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F. Thornton Miller

COMMENTARIES

JOHN MARSHALL IN SPENCER ROANE'S VIRGINIA: THE SOUTHERN CONSTITUTIONAL OPPOSITION TO THE MARSHALL COURT

F. THORNTON MILLER*

Between 1819 and 1821, with cases such as *McCulloch v. Maryland*[1] and *Cohens v. Virginia*,[2] John Marshall delivered his most nationalist opinions. Marshall was not, however, advancing an interpretation of the Constitution in a country generally receptive to his views. Nor, in any positive sense, were his court opinions just part of the Era of Good Feelings, the patriotic and nationalistic popular mood that swept through America after the War of 1812. Rather, Marshall was on the defensive. His opinions were being criticized. The authority of the Supreme Court was being questioned. Marshall and his good friend, Joseph Story, were very disturbed by the opposition coming from Virginia. The opposition was led by state judges, in particular, by Spencer Roane, senior judge of the Supreme Court of Appeals of Virginia. Marshall and Story knew how serious a states' rights movement led by Virginia could be. They saw it as Anti-Federalism revived. Indeed, Roane had been an Anti-Federalist. Did the states' rights persuasion want to reverse the decision of 1788? Again, as in the 1780s, the question was: would America be a nation or a league of sovereign states?

Marshall, believing the thread that held America together, the federal supreme law of the land, was being threatened, assumed its defense, in court opinions and out of court essays. He and his chief judicial adversary of the states' rights school, Roane, presented their opposing constitutional views in court case opinions such as, for Roane, *Hunter v. Martin, Devisee of Fairfax*,[3] and, for Marshall, *Cohens v. Virginia*.[4] They both went beyond the courts and carried their debate into the newspapers. Marshall's

* Associate Professor of History, Southwest Missouri State University.

1. 17 U.S. (4 Wheat.) 316 (1819).
2. 19 U.S. (6 Wheat.) 264 (1821).
3. 18 Va. (4 Munf.) 1 (1814).
4. 19 U.S. (6 Wheat.) 264.

essays were written as "A Friend of the Constitution" and Roane's essays were written as "Hampden" and "Algernon Sidney."[5]

Other Virginians joined Roane. While the Virginia judiciary ignored Supreme Court decisions, the Virginia state legislature passed resolutions supporting its judiciary and opposing the appellate jurisdiction of the Supreme Court over the states; for example, John Taylor wrote *Construction Construed and Constitutions Vindicated* attacking the nationalists. The still popular Thomas Jefferson publicly supported Taylor, Roane, and Virginia's stand against the Supreme Court. Far from Virginia being isolated, other states were concerned about the Marshall Court's nationalist opinions, and, in Congress, some discussion emerged regarding repealing Section 25 of the Judiciary Act of 1789, which authorized the Supreme Court's appellate jurisdiction over state courts.

Despite all of Marshall's efforts, a states' rights movement had begun; it developed through the 1820s, and was dominant by the Jacksonian era. Many Marshall Court opinions were ignored at that time. Marshall and Story were concerned that their nationalist opinions would not be precedents for future law. Marshall was in a struggle. Only much later could it be determined whether he was on the winning side.

Several questions need to be considered. One is in terms of timing: why did the Southern or Virginia states' rights opposition start when it did? Another concerns motivation: why did such a condemnation of the Supreme Court emerge?

First, in the debate that emerged between Marshall and Roane, both sides were on the defensive. The states' rights reaction to the Marshall Court needs to be kept in the context of the Era of Good Feelings. Second, the Fairfax litigation through *Martin v. Hunter's Lessee*[6] was important in terms of both the timing and motivation for Roane's and states' rights Virginians' opposition to the Marshall Court. Third, the Fairfax litigation made the problems with the appellate process in Section 25 of the Judiciary Act of 1789 apparent to the states' rights persuasion.

First, the Marshall Court's nationalist opinions were viewed by the states' rights group as being part of the Era of Good Feelings. Roane and other Virginians who shared what can be called the agrarian or country republican perspective found most aspects of the era disturbing—the Marshall Court opinions were joined with the nationalistic mood, the talk of banks, and a national system of roads and canals. The states' rights movement

5. For information on Roane, "Hampden" and "Algernon Sidney," and for more information on Virginia's opposition to the Marshall Court, and on the Fairfax litigation, see F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828, chs. 5-7 (1994).

6. 14 U.S. (1 Wheat.) 304 (1816).

rose to counter this trend in America.

Leaders such as Roane were afraid that prosperous times, after the War of 1812, would lull their fellow Virginians into complacency. During this Era of Good Feelings, William Branch Giles stated that a malignant star had shone above the United States. He called on Virginians to maintain their political virtues and principles and to resist the exchange of all that was good, stable, valuable, and venerable for mere novelty. The Panic of 1819 was viewed as confirming the warnings on experimenting in banking. Virginians had to face serious economic problems and would have to find others to blame for their decline. Starting with their reaction to the events and rhetoric of the Era of Good Feelings, including the Marshall Court's nationalist opinions, the states' rights leaders believed they were on the defensive.

Second, in terms of the Marshall-Roane dispute, and specifically the challenges to the judiciary, emphasis needs to be placed on the Fairfax litigation that led to *Martin v. Hunter's Lessee*.[7] This is important for understanding when and why the Virginia states' rights opposition arose. It also is a necessary background for understanding Roane's motivation for his antagonism with Marshall.

Marshall and Roane had been in opposite political camps in Virginia. Roane, the son-in-law of Virginia's leading Anti-Federalist, Patrick Henry, became one of the leaders of the state's Republican party. By 1801, Marshall was clearly Virginia's most prominent Federalist. It was perhaps not mutual for the two judges, but, for Roane, the antagonism with Marshall could be personal. Roane disliked and distrusted Marshall. This can be seen through their involvement in the Fairfax litigation.[8]

This litigation involved land that had been part of Lord Fairfax's proprietary domain in the Northern Neck, about a third of settled Virginia. It involved two sets of land disputes: land confiscated during the Revolution and the same land which was

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7. *Id.*

8. For Roane's attacks, see Marshall v. Conrad, 9 Va. 364 (1805); Hunter v. Fairfax's Devisee, 15 Va. (1 Munf.) 218 (1809). On problems for the Marshalls, see Letter from Henry St. George Tucker to St. George Tucker (Dec. 3, 1805), TUCKER-COLEMAN PAPERS (on file with College of William and Mary); Letter from John Marshall to James Marshall (Apr. 1, 1804), *in* 6 THE PAPERS OF JOHN MARSHALL, at 277-79; Letter from John Marshall to James Marshall (Feb. 13, 1806), *in* 6 THE PAPERS OF JOHN MARSHALL, at 426-27; Letter from John Marshall to James Marshall (Nov. 21, 1808), *in* 7 THE PAPERS OF JOHN MARSHALL, at 185-87. For discussion of the continued litigation by the Marshalls, see Petition for Writ of Error, Martin v. Hunter's Lessee, *in* 8 THE PAPERS OF JOHN MARSHALL, at 121-22; and 3 VIRGINIA COURT OF APPEALS, ORDER BOOKS 183 (on file with the Virginia State Archives); 4 VIRGINIA COURT OF APPEALS, ORDER BOOKS 326, 5 VIRGINIA COURT OF APPEALS, ORDER BOOKS 75, 427, 437; and 6 VIRGINIA COURT OF APPEALS, ORDER BOOKS 258.

then sold by the state, setting off a land boom. One of the purchasers was David Hunter, a land speculator, who was an active litigant trying to secure his title—and, after the Revolution, land that was the object of escheat proceedings by the state (a process reverting property to the state where no one is entitled to inherit) which the British Fairfax family hoped to sell. John and James Marshall headed a syndicate, which included Henry Lee, that was interested in purchasing it. The Marshalls, who were the American attorneys for Denny Martin Fairfax and the British Fairfax family, handled litigation involving both sets of land disputes: on the one hand, challenging the sale of the confiscated Fairfax land, and, on the other hand, defending the claim of the Fairfax family to the land being escheated which the Marshall syndicate wished to purchase.

John Marshall, while a member of the Virginia General Assembly, managed to work through a compromise act, known as the Compromise of 1796, wherein the Fairfax family deeded to the state the confiscated land, which cleared the titles to all the Fairfax land the state had sold—including the land purchased by David Hunter. The state ceased the escheat actions against the remaining Fairfax land, which allowed the Marshall syndicate to acquire some of the choicest land in northern Virginia, and the Fairfax family to gain 20,000 pounds sterling.

Not all questions, however, were settled by the Compromise of 1796. The main issue, which was not mentioned in the compromise, was rents: the status of unpaid back rents and all other various rents, including quit rents, that had once been collected by the lord proprietor of Virginia's Northern Neck. The Marshalls tried to gain these rents and found themselves in continuous litigation. They had problems in Virginia courts, including criticism from Judge Roane. They had grave concerns as litigants in courts which appeared, increasingly, to be hostile to their interests. To secure rents (and given that the Compromise of 1796 legislation could be repealed, reopening the escheat proceedings), it would be best for the Marshalls to rest their claim not on the compromise, but on the proprietor's title secured by the Treaty of 1783 and the Constitution. As Roane saw it, the Marshalls needed a suit that would get around the compromise because any new case would come after the passage of that legislation. Roane believed that this was the only reason for the continuation of the Fairfax litigation after the compromise, specifically, the continuation of *Hunter v. Fairfax's Devisee*.[9] This litigation was initiated before the Compromise of 1796, but, after the compromise, had not been struck from the docket of the Supreme Court of Appeals of Virginia. The suit was continued

9. 15 Va. (1 Munf.) 218 (1809).

through hearings, decisions, and appeals to *Martin v. Hunter's Lessee,*[10] not by David Hunter, who had no interests involved after 1806 when he sold the land that was the subject of the controversy, or by the state, because, after the compromise legislation, the status of the confiscated land was no longer in dispute, but by the Marshalls.

In his opinion in the state court cases, Judge Roane attacked Marshall. Roane reminded Virginians that Marshall had assured them in the state ratifying convention that Fairfax would not be able to reestablish his proprietary domain or collect his feudal rents. Now it was Marshall himself trying to collect them. Would he try to reestablish the feudal domain as well?

In *Hunter v. Fairfax's Devisee,*[11] the Supreme Court of Appeals of Virginia ruled against the Marshalls and entered the Compromise of 1796 upon the record, and, from the bench, Roane attacked Marshall for trying to trick Virginians.[12] In the Compromise Act, Roane said, the Fairfax-Marshall side had agreed to give up one half of the old proprietary domain—the claim to what had been confiscated—to get the other half, what the Marshall syndicate was buying. However, now the Marshalls sought to throw out the compromise agreement to gain the whole.

Roane presented in his opinion the old Anti-Federalist view of the Fairfax controversy, that Virginia had preferred a general confiscation of British property to the common law procedure of escheating individual tracts of land, and that such a general confiscation was within the power of a sovereign state. The Treaty of 1783, enacted after the ratification of the Constitution, through the Supremacy Clause, did not affect this confiscation because the treaty only barred future confiscations. Indeed, Roane believed that the Compromise of 1796 had been unnecessary, that the escheat proceedings should not have been stopped, that all of the former Fairfax land should have been taken by the state.

The Marshalls appealed to the Supreme Court which ruled in their favor in *Fairfax's Devisee v. Hunter's Lessee.*[13] Due to his personal involvement, Marshall did not participate officially. Joseph Story gave the opinion of the Court.[14] In his opinion, Story ignored the Compromise of 1796, part of the record of the appeal from the Court of Appeals, and went beyond the record to include the Jay Treaty. Also, he made a pronouncement on Virginia law which did not involve a construction of the Constitution, treaty, or federal law. He ruled that Virginia's highest court erred on the common law. He determined that Virginia should have gone

10. 14 U.S. (1 Wheat.) 304 (1816).
11. 15 Va. (1 Munf.) 218 (1809).
12. *Id.*
13. 11 U.S. (7 Cranch) 603 (1813).
14. *Id.*

through common law escheat proceedings, therefore improperly confiscating the land. He ruled that the state could not legally confiscate the land after the Treaty of 1783, and could not legally escheat any of it under the Jay Treaty. Story included the Jay Treaty because it confirmed the articles in the 1783 treaty that protected British claimants from actions taken against them owing to their alien status, and it applied to any kind of escheat action, unlike the Treaty of 1783, which, it could be argued, was restricted to unlawful confiscations. Marshall finally received a solid judicial basis for his claims to land and rents under federal treaties. Further, the Court awarded to the Fairfax-Marshall side both the land that the Marshall syndicate was buying and the land confiscated by the state.

Roane saw this as ample proof that the Anti-Federalists had been correct. Had a Revolution been fought so that years later, through treaties and the Constitution, the Supreme Court could reestablish a feudal domain in republican Virginia? Was it to be headed by Lord Marshall? Roane was inclined to get into disputes. In his mind this one with Marshall was clearly between opposite forces. This antagonism was personal, political, legal and constitutional, and ideological as well. Roane was ready to lead the Supreme Court of Appeals of Virginia to actively defy the Marshall Court.

When the decision was sent down in *Fairfax's Devisee v. Hunter's Lessee*,[15] the Virginia high court refused to comply. In *Hunter v. Martin, Devisee of Fairfax*,[16] the Supreme Court of Appeals decided, instead, to review the subject again. The Virginia judges contended that Story violated the Judiciary Act of 1789 by discarding the Compromise of 1796 legislation from the record of the appeal. His opinion was also incorrect in that the treaty that related to the issues in the 1780s and early 1790s was not the Jay Treaty, but the Treaty of 1783. (Marshall, in the later Fairfax litigation, after *Martin v. Hunter's Lessee*,[17] realized that Story's use of the Jay Treaty had been a mistake).[18]

The Supreme Court of Appeals maintained that a good amount of the litigation concerned only state law and did not relate to U. S. law, treaties, or the Constitution. The Virginia court denied both that a valid federal jurisdiction could be established regarding the case, and Story's claim that a federal court could decide upon state common law.[19]

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15. 11 U.S. (7 Cranch) 603 (1813).

16. 18 Va. (4 Munf.) 1 (1814).

17. 14 U.S. (1 Wheat.) 304 (1816).

18. Letter from John Marshall to James Marshall (July 9, 1822), *in* 9 THE PAPERS OF JOHN MARSHALL, at 239-41 (Charles F. Hobson ed., 1998).

19. 18 Va. (4 Munf.) 1 (1814); for more on Story, on federal jurisdiction over state law, and, for the discussion below, on the Judiciary Act of 1789, see F.

The Virginia Court also had the problem of how to comply with the Supreme Court's ruling. Was it to return land to Fairfax that had been deeded by him to the state? (Regardless of the Supreme Court's decision, the Compromise of 1796 legislative act had been agreed to by all parties, it had not been reviewed and declared unconstitutional, and it was still in effect.) The Virginia judges took the decision and Story's opinion as little more than a challenge, refused to comply with the Court's ruling, and, indeed, denied the Supreme Court's appellate jurisdiction over state courts. The Virginia state legislature passed resolutions supporting its judiciary.

Hunter v. Martin, Devisee of Fairfax[20] was appealed to the Supreme Court. The Marshalls hoped that the Court would continue to ignore the Compromise of 1796, on the grounds that the compromise legislation came after the original suit was begun, counter to the position taken by the Supreme Court of Appeals of Virginia. Story agreed. Again, this was a question of state law having no relation to U.S. statute, treaty, or the Constitution. Story, again, gave the opinion of the Court—in *Martin v. Hunter's Lessee*.[21] As before, Virginia ignored the Marshall Court.[22]

One should not underestimate the importance of these cases leading up to *Martin v. Hunter's Lessee*.[23] To Roane and other states' rights Virginians, already in opposition to the Supreme Court over the Fairfax litigation, later opinions, such as *McCulloch v. Maryland*,[24] added oil to the fire.

Finally, there is another reason for the states' rights opposition, and another aspect of the Marshall-Roane dispute, that should be explored. This involves the controversy around Section 25 of the Judiciary Act of 1789. Again, for Virginians such as Roane, this problem was brought out in the Fairfax litigation—the cases before the Supreme Court were Section 25 appeals.

Section 25 had, of course, been in effect with the Judiciary Act since it was passed by Congress in 1789. Anti-Federalists and others with states' rights concerns were not initially critical of the Judiciary Act, or, specifically, Section 25. Oliver Ellsworth and the First Congress tried to be conciliatory in developing the federal judicial system. They tried to satisfy Anti-Federalist concerns, especially the demand that justice be kept close to home. In the

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THORNTON MILLER, *Joseph Story's Uniform, Rational Law*, *in* GREAT JUSTICES OF THE U.S. SUPREME COURT 49-72 (William D. Pederson & Norman W. Provizer eds., 1993).

20. 18 Va. (4 Munf.) 1 (1814).

21. 14 U.S. (1 Wheat.) 304 (1816).

22. Fragment of Argument, Martin v. Hunter's Lessee, *in* 8 THE PAPERS OF JOHN MARSHALL, at 122-26 (Charles F. Hobson ed., 1995).

23. 14 U.S. (1 Wheat.) 304 (1816).

24. 17 U.S. (4 Wheat.) 316 (1819).

federal court system, each state was made a district for district and circuit courts, and, within each district, that states' rules applying to common law trials would be used when in accordance with the Constitution and federal law. Also, district judges had to reside in their districts. Questions of fact were to be tried by a jury, and appeals would be on the record as it stood from the lower court. (The circuit courts consisted of the federal judge of the district in which the court was held and two Supreme Court Justices, who literally rode the circuit through their different districts, and an appellate procedure was established leading to the Supreme Court.) Anti-Federalists were pleased with local juries being guaranteed in the Judiciary Act (and in the Bill of Rights). A ruling on a question of law by the Supreme Court could be tempered in practice by the actions of a jury in a lower court as it determined the facts. Further, the Judiciary Act not only established a decentralized federal judicial system with courts in each state, it also drew upon the services of the state courts. This would allow a concurrent jurisdiction by state courts on federal and constitutional questions. This was one of the reasons why nationalists, indeed, became critical of the Judiciary Act.

Justice Story was one of the critics of the Judiciary Act of 1789. He believed the act constrained the federal judiciary. "No court of the United States has any general delegation of authority 'in all cases in law and equity arising under the Constitution, the laws of the United States, and the treaties made, or to be made, under its authority'." Even federal government officials often had to move through the state courts to enforce federal law. Is it not incredible, he asked, "that the United States will submit all their own rights, and those of their officers to the decisions of State tribunals?" He felt this violated the dignity of the federal government. Story believed that because the Judiciary Act allowed state courts to have jurisdiction over areas that touched upon the Constitution or federal law—despite the recourse of appeal into the federal courts—state courts, as the Anti-Federalist and states' rights persuasion hoped, could check the federal courts. It infuriated Story when litigants had to seek through state courts matters of a general concern and coming under the Constitution or federal law.[25]

While nationalists such as Story would have their problems with the Judiciary Act, it seemed to be generally acceptable to those of the Anti-Federalist or states' rights perspective through to the Era of Good Feelings. What finally alerted and alarmed Roane and other states' rights Virginians was the possible threat to state law and state courts from Section 25 appeals. This problem was

25. *A Bill Further to Extend the Judicial System of the United States*, *in* 1 LIFE AND LETTERS OF JOSEPH STORY, at 293-95 (William W. Story ed., 1851).

brought out in the Fairfax litigation.

Section 25 of the Judiciary Act of 1789 allowed appeals from state courts to the Supreme Court on questions regarding the Constitution, treaty, and federal law. Yet, as noted earlier, Story, in his opinion in *Fairfax's Devisee v. Hunter's Lessee*,[26] made a pronouncement on state law declaring that Virginia erred in how, during the Revolution, it seized Fairfax land. After the Supreme Court sent down its decision to be carried out, Roane and the Supreme Court of Appeals of Virginia, in *Hunter v. Martin, Devisee of Fairfax*,[27] reviewed the subject again, criticized Story's opinion, and refused to carry out the Supreme Court decision.[28]

The Supreme Court of Appeals of Virginia dealt with one of the specific problems posed by Section 25 appeals: once a case was appealed on federal or constitutional questions, what was to stop the U.S. Supreme Court from ruling on matters in the case that were not directly related to the federal or constitutional questions? The Supreme Court of Appeals, as the highest state court, made a final decision on state law, in a common law suit, in *Hunter v. Fairfax's Devisee*.[29] Would the court accept a reversal of that decision by the U.S. Supreme Court through an appeal—*Fairfax's Devisee v. Hunter's Lessee*[30]—brought under Section 25 of the Judiciary Act of 1789? In *Hunter v. Martin, Devisee of Fairfax*,[31] the Virginia court dealt with the question of whether this appellate procedure was proper, or, in other words, the court engaged in the judicial review of Section 25 of the Judiciary Act.

The major problem the Virginia Court found with Section 25 was the interconnection of the federal and state governments in a way that violated divided sovereignty and went against the spirit of the Constitution. The court concluded that the two systems of government should be kept separate. If a party in a suit considered the Constitution, treaty, or federal statute to be involved, then this federal question should be placed before the federal judiciary at the commencement of the litigation. There should be no appeal from the state's highest court to the Supreme Court. Such an appellate power meant that, even in suits determined by state common law, the Supreme Court could send reversals back through the state courts to be carried out. The U.S. Supreme Court could potentially become the final or supreme court for the law of each state.

After reviewing Section 25 of the Judiciary Act of 1789, the Supreme Court of Appeals of Virginia declared it unconstitutional.

26. 11 U.S. (7 Cranch) 603 (1813).
27. 18 Va. (4 Munf.) 1 (1814).
28. *Id.*
29. 15 Va. (1 Munf.) 218 (1809).
30. 11 U.S. (7 Cranch) 603 (1813).
31. 18 Va. (4 Munf.) 1 (1814).

Neither the Supreme Court's jurisdiction to hear *Fairfax's Devisee v. Hunter's Lessee*[32] was recognized nor its reversal of the decision in *Hunter v. Fairfax's Devisee*[33]. Furthermore, as already noted, the Virginia judiciary would ignore *Martin v. Hunter's Lessee*.[34]

Reflecting upon the nationalist and states' rights debate of the nineteenth century, while it was always difficult to mark out the distinct spheres of the federal and state governments, this appeared to be an even greater problem with the judiciary. It was easier to distinguish between the constitutional powers of Congress and state legislatures or the President and state governors than between federal and state courts. The connection of the federal and state courts in the Judiciary Act of 1789 exacerbated the problem. What disturbed Roane and others in the states' rights group was that the very interconnectedness of the federal and state courts in Section 25 would allow the federal judiciary to impose its jurisdiction over state law.

Roane and other states' rights jurists believed that Section 25 appeals posed a real threat to the states, specifically a threat to the institutional independence and integrity of the state courts. It appears Roane was sincerely afraid that the state courts would be reduced to a status similar to county courts within a state. He was afraid that the barriers would be broken down, there would be just one American law, all courts would be courts of this American law, and appeals would run to the Supreme Court which would lay down the law for all courts to follow.

It should be noted that to deny Section 25 appeals would allow each state supreme court to be the final court in that state on the U.S. Constitution. This is obviously important in understanding Marshall's and Story's motivation in defending Section 25. However, in understanding the motivation of Roane and the states' rights side, Section 25 appeals also allowed the Supreme Court to act as the final court of appeals for a state on state common law.

Roane had his fears. Marshall did as well. Marshall saw a real threat to the Supreme Court and the Constitution from Roane and the states' rights movement. That motivated him to write his nationalist court opinions and his out of court essays. Placed in historical context, both sides were struggling with each other, hoping that their vision of America would prevail.

32. 11 U.S. (7 Cranch) 603 (1813).
33. 15 Va. (1 Munf.) 218 (1809).
34. 14 U.S. (1 Wheat.) 304 (1816).