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Samuel R. Olken
John Marshall Law School, solken@uic.edu

ARTICLES

CHIEF JUSTICE JOHN MARSHALL AND THE COURSE OF AMERICAN CONSTITUTIONAL HISTORY

SAMUEL R. OLKEN*

INTRODUCTION

Though he was the nation's fourth Chief Justice, John Marshall, by virtue of the magnitude of his accomplishments as a jurist and the power of his character, forever altered the perception of the role of the United States Supreme Court in this country's constitutional democracy. Indeed, the very term, "the Marshall Court," used by both the Chief Justice's contemporaries to refer to the Supreme Court during his lengthy tenure and by subsequent scholars of constitutional history, underscores his seminal influence upon the other members of the Court and the course of constitutional law.[1] Prior to 1801, when Marshall assumed the helm of the nation's highest tribunal, it largely operated in the shadows of the presidency and Congress. During its initial twelve years of existence, three different men served as Chief Justice,[2] and none put his mark on the Court the way

*Associate Professor of Law, The John Marshall Law School, Chicago, Illinois. A.B., Harvard University; J.D., Emory University. Chair, Symposium on Chief Justice John Marshall and the United States Supreme Court: 1801 – 1835 (Hosted by The John Marshall Law School, April 4-5, 2000).

1. John Marshall was Chief Justice of the United States Supreme Court from 1801 until his death in July 1835. He was the author of over five hundred opinions, more than thirty of which involved constitutional law. His opinions, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), are among the most cited in constitutional law. For his influence among the members of the Court, see generally GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-1815 (1981) (chronicling the initial years of the Marshall Court) and G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835 (abridged paper ed. 1991) (discussing the last twenty years of the Marshall Court).

2. John Jay of New York was the first Chief Justice from 1789 to 1795.

Marshall himself would during his thirty-four years of leadership.

Institutional constraints in the form of onerous circuit court obligations,[3] the relative dearth of important constitutional cases[4] and an emphasis from within on individual adjudication[5] rather than collective decisionmaking all contributed to the relegation of the Court to the background of the nascent federal government. As a result, a perception arose, and still persists, to some extent,

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John Rutledge of South Carolina (1795) was the second Chief Justice, followed by Oliver Ellsworth of Connecticut (1796-1800). Interestingly, Marshall became the fourth Chief Justice, in large part because of Jay's reluctance to relinquish a lucrative New York private practice and his perception that the job afforded one relatively little prestige or compensation. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 283 (1996).

3. Circuit court assignments dominated the workload of each justice and would continue to comprise a significant portion of Supreme Court duties until much later in the nineteenth century when Congress created new federal circuit courts and relieved the justices from such obligations. For an account of the circuit court work of pre-Marshall Supreme Court justices, see generally 2 & 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 (Maeva Marcus, ed., 1988 & 1990). Because the vast majority of cases heard by the early justices were those on circuit, the Court's emergence as the ultimate arbiter of constitutional conflicts did not really occur on a widespread basis until after Marshall began his chief justiceship when many more issues of constitutional significance made their way through the lower federal courts to the high tribunal. For a discussion of how Marshall and the other members of the Court were particularly instrumental in this development through their use of writs of error and other means of Supreme Court appellate review, see WHITE, *supra* note 1, at 167–80.

4. Two cases of considerable constitutional importance decided by the pre-Marshall Court were *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (upholding the supremacy of a federal treaty over conflicting state law) and *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (ruling the state of Georgia amenable to suit brought against it by the heirs of a British creditor). *Chisholm* prompted the creation of the Eleventh Amendment. In addition, the early Supreme Court sustained the constitutionality of a federal carriage tax in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) and ruled that a state law did not violate the *Ex Post Facto* Clause in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). For the notion that the early Court decided relatively few cases of constitutional importance, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 61 (1985); DAVID LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE AMERICAN REPUBLIC 162-65 (1948). *But see* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at xli-xlv (Maeva Marcus, ed., 1985) (suggesting that most commentators overlook the significance of the early Court's accomplishments). *See also* CURRIE, *supra*, at 3-58 (summarizing the Supreme Court's public law jurisprudence during its initial twelve years of existence); J. GOEBEL, 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1971) (providing an overview of the Court from 1789-1801); Marcus, *supra* note 3, at vol. I-IV (using primary sources to chronicle the institutional development of the Supreme Court during its initial decade).

5. Prior to the Marshall Court, the justices delivered seriatim opinions in which each member of the Court rendered his opinion instead of there being a single opinion for the Court, or a majority opinion with concurrences and dissents.

that until Marshall became Chief Justice, the Court had barely begun to realize its potential in the constitutional system, much less receive the attention accorded to its coordinate branches.[6] Through the confluence of institutional change,[7] the opportunity for the Court to decide numerous constitutional issues of seminal importance and his own extraordinary ability to draw upon the intellectual talents of his colleagues,[8] John Marshall transformed the Supreme Court into a powerful and respected bastion of judicial review. For these reasons, his is the chief justiceship by which all others are measured; therein lies the special significance of his name and its close association with the majesty of the Supreme Court.

Many of the justices on the Marshall Court were luminaries in their own right, such as the redoubtable and irascible Samuel Chase,[9] the eminent scholar, Harvard Law School professor, and highly successful commercial lawyer, Joseph Story,[10] and the

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6. *See, e.g.*, SMITH, *supra* note 2, at 2-3, 282-84; FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 80 (1981).

7. The substitution of opinions for the Court, or in the event of a concurrence and/or dissent the adoption of a majority opinion, for seriatim opinions were significant institutional changes that bolstered the image of the Court and, in cases such as *Marbury* and *McCulloch*, underscored the unanimity of the justices. *See* WHITE, *supra* note 1, at 181-94. Even when he had his doubts about a case, Marshall often joined the majority, even writing and announcing the majority opinion himself, in order to present a solid public front that he and the other justices believed was essential in bolstering the image of the Court and the power of its decisions. *See* STITES, *supra* note 6, at 117-18; WHITE, *supra* note 1, at 181-94 (discussing Marshall's purported dominance of the Court). Moreover, during the first couple of decades of Marshall's tenure, he went to great lengths to make sure that the justices boarded together in comfortable lodgings. This helped foster a collegial and highly productive atmosphere during the first two decades of Marshall's chief justiceship. *See generally* SMITH, *supra* note 2, at 286-87, 293, 351-52, 378-79, 394, 402-03 (discussing the often convivial manner in which the Marshall Court justices deliberated over cases at the Washington, D.C. boarding houses in which they collectively resided during Supreme Court terms).

8. *See* LOTH, *supra* note 4, at 275; WHITE, *supra* note 1, at 181-95. *See generally* SMITH, *supra* note 2 (describing Marshall's ability to harness the intellectual energy of his colleagues throughout most of his tenure on the Court).

9. From Maryland, Chase came onto the Court in 1796. An ardent Federalist, his politically partisan charges to grand juries in circuit cases involving the controversial Alien and Sedition Acts embroiled the Court in a debate over judicial independence, and Chase himself ultimately faced the threat of impeachment for his intemperate remarks from the circuit court bench. *See generally* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE (1991) (discussing the judicial career of Samuel Chase).

10. Perhaps Marshall's closest colleague, Story was Dane Professor of Law at Harvard Law School from 1829 to 1845 and the author of several treatises about commercial, public and international law. He was associate justice of

brilliant and assertive South Carolinian, William Johnson.[11] Yet it was John Marshall, who through a mixture of intellectual energy, personal charisma[12] and, at times, stubborn will,[13] molded these strong personalities into an often cohesive juridical unit during a period when the maelstrom of antebellum politics threatened to dissolve the federal system in a series of conflicts over the limits of governmental power.

Not surprisingly, Marshall has emerged as somewhat of a mythical presence throughout the course of American constitutional history. Admired by many, reviled by some, Marshall's storied place in this nation's constitutional cannon is similar to the luminescent position held by his close friend and mentor, George Washington, in the annals of the American presidency.[14] His influence towers over constitutional law, and his

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the United States Supreme Court from 1812 until his death, in 1845. In many respects, his was the most powerful, if not always the most persuasive, intellect on the Court. *See generally* JAMES B. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT (1971) (providing an overview of Story's jurisprudence); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985) (discussing Story's judicial career).

11. Appointed to the Court as an associate justice by Thomas Jefferson in 1804, Johnson nevertheless became a staunch proponent of federal judicial review and nationalism, while also recognizing the importance of state police powers. Independent of mind and, at times, headstrong, Johnson, more than other justices of the Marshall Court, published concurring opinions and dissents. For an excellent overview of his life and judicial career, see WILLIAM MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER (1954).

12. *See* SMITH, *supra* note 2, at 352, 378, 402-03.

13. *See, e.g.*, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (applying the Contract Clause to a corporate charter). In *Dartmouth College*, Marshall took it upon himself to craft the Court's majority opinion during a hiatus between terms of the Court despite the fact that deep divisions initially existed among the justices about whether to extend the scope of the Contract Clause to royal grants and over the extent to which local government could reserve powers of amendment with respect to the obligation of contracts. Marshall's sweeping opinion expanded the ambit of the Contract Clause and somewhat masked the Court's internal disagreements, though Joseph Story's concurring opinion, for example, indicated some of the difficulties the Court encountered in reaching its decision that prohibited the state of New Hampshire from retroactively impairing the contract and property rights Dartmouth College acquired pursuant to its antecedent royal charter. *See* WHITE, *supra* note 1, at 619-23 (discussing the roles of Marshall and Story in the *Dartmouth College* decision). See also *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), in which it appears that Marshall convinced some of his more reluctant brethren to invalidate a New York insolvency law that retroactively impaired the contractual obligation of debtors to creditors. Eight years later, Justice William Johnson noted that *Sturges* was a compromise decision. *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 272-73 (1827) (Johnson, J. concurring). Marshall registered his sole constitutional dissent in this case.

14. Marshall himself is largely responsible for Washington's canonization.

substantive legacy remains highly relevant in the modern Court's struggle to interpret the scope of governmental authority and constitutional limitations. Every Chief Justice undergoes inevitable comparisons to John Marshall,[15] whose formidable presence lingers throughout history, and his ideas continue to influence the contours of constitutional discourse. Credited with using the rule of law in constitutional decisionmaking as the principal means of establishing a vigorous independent federal judiciary,[16] Marshall was the author of several important constitutional decisions of enduring significance.[17] His public law opinions secured the constitutional firmament and the primacy of law in a democratic republic. Much analyzed, Marshall remains a compelling subject for biographers and constitutional historians

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See generally JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON (5 vols.) (1801-06) (Citizens Guild Reprint ed. 1926) (chronicling the life of Washington) [hereinafter MARSHALL, LIFE OF GEORGE WASHINGTON].

15. *See, e.g.*, Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183, 1183 (Nov. 1972) (ranking Marshall perhaps the very best Chief Justice).

16. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See generally* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996) [hereinafter HOBSON, THE GREAT CHIEF JUSTICE].

17. *See, e.g.*, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (explaining that the Bill of Rights only limits the federal government); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (invalidating Georgia's attempt to regulate Indian territory); Osborne v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824) (permitting federal court jurisdiction over suits involving the national bank); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (defining the broad scope of federal Commerce Clause power); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (sustaining the Supreme Court's appellate jurisdiction over state criminal prosecutions that implicate federal laws); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (invoking the Contract Clause to protect vested rights under a corporate charter); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (asserting the supremacy of Congress's implied and incidental powers); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (applying the Contract Clause to retroactive debtor relief legislation); Fletcher v. Peck, 10 U.S. 87 (6 Cranch) (1810) (holding land grants as contracts within the meaning of the Contract Clause); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (using the power of Supreme Court review of federal legislation to invalidate Section 13 of the Judiciary Act of 1789). Other Marshall Court justices also rendered important constitutional decisions. Joseph Story, for example, was the author of *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823) (invalidating the Kentucky Occupying Claimants Laws under the Contract Clause); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (sustaining the constitutionality of section 25 of the Judiciary Act of 1789); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813) (declaring supremacy of a treaty over conflicting state law). For discussion of Marshall's role in the *Martin* decision, see Samuel R. Olken, *John Marshall and Spencer Roane: An Historical Analysis of their Conflict over U.S. Supreme Court Appellate Jurisdiction*, J. SUP. CT. HIST. 125, 132-33 (1990) (suggesting that Marshall and Story worked together on the *Martin* opinion) [hereinafter Olken, *John Marshall and Spencer Roane*].

eager to parse his unparalleled record as Chief Justice and examine the context and meaning of his constitutional jurisprudence.[18]

Yet, like George Washington, Marshall was not without critics among his contemporaries, nor has his legacy been entirely free of embellishment and distortion. To Thomas Jefferson and Spencer Roane, two of his most vociferous critics, Marshall represented a partisan jurist who imbued his analysis of the Constitution with principles of Federalist politics detrimental to states' rights. Skeptical of his logic and aware of his vast influence, they viewed with distrust his observations about constitutional law and decried his apparent control over the Court. Critical of Marshall's legal analysis in several major constitutional opinions, Jefferson, while President, complained: "the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice."[19] A few years later, Spencer Roane, a judge on the Virginia Supreme Court of Appeals expressed his intense dislike for his Richmond, Virginia, neighbor, when during the antebellum controversy over Supreme Court appellate jurisdiction, he assailed Marshall as a foe of liberty intent upon the destruction of state sovereignty and, like Jefferson, questioned the soundness of the Chief Justice's constitutional jurisprudence.[20] In contrast, Joseph

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18. Leading biographies of Marshall include: LEOANARD BAKER, JOHN MARSHALL: A LIFE IN LAW (1974); ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (4 vols.) (1916-19); DAVID LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC (1949), ALLAN B. MAGRUDER, JOHN MARSHALL (1885); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996); FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION (1981); JAMES B. THAYER, LIFE OF JOHN MARSHALL (1901). *See also* R. KENT NEWMEYER, JOHN MARSHALL AND THE HEROIC AGE OF THE CONSTITUTION (forthcoming 2001). For excellent overviews of the Marshall Court, see generally HASKINS & JOHNSON, *supra* note 1; WHITE, *supra* note 1. On Marshall's jurisprudence, see EDWARD CORWIN, JOHN MARSHALL AND THE CONSTITUTION (1919); HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 16; ROBERT K. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL (1968); CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL (Melville Jones, ed., 1955). *See also* THE PAPERS OF JOHN MARSHALL (Charles Hobson, et al. eds.) (ten vols.) (1974 – 2000), a multi-volume collection of letters written by Marshall (along with a few he received), his speeches and judicial decisions that also includes extensive analysis by Dr. Hobson's editorial staff and their predecessors.

19. Letter of Thomas Jefferson to James Madison (May, 1811) *quoted in* LOTH, *supra* note 4, at 272.

20. *See generally* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 106-54 (Gerald Gunther, ed., 1969) ("Hampden" essays of Spencer Roane, June 11-22, 1819) (providing states' rights analysis of *McCulloch* and detailed criticism of the Supreme Court's analysis of the constitutional term, "necessary and proper"). For analysis of the Roane-Marshall dispute, see generally Olken, *John Marshall and Spencer Roane, supra* note 17 (attributing their conflict to historical circumstances and different

Story thought Marshall "was a great man . . . and that he would have been deemed a great man in any age, and of all ages"[21] and considered the Chief Justice a genius at the exposition of constitutional principles.[22]

Decades later, Marshall's somewhat partisan biographer, Senator Albert Beveridge, perceived his subject as a model of patriotism and statesmanship who wielded the power of his judicial office to protect the nation from the threatened tyranny of Jeffersonian Republicans and the chaos of states' rights.[23] In more measured tones, Marshall's most recent biographer, Jean Edward Smith, portrayed the Chief Justice as a statesman of the highest quality who shrewdly used his position as the country's top jurist to define the role of the Supreme Court and the Constitution itself in the turbulent decades of the early nineteenth century.[24] These comments are significant because they reveal, in part, not only the spectrum of opinion engendered by Marshall's performance as Chief Justice; they also suggest the depth of emotion Marshall aroused among his contemporaries and those who have considered his judicial career long after his death in 1835. Relatively few members of the Supreme Court have so enthralled their peers and subsequent generations of scholars. Marshall is an intriguing and complex jurist, the details of whose public life and ideas warrant frequent review, if for no other reason than that they enhance one's appreciation for and understanding of the American constitutional system.

I. BEFORE THE SUPREME COURT YEARS

John Marshall became the nation's fourth Chief Justice by default. When John Jay, of New York, declined the invitation of

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perspectives about the Constitution and politics).

21. *See* Joseph Story, *A Discourse upon the Life, Character, and Services of the Honorable John Marshall* (October 15, 1835) *reprinted in* 3 JOHN MARSHALL: LIFE, CHARACTER AND JUDICIAL SERVICES 369 (John F. Dillon, ed., 1903).

22. *See id.* at 377-79 (admiring the logic and jurisprudential soundness of Marshall's constitutional opinions).

23. *See generally* BEVERIDGE, *supra* note 18 (discussing the judicial career and character of John Marshall). Beveridge's biography, though the first exhaustive chronicle of Marshall's life and public career, nevertheless contains some flaws emanating from its distortion of facts, particularly those concerning Marshall's struggles with Thomas Jefferson and its myopic portrayal of Jefferson as a constitutional and political villain. For a discussion of Beveridge's biography, see Samuel R. Olken, *Chief Justice John Marshall in Historical Perspective*, 31 J. MARSHALL L. REV. 137, 142, 149 (1997) [hereinafter Olken, *Chief Justice John Marshall*].

24. *See generally* SMITH, *supra* note 2 (chronicling the course of Marshall's public career). *See also* MAGRUDER, *supra* note 18 (emphasizing Marshall's non-judicial public career as soldier, legislator, diplomat and success as an attorney as critical components of his eminence as a statesman).

the lame duck Federalist president, John Adams, to return to the helm of the Supreme Court, Adams, desperate to fill the post before the end of his term, offered the Chief Justiceship to Marshall, then his Secretary of State.[25] Despite the inauspicious circumstances of his appointment, Marshall, in retrospect, was truly an inspirational choice and one that changed the course of constitutional history.[26] Moreover, aside from Alexander Hamilton, Marshall was probably the best person available for the position. Forty-five years old and in the prime of his life, Marshall's assumption of the chief justiceship in January, 1801, marked both the culmination of his public career and the pinnacle of his success at the bar.

A. The Influence of Family and the American Revolution

Born on the Virginia frontier on September 24, 1755, Marshall enjoyed a spirited childhood, during which he obtained the bare remnants of a classical education.[27] Of seminal influence was his father, James, a colleague and close friend of George Washington, who surveyed land throughout the commonwealth and served for a time in the state legislature. A self-made man who eventually amassed a considerable fortune in real estate, he imparted to his oldest son a love of learning and the virtue of boundless energy. Years later, as Chief Justice, Marshall fondly remembered his father:

> My Father [sic] possessed scarcely any fortune, and had received a very limited education; - but was a man to whom nature had been bountiful; and who had assiduously improved her gifts. He. . .gave me an early taste for history and poetry. . . . My Father [sic] superintended the English part of my education, and to his care I am indebted for anything valuable which I may have acquired in my youth. He was my only intelligent companion; and was both a watchful parent and an affectionate instructive friend.[28]

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25. *See* JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH (John Stokes Adams ed., 1827) (reprinted. Univ. of Michigan Press 1937) 29-30 [hereinafter MARSHALL, AUTOBIOGRAPHICAL SKETCH]; SMITH, *supra* note 2, at 278-79 (describing the circumstances of Marshall's appointment to the Supreme Court).

26. Towards the end of his life, John Adams observed in a letter to Marshall that "it is the pride of my life that I have given to this nation a Chief Justice equal to Coke or Hale, Holt or Mansfield." Letter from John Adams to John Marshall (August 17, 1825) *reprinted in* GREAT LIVES OBSERVED: JOHN MARSHALL 115 (Stanley Kutler ed., 1972).

27. *See* HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 16, at 2 (discussing Marshall's educational background).

28. *See* MARSHALL, AUTOBIOGRAPHICAL SKETCH, *supra* note 25, at 3-4. Joseph Story requested Marshall to write his autobiography in 1827 so that Story would have sufficient biographical information about the Chief Justice to include in a review Story was writing in the *North American Review* of

A young man at the start of the American Revolution, Marshall, together with his father, enlisted in the Continental Army. He participated in several battles and witnessed first hand the rigors of a winter encampment at Valley Forge, where thousands of soldiers starved in the bitter cold during a bleak early phase of the war. His military experiences left an indelible impression upon him as he observed how provincial jealousy and scarce funds continually plagued colonial troops. Often desperate for resources, George Washington, Commander-in-Chief of the American Forces, pleaded for support from the Continental Congress throughout the conflict, a fact which did not escape the attention of Marshall and other soldiers of the Revolution.[29]

In many respects, the Revolution shaped Marshall's perception of America and forged his belief in the importance of a strong national government limited in scope to prevent the tyrannical concentration of power but necessarily supreme within its delegated authority to confront problems of national concern. Contact with Alexander Hamilton and other Revolutionary leaders from outside Virginia, as well as with soldiers from all the colonies, broadened Marshall's horizons and confirmed his patriotic zeal. He emerged from the war a pragmatic idealist, committed to the concept of America as a democratic republic and aware of the perils of unrestrained state sovereignty.[30]

B. Virginia Lawyer and Statesman

In the spring of 1780, while on furlough from the Revolutionary War, Marshall studied law under George Wythe, professor of law, at the College of William and Mary in Williamsburg, the then intellectual and political locus of the commonwealth. The foremost legal scholar in colonial Virginia, Wythe trained many of Virginia's leading attorneys and statesman, including Thomas Jefferson and Marshall's boyhood friend and classmate, James Monroe. Wythe instructed Marshall in the rudiments of the common law and the fundamental aspects of precedential reasoning.[31] More significantly, perhaps, Wythe

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Marshall's 1824 publication of A HISTORY OF THE COLONIES PLANTED BY THE ENGLISH ON THE CONTINENT OF NORTH AMERICA, FROM THEIR SETTLEMENT, TO THE COMMENCEMENT OF THAT WAR, WHICH TERMINATED IN THEIR INDEPENDENCE (previously written as the lengthy introduction to his multivolume biography of George Washington). *Id.* at xvi.

29. *See id.* at 9-10; 2 MARSHALL, LIFE OF GEORGE WASHINGTON, *supra* note 14, at 406-65 (describing the Revolutionary War experience at Valley Forge during 1778-78).

30. *See* Olken, *John Marshall and Spencer Roane*, *supra* note 17, at 133, 135 (attributing, in part, Marshall's belief in the virtues of a strong national government to his Revolutionary War experiences).

31. *See* HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 16, at 28-29, 33-43 (discussing the influence of Wythe and Marshall's exposure to the common

also introduced the future Chief Justice to political philosophy and its role in legal argument. After a few short but rather intense months of formal legal training, Marshall embarked upon the practice of law.

Throughout the last two decades of the eighteenth century, Marshall became a distinguished member of the Virginia bar, representing clients in a variety of commercial and real estate matters. Acutely aware of the economic sacrifices made by those who fought in the Revolutionary War, Marshall successfully procured pensions and land grants for many of these veterans.[32] Eventually, he emerged as one of the commonwealth's most effective appellate lawyers. Throughout the 1780s and into the 1790s, Marshall also intermittently served in the Virginia legislature, where he advocated judicial reform and other measures he believed essential to the economic growth of his native state.

Increasingly frustrated with that fractious body, Marshall realized the problems that beset local government and soon reposed his trust in a strong federal system.[33] Accordingly, he supported the new Constitution of 1787 and expressed his views as a delegate to the Virginia Ratifying Convention. With remarkable prescience, Marshall explained, at some length, the attributes of the federal judicial structure created by Article III of the proposed Constitution. Careful to assuage the fears of states' rights proponents who thought the federal judiciary might usurp state judicial powers, Marshall demonstrated that a federal judicial system, including a national Supreme Court with prescribed powers of original and appellate jurisdiction, could most effectively preserve the constitutional and federal rights of United States citizens.[34] His cogent analysis of Article III helped to persuade a majority of the other delegates to adopt the federal constitution and presaged his views of federal court jurisdiction as Chief Justice of the United States Supreme Court.[35]

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law). *See* JOYCE BLACKBURN, GEORGE WYTHE OF WILLIAMSBURG 40-47, 99-109, 119-31 (1975) (chronicling Wythe's public career and legal thought).

32. *See* STITES, *supra* note 6, at 20.

33. *See id.* at 29-30.

34. *See generally* Speech of John Marshall in Virginia Ratifying Convention (June 20, 1788), *in* 1 THE PAPERS OF JOHN MARSHALL, *supra* note 18, at 275-85 (describing the advantages of the federal judicial system).

35. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (noting the jurisdiction of federal courts over matters arising under federal law); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (upholding the authority of the Supreme Court to review state criminal prosecutions that conflict with federal law); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (asserting the power of the Supreme Court to review federal legislation). *See also* Olken, *John Marshall and Spencer Roane*, *supra* note 17, at 127-28 (discussing the relevance of Marshall's 1788 speech before the Virginia Ratifying Convention).

By the 1790s, Marshall enjoyed considerable prestige as an attorney. In 1796, in his only appearance before the United States Supreme Court, Marshall, in a strange twist of fate, unsuccessfully argued that a Virginia law relieved debtors of the obligation of payment to British creditors notwithstanding the existence of a federal treaty to the contrary.[36] In contrast, Marshall represented the British heirs of Lord Fairfax, who sought to maintain ownership of several thousand acres of land Virginia claimed by escheat through the operation of revolutionary era laws intended to confiscate the real property of British subjects. A case of enormous complexity and one of much personal significance to Marshall, whose father Lord Fairfax had once employed as a surveyor, the Fairfax litigation preoccupied Marshall for several years and later formed the backdrop of one of the more significant decisions of the Marshall Court.[37] Eventually, after reaching an accord with the state over disposition of this vast property, Marshall formed a syndicate with some members of his family to purchase a large portion of the Fairfax land. Eager to acquire funds for this project, Marshall declined offers to serve in the Justice Department and even a seat on the Supreme Court so that he could maintain his flourishing private practice and remain at home with his growing family.[38]

C. Diplomacy and Federalist Politics

However, in 1797, a diplomatic commission enabled him to pursue his financial objective, and so despite some reluctance about leaving his home in Richmond, Virginia, Marshall, together with Elbridge Gerry of Massachusetts, and Charles Coatsworth Pinckney of South Carolina, traveled to France in an ill-fated attempt to secure American neutrality in the continental conflict between Great Britain and France. Rebuffed at every turn by the French foreign minister, Talleyrand, who brazenly insisted that the American diplomatic envoys procure him with bribes and other

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36. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (upholding the supremacy of a United States treaty with Great Britain guaranteeing the payment of outstanding debts owed to British creditors over conflicting Virginia law).

37. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 316 (1816) (reaffirming the appellate jurisdiction of the Court over legal issues arising under the Constitution, federal laws and treaties); *see also* Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813) (asserting the primacy of federal treaties over conflicting provisions of state law). Marshall recused himself from these cases, though evidence suggests that he prepared the petition to the Supreme Court for appellate review in both cases. *See* WHITE, *supra* note 1, at 165-73. *See also* Charles F. Hobson, *John Marshall and the Fairfax Litigation: The Background of Martin v. Hunter's Lessee*, 1996 J. SUP. CT. HIST. 36 (discussing Marshall's role in *Martin*).

38. *See* LOTH, *supra* note 4, at 107, 120, 146-47.

financial inventives as a condition for obtaining French concessions, Marshall and his diplomatic partners terminated their mission. A discouraged Marshall dispatched his candid observations of the failed negotiations back to President Adams, referring to Talleyrand's agents as X, Y and Z. After much public pressure, Adams released the contents of Marshall's memorandum to Congress. The notes disclosed Marshall's steadfast adherence to maintaining American neutrality in foreign affairs and his refusal to permit political expediency and graft subvert the long range diplomatic goals of the United States.[39] With their emphasis upon probity, they not only revealed Marshall's commitment to public service and flair for leadership but also anticipated, by several years, his judicial commitment to using the rule of law in the resolution of difficult international issues.[40]

After the XYZ affair, Marshall returned to Virginia a hero. At the behest of the recently retired George Washington, long a family friend and personal mentor, Marshall ran for Congress as a Federalist from Richmond, where he had established a thriving private law practice. In 1798, Marshall became a member of Congress and quickly emerged as a leader of the moderate wing of the Federalist party. Despite personal misgivings about the wisdom and legality of the Alien and Sedition Acts enacted prior to his arrival in Congress,[41] Marshall was a stalwart supporter of the beleaguered Federalist president, John Adams, who sought to maintain American neutrality in the wake of international conflict between Great Britain and France. Within a year, Marshall left Congress to become Secretary of State. Nominated to the chief justiceship in January of 1801, he assumed the helm of the Supreme Court one month later.

II. CHIEF JUSTICE MARSHALL: THE COURT AND THE CONSTITUTION

Chief Justice of the United States Supreme Court for thirty-four years until his death at 79, on July 5, 1835, John Marshall exerted an enormous influence on both the interpretation of the Constitution and its acceptance as the fundamental law of a democratic republic. Joseph Story, who worked closely with Marshall for over two decades while both were on the Court, aptly summarized the Chief Justice's principal contribution to constitutional law, when in a speech months after Marshall's death he proclaimed that Marshall's "proudest epitaph may be written in a single line - Here lies the Expounder of the

39. *See* SMITH, *supra* note 2, at 182-233 (providing an excellent discussion of the XYZ affair).

40. *See, e.g.*, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (recognizing the rights of foreign vessels in American ports).

41. *See* SMITH, *supra* note 2, at 239, 242-44, 263 (discussing Marshall's views of the Alien and Sedition Acts).

Constitution of the United States."[42] A brief overview of some aspects of John Marshall's constitutional jurisprudence and the decisions of the Court he led so ably for thirty-four years provides an essential perspective from which to assess his pivotal role in American constitutional history.

A. *The Distinction Between Law and Politics*

From the outset of Marshall's tenure as Chief Justice, the Supreme Court confronted enormous political pressure from both the Federalists and Republicans, each group eager to use the Court to advance its political agenda. Jeffersonian Republicans, deeply frustrated about the glut of Federalist judges and wary of the Federalist-dominated Supreme Court, enacted legislation that ultimately suspended the 1802 term of the Court and rescinded a Federalist measure from the previous year that created several new federal circuit courts and relieved the justices of the Supreme Court from their onerous circuit court duties.[43] In addition, during the early years of the Marshall Court, the threat of impeachment ominously loomed over the justices as Jeffersonian Republicans used this political device to remove an insane and drunken Federalist circuit court judge in New Hampshire and nearly succeeded in divesting one of the more outspoken and outlandish members of the Supreme Court, Associate Justice Samuel Chase, of his lifetime appointment.[44]

Eventually the furor over Chase subsided,[45] and the impeachment issue receded to the background.[46] Yet other external political events engulfed the Supreme Court during Marshall's chief justiceship. The Aaron Burr treason trial

42. Story, *supra* note 21, at 378.

43. The Judiciary Act of 1802 repealed the Judiciary Act of 1801. For a discussion of the Judiciary Act of 1802 and its effects upon the Justices, see HASKINS & JOHNSON, *supra* note 1, at 163-81.

44. For an excellent discussion of the context of these impeachments, see RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 69-82 (1971). *See also* LOTH, *supra* note 4, at 198-202, 214 (discussing the impeachment threat that loomed over all of the Marshall Court justices during the first few years of Marshall's tenure, arising from the political battles between Jeffersonian Republicans and Federalists).

45. The Senate acquitted Justice Chase in 1805. Jonathan Pickering, however, was convicted the year before and removed from the federal bench in New Hampshire for neglect of his judicial duties. A chastened Chase kept a relatively low profile the rest of his judicial career, and his brethren on the Court refrained from partisan political activities and controversial extrajudicial activities.

46. Yet it continued to simmer during Jefferson's presidency and into the 1820s in response to politically unpopular decisions rendered by the Court. In addition, members of Congress, particularly proponents of states' rights, periodically tried, unsuccessfully, to enact legislation to limit the Supreme Court's appellate jurisdiction. *See* Olken, *supra* note 17, at 138.

embroiled the Chief Justice himself in a dispute with his distant cousin, Thomas Jefferson, over the power of the Court to compel the production of material evidence from a sitting President.[47] Moreover, in a series of decisions concerning the constitutionality of the Embargo and Non-Intercourse Acts,[48] Marshall often upheld the broad authority of the President to make foreign policy decisions even when he and the other justices may have privately disagreed with them.[49] In addition, toward the end of Marshall's tenure, the Court became embroiled in a stalemate between President Andrew Jackson and the state of Georgia over Indian affairs.[50]

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47. Eventually, Jefferson agreed to comply with the *subpoena duces tecum* served on him by the circuit court in the *Burr* case. Though he never went so far as to claim an absolute executive privilege, the circuit court's subpoena clearly irked him and honed his perception that political animus underlay Marshall's preliminary ruling. Marshall presided over the circuit court proceedings, which ultimately acquitted Burr of all charges related to his alleged treason. Furious over both the outcome of this legal action and Marshall's role in it, Jefferson accused the Chief Justice of political partisanship. *See generally* LOTH, *supra* note 4, at 221-50 (discussing Burr's trial for treason).

48. *See, e.g.*, The Nereide, 13 U.S. (9 Cranch) 388 (1815) (construing the property rights of neutral shipowners).

49. *See, e.g.*, LOTH, *supra* note 4, at 255, 286. In a 1799 speech before Congress in support of President Adams' decision to honor a controversial extradition request from Great Britain arising from a mutiny on a British ship that ended up in Charleston, South Carolina, Marshall explained that the President acted pursuant to his interpretation of a treaty between the United States and Great Britain. Great Britain sought extradition of a sailor from this vessel in order to punish him for his alleged part in the mutiny. The sailor claimed he was an American citizen who had earlier been impressed into the service of Great Britain and that Great Britain had no legal recourse against him. Having found no evidence of his putative American citizenship, President Adams extradited the sailor to Great Britain, where he eventually hanged for his role in the mutiny. Outraged foes of the Adams administration accused the President of interfering with the American judicial process through the sailor's extradition. Marshall, however, explained that issues arising from the execution of a treaty are non-justiciable political questions within the discretion of the President, whom he characterized as the "sole organ of the nation in its internal affairs." *quoted in* STITES, *supra* note 6, at 75. Marshall's statement is significant because it anticipated his views as Chief Justice. It also foreshadowed the modern view of the relationship between judicial review and Presidential foreign policy prerogatives expressed by Justice George Sutherland in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

50. When told of the Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), President Jackson supposedly remarked "Well, John Marshall has made his decision; now let him enforce it," *quoted in* LOTH, *supra* note 4, at 365. Though Jackson may not have actually made this statement, *see id.*, he probably did not appreciate the Court's ruling that reversed Georgia's conviction of a white missionary for being in Cherokee territory without a state permit. Technically, the Court did not order the President to do anything in *Worcester*, but had Jackson previously forced the state to

Throughout these conflicts Marshall sought to insulate the Court from the external pressures of partisan politics. Ostensibly, distinguishing between law and politics, Marshall seemingly relied upon the law of the Constitution as the basis for adjudication rather than succumbing to contemporary political persuasion.[51] As a result, he and his fellow justices actually enhanced the role of the Court as the arbiter of constitutional questions while creating the appearance that it operated in a sphere somewhat removed from the tumult of party politics.[52]

Marbury v. Madison[53] illustrates this point. Arising from the accidental non-delivery of several Federalist justice of the peace commissions signed and sealed by the Adams administration on the eve of Jefferson's presidential inauguration, the case came before the Supreme Court at the behest of bitter Federalists eager to seek redress from the one branch of the national government still controlled by members of their party. Painfully aware of the factual context of this dispute,[54] Chief Justice Marshall agreed the plaintiffs had both a legal right to the missing commissions and that a legal remedy existed for their non-delivery.[55] Yet he also took the opportunity to invoke the authority of the Supreme Court to review the constitutionality of federal legislation.[56] Finding that Section 13 of the Judiciary Act of 1789 violated Article III of the Constitution because it improperly authorized the Court to issue a writ of mandamus in a case where the Court lacked original jurisdiction,[57] Marshall, in effect, ruled against the four Federalist judicial appointees who had sought a writ of mandamus from the

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comply with federal Indian policy, the conflict between state and federal law might not have occurred as it did in this case. *See* STITES, *supra* note 6, at 157-65 (discussing the Court's role in the impasse between the President, Cherokees and Georgia).

51. *See, e.g.*, United States v. Burr, 25 F. Cas. 187, 190-92 (No. 14,694) (C.C.Va. 1807), where rather than capitulate to Republican pressure to convict Burr of treason, Marshall strictly construed the treason provision of the Constitution and found that Burr's actions, while circumspect, did not rise to the level of either treason or conspiracy to commit treason.

52. *See* HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 16, at 49-51; Olken, *Chief Justice John Marshall*, *supra* note 23, at 166-70 (suggesting that Marshall may not have altogether separated law from politics in his constitutional adjudication).

53. 5 U.S. (1 Cranch) 137 (1803).

54. As Secretary of State in the waning days of the Adams administration, it was Marshall's legal duty to deliver the justice of the peace commissions. Two weeks after Jefferson's inauguration, Marshall confided to his brother, James, that "some blame may be imputed to me" concerning the controversy over the undelivered commissions. Letter from John Marshall to James Marshall (March 15, 1801), *in* 6 THE PAPERS OF JOHN MARSHALL, *supra* note 18, at 90.

55. *See Marbury*, 5 U.S. (1 Cranch) at 167-68.

56. *See id.* at 173-80.

57. *See id.* at 176-80.

Court to compel the Republican Secretary of State James Madison to honor their justice of the peace commissions. Constitutional principle, therefore, trumped political expediency. Though the immediate decision inured to the benefit of the Jeffersonian Republicans, Marshall's opinion also offered several pointed reminders to the executive branch that the Court alone had the final authority to review the constitutionality of federal laws.[58]

During Marshall's chief justiceship, the Supreme Court also weathered numerous attacks upon its authority launched by states' rights advocates who feared that the Court's broad construction of national powers signified the destruction of state sovereignty and autonomy over matters such as their internal commerce and the peculiar institution of slavery.[59] At times, the Court confronted the recalcitrance of state judges[60] and political officials[61] who refused to recognize the binding appellate authority of the Supreme Court in matters arising under the Constitution, federal laws or treaties. Consequently, several Supreme Court decisions during the first three decades of the nineteenth century illustrate the extent to which the justices, under the leadership of John Marshall, sought to insulate their adjudication from the tumult of antebellum politics.[62] In so doing, they further defined

58. *Marbury* also raises the question whether Marshall manipulated the issues in order to preserve the primacy of the Court. Though Marshall ultimately concluded that the Supreme Court lacked jurisdiction to issue the writ of mandamus, he first ruled that William Marbury had a vested legal right and a legal remedy, two points the Court did not necessarily have to resolve if it lacked jurisdiction. On the other hand, Marshall correctly and prudently asserted the perogative of the Court to determine the limits of its own jurisdiction. *See* Olken, *Chief Justice John Marshall*, *supra* note 23, at 166-70; William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1, 14-16, 30-33 (discussing Marshall's errors in interpreting Article III of the Constitution).

59. *See, e.g.*, LOTH, *supra* note 4, at 308; SMITH, *supra* note 2, at 453-55 (discussing Virginia's reaction to the Supreme Court's broad assertions of judicial review of state laws).

60. *See* Olken, *John Marshall and Spencer Roane*, *supra* note 17, at 130-38 (discussing the conflict between the Virginia Supreme Court of Appeals and the Supreme Court between 1810 and 1821).

61. *See, e.g.*, United States v. Peters, 9 U.S. (5 Cranch) 115 (1809) (involving a Pennsylvania judge who refused to comply with the requirements of a federal law); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (arising from attempts of Ohio officials to interfere with the operation of the Ohio branch of the federal bank).

62. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (asserting the supremacy of federal Indian policy over state control of Cherokee occupied land within Georgia); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (invalidating a Maryland tax on imports); Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (ruling the Kentucky Occupying Claimants Acts violated the Contract Clause by impairing contractual obligations created by a state's agreement with land owners over provenance of western territories); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (exercising Supreme Court appellate jurisdiction

the relationship between the states and the federal government in terms of the Constitution rather than political precepts.[63]

John Marshall's commitment to the rule of law in a democratic republic reflected his views of the Constitution, which he regarded as the supreme law of the land.[64] Its supremacy derived from the American people, who Marshall considered the ultimate source of political and governmental authority.[65] Though skeptical of pure democracy[66] and never comfortable with universal suffrage,[67] Marshall believed in a balanced constitutional system in which at the national level the legislative, executive and judicial branches operated pursuant to both enumerated powers as well as implied, or incidental ones, necessary and proper to attain prescribed constitutional objectives.[68] Accordingly, he thought constitutional limitations existed to prevent the tyrannical accumulation of power in any one segment of the federal government to the detriment of the states and citizens therein.[69]

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to review the constitutional application of a state criminal law to defendants who claimed the right to sell lottery tickets pursuant to federal law); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding the constitutionality of the Bank of the United States and invalidating a Maryland tax on the fiscal operations of the Baltimore branch of the federal bank); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (invoking the Contract Clause to protect vested rights created in a corporate charter from the turbulent factional politics of early nineteenth century New Hampshire); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (invalidating, under the Contract Clause, a popular New York debtor relief law enacted to appease debtors during a financial crisis); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) (asserting the primacy of a federal treaty over a Revolutionary Era escheat law intended to divest British heirs of land in Virginia); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (protecting the contract rights of bona fide purchasers of land in the aftermath of legislative corruption and the turmoil of Georgia political factions); United States v. Peters, 9 U.S. (5 Cranch) 115 (1809) (requiring a state judge to comply with federal law).

63. *See, e.g., McCulloch*, 17 U.S. (4 Wheat.) at 403-05 (defusing states' rights arguments of counsel for Maryland with explanation of popular sovereignty and constitutional supremacy).

64. *See, e.g., id.* at 406; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

65. *See, e.g., McCulloch*, 17 U.S. (4 Wheat.) at 403-04.

66. *See* John Marshall, Speech at the Virginia Ratifying Convention (June 10, 1788), *in* 2 THE PAPERS OF JOHN MARSHALL, *supra* note 18, at 256 (referring to need for "a well regulated Democracy"). *See also* Letter from John Marshall to James Wilkinson (Jan. 5, 1787), *in* 2 THE PAPERS OF JOHN MARSHALL, *supra* note 18, at 199-201 (discussing factional influence upon the 1786 Shays Rebellion in western Massachusetts and Marshall's "fear . . . that man is incapable of governing himself").

67. *See* SMITH, *supra* note 2, at 505 (noting that at the 1829 Virginia state constitutional convention Marshall favored a freehold requirement for suffrage).

68. *See, e.g., McCulloch*, 17 U.S. (4 Wheat.) at 406-14.

69. *See, e.g., Marbury*, 5 U.S. (1 Cranch) at 170 (proclaiming the Court's duty to review laws that affect individual rights).

At the same time, he also understood that the Constitution placed limits upon the states to protect the federal government from the exercise of local powers that either conflicted with federal ones[70] or interfered with matters of national interest such as interstate commerce.[71] Moreover, he appreciated the need for constitutional restrictions upon arbitrary local authority that jeopardized the security of commercial transactions, particularly those involving property rights and contracts.[72]

B. *Judicial Review and the Need for An Independent Federal Judiciary*

A fundamental component of Marshall's constitutionalism was his fervent belief in an independent federal judiciary. At the 1788 Virginia Convention to ratify the Constitution, the future Chief Justice explained the constitutional imperative for judicial review when he rhetorically asked: "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary?"[73] Cognizant of the problem of factions in a democratic republic[74] and distrustful of unrestrained governmental authority, Marshall, in common with most of the framers of the Constitution, reposed his faith and trust in federal judges, whose lifetime tenure and oath to uphold the Constitution, he thought, largely insulated them from political temptation and conferred upon them the duty of impartial adjudication.[75]

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70. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (invalidating the New York steamboat transportation monopoly under the Commerce Clause); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (invalidating, on Supremacy Clause grounds, a Maryland tax on the fiscal operations of the Baltimore branch of the Bank of the United States).

71. *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (ruling unconstitutional a Maryland tax on goods imported into the state in their original packaged form); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (finding that the New York steamboat monopoly unduly restricted interstate transportation).

72. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (invalidating retroactive New York debtor relief legislation under the Contract Clause); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (finding that Georgia's repeal of legislation that granted millions of acres of land to private speculators violated the Contract Clause).

73. John Marshall, Speech at Virginia Convention to Ratify the Federal Constitution (June, 20 1788), *in* 1 THE PAPERS OF JOHN MARSHALL, *supra* note 18, at 277.

74. Writing to his brother, James, Marshall commented: "Nothing I believe more debases or pollutes the human mind than faction." Letter from John Marshall to James Marshall (April 3, 1798), *in* STITES, *supra* note 6, at 71.

75. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819) (discussing the significance of the oath public officials take to uphold the Constitution); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (asserting the oath of public officers to uphold the Constitution affirms the notion of constitutional supremacy).

Accordingly, Marshall and the other members of his Court regarded independent federal judicial review an essential prerogative in a "government of laws. . . ."[76]

Careful to distinguish between legal issues and non-justiciable political questions, the Marshall Court articulated several fundamental principles of federal judicial review, each of which emanates from the doctrine of constitutional supremacy. Beginning with the premise that "[i]t is emphatically the province and the duty of the judicial department to say what the law is,"[77] the Court exercised its authority to review the constitutionality of federal legislation. Consequently, it compared the text of the Constitution[78] with the provisions of two federal statutes that, coincidentally, regulated the national judiciary, finding unconstitutional in *Marbury v. Madison*[79] a portion of the original Judiciary Act of 1789 that conflicted with Article III of the Constitution, yet sustaining six days later an 1802 law that reinstated the justices' onerous circuit court assignments because it fell within Congress' power to regulate lower federal courts.[80]

In addition, Chief Justice Marshall clarified that because of the paramount legal status of the Constitution, federal courts could review the non-discretionary actions of federal officials, especially those that affected individual rights.[81] In *Marbury*, he invoked this doctrine to remind President Jefferson and Secretary of State Madison of their legal duties, which he differentiated from acts of political discretion.[82] Thereafter, he applied it, also to the chagrin of Jefferson, in the Aaron Burr treason trial when he ruled that the President had a legal obligation to produce evidence requested of him by Burr's defense counsel.[83]

Confronted by several cases in which states challenged the appellate authority of the Supreme Court, Marshall and his fellow

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76. *Marbury*, 5 U.S. (1 Cranch) at 163.

77. *Id.* at 177.

78. As Marshall explained in *Marbury*: "if a law be in opposition to the Constitution: if both the law and the Constitution apply to a particular case . . . the court must determine which of the conflicting rules governs the case. This is the very essence of judicial duty." *Id.* at 178. The Marshall Court also applied this principle in its review of state laws. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (holding that Georgia's statutory repeal of a land grant violated the Contract Clause). *But see, e.g.*, Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) (sustaining, against a Contract Clause challenge, a Rhode Island tax on capital stock in banks chartered by the state).

79. 5 U.S. (1 Cranch) 137 (1803).

80. Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803). Marshall recused himself from this case, having heard it in the circuit court, where he sustained the constitutionality of the Judiciary Act of 1802.

81. *See Marbury*, 5 U.S. (1 Cranch) at 170.

82. *See id.*, at 166, 170.

83. *See* United States v. Burr, 25 F. Cas. 187, 190-92 (C.C.D. Va. 1807) (No. 14,694).

justices used the dual notions of constitutional supremacy and federal judicial independence as the rationale for the Court's prerogative to review and revise state court decisions that involved interpretation of either the Constitution, federal law or treaties. In *Martin v. Hunter's Lessee*,[84] for example, Justice Story invoked the Supreme Court's appellate jurisdiction under the Constitution in a case in which the highest court in Virginia refused to accede to the Supreme Court's interpretation of a federal treaty. A few years before this pivotal decision, which helped establish the Supreme Court as the ultimate arbiter of constitutional conflicts within the federal system, Marshall rebuked a Pennsylvania judge for refusing to follow federal law.[85]

Worried about the fragmentation of federal judicial power in general, he broadly construed the "arising under" requirement of Article III, allowing federal courts to hear a number of cases in which states, jealous of the growing influence of the national government, sought to restrict the operation of federal laws within their sovereign borders.[86] Convinced that federal judicial review would effectively counter local prejudice, Marshall specifically ruled in a controversial Virginia case that the Supreme Court could review a state court conviction that implicated federal law in order to preserve the sometimes fragile constitutional balance between states and the national government.[87] Accordingly, Marshall and the other justices of the Supreme Court believed that the Constitution conferred upon the Supreme Court judicial supremacy in all matters arising under the Constitution, federal laws or treaties.

Through the power of judicial review the Marshall Court invoked constitutional limitations upon state governmental authority in order to protect private property and contract rights

84. 14 U.S. (1 Wheat.) 304 (1816). Marshall recused himself from this decision and an earlier case before the court, *Fairfax's Devisee v. Hunter's Devisee*, U.S. (7 Cranch) 603 (1812), because he had a financial interest in the litigation and had represented the Fairfax heirs from the mid-1780s well into the next decade. Marshall did, however, probably draft the appeal in both cases and may have helped Story construct the opinions. *See* WHITE, *supra* note 1, at 165-73 (analyzing Marshall's role in the *Martin* appeal and Story's Supreme Court opinion); Olken, *John Marshall and Spencer Roane*, *supra* note 17, at 132-33 (discussing Story's craftsmanship of the *Martin* opinion).

85. *See, e.g.*, United States v. Peters, 9 U.S. (5 Cranch) 115 (1809).

86. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (sustaining federal court jurisdiction).

87. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). Interestingly, Marshall ultimately upheld the Cohens conviction for violating a Virginia law that prohibited the sale of out-of-state lottery tickets within the commonwealth. Narrowly construing the federal law under which the Cohens asserted their defense, Marshall found no actual conflict existed between Virginia law and the federal statute. *See id.* at 428-30, 440-48.

from the turbulent passions of transient democratic majorities.[88] Broadly construing the language of the Contract Clause, Marshall and the other justices interpreted its pivotal phrase, "the obligation of contracts"[89] to include land grants,[90] corporate charters[91] and promises of exemption from local taxation.[92] Convinced that retroactive legislation impaired contractual duties voluntarily assumed by private parties,[93] the Chief Justice even went so far as to contend, unsuccessfully, in the only constitutional case from which he dissented, that the Contract Clause forbade a state from enacting a prospective debtor relief law.[94] Viewed in historical perspective, the Contract Clause jurisprudence of the Marshall Court reflected the justices' overall concern with protecting the security of property rights and the sanctity of contracts. It also facilitated the growth of commerce and fostered corporate development in the early republic.

C. *Instrumental Constitutionalism*

Through the influence of its Chief Justice the Marshall Court imbued its interpretation of the Constitution with a measure of pragmatism. Acutely aware that the framers deliberately

88. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 355-57 (1827) (Marshall, C. J., dissenting) (reviewing unstable post-Revolutionary socio-economic conditions that jeopardized the security of property and contract rights); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) (asserting that the constitutional framers created the Contract Clause "to shield . . . property from the effects of those sudden and strong passions to which men are exposed").

89. U.S. CONST. art. I, § 10, cl. 1. (providing, in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."). Insofar as Marshall broadly interpreted the scope of the Contract Clause, he strictly construed its prohibition against state legislation that adversely affected contract rights. *See e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 355-57 (1827) (Marshall, C.J., dissenting). For analysis of how the Marshall Court Justices distinguished between impermissible laws that impaired contract obligations and ones that merely altered contract remedies, see Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: An Historical Analysis of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 522-32 (1993) [hereinafter Olken, *Charles Evan Hughes*].

90. *See, e.g.*, *Fletcher*, 10 U.S. (5 Cranch) at 137. *See also* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (applying the Contract Clause to compacts).

91. *See, e.g.*, *Fletcher*, 10 U.S. (5 Cranch) at 137. *See also* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (applying the Contract Clause to compacts).

92. *See, e.g.*, New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (holding that a state's repeal of a tax exemption contained within in a land grant unconstitutionally impaired the obligation of contracts).

93. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (holding that a New York debtor relief law that retroactively impaired the contract rights of creditors violated the Contract Clause).

94. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 337, 343, 346-50, 353-56 (1827) (Marshall, C.J., dissenting) (strictly interpreting the obligation of contracts and narrowly construing the scope of state police powers).

designed the Constitution, "to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs,"[95] Marshall understood that the Court could, at times, flexibly apply various constitutional provisions in ways that did not contradict their essential meaning. As such, he and the other justices devised an instrumental constitutionalism that afforded the national government wide latitude in the area of international affairs[96] and much needed discretion in domestic matters that encouraged widespread internal improvements and industrial progress.

Of particular importance in this regard was Marshall's opinion in *McCulloch v. Maryland*[97] in which he used the theory of implied powers to sustain the constitutionality of the federal bank. Though no express constitutional provision authorized Congress to create a financial institution, Marshall shrewdly reasoned that the national legislature could use implied, or incidental, powers necessary and proper to attain certain constitutional objectives.[98] In his own elegant words, he explained: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[99] While perceived by foes of the Bank of the United States and states' rights critics of his Court as an overly broad and uncritical endorsement of national power,[100] Marshall's opinion essentially adapted the framework of the eighteenth-century Constitution to the realities of government in a subsequent era.[101] It reinforced the political discretion of the legislative branch but reaffirmed the constitutional limits of its power.[102] Moreover, the Chief Justice confirmed the notion of the

95. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

96. *See, e.g.*, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (refusing to interfere in foreign affairs); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (refraining from deciding foreign policy issues); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) (ruling war powers non-justiciable). *Cf.* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (questioning the validity of a presidential order that jeopardized the neutrality rights of foreign ships).

97. 17 U.S. (4 Wheat.) 316 (1819).

98. *See id.* at 404-25.

99. *Id.* at 421.

100. *See generally* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 52-154 (Gerald Gunther, ed., 1969) (reprinting 1819 essays of Virginia jurists Spencer Roane and William Brockenbrough criticizing Marshall's constitutional analysis and the notion of Supreme Court review of state laws).

101. *See* STITES, *supra* note 6, at 129.

102. *See McCulloch*, 17 U.S. (4 Wheat.) at 421-23 (indicating that the Court should not assess the wisdom of legislation, but rather whether it falls within the permissible scope of the Constitution).

Constitution as a set of guidelines prescribed for a democratic republic across time rather than as an exhaustive and rigid legal code fixed applicable primarily to the needs of a particular generation.[103]

Insofar as *McCulloch* recognized the existence of Congress' implied powers, it also involved a conflict between the state and federal government. Rejecting Maryland's argument that it never fully relinquished its sovereignty when it ratified the Constitution, Marshall ruled unconstitutional that state's tax on the fiscal operations of the Baltimore branch of the federal bank.[104] Having earlier found that Congress had the constitutional authority to charter a bank, he reasoned that a local tax on its core functions effectively subordinated the federal government to the whim of a state in contravention of the principle of constitutional supremacy.[105] While the nationalist ramifications of Marshall's opinion rankled states' rights proponents, it exemplified his intuitive understanding of relations between states and the federal government in the constitutional system.

D. Commercial Nationalism and Local Police Powers

A dynamic conception of federalism pervaded John Marshall's constitutional jurisprudence. From Marshall's perspective, the Constitution allocated governmental authority between the national and state governments. Supreme in its powers, the national, or federal, government derived its authority from a series of explicit grants from the people of the nation as a whole.[106] Yet Marshall and the other justices, to one extent or another, also realized that powers not expressly delegated to the federal government were either left to the states or to the people themselves.[107] Ever cognizant of this inherent tension within the constitutional system, the Marshall Court, therefore, sought to reconcile the enumerated powers of the federal government with the residual ones of the states.

Burgeoning economic protectionism between the states in the form of a maze of commercial regulations, and local taxes, in particular, raised important questions of federalism for the Marshall Court. A strong consensus existed among the justices,

103. *See id.* at 414-15.
104. *See id.* at 425-37.
105. *See id.* at 404-06.
106. *See id.*
107. This is the underlying principle of the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. *See generally*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186-222 (1824) (referring to Chief Justice Marshall implying the existence of a reciprocal relationship between Congress's power to regulate interstate commerce and state police powers).

however, about the paramount importance of interstate commerce to the commercial vitality of the young republic. Largely devoted to the concept of a national economic market, Marshall and his brethren feared that the conflicting and the sometimes discriminatory regulations of the various states would obstruct the flow of commerce and weaken the union. Consequently, the Court used its powers of appellate review to strike a balance of sorts between economic nationalism and preserving the role of states in the federal system.

Gibbons v. Ogden[108] exemplifies Marshall's practical interpretation of Congress's power "to regulate commerce . . .among the several [s]tates."[109] Ruling that commerce included the concept of navigation,[110] Marshall upheld the constitutional authority "to prescribe the rule[s] . . ."[111] for commerce that extended across state borders. Concerned that in the absence of such plenary federal power, individual states might impede traffic in commerce within the nation through retaliatory measures and protectionist practices, Marshall emphasized the intrinsic value of the Commerce Clause as both a specific source of federal power and a limitation upon some forms of local authority.[112]

Yet Marshall and the other justices implicitly appreciated the importance of states within the federal system. Indeed, in so far as *Gibbons* set forth the parameters of Congress' authority to regulate interstate commerce, it also acknowledged that states could enact quarantine laws, inspection requirements and other measures intended to promote public health and safety.[113] Though the Court ultimately invalidated the New York steamboat monopoly because it conflicted with the navigation prerogatives created by a federal coastal license,[114] Marshall conceded the authority of the state to enact police power regulations of incidental effect upon commerce.[115] Indeed, five years after *Gibbons*, he upheld the right of Delaware to order the erection of a dam across a navigable creek as a legitimate exercise of state police powers.[116]

While in a few cases, the Marshall Court implied the existence of concurrent state powers over commerce,[117]

108. 22 U.S. (9 Wheat.) 1 (1824).
109. *Id.* at 189 (quoting in part U.S. CONST. art. I, § 8, cl. 3).
110. *See id.* at 191-93.
111. *Id.* at 196.
112. *See id.* at 190, 197, 206, 222.
113. *See Gibbons*, 22 U.S. (9 Wheat.) at 203, 209-210.
114. *See id.* at 210-21.
115. *See id.* at 203.
116. *See, e.g.*, Willson v. Black Bird Creek Marsh Co. 27 U.S. (2 Pet.) 245 (1830) (sustaining construction of a dam as a public health measure).
117. *See, e.g., id.* at 197, 206; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95,

bankruptcy[118] and taxation,[119] it remained steadfast in the conviction held foremost by its Chief Justice that local regulation of private business affairs should neither interfere with national economic objectives[120] nor jeopardize the security of property rights and the sanctity of contracts.[121] As a result, many of its Contract Clause decisions embodied notions of federalism complementary to those involving interstate commerce and the constitutional validity of local taxation. For in all of these cases, the Court either sought to protect private economic affairs from unbridled state authority or to preserve the national market in commerce from other forms of local tyranny. Within this broad context, the Marshall Court employed its ample judicial power to assess constitutional limits upon the states within the federal system.

III. THE LEGACY OF CHIEF JUSTICE JOHN MARSHALL

John Marshall left an astounding substantive legacy in American constitutional law. The author of over thirty major constitutional opinions, much of his interpretation of judicial review, separation of powers and federalism remains relevant today. Moreover, within some of his opinions are the seeds of modern constitutional principles such as preemption, the dormant Commerce Clause and the political question doctrine. His application of vested rights theory in early cases involving contract and property rights anticipated the subsequent development of substantive due process,[122] and his refusal to apply the Bill of

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209-10 (1824) (implying that states can regulate matters of intrastate commerce that arise entirely within their borders).

118. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 273-81 (1827) (Johnson, J., concurring) (asserting the existence of concurrent state bankruptcy authority); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (indirectly implying that in the absence of express federal bankruptcy legislation a state could enact a narrowly drawn bankruptcy law).

119. *See, e.g.*, Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, (1819) (differentiating between an impermissible state tax on the fiscal operations of the federal bank branch office located within the state and a permissible tax upon the realty on which the regional branch of the federal bank sat). *See also* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 675 (1819) (Story, J., concurring) (articulating the reservation doctrine in which states could reserve certain regulatory powers in the terms of the corporate charter).

120. *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (invalidating a state import tax).

121. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (holding that retroactive New York debtor relief legislation unconstitutionally impaired the obligation of contracts between debtors and creditors); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (protecting contract rights of third-party bona fide purchasers).

122. *See* Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions* 6 WM. & MARY BILL. RTS. J. 1, 14-17 (1997) [hereinafter Olken, *Justice George Sutherland*].

Rights to the states set forth, in inchoate form, the origins of the state action doctrine.[123] Given the continued relevance of Marshall's leading constitutional decisions, the temptation exists to attribute to Marshall sole provenance of these staples of constitutional law. This attribution, however, overemphasizes, in one sense, his role in American constitutional history and largely ignores the significant jurisprudential contributions of the other members of his court and their intellectual forbearers.

A. Marshall's Derivative Application of Some Constitutional Principles

In several respects, Marshall's constitutional thought was not entirely original. Indeed, his perception of judicial review reflected a longstanding common law tradition in which courts invoked rules of law to limit governmental authority.[124] By the end of the eighteenth century, judicial review of state legislation was a widely accepted precept of early American jurisprudence. For example, several years before *Marbury v. Madison*[125] and *Fletcher v. Peck*[126] the Supreme Court of Appeals in Marshall's native Virginia had, in two significant cases, exercised the prerogative of judicial review.[127] Other early American jurisdictions featured comparable attributes of judicial review.[128] Moreover, during the initial years of the republic the Supreme Court, to one extent or another, had used its appellate authority to determine the constitutionality of state legislation,[129] a federal law[130] and a

123. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (ruling the Takings Clause of the Fifth Amendment inapplicable to the states). For more modern expositions of the state action doctrine, see *The Civil Rights Cases* and *Jackson v. Metropolitan Edison Co.* 109 U.S. 3 (1883); 419 U.S. 345 (1974).

124. *See, e.g.*, The Case of the Tailors of Ipswich, 77 Eng. Rep. 1218 (1614) (finding a monopoly of tailors constituted an unlawful restraint of trade); Charles Fairman, *John Marshall and the American Judicial Tradition, in* CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL 87 (W. Melville Jones ed., Da Capo Press 1971).

125. 5 U.S. (1 Cranch) 137 (1803).

126. 10 U.S. (6 Cranch) 87 (1810).

127. *See, e.g.*, Case of the Judges of the Court of Appeals, 8 Va. (4 Call.) 135, 142, 146 (1788); Commonwealth v. Caton, 8 Va. (4 Call.) 5, 8 (1782) (Judge Wythe suggesting that the Virginia Constitution limited state legislative authority); Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793).

128. *See* GORDON S. WOOD, THE CREATION OF THE AMERCIAN REPUBLIC, 1776-87, at 453-62 (1969) (discussing the inchoate pattern of judicial review in the states during the 1780s).

129. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (sustaining Connecticut's legislative revocation of a judicial decree involving a will). In a seriatim opinion, Justice Chase declared that "[a]n [act] of the Legislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* at 388.

130. *See, e.g.*, Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (upholding

treaty.[131]

In addition, the *Federalist Papers*, most notably Number 78, written by Alexander Hamilton, anticipated Marshall's subsequent observations as Chief Justice about the importance of federal judicial review. In *Federalist Paper No. 78*, Hamilton explained that the Supreme Court should function as a bulwark of the constitutional system because the framers intended it to be the ultimate arbiter of legal conflicts between the states and federal government and the guardian of individual constitutional rights.[132] Marshall later applied this concept in several Supreme Court opinions.[133] Other *Federalist Papers*, such as Numbers 10[134] and 51[135] by James Madison, set forth fundamental concepts about the importance of limited government and separation of powers in a constitutional democracy that Marshall and the other justices of the Supreme Court implicitly drew upon in their analysis of the limits of governmental power during the initial decades of the nineteenth century.

Hamilton, in particular, appears to have wielded considerable influence upon John Marshall. His arguments as Secretary of Treasury in the Washington administration about the need for a federal bank presaged Marshall's assertions in *McCulloch v. Maryland*[136] about the Necessary and Proper Clause. His ideas also may have affected Marshall's interpretation of the Contract

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a federal tax on carriages).

131. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (rejecting the claims of debtors that conflicted with the provisions of a federal treaty with Great Britain). Interestingly, John Marshall argued unsuccessfully on behalf of the debtors in what would be his sole appearance as an attorney before the Supreme Court.

132. THE FEDERALIST NO. 78 (Alexander Hamilton).

133. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (sustaining Supreme Court appellate jurisdiction); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (ruling the Contract Clause forbade Georgia's legislative repeal of land grants); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (invalidating Section 13 of the Judiciary Act of 1789).

134. *See generally* THE FEDERALIST NO. 10 (James Madison), *supra* note 133 (analyzing political factions and the benefits of a democratic republic). Marshall's Contract Clause opinions and his discussion in *Gibbons v. Ogden* and *McCulloch v. Maryland* reflected Madison's ideas about representative government in a democratic republic. 22 U.S. (9 Wheat.) 1, 196-97 (1824); 17 U.S. (4 Wheat.) 316 (1819) (implicitly referring to the political safeguards of federalism).

135. *See generally* THE FEDERALIST No. 51 (James Madison), *supra* note 133 (discussing separation of powers).

136. 17 U.S. (4 Wheat.) 316 (1819). Indeed, Marshall was well aware of Hamilton's interpretation of the constitutional terms "necessary and proper", having summarized the former Secretary of the Treasury's 1791 arguments in 4 MARSHALL, LIFE OF GEORGE WASHINGTON, *supra* note 14, at 390-93. *See also* LOTH, *supra* note 4, at 305 (mentioning Hamilton's influence upon Marshall).

Clause. As counsel to some New England land companies at the outset of the Yazoo land controversy, Hamilton had asserted the importance of preserving the obligation of contracts from the tyranny of democratic majorities and invoked the bona fide purchaser rule as a means of sanctifying contract rights.[137] Ultimately, Marshall incorporated this sophisticated analysis into his own when he crafted his seminal opinion in *Fletcher v. Peck*.[138]

Nevertheless, it was the manner in which Marshall interpreted the Constitution and applied its principles to the problems of the early nineteenth-century democratic republic that signaled his unique contribution to American constitutional law. Notwithstanding his relative lack of originality in some respects, Marshall, perhaps more clearly and cogently than any other statesman, save for Hamilton, sensed the power and obligation of the Court in a constitutional democracy. In this regard, his frequent invocation of the rule of law to resolve disputes rooted in political conflict helped insulate the Court from the external pressures of partisan politics and allowed it to focus its attention upon the practical problems of constitutional interpretation.

B. The Power of Judicial Review

Most importantly, the Marshall Court set forth fundamental tenets of judicial review that helped the early republic flourish as a constitutional democracy. Decisions such as *Marbury v. Madison*[139] and *Stuart v. Laird*[140] established once and for all the power of the Supreme Court to review the substance of federal laws and reaffirmed the primacy of the Court in all matters constitutional. Similarly, a pair of cases arising from local interference with branches of the national bank clarified the scope of subject matter jurisdiction in ways that strengthened the lower federal courts.[141] Most importantly, the Court solidified its critical role as the arbiter of conflicts within the constitutional system when it refused to relinquish its appellate prerogative over issues arising under the Constitution, federal law and treaties.[142] Indeed,

137. *See* WHITE, *supra* note 1, at 603.

138. 10 U.S. (6 Cranch) 87 (1810).

139. 5 U.S. (1 Cranch) 137 (1803).

140. *Id.* at 299 (1803).

141. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824). Both of these cases broadly construed the "arising under" requirement of Article III.

142. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (upholding Supreme Court review of state criminal convictions with federal law implications); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (sustaining the constitutionality of Section 25 of the Judiciary Act of 1789); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) (asserting the supremacy of a treaty over conflicting state law).

without this power to review and revise state court decisions involving matters of constitutional law, federal legislation and treaties, the states could very well have destroyed the federal judiciary and subverted the constitutional system.[143]

Yet notwithstanding the solidification of federal judicial power that occurred between 1801 and 1835, Marshall himself set forth limitations of federal judicial review that have helped to preserve the legitimacy of the federal judiciary. Marshall understood that the Supreme Court's (as well as any other court's) primary role was to interpret the law in the cases before it and not to intercede in political affairs. For example, when, in *Marbury*, he noted the Court could not review matters within the political discretion of executive branch officials but could examine issues arising from the execution of their legal duties,[144] Marshall set forth, in inchoate form, the principle distinction upon which the political question doctrine rests. In other contexts, Marshall advocated similar judicial restraint, noting that when presented with a question about the constitutionality of legislation, the Court should refrain from inquiring into the wisdom of the law and instead ask whether the legislature, either federal or state, enacted the law within the scope of its constitutional power.[145]

Acutely aware of the ramifications of federal judicial review upon relations between the state and federal governments,

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143. In this regard, the observation of the late United States Supreme Court Justice (and former Justice of the Supreme Judicial Court of Massachusetts) Oliver Wendell Holmes, Jr. bears considerable relevance. "I do not think the United States would come to an end if we [the United States Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." OLIVER W. HOLMES, JR., COLLECTED LEGAL PAPERS 295-96 (1920) (reprint of Oliver Wendell Holmes' "Law and the Court" speech at dinner of the Harvard Law School Association of New York, Feb. 15, 1913).

144. Marshall said:

> The province of the court [sic] is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution [sic] and laws, submitted to the executive, can never be made in this court [sic].

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

145. As Marshall explained in *McCulloch*:

> But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court [sic] disclaims all pretensions to such power.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (discussing Congress's charter of the Second Bank of the United States and the Necessary and Proper Clause). *See also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (disregarding whether the 1795 act by which Georgia conveyed millions of acres to speculators was fraudulent).

Marshall refused, for example, to apply the Bill of Rights to the states in the absence of explicit constitutional language on this point.[146] In so doing, he anticipated the state action doctrine, which not only operates as a *de facto* jurisdictional requirement in cases involving the Fourteenth Amendment,[147] but also as a means of promoting federalism values such as the legitimacy, efficiency and autonomy of the states in governing matters within their internal borders. For similar reasons, Marshall's reluctance to hear suits from citizens directly against the states,[148] presaged the modern Court's Eleventh Amendment distinction between suing a state and one of its officers that exists in large part to preserve the balance between the states and the national government in the federal system.[149] While *Osborn* broadly construed the meaning of "arising under," the decision also made clear that in the absence of a federal law, treaty or constitutional provision, federal subject matter jurisdiction would not occur.[150] This notion, too, has become an integral component of contemporary judicial review.

The real significance of these limitations, some of which reflect separation of powers values and others policies of federalism, is that they exist to preserve the legitimacy of federal judicial review and to retain the vitality of an independent federal judiciary. Marshall and his fellow justices developed this sense of prudence in response to the political pressures and turbulence that marked the early decades of the nineteenth century. However, their concerns about the overextension of national judicial power resonate in modern cases involving standing and other aspects of justiciability.[151]

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146. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding the Takings Clause of the Fifth Amendment inapplicable to the states).

147. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (rejecting the notion that a privately owned and operated utility company is a state actor under the Fourteenth Amendment). The Court relied upon *Barron* when it ruled that the Fourteenth Amendment does not apply to persons who are neither state officials nor acting under color of state law. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (refusing to apply the Fourteenth Amendment to private discrimination).

148. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 849-59 (1824) (explaining that the Eleventh Amendment does not bar suit against state officers but would prohibit a federal court action against a state itself if it was a defendant on record); CURRIE, *supra* note 4, at 102-06 (analyzing *Osborn* and *Planters' Bank of Georgia*).

149. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974) (prohibiting suits for retroactive injunctive relief against a public official); Ex Parte Young, 209 U.S. 123 (1908) (permitting suit for prospective injunctive relief against an officer of the state for unconstitutional conduct).

150. *See Osborn*, 22 U.S. at 818-28 (discussing the meaning of "arising under").

151. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-476 (1982). This case

Moreover, the Marshall Court decisions involving the legal actions of coordinate branches of the federal government underscored the Supreme Court's role in separation of powers. By not only clarifying the parameters of its own constitutional obligations but also by its principled review of executive branch and legislative behavior, the Court honed its role as the ultimate referee in constitutional disputes within the national government. Indeed, much of Justice Jackson's illuminating analysis of separation of powers nearly fifty years ago in the *Steel Seizure* case[152] derived from John Marshall's constitutional exegesis in *Marbury v. Madison*[153] and decisions involving the constitutional limits upon the executive and legislative branch in matters of foreign affairs.[154]

C. The Commerce Clause and Federalism

In the realm of federalism, Chief Justice Marshall's Commerce Clause opinions, though relatively few in number, have nevertheless greatly influenced both the course of Commerce Clause jurisprudence and modern conceptions of the relationship between the states and the national government in the federal system. Of seminal importance is *Gibbons v. Ogden*,[155] a pivotal decision that not only facilitated the proliferation of interstate commerce when it struck down the New York steamboat transportation monopoly but also expressed fundamental notions of the Commerce Clause and federalism of relevance far beyond the immediate context of that case.

For in broadly construing the constitutional term, "commerce among the states," to mean, among other things, navigation, Marshall set forth a pragmatic and instrumental view of interstate commerce that sanctioned federal control of aspects of commercial activity that extended beyond the internal boundaries of

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discussed the prudential requirements of federal judicial review:

> Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

Id. at 474.

152. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring) (discussing judicial review and separation of powers).

153. 5 U.S. (1 Cranch) 137 (1803).

154. *See, e.g.*, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (holding matters of foreign affairs non-justiciable); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (upholding presidential discretion in foreign affairs).

155. 22 U.S. (9 Wheat.) 1 (1824).

individual states.[156] Although by the end of the nineteenth century, Marshall's emphasis upon the navigational characteristics of interstate commerce indirectly led to increasingly untenable judicial distinctions between manufacturing and commerce that narrowly constrained the ambit of federal regulatory authority,[157] the Supreme Court eventually adopted a more expansive interpretation of the Commerce Clause in response to industrial and socio-economic changes within the country. Increasingly, the Court justified Congressional regulation intended to preserve the stream of commerce among the states[158] and instrumentalities of such commerce from the impediments of provincialism.[159] By the end of the 1930s, a majority of the justices had even begun to accept the notion that Congress could proscribe intrastate conduct that substantially affected commerce among the states.[160] Each of these theories emanated in large part from Marshall's analysis of the Commerce Clause in *Gibbons*, which sanctioned the use of such federal power as a catalyst for the nation's economic growth.

Moreover, despite recent Court decisions critical of Congressional legislation thought to bear remote relevance to matters of interstate commerce,[161] Marshall's understanding of the Commerce Clause as a component of federalism pervades the debate between proponents of a powerful national government and their critics who prefer to emphasize the role of the states in the federal system. In retrospect, Marshall recognized an inverse relationship between the permissible scope of federal and state powers, when he implicitly asserted in *Gibbons* that the paramount interest in a competitive steamboat transportation system warranted broad construction of federal Commerce Clause authority and a corresponding narrow interpretation of state

156. "Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior." *Id.* at 194.

157. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895) (ruling that manufacturing precedes commerce).

158. *See, e.g.*, Swift v. United States, 196 U.S. 375, 398 (1905) (asserting that interstate commerce "is not a technical legal conception, but a practical one, drawn from the course of business").

159. *See, e.g.*, Shreveport Rate Case, 234 U.S. 342, 351-53 (1914) (sustaining the authority of the Interstate Commerce Commission to prescribe intrastate railroad rates that substantially affect interstate railroad traffic); Champion v. Ames, 188 U.S. 321 (1903) (upholding federal law prohibiting the interstate carriage of lottery tickets).

160. *See, e.g.*, National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the application of the National Labor Relations Act to the manufacturing operations of a national steel company).

161. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (invalidating the federal Gun-Free School Zones Act because it did not bear a direct and substantial connection to interstate commerce).

police powers.[162] Accordingly, his conclusion that the federal coastal license under which Gibbons operated his vessel outweighed an exclusive steamboat monopoly created by New York exemplified an abiding respect for constitutional and federal supremacy. It also represented an early application of the preemption doctrine, used by the Court then and now to invalidate state laws that effectively conflict with federal regulations of interstate commerce.[163]

Yet Marshall stopped short of declaring federal control over interstate commerce exclusive, thereby implying that states could have concurrent powers to regulate some aspects of interstate commerce.[164] In this respect, his oblique reference in *Gibbons* to state control over commerce entirely within state borders, together with his recognition of the legitimate exercise of state police powers over inspection, quarantine and matters of health,[165] anticipated, by several decades, the Court's dormant Commerce Clause jurisprudence. Evoking Marshall's concern with protecting the national market from the scourge of local economic protectionism,[166] later jurists have used this theory about the relative supremacy of latent, or unused, federal Commerce Clause authority to assess both even-handed[167] and overtly discriminatory applications of local police powers that burden the flow of interstate commerce in the absence of federal regulations.[168]

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162. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205-221 (1824).

163. *See, e.g.*, City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973) (invoking the Commerce and Supremacy Clauses of the Constitution to strike down a local airport noise ordinance that adversely affected interstate commerce).

164. *See Gibbons*, 22 U.S. at 194-95, 209-10. Marshall only characterized federal Commerce Clause power as plenary. *See id.* at 197, 206.

165. *See id.* at 203, 209-10.

166. *See, e.g.*, H.P. Hood and Sons v. Du Mond, 336 U.S. 525, 533-34 (discussing the purpose of the Commerce Clause). In *Hood*, the Court invalidated a New York licensing law that prohibited a Massachusetts milk distributor from operating an additional plant within New York (it already had three such facilities within the state). The Court regarded the New York statute, enacted pursuant to the state's police powers, as a form of economic protectionism that imposed substantial burdens on interstate commerce. Even though no conflicting federal law applied, the Court struck down the New York measure under the dormant Commerce Clause because it conferred a competitive advantage upon in-state dairies to the detriment of their competitors based outside who sought access to New York markets. *Id.* at 530-39, 545. *Hood* specifically cites *Gibbons* for the proposition that protection of the national economic market from the potential chaos of variegated state regulation underlies the dormant Commerce Clause. *Id.* at 534.

167. *See, e.g.*, Pike v. Bruce Church, 397 U.S. 137 (1970) (ruling that an Arizona fruit and vegetable packaging law imposed a substantial burden on interstate commerce despite its evenhanded application).

168. *Compare* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (invalidating a New Jersey law that prohibited the importation of waste from outside of the state) *with* Maine v. Taylor, 477 U.S. 131 (1986) (sustaining

In addition, Marshall articulated limitations upon federal power to regulate interstate commerce of relevance today. Aside from his suggestions that both the language of the Commerce Clause and the Tenth Amendment restricted the scope of federal authority, he also intimated that an inherent political check upon Congress existed in the democratic process. Marshall considered this last general limitation applicable to all types of national legislation. As he explained in *McCulloch v. Maryland*:[169] "In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."[170] Essentially, this idea is an early statement of the political safeguards of federalism, which during the late twentieth century has often functioned as a partial justification for federal intervention into local affairs believed to have some effect upon the nation's commerce.[171]

D. Limitations upon Governmental Authority and Individual Rights

Several of the Marshall Court decisions also underscored the vital role of an independent federal judiciary, and the Supreme Court in particular, as the guardian of individual constitutional rights in the federal system. Indeed, Marshall had anticipated as much upon reviewing the text of Article III of the Constitution in 1788; for in a speech before the Virginia Ratifying Convention of that year, the future Chief Justice characterized the federal judiciary as the bulwark of constitutional rights and liberties.[172] Fifteen years later in *Marbury*, Marshall reiterated the importance of judicial review of legal rights.[173]

Nevertheless, concerns about federalism and judicial review prompted the reluctance of Marshall and the other justices to

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Maine's ban on the importation of live baitfish from other states).

169. 17 U.S. (4 Wheat.) 316 (1819).

170. *Id.* at 431. *See also Gibbons*, 22 U.S. at 196-97 (discussing the wisdom of Congress and Federalism limits on it).

171. *See, e.g.*, Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985). "But the principal and basic limit on the federal commerce power is that inherent in all congressional action-the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism-The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (discussing the political process and federalism limits on national power).

172. Reprint of John Marshall's speech before The Virginia Ratifying Convention (June 20, 1788), *in* 1 THE PAPERS OF JOHN MARSHALL, *supra* note 18, at 277.

173. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 170 (1803).

interfere with the legal status of slavery.[174] Many remained personally ambivalent about the peculiar institution and hoped it would eventually cease to exist within the nation.[175] Similarly, the Court's record in Indian affairs did not necessarily demonstrate an overriding interest with the personal welfare of Indians, and, in fact, its decisions probably helped perpetuate the conception of Indians as noble savages and the casualties of European conquest.[176]

However, several of the individual rights cases that came before the Marshall Court involved state incursion of private economic affairs through laws that interfered with the obligation of contracts. Acutely aware of the vulnerability of contract and property rights to the transient whims of democratic majorities, Marshall, perhaps more than the other justices on the Court, invoked the Contract Clause as a limitation of state power in order to preserve the integrity of contractual obligations from the caprice of political factions.[177] Under his leadership, the Court, for the most part, broadly construed the scope of the Contract Clause in order to limit the exercise of state regulatory authority perceived as detrimental to the sanctity of contracts and the security of property rights. Marshall, in particular, strictly interpreted the Contract Clause as an absolute prohibition on state laws that

174. *See* STITES, *supra* note 6, at 145-48. *See also* HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 16, at 163-70 (discussing the distinction between morality and the rule of law in Marshall's jurisprudence concerning the slave trade). In *The Antelope* the Court, relying upon the law of nations, held the United States had an international obligation to return seabound slaves captured by an American military vessel to their Portuguese and Spanish owners. 23 U.S. (10 Wheat.) 66 (1825).

175. Marshall himself owned a few slaves throughout his life. President of the Richmond, Virginia, branch of the American Colonization Society, Marshall preferred recolonization of emancipated slaves rather than addressing the evils of slavery itself or the problems of integration. *See* STITES, *supra* note 6, at 145-48 (discussing Marshall's ambivalence). Interestingly, William Johnson, a South Carolinian, grew disgusted with slavery, going so far as to rule against slaveowners in a controversial circuit court case, *Elkison v. Deliesseline*, the aftermath of which, together with Johnson's increasing alienation from his native region, compelled Johnson to move permanently from South Carolina to Pennsylvania. 8 F.Cas. 493 (C.C.D.S.C. 1823) (No. 4366); *See* LOTH, *supra* note 4, at 320-21.

176. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (referring to Indians as members of a dependent foreign nation); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (dismissing suit by Indians against state of Georgia for lack of federal jurisdiction); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (declaring Indians mere occupants of land conquered by European discoverers).

177. *See, e.g.* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1803); *see also* Olken, *Justice George Sutherland*, *supra* note 122, at 15-16 (discussing factional aversion and vested rights theory in the Marshall Court's Contract Clause jurisprudence).

impaired the obligation of contracts.[178]

From this perspective, the Marshall Court's Contract Clause jurisprudence reflected a conscious effort of the justices to protect certain kinds of individual rights, particularly those of private property. Consequently, its emphasis upon vested rights presaged the subsequent rise of economic substantive due process that reached its acme nearly a century after Marshall's death.[179] Yet because the Marshall Court often invoked the Contract Clause as a limitation upon the states, its jurisprudence in this regard also embodied the notion of the Court as a bastion against democratic tyranny that persists today, albeit in the broader context of civil rights and other non-property based personal liberties.[180]

E. The Institutional Legacy of the Marshall Court

From an institutional perspective, the Marshall Court left an impressive legacy. At Marshall's death, the Court enjoyed a measure of respect and prestige due in part to changes that he implemented as Chief Justice in addition to the substance of his opinions and those of his fellow justices. Through the force of his character, at times the power of his logic, and the good will engendered by his congenial personality, Marshall fostered a sense of harmony among members of the Court that often outweighed internal rifts over points of law.[181] Marshall's insistence that whenever possible the Court speak as one voice, especially in important constitutional cases, honed the perception of the Court as a powerful coordinate branch of the federal government and ultimately enhanced its image as the ultimate arbiter of constitutional conflicts within the federal system. Adoption of majority opinions in place of seriatim ones enabled the justices to present their views in a more uniform fashion, which although it did not prevent the creation of concurring and dissenting opinions, nevertheless increased the solemnity and precedential weight of Supreme Court decisions essential in a constitutional democracy. Determined to insulate the Court's adjudicatory process from the external pressure of partisan politics, Marshall eventually dissuaded his brethren from active participation in the political process while they served as justices. Accordingly, they devoted

178. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat) 213, 337, 343, 346-50, 353-56 (1827) (Marshall, C.J., dissenting); Olken, *Charles Evans Hughes*, *supra* note 89, at 522-32 (discussing Marshall's Contract Clause jurisprudence).

179. *See* Olken, *Justice George Sutherland*, *supra* note 122, at 14-20.

180. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (suggesting the Court should use more exacting scrutiny where the normal political process might not adequately protect the individual rights of "discrete and insular minorities").

181. *See generally* SMITH, *supra* note 2 (discussing the relative harmony on the Marshall Court).

their collective energy to the formidable task of transforming the idea of a supreme judicial court into a powerful reality.

CONCLUSION

Marshall's true genius lay in his recognition of the vast potential of the Supreme Court and in his steadfast application of the Constitution to the problems of governmental authority in an emerging democratic republic. He was a figure of transcendent importance, whose life and work remains of considerable interest not only because of the substance of his jurisprudence and the nature of his accomplishments, but also because his was a life that encompassed America's transformation from a disjointed collection of British colonies into a nation. That he died at a time when the country's sectional conflicts over slavery and economics threatened the sanctity of the constitutional system he cherished should neither diminish his legacy nor detract from his continued importance. For Marshall was much more than an outstanding jurist and statesman, he was a compelling personage who perhaps more than any other individual of his era understood and appreciated the Constitution as the touchstone of the American experience. It is for these reasons that scholars of constitutional law and history return to John Marshall.