

NJS Presents**The 2019 Paul A. Stellhorn New Jersey History Award Winning Undergraduate Papers****In this Issue:*****A Senator's Resolve and the Destiny of Two Nations: A Reappraisal of New Jersey's Theodore Frelinghuysen Role in the Cherokee Removal Debate of 1830*****By Perry Arrasmith****DOI: <http://dx.doi.org/10.14713/njs.v5i1.194>**

Throughout the first presidential administration of Andrew Jackson, debate over the removal of the Cherokee Nation from northern Georgia elected serious national controversy, with congressional rhetoric serving to document regional stances on the issue. While the executive actions of President Jackson and the Marshall Court's attempts to stymie Jackson are well-documented in prevailing historical narratives on the debate, the extent of congressional opposition to Jackson's Indian Removal Act remains less developed. Congressional records indicate that Senator Theodore Frelinghuysen¹ of New Jersey occupied a crucial position as the U.S. Congress's main opponent to the Indian Removal Act; his debates on the floor of the U.S. Senate laid bare the extent of the regional divide over the issue, as the relatively-obscure New Jerseyan openly questioned Southern supporters of Jackson about the morality of forced deportation of Native American populations. Frelinghuysen did not believe in equality between Whites and Native Americans, but he still maintained that Native Americans enjoyed rights greater than the Jackson Administration and his congressional allies were prepared to recognize.

The 1828 presidential election of Andrew Jackson marked a turning point in the history of the America's relationship with Native Americans. Prior to his election, the Cherokee, Creek,

¹ The Frelinghuysen family has been involved in state and national politics from the American Revolution to the present.

Choctaw, Chickasaw, and Seminole tribes maintained a fraught relationship with the states of Mississippi, Alabama, Georgia, and in particular, the United States Federal Government.

Against this background, the new president's decision to address the Indian question in his first annual address to Congress made it clear that he intended to settle the question of these tribes' political status once and for all. Jackson proposed "setting apart an ample district West of the Mississippi, and without the limits of any State or Territory, now formed, to be guaranteed [sic] to the Indian tribes, as long as they shall occupy it."² Jackson's decision was framed around the Cherokee's longstanding legal conflict with the state of Georgia over their claim to sovereignty. Such fights had been fought for decades, but Jackson's arrival meant that something was destined to happen. After all, Jackson's "strong stand in favor of rapid removal was well known and accounted for much of his popularity"³ throughout the lower south. Therefore, one of Jackson's first major actions was to introduce legislation calling for their immediate removal.

The introduction of an Indian Removal bill immediately consumed the first session of the nation's twenty-first Congress. In the midst of this debate, a little-known Senator from New Jersey, Theodore Frelinghuysen, emerged as the leader of the opposition to the president's bill. His April 6, 1830, address to the Senate marked the beginning of one of the strongest rebuttals to the President's bill, which continues to be cited and quoted among historians working to crystallize the nation's opposition to Cherokee removal. Figures both in favor of and against the legislation readily came forth, but the bill's eventual passage on May 28, 1830 relegated the efforts of those in opposition to defeat. However, voices of opposition like Frelinghuysen are today largely forgotten, and the true breadth of their opinions is lost in the process.

² 21st Congress, *Journal of the House of Representatives of the United States, 1829-1830* (Washington, DC: Duff Green, 1830), 24–25.

³ Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848*, Oxford History of the United States (Oxford ; New York: Oxford University Press, 2007), 342.

Previous biographies have painted Frelinghuysen's views using a simple frame without dissecting the nuance of his views. In some ways, those historians who write monographs about the period seem inclined to accept these simple interpretations. Instead of consigning Senator Frelinghuysen to the status of a superficial caricature serving a larger narrative, a re-examination of his role in the Cherokee removal debates offers to reconfigure and extend the actual nature of his opposition to the Indian removal bill beyond that of a 'Christian statesman.' In order to re-establish Senator Frelinghuysen's crucial role in the Indian removal debates, this paper will trace how Frelinghuysen has been traditionally received by historians, the circumstances of the national debate over Cherokee rights, and those arguments employed by Frelinghuysen on the Senate floor against Southeastern opponents. With a renewed approach and tolerant view of his arguments in favor of the Cherokee's political rights and liberties, one can begin to discern the true scope of congressional opposition to this newly elected President's proposal, and in the process of doing so, re-evaluate the stakes of this process and their true implications for the Jackson administration, and indeed, the fate of the Cherokee nation.

Over the course of the last century, Senator Frelinghuysen's legacy has been both complicated and simplified by contemporary politics and his Christian identity. Throughout the nineteenth century, the only serious biography of Frelinghuysen was Talbot W. Chambers' *Memoir of the Life and Character of the Honorable Theodore Frelinghuysen*. Chambers, a relative by marriage to Frelinghuysen, was determined to see the biography highlight Frelinghuysen's "recognized leadership among evangelical Christians of every name, and his relations to all the great Christian enterprises of the age."⁴ This 'Christianized' portrayal of Frelinghuysen followed

⁴ Talbot W. (Talbot Wilson) Chambers, *Memoir of the Life and Character of the Late Hon. Theo. Frelinghuysen, LL.D.*, Harvard College Library Preservation Microfilm Program 2002; 09008 (New York: Harper & Bros, 1863), iii, <http://nrs.harvard.edu/urn-3:HUL.FIG:003748917>.

him into the twentieth century, where the only other biography was written by a Christian author, Robert Eells, who sought to conceptualize Frelinghuysen as the ideal of a “Christian statesman” at the height of the Reagan revolution. Even here, Eells argued that Frelinghuysen’s actions in defense of the Cherokees “rightly earned him the title of America’s Christian statesman” and marked the “moral high point of Frelinghuysen’s years in Washington.”⁵ In the eyes of his two main biographers, Frelinghuysen was a model Christian whose arguments against the forced resettlement of the Cherokee were dictated strictly by faith.

Besides the two biographies written since his death in 1862, larger monographs of the ‘Jacksonian’ era have also continued to cast Frelinghuysen as a minor pawn in a larger story, with some even going so far as to omit Frelinghuysen’s role in the Cherokee debate altogether. One of the most important histories of the Jacksonian period, Arthur Schlesinger Jr’s *The Age of Jackson*, makes one passing reference to the Cherokee Indians in his over five hundred-page monograph and reserves no discussion for the Indian Removal Act. However, Schlesinger still identifies Frelinghuysen as a strict advocate for the “re-establishment of the belief in the religious character of the state and, thus, in the supremacy of religious interests.”⁶ Furthermore, Schlesinger goes so far as to label Frelinghuysen “a staunch conservative.”⁷ In the course of crafting these large monographs on major figures or sweeping periods of American history, the actual nuance of smaller and seemingly less important figures is inherently easily lost.

Under these conditions, Frelinghuysen’s political rhetoric has been overlooked and confined to a few quotations or general characterizations. However, recent historians with more interest in the Indian Removal debate have begun to recognize his crucial role. Howe’s 2007 *What*

⁵ Robert Eells, *Forgotten Saint: The Life of Theodore Frelinghuysen: A Case Study of Christian Leadership* (Lanham, MD : [Palos Heights, Ill.]: University Press of America; Trinity Christian College, 1987), 23.

⁶ Jr Arthur M. Schlesinger, *The Age of Jackson*, 1 edition (Boston: Little, Brown and Company, 1945), 351.

⁷ Schlesinger, 351.

*God Hath Wrought*⁸ and Bowes' 2016 *Land Too Good for Indians*⁹ are among some examples of recent monographs of the plight of the Cherokee, which charted congressional debate over the Indian Removal bill and made reference to Frelinghuysen's attempts to add amendments to the bill to protect Indian sovereignty. These histories provide a potential model for a more deliberate and focused study of congressional opposition to President Jackson's bill, especially Senator Frelinghuysen's singular opposition.

The place of a tribe like the Cherokees in the framework of the American state was destined to be a fraught topic from the nation's very beginnings. The American Declaration of Independence, in the course of separating thirteen North American colonies from the Kingdom of Great Britain and Ireland, set a new course for the destiny of an entire continent. The Declaration, in laying out the reasons for their need "to dissolve the political bands which have connected them to one another,"¹⁰ was intended to "institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness."¹¹ The document was not only meant to justify the reasons why the political actions of those thirteen colonies were justified, but also to provide an early blueprint for the direction and destiny of the fledging new Union. Among the reasons provided, the assembled delegates maintained that the British sovereign had "endeavored to bring on our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes, and conditions."¹² Among those on the periphery of this new Union were the

⁸ Howe, *What Hath God Wrought*, 350–51.

⁹ John P. Bowes, *Land Too Good for Indians: Northern Indian Removal*, First edition., *New Directions in Native American Studies*; v. 13 (Norman: University of Oklahoma Press, 2016), 60–61.

¹⁰ Danielle S. Allen, *Our Declaration: A Reading of the Declaration of Independence in Defense of Equality*, First edition (New York: Liveright Publishing Corporation, 2014), 27.

¹¹ Allen, 27.

¹² Allen, 30.

Cherokees, whose attempts to adapt to the growth of one state, Georgia, soon turned their struggle into a greater national question of how such ‘savages,’ especially if ‘civilized,’ could be incorporated into the Union.

Before both Jackson and Frelinghuysen’s elections in 1828, the Cherokee nation had gradually asserted sovereignty over its shrinking territories. As settlers itched to seize their lands, the Cherokee responded to encroachment by readily adopting Western technologies and practices. As Howe observed, “the emergence of a commercially and politically viable Cherokee Nation with a growing Christian minority, borrowing Western technology as needed, forced the white majority to decide what they really wanted for and from the Native Americans.”¹³ There was an inconvenient question now crossing expansionist policy-makers: how can one justify the takeover of lands held by a people who had readily adopted the ‘proper’ customs and religion? These were not the ‘savages’ of the Declaration. In fact, their readiness to adopt Western conventions was only facilitating a stronger case for greater political autonomy. The Cherokee’s progress culminated with the ratification of a Tribal Constitution in July 1827. Influenced directly by the American Constitution, the document’s preamble held that the Cherokee Constitution was created “to establish justice, ensure tranquility, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty.”¹⁴ The new Constitution was also intended to provide a legal response to the Georgia State Legislature, which continued to pass legislation granting the state new powers to seize Cherokee lands. Thus, Section One of the Cherokee Constitution took the interesting step of carefully laying out the limits of their entity’s territory.¹⁵ Furthermore, the new

¹³ Howe, *What Hath God Wrought*, 345.

¹⁴ *Constitution of the Cherokee Nation Formed by a Convention of Delegates from the Several Districts at New Echota, July 1827*, 1827, 1.

¹⁵ *Constitution of the Cherokee Nation Formed by a Convention of Delegates from the Several Districts at New Echota, July 1827*, 2–5.

constitution demonstrated the Cherokee Nation's assumption of southern white culture's attitudes towards race by disenfranchising any individual of the "African race" or "of negro or mulatto parentage."¹⁶ On the basis of this Constitution, coupled with their economic development, the Cherokees laid out a strong case against the notion of the 'savage' incapable of any progress.

With these factors weighing on his shoulder, it was clear that Andrew Jackson's case for the forced removal of 'civilized' tribes was precarious at best. Figures like Senator Frelinghuysen, who might have witnessed the Senate Clerk read out the President's message on December 7, 1829, now heard the words of a President, who had built his political career on waging wars against the 'savages', adopt a tone of sympathy and concern for the future of increasingly-independent tribes like the Cherokee. These tribes were "surrounded by the whites, with their arts of civilization, which, by the destroying the resources of the savage, doom him to weakness and decay; the fate of the Mohegan, the Narragansett, and the Delaware, is fast overtaking the Choctaw, the Cherokee, and the Creek, that this fate surely awaits them, if they remain within the limits of the States, does not admit of a doubt."¹⁷ President Jackson's message, which was partly based on observation and partly on threats, communicated a new form of condescension towards the Native Americans. The 'whites' were no longer a threat, but the faculties of their civilization still were at the hands of other tribes.

The implications of this argument ran counter to the next major point raised by Jackson, who directly addressed the established sovereignty—and resilience—of the Cherokee people. Those lines drawn by the state of Georgia, Jackson countered, could not be redrawn. The President contended "it is too late to inquire what it was just in the United States to include [the Cherokees]

¹⁶ *Constitution of the Cherokee Nation Formed by a Convention of Delegates from the Several Districts at New Echota, July 1827*, 6–7.

¹⁷ 21st Congress, *Journal of the House of Representatives of the United States, 1829-1830* (Washington, DC: Duff Green, 1830), 24.

and their territory within the bounds of new States whose limits they could control. That step cannot be retraced. A State cannot be dismembered by Congress, or restricted in the exercise of her constitutional power.”¹⁸ The President’s careful interpretation of the Constitution held that the boundaries of a state could not be modified so long as the people of that state did not consent (overlooking the fact that Native Americans were not considered citizens), and concluded that nothing could be done. In the context of attempting to rectify this issue, created through the Constitution and not caused by Jackson, the proposal was presented as a compromise— an attempt to right a previous wrong. The address, quite elegant in how it framed the intended fate of the Cherokee, forced them into the midst of a larger struggle “over the principles of state jurisdiction, federal power, treaty rights, and tribal sovereignty.”¹⁹ The Congress, now fully aware of the President’s desires, began to grapple with the full force of his proposal.

Throughout the early months of 1830, the freshman Senator from New Jersey began to gradually find his place in the nation’s grandest deliberative body. Senator Frelinghuysen made his first remarks on Thursday, January 14, 1830, concerning the Treaty of Wabash, which “proposed that the sum of forty thousand dollars be, and the same is hereby appropriated, for the purpose of holding Indian treaties, and extinguishing Indian title within the State of Indiana.”²⁰ Senator Frelinghuysen’s concerns laid not with how the bill had been presented, but with the broader treatment of the Native Americans by the Federal Government. He challenged the government’s conduct in these matters, insinuating that such pay-outs were not actually ‘civilizing’

¹⁸ 21st Congress, *Journal of the House of Representatives of the United States, 1829-1830* (Washington, DC: Duff Green, 1830), 24.

¹⁹ Bowes, *Land Too Good for Indians*, 59.

²⁰ 21st Congress, *Register of Debates in Congress: Comprising the Leading Debates and Incidents of the Second Session of the Eighteenth Congress: [Dec. 6, 1824, to the First Session of the Twenty-Fifth Congress, Oct. 16, 1837], Together with an Appendix, Containing the Most Important State Papers and Public Documents to Which the Session Has Given Birth*, vol. IV (Gales & Seaton, 1830), 16.

the Native Americans: “The Indian nations, are at most, but dependent sovereignties under our guardianship, and to whom we have promised protection. And can it be for a moment tolerated, that a guardian shall, but the force of extraneous and corrupting motives, obtain from the wards his lands?”²¹ The Senator, by choosing to express such thoughts during this debate over the fate of those tribes in northern Indiana, established a position of general concern for the American government’s conduct towards all tribes under its jurisdiction.

By insinuating that cash payments to tribes were tantamount to bribes in the course of his comments, he also insulted those members who had become used to such conduct. Senator James Noble of Indiana angrily responded to Senator Frelinghuysen by retorting that “talking of holding treaties with these people as with civilized nations” was nothing but “an idle loss of time.”²² Frelinghuysen also called for the Senate to “deal with these men as we do with the rest of mankind—upon open, equal, and just terms; such as our country and the world will sanction; such as future history, in its impartial retrospects [sic], will not censure and condemn.”²³ His comments excited much debate in the Senate over the question of the Indian’s faculties, and whether or not treaties could actually be reached without bribes. The Senate eventually amended the bill to ensure that no bribes could be carried out while negotiations with those outlined tribes of Indiana were ongoing. Whether or not the legislation could actually be carried out in the hinterlands of this newly admitted state did not matter. Overall, Senator Frelinghuysen’s first act in the Senate called for more transparency in negotiations with Native American tribes and a need to change the way they were treated. Over the next month, he would extend the same attitude to the debate over the fate of the ‘civilized tribes’ in the Southeastern United States.

²¹ 21st Congress, IV:18.

²² 21st Congress, IV:19.

²³ 21st Congress, IV:19.

President Jackson's call for the conclusion of a bill to secure a 'voluntary' movement of the Cherokee to lands west of the Mississippi was a far larger issue than the question of those tribes located in Northern Indiana. According to Bowes, congressional debate over the question of Indian removal (1) "focused on the definitions and limits of federal power, constitutional authority and tribal sovereignty" and (2) discussion was "framed around exclusively within the context of the southeastern United States."²⁴ Senator Frelinghuysen was prepared to address these questions by evaluating the actual civility of these Native American tribes. Since the conclusion of the Creek Wars in 1814, how had the Cherokees evolved? On Monday, January 25, 1830, Frelinghuysen introduced a resolution to the floor calling on the Secretary of War "to furnish to the Senate any information in the possession of his Department, respecting the progress of civilization for the last eight years, among the Cherokee, Creek, and Choctaw nations of Indians, east of the Mississippi, and the present state of education, civil government, agriculture, and the mechanic arts, among those nations."²⁵ Frelinghuysen's decision to request this information from the Department of War was a direct attack on Jackson; it was more than likely intended to highlight the progress of the Cherokee, Creek, and Choctaw and thereby challenge the need for their removal to the west.

Frelinghuysen ran into opposition from Senator John Forsyth of Georgia, a Jacksonian Democrat and the future Secretary of State for both Jackson and Martin Van Buren. Forsyth moved for an amendment to "embrace all the Indians in the United States," to which Frelinghuysen now revealed his dissatisfaction with the abuse the Jackson administration (and Forsyth's state of Georgia) was levying on the Cherokees. Forsyth, it would appear, was attempting to initiate an argument with Frelinghuysen on the floor over the removal debate. Frelinghuysen took the bait and charged the Democrats with overlooking the progress of the Cherokees, admitting that he had

²⁴ Bowes, *Land Too Good for Indians*, 64.

²⁵ 21st Congress, *Register of Debates in Congress*, IV:42.

proposed this amendment to focus on these particular tribes, because he intended “to be able to meet the reasons which now assail us, that unless we remove these people, their population will soon melt away. It is in vain we attempt to disguise the tendency of such proceedings.”²⁶ Behind this coded language, Frelinghuysen was addressing the Jackson administration directly; the desire to move these tribes and break those treaties already established with them was not due to some sense of ‘benevolence’ or ‘concern for their future.’ By calling for this information from the War Department, Frelinghuysen wanted the Senate to acknowledge these facts and increase awareness of how the tribes were prospering. Forsyth carefully worded his response to counter Frelinghuysen by expressing a hope that the resolution would not water itself down to “a local or sectional question.”²⁷ Once again, Forsyth’s attempt to moderate the resolution did not work; Frelinghuysen refused to budge, and Forsyth gave up on his efforts. This exchange was overshadowed by another infamous exchange taking place on the same week between Senators Daniel Webster of Massachusetts and Robert Hayne of South Carolina. While those two figures engaged in an unexpected debate over the appropriate powers of the Federal Government, Frelinghuysen established himself as a major opponent of Jackson’s Indian Removal bill.

Discussions about the fate of the Cherokees moved into the month of March, and Senator Forsyth now moved to submit to Congress legislation recently passed by the Georgia State Legislature “against treaties previously formed by the United States with the Indians in that State, and against the intercourse law of 1796, and the report of the House of Representatives of Georgia, on the 11th February 1786.”²⁸ Such documents were likely intended to bolster Georgia’s claims against the Cherokee’s right to sovereignty. Frelinghuysen immediately moved to add an

²⁶ 21st Congress, IV:42.

²⁷ 21st Congress, IV:42.

²⁸ 21st Congress, IV:245.

amendment to “include also the laws of Georgia, recently passed, extending jurisdiction over the Cherokee Indians.”²⁹ Forsyth then offered to acquiesce to Frelinghuysen’s request, on the condition “the objects of it were extended so that it should embrace the laws of all the States in which Indians have resided, concerning their relations.”³⁰ Forsyth, who might have originally requested the procurement of those three documents in order to make a simple point, was now being challenged by Frelinghuysen to a debate on Georgia’s general conduct towards the Cherokees. Forsyth was not interested, and now very irritated by Frelinghuysen’s decision to intervene in the motion. Frelinghuysen curtly pointed out how “it appeared strange, that, when a question is to be discussed in relation to the laws of Georgia, the materials which are deemed necessary for that discussion will not be given to us. It cannot be disguised, nor denied, that the principal question we have to decide, is in relation to the right of Georgia to designate as she had done.”³¹ Forsyth knew that the laws of Georgia contradicted one another, and potentially contravened Federal law when laid out side by side.

The cordiality of their interactions on the floor now boiled over into a bitter response from Forsyth, who had grown agitated with the mid-Atlantic Yankee. The Georgian fell back on a familiar argument made by Southern politicians since the nation’s founding: the laws being passed by the states were not the concern of the national government. According to Forsyth, “the Senate—the Congress of the United States—is not the place where the State of Georgia is to be arraigned. But, if the question is to be debated here as to the policy, the expediency, and the humanity of her laws, and those laws are tjurherefore to be called for, why not include the laws of other states?”³² The challenge being issued by Forsyth laid bare his sensitivity to Frelinghuysen’s insinuation that

²⁹ 21st Congress, IV:245.

³⁰ 21st Congress, IV:245.

³¹ 21st Congress, IV:245.

³² 21st Congress, IV:246.

the state of Georgia was being any crueler to the Cherokee than other states had been toward their native populations. From a contemporary perspective, Forsyth had a reasonable point; there was no denial that the Native Americans had been decimated in states such as New Jersey. From that standpoint, how cruel was the Indian Removal bill? “As to the laws of Georgia which are wanted,” Frelinghuysen argued “the only advantage they can be of, will be, to afford gentlemen to address [sic] themselves to the passions and prejudices of members of the Senate, and of people out it.”³³ Forsyth’s request for ‘fairness’ in this debate, and the tone of his speech, create the sense that he felt he was being backed into a corner. The act, likely passed by a state legislature emboldened by President Jackson, aimed at affirming the state’s control over those parts of the state currently under Cherokee control.

Within the context of the debate over the removal of those tribes located throughout the Southeastern United States, the specific case of Georgia and the Cherokees had taken on national significance because of the attitude adopted by the state, and the Cherokee’s response to the state’s actions. Within this conflict, the Federal Government’s role was difficult to define. The Cherokee 1827 constitution had been drafted to specifically define the boundaries of their polity. However, an 1830 Georgia law intended to “add the Territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians” to four counties of Georgia, “to extend the laws of [Georgia] over the same, and to annul all laws and ordinances made by the Cherokee nation of Indians.”³⁴ For the Cherokee nation, any acceptance of this law would amount to a surrender of their land, and an acceptance of what President Jackson had already proposed prior to its passage.

³³ 21st Congress, IV:246.

³⁴ Theodore Frelinghuysen, *Speech of Mr. Frelinghuysen, of New Jersey, Delivered in the Senate of the United States, April 6, 1830, on the Bill for an Exchange of Lands with the Indians Residing in Any of the States or Territories, and for Their Removal West of the Mississippi*. (Washington, DC: Office of the National Journal, 1830), 30.

On March 4, 1829, the *Cherokee Phoenix*, a major Cherokee newspaper located in the capital of the tribal nation, voiced concerns about the continued aggression of the Georgia state government. According to their editors, “the frivolous claim advanced by Georgia to a part of our Country shows, too manifestly, the nature of her boasted *rights*, and the inconsistency of her proceedings.”³⁵ If they assented to Georgian laws, it was assured that they would have no legal recourse to defend their land in case of encroachment.

These anxieties were the source of Frelinghuysen’s demand for more information about Georgia’s treatment of the Cherokee. As the *Phoenix* had already noted, Georgia state law openly discriminated against the Cherokee. For instance, it held that “no Indian or descendant of Indians, residing within the Creek or Cherokee Nation of Indians, shall be a competent witness, or a part to any suit, to which a white man is a party.”³⁶ As the state legislature continued to push for the deportation of Cherokees, Frelinghuysen knew Georgia had no vested interest in defending the civil rights of these Native Americans. Therefore, as Frelinghuysen bickered with Forsyth on the Senate floor, he bluntly called on his Georgia colleague to “let us see her laws, and we will be the better enabled to speak of her generosity.”³⁷ Frelinghuysen was challenging Forsyth to provide evidence proving that the state of Georgia was actually willing to protect tribes. Even as this particular motion set forth by Forsyth nearly fell apart, Frelinghuysen’s demand for an examination of Georgia’s conduct was not fulfilled. By a vote of 21 to 20, Forsyth’s addition to Frelinghuysen’s amendment barely passed, and a full investigation of Georgia’s conduct towards the Cherokee was not brought before the Senate.

Frelinghuysen’s clashes with Forsyth foreshadowed the commencement of a much larger,

³⁵ “Wednesday, March 4, 1829,” *Cherokee phoenix, and Indians’ advocate*, March 4, 1829, 2.

³⁶ “Wednesday, March 4, 1829,” 2.

³⁷ 21st Congress, *Register of Debates in Congress*, IV:246.

more concrete, opposition to the Indian Removal bill. Over the course of the month of April, Frelinghuysen began to lay the groundwork for an amendment aimed at weakening the bill's structure. On April 6, 1830, Senator Hugh White of Tennessee, who had filled Jackson's vacancy in the Senate, opened discussion of the bill. White, anticipating a response from Frelinghuysen, made a preliminary address expressing the Jackson administration's views on "the rights of the Indians, the rights of the States, and the power of the General Government, in reference to the right of the former to self-government within the limits of a sovereign State, against the will of such State."³⁸ Immediately following his remarks, Frelinghuysen rose to address the Senate, presumably to respond to these lines of debate, but ended up not giving his speech. The reasons for this decision are unclear: the Congressional Register only states that he "desired to make some remarks on the subject of the bill, but, as he was much indisposed, and it was late he would move an adjournment."³⁹ It is not entirely clear from this text why Frelinghuysen made this move, but it would appear his attempt to adjourn the Senate was refused by another Democrat, Senator John McKinley of Alabama, who then moved to add another amendment intended to strengthen the Indian Removal bill. Once this was done, and "Forsyth, Sprague, and McKinley," all southern Democrats, had conferred on the effect of the amendment, the Senate adjourned for the day.⁴⁰ While the exact details of the amendment are not offered, the document's introduction still demonstrates the degree of coordination among the Senate's southern members, and the restrictions their actions placed on Frelinghuysen.

The following day, Frelinghuysen finally was given his chance. As discussion on the Indian Removal bill came up for consideration once again, he rose to address the Senate body for two

³⁸ 21st Congress, IV:305.

³⁹ 21st Congress, IV:314.

⁴⁰ 21st Congress, IV:304.

hours each day from April 7 to April 9. Over the course of those cumulative six hours, Frelinghuysen offered an amendment to the bill in the form of two provisos designed to effectively gut the Indian Removal bill's right to remove the Cherokee from their territory without express consent from the Cherokee themselves. The first proviso held that all "tribes or nations" affected by the bill would be "protected in their present possession, and in the enjoyment of all their rights of territory and government, as heretofore exercised and enjoyed, from all interruptions and encroachments."⁴¹ This first proviso was indirectly aimed at the states of Mississippi, Alabama, and Georgia, and was based on the implicit constitutional sovereignty of the Federal Government over the state in the administration of Native American tribes. The second proviso, in contrast, was designed to clarify the relationship of the Native Americans with the United States Government. Before any Native American people could be compelled to move, "the rights of any such tribes or nations in the premises shall be stipulated for, secured, and guaranteed by treaty or treaties heretofore made."⁴² In order to justify the necessity of these points, Frelinghuysen needed to outline the Federal Government's explicit power to make treaties with the tribal nations, specify the political status of the Cherokee, the obligations of pre-existing treaties made with the tribes, and present evidence for why the laws of Georgia, Mississippi, and Alabama contravened these principles. Such an address, in its totality, presented a direct challenge to the legality and morality ushered in by Jackson's new America.

The political history of the Federal Government's relationship with Native Americans established a clear obligation on the part of Federal authorities to protect any infringement of their rights by regional entities like the state of Georgia. Starting with the 1785 Treaty of Hopewell, he

⁴¹ Frelinghuysen, *Speech of Mr. Frelinghuysen, of New Jersey, Delivered in the Senate of the United States, April 6, 1830, on the Bill for an Exchange of Lands with the Indians Residing in Any of the States or Territories, and for Their Removal West of the Mississippi.*, 3.

⁴² Frelinghuysen, 3.

dove into a long narrative of the Federal Government's protection of the Cherokee nation, with reference made to how the President "had not yielded to the safe guidance of such high example" as President Washington, then the most venerated man in the United States.⁴³ President Jackson had not only departed from those treaties conducted by Washington, but also, as Frelinghuysen's astute analysis would contend, the precedent of those who followed Washington's example after he left office. The treaty of Hopewell had been signed while the Union was still administered under the Articles of Confederation, but later agreements like the 1791 Treaty of Holston crystallized the Cherokee's relationship with the Union's Federal Government. The Constitutional Convention, Frelinghuysen concluded, was "wisely determined to place our relations with the tribes under the absolute superintendence of the General Government which they were about to establish."⁴⁴ It was grounded in the "treaty power," an explicit tool found under Article II, Section 2 of the United States Constitution. On the basis of this power, the United States Senate, not the president, assumed absolute control any approval of the Cherokee Nation's fate.

These treaties allowed the United States to obtain more territory from the Cherokees over time, but they were also subject to those "solemnities and stipulations," which characterized discussions between two powers.⁴⁵ If Jackson intended to overturn this process and grant greater powers to the states, he also risked the likelihood of extra-judicial violence and disregard for Federal laws protecting the Cherokee. "It may be true," Frelinghuysen warned, "that if we withdraw our protection, give them over to the high handed, heart-breaking legislation of the States, and drive them to despair, that when improper means fail to win them, force and terror may compel them."⁴⁶ The Federal Government, Frelinghuysen held, was obligated to protect the Native

⁴³ Frelinghuysen, 5.

⁴⁴ Frelinghuysen, 14.

⁴⁵ Frelinghuysen, 16.

⁴⁶ Frelinghuysen, 7.

Americans; it was their paternalist duty to protect this small nation against the tyranny of one of its states.

Although the Constitution failed to spell out the fate of those Native Americans west of the original thirteen states, Frelinghuysen argued that the Federal Government's dealings with small tribal nations was actually well engrained within the thinking of influential enlightenment figures like Emer de Vattel in his 1758 *Law of Nations*. The work would have been widely available to the founders as a primer on diplomatic affairs, and is even credited with influencing Thomas Jefferson's perception of the Declaration of Independence as "an argument framed in the universal law of nations."⁴⁷ Within the present day, Frelinghuysen once again called upon a reading of the work, which recognized the possibility of a weaker state maintaining an alliance with a stronger one. The Cherokee, he recognized, had "become comparatively feeble, and as they were, in the mass, an uncivilized race, they chose to depend upon us for protection; but this did not destroy or affect their sovereignty."⁴⁸ His reading of the Native Americans as "an uncivilized race" was aligned with the cultural stigmas held by contemporary white Americans, but his defense of their nation was based on a European conception of peaceful relations among sovereign states. According to Vattel, any state which "places itself under the protection of a more powerful one, and engages, in return, to perform several offices equivalent to that protection, without however divesting itself of the right of government and sovereignty...does not, on this account, cease to rank among the sovereigns who acknowledge no other law than that of nations."⁴⁹ The Cherokee were protected by the very same principles of sovereignty which had originally justified the

⁴⁷ Mark Weston Janis, *Jefferson, Madison, and Marshall: The Law of Nations and the New Republic* (Oxford University Press, 2010), 26.

⁴⁸ Frelinghuysen, *Speech of Mr. Frelinghuysen, of New Jersey, Delivered in the Senate of the United States, April 6, 1830, on the Bill for an Exchange of Lands with the Indians Residing in Any of the States or Territories, and for Their Removal West of the Mississippi*, 12.

⁴⁹ Emer Vattel, *Law of Nations* (Indianapolis: Liberty Fund, 2008), 83.

American Declaration of Independence was not an original argument of Frelinghuysen's. His quotation, taken from a different edition of Vattel, is nearly identical to a similar one put forward by New York Supreme Court Chief Justice James Kent in the 1823 court case *Goodell v. Jackson*. Excerpts of the case, including this quote, were collected by Jeremiah Evarts, an influential New England minister who funded a number of missions into the Cherokee nation.⁵⁰ Frelinghuysen's reading of Vattel would not be the last time it was referenced within the context of the Indian Removal debate, but it was certainly the first time this reading of Native American rights was directly addressed on the floor of the Senate.

A studied defense of the Cherokee nation's political status was accompanied by a studied defense of the people's right to self-government. In language reminiscent of the Declaration, Frelinghuysen reminded the Senate that the "Indians are men, endowed with kindred faculties and powers with ourselves; that they gave a place in human sympathy, and are justly entitled to a share in the common bounties of a benignant providence."⁵¹ Previous biographers could have easily taken this quote out of context to suggest Frelinghuysen was defending all people under the grace of a common God, but such a reading would misconstrue his actual meaning. Only a few moments later, Frelinghuysen followed up this assertion with a declaration that "however mere human policy, or the law or power, or the tyrant's plea of expediency, may have found it convenient at any or in all times to recede from the unchangeable principles or eternal justice, no argument can shake the political maxim—that where the Indian always *has been*, he enjoys an absolute right still *to be*, in the free exercise of his own modes of thought, government, and conduct."⁵² These

⁵⁰ Jeremiah Evarts, *Essays on the Present Crisis in the Condition of the American Indians* (Perkins & Marvin, 1829), 109.

⁵¹ Frelinghuysen, *Speech of Mr. Frelinghuysen, of New Jersey, Delivered in the Senate of the United States, April 6, 1830, on the Bill for an Exchange of Lands with the Indians Residing in Any of the States or Territories, and for Their Removal West of the Mississippi*, 7.

⁵² Frelinghuysen, 7.

arguments came with no references to how the Cherokee's progress as a 'civilized' race was driven by their acceptance of Christianity, but Frelinghuysen still inserted such evidence at the end of his speech: he openly cited the testimony of religious figures, whose work appeared to prove how the Cherokees "have in good earnest resolved to become rational, educated, Christian men."⁵³ Christianity, in this instance, was not an end in itself, but a central mean towards a greater end of living what was considered a 'civilized' life. Frelinghuysen did not openly consider why the Cherokee might have pursued these efforts, but he remained steadfast in his conviction that the tribe epitomized the model of a 'civilized' Indian. If their livelihood was destroyed, where would another model be found? As his address came to a close, Frelinghuysen returned the destiny of the Cherokee to the southerners.

The Jackson administration desperately needed a strong response to Frelinghuysen's fiery indictment of their central piece of legislation. It took a few days for one to be crafted, but Forsyth finally stepped forward to deliver an official response from April 13 to 15, 1830. His speech, of even longer length than Frelinghuysen's, was dedicated chiefly to downplaying the level of support the Cherokees enjoyed, defend the state of Georgia, and downplay the tribe's 'civility.' As Forsyth tried to tell his fellow members, Georgia's actions were on par with those of any other state. In total, "all the New England States, New York, Virginia, North Carolina, South Carolina, and Maryland, escape censure for similar acts with those which have brought down upon us torrents of invective."⁵⁴ Forsyth's point was valid: why was it only now that the expulsion of Indians morally reprehensible? Why were northerners levying criticism on their southern counterparts for actions they had undertaken themselves? Was it only necessary to protect the Native Americans now that they were 'civilized'? As Smythe declared further, "the honorable Senator from New

⁵³ Frelinghuysen, 26.

⁵⁴ 21st Congress, *Register of Debates in Congress*, IV:329.

Jersey claims that the Cherokee Indians were, ever have been, and ever shall be, the owners of the soil, and independent of the Government of the State and of the Union; and he denies that the European discoveries, particularly the English, ever claimed or exercised the right to legislate directly over the Indians, as their dependents or subjects.”⁵⁵ The Cherokee were not special: all Indians came from a common state of inferiority, which should not have even merited any reference to their political status as being close to that of a weaker European state. Smythe directly responded to Frelinghuysen’s reading of Vattel by reminding everyone that “the Indians are in the condition of the perpetual inhabitants described by Vattel as sometimes united to a social system without enjoying all its advantages, partaking only of those given by law or custom; the sovereign having always the power to improve that conditions, as time and circumstances may permit.”⁵⁶ The sovereign state, in this instance, was Georgia, whose abilities were limited by figures in their own national government. Any testimony, Smythe tried to assure his Senators, claiming the Cherokee had made progress were simply “exaggerated.”⁵⁷ Smythe knew that if this had been the case (which it was), it would have destroyed the cultural stereotypes underlying the entire rationale of their resistance to the Cherokees. When taken together, his arguments were messy and largely reactionary, but they held the line against Frelinghuysen’s assertions in defense of the President’s proposal.

The Senate set a vote for April 24, 1830 to consider Frelinghuysen’s proposed amendments. Frelinghuysen took the floor once again, but framed the amendment as an assertion of the Senate’s power over President Jackson. With this vote, he believed, the institution would “revise the interpretations which the President in his late message has thought fit to present to Congress, or

⁵⁵ 21st Congress, IV:333.

⁵⁶ 21st Congress, IV:337; Vattel, *The Law of Nations*, 216–17.

⁵⁷ 21st Congress, *Register of Debates in Congress*, IV:339.

the regulations of Georgia and ourselves towards the Indians and each other.”⁵⁸ He made the decision to frame this argument about an emerging worry, amongst many Senators, that the President was relegating the Senate to the position of a subordinate partner. By supporting these amendments, and watering down the bill’s power, the body would send a strong message to the ‘authoritarian’ President. “We cannot,” Frelinghuysen declared, “in the discharge of high public duties, defer to executive will, nor leave to him the common right inherent in this co-ordinate department of power, of ascertaining and deciding when and how far our treaties bind us, and when and under what circumstances the nation is absolved.”⁵⁹ Southern senators continued to respond to Frelinghuysen accordingly: they would not let him gain any ground. With little support from other northerners, both of his amendments were handily defeated.

The Senate’s role in the Indian removal debates was now over, but those arguments advanced by Frelinghuysen continued to move forward. The passage of the Indian Removal Act on May 28, 1830 commenced a larger legal battle regarding the status of the Cherokee nation. In *Cherokee Nation v. Georgia*, Vattel’s definition of the state reappeared, especially as William Wirt, a former attorney general under the Monroe and Quincy Adams administrations, defended the Cherokee Nation’s right to freedom from interference by the state of Georgia. Before Marshall’s court, Wirt contended that while there was “no objection” the Cherokee were “inferior or dependent allies,” it could not be denied that the “state is still a state, though it may not be of the highest grade, or even though it may have surrendered some of the powers of sovereignty.”⁶⁰ In the course of presenting the Cherokee as an entire political society, he once again presented evidence of their progression as a ‘civilization’ through Vattel’s European framework. These

⁵⁸ 21st Congress, IV:380.

⁵⁹ 21st Congress, IV:381.

⁶⁰ Richard Peters, *The Case of the Cherokee Nation Against the State of Georgia* (Philadelphia: John Grigg, 1831), 53.

people had even progressed beyond the ‘primitive’ state of the Germanic tribes or Tatars who challenged the earlier civilizations of Europe: these were not simple ‘hunter-gatherers’ living off the land in a state of contrast with organized societies. The Cherokees were doing what “Vattel says it is the duty of all nations to do, to draw upon the earth, by cultivation, for the support of life, and thus to contribute to the greatest possible multiplication of the human family; and they have now no more land than they want.” Wirt’s argument was designed to expand the scope of the Native American’s rights because their status under the Constitution was trapped in a state of legal purgatory.

History knows Chief Justice John Marshall ruled against Wirt, and determined that the Cherokee Nation was a “domestic-dependent state,” a sovereign entity whose relationship with the United States Federal Government resembled “that of a ward to his guardian.”⁶¹ Justice Marshall, in his own majority opinion, failed to even reference Vattel; his decision only sowed the seeds of future confusion and legal deliberation. Justice Thompson, in his own dissent, could not understand how the Cherokee nation could “form a sovereign state according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a foreign state within the meaning of the constitution.”⁶² Thompson believed Vattel’s conception of sovereignty was not well-suited to the needs of the United States. Instead, Thompson argued that “right of occupancy is still admitted to remain in them, accompanied with the right of self-government, according to their own usages and customs; and with the competency to act in a ‘national capacity’ although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety.”⁶³ Like Frelinghuysen, Thompson’s pragmatic approach to the Cherokee question

⁶¹ Peters, 161.

⁶² Peters, 198.

⁶³ Peters, 199.

offered the most concrete vision for the destiny of the Cherokees.

Following his fight for the Cherokee Nation, Senator Frelinghuysen served the remainder of his one term in relative quiet. Three years after his time in Congress expired, Frelinghuysen outlined his political beliefs (under the alias of Henry Whiting Warner) in his *Inquiry into the Moral and Religious Character of the American Government*. As the title would suggest, the work took on strong Christian overtones and created a foundation for the pious reputation he would begin to develop in the eyes of historians over the coming century-and-a-half. After a term punctuated by the approval of an Indian Removal Act he had so strongly opposed, Frelinghuysen's views on his topic might have only hardened with time. Behind the guise of Warner, Frelinghuysen still believed that "our demeanor towards [Indians] shall be such as a Christian people owe to savages; full of active kindness, and involving the employment of person of capacity and virtue to reside among them under the license of the executive [branch], to teach them agriculture, to educate their children, and to do whatever can be done at once their spiritual and general welfare."⁶⁴ On the basis of these characteristics, it is clear why the Cherokee became Frelinghuysen's ideal model for a 'civilized tribe.' However, his prejudice against 'uncivilized' Native Americans is also incredibly clear; the now-former Senator declared the American nation constituted "a great and powerful people, while the Indian tribes are comparatively small and helpless: we are civilized men, they savages: God has given us wealth, knowledge, arts, and a religion that makes these doubly precious; while they are at our feet, buried in the miseries which our religion commands us, and our magnanimity should impel, to feel for and relieve."⁶⁵ He goes on further, but his prejudice is elucidated by this one statement alone. In the midst of these

⁶⁴ Henry Whiting Warner, *An Inquiry into the Moral and Religious Character of the American Government* (New York: Wiley & Putnam, 1838), 117–18.

⁶⁵ Warner, 125.

prejudices, it becomes difficult to situate Frelinghuysen's legacy, and his proper place in the Indian Removal debate. To some degree, his desire to 'civilize' Native Americans might have been a welcome alternative to their forced deportation, but from modern lenses, his views are still vehemently reprehensible.

Just as it was then, the decline and fall of the Cherokee nation is still a strange and problematic event in the history of the American Union. The forced deportation of hundreds of thousands of people, and the deaths of many tens of thousands in the process is often identified as a direct consequence of the passage of the 1830 Indian Removal Act. As it was debated, figures like Senator Frelinghuysen continued to challenge the validity and morality of the Indian Removal bill, indicting the nation's conduct towards Native Americans in the process. As the Congressional Register shows, Frelinghuysen's voice often stood alone as a vocal opponent of the Indian Removal Act in the United States Senate. In the context of the nation's broken promises to Native Americans, his defense cannot be forgotten. His own racist views are inexcusable, but law experts like Gerard Magliocca have noted that Senator Frelinghuysen's defense of the Cherokees played a role in an emerging political debate amongst abolitionist figures with direct ties to the eventual drafting of the Fourteenth Amendment to the Constitution.⁶⁶ The Cherokee lost their battle, but their role in a larger continental narrative demonstrates the role of the United States as an expanding nation struggling to comprehend the rights of not just some, but all of its inhabitants.

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⁶⁶ Gerard N. Magliocca, "The Cherokee Removal and the Fourteenth Amendment," *Duke Law Journal* 53, no. 3 (2003): 916, 940.

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