the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise. . . . These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws and it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere, in our system of government." Chief Justice Marshall's language in *Foster v. Neilson* [402] is to the same effect.

Indian Treaties

In the early cases of *Cherokee Nation v. Georgia*,[403] and *Worcester v. Georgia*,[404] the Court, speaking by Chief Justice Marshall, held, first, that the Cherokee Nation was not a sovereign state within the meaning of that clause of the Constitution that extends the judicial power of the United States to controversies "between a State or the citizens thereof and foreign states, citizens or subjects." Second, it held: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, had adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." [405]

Later cases established that the power to make treaties with the Indian tribes was coextensive with the power to make treaties

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[402] 27 U.S. (2 Pet.) 253, 309 (1829). Baker v. Carr, 369 U.S. 186 (1962), qualifies this certainty considerably, and Goldwater v. Carter, 444 U.S. 996 (1979), prolongs the uncertainty. *See* L. Henkin, supra at 208–16; Restatement, Foreign Relations, § 326.

[403] 30 U.S. (5 Pet.) 1 (1831).

[404] 31 U.S. (6 Pet.) 515 (1832).

[405] 31 U.S. at 558.