

**Subaltern Voices In The Trail Of Tears: Cognition
And Resistance Of The Cherokee Nation To
Removal In Building American Empire**

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“Time here had “snowed its centuries upon them.” They were here, doubtless, before the pyramids were planted or ever the Sphinx had lifted his head above the Libyan sands. Their nation was venerable when the British Empire was in the cradle of its infancy and the Anglo-Saxon were clothing themselves in skins and sleeping in the drifted leaves of the forest.”

DeWitt Clinton Duncan, Too-qua-stee

“Trail of Tears, 1932. Trail of Cheers, 1972.”

Ocmulgee National Monument Souvenir

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“Mystified ... standing with the rest of us, who used to rule the world.”

Bonnie Raitt, 2012

Empire, since publication of the book by the same name, by Michael Hardt and Antonio Negri¹ has generated almost an obsession for revisionist social theorists. In this literature, the idea and history of empire is structurally dialectical - the ongoing interaction between imperialist colonizers and subordinated indigenous or subaltern populations and cultures connected with the colonized space. “Empire is quintessentially about constructing hierarchies between peoples, subordinating one or more groups to enrich another.”²

Included in this literature are two recent works that present a curious view of American Empire, and its relatively early and key history of removal of Eastern Native nations to west of the Mississippi. The curiosity in the book by Sean Wilentz,³ and an article more focused on law by Paul Frymer⁴, is that the exceptional histories of removal they report include the voice of none of the removed populations, the subalterns by which the imperialists are in part constructed. As Frymer ironically recognizes in another context, to include a wider account would complexify the narrative – undoubtedly so, but necessary to empire reconstruction. In the case of the Cherokee Nation this is inexplicable in that the Cherokees published their own newspaper from 1828⁵ until a Georgia Militia seized and broke the

1. MICHAEL HARDT AND ANTONIO NEGRI, *EMPIRE* (2000).

2. Paul Frymer, *Building an American Empire: Territorial Expansion in the Antebellum Era*, 1 U.C. IRVINE L. REV. 913, 915 (2011).

3. SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (New York: W.W. Norton & Co., 2005). Of course, Wilentz’s main argument is not about empire, but removal is a recurring and somewhat embarrassing topic in Jacksonian Democracy: “Nothing exculpates Jackson and his pro-removal supporters from the basic truths in the anti-removal arguments. Jackson’s paternalism was predicated on his assumption, then widely but not universally shared by white Americans, that all Indians ... were ‘erratic in their habits’ and inferior to all whites. His promises about voluntary and compensated relocation, and his assertion that Indians who wished to remain near ‘the graves of their fathers’ would be allowed to do so, were constantly undermined by delays and by sharp dealing by War Department negotiators – actions Jackson condoned.” *Id.* at 326.

4. P. Frymer, *supra* note 2.

5. *The Cherokee Phoenix*.

presses at the beginning of the Trail of Tears in 1835, and emphasized legal strategies in resistance to removal, that accounts of the rigged treaty process that provided the fig leaf of legitimation for the imperial power, are available, and that the Cherokee were the exclusive focus of public debate over removal of all the Eastern tribes.⁶ This comment interrogates the two publications as stand-ins for the literature (not necessarily exemplars), and recovers the “lost” voices of the Cherokees experience and resistance to removal. This is not at all to attack the history in the two works. Both are careful and sophisticated. Professor Wilentz convincingly shows how President Andrew Jackson’s pushing through removal and failing to protect the Cherokees substantially strengthened the southern states, and indirectly promoted the ideology of Calhoun’s emerging State’s nullification, if not secession. In turn, Professor Frymer’s article, correctly smashing the myth of the weakness of the federal (central) government, connects the willingness of the federal government’s ceding to state control of territory to limitlessly avaricious private and public Georgian control of local law courts, with unwillingness to abide by United States treaties. Disinterest and avarice caused and strengthened racial hierarchy of whites over both black slaves and red “savages.”

Two points can be faulted in otherwise excellent interrogation of the means taken to American empire in the first half of the nineteenth century: First, the internal critique that the empire was not hatched as full blown architecture of white Machiavellian power. Empire assumes dialectical hierarchy of power and control, oppression and resistance.⁷ In this review the record is simply being documented as necessary to recover the subalterns assumed by the histories because they were there, and had to be there, in the history of subordination. They did not go quietly into that good night. Second, if the subaltern voices had been included, important points of both historians’ claims, while complexified, would in the end be strengthened!

For the subaltern population the removal was part of the American Genocide. Of the maximum of 17,000 Cherokees in their territory of parts of Tennessee, North Carolina, Alabama, Georgia, and Virginia; between 1,000 and 2,000 persons removed voluntarily before

6. JILL NORDGREN, *THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY*, 45, *passim* (Norman: Univ. of Oklahoma Press, 2003)(1996).

7. I am indebted for this quatrain to the work and thought of Martha Mahoney.

forced removal, an estimated 1,000 escaped arrest and stayed in mountain hiding; but more than 2,000 perished in the camps where they were collected before transporting to the west, approximately 2,000 more died on the trail, and 3-4,000 died from disease and starvation upon arrival in the west, many from sickness contracted on the trail. The most vulnerable at all points of the removal were the elderly and children. Up to 8,000 dead out of 15,000 people⁸ - the Trail of Tears.

Two primary legal “justifications” for removal were offered by the settlers of Georgia and South Carolina - “conquest” and “non-European savagery.”⁹ Neither applied. The precipitate event of land frenzy dooming the Eastern Cherokee in real-politic was the 1828 discovery of gold at Dahlanaga (Georgia [sic]). The early version of the first justification, “discovery,” was adopted by Justice John Marshall in *Johnson v. McIntosh*¹⁰, holding that European discovery of unclaimed land created dominion over natives having no (European) recognized territorial government. This heavily criticized doctrine by the time of removal had been narrowed somewhat to the idea of conquest, in part given the vast territories beyond colonial/state control in North America. But for the Cherokee there had been no conquest. The vast land of the Cherokees was never occupied by a conqueror. The closest claim was that the Cherokee Nation had allied with the losing French in the French and Indian War, whereby England took French colonies in North America, part of which succeeded to the United States after the revolution. This is the source of the dependent sovereign notion of John Marshall in *The Cherokee Nation v. the State of Georgia*.¹¹ Such status still included sovereignty of the Cherokee Nation, and should have preempted the claim of states even as to control of territory within their own disputed boundaries.

The second justification was simply laughable. Here

8. S. Wilentz, *supra* note 3, at 327. VICKI ROZEMA, VOICES FROM THE TRAIL OF TEARS, 40 (Winston-Salem: John F. Blair, 2003). In all, over 90,000 Native Americans were removed in the South, with similar mortality rates.

9. For the best account of removal legitimation, *see*, TIM A. GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS, (Athens: Univ. of Georgia Press, 2002).

10. 21 U.S. 543 (1823). For the complete history of the *Johnson* controversy and case, *see* LINDSAY ROBERTSON, CONQUEST BY LAW (Oxford: Oxford University Press, 2005).

11. 30 U.S. 1 (1831).

complexification begins.

One is that the debate over removal policy that occurred in the press, various public settings, and Congress focused on the Cherokee. To many, the Cherokees demonstrated that Indians could change and that someday they could be integrated into American Society. Furthermore, the Cherokee leaders during the removal crisis of the 1820s and 1830s were uniquely well educated and extraordinarily articulate in both spoken and written English.¹²

The Cherokee had their own written language and developed legal code based on a Constitution like that of the United States. The written language, based on a syllabify, was understood by an astounding 85% of the people, a rate never approached by the European population of the United States.¹³ Many of the mostly mixed breed land owning class were college graduates. Of those, many studied law. Cherokee culture diverged from the European to be sure, which complicated understanding of their own view of land law, but did not prevent Cherokee adoption and deployment of legal resistance to removal on European terms. By the time substantially before removal, the Cherokee understood exactly what was happening to them. Indeed heated argument over removal split the tribe into separate “Treaty” (Ridge) and “Traditional” (Ross) political parties, which erupted in civil war during removal in the “Indian Territory.” The Cherokee were a complex and sophisticated subaltern.

I. CHEROKEES AND CIVILIZATION:

Prof. Frymer asserts that incorporation and assimilation were never seriously considered.¹⁴ Perhaps not by whites, but by the Cherokee who consciously gave over from hunting to modern agriculture, frequently intermarried, and adopted Christianity. The Blue Ridge and the Smokies were not unabashedly the Deep South.

12. THEDA PERDUE AND MICHAEL D. GREEN, *THE CHEROKEE NATION AND THE TRAIL OF TEARS*, XIV (New York: Penguin Books, 2007).

13. *See generally*, RENNARD STRICKLAND, *THE CHEROKEE PEOPLE*, 20-23 (Phoenix: Indian Tribal Series, 1973); ROBERT J. CONLEY, *THE CHEROKEE NATION: A HISTORY*, 105-06 (Albuquerque: Univ. of New Mexico Press, 2005). Both authors are Enrolled Cherokee.

14. P.Frymer, *supra* note 2, at 926.

As early as 1819, the Cherokees made the question of civilization a subject of deliberation in the council of the nation. "Shall the Cherokee adopt the habits, customs, and institutions of the white race, or shall they continue in the way of their forefathers?" ... They determined in favor of civilization. Accordingly, they organized a civil government founded on the three fundamental ideas: Law, Law understood, and Law Executed. The rights and liberties of the citizens were suitably guaranteed; religion was made free; morality encouraged and education provided for.¹⁵

Elias Boudinot, editor of *The Cherokee Phoenix*, wondered, "Where have we had an example in the whole history of man, of a nation or tribe, removing in a body, from a land of civil and religious means, to a perfect wilderness, *in order to be civilized*."¹⁶

II. REMOVAL: TRAIL OF TEARS AND SUBALTERN VOICES¹⁷

In the memory of the Cherokee, removal was forced, and conditions horrific:

Finally the Cherokees knew that they had to go some place because the white men would kill their cattle and hogs and would even burn their houses in Georgia.¹⁸

The food on the Trail of Tears was very bad and very scarce and the Indians would go for two of three days without water, which they would get just when they came to a creek or river as there were no wells to get water from. There were no roads to travel over, as the country was just a wilderness. The men and women would go ahead of the wagons and cut the timber out of the way

15. DEWITT CLINTON DUNCAN, STORY OF THE CHEROKEES, *Cherokee Advocate*, October 6, 13, 20, 27, (1882) available at Digital Library, American Native Press Archives, Univ of Ar. Little Rock.

16. Quoted in STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER, 211 (Cambridge, Harvard Univ. Press, 2005).

17. The Cherokee descriptions of the Trail of Tears will proceed without elaboration in their own voices and that of their ancestors. In the next section, the legal arguments will rely on contemporary Cherokee voices to elaborate their claims as much as possible. Restatement adds nothing. Speculative conclusions will follow in Section IV.

18. Interview with Mary Cobb Agnew (May 25, 1937), OKLAHOMA FEDERATION OF LABOR COLLECTION, M452, Box 5, Folder 2 (Western History Collections, Univ. of Oklahoma, Norman, Oklahoma).

with axes.¹⁹

Many had chills and fever from the exposure, change of country and they didn't have too much to eat. When they would get too sick to walk or ride, they were put in the wagons and taken along until they died. The Indian doctors couldn't find the herbs they were used to and didn't know the ones they did find, so they couldn't doctor them as they would have at home.²⁰

The form of law invoked, militia enforced at the outset:

In 1835, after serving a term in the Georgia penitentiary, because of his firm fidelity to the tribe, my grandfather, Rev. Worcester, was forced to leave Georgia. His notice to evacuate follows:

It becomes my duty to give you notice to evacuate the lot of land No. 125, in the 14th District, of the third section, and to give the house now occupied by you to Col. William Handen, or whoever he may put forward to take possession of the same and that you may have ample time to prepare for the same, I will allow you until the 28th day of this month to do the same.²¹

Settlers being avaricious, little could be taken:

My mother was about twelve years old when they were forced to leave Georgia and I have heard her say that before they left their homes there that the white people would come into their houses and look things over and when they found something that they liked, they would say, "This is mine, I am going to have it", etc. When they were gathering their things to start they were driven from their homes and collected together like so many cattle. Some would try to take along something which they loved, but were forced to leave it, if it was of any size. The trip was made in covered wagons and this made many of the women sick, but they were forced along just the same. When they reached streams and rivers, they did not want to cross and they were dragged on the boats.²²

The U.S. military followed when the Cherokee refused, with collection brutal:

19. Interview with Lilian Anderson (August 20, 1937), *Id.*

20. Interview with Rachel Dodge (May 14, 1937), *Id.*

21. Interview with Herbert Worcester Hicks (March 30, 1937), *Id.*

22. Interview with Joanna Jones (July 15, 1937), *Id.*

They died by the hundreds and were buried by the roadside. As they were not allowed to remove any of their household goods, they arrived at their destination with nothing with which to start housekeeping.²³

After the soldiers appeared, they began to build stockades to house the Cherokees until they could get them moving. All over the Cherokee country they went, bringing in all of them, old and young, male and female and their babes, the sick, the lame and the halt. They hunted them down like hunting wild beasts and when they found them, they drove them under threats and blows like cattle to these stockades. These stockades were over crowded, disease broke out among them and many of them died with dysentery. Poor food and poor water, no doctors and no medicine.

In due time parties were started west, under the charge of soldiers. These parties were driven through like cattle. The sick and weak walked until they fell exhausted and then were loaded in wagons or left behind to die. When streams were to be crossed if not too deep all were compelled to wade. The water often times was to the chins of the men and women, and the little children were carried high over their heads. If the water was over their heads they would build rafts and cross on them.

Chief Ross and the Council begged the Government to let them take over the moving after a few parties had been moved by the soldiers and this was agreed upon. They began to establish camps and their health got better. It was only a short time until Chief Ross had worked out the details for the removal and he moved his people in groups through Kentucky, Illinois, Missouri, Arkansas, and then into the Indian Territory. This journey was called the "Trail of Tears".

Unlike the moving by the army, arrangements were made whereby the old, sick and afflicted and the babies rode on the wagons hauling provisions and household goods. The others walked or rode horseback. These wagons hauling provisions were Government property.

Even with these arrangements many died on account of cold and

23. Interview with Mary Payne (May 10, 1937), *Id.*

hunger enroute and were buried in unmarked graves.²⁴

Legal resistance proved futile:

The white people used all means to get the Indians out of Georgia. Claimed they were barbarians, and they, the Cherokees, made new laws, just like the ones we had here in the Nation. John Ross was elected Chief of all the Tribes of Cherokees. Ross did all he could to get to stay there, but the Georgia white man passed laws and more laws, and law or no law, they destroyed the Indian's fences, and crops, and killed their cattle, burned their homes and made life a torment to them.

The Cherokees began to think of joining the West Cherokees. They simply could endure no longer. Like everything, it took a leader, and Major Ridge, his son, John Ridge, and two nephews, Elias Boudinot and Stand Watie became leaders. Of course, John Ross was the Chief and they all got to squabbling. Ross did not want to move his people, but by some hook or crook, Boudinot and Ridge signed a treaty to move, and claimed it was the will of the majority, but it was not, and the Government united a little while and sent Gen. Scott and two or three thousand soldiers. The soldiers gathered them up, all up, and put them in camps. They hunted them and run them down until they got all of them. Even before they were loaded in wagons, many of them got sick and died. They were all grief stricken. They lost all on earth they had. White men even robbed their dead's graves to get their jewelry and other little trinkets.

They saw to stay was impossible and the Cherokees told Gen. Scott they would go without further trouble and the long journey started. They did not all come at once. First one batch and then another. The sick, old, and babies rode on the grub and household wagons. The rest rode a horse, if they had one. Most of them walked. Many of them died along the way. They buried them where they died, in unmarked graves. It was a bitter dose and lingered in the mind of Mrs. Watts Grand-parents and parents until death took them. The road they traveled, History calls the "Trail of Tears". This trail was more than tears. It was death, sorrow, hunger, exposure, and humiliation to a civilized people as were the Cherokees. Today, our greatest politicians, lawyers, doctors, and

24. Interview with Josephine Pennington (October 12, 1937), *Id.*

many of worthy mention are Cherokees. Holding high places, in spite of all the humiliation brought on their forefathers.²⁵

On one occasion she told of an officer in charge of one of the wagons, who killed a little baby because it cried all the time. It was only four days old and the mother was forced to walk and carry it, and because it cried all of the time and the young mother could not quiet it, the officer took it away from her and dashed its little head against a tree and killed it.²⁶

And no paradise appeared at the end of the trail:

Grandpa and Grandma leave North Carolina, in old country, come Georgia, that old country too, stay there year. . . . 1837, soldiers drive um West. . . . Grandpa and Grandma no want come. Soldiers say go or kill you. Stick bayonet in you. They get things one night, skillet, pot, dishes, clothes, bedclothes too. . . . got dish grandma bring. I eat beans out em, I boy. It was an old piece of pottery, highly polished. Bowl was fashioned with handles, handles broken off, but designs on it were beautiful. See bowl, is over hundred years old. Next day soldiers drive um out. Easy first day. Make soldiers feel good. Every day worse. Just drive um like cattle. Grandma say she walk, grandpa walk too or soldiers run bayonets through um. They walk, wade creeks to chin, lots mud some places. Cross rivers in canoes. Soldiers save canoes, sometimes hollow logs, made um boats, go cross river. Yuh, soldiers have wagons. Feed um two times some days, sometimes feed um one time. Soldiers eat all time, take care horses better than my grandma-grandpa. Yuh-they bring skillet some things grandma had. Yuh - lots die, lots sick, lots die, two week walk, they die, bury em where they die, any place. Yuh - clothes bad, tore em, dirty too, clothes all gone when get here. Throw lot way on road, no good.

They get here, lots timber, land no good in hills, all right in valley Yuh - Grandma hate white man. Give all land, good land, in old country meaning North Carolina and Georgia. . . . white man say "Trail Tears", she say: "Trail Death".²⁷

25. Interview with Elizabeth Watts (April 27, 1937), *Id.*

26. Interview with Bettie Woodall (September 20, 1937), *Id.*

27. Interview with Ellis Waterkiller, *Id.*

III. REMOVAL: POLICY AND SUBALTERN RESISTANCE

Let the Cherokees voice their own arguments and resistance:

We are opposed, as our readers undoubtedly know, to the removal of the Cherokees ... It is now admitted by all, we believe, that we are an improving people; that we are on a constant and gradual march toward a civilized state; and that, although we have to encounter many counteracting influences, yet, we are on the increase in numbers; and that the present appearances are favorable to our complete recovery from a savage state.²⁸

A group of Cherokee women wrote *The Cherokee Phoenix*, “We believe the present plan of the General Government to effect our removal West of the Mississippi, and thus obtain our lands for the use of the state of Georgia, to be highly oppressive, cruel, and unjust.”²⁹

If law would not intervene, removal would be by force by whatever means it was denominated.

Will the men of 1840 or 1850, be more tender of the reputation of President Jackson than the men of the present day are of the reputation of President Washington? Will they not say, that the pretended treaty of 1832 (if a treaty should now be made) was an act of their usurpation? That it was known to be such at the time, and it was never intended to be kept? That every man of sense considered the removal of 1832 to become one of those few steps necessary to the utter extermination of the Indians; that the Indians were avowedly considered as children, and the word treaty was used as a plaything to amuse them, and to purify grown up children among the whites? ... I would close by saying, “that if the Indians are removed, in an open and manly tone, that they are removed because we have the power to remove them, and there is a political reason for doing it; and that they will be removed again whenever the whites demand their removal; let it be said in a style sufficiently clamorous and imperative to make trouble” for the advocates of a measure so unrighteous and oppressive.³⁰

Removal could not be thought to be of benefit to the Cherokee:

I suppose Andrew Jackson thinks that the people away here

28. Elias Boudinot, editor, *The Cherokee Phoenix*, April 24, 1828, at 3.

29. *The Cherokee Phoenix*, November 12, 1831.

30. Naboth, *The Cherokee Phoenix*, February 4, 1832, at 2.

towards the East, will believe what he says about this “interesting subject;” but he need not deceive himself in this way; for he may rest assured that every time he writes against our red brethren, that comes before the world, raises the virtuous indignation of thousands of our most rational citizens, who are opposed to ROBBERY, TYRANNY and SLAVERY. And according to the best information that I am able to obtain, Andrew Jackson is robbing this oppressed people of their lands and their liberties, and by his agents tyrannizing over them contrary to law, and numerous treaties, which the Indians only ask for the fulfillment of, and thus he is forcing them into the wilderness, and into a state to them, no better than slavery; where they will no doubt be accounted intruders upon the lands of other tribes of Indians, with whom they may ere long involved in conflicting and bloody wars.³¹

Indeed, removal violated the highest law of the land, treaties of long standing, whose non-enforcement violated the U.S. Constitution.

Your Committee regret to perceive that the difficulties, which have grown up like the grass in the season of spring, in consequence of the withdrawal of the protection guaranteed to us by treaty, are rapidly increasing, and the Cherokee Nation is besieged and assailed by the unholy combinations of interest and cupidity of the States immediately interested. The treaties, laws and the decision of the Supreme Court do not appear to have that moral influence with the President, or the American people, which we desire. It is also evident, that unless this influence is lighted up in the Executive and Legislative Departments of the United States Government and properly respected by the officers filling those Departments, our own Government will gradually expire by the violent and usurping hands of the neighboring States.³²

Cherokee opposition up until all legal means exhausted, was virtually unanimous. The Cherokee could not comprehend their abandonment.

Soon after their arrival in the City they presented to Congress a petition from our National Council asking for the interposition of

31. John Ross, Principle Chief, before Cherokee General Council, Red Clay, February 5, 1832, *The Cherokee Phoenix*, March 1, 1832, at 2.

32. John Ridge, Richard Fields, John Timson, David Vann, General Council, Red Clay, October 23, 1833, *The Cherokee Phoenix*, November 23, 1833, at 1-2.

that body in our behalf, especially with reference to the laws of Georgia, which were suspended in a most terrifying manner over a large part of our population, and protesting in the most decided terms against the operation of those laws. In the course of the Winter they presented petitions to Congress, signed by more than four thousands of our citizens, including probably more than nineteen twentieths, and for ought we can tell ninety-nine hundredths, of the adult males of the Nation, ...pleading with the assembled representatives of the American people, that the solemn engagements between their fathers and our fathers may be preserved, as they have been till recently, in full force, and continued operation; asking, in a word, for perfection against threatened usurpation, and for faithful execution of a guarantee which is perfectly plain in its meaning, has been repeatedly and rigidly enforced in our favor ...

We are aware that some persons suppose it will be for our advantage to remove beyond the Mississippi. We think otherwise. Our people universally think otherwise. Thinking that it would be fatal to their interests, they have almost to a man sent their memorial to Congress, deprecating the necessity of a removal. ...

We have been called a poor, ignorant and degraded people: We certainly are not rich; nor have we ever boasted of our knowledge or our moral or intellectual elevation. But there is not a man within our limits so ignorant so as not to know that he has a right to live on the land of his fathers, in possession of his immemorial privileges, and that this right has been acknowledged and guaranteed by the United States; nor is there a man so degraded as not to feel a keen sense of injury, on being deprived of this right and driven into exile.³³

33. Lewis Ross, President of the Committee, James Daniel, Jos. Vann, David Vann, Edward Gunter, Richard Taylor, John Baldrige, Samuel Ward, George Sanders, Daniel Griffin, Jr., James Hamilton, Alex M'Daniel, Thos. Foreman, John Timson, W.S. Coddley, clerk, Going Snake, Speaker of the Council, James Bigbey, Deer-in-the-water, Charles Reese, Sleeping Rabbit, Chu-nu-gee, Bark, Laugh-at-mush, Chuleowah, Turtle, Walking Stick, moses Parris, J.R. Daniel, Slim Fellow, Situake, De-dal-le-lu-ge, Robbin, Tah-lah-doo, Nah-hoo-lah, White Path, Ne-gah-we, Dah-ye-ske, John Ridge, Address to Congress, New Echota, July 17, 1830, *The Cherokee Phoenix*, July 24, 1830, at 1. One petition to Congress was signed by 12,719 Cherokee. Theda Perdue and Michael Green, quoting Chief John Ross, *The Cherokee Removal: A Brief History with Documents*, 156 (Boston: Bedford/St. Martins, 2005).

IV. LEGAL DIALECTIC – IMPERIUM AND SUBALTERN

In 1802, the United States guaranteed Georgia the lands belonging to the Cherokees within Georgia's territory, *provided and not until*, the Cherokees consented. Thereafter numerous treaties ceded lands to the United States, or to private trading companies to whom Cherokees ran up an unknowing high debt.³⁴ Frequently the debt was expunged, not for Cherokee property directly, but for the ability to receive property upon a United States treaty to receive said land. Federal power first therefore appears as the sole power to make treaties including the purchase of Indian territory. Relying on this principle, in 1819, the Cherokee National Council decided to make no further treaty cessions of land. This would not prevent localized legal contests over land holdings, from which Cherokees were often excluded.

To some Cherokees there was epistemic confusion on what was ceded even in agreed resolutions. Historically, their concept of property was for use of the surface for as long as needed by the individual or family, reverting to the communal tribe upon ceasing use.³⁵ Indeed this was more than tradition, while it clearly was that as well. Undivided, communal land made an implied claim to sovereignty over all land of the Nation, the key to the Cherokee legal strategy. It was also economic as the Nation shifted to full reliance on agriculture, "Cherokee planters recognized that the practice of holding land in common freed capital for investment elsewhere. Therefore, they became even more committed to preserving common title to land and resisted any attempt to allot the Cherokee domain to individuals."³⁶ It became clear over time that white settlers held a quite different view of property in perpetuity. " 'Whites always acquired Indian land within a legal framework of their own construction,' a construction that rested on judicial and common law rules and institutions that would enable property transactions to continually benefit settlers and speculators at the expense of indigenous people." (who were also often unable to afford legal fees).³⁷

Beyond the manipulation of property law, in 1828, the state of

34. P. Frymer, *supra* note 2, at 932, 936, 943.

35. P. Frymer *supra* note 2, at 943, 945. *See also*, T. Garrison, *supra* note 9, at 36-39.

36. T. Perdue and M. Green, *supra* note 10, at 36.

37. *Id.* at 919 (quoting STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER, 4 (2005)).

Georgia pursued an explicit legal strategy of removal by inconvenience and approved vigilantism; withdrawing criminal law protections of Cherokee individuals, prohibiting Cherokees from appearing or arguing in state courts (making it impossible to resist fraudulent land claims by whites), and making it a crime for any white to enter Cherokee land, by refusing Cherokee gold claims while recognizing white claims within Cherokee territory. Banning whites from Indian land thereby foreclosed craftsmen, missionaries, teachers, in short, all men of skills, even including the printers necessary to run the presses of *The Cherokee Phoenix*. Chief John Ross responded, “The clouds may gather, thunders roar & lightning flash from the acts of Ga. Under the approbation of Genl. Jackson’s neutrality, but the Cherokees with an honest patriotism & love of country will still remain peaceably and quietly in their own soil.”³⁸ The Cherokee Nation continued their strategy of the 1820’s, demanding treaty enforcement and federal protection of rights gained from them. Yet, however strong or weak the federal government, the blind eye of Andrew Jackson subordinated the Cherokee to the Georgians.

Internal dispute within the Nation, coupled with federal negotiation strategies, aided Georgian aggressiveness, weakening resistance. To the contrary of neutrality, Andrew Jackson’s Executive acted by forcing through Congress in stacked Committees and on party lines, the Removal Statute of 1830. By now in 1832 seeing little realistic alternative to their mind, former anti-removal Cherokees, notably John Ridge and Elias Boudinot, switched to promoting voluntary removal. By the Treaty of New Echota of 1835, an unauthorized Treaty Party, representing less than one hundred voting Cherokees, authorized removal from Eastern lands in exchange for land in Indian Territory, West of the Mississippi and \$ 5 million dollars. The Pro-Treaty party explained,

[Delegates] express ... that it is impossible for them, in the present state of things, to retain their national existence, and to live in peace and comfort in their native region. They therefore have turned their eyes to the country west of the Mississippi, to which a considerable portion of their tribe have already emigrated; and they express the opinion that they are reduced to the alternative of following them to that region, or of sinking into a condition but

38. *Id.* at 69 (quoting Chief John Ross, 1830).

little, if at all, better than slavery.³⁹

Later, in 1837, Elias Boudinot more strongly defended the minority action, “we can see strong reasons to justify the actions of a minority of fifty persons to do what the majority *would do* if they understood their condition – to save a *nation* from political thralldom and moral degradation.”⁴⁰ Thus federal policy was fully complicit – from Treaty land purchases indirectly meant for European settlers, to non-enforcement of existing Treaty guarantees to Cherokees, to a knowingly illegitimate Treaty for removal in the shadow of federal statute.

The result would be civil war between the Treaty Party and the Traditionalists who opposed removal until military removal by the United States. Major Ridge, John Ridge, and Elias Boudinot were all assassinated for their signature on the document shortly following removal.

Before the military accompli of 1836-39, given the Georgia/federal constellation of actions, the Cherokee Nation had long decided resistance to removal would exclusively be a strategy of law – lobbying Congress in Washington DC and challenging State’s actions in federal court.⁴¹ “The Cherokees are for justice and they are trying to obtain it in a peaceable manner by a regular course of law. If the last and legitimate tribunal decides against them, as honest men the Cherokees will submit and the ‘agony will be over.’”⁴² Far from a passive client, the Cherokee National Council sent numerous written interrogatories to Wirt and approved Wirt’s briefs in the litigation before their filing.

Three times cases reached the Supreme Court. Twice, the cases failed on procedural or subsidiary grounds. When the Cherokee Nation won in the third, *Worcester v. Georgia*,⁴³ Andrew Jackson famously (but perhaps apocryphally) stated, “John Marshall has made his decision, now let him enforce it.”⁴⁴ The Court was defied, and Georgia continued apace to supplant the Cherokee. In the litigations, the Nation

39. V. Rozema *supra* note 8, at 15 (quoting Council at Running Waters)

40. T. Perdue and M. Green, *supra* note 10, at 91.

41. *Id.* at 74-77.

42. Strickland, *supra* note 11, at 23 (quoting Elias Boudinot, *The Cherokee Phoenix*, March 5, 1831).

43. 31 U.S. 515 (1832).

44. P. Frymer, *supra* note 2, at 942.

was represented by the famous Constitutional lawyer and former Attorney General of the United States, William Wirt.

Legal argument of the Cherokees themselves shaped resistance and response by the federal government.⁴⁵ Moreover, the conduct of the series of litigations precurred a larger dialectic involving the federal courts and federalism. Prof. Wilentz claims Jackson thought sovereignty within a state to be unconstitutional, or at least unrealistic.⁴⁶ Elias Boudinot thought the opposite and prophesized the federalism to come, “[Georgia had] hoist the flag of rebellion against the United States,” [if tolerated], the Union is but a tottering fabric, which will fall and crumble into atoms.”⁴⁷ While the federal military was strong enough to carry out removal, it was apparently too weak to enforce treaty rights and protect the Cherokee earlier – perhaps a particularly easy political choice, mollifying the Calhounists.

Legal claim resistance had to be through federal courts, but ultimately those courts failed the Cherokee. First, the Supreme Court in *Tassle*⁴⁸ held void state criminal proceedings against a native-American for conduct subject to Cherokee law on a reservation. Georgia refused to follow the direction of the Supreme Court to release George Tassel and instead hanged him. Second, in *Cherokee Nation*⁴⁹ the Court defined Cherokee sovereignty as neither a conquered people, nor an independent nation, but as a dependent sovereignty under potential administration of the federal Congress, but denied that judicial relief existed on behalf of the Nation against the State of Georgia.

Finally in *Worcester*, vindication seemed secured at last. The Court found the Cherokee Nation to be sovereign, recognized in international law, preventing Georgia’s prosecution of a white missionary charged with being found in Cherokee territory. Elias Boudinot rejoiced, “It is glorious news. The laws of the state are declared by the highest judicial tribunal in the country to be *null and void*. It is a great triumph on the part of the Cherokees.”⁵⁰ “In every community, it seemed, people celebrated with ‘Rejoicings Dances and

45. J. Nordgren, *supra* note 6, at 56.

46. S. Wilentz, *supra* note 3, at 325

47. Elias Boudinot, *The Cherokee Phoenix*, January 8, 1831.

48. *State v. Tassels*, 1 Dud. 229 (1830).

49. *supra* note 11.

50. R. Conley, *supra* note 13, at 135.

Meetings”⁵¹ Still Rev. Worcester spent two years in Georgia jail. The Nation won recognition of their sovereign right to control their territory, but no federal court protection against State intrusion. President Jackson refused to protect Cherokees by claiming there was no federal power to interfere within the territory of a state, begging the question of whether Cherokee Nation territory lay within any state. Thus the Cherokee ultimately lost their most promising and European forum, the federal courts.

Jackson did however believe Congress had federal authority to act upon the Cherokee Nation under the Indian Commerce Clause, and thus pushed through removal. Of course extensive preemption of state power within a state had been earlier upheld in Marshall’s masterpiece, *McCulloch v. Maryland*⁵². Thus Jackson’s view of deferring to the democratic decisions of a state within its territory would presage the complete overthrow of the centralized union envisaged by Marshall. Instituted by his successor, Roger Taney, appointed precisely to overrule all the important Marshall federalism decisions. Taney’s reign culminated with complete state control of property prohibiting federal power to interfere even in federal territories with original state property grants – that is, *Dred Scott*⁵³. Marshall seemed to catch on too late to save federal court power within the central government. By the time of his revised more favorable view of Cherokee sovereignty in *Worcester* would have strengthened federal power, not just by upholding Congress under Commerce powers, but upholding federal court power to enforce his national federalism, the country’s political commitments were rapidly disintegrating before increasing nullification and states rights challenges to all federal powers.⁵⁴ One year after the *Worcester* decision, South Carolina passed the first nullification act on a tax/licensing policy of the federal government. The rise of Calhoun on the contrary was not lost on Jackson. Removing (some) slave owning Cherokees contributed to perpetuating slavery generally, even in the name of universal white male suffrage in the states – Jacksonian Democracy.

51. T. Perdue and M. Green, *supra* note 10, at 88.

52. 17 U.S. 316 (1816).

53. 60 U.S. 393 (1857).

54. Ironically contrast the federal court enforcement of a non-existing national executive power against a labor union during the states centered era in *In Re Debs*, 158 U.S. 564 (1895).

Follow the dialectic progression of Imperium and Subaltern. The States persecuted the Cherokees and asserted territorial control over the Nation, foreclosed a Law Strategy via state courts, forced the Law strategy into federal courts where the Nation was denied sufficient vindication of sovereignty until too late to change the political deluge, and denied enforcement of the federal law of treaties by the Constitution the highest law of the land, although federal courts were open to protect rights of American (white) citizens derived from Cherokee sovereignty, forcing a political appeal to the federal Congress that instead used federal power to pass removal that the Executive, possessing no federal power to protect the rights of the Cherokee, was only too willing to lend to military enforcement of Congressional removal – all of which dialectical moves of the dance were articulately predicted publically in intellectual precision and eloquent power by the “heathen” Cherokee Nation.⁵⁵ The stunted reasoning and subsequent dénouement contributed significantly to the legitimation campaign supporting slavery and predated and anticipated the jurisprudence of *Dred Scott*⁵⁶, and in material terms, contributed to the inevitability of the secession and the Civil War.

The geography of the United States ruled by the law of Whites, not because as Professor Frymer noted the weakness of the central government allowed rigged state law and law courts to protect land grabs and technicalities to alter titles, or as per Professor Wilentz, because a well intentioned Andrew Jackson truly thought the children Cherokee would be better off, or at least avoid extinction, in the west.⁵⁷ The subalterns lost their strategy of legal resistance to an Empire for whom law was disposable veneer. The Cherokee knew the law’s execution quite well, they believed the laws of the treaties would be enforced, and most tragically, they believed in *Law, Big Law, Capitalized Law, Law the Idea and Promise of Civilization*, as the bulwark of civilized society. They could not comprehend a free, Christian people abiding the untruths, the abandonment of Justice and Rights under Law, the desertion of literate, fellow Christians. And for this the subalterns were at fault in their naïveté. And the only

55. *supra* note 33.

56. *supra* note 53, *Dred Scott* was not just a bad dream, one of the most embarrassing judicial opinions in U.S. history. It was rather a mirror of and consolidation of constitutionalized racial power in historical context.

57. S. Wilentz, *supra* note 3, at 324.

barbarians in the room were with the Empire. ... Half the “protected” Cherokees died.

No matter how accurately the actions and tools of imperial triumph are detailed and rationalized, the meaning of empire must be voiced as well by the conquered or hierarchically oppressed.⁵⁸ If not, certainly the law, if not history itself, will be sanitized as perhaps merely unfortunate, and subordination as feebly resisted. Uncovering the dialectic of hierarchy more than the result of power triumphant is the necessary lesson of study of empire. Even very good histories of policies and events need to be interrogated.

The Technique of Empire, considered alone and by itself; Mystifies “... standing with the rest of us, who used to rule the world.”

58. HERBERT GUTMAN, *WORK, CULTURE AND SOCIETY*, 67 (New York: Vintage Books, 1976) (“[V]ictorious events come about as the result of many possibilities ... for one possibility that actually is realized, innumerable others have drowned...And yet, it is necessary to give them their place because the losing arguments are forces which at every moment affected the final outcome.” Fernand Braudel).⁴