) perspective, there can be only one reasonable conclusion about their intent unless additional evidence is uncovered.[418]

Moreover, there is something odd about arguing that one of the most profound constitutional transformations in our history was about preventing hybrid harms. Margaret Thatcher once argued that great causes are not "fought and won under the banner 'I stand for consensus.'"[419] Likewise, great constitutional movements are not founded on a rallying cry of "Down with Hybrids." Indeed, the term hybrid is an artifice of judges and not something associated with people who are setting forth first principles. Accordingly, reading the intent of the Reconstruction Framers as reaching only hybrid violations of free exercise rights by neutral and general laws is at best an uphill struggle.

The Cherokee Paradigm undermines *Smith* by showing that the case is at odds with the original understanding of the Fourteenth

417. In other words, it is inappropriate to analyze the original understanding of the Reconstruction Framers by saying that unacknowledged concerns about free speech in the *Worcester* case must have played a role in their view of the Free Exercise Clause. Yet one could analyze a case that way depending on the nature of the holding.

418. The Supreme Court's decision in *Reynolds v. United States*, 98 U.S. 145 (1879), upholding an anti-polygamy law against objections by the Mormons, is not to the contrary. First, although that case is often cited as support for *Smith*, *see Smith*, 494 U.S. at 879, the law at issue in *Reynolds* actually targeted the Mormon faith and hence was not really neutral at all. *See generally* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002) (documenting the intense anti-Mormon animus behind the statute proscribing polygamy). Second, even if one assumes that the statute was neutral, there is nothing in the result of *Reynolds* that is inconsistent with the application of a narrow tailoring and compelling interest test. Third, the Court construed the free exercise claim based on the views of the 1791 Framers (i.e., the pro-*Smith* view) because the statute banning polygamy applied to the federal territories rather than to a state. *See Reynolds*, 98 U.S. at 162–65.

Nevertheless, a broader point can be made that the Reconstruction Framers were capable of some religious bigotry of their own. This does not, however, undermine the free exercise interpretation of *Worcester* offered in the text. At best, all it suggests is that their concept of a valid religion was narrower than ours.

419. MARGARET THATCHER, THE DOWNING STREET YEARS 167 (1993).

Amendment. This does not, of course, prove that *Smith* was wrongly decided. There may be valid reasons for disregarding the views of the Reconstruction Framers in this context. Yet the burden of establishing this rationale should now rest with *Smith*'s proponents.

B. Equality Reborn

Another area that needs to be reassessed in light of the Cherokee Paradigm is the Equal Protection Clause. A central theme of this Article is that the Reconstruction Framers saw both Native Americans and African Americans as paradigmatic groups for thinking about equality. Thus, a key question that judges should be asking is whether there are distinctive lessons from the Native American experience that might be relevant in antidiscrimination cases.[420] This Section explores that issue and provides some new thoughts about when heightened scrutiny should be applied to equal protection claims.[421]

At present, judges normally engage in this kind of searching inquiry when distinctions are drawn based on an immutable or visible trait that is deemed a suspect or quasi-suspect classification.[422] Courts

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420. One example of the benefits that this approach may bring involves a comparison between *Worcester* and *Korematsu v. United States*, 323 U.S. 214 (1944). The parallels between the forced relocation of the Cherokees, which was partly justified as a security measure, *see* 2 REMINI, *supra* note 44, at 265, and the detention of Japanese Americans during World War Two are suggestive. If the Supreme Court had been aware of the role that The Trail of Tears played in the thinking of the Reconstruction Framers, the Justices may have approached *Korematsu* in a different way.

421. Another point worth examining briefly is whether the Fourteenth Amendment's incorporation of *Worcester*'s principles means that group rights should play a role in equal protection law. Earlier, we saw the Reconstruction Framers dealing with this problem in explaining the relationship between Section 1's declaration of birthright citizenship and the guarantee of tribal autonomy in *Worcester*. *See supra* notes 368–370 and accompanying text.

A good starting point is that the text of the Amendment seems to reject group rights by focusing on "persons" and "citizens." U.S. CONST. amend. XIV, § 1. This creates a presumption that group rights were not absorbed into the Equal Protection Clause. That presumption is reinforced by the lack of any references to group rights in abolitionist thought or in the ratification discussions. Thus, the Cherokee Paradigm does not seem to support a group-rights reading.

There may still be a role for group rights, however, if they can somehow be blended, with an antidiscrimination principle focused on individuals, into a new equality framework. Resolving the tension between this facet of *Worcester* and the Fourteenth Amendment is one of the important tasks going forward.

422. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987) ("Close relatives are not a 'suspect' or 'quasi-suspect' class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group." (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986))).

have not offered a clear rationale about why immutability and visibility are so important, but one explanation is that judges are drawing on the conventional wisdom that African Americans were the paradigmatic group protected by the Equal Protection Clause. In thinking about what follows from this core premise, the most obvious point is that the defining characteristic of African Americans—race—is largely an immutable and visible trait. Accordingly, it should come as no surprise that judges have concluded that distinctions based on these characteristics can receive heightened scrutiny. Of course, not all discrimination grounded in immutability or visibility is unlawful. Instead, the trait in question must be analogous to race. This logic has led to decisions expanding heightened scrutiny to distinctions based on sex, national origin, and illegitimacy.[423] Yet that approach also pushes courts to reject heightened scrutiny for other groups that face discrimination.

The Cherokee Paradigm challenges this reasoning by introducing the alternative premise that Native Americans were a paradigmatic group for the Framers of the Fourteenth Amendment. Some might argue that substituting Native Americans for African Americans changes nothing. That contention, however, rests on the assumption that the defining trait of both groups is race. Proponents of this view can point to some proof that the Reconstruction Framers saw Native Americans in racial terms.[424] On the other hand, there is also compelling evidence that the Reconstruction Framers defined Native Americans by their cultural practices rather than by their race. That suggests that the Cherokee Paradigm can add something new to equal protection law. And this unique contribution is that immutability or visibility may not be a requirement for heightened scrutiny because one of the Fourteenth Amendment's paradigm groups was defined by *choices* and not by biology.

One of the strongest examples of this cultural understanding of Native American identity comes from judicial decisions

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Concededly, this summary of the law glosses over some thorny issues. For instance, there may be cases where the Court claims that it is engaged in rational basis review when the reality is somewhat different. Moreover, the application of heightened scrutiny does not mean that the statute in question will be struck down, and there are distinctions within the category of claims that receive this kind of attention. All of these subtle points will have to wait for a more thorough treatment.

423. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 494 (1998).

424. *See supra* notes 344, 361, and accompanying text.

contemporaneous with the ratification of the Fourteenth Amendment. In *United States v. Lucero*,[425] decided in 1869, the question presented to the New Mexico Supreme Court was whether the Pueblos were an "Indian Tribe" for purposes of a federal law governing property claims.[426] The Court's analysis explained that the Pueblos lived in villages, engaged in agriculture, and were peaceful.[427] Yet "[w]hen the term Indian is used in our acts of congress, it means that savage and roaming race of red men given to war and the chase for a living, and wholly ignorant of the pursuits of civilized man."[428] Because the Pueblos did not adhere to the cultural practices of an Indian Tribe, the Court held that they were not one. Indeed, the analysis directly rejected a racial conception of Native Americans by saying that the Pueblos were "Indians only in feature [and] complexion."[429] In other words, those biological traits did not define a Native American.

The United States Supreme Court affirmed this judgment and its rationale. Justice Miller, writing for a unanimous Court, quoted the New Mexico Supreme Court opinion at length and explained that "[t]he pueblo Indians, if, indeed, they can be called Indians, had nothing in common with [the Tribes]."[430] Though the opinion conceded that the Pueblos engaged in many unusual cultural practices,[431] Justice Miller concluded that "they only resemble in this regard the Shakers and other communistic societies in this country, and cannot for that reason be classed with the Indian tribes."[432] Although the Court declined to declare the Pueblos citizens under the Fourteenth Amendment because the issue was not squarely presented, [433] Justice Miller went out of his way to say that in a proper case it probably would so declare given the Pueblos' situation.[434]

425. 1869 WL 2423, *aff'd sub nom.* United States v. Joseph, 94 U.S. 614 (1876).

426. *See id*. at *1–2.

427. *Id*. at *18.

428. *Id.* at *5. Although the opinion did use the word "race" to describe some other Native Americans, that term was used as a pejorative that referred to the cultural "savages" who were, in the Court's view, the real Native Americans. *See id*.

429. *Joseph*, 94 U.S. at 616.

430. *Id.* at 617.

431. *Id*. at 616–17.

432. *Id.* at 617–18.

433. *Id.* at 618.

434. *Id.* at 618.

Another instance in which Native American status was defined through cultural choices rather than race involved treaties between the United States and certain tribes concerning whites that wanted to be tribal members. During the Jacksonian era, the Supreme Court held that a white man who was adopted by the Cherokees was not a Native American because race alone determined a person's status.[435] The Reconstruction Framers reversed this understanding and established voluntary choices as a key touchstone. For instance, one treaty ratified by the same Senate that passed the Fourteenth Amendment said:

> Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chicaksaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations . . . as though he was a native . . . .[436]

This treaty and *Lucero* make it clear that many legal authorities during this era defined Native Americans by their choices about culture.[437]

The conclusion that may follow from this analysis is that the Equal Protection Clause can be read, consistent with its original understanding, as a two-tiered structure that extends heightened protection to certain immutable or visible characteristics and to some choices that involve fundamental questions of personal autonomy. The first track is the traditional approach, which draws its authority from the African-American Paradigm and looks at whether a distinction is based on an immutable or visible trait that is analogous to race. The other track derives from the Cherokee Paradigm and would examine whether a distinction is based on a critical aspect of personal identity that is analogous to the cultural choices that determined Native American status. Such a dual approach would acknowledge that the views of the Reconstruction Framers were shaped by the brutal discrimination that was inflicted on two different paradigm groups.

Describing the second track as covering choices about fundamental facets of personal identity is an attempt to capture what

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435. United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1845).

436. Treaty with the Choctaw and Chickasaw, Apr. 28, 1866, art. 38, 14 Stat. 769, 779.

437. *Cf.* KEYSSAR, *supra* note 345, at 59 ("The prevailing view in much of the nation, however, was that Native Americans . . . ought not be excluded from the franchise on *racial* grounds: as long as they were 'civilized' and taxpaying, they should be entitled to vote.").

discrimination against Native American status is all about. That choice is distinctive because it cuts to the heart of a person's beliefs on a range of sensitive issues including religion, lifestyle, and culture.[438] Rescinding these decisions would require people to transform who they are in a most basic sense. And the legacy of the Cherokee Paradigm suggests that this is a choice that the Constitution cannot force upon someone.[439] During the Removal Crisis, the Tribe's members had the option of remaining true to themselves and being hounded into exile or staying in Georgia and having their identity stripped away. It was precisely this choice that the opponents of Removal and their abolitionist heirs denounced as unjust.

Accordingly, the Cherokee Paradigm could expand heightened scrutiny to include basic choices about personal identity. Though that

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438. Granted, these choices are not completely a matter of free will. For example, when we are born into a particular religion, we are not free to abandon our faith until we reach adulthood. Furthermore, our cultural background exerts a powerful pull on our subsequent choices. Nevertheless, these choices are more easily made than changing an immutable trait like race.

439. A contemporary application comes from Justice O'Connor's concurring opinion in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), in which the Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and voided a law that barred same-sex sodomy, *see Lawrence*, 123 S. Ct. at 2484. Instead of embracing the majority's privacy rationale, Justice O'Connor concluded that the statute was unconstitutional because its distinction between homosexuals and heterosexuals was based solely on the State's moral disapproval of the former, which "is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 2486 (O'Connor, J., concurring). To support this conclusion, she cited a handful of cases that stand for the proposition that a statute was most likely to flunk rational basis review where "the challenged legislation inhibits personal relationships." *See id.* at 2485 (O'Connor, J., concurring) (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985) (striking down an ordinance that discriminated against the retarded), and United States Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973) (voiding a law that discriminated against hippies)).

Putting aside the question of whether this is really an exercise in heightened scrutiny rather than rational basis review, the problem with Justice O'Connor's opinion is that it fails to explain why her analysis follows from the Fourteenth Amendment itself. For some of us, this detail still matters. And even those who are not troubled by this problem must recognize that the Court's decisions in this area will be vulnerable so long as it appears that the Justices are doing nothing more than substituting their moral disapproval for the moral disapproval of State legislatures.

The Cherokee Paradigm might provide a rationale that would both legitimize and limit this thread of equal protection doctrine. Although the specific issue presented in *Lawrence* cannot be resolved through this framework without a deeper inquiry into the relevant sources, the Cherokee Paradigm does indicate that distinctions based on choices about personal identity that are analogous to Native American status are suspect. Applying this test will give judges more tangible guidance by focusing their inquiry on a defined set of texts relating to the Tribes. This would have the advantage of diminishing the ad hoc quality of the doctrine in this area while recognizing that there is a historical basis for addressing discrimination that falls outside of traditional Fourteenth Amendment analysis.

approach is not a silver bullet, it may be the best way of interpreting the Reconstruction Framers' focus on Native Americans as a paradigmatic group for equality analysis.

CONCLUSION

By taking a fresh look at the primary sources, this Article restores the forgotten link between the Cherokee Removal and the Fourteenth Amendment. The Reconstruction Framers recalled *Worcester* from a deliberate exile. We must recall it from the doldrums of neglect. In so doing, courts and scholars will finally be able to keep faith with our constitutional past.

Yet there is more to this project than historical integrity. Adding the Cherokee Paradigm to the toolbox of Fourteenth Amendment analysis provides valuable insights that only a holistic approach can bring. And by focusing attention on the first abused minority in our history, the law will memorialize a set of injustices that have been ignored to the continuing detriment of too many Americans. That is the only way we can overcome the legacy of The Trail of Tears and ensure that the path forward leads to greater liberty for all.