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Charles Hobson

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# JOHN MARSHALL: THE FORMATION OF A JURIST

CHARLES HOBSON\*

## INTRODUCTION

Two hundred years ago, on February 4, 1801, John Marshall of Virginia took the oath of office as the fourth Chief Justice of the United States. He held this office until his death in July 1835, when he was nearing eighty. Marshall presided over the Supreme Court longer than any other Chief Justice. Under his leadership, the Court began to acquire the power and play the role in our constitutional system of government that we take for granted today. We recognize the judiciary as one of three co-equal branches of the government, along with the legislative and executive. Yet, the notion of a balanced government of three co-equal branches did not spring full-blown from the mind of the framers of the Constitution in 1787. The framers expected the federal judiciary, which they called “the least dangerous branch,” to be a distant third behind Congress and the Presidency in terms of power, importance, and prestige.<sup>1</sup> It is not inconceivable that the Supreme Court would have remained a minor appendage of our government, and our constitutional development taken a distinctly different course, but for the fact that John Marshall occupied the Chief Justice’s chair during the first three decades of the nineteenth century.

\* Adjunct Professor, College of William and Mary; Editor, Papers of John Marshall.

<sup>1</sup> See THE FEDERALIST PAPERS, NO. 78 HAMILTON 464 (Clinton Rossiter ed., 1961) (stating that “[i]t may truly be said [the judiciary] ha[s] neither *force nor will* but merely judgment; and most ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”); see also Forrest G. Alogna, *Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction*, 86 CORNELL L. REV. 1131, 1164 (2001) (discussing Alexander Hamilton’s quotation). See generally DAVID LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 162 (Vail-Ballou Press Inc. 1949) (stating that separate building for Supreme Court did not exist and they had to conduct their business in basement of Capital).

Marshall made the Supreme Court into a major player by hitching its destiny to the Constitution itself. He appropriated the Constitution as the judiciary's special preserve. He acted on the assumption that the Constitution, besides being a framework of our government, is also a law that judges must take into account when deciding cases. He staked out and ultimately established the judiciary's claim to expound and apply the law of the Constitution in the same way that courts interpret common law and statutes in their accustomed role of adjudicating legal disputes.<sup>2</sup> On this disarming premise that the Constitution operates in our courts just like any ordinary law, Marshall laid the foundation for the judiciary's unanticipated rise to coordinate status with the other branches of government. He asserted this claim first and most famously in *Marbury v. Madison*,<sup>3</sup> where he stated that the Constitution was "a rule for the government of courts, as well as of the legislature."<sup>4</sup> As he framed the issue, judges could not ignore the Constitution but were duty bound to enforce it by disallowing laws repugnant to it.<sup>5</sup>

Chief Justice Marshall understood that the judiciary, possessing neither power nor patronage, would always be the weakest branch and that its effectiveness depended on gaining the acquiescence of the legislative, executive, and ultimately, of the people. Whatever power the Supreme Court enjoyed would be a moral force based on its ability to persuade. In building up the institutional strength of the judiciary, Marshall shrewdly tapped the American people's undoubted reverence for the

<sup>2</sup> See ROBERT KENNETH FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 195-96 (Princeton Univ. Press 1968) (explaining idea of constitution as fundamental law when written that is analyzed according to common law principles); see also Charles W. Collier, *Historical Perspectives on Contemporary Hermeneutics: Law as Interpretation*, 76 CHI.-KENT L. REV. 779, 807-09 (2000) (explaining Marshall's view of role of court in interpreting Constitution). See generally FRANCIS N. STITES, *JOHN MARSHALL DEFENDER OF THE CONSTITUTION* 77-96 (Oscar Handlin ed., Little, Brown & Company 1981) (explaining evolution of independent judiciary).

<sup>3</sup> 5 U.S. 137 (1803).

<sup>4</sup> *Id.* at 180.

<sup>5</sup> See FAULKNER, *supra* note 2, at 202 (quoting Marshall at Virginia Ratifying Convention: "[i]f [the government of the United States] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."); see also CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 5 (Univ. of Kan. Press 1996) (suggesting Marshall thought judges should be guardians of the Constitution); STITES, *supra* note 2, at 92 (citing Marshall's statement at Virginia Ratifying Convention).

Constitution. He carefully nurtured and strengthened the Court's claim to be the peculiar guardian of the Constitution, giving voice and effect to the people's permanent will. He strove to preserve and enhance the judiciary's image as a tribunal that impartially pronounced "law" and kept out of "politics."<sup>6</sup> By the end of his tenure, the Supreme Court's mystique was essentially in place. The justices were revered as Olympian sages, as jealous protectors of the Constitution who are elevated above the turbulent waters of politics. This mystique remains the basis of the Court's extraordinary power and largely explains why an institution composed of unelected judges with lifetime appointments can credibly claim to serve the ends of democratic government.<sup>7</sup>

### I. CAREER TO 1801

So, who was John Marshall and what were the political principles and beliefs that informed his jurisprudence? First, let me rapidly summarize his career to 1801.<sup>8</sup> Before his judicial appointment, Marshall led a varied career as a soldier, state legislator, lawyer, diplomat, member of Congress, and Secretary of State.<sup>9</sup> Born in the foothills of the Blue Ridge Mountains of

<sup>6</sup> See FAULKNER, *supra* note 2, at 201 (noting "[q]uestions in their nature political, or which are, by the constitution and law, submitted to the political department, can never be made in this court."); HOBSON, *supra* note 5, at 52 (finding that "the judiciary refused to take jurisdiction over 'questions, in their nature political' and confined itself to deciding upon legal rights of individuals" (citing *Marbury v. Madison*)).

<sup>7</sup> See JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER, JOHN MARSHALL AND THE JUDICIAL FUNCTION 137 (The Univ. of Chic. Press 1967) (finding that "Marshall's ideas, diffused in all sorts of ways, especially through the influence of the legal profession, have become the presuppositions of our political institutions."); see also W. MELVILLE JONES, CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL 94 (W. Melville Jones ed., Cornell Univ. Press 1956) (stating Marshall is standard against whom all other Chief Justices are compared). See generally ROBERT B. TURNSTALL, THE MARSHALL READER: THE LIFE AND CONTRIBUTIONS OF CHIEF JUSTICE JOHN MARSHALL 218-35 (Erwin C. Surrency ed., Oceana Publ'g 1955) (discussing how Marshall's contribution to fundamental judicial principle had lasting effect on development of American government).

<sup>8</sup> See generally JOHN R. CUNEO, JOHN MARSHALL: JUDICIAL STATESMAN 4-5 (McGraw-Hill Book Co. 1975) (summarizing events in Marshall's life before Revolutionary war); HOBSON, *supra* note 5, at 5 (discussing Marshall's professional life from 1789 until his judicial appointment twelve years later); AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL 4 (John Stokes Adams ed., The Univ. of Mich. Press 1937) (recounting Marshall's early years).

<sup>9</sup> See CUNEO, *supra* note 8 (cataloguing Marshall's early career accomplishments); HOBSON, *supra* note 5, at 5 (discussing Marshall's career from 1782 until his appointment to U.S. Supreme Court); AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL, *supra* note 8, at 4 (reviewing Marshall's early career).

Virginia in 1755, he was the eldest of fifteen children of Thomas Marshall, a planter and county leader, and Mary Randolph Keith, a clergyman's daughter descended from one of Virginia's first families. His early education took place at home under his father's supervision. At age fourteen Marshall spent a year at an academy in a neighboring county, which was followed by a year of study at home with the local parish priest. These two years of formal schooling provided him the rudiments of a classical education. Equally invaluable was the youth's exposure to the informal "curriculum" of the colonial Virginia gentry, an unexcelled practical school for future American statesmen.<sup>10</sup>

Although fated for a career in law, at the onset of the War of Independence in 1775 Marshall put aside his reading of *Blackstone's Commentaries* and took up arms. He eventually obtained a commission as an officer in the Continental army, rising to the rank of captain. He saw action at Brandywine Creek, Germantown, Monmouth, and Stony Point and survived the winter's encampment at Valley Forge in 1777-1778. On temporary leave from the army, Marshall in 1780 attended a course of law lectures by George Wythe at the College of William and Mary. Wythe's lectures constituted the future Chief Justice's only formal law study and supplemented his self-education, which began before and certainly continued after his brief college sojourn.<sup>11</sup>

Marshall commenced his law career in earnest after moving permanently to Richmond in 1784. He rapidly ascended the professional ladder, distinguishing himself among the small fraternity of lawyers who practiced in the state superior courts. During the 1780s and 1790s he served periodically in the state legislature. He was a delegate to the state ratifying convention of June 1788, where he made a notable speech defending the judiciary article of the Constitution. After the new government began operation in 1789, Marshall repeatedly declined offers to

<sup>10</sup> See CUNEO, *supra* note 8, at 5 (stating that at age 14 Marshall was sent 100 miles from home to study at boarding school run by Scotch clergymen); HOBSON, *supra* note 5, at 2 (delineating Marshall's education); AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL, *supra* note 8, at 4 (reviewing Marshall's early education).

<sup>11</sup> See CUNEO, *supra* note 8, at 16 (stating Marshall attended lectures at William and Mary College from George Wythe); HOBSON, *supra* note 5, at 3 (noting that "the term at William and Mary constituted Marshall's only formal study of law."); AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL, *supra* note 8, at 5-6 (stating that he attended these lectures).

run for Congress or to accept a federal appointment, not yet ready to give up a lucrative law practice that had now expanded to include the federal circuit court.<sup>12</sup>

As divisions over financial and foreign policy gave birth to an opposition party led by Thomas Jefferson, Marshall, who continued to serve in the state legislature, emerged as the leading defender of the Washington administration. In effect, he became the unofficial leader of the Federalist Party in Virginia, gaining national attention for his public role in defending the government's policies. Eventually, in 1797, President John Adams prevailed upon Marshall to accept an appointment to a diplomatic commission to France. The mission failed, but the publication of his dispatches reporting the commissioner's refusal to compromise American sovereignty and independence won him national acclaim. Back home, Marshall was elected to Congress, where he distinguished himself as a formidable spokesman for the Adams administration. In May 1800, Adams brought the Virginian into his cabinet as Secretary of State, the post he held when nominated Chief Justice eight months later.<sup>13</sup>

Marshall was a happy choice to fill the highest judicial office in the land. First, he was a technically sound lawyer, having practiced for nearly twenty years in the higher courts of Virginia and in the federal court. Second, he was a statesman of broad experience. The knowledge and understanding gained through participation in government were no less essential than lawyerly skills as preparation for his role on the Supreme Court. Marshall came to the bench thoroughly versed in the political processes and workings of the federal and state governments, and he understood as well as anyone the nature and boundaries of legislative, executive, and judicial power. Intermittent, though it was prior to 1801, Marshall's participation in public life occurred at times and places that in retrospect appear to have been nicely

<sup>12</sup> See CUNEO, *supra* note 8, at 49 (stating that monetary considerations precluded Marshall from accepting public office); HOBSON, *supra* note 5, at 5 (stating that "[h]e could not yet afford to give up his lucrative law practice."); AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL, *supra* note 8, at 20-21 (explaining choice of private practice over public service).

<sup>13</sup> See CUNEO, *supra* note 8, at 50-56, 67-76 (providing detailed description of Marshall's trip to France and what happened to him there); HOBSON, *supra* note 5, at 7 (providing concise explanation of events leading up to Marshall's nomination as Chief Justice); AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL, *supra* note 8, at 21-30 (providing autobiographical account of these events).

calculated to prepare him for his high judicial station. For example, he gained invaluable experience in constitutional dialectics by participating in the debates at the Virginia ratifying convention of 1788, by defending the Jay Treaty as a member of the Virginia legislature in 1795, by arguing the celebrated British debts case of *Ware v. Hylton*<sup>14</sup> in the Supreme Court in 1796, and, lastly, by his masterly defense of the Adams administration's extradition of Jonathan Robbins in 1800. Indeed, it was for this great forensic effort that Adams rewarded Marshall with a place in his cabinet. In appointing Marshall to be Chief Justice, Adams knew he had found the right man for the job, but perhaps in 1801 he did not know just how excellent his choice was. In 1825, shortly before his death, he wrote that it was "the pride of my life that I have given to this nation a Chief Justice equal to Coke or Hale, Holt or Mansfield."<sup>15</sup>

## II. MARSHALL AS REPUBLICAN

Marshall was forty-five when he took his seat on the Supreme Court. During the preceding two decades he had formulated the views on politics and government that he was to hold essentially unchanged for the rest of his life. As a child of the American Revolution, he embraced classical republicanism as modified by its accommodation to the "modern" world of the eighteenth century.<sup>16</sup> He was a votary of "republican" or "popular" government, that is, government that was elective and representative and in which the right to vote belonged to white male landowners.<sup>17</sup> Such a government depended on "virtue,"

<sup>14</sup> 3 U.S. 199, 199 (1796).

<sup>15</sup> 10 THE PAPERS OF JOHN MARSHALL, JOHN ADAMS TO JOHN MARSHALL, AUG. 17, 1825 197 (Charles F. Hobson et al. eds., 2000); see also ALLAN B. MACGRUDER, AMERICAN STATESMAN: JOHN MARSHALL 163 (John T. Morse, Jr. ed., Houghton, Mifflin and Co. 1897) (1885) (stating Adams decision was based on "an instinctive perception of a peculiar fitness for the place"); STITES, *supra* note 2, at 79 (stating that 25 years later, Adams considered Marshall's appointment as "gift" to American people and proudest moment of his life).

<sup>16</sup> See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 64-71 (Transaction Publishers 1998) (1913) (explaining freehold requirements established in each of 13 colonies); FAULKNER, *supra* note 2, at 117-24 (explaining freehold requirement in terms of Lockean political theory); HOBSON, *supra* note 5, at 16-25 (explaining Marshall's understanding of Republicanism).

<sup>17</sup> See FAULKNER, *supra* note 2, at 122-23 (associating republican principles with representation based on property rights); HOBSON, *supra* note 5, at 16-17 (explaining that "[p]opular government was elective and representative government, in which the right to vote belonged to white male 'freeholders,' defined in his own state of Virginia as those

now recently redefined to accord more with the realities of human nature and better adapted to the rise of commerce and the market.<sup>18</sup> It recognized and to some extent gave free play to man's passions and interests.<sup>19</sup> Like others of his generation, Marshall was able to reconcile republicanism with the spirit of commerce, a belief in the philosophy of individual rights, and a recognition of self-interest as a legitimate motive in human affairs.<sup>20</sup> Still, he remained firmly wedded to classical republican values.<sup>21</sup> The idea that society was nothing more than a collection of completely self-absorbed individuals and groups and that politics was an arena of scrambling selfish interests was abhorrent to Marshall,<sup>22</sup> as it was to the founders generally.<sup>23</sup> He was typically republican in his distaste for party politics, which, he said, tended "to abolish all distinction between virtue and vice;<sup>24</sup> and to prostrate those barriers which the wise and good have erected for the protection of morals, and which are defended solely by opinion."<sup>25</sup> Federalist spokesman though he was in the

owning a one-quarter-acre town lot or twenty-five acres and a dwelling house in the country, or fifty acres of unimproved land." See generally BEARD, *supra* note 16, at 69 (explaining Virginia qualifications for voting).

<sup>18</sup> See HOBSON, *supra* note 5, at 18; see also FAULKNER, *supra* note 2, at 37-39 (discussing Marshall's respect for industry and how he followed Montesquieu's view of commercial republicanism).

<sup>19</sup> See HOBSON, *supra* note 5, at 18; see also FAULKNER, *supra* note 2, at 117 (discussing Marshall and Madison's definition of republic as "administered . . . according to the public will. . .").

<sup>20</sup> See HOBSON, *supra* note 5, at 18-19; see also FAULKNER, *supra* note 2, at 37 (emphasizing Marshall's praise of industry, wealth, power and dedication leading to peace and improvement of man).

<sup>21</sup> See HOBSON, *supra* note 5, at 19; see also LEONARD BAKER, JOHN MARSHALL - A LIFE IN LAW 38 (Macmillan Publ'g 1974) (defining Marshall's idea of republic as responsive to those it represents and based on fair set of laws).

<sup>22</sup> See HOBSON, *supra* note 5, at 19; see also BAKER, *supra* note 21, at 92 (quoting Marshall, who questioned whether some powerful men had objectives other than America retaining its independence); DAVID ROBARGE, A CHIEF JUSTICE'S PROGRESS - JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME COURT 99 (Greenwood Press 2000) (explaining Marshall's fears of violent dissensions in state, as well as politicians who promote their own private dishonesty, harming prospect of free America).

<sup>23</sup> See HOBSON, *supra* note 5, at 17; see also BAKER, *supra* note 21, at 111 (discussing Washington's view that United States' success depended on unity among Americans "which will induce them to forget their local prejudices and politics"); ROBARGE, *supra* note 22, at 209 (describing founding fathers as enlightened and virtuous).

<sup>24</sup> HOBSON, *supra* note 5, at 17; see also ROBARGE, *supra* note 22, at 203 (explaining Marshall's disgust for partisan politics); JEAN EDWARD SMITH, JOHN MARSHALL - DEFINER OF A NATION 6 (Henry Holt and Co. 1996) (defining Marshall as man driven by patriotism, not partisanship).

<sup>25</sup> JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 2: 349 (2d ed. 1838); see also SMITH, *supra* note 24, at 7-8 (describing how Marshall deplored vindictiveness of campaigning).



1790's, Marshall never regarded himself as a "party" man, but as a defender of the Constitution, and established government against unjustified attacks by partisan factions bent on some selfish or sinister aim.<sup>26</sup> Marshall clung to the classical republican conception that enlightened statesmen could identify and pursue a single public interest even as he recognized that competing and clashing interests were inevitable concomitants of free and popular governments.<sup>27</sup> He continued to hold onto a concept of virtue that in some measure required disinterestedness, if not by the whole citizenry, then at least by the leadership of the republic.<sup>28</sup> He believed that virtue, fortified by proper constitutional arrangements, could continue to be the animating principle of the American republic.<sup>29</sup> His attachment to the Constitution was based in no small part on the hope that it would preserve and strengthen the career of republican virtue in a society that was becoming increasingly less homogeneous, more factious, and more driven by the imperatives of the market.

Revolutionary republicanism shaped Marshall's political creed and his constitutional jurisprudence.<sup>30</sup> From his experiences as a Continental soldier and postwar Virginia legislator<sup>31</sup> sprang a conviction that the Constitution of 1787 marked a decisive turning point away from a union of confederated states toward a

<sup>26</sup> See HOBSON, *supra* note 5, at 17; see also DAVID LOTH, CHIEF JUSTICE – JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 335 (W.W. Norton & Co. 1949) (stating that Marshall's aloofness toward slavery was but one example of his "general abstention from politics"); SMITH, *supra* note 24, at 6-7 (describing Marshall's bond to patriotism, not particular political party).

<sup>27</sup> See HOBSON, *supra* note 5, at 17; see also FAULKNER, *supra* note 2, at 125-26 (stating that Marshall believed ideal statesmen possessed such virtues as discipline and sense of justice).

<sup>28</sup> See HOBSON, *supra* note 5, at 19, 24; see also FAULKNER, *supra* note 2, at 117 (describing Marshall's view that only through virtue can nation be republican); ROBARGE, *supra* note 22, at 41 (describing Marshall's insistence on virtuous men running government).

<sup>29</sup> See HOBSON, *supra* note 5, at 22; see also BAKER, *supra* note 21, at 94 (explaining how Marshall's desire for strong central government developed in his years as a soldier); LOTH, *supra* note 26, at 43 (describing how great deal of Marshall's future politics was developed during his combat experience).

<sup>30</sup> See HOBSON, *supra* note 5, at 20; see also ROBARGE, *supra* note 22, at 101 (describing how members of Constitutional Convention wanted to enlarge powers of federal government); SMITH, *supra* note 24, at 111 (citing invitation Marshall received to Constitutional Convention to make central government stronger by revising Articles of Confederation).

<sup>31</sup> See HOBSON, *supra* note 5, at 20; see also BAKER, *supra* note 21, at 106 (describing how Articles of Confederation rested on voluntarism that was impossible to enforce).

“nation of states” based on the principle of national supremacy.<sup>32</sup> Any attempt to construe the Constitution into a compact resembling the discarded Articles of Confederation was an interpretative heresy that must be combated with all the weapons at his command.<sup>33</sup> Nationalism arose naturally from resistance to Great Britain; and his association in the Continental army “with brave men from different states who were risking life and everything valuable in a common cause” confirmed him “in the habit of considering America as my country, and congress as my government.”<sup>34</sup> Marshall’s partiality to union and nationalism hardened into an unwavering conviction during the 1780’s, as the return of peace exposed the dangerous weaknesses of a Confederation government that lacked the power to tax or to impose a uniform commercial policy.<sup>35</sup> He was never an advocate of national power for its own sake, however, but only as a means to preserve and consolidate the newly won independence of the United States and to promote the commercial prosperity of the American people.<sup>36</sup> The impotent Confederation portended political and commercial anarchy, disunion, and eventual loss of independence, as the individual American states would inevitably become subservient to European powers.<sup>37</sup>

At the core of Marshall’s nationalist outlook was a deep-rooted anxiety about the perilous position of the United States in a hostile world. That American security, independence, and

<sup>32</sup> AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL, *supra* note 8, at 9-10.

<sup>33</sup> See HOBSON, *supra* note 5, at 20; see also LOTH, *supra* note 26, at 96 (describing how, even in emergency, states were not likely to obey tax put on them by national government); ROBARGE, *supra* note 22, at 98 (describing how Confederation had no power to raise revenue, regulate commerce or defend nation from invaders).

<sup>34</sup> HOBSON, *supra* note 5, at 20; see also ROBARGE, *supra* note 22, at 38 (describing how Marshall’s war experience led him to believe that strong national government was crucial for continued independence); SMITH, *supra* note 24, at 12 (describing Marshall’s view that strong national government was key to survival of nation).

<sup>35</sup> See HOBSON, *supra* note 5, at 20; see also LOTH, *supra* note 26, at 79 (describing how commerce was suffering from rivalries between states); SMITH, *supra* note 24, at 8 (describing how Marshall was one of supporters of Constitution as guard against what was becoming anarchy in states).

<sup>36</sup> See HOBSON, *supra* note 5, at 20; see also LOTH, *supra* note 26, at 98-99 (stating that Federalists believed that absence of strong central government would allow Spanish, British and Indians to stop union’s manifest destiny). Cf. SMITH, *supra* note 24, at 118 (quoting Washington, stating that “[A] weak state with Indians on it’s back and Spaniards on it’s flank [must] see the necessity of a General Government. . .”).

<sup>37</sup> See HOBSON, *supra* note 5, at 20; see also SMITH, *supra* note 24, at 115 (describing Marshall’s belief that national unity was crucial to survival of United States and continued independence).

ultimately, American liberty, required a strong and energetic general government was an axiom Marshall never doubted, and he operated on the assumption that the Constitution conferred the requisite powers to accomplish these objects.<sup>38</sup> Throughout his life, Marshall viewed the federal government as chronically vulnerable to the aggressive encroachments of the state governments.<sup>39</sup> These internal pressures that undermined the authority of the central government and loosened the bonds of union in turn exposed the United States to external threats—inviting intervention, even invasion, by foreign powers.<sup>40</sup> In the American federal system as he understood it, centrifugal force was much stronger than centripetal.<sup>41</sup> If the republic was to perish, it would not be “by the overwhelming power of the National Government, but by the resisting and counteracting power of the State sovereignties.”<sup>42</sup> The Constitution, he believed, was designed to establish equilibrium between the federal and state governments, an equilibrium that was in constant danger of breaking down in the direction of the states.<sup>43</sup> Marshall’s nationalism might properly be described as defensive or negative—resisting the superior force of state sovereignty rather than augmenting federal power.

As a state legislator in the 1780’s, where he followed the lead of James Madison, Marshall came to see that the objects of an invigorated national government went beyond enhancing

<sup>38</sup> See HOBSON, *supra* note 5, at 20; see also LOTH, *supra* note 26, at 79 (describing how whole country was at mercy of bickering states in area of commerce); SMITH, *supra* note 24, at 17 (quoting Marshall, describing his fear Jefferson would try to strengthen state rights at expense of federal government).

<sup>39</sup> See HOBSON, *supra* note 5, at 20-21; see also LOTH, *supra* note 26, at 98 (describing how nation was vulnerable to foreign invasion); SMITH, *supra* note 24, at 103 (describing Marshall’s fear that, if US did not repay its debts to England, they were likely to be attacked).

<sup>40</sup> See HOBSON, *supra* note 5, at 21; see also ROBARGE, *supra* note 22, at 101 (stating that nationalists were in favor of enlarging power of federal government).

<sup>41</sup> Joseph Story, *A Discourse upon the Life, Character, and Services of the Honorable John Marshall*, in JOHN MARSHALL: LIFE, CHARACTER, AND JUDICIAL SERVICES 3:368 (John F. Dillon ed., 1903)

<sup>42</sup> See HOBSON, *supra* note 5, at 21; see also FAULKNER, *supra* note 2, at 105 (describing Marshall’s fear that states would grow in power and conflicts between states would get worse); ROBARGE, *supra* note 22, at 98 (stating how Virginia and other states were gaining more power and harming federal government by passing paper money and hurting individual property rights).

<sup>43</sup> HOBSON, *supra* note 5, at 21; see also BAKER, *supra* note 21, at 111 (describing Washington’s idea that stronger federal government was crucial to survival of United States); LOTH, *supra* note 26, at 79 (describing attempts to reform commerce to alleviate rivalries between states).

security and promoting greater commercial prosperity, important as these were.<sup>44</sup> Such a government would also promote internal tranquility within the states, where the danger to liberty was perhaps more immediately threatening than that posed by external forces.<sup>45</sup> The source of this danger was the American people themselves, a circumstance that cast grave doubts on the long-term prospects for their novel experiment in republican self-government.<sup>46</sup> Madison, indeed, concluded on the eve of the Federal Convention that the fundamental crisis facing America was the apparent failure of republican government as practiced in the states.<sup>47</sup> Laws enacted by state legislatures far too frequently reflected the selfish interests of popular majorities and trampled upon the private rights of individuals and minorities.<sup>48</sup> Marshall, too, directly witnessed the declining influence of the “wise and virtuous,” whose efforts to observe public faith and honor were increasingly challenged by the schemes of self-interested majorities. Debtors and land speculators, for example, formed the core of an increasingly numerous faction that was gaining ascendancy in the legislature, where under the guise of public law they could mitigate the consequences of private folly.<sup>49</sup>

Without question, the turbulent and corrupt politics of the postwar years, the disorderly tumults that portended civil anarchy and social chaos made an indelible impression upon the

<sup>44</sup> See HOBSON, *supra* note 5, at 21; see also BAKER, *supra* note 21, at 111 (describing Washington’s idea that stronger federal government was crucial to survival of United States); LOTH, *supra* note 26, at 79 (describing attempts to reform commerce to alleviate rivalries between states).

<sup>45</sup> See HOBSON, *supra* note 5, at 21; see also ROBARGE, *supra* note 22, at 99 (stating Marshall’s fear that uprisings such as Shay’s Rebellion, and inability of national government to combat them, was major problem for Confederation).

<sup>46</sup> See HOBSON, *supra* note 5, at 21; see also LOTH, *supra* note 26, at 34 (stating that way Continental Congress governed was chaotic); ROBARGE, *supra* note 22, at 101 (stating Marshall’s idea that relaxation of laws by states needed to be stopped).

<sup>47</sup> See HOBSON, *supra* note 5, at 21; see also ROBARGE, *supra* note 22, at 77 (describing how, even later in his life, Marshall, being private citizen experienced “opposition from selfish individuals”); SMITH, *supra* note 24, at 93 (quoting Marshall, stating that pettiness of self-interests distract Counsel members from their real tasks).

<sup>48</sup> See HOBSON, *supra* note 5, at 22; see also SMITH, *supra* note 24, at 111, 115 (discussing Marshall’s concern that state legislatures were catering to needs of debtors).

<sup>49</sup> See HOBSON, *supra* note 5, at 23; see also ROBARGE, *supra* note 22, at 100 (stating Marshall’s fear that uprisings in Massachusetts would spread throughout New England and south); SMITH, *supra* note 24, at 110 (describing Marshall’s disdain at turbulence done in name of people).

mind of the future chief justice.<sup>50</sup> Marshall embraced a chastened and sober republicanism that favored a "well regulated Democracy" as embodied in the Constitution, that is, popular government in which there would be "a strict observance of justice and public faith, and a steady adherence to virtue."<sup>51</sup> Marshall believed that republican government could still work tolerably well, so long as it operated within a system of checks and balances that reinforced the natural moderating effects of self-interest<sup>52</sup> and produced leaders of excellent character, distinguished for sound and discriminating judgment and disinterested attachment to the public interest.<sup>53</sup> In revising his thinking about republican government, Marshall, like Madison and others, called into question the heretofore superior role enjoyed by legislatures, where much of the obnoxious behavior from which he recoiled in disgust was occurring.<sup>54</sup> His own direct experience with the mischievous, selfish politics of the 1780's left him deeply skeptical of popular assemblies and led him to reflect on the potential role of the judiciary in maintaining a "well regulated Democracy."<sup>55</sup> With the decline of the legislatures into arenas of licentiousness, courts and judges became increasingly looked upon as repositories of virtue and wisdom, where reason, reflection, judgment, and disinterestedness continued to hold sway.<sup>56</sup>

<sup>50</sup> See *John Marshall, Speech in the Virginia Ratifying Convention, June 10, 1788 in THE PAPERS OF JOHN MARSHALL, VOL. 1 256* (Herbert A. Johnson, et al. eds., 1974).

<sup>51</sup> HOBSON, *supra* note 5, at 24; see also BAKER, *supra* note 21, at 113 (describing Marshall's view that balancing of power is essential for Constitution to work); SMITH, *supra* note 24, at 132 (quoting Marshall's speech before Virginia Constitutional Convention, which detailed virtues of separation of powers).

<sup>52</sup> See HOBSON, *supra* note 5, at 24; see also BAKER, *supra* note 21, at 107-08 (quoting Marshall, describing how government must be run "by men exempt from passions incident to human nature"); LOTH, *supra* note 26, at 104 (describing Marshall's hope that judiciary would be run by able and honest men).

<sup>53</sup> See HOBSON, *supra* note 5, at 24; see also ROBARGE, *supra* note 22, at 101 (noting Marshall was able to discern "imbecility of the nation" and danger young states face if not held together by cement); SMITH, *supra* note 24, at 115 (stating that in light of excessive power of state legislature, Marshall highly valued article in Constitution which imposed restrictions on states).

<sup>54</sup> See HOBSON, *supra* note 5, at 24; see also BAKER, *supra* note 21, at 364 (asserting that from moment Marshall became Chief Justice, he aimed to strengthen role of Supreme Court, using law to solve political problems); SMITH, *supra* note 24, at 116 (explaining Marshall's view that strong judiciary was essential to individual liberties).

<sup>55</sup> See HOBSON, *supra* note 5, at 24; see also FAULKNER, *supra* note 2, at 200 (revealing Marshall's belief that "the judiciary's role was first in dignity and authority, and it was to determine the principles to be guarded").

<sup>56</sup> See HOBSON, *supra* note 5, at 24; see also FAULKNER, *supra* note 2, at 106-107

From this period, as well, dates Marshall's lifelong distrust of the state governments and his belief that one of the chief advantages of a reformed and strengthened national government was its capacity to act as a steadying counterweight to those smaller republics.<sup>57</sup> The "general tendency of state politics" had convinced him that "a more efficient and better organized general government" provided the only "safe anchorage ground."<sup>58</sup> In his opinion the most valuable provision of the new Constitution was the restrictions placed upon the states, particularly the restriction prohibiting the states from enacting laws "impairing the Obligation of Contracts."<sup>59</sup> Marshall's later expositions of the Constitution's contract clause were infused with perceptions formed during the post-Revolutionary era.<sup>60</sup> Time and again he recited the evils arising from the state politics of the 1780's, whose vicious and alarming tendency was "not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith."<sup>61</sup> To remedy these mischiefs was a paramount goal of "all the truly wise, as well as the virtuous" and "one of the important benefits expected from a reform of the government."<sup>62</sup> In the hands of Chief Justice Marshall and his "wise and virtuous" brethren, the contract clause emerged as a potent constitutional remedy for preserving the health of the American republic.

(assessing Marshall's characterization of state's power was phrased in the negative).

<sup>57</sup> See AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL, *supra* note 8, at 10.

<sup>58</sup> HOBSON, *supra* note 5, at 24; see also BAKER, *supra* note 21, at 119 (revealing that part of Constitution, which imposed restrictions on states most appeals to Madison); SMITH, *supra* note 24, at 110 (suggesting in Marshall's opinion that one of nation's largest problems was "lax notions" states had toward contract obligations).

<sup>59</sup> See HOBSON, *supra* note 5, at 24; see also ROBARGE, *supra* note 22, at 77 (describing Marshall's concern for those who opposed movement to compel strict compliance with contracts); SMITH, *supra* note 24, at 116 (demonstrating that Marshall according to holding of many cases was firmly on side of contract compliance).

<sup>60</sup> See HOBSON, *supra* note 5, at 24-25.

<sup>61</sup> *Ogden v. Saunders*, 25 U.S. 213, 355 (1827).

<sup>62</sup> Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 792-93 (1999); see also Brannon P. Denning, *Book Review: Marbury v. Madison: The Origins and Legacy of Judicial Review*. By William E. Nelson, 93 LAW LIBR. J. 345, 345 (2001) (describing author's assessment of judicial review as "tentative in appearance" on American Stage prior to *Marbury*); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 978 (1990) (stating that idea of judicial review gained force from 1780s onward); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1129 (1987) (commenting how new states translated "English opposition rhetoric" into action with early instances of judicial intervention of legislative acts).

### III. JUDICIAL POWER

I want to devote my remaining time to examining the ideas about judicial power and the role of the judiciary in the American system of government that Marshall was exposed to in the years preceding his appointment. Although his first years in office were marked by conflict with the Jefferson administration, the larger truth is that Marshall arrived at the chief justiceship at an auspicious moment for the institution of the judiciary. The last two decades of the eighteenth century witnessed what historian Gordon Wood has called “a massive rethinking that eventually transformed the position of the judiciary in American life,” and “a remarkable transformation,” all the more so because it took place in a relatively brief time and “flew in the face of much conventional eighteenth-century popular wisdom.” Most Americans in 1776 lacked a concept of an independent judiciary. Even though they divided government into legislative, executive, and judicial branches, separation of powers really meant separation of legislative and executive power. The administration of justice was still regarded as part of the executive or magisterial power. Indeed, during the colonial period, judges had been an extension of royal authority, completely identified with the royal governors. Judges were viewed with mistrust not only because of their connection with the governors, but also because they exercised broad discretionary power in interpreting the multiple and confusing sources of colonial law.<sup>63</sup> So, against this background of mistrust, how did the judicial power carve out a separate identity as one of the three constitutional powers of government; how did judges acquire a role in republican government as the paramount interpreters of the laws and as guardians of the rights of individuals; and how did unelected judges with life tenure ultimately presume to disallow laws enacted by popularly elected legislatures?

We now have a clearer understanding that the enhanced status

<sup>63</sup> See Wood, *supra* note 62, at 792-93; see also Denning, *supra* note 62, at 345 (describing author's assessment of judicial review as “tentative in appearance” on American Stage prior to Marbury); Riggs, *supra* note 62, at 978 (stating that idea of judicial review gained force from 1780s onward); Sherry, *supra* note 62, at 1129 (commenting how new states translated “English opposition rhetoric” into action with early instances of judicial intervention of legislative acts).

of judicial power was a trans-Atlantic phenomenon, a reaction to the tremendous upsurge in legislation issued forth from representative assemblies in Great Britain and, after the onset of the Revolution, in America.<sup>64</sup> No longer simply checks on an aggrandizing executive, representative assemblies had become institutions whose chief activity was the enactment of positive legislation to meet the demands of a modernizing society. In England, the swelling parliamentary statute book produced a sustained critique of legislation riddled with gross defects and inconsistencies and brought about a corresponding new respect for judicial interpretation as a means of rationalizing and reconciling legislation to accord with the principles of common law and equity.<sup>65</sup> Even in Great Britain, whose constitutional system recognized the doctrine of parliamentary sovereignty, there was plenty of room for a robust conception of judicial power, as evidenced by the career of Lord Mansfield, the great Chief Judge of the Court of Kings' Bench.

<sup>64</sup> See Jack N. Rakove, *The Critical Use of History: The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1054-56 (1997) (stating that there is general agreement that 18<sup>th</sup> Century brought dramatic upsurge in impulse to legislate). See generally Steven Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1128 (1994) (noting that between Revolution and drafting Federal Constitution, several state courts had made tentative moves toward asserting power of judicial review over legislation); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 993 (2001) (addressing how distrust of legislative bodies caused receptive opinions towards judicial review and equitable construction of statutes to protect liberty); Rodolphe J.A. de Seife, *The King is Dead! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability under Law*, 24 HOFSTRA L. REV. 981, 1067 n.18 (1996) (discussing birth of American concept of judicial review when attempt was made to rule act of Parliament unconstitutional).

<sup>65</sup> Cf. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 896 (1994) (noting English precedent as relevant because with comparatively less power than Congress, English Commons had successfully deployed power of purse as device to curb dictatorial tendencies of their monarchs); Joshua Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 281 n.100 (1997) (stating that United States rejected English concept of Parliamentary sovereignty thus creating American legislative sovereignty in way more closely analogous to corporate charters and subjecting it to concept that government was "bounded by terms of delegation" of power derived from consent of governed). See generally DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 124 (Cambridge Univ. Press 1989) (stating that this conception of common law appears also to have informed Chief Justice often critical attitude to Parliament Legislation); Nestor M. Davidson, *Constitutional Mass Torts: Sovereign Immunity and the Human Radiation Experiments*, 96 COLUM. L. REV. 1203, 1251 n.72 (1996) (finding that "the Constitution reflected a conscious decision to reject English conception of sovereignty as King-in-Parliament, and was instead modeled on the corporate examples of the early colonial compacts and state constitutions.").



The same forces were at work in post-Revolutionary America, when many came to perceive the advantages of a knowledgeable and professionally-trained judiciary in bringing order and stability to the republican experiment in government that at times threatened to careen out of control. Madison, for example, recognized more quickly than anyone else that the turbulent, faction-ridden, interested politics that characterized the state legislatures was ill-suited to the task of making good laws. Although he never conceived of and never fully endorsed the concept of judicial review, Madison did envision an enlarged role for the judiciary in helping to ensure that popular government would also be stable and just. He preferred to have wise and good laws framed at the outset by associating the judiciary with the executive as a "council of revision" over pending legislation. In this way the judiciary would give the legislature "valuable assistance . . . in preserving a consistency, conciseness, perspicuity [and] technical propriety in the laws" and would provide "an additional check" against "unwise [and] unjust legislation."<sup>66</sup> Even without judicial review, it is clear that American judges, like their English counterparts, would play a significant role in controlling legislative excesses and abuses simply by exercising their ordinary adjudicative power or possibly by having a role in the legislative process itself.

In America, judicial discretion was assimilated to republicanism, contrary to what Thomas Jefferson, the great republican revolutionary and lawgiver, had in mind in formulating his reform plans for Virginia. Jefferson, who detested Lord Mansfield to the same degree that Marshall admired him, believed that it was possible to maintain a system of laws founded in reason and equity without resorting to judicial discretion. He proposed a comprehensive reform that aimed not only to purge the laws of all monarchical features but also to reduce much of common law and equity to statute. He envisioned a code of laws "adopted to our republican form of government . . . with a single eye to reason, and the good of those for whose government it was framed." This republican code would be rational, clearly understood, and easily applied. Deeply

<sup>66</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 74 (Max Farrand ed., Yale Univ. Press 1966) (1918) (quoting James Madison's Speech at Federal Convention (July 21, 1787)).

distrustful of discretionary judicial power, Jefferson frankly admitted that his goal was to confine judges to the strict letter of the law. "Let mercy be the character of the law-giver," he wrote in 1776, "but let the judge be a mere machine. The mercies of the law will be dispensed equally and impartially to every description of men; those of the judge, or of the executive power will be the eccentric impulses of whimsical, capricious designing man."<sup>67</sup>

But the Virginia legislature, as Madison and Marshall soon discovered, confounded Jefferson's hopes. His vision of a republican political order with a system of laws founded on precise legislative enactment, to be mechanically applied by judges bound by the strict letter of the law, never materialized. Because of confusing, contradictory, and most disturbingly, a growing number of unjust laws enacted by the legislature, judicial discretion became even more necessary than it had been under the colonial regime. To the traditional task of applying English common law and equity was added that of construing the positive laws of the commonwealth. Each year brought a harvest of new laws requiring ever increasing adjudications. Virginians got used to the idea that their courts were necessary to prevent or ameliorate mischiefs arising from the laws. The emerging distinction between "legislative will" and "justice," the growing perception that statutory law was not necessarily reasonable and just, became the foundation of a conception of judicial independence and discretion that was consistent with the republican belief in popular sovereignty. Virginians came to accept the notion, which their judges consciously fostered, that judicial discretion in the interpretation of laws was not the exercise of the arbitrary and capricious will of the judge, but in the deepest sense, giving effect to the will of the law. With the disparagement of legislative power, a consequence of the volatile politics of the 1780's, the assemblies lost their status as the sole repositories of the people's will. At the same time there was a corresponding enhancement of both executive and judicial power. In brief, there was a redefinition of the separation of powers, in which executives and judges, even though unelected, gained a

<sup>67</sup> 1 THE PAPERS OF THOMAS JEFFERSON 505 (Julian P. Boyd ed., Princeton Univ. Press 1950) (quoting letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776)).

kind of equivalent standing with legislators as representatives or agents of the sovereign people.

As a lawyer in post-Revolutionary Virginia, Marshall was directly exposed to this transformation of the judiciary, to this renewed flourishing of judicial discretion, which was increasingly accepted not only as compatible with republican government but as necessary to its preservation.<sup>68</sup> As a practitioner in the courts of Edmund Pendleton, president of the Court of Appeals, and of George Wythe, chancellor of the High Court of Chancery, Marshall was enrolled in the best of schools for judges. The most important lesson these eminent jurists imparted to the future chief justice was that judges in the ordinary course of deciding cases had broad discretion to determine what the law was, compelled as they were to choose from a variety of sources: English common law, Parliamentary statutes, acts of colonial and state legislatures, and a growing body of state common law emerging from adjudicated cases in the state courts. The opinions and decrees of Pendleton and Wythe breathed a spirit of vigorous independence, even in the most mundane cases, and furnished lawyer Marshall with countless practical lessons in judging. The routine function of applying the common law frequently involved the exercise of discretion in cases that called for adjusting the law to fit Virginia circumstances, in cases that depended on the construction of a testator's will, and in cases that hinged on the explication of a statute. No judge better epitomized the independent-minded jurist than did Chancellor Wythe. Whether upholding the rights of British creditors or interpreting the will of a Quaker to give the broadest possible scope to the testator's intention of manumitting his slaves, Wythe was fearless in the performance of his duty of meting out discretionary justice.<sup>69</sup>

<sup>68</sup> See generally HOBSON, *supra* note 5, at 39-46; Calabresi & Larsen, *supra* note 64, at 1128 (stating that between Revolution and drafting of Federal Constitution, several state courts had made tentative moves toward assertion of power of judicial review over legislation); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 571 (1995) (noting judicial review, too, would safeguard deliberation by protecting considered judgments of populace, embodied in constitutional law, against transitory, ill-considered actions of public officials); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 195 (quoting Marshall's dictum, stated years later, whereby he asserted, "It is, emphatically, the province and duty of the judicial department to say what the law is.").

<sup>69</sup> See generally Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 1991 DUKE L.J. 741, 768 (1992) (keeping with Revolutionary

But the instruction of Pendleton and Wythe extended further to embrace the role of law and courts in the larger scheme of republican government. In Virginia, the concept of an independent judiciary took root quickly and flourished in congenial soil. As early as 1782, the Virginia Court of Appeals heard a case involving a seeming conflict between the state constitution and a statute concerning treason. Although in this instance the judges were able to reconcile law and constitution, the occasion brought forth an eloquent statement from Chancellor Wythe on the duty of a judge "to point to the constitution" and say to an overreaching legislature, "Here is the limit of your authority; and hither, shall you go, but no further."<sup>70</sup> Wythe's dicta revealed how fully he had moved beyond a narrow conception of judicial duty to embrace the idea of the judiciary as an impartial umpire between government and citizen and between different departments of government.<sup>71</sup> In 1788, the Court of Appeals publicly protested against an act that would have required them to ride circuit, claiming that it assigned new duties without a commensurate increase in pay and thus undermined the principle of judicial independence.<sup>72</sup> Again, a crisis was averted because the legislature repealed the offending law. This episode was a clear indication that Virginia judges regarded judicial independence as a constitutional principle that legislatures in drafting legislation affecting the judiciary were bound to respect. A few years later the legislature enacted a law giving common law district judges the power to issue injunctions and hear suits by injunction. This time the judges actually

generation's thoughts of emancipating slaves, Wythe freed his slaves in 1782 when it became permissible in Virginia); Paul D. Carrington, *Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748-1816)*, 53 U. PITT. L. REV. 705, 737-38 (1992) (stating that according to Wythe and other law teachers of his generation, political studies ought to be great object with general youth of republic, not for sake of place or profit, but for sake of judging right and preserving constitution inviolate); A. Leon Higginbotham et al., *DeJuree Housing Segregation in the United States and South Africa*, 1990 U. ILL. L. REV. 763, 877 n.585 (1990) (noting that although Virginia Supreme Court held otherwise, Chancellor George Wythe declared in lower court decision in pre-Civil War case of *Hudgins v. Wrights*, 11 Va. 134 (1806) that when one person claimed to hold another in slavery, burden of proof always lay on claimant).

<sup>70</sup> *Commonwealth v. Caton*, 8 Va. 5, 8 (1782).

<sup>71</sup> *See id.* at 17 (describing government divided into three branches with each assigned its proper power and directing each to be kept separate and distinct).

<sup>72</sup> *See Case of the Judges of Court of Appeals, 1788 Va. LEXIS 3, 8 (1788)* (contending that it was contrary to Constitution to impose new duties to be performed out of courts to which judges respectively belonged).

disallowed the law on the ground that it unconstitutionally conferred chancery jurisdiction on common law judges. This case, *Kemper v. Hawkins*,<sup>73</sup> has some interesting parallels with the case of *Marbury v. Madison*<sup>74</sup> decided years later. In both cases the laws brought under constitutional scrutiny were judiciary acts, and on both occasions the judges denied the additional jurisdiction conferred upon them by the legislature.

Without question, this transformation of the judiciary in post-Revolutionary America, the consequence of a largely successful campaign to persuade the American people that judicial discretion was an essential means of ensuring that republican government would be "a government of laws, and not of men,"<sup>75</sup> was an indispensable prerequisite for the emergence of the doctrine that courts in deciding cases were empowered to void laws that infringed constitutions, what we today call "judicial review."<sup>76</sup> This is a large topic that I have deliberately avoided and haven't intention of entering into on this occasion. My concluding point is simply this: We cannot begin to understand what judicial review meant to Marshall or to the framers generally without reference to this broader, and somewhat unexpected, development in which the judicial power became in fact, as well as theory, one of the three constituent powers of government.

<sup>73</sup> 3 Va. 20, 45 (Sup. Ct. 1788).

<sup>74</sup> 5 U.S. 137 (1803).

<sup>75</sup> *Id.* at 163.

<sup>76</sup> *See id.*