UIC Law Review

Volume 31 | Issue 1 Article 5

Fall 1997

Chief Justice John Marshall in Historical Perspective, 31 J. Marshall L. Rev. 137 (1997)

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REVIEW ESSAY

CHIEF JUSTICE JOHN MARSHALL IN HISTORICAL PERSPECTIVE

John Marshall: Definer of a Nation. By Jean Edward Smith. Henry Holt. 1996. Pp. 736. $35.00 and *The Great Chief Justice: John Marshall and the Rule of Law*. By Charles F. Hobson. University of Kansas Press. 1996. Pp. 256. $35.00.

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INTRODUCTION

In the pantheon of American constitutional law, John Marshall occupies a special place of honor. Chief Justice of the United States Supreme Court from 1801 until his death in 1835, Marshall presided over the Court's transformation from a neglected part of the federal government into a powerful tribunal of constitutional interpretation. Uncertain and often fragmented in its initial decade,[1] the Court under Marshall's energetic and charismatic leadership, emerged as the principal guardian of the Constitution, a bulwark for individual rights[2] and the ultimate arbiter of legal

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1. Between 1789 and 1801, the Supreme Court decided 63 cases. The Court met for one month a year, as the justices spent several months hearing federal cases on circuit. Frequent changes in personnel and the justices' practice of delivering *seriatim*, or individual opinions, underscored the Court's relatively weak institutional identity. Moreover, it heard few cases of significant constitutional importance. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 282-84 (1996). *But cf.* DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 3-58 (1985) (arguing that during its first decade the Court set forth the antecedents of modern judicial review and constitutional construction).

2. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 170 (1803); *cf.* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (refusing to apply the Bill of Rights to the states).

conflicts within the federal system.[3] Over the course of three and a half decades, the Marshall Court delineated the limits of government in a democratic republic and, in so doing, bolstered the prestige of the federal judiciary while preserving the delicate balance between state and federal authority. Constitutional supremacy, judicial independence and dedication to the rule of law characterized the philosophy of the Court during this era.

Often unanimous in its major constitutional opinions, the Court, in the words of Marshall biographer Jean Edward Smith, set out to "define the nation" through its interpretation of the Constitution.[4] Most of the time the Court spoke through its eminent Chief Justice, whose views significantly shaped the development of constitutional law and the role of the Supreme Court. John Marshall regarded the Constitution as the fundamental law of a nation in which the people retained ultimate political control in a federal system that allocated authority between the states and the federal government. Accordingly, Marshall understood the Constitution as a document that reflected the will of the people to protect individual liberty through limitations upon both the state and federal governments. For Marshall, the supremacy of the Constitution, therefore, derived from its popular origins and, as he explained in *Marbury v. Madison*[5] and *McCulloch v. Maryland*,[6] it was popular sovereignty that compelled the Supreme Court to invalidate federal and state laws that conflicted with the Constitution. Consequently, the Marshall Court employed judicial review to preserve separation of powers on the national level and to prevent the "centrifugal forces" of the states from destroying the country in its early years.[7]

Although the fourth person to hold the position of Chief Justice,[8] Marshall was undoubtedly the first to appreciate the singular role of the Court in the country's constitutional system. As a legal

3. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

4. SMITH, *supra* note 1, at 1-2.

5. 5 U.S. (1 Cranch) 137, 176-80 (1803).

6. 17 U.S. (4 Wheat.) 316, 403-406 (1819).

7. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 21, 123, 210-11 (1996). *See also* SMITH, *supra* note 1, at 445.

8. Confirmed as Chief Justice on January 27, 1801, Marshall succeeded Oliver Ellsworth, who resigned because of illness in December, 1800. Originally, President Adams sought to reappoint John Jay as Chief Justice, but Jay, who presided over the Court as its first Chief Justice from 1789 until 1795, when he left to practice law and enter New York politics, declined Adams's offer, believing the Court lacked sufficient prestige and authority. Marshall's only other predecessor as Chief Justice, John Rutledge, from South Carolina, was on the Court for a single term but left when he failed to receive Senate confirmation. Interestingly, Marshall himself declined appointment to the Court as an Associate Justice in 1798.

institution and not a political one, the Court, from Marshall's perspective, enjoyed a particular distinction in the American constitutional framework that necessitated its independence and prompted its conservatism in the wake of political expediency. While Marshall recognized that the coordinate branches of the federal government and the state courts themselves could review the constitutionality of governmental actions,[9] he believed the Supreme Court had the solemn duty of preserving the Constitution and its inherent values from the ephemeral whims of transient democratic majorities and the political factions which controlled them.[10] As a tribunal of last resort in matters concerning federal law, treaties and the Constitution itself, the Court alone had the authority to decide cases from which there could be no appeal.[11]

Marshall and his brethren maintained the independence of the federal judiciary during an era of intense political turmoil. Buffeted initially by threats of impeachment from radical Jeffersonian Republicans,[12] later criticized vociferously by states' rights advocates,[13] and eventually drawn into the wrenching turmoil of

9. *See* HOBSON, *supra* note 7, at 67. Marshall's "defense of judicial review fully agreed with the 'departmental theory' of constitutional interpretation, according to which each of the three coordinate departments of government had the final authority to interpret the Constitution when acting within its own sphere of duties and responsibilities." *Id.* However, the Supreme Court, under Article III of the Constitution, retained the ultimate authority to make sure that the coordinate branches of the federal government, as well as the states, acted within the parameters of the Constitution. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (sustaining the Supreme Court's appellate jurisdiction over state court decisions involving issues of constitutional law, federal law or treaties); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.) (reversing a Virginia appellate court decision that conflicted with a United States treaty with Great Britain); Fletcher v. Peck, 10 (6 Cranch) U.S. 87 (1810) (invalidating, under the Contract Clause, a Georgia law that rescinded land grants); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding unconstitutional a federal law that altered the Court's original jurisdiction).

10. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810). *See also* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 194-99 (1990) (discussing the Marshall Court, judicial review, private property and political factions).

11. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.). For discussion of Marshall's views see Samuel R. Olken, *John Marshall and Spencer Roane: An Historical Analysis of their Conflict over U.S. Supreme Court Appellate Court Jurisdiction*, 1990 J.S. CT. HIST. 125 [hereinafter Olken, *John Marshall and Spencer Roane*].

12. This occurred during the infamous impeachment of Associate Justice Samuel Chase in 1805. For an excellent overview see RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 69-82 (1971) (discussing the impeachments of New Hampshire Federalist judge John Pickering and Chase).

13. *See, e.g.*, Olken, *John Marshall and Spencer Roane*, *supra* note 11 (discussing the states' rights controversy over the Supreme Court's appellate

Indian affairs[14] and indirectly into the slavery crisis during the 1820s and 1830s,[15] the Court refrained from political partisanship and claimed for itself the province of legal adjudication.[16] Two recently published books, Jean Edward Smith's *John Marshall: Definer of a Nation* and Charles F. Hobson's *The Great Chief Justice: John Marshall and the Rule of Law*, examine the life and jurisprudence of America's most important jurist. Both are superb works of historical scholarship which contribute significantly, albeit in different ways, to understanding John Marshall as a historical figure and the challenges faced by the Supreme Court during the first decades of the nineteenth century.

While many books and articles have analyzed the tenure of John Marshall as Chief Justice, relatively few biographies have been written about him.[17] Born in 1755 on the Virginia frontier, Marshall's active and varied life encompassed the critical formative years of the nation. A veteran of the American Revolution, he practiced law, served in his state legislature and rose to prominence in both Congress and as Secretary of State before he became Chief Justice of the United States Supreme Court at the age of forty-five. As a historical figure, Marshall's significance is comparable to that of George Washington, Thomas Jefferson, or James Madison, each of whom was involved with Marshall in the public affairs of the early republic and has been the subject of many biographies over the years. Unlike his renowned contemporaries,

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jurisdiction from 1810-21).

14. *See, e.g.*, HOBSON, *supra* note 7, at 170-80 (discussing the political and legal context of the Marshall Court's leading Indian cases); SMITH, *supra* note 1, at 515-18 (similar discussion).

15. *See* HOBSON, *supra* note 7, at 163-70 (discussing Marshall's legal and constitutional views of slavery); SMITH, *supra* note 1, at 453-55 (discussing states' rights, slavery and the controversy in Virginia over federal judicial power). Smith explains ambiguously that "[t]he issue of slavery itself never came before the Marshall Court." *Id.* at 488. However, the Court addressed some aspects of slavery and the slave trade in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). In this case, the Court, though troubled by the moral issues arising from slavery, ruled that the United States must observe international law and return a slave ship to its Latin American origins. *Id.*

16. *See generally* HOBSON, *supra* note 7, at 47-214 (discussing the distinction between law and politics in Marshall's jurisprudence); SMITH, *supra* note 1, at 282-524 (discussing Marshall's Court years).

17. Previous biographies include: LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW; ALBERT BEVERIDGE, THE LIFE OF JOHN MARSHALL (4 vols.) (1916); FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION (1981). *See also* Joseph Story, *A discourse upon the Life, Character, and Services of the Honorable John Marshall in* 3 JOHN MARSHALL: LIFE, CHARACTER, AND JUDICIAL SERVICES 327 (John F. Dillon, ed., 1903); JAMES B. THAYER, JOHN MARSHALL (1901); *and* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 7-34 (Oxford paper. ed., 1978) (discussing Marshall). Marshall himself wrote an autobiography. *See* JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH (1833) (J.S. Adams ed., 1937).

Marshall destroyed most of his personal correspondence, leaving scholars to sift through a vast array of his Court opinions, together with records from his extensive public career and contemporary newspaper accounts, in order to reconstruct his life. As a result, most studies of Marshall focus upon his Court years, and many perpetuate, in some form, the conventional notion of Marshall as a judicial activist who imbued the Constitution with his political views.[18]

Both Smith and Hobson challenge this perception of John Marshall in fascinating books that draw upon previously scattered primary sources carefully assembled by scholars at the Institute of Early American Culture at the College of William and Mary. Known collectively as the Marshall Papers, these documents include copies of letters Marshall wrote retained by the friends, family and colleagues to whom he sent them, along with previously neglected circuit court opinions and other materials that illuminate the interstices of Marshall's personal and public life and permit reappraisal of his remarkable career.[19]

This review essay has three parts. The first discusses Marshall's life before he came onto the Supreme Court as presented by Smith's biography. The second part addresses some of Smith's points about the Marshall Court. The third and final section briefly critiques the notion set forth by Charles Hobson in his book about Marshall's jurisprudence that Marshall was a common law jurist who sought to differentiate law from politics in his leading constitutional decisions.

I. MARSHALL'S RISE TO THE BENCH

The Marshall who emerges in Smith's meticulous and well-written biography is a man of moderate politics whose reverence for the Constitution and sincere faith in the national government characterized his jurisprudence. Like Hobson, who incidentally is the editor of the Marshall Papers, Smith, a professor of political science at the University of Toronto, concludes that Marshall sought to insulate the Court from the external pressure of partisan politics. His is a tale of an urbane, sophisticated man endowed with considerable legal ability, shrewd political instincts and impressive character who endured personal tragedy and public strife with grace, compassion and even humor.

Smith devotes nearly three-fifths of his time to the years be-

18. *See, e.g.*, 1 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY iv, 267-316 (1932) (discussing Marshall and nationalism); ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 272-99 (4th ed. 1970). See BEVERIDGE, *supra* note 17, vols. 2-4, for this implication.

19. For an explanation of the Marshall Papers archival project see Charles F. Hobson, *John Marshall and His Papers*, 1996 J.S. CT. HIST. 30-35.

fore Marshall came onto the Court. Rather than begin with John Marshall's birth, Smith introduces Marshall at the outset of his judicial career, poised to lead the Court while the Republicans under the leadership of newly elected President Thomas Jefferson are about to assume control of the national government for the first time from the Federalists. This was a critical period in the nation's history: the Presidential and Congressional elections of 1800 underscored fundamental differences in political and constitutional theory extant since the Revolution, and never before had a political transition of this magnitude occurred in the eleven years since the Constitution's ratification.[20] As Smith notes, it was imperative for the nation's survival that its highest court have at its helm a person of sound political judgment and unimpeachable integrity intimately familiar with the Constitution and highly proficient in legal analysis.[21] That Marshall was uniquely suited for this task is the conclusion Smith ultimately draws over the course of several hundred, closely reasoned pages. In this study of Marshall's life, Smith not only explains his subject's actions but dispels much of the Marshallian mythology created by previous biographers such as Albert Beveridge, whose 1916 multi-volume work is really more hagiography than detached historical scholarship.[22]

Early chapters of Smith's book describe Marshall's frontier upbringing and family background. Descended from Welsh yeomanry through his father, Thomas, a land surveyor and speculator, and from the aristocratic Randolphs of eastern (Tidewater) Virginia, through his mother, Mary, Marshall grew up the eldest of fifteen children in the rough backwoods of colonial Virginia near the Appalachian Mountains. Marshall apparently adored his father, who in Marshall's youth was close friends with George Washington and became a prominent surveyor for the colony's largest landowner, Lord Fairfax. Active in politics and a soldier in the Revolution, Thomas eventually acquired substantial tracts of land in Kentucky. Although informally educated, he read widely and encouraged his son, John, to do the same.

According to Smith, Marshall was hardly ill-educated for his time. He read classical authors such as Horace and Livy, who influenced the future chief justice's literary style, along with Shake-

20. For a general overview of this period see ELLIS, *supra* note 12, at 278-83 (discussing the Jeffersonian revolution); RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 32-35 (Knopf reprint. ed. 1962) (discussing Thomas Jefferson).

21. SMITH, *supra* note 1, at 279-81, 402.

22. *See* HOBSON, *supra* note 7, at 247 (alluding to Beveridge's mythological treatment of Marshall and his overemphasis upon Marshall's nationalism); SMITH, *supra* note 1, at 18 (attributing Beveridge's inaccurate analysis of the Marshall-Jefferson relationship to the biographer's intense dislike for Jefferson).

speare, Milton, Dryden and Alexander Pope.[23] In addition, he studied Latin and mathematics at a school in Washington County, where he became lifelong friends with James Monroe, himself a future statesman. Smith describes Marshall's early education in some detail to refute the assertion of Beveridge and others that Marshall was an unsophisticated youth whose mental agility only manifested itself once he entered the practice of law and the realm of politics.[24]

At twenty, Marshall began what would become nearly five years of distinguished service in the American Revolution, to which Smith attributes considerable importance in the formation of Marshall's character and regards as illustrative of his innate talent for leadership.[25] Marshall, a Virginia rifleman, quickly earned a promotion to officer and fought in battles at Great Bridge (Virginia), Brandywine, Germantown (Pennsylvania) and Monmouth (New Jersey). He and fellow soldier James Monroe shared a cabin in Valley Forge during the miserable winter of 1777-78, where Marshall witnessed first hand the necessity for a strong national government to coordinate the war effort.[26] Instead, the weak Continental Congress lacked the necessary authority to collect badly needed revenue and supplies from individual states throughout the war for independence. Marshall's military experience left an indelible impression and "confirmed his habit of considering America as his country and Congress as his government."[27]

At the conclusion of the Revolution, Marshall became a lawyer in his native Virginia, having attended, during a military furlough, George Wythe's lectures on common law at the College of William and Mary. At William and Mary, Monroe was once again a classmate, along with Marshall's future colleague and confidante on the Supreme Court, Bushrod Washington, and Spencer Roane, a formidable political rival and ascerbic critic of Marshall's over thirty years later. Smith credits Wythe with introducing Marshall to the common law methodology he eventually applied at the bar and on the Court.[28] Wythe himself subscribed to the jurisprudence

23. SMITH, *supra* note 1, at 34-35.

24. *See, e.g.*, I BEVERIDGE, *supra* note 17, at 42-46, 161. Beveridge acknowledges Marshall read Pope but discusses no other literary influences upon him. *See also* HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 7, at xiii (criticizing Beveridge).

25. SMITH, *supra* note 1, at 37-69.

26. Years later, Marshall recounted this experience in his own book describing the life of George Washington. *See* II JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 406-65 (Ch. 11) (1801-06) (Citizens Guild reprint ed. 1926).

27. SMITH, *supra* note 1, at 69. *See also* MARSHALL, AUTOBIOGRAPHICAL SKETCH, *supra* note 17, at 9-10.

28. SMITH, *supra* note 1, at 76-79.

of Blackstone, the eminent British jurist who emphasized deductive reasoning from general principles.[29] Marshall also read works by Montesquieu and Hume under Wythe's direction and thus learned about separation of powers and the importance of property rights for legal and social stability.[30]

Smith devotes considerable attention to Marshall's rise to prominence as an attorney and politician in post-war Virginia, and for good reason. Years later as Chief Justice of the Supreme Court, Marshall's constitutional jurisprudence reflected ideas about law and government that he formed during this volatile period.[31] Engaged in general practice, Marshall represented, among others, both debtors and creditors in commercial law[32] and observed with some trepidation the failure of the Virginia legislature to protect property and contract rights from the capriciousness of democratic majorities.[33] Doubts about the efficiency of local legislative bodies and his conviction about the necessity for a strong national government deepened in Marshall's mind throughout his intermittent membership in the Virginia House of Delegates.[34]

An advocate for court reform,[35] Marshall refused, as an official on the prestigious Council of State, to sanction a law which authorized the governor to investigate the alleged misbehavior of county magistrates. Marshall believed the law violated separation

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29. *Id.* at 76-78. *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) (discussing common law methodology).

30. SMITH, *supra* note 1, at 78-79. Montesquieu articulated in inchoate form the theory of separation of powers in those portions of his 1748 treatise, *The Spirit of the Laws* (*De L'Esprit des Loix*), that discussed the English constitution and English law. For an overview of Montesquieu's work see J. BRONOWSKI AND BRUCE MAZLISH, THE WESTERN INTELLECTUAL TRADITION: FROM LEONARDO TO HEGEL 264-79 (Harper paper reprint. ed. 1975).

31. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 355-57 (1827) (Marshall, C. J., dissenting) (discussing the post-Revolutionary economic crisis and the Contract Clause); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203-06 (1819) (discussing the historical context of the Contract Clause).

32. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), Marshall unsuccessfully argued on behalf of American debtors that a Virginia sequestration law during the Revolution discharged their debts owed to British creditors. *Id.* Marshall had represented the debtors in this litigation for several years. Conversely, in 1786, he argued on behalf of Philadelphia creditor Simon Nathan that Virginia could not escape its contractual obligation to him by paying its debts in depreciated paper money rather than in hard currency. SMITH, *supra* note 1, at 108-09.

33. SMITH, *supra* note 1, at 109-10. In *Ogden*, Marshall recounted the economic chaos of the 1780s in his discussion of the context of the formation of the Contract Clause. 25 U.S. (12 Wheat.) at 355-57. He argued that the Clause should apply to all debtor relief laws that impair the obligation of contracts and should be construed as a strict limitation upon state police powers. *Ogden*, 25 U.S. (12 Wheat.) at 332 (Marshall, C.J., dissenting).

34. SMITH, *supra* note 1, at 87-114.

35. In part, Marshall's interest in court reform reflected his concern with protecting property rights. SMITH, *supra* note 1, at 102 .

of powers by infringing upon judicial independence and conflicted with the state's constitution.[36] Smith astutely emphasizes this aspect of Marshall's early public career because it demonstrates Marshall's devotion to the interrelated concepts of constitutional supremacy and the need for an independent judiciary existed long before his appointment to the Court.

Marshall reiterated this theme at the Virginia ratifying convention of 1788 in a stirring defense of federal judicial power. Smith's account of this convention in which elected delegates debated whether Virginia should adopt the federal Constitution and of Marshall's participation in the spirited proceedings provides an essential perspective from which to appreciate Marshall's political shrewdness and profound commitment to the Constitution.[37] Moreover, the details of the convention reveal the ambivalence in Virginia toward the creation of a federal system in which ultimate political authority emanated from the people of the United States as a whole and not from a compact of the individual states. Antifederalists led by the redoubtable Patrick Henry, a close friend and future legal colleague of Marshall's, feared the proposed national government portended the destruction of the state's autonomy. In contrast, proponents of the Constitution, such as James Madison, its principal architect, argued that a federal government of enumerated powers would increase national unity yet leave the states with a residuum of authority over matters within their own borders.[38]

To Marshall fell the task of explaining the scope of federal judicial power under Article III of the Constitution. Marshall articulated that federal judicial review was an essential means of preserving the limitations of government in a constitutional democracy. He predicted the federal judiciary would function as the guardian of the Constitution, its judges responsible for assessing the constitutionality of governmental actions in order to protect individual liberty from political tyranny.[39] While Smith is careful

36. *Id.* at 93-96 (discussing the controversy over magistrate John Price Posey in 1783).

37. Even before the convention, the Antifederalists sought to amend the Constitution with a bill of rights and other limitations upon national authority as a prerequisite for its ratification. *See id.* at 114. Afraid that this maneuver might further delay ratification of the Constitution in Virginia and other states, Marshall persuaded his fellow members of the Virginia House of Delegates to submit the Constitution in its original form to a special ratifying convention which would then decide whether to adopt the document. *Id.*

38. *See generally* Lance Banning, *Virginia: Sectionalism and the General Good in* RATIFYING THE CONSTITUTION 261-299 (Michael A. Gillespie & Michael Lienesch, eds., 1989).

39. Marshall said: "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the [federal] judiciary?" Speech of John Marshall at the Virginia Ratifying Convention, June 20, 1788, *in* I PAPERS OF JOHN MARSHALL 277 (Charles Cullen

to note that Marshall did not originate the doctrine of judicial review,[40] he suggests that Marshall's defense of federal judicial power in 1788 anticipated his decisions years later in a series of cases that proclaimed the Court's power to review federal and state laws.[41]

Throughout his study Smith emphasizes Marshall's political moderation and judicial temperament. Ironically, it is Marshall's activities during the dozen years before he came to the Court that many scholars believe indicate his penchant for partisan politics as a judge. Smith refutes this perception by portraying Marshall as a reluctant politician who preferred to build a thriving law practice and live comfortably among family and friends in Richmond than participate directly in the rough and tumble world of politics.[42] In part, the evidence supports this premise. Marshall, by now a close friend of President George Washington, and his personal attorney, declined offers to become the United States Attorney General and a minister to France so that he could concentrate on the Fairfax litigation and other business matters.[43] However, as an ardent supporter of the President's policy of neutrality in foreign relations Marshall became strongly identified with the Federalist party in Virginia. In addition, he endorsed the controversial Jay treaty with Great Britain, which further involved Marshall in partisan political debates about the course of American foreign policy.

In a detailed analysis of Marshall's foreign service and subsequent public life in the interlude before his judicial career, Smith demonstrates that Marshall remained politically moderate and faithful to his constitutional principles. For example, as a special envoy to France in 1797-98 Marshall consistently refused to accede to the outlandish demands of French foreign minister Talleyrand

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ed., 1974).

40. Early cases in Virginia include *Kamper v. Hawkins*, 1 VA Cases 20 (Va. Gen Ct. 1793); *Case of the Judges*, 4 Call. 142, 146 (Va. Ct. App. 1788); and *Commonwealth. v. Caton*, 4 Call. 5 (Va. Ct. App. 1782).

41. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (sustaining the Court's power to review state laws); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (declaring unconstitutional a Georgia law); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (invalidating a federal law under Article III of the Constitution).

42. SMITH, *supra* note 1, at 144-68.

43. In the late 1780s through 1796, Marshall represented the British heirs of Lord Fairfax, who claimed title to land in Northern Virginia that the state had confiscated through various laws. *Id.* at 164-68. Eventually, Marshall helped negotiate a settlement on behalf of the heirs. *Id.* In 1793, three years before the legislative compromise which settled the dispute, Marshall contracted to purchase 215,000 acres of the Fairfax manor lands with his brother, James, from the Reverend Denny Martin Fairfax, conditioned upon Fairfax receiving valid title to the land. *Id.* Marshall's involvement and interest in the Fairfax land precluded him from formally participating in *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch), 603 (1812) and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *Id.*

that the United States provide France with a loan that would help that country in its war with England and subvert American neutrality in foreign relations.[44]

Similarly, as a member of Congress, Marshall's respect for the Constitution outweighed his loyalty to a particular political party. Although a leader of the moderate wing of the Federalists, Marshall considered the Sedition Act unconstitutional and thought it exacerbated political tensions with its provision for punishment of those who criticized the President. Consequently, Marshall joined the Republicans in voting to repeal this act.[45] In a separate incident, although Marshall supported President Adams's unpopular extradition of a British seaman, he did so, Smith argues, not because of party politics, but from a belief that the President acted within his inherent foreign policy authority pursuant to the separation of powers implicit within the Constitution.[46] In essence, Marshall's was a legal decision rather than a political one, and it foreshadowed his Supreme Court opinions that set forth the limits of federal judicial power in cases where individual claimants sought redress in federal courts for injuries sustained because of foreign policy or military actions of public officials.[47]

Marshall even refrained from partisan intervention in the presidential election of 1800 in which two Republican candidates, Aaron Burr and Thomas Jefferson, received an identical number of electoral votes and soundly defeated the Federalist incumbent,

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44. As England and France waged war in Europe, each country tried to lure America into the conflict, often seizing American ships and disrupting commerce. To alleviate diplomatic tension with France and to preserve American neutrality, President Adams dispatched Marshall and two other commissioners, Elbridge Gerry, of Massachusetts, and Charles Coatsworth Pinckney, of South Carolina, to France in the late spring of 1797. The infamous XYZ affair (letters used by Marshall in his diplomatic correspondence to identify Talleyrand's agents) arose from Talleyrand's ploy to secure a bribe and French war funds from the United States as a prerequisite for negotiating with the American ministers. See SMITH, *supra* note 1, at 182-233, for an excellent discussion of the XYZ affair.

45. Smith's discussion actually corrects previous misconceptions that Marshall supported the Alien and Sedition laws in the Virginia legislature prior to his stint in Congress. *Id.* at 239, 242-44, 263, 601 n.79. *Cf.* BEVERIDGE, *supra* note 17, at 402 (inferring from the correspondence from Alexander Hamilton in 1799, that Marshall, himself, defended the Alien and Sedition laws before the Virginia legislature in 1798).

46. SMITH, *supra* note 1, at 259-61 (discussing Marshall's views of the Robbins affair).

47. *See, e.g.*, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (ruling a foreign affairs issue non-justiciable); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (holding questions of foreign policy non-justiciable); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) (holding war powers non-justiciable); *cf.* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (invalidating a Presidential order to capture a ship sailing from a French port).

John Adams. Despite Marshall's intense personal dislike for Jefferson, he declined to endorse Burr despite the entreaties of leading Federalists. Yet, as he confided to Alexander Hamilton, Marshall "could not bring himself to support Mr. Jefferson . . . "[48] and refused to denigrate him in public.

Marshall's complicated relationship with Jefferson comprises a significant portion of this biography. As Smith explains: "One cannot understand Marshall without an appreciation of his relationship with Thomas Jefferson, just as one cannot understand his tenure as chief justice except in the context of the exceptional circumstances that brought both men to power in 1801."[49] Despite their shared heritage as distant cousins, theirs was a mutual animosity borne of distrust and misconception. Both were raised in Virginia, Jefferson among the Tidewater aristocrats, and Marshall on the frontier, and although each studied law with George Wythe, they developed fundamentally different notions of constitutional democracy that formed the backdrop against which their personal differences emerged. While Marshall accorded considerable significance to popular sovereignty, he remained inherently skeptical of democratic majorities and believed that the Constitution prescribed limitations upon governmental authority to preserve the rights of the few against the tyrannical excesses of the many.[50] In large part, his caution emanated from his devotion to property rights and from his observation that the self-interest of political factions occasionally jeopardized the long-term objectives of the community. Unable to trust completely the will of democratic majorities, Marshall perceived in judicial review the means for ensuring that their ephemeral whims did not transcend the limits upon government the people themselves had created through the provisions of the Constitution.[51]

In contrast, Jefferson extolled the virtues of republican democracy and dwelled little upon the potential for tyranny in majority rule, believing that legislators were more likely to represent the popular will than unelected judges, whose insistence upon reviewing the constitutionality of statutes he regarded with suspicion.[52] Jefferson, unlike Marshall, never really accepted the premise of popular sovereignty as the basis for constitutional government and throughout his public career advocated, in one form or another, the doctrine of states' rights, which viewed the federal union as a

48. SMITH, *supra* note 1, at 14 (*quoting* letter from John Marshall to Alexander Hamilton (Jan. 1, 1801), *in* 6 MARSHALL PAPERS 46-47).

49. *Id.* at 8.

50. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).

51. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); *Fletcher*, 10 U.S. (6 Cranch) at 138.

52. For a general discussion of Jefferson's views, see DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 257-94 (1995).

confederation of states rather than as a creation of the American people as a whole.[53] Under this theory the Constitution narrowly prescribed the powers of the national government in favor of those of the states, and Jefferson, like other Republicans, remained critical of Federalist policies he believed undermined the sovereignty of the states in favor of a strong federal government.

Within this context Smith presents the conflict between Marshall and Jefferson as part of a larger one between states' rights advocates and proponents of a coherent union that influenced the course of American politics and perceptions about constitutional law. Unlike previous Marshall biographers, he is careful to distinguish between the personal antipathy of these statesmen and their views about law and government.[54] This is important because neither Marshall nor Jefferson was as politically radical as the other apparently thought. Marshall considered Jefferson a demagogue and underestimated his difficulties with restraining the more extreme elements of the Republican party. Similarly, Jefferson believed Marshall was a hypocrite who used his judicial position to further orthodox Federalist politics.[55] Yet, despite their fears of each other, both were statesmen, who Smith contends sought to avoid direct constitutional confrontation as Chief Justice and President of the United States, and "maintained an uneasy equilibrium that personified the separation of powers."[56] Viewed from this perspective, Marshall's performance as Chief Justice becomes as significant for his ability to focus the Court's attention on questions of law as for his jurisprudence.

II. THE CHIEF JUSTICE DEFINES A NATION

A central premise of Smith's biography is that Marshall solidified the legitimacy of the Court by removing it from partisan politics. He suggests that Marshall's decisions about judicial review not only asserted the independence of the federal judiciary to interpret the Constitution but recognized limits upon federal

53. *See id.* at 199-228 (discussing Jefferson's authorship of the 1798 Kentucky Resolutions in which he articulated the states' rights compact theory).

54. *See* SMITH, *supra* note 1, at 18, 63 (criticizing Beveridge's analysis of the Marshall-Jefferson relationship), 301, 333-34 (comparing views of Marshall and Jefferson).

55. *Id.* at 333. In this regard, Jefferson remarked:

> [w]hen conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why if he were to ask me if it were daylight or not, I'd reply, 'Sir, I don't know, I can't tell.'

SMITH, *supra* note 1, at 12 (*quoting* DILLON, *supra* note 17, at 370 (*quoting* Joseph Story's funeral eulogy of John Marshall (July 1835))).

56. *Id.* at 333.

courts based upon separation of powers and the constraints of federalism. While Smith does not examine in any real depth the jurisprudence of the Marshall Court, he sees its main constitutional decisions as evidence of Marshall's genius for differentiating the rule of law from political expediency and his respect for the supremacy of the Constitution.

In cases involving federal judicial power the Court, under Marshall's lead, exercised its authority to review the constitutionality of federal[57] and state laws,[58] yet declared federal courts could not assess questions of foreign[59] or military[60] policy without infringing upon the coordinate branches of the national government. Similarly, while the Court recognized the importance of a strong national government, it declined from interpreting the Constitution in a manner that sanctioned the usurpation of local police powers by federal authorities.[61] For example, Marshall's opinion in *Gibbons v. Ogden*,[62] expressly acknowledged that states could regulate purely local commerce or enact quarantine laws pursuant to their Tenth Amendment police powers even though the Constitution prohibited their restriction of interstate commerce.[63] Smith, quite reasonably, concludes that this indicates the Marshall Court actually used its authority of judicial review defensively to protect the federal union from dissolution by individual states.[64]

Smith often substitutes extensive doctrinal analysis of leading Marshall Court cases for discussions of their historical context to demonstrate the extent to which the justices sought to adjudicate legal and constitutional issues in a politically neutral manner. He argues, for example, that in *Marbury v. Madison*,[65] the Court actually sought to avoid a direct confrontation with the executive branch in a case whose origins reflected a bitter political dispute

57. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

58. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

59. *See, e.g.*, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (ruling foreign affairs' questions non-justiciable); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (holding questions of foreign policy non-justiciable).

60. *See, e.g.*, 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) (invalidating Presidential order to capture ships sailing from French port).

61. *See, e.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (sustaining state law authorizing a dammed creek as a legitimate local police power measure not in conflict with the Commerce Clause).

62. 22 U.S. (9 Wheat.) 1 (1824).

63. *Id.* at 188-240.

64. SMITH, *supra* note 1, at 445, 477-79. *See also* HOBSON, *supra* note 7, at 142-49.

65. 5 U.S. (1 Cranch) 137 (1803). *See also* SMITH, *supra* note 1, at 300-26 (discussing *Marbury* as a non-partisan decision).

over an undelivered Justice of the Peace commission during the transition in power between the Federalists and Republicans.

Marshall clearly perceived the controversy over Madison's refusal to deliver Marbury's commission as a political one.[66] He also realized that the legal remedy sought by Marbury, a writ of mandamus issued by the Court as an exercise of its original jurisdiction, required the Court to review the constitutionality of the federal law that created this remedy. This Marshall considered within the province of the Court,[67] and although he ruled invalid that portion of the Judiciary Act of 1789 which unconstitutionally enlarged the Court's jurisdiction,[68] Marshall was careful to explain that the Court could not review matters within the political discretion of the executive branch.[69]

The irony of *Marbury* is that Marshall, a Federalist judge, refused to order a Republican administration to deliver a minor judicial commission to a Federalist businessman who brought suit in the Supreme Court pursuant to a provision of law enacted by a Federalist legislature.[70] Although Smith notes that Marbury acted in response to heavy pressure from High Federalists, who sought to involve the Court in a partisan debate with the Republicans, he does not consider whether Marshall should have recused himself from this case. As Madison's predecessor as Secretary of State, Marshall failed to deliver Marbury's Justice of the Peace commission in the first place.[71] This odd circumstance, however, does not

66. See William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 1-6, for an excellent discussion of the political context of this case. *See also* ROBERT LOWRY CLINTON, Marbury v. Madison AND JUDICIAL REVIEW 81-101 (1989) (in part, criticizing Van Alstyne's conclusions about *Marbury*).

67. *Marbury*, 5 U.S. (1 Cranch) at 170-80.

68. *Id.* at 173-80. The federal provision in issue was section 13 of the Judiciary Act of 1789, 1 Stat. 73, 81 (1789), which provided in relevant part: "[the] Supreme Court shall also have appellate jurisdiction . . . and shall have power to issue . . . writs of mandamus . . . to any persons holding office under the authority of the United States." *See id.* (discussing the Judiciary Act of 1789).

69. *Marbury*, 5 U.S. (1 Cranch) at 164-66, 169-70.

70. President John Adams, in the waning hours of his "lame duck" administration, appointed William Marbury as a District of Columbia justice of the peace, pursuant to the Judiciary Act of 1801 (Act of February 27, 1801, ch. 15, sec. 11, 2 Stat. 107), in an attempt by the Federalists to pack the lower courts with their own party members. *See generally Marbury*, 5 U.S. (1 Cranch) 137 (1803). Marshall, Adams' Secretary of State, originally failed to deliver Marbury's commission, which President Jefferson found atop a desk when he assumed power. *Id.* Jefferson, under statutory authority, chose not to honor Marbury's commission and thus did not require James Madison, Marshall's successor as Secretary of State, to deliver the commission. *Id.* Thereafter, Marbury's lawyers filed a motion in the Supreme Court demanding Madison to show cause as to why he should not deliver the commission. *Id.*

71. Van Alstyne, *supra* note 66, at 4, 8. Curiously, Smith does not explain

detract from *Marbury's* points about the scope of judicial review.

Curiously, Smith does not really address whether the Court acted improperly in deciding the constitutional question presented by this case once it concluded it lacked jurisdiction to issue a mandamus upon Madison.[72] Normally, a federal court must first determine if it has jurisdiction to hear a particular case. If it concludes that it does not, it must then dismiss it.[73] In *Marbury*, the Court cleverly avoided this quandary by characterizing the real issue as one of its power to review the constitutionality of a law that expanded its original jurisdiction.

Marbury, however, was not nearly as controversial as those decisions involving the Court's authority to review state laws. In this regard, Smith's discussion of *Martin v. Hunter's Lessee*,[74] *Cohens v. Virginia* [75] and *McCulloch v. Maryland* [76] is quite informative, as it demonstrates that the conflict was in essence one over the nature of federalism with important ramifications for the survival of slavery in the union. In particular, Smith explains that states' rights advocates believed that the Court's broad interpretation of the Necessary and Proper Clause in *McCulloch*[77] signified

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why Marshall did not recuse himself in this case but did recuse himself in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). In *Stuart*, decided less than a week after *Marbury*, the Court sustained the constitutionality of a Republican judiciary law (Act of March 8, 1802, ch. 8, sec. 1, 2 Stat. 132) that repealed the Circuit Courts Act of 1801 (Act of Feb. 13, 1801, ch. 4, 2 Stat. 89) and reinstated the requirement that Supreme Court justices ride on circuit. *Stuart*, 5 U.S. (1 Cranch) at 308-09. Marshall recused himself in this case because he had heard the legal dispute while on circuit. *Id.*

72. Van Alstyne, *supra* note 66, at 6-8. *Cf.* CLINTON, *supra* note 66, at 88-91 (arguing that "summary disposition of Marbury's complaint would . . . have been disingenuous . . .").

73. *See, e.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

74. 14 U.S. (1 Wheat.) 304 (1816) (Story, J.).

75. 19 U.S. (6 Wheat.) 264 (1821).

76. 19 U.S. (6 Wheat.) 316 (1819). Smith, unfortunately, does not further address the Court's analysis of federal question jurisdiction. In 1824, in a case that emanated from the *McCulloch* controversy, the Court sustained federal question jurisdiction when the Ohio branch of the U.S. Bank sued an Ohio official in local federal district court, alleging the unconstitutionality of an Ohio tax on the bank's operations. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824). This is an important case because it complements the Court's rulings in *Martin* and *Cohens* and sets forth the genesis of the well-pleaded complaint rule in federal jurisdiction.

77. Article One, Section Eight, Clause 18 of the United States Constitution provides that Congress shall have the power, "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ." U.S. CONST. art. I, § 8, cl. 18. In *McCulloch*, the Court sustained the constitutionality of the United States Bank as a necessary and proper means for the federal government to accomplish its enumerated powers under Article I of the Constitution. *McCulloch*, 17 U.S. (4 Wheat.) at 404-25. The Court also ruled a Maryland tax on the Bank's operations unconstitutional

an assault upon state police powers. They feared that if it was constitutional for the federal government, in the absence of a specific enumerated power, to operate a bank, the federal judiciary might similarly sustain Congressional legislation prohibiting the expansion of slavery into western territories.[78] Moreover, they regarded the Court's assertion of its appellate jurisdiction to review the constitutionality of state laws as inconsistent with a state's prerogative to decide such issues for itself without interference from the federal judiciary.[79]

Consistent with his overall premise, Smith considers the states' rights attacks on the Supreme Court during Marshall's tenure as an attempt by states such as Virginia,[80] Pennsylvania[81] and Georgia[82] to chip away at the federal government through its judicial branch. Accordingly, he explains the Court's opinions sustaining federal judicial authority to review state laws and invalidate those in conflict with the Constitution as an attempt by the justices, particularly Marshall and Joseph Story,[83] to preserve the nation from the petty jealousies of the states. Indeed, this conclusion finds ample support in Marshall's correspondence with Story at the time as well as his newspaper articles in defense of the Constitution and federal judicial review.[84]

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because the tax subverted the principle of constitutional supremacy. *Id.* at 425-37.

78. *See* SMITH, *supra* note 1, at 453-55 (discussing states' rights, the controversy over the Missouri Compromise and federal judicial review of state laws).

79. The most strident critics were Virginia judges William Brockenbrough and Spencer Roane and theorist John Taylor. The 1819 *Richmond Enquirer* essays of Brockenbrough and Roane appear in *John Marshall's defense of McCulloch v. Maryland*, 52-154 (John Gunther, ed., 1969), along with Marshall's responses in the *Alexandria Gazette*. *See* SMITH, *supra* note 1, at 155-214. Taylor vilified *McCulloch* and reiterated the compact theory of states' rights in his treatise, *Construction Construed and Constitution Vindicated* (1820). For an analysis of the conflict over Supreme Court appellate jurisdiction see Olken, *John Marshall and Spencer Roane*, *supra* note 11.

80. SMITH, *supra* note 1, at 446-68 (discussing Virginia judicial, legislative and political opposition to the Court's exercise of judicial review).

81. *See* United States v. Peters, 9 U.S. (5 Cranch) 115 (1809) (arising from Pennsylvania's refusal to follow a federal court order that it reimburse a prize claimant under federal law).

82. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (both involving the conflict between Georgia and federal Indian policy).

83. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.). Marshall recused himself because of his extensive involvement in the litigation as a Virginia attorney and landowner whose own property rights were affected by the Virginia escheat law and federal treaties in issue. Smith, however, omits extensive discussion of Marshall's involvement in the federal judicial proceedings. *See* Olken, *John Marshall and Spencer Roane*, *supra* note 11, at 132-33.

84. See sources cited *supra* note 79.

Smith also explains that the Court, especially during Marshall's initial decade as Chief Justice, confronted tremendous pressure from the political branches of the federal government that threatened its independence. For instance, within a year of its decision in *Marbury*, radical Republicans, beyond the control of President Jefferson, initiated impeachment proceedings against one of Marshall's colleagues on the Court, Samuel Chase, charging him with misconduct as a circuit court judge in controversial cases from years before involving the notorious Sedition Act.[85] Ultimately, the Senate acquitted Justice Chase, but the incident underscored the political maelstrom which surrounded the Court in its early years and compelled Marshall to refrain from using the powers of the federal judiciary to resolve political disputes.

In addition, as the circuit court justice presiding over the 1807 treason trial of Aaron Burr, Marshall effectively removed the judicial branch from partisan politics when he rejected President Jefferson's claim of an absolute executive privilege and ordered him to provide Burr's counsel with documents essential to the defense.[86] In this same case Marshall also refused to distort the constitutional definition of treason rather than succumb to political expediency.[87] Burr's acquittal no doubt annoyed the President and his fellow Republicans, but as Smith astutely explains, Marshall's equanimity and judicial probity solidified the role of federal courts in upholding the Constitution in cases involving even the most unsympathetic parties.

Notwithstanding the many virtues of this biography, its analysis of the Marshall Court's jurisprudence contains some flaws, which although they do not detract from the author's main points nevertheless merit attention. The book's weaknesses in this respect emerge most clearly in its discussion of the Court's Contract Clause cases.

Although Smith notes the correlation between federal judicial review, constitutional supremacy and federalism, he probably does not place enough emphasis upon the Marshall Court's Contract Clause decisions from this perspective. For throughout the early nineteenth century the principal vehicle by which the Court reviewed state laws was the Contract Clause,[88] a specific constitutional prohibition of state power to impair the obligation of con-

85. SMITH, *supra* note 1, at 336-37, 342-47.

86. *See id.* at 352-74 (discussing Burr's treason case).

87. *Id.* at 359-74. *See, e.g.*, United States v. Burr 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14, 963).

88. In relevant part the Contract Clause provides, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1. See BENJAMIN F. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION (1938), for the notion that this clause dominated antebellum Supreme Court jurisprudence.

tracts. While Smith discusses most of the leading cases, he should clarify that not only were they examples of the Court's attempt to protect the rights of private property and contracts from the tyranny of democratic majorities, but that they also represented specific opportunities for the Court to assess the constitutionality of state laws.[89]

Moreover, Smith's discussion of the Court's Contract Clause jurisprudence could probably explain in more depth the divisions within the Court over the meaning of the term contract obligation. While most of the justices accepted the notion that land grants[90] and corporate charters[91] comprised contracts within the purview of the Contract Clause, differences emerged over the extent to which states could regulate contractual performance. To one extent or another the individual justices accepted states could impair contractual remedies without destroying contract rights or obligations,[92] but some loosely construed this distinction and thought state law often created contract rights,[93] a premise with which John Marshall personally disagreed.[94] In addition, Justice William Johnson and others adopted a relatively permissive attitude toward state insolvency laws that discharged contractual obligations.[95]

John Marshall, Bushrod Washington and Joseph Story, however, were more hesitant to acknowledge a formal distinction be-

89. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810).

90. *Id.* at 138.

91. *See, e.g.*, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

92. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 256-61 (1827) (Washington, J.), 271-92 (Johnson, J., seriatim opinion); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 96-107 (1823) (Johnson, J., concurring) (emphasizing importance of state police powers); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 144-45 (1810) (Johnson, J. concurring). For discussion of the Marshall Court Contract Clause jurisprudence see Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence*, 72 Or. L. Rev. 513, 522-32, 536-38 (1993) [hereinafter Olken, *Contract Clause Jurisprudence*].

93. *See, e.g.*, *Ogden*, 25 U.S. (12 Wheat.) at 282-92 (Johnson, J., seriatim opinion), 297-300, 305-08 (Thompson, J., seriatim opinion) and 316, 327 (Trimble, J., seriatim opinion).

94. *Id.* at 343-47, 353 (Marshall, C.J., dissenting).

95. *Id.* at 253-70 (Washington, J.), 271-92 (Johnson, J., seriatim opinion), 292-313 (Thompson, J., seriatim opinion) and 314-31 (Trimble, J., seriatim opinion) (all sustaining a prospective insolvency law). *Cf.* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (invalidating a retroactive insolvency law). However, as Johnson remarked in *Ogden*, *Sturges* was a compromise decision that never resolved all the Contract Clause issues pertaining to insolvency laws. *Ogden*, 25 U.S. (12 Wheat.) at 272-73 (Johnson, J., seriatim opinion). In fact, Johnson had sustained the New York insolvency statute in issue in *Sturges* while on circuit. *See* Adams v. Storey, 1 F. Cas. 141 (C.C.D.N.Y. 1817) (No. 66).

tween contract rights and remedies and narrowly construed the scope of state police powers.[96] The division between the justices manifested itself most clearly in *Ogden v. Saunders*,[97] in which, over the dissents of Marshall, Story and Duvall, the Court sustained a New York law that prospectively discharged the payment of debts. Although Smith discusses this case, his analysis is unclear because he does not address the dichotomy between contract rights and remedies that occupied the Court during this time. Instead, he views *Ogden* as an aberration since it was the only major constitutional decision from which Marshall dissented.

Indeed, for Smith one of the most significant aspects of Marshall's tenure as Chief Justice was the unanimity of the Court in the vast majority of cases. Prior to 1801, Supreme Court justices issued *seriatim* opinions which revealed their individual views about legal issues but did little to foster a perception of the Court's unity.[98] This troubled Marshall, who insisted that the Court, whenever possible, should issue a single opinion delivered by the Chief Justice.[99] As Smith explains, Marshall's motive was not to create an imperial judiciary, but rather to enhance the Court's legitimacy and increase public confidence in its decisions.[100] In large

96. *See, e.g.*, *Ogden*, 25 U.S. (12 Wheat.) at 337, 343, 346-50, 353-56 (Marshall, C.J., dissenting) (Story joined in this opinion); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 84, 92 (1823) (Washington, J.) (applying the Contract Clause to a compact between states that affected property rights of third parties). *But cf. Ogden*, 25 U.S. (12 Wheat.) at 259-61, 267 (Washington, J.) (sustaining an insolvency law that prospectively affected contract rights). Washington distinguished between prospective and retrospective laws that affected the obligation of contracts. *Id.*

97. 25 U.S. (12 Wheat.) 213 (1827).

98. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (sustaining a Connecticut law that set aside a probate decree, but two of the justices, Iredell and Chase, articulated quite different theories about the limitations upon legislative authority). In *Calder*, Justice Samuel Chase invoked natural law when he said, "[a]n [act] of the [l]egislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* at 388 (Chase, J., seriatim opinion). In contrast, Justice James Iredell criticized natural law as the basis of constitutional adjudication:

> [I]deas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject . . . [i]f . . . the [l]egislature . . . shall pass a law, within the general scope of . . . [its] . . . constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to principles of natural justice.

Id. at 399 (Iredell, J., seriatim opinion).

99. Marshall wrote 547 opinions for the Court during his tenure as Chief Justice, "all the other . . . justices combined wrote 574 such opinions." G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835 191 (abridged paper. ed. 1991).

100. SMITH, *supra* note 1, at 284-87, 293. Marshall borrowed this concept from Edmund Pendleton, Chief Judge of the Virginia Court of Appeals in the

part, Marshall attained these objectives, yet his success at forming consensus among his judicial colleagues and his authorship of most of the Court's opinions also fostered the notion that he forced the other members of the Court to adopt his views.[101] Smith, however, refutes this perception and claims that "Marshall led the Court, but his leadership was collegial. The justices reasoned collectively, even when Marshall assembled the final product. In that sense he was the moderator, not the master, of the Court and he wore his authority with gentle deference."[102]

Possessed of considerable personal charm with a facile mind and keen political instincts, Marshall implicitly understood the importance of collaborative decisionmaking and worked hard to solicit the ideas of his fellow justices. To this extent, Smith attributes much of the Court's unity to Marshall's efforts in having the justices board together, where away from their families they could discuss cases over meals and enjoy each other's company over a glass of wine.[103]

In addition, Smith notes that, as a whole, the justices shared similar judicial values; they revered the Constitution, believed in the importance of an independent federal judiciary and endorsed a strong national government.[104] From this common set of beliefs they forged a collective identity which transcended their individual politics[105] and ultimately strengthened the Court's role as the guardian of the Constitution.

Smith supports his contention about the Marshall Court's coherence in two other ways. First, at the conclusion of his discussion of each Court term, he specifically mentions how many of the cases were unanimous and the number of opinions Marshall wrote for the Court. Second, he relies extensively upon figures from the middle period of Marshall's tenure, 1812-23, during which the Court decided some of its most important cases about federalism and the same justices remained on the Court. In this period the Court decided 457 cases, 437 of which were unanimous, and Marshall himself authored many of the Court's opinions.[106]

Yet, despite this impressive array of statistics, the Court may

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late eighteenth century. *Id.* at 193.

101. *See* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 469 (1983) (referring to "John Marshall and the Six Dwarfs").

102. SMITH, *supra* note 1, at 402. *See also* HOBSON, *supra* note 7, at 16.

103. SMITH, *supra* note 1, at 286-87, 351-52, 377-78, 402-03. "Marshall lubricated the wheels of justice with fine Madeira . . . ." *Id.* at 403.

104. *Id.* at 403-04; HOBSON, *supra* note 7, at 10.

105. By the second decade of Marshall's tenure on the Court, five of the seven justices were Republicans. Only Marshall and Washington had been Federalists.

106. SMITH, *supra* note 1, at 469.

not have been as unanimous as Smith would have one believe.[107] Even though he briefly mentions differences among the justices in cases arising from the War of 1812,[108] he barely mentions those over other issues.[109] Instead, Smith prefers to emphasize Marshall's ability to foster general consensus within the Court. Given his premise that Marshall sought to enhance the Court's legitimacy through means intended to insulate it from partisan politics, this approach makes sense. However, Smith, at times, may obscure important theoretical differences among individual justices that eventually influenced substantive constitutional doctrines. He attributes, for example, to Justice Johnson an ardent nationalism that does not take into account Johnson's marked tolerance for state police powers in the context of the Contract Clause[110] nor his doubts about the exclusivity of federal bankruptcy authority.[111] Interestingly, Smith perceives Marshall's majority opinion in *Sturges v. Crowninshield* [112] as a compromise between Johnson's views and those of Justice Story,[113] yet he dwells relatively little upon the importance of these theoretical differences.

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107. G. Edward White suggests that the Court's unanimity may be deceptive because the practice of having, whenever possible, a single opinion of the Court, may have, at times, "conceal[ed] the views of most individual justices." WHITE, *supra* note 99, at 194. Indeed, Justice Johnson implied as much when he explained that the Court's opinion in *Sturges v. Crowninshield* was "a compromise. . . ." Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 272-73 (1827) (Johnson, J., seriatim opinion). White, in part, attributes much of the justices' acquiescence to their common lodgings and to their desire for maintaining a smooth working and personal relationship. WHITE, *supra* note 99, at 184-95.

108. *See, e.g.*, Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (a divided Court rejecting the notion of inherent presidential authority). See SMITH, *supra* note 1, at 417-19, for a further discussion of the rejection of inherent presidential authority.

109. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20-30 (1831) (Johnson, J., concurring), 31-50 (Baldwin, J., concurring) and 50-80 (Thompson, J., dissenting) (holding that because Indian tribes were not foreign nations within the meaning of the Commerce Clause, the Court lacked jurisdiction to hear their dispute with Georgia). Smith does not account for Justice Johnson's many concurring and dissenting opinions during his years on the Marshall Court.

110. *See, e.g.*, *Ogden* 25 U.S. (12 Wheat.) at 271-92 (Johnson, J., seriatim opinion); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 94-104 (1823) (Johnson, J., concurring).

111. *See, e.g.*, *Ogden*, 25 U.S. (12 Wheat.) at 273-81 (Johnson, J., seriatim opinion) (arguing that the states have concurrent bankruptcy powers). Marshall also shared these doubts. Writing to Bushrod Washington in 1814, Marshall expressed skepticism over whether Congress had exclusive power to regulate bankruptcy. HOBSON, *supra* note 7, at 97.

112. 17 U.S. (4 Wheat.) 122 (1819).

113. Story and Bushrod Washington believed Congress had exclusive power to regulate bankruptcy. They also thought a retroactive insolvency law impaired the obligation of contracts. *See* SMITH, *supra* note 1, at 439-40, 658 n.116 (discussing their views and *Sturges*).

Similarly, Smith invokes *Dartmouth College v. Woodward*[114] as a prime example of Marshall's skill at negotiating compromise among his colleagues, but in so doing he omits discussion of the internal debate between the justices over natural law, the common law doctrine of vested rights and the scope of state police powers.[115] While Marshall's opinion is significant in that it applied the Contract Clause to protect corporate charters,[116] Story's concurrence, in which he set forth the doctrine of reserved state powers,[117] actually was more influential in the development of Contract Clause jurisprudence during the remainder of the nineteenth century.[118]

These, however, are relatively minor criticisms which should not diminish the importance of this book as a detailed study of John Marshall's life. Unlike a traditional judicial biography, Smith chooses to understand his subject through extensive analysis of his personal character and the events that shaped his actions. Historical context rather than jurisprudential doctrine comprises the principal focus of Smith's book, which more than any other previous Marshall biography reveals the jurist as a multifaceted individual whose public existence, at times, contrasted significantly with his private sorrow. Indeed, as Marshall's public career flourished, he and his wife, Polly, endured the heartbreak of several children dying, and separations from each other, as Marshall presided over the Supreme Court in Washington and rode circuit in North Carolina. Even more poignant was Polly's fragile emotional condition and constant depression during most of their lengthy marriage.[119]

Interspersed throughout the chronicle of Marshall's years on the Court are references to aspects of Marshall's personal life that underscore his tenacity, optimism, intellectual curiosity and playfulness.[120] Although Marshall served on the Court for thirty-four

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114. 17 U.S. (4 Wheat.) 518 (1819).

115. *See* WHITE, *supra* note 99, at 622-28 (discussing the theoretical differences between Johnson, Story and Marshall).

116. *Dartmouth College*, 17 U.S. (4 Wheat.) at 644, 653-54 (Marshall, C. J.) (ruling that New Hampshire unconstitutionally revoked Dartmouth College's charter with a series of acts that transformed the college from a private, eleemosynary, educational institution into a public university).

117. *Id.* at 675, 708-12 (Story, J., concurring). "[T]he rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." *Id.* at 708.

118. The Court adopted Story's reservation theory in *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830) (ruling that, absent express language in a bank charter, the state did not relinquish its power to tax the bank). *See* Olken, *Contract Clause Jurisprudence*, *supra* note 92, at 536-52 (discussing nineteenth century Contract Clause jurisprudence).

119. SMITH, *supra* note 1, at 107, 122, 161, 185-86, 188, 217, 237, 375-76, 395, 433, 503-04, 511-12.

120. Throughout his life Marshall enjoyed the company of others, theatre,

years, the annual Court term was fairly short and his circuit court duties lasted only for a few months. As a result, much of each year Marshall lived in Richmond or on his farm in Fauquier County. For this reason a significant strength of Smith's biography is the emphasis it places upon the importance of Marshall's life away from the Court. Accordingly, Smith balances discussion of Marshall's judicial duties with relevant information about his work on a multi-volume biography of George Washington and other projects that illuminate the depth of his character and perhaps shaped the contours of his jurisprudence.[121]

Smith's discussion of Marshall's friendships with James Monroe, Patrick Henry and colleagues on the Court such as Bushrod Washington and Joseph Story demonstrates Marshall's genial nature and innate ability to make friends, qualities which aided Marshall as Chief Justice. Smith's attention to the personal details of Marshall's life is not entirely flawless, however. For example, he never really explores why, despite Marshall's personal distaste for the institution of slavery, he kept a few slaves as servants in his house.[122] Yet, as a whole, Smith's biography succeeds where others have disappointed because it explains the historical relevance of the entirety of Marshall's life, and thus provides an essential perspective from which to assess his remarkable achievements.

III. HOBSON AND THE CHIEF JUSTICE'S JURISPRUDENCE

In contrast, Charles Hobson's slender volume concentrates upon the jurisprudence of John Marshall. Drawing upon Marshall's many constitutional opinions, surviving remnants of his

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food and drink, and playing all sorts of sports. In 1788, the gregarious Marshall helped create the Richmond Quoits Club, comprised of several of Richmond's most prominent men, who every Saturday during the summer held a lavish barbecue and played the game of quoits. Marshall participated in this club's functions for nearly the rest of his life. SMITH, *supra* note 1, at 160-61. Marshall also loved literature, and especially, poetry. *Id.* at 376-77, 484-85, 515. *See also id.* at 3-4 (discussing Marshall's humor and optimism).

121. *Id.* at 329-32 (suggesting Marshall's biography of Washington reflected his constitutional nationalism as a jurist). *See also id.* at 411-13 (discussing Marshall's leadership of an expedition to survey a commercial route between the James River and the Appalachian Mountains in Virginia as evidence of Marshall's interest in economic development).

122. Marshall, who opposed slavery in general, nevertheless owned a few slaves, whom he used as house servants. He also opposed radical abolitionism, and preferred the gradual elimination of slavery and the recolonization of slaves in Africa. In fact, he helped create the Virginia Society for Colonization in 1827. SMITH, *supra* note 1, at 162, 488-90. Other leading statesmen also demonstrated contradictory attitudes toward slavery. For example, Marshall's good friend, James Monroe, as President championed recolonization but also maintained slaves on his Virginia plantation. See ALAN T. NOLAN, LEE CONSIDERED: GENERAL ROBERT E. LEE AND CIVIL WAR HISTORY 9-29 (1991), for analysis of the conflicting public and private views of other leading Virginians toward slavery.

personal correspondence, legal papers and circuit court decisions Hobson reaches similar conclusions as Smith about Marshall's importance as a jurist. While both authors assert that Marshall sought to maintain the independence of the federal judiciary from partisan politics, subtle differences emerge in their arguments. Whereas Smith emphasizes Marshall's political skills as Chief Justice and the political context of his cases, Hobson deemphasizes these points in order to underscore the distinction between law and politics in Marshall's jurisprudence.[123] In his view, Marshall believed in a constitutional democracy in which limited government was essential to the protection of individual rights. Hobson's John Marshall inherently distrusted popular majorities and invoked the doctrine of judicial review to preserve the rule of law as the basis of constitutional government.

In essence, Hobson contends that Marshall "adapt[ed] the methods of common law interpretation to the task of expounding the Constitution."[124] He suggests that Marshall regarded the Constitution as the fundamental law of the nation but construed it in accord with common law rules of statutory construction to refrain from imbuing it with his own personal or political biases.[125] Accordingly, Hobson places Marshall within a common law tradition in which judges exercised broad discretion in the application of statutory law and precedent to legal disputes. Although aware of the precise nuances of case law, jurists such as Edmund Pendleton and George Wythe, in whose Virginia courts Marshall frequently appeared during the late eighteenth century, often preferred to reason from general principles in reaching pragmatic conclusions.[126] Consequently, they relied less on precedent than on inductive analysis of the law. Many of Marshall's own constitutional opinions as Chief Justice also demonstrated this characteristic as he eschewed copious citation to cases in favor of general statements about controlling legal rules.[127]

Hobson's description of Marshall's extensive common law background provides an essential perspective from which to assess his jurisprudence. Rather than portray Marshall as a natural

123. HOBSON, *supra* note 7, at xiii.

124. *Id.* at xii.

125. *Id.* at 42-43, 52, 137-38, 208. While on the Court, Marshall said: "Judicial power is never exercised for the purpose of giving effect to the will of the Judge . . . ." Osborn v. Bank of the United States., 22 U.S. (9 Wheat.) 738 (1824).

126. *Id.* at 33-43.

127. *Id.* at 182, 190-92. *See, e.g.*, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), all leading constitutional decisions which contained relatively few citations to cases in support of general legal principles.

rights jurist[128] or as an especially partisan political judge, Hobson explains that Marshall's understanding of the common law influenced his perceptions about the Constitution.[129] For example, he invoked common law principles in his application of the Contract Clause to land grants and corporate charters.[130] Like common law jurists before him, Marshall did not hesitate to use the law to protect property rights from the turbulence of political factions.[131] Indeed, in *Dartmouth College v. Woodward*,[132] Marshall explicitly rejected the notion that the grant of a corporate charter was an exercise of political power by the state and thus subject to the vicissitudes of majority rule.[133] In this respect, Hobson's emphasis upon the common law aspects of Marshall's jurisprudence lends credence to the notion advanced by some historians that Marshall's aversion toward political factions anticipated the rise of substantive due process.[134]

One particular strength of Hobson's book is its lucid discussion of the common law basis of judicial review. Hobson explains that the rise of popular sovereignty and the development of written constitutions required judges, trained in common law methods, to assess the limits of governmental authority. Despite the wide latitude they enjoyed in construing the law, most common law jurists differentiated between judicial interpretation of statutes and lawmaking, which they understood as the prescribed role of the legislature in a constitutional democracy.[135] The common law judicial tradition with which Marshall identified emphasized the responsibility of judges to engage in dispassionate analysis of the law in order to ensure that the whims of political majorities did not transgress the rights of individuals.[136] Indeed, it was the common law's distinction between legal rights and political ones that characterized its solicitude for private property and civil liberties and its insistence upon the equal operation of the law.[137] As Hob-

128. HOBSON, *supra* note 7, at 79-80.

129. *Id.* at 208, 213-14.

130. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

131. *See, e.g.*, *Dartmouth College*, 17 U.S. (4 Wheat.) at 628, 648; *Fletcher*, 10 U.S. (6 Cranch) at 138. *See also* Nedelsky, *supra* note 10, at 187-99.

132. 17 U.S. (4 Wheat.) 518 (1819).

133. *Dartmouth College*, 17 U.S. (4 Wheat.) at 628, 648; HOBSON, *supra* note 7, at 91-95.

134. *See* Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions* 6 WM. & MARY BILL RTS. J. ___ (Winter 1997) (forthcoming) (pp. 8-12) (manuscript on file with author); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 58-61 (1991).

135. HOBSON, *supra* note 7, at 42-43.

136. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the federal judiciary as the "least dangerous branch").

137. *See* NEDELSKY, *supra* note 10, at 184-211.

son notes, by the end of the eighteenth century jurists in Virginia and other states began to review state laws to ensure that the political branches of government observed the limits of their authority. Judicial review, therefore, necessitated that judges exercise the discretion afforded them in common law adjudication to preserve the will of the people as manifested in the provisions of state constitutions.[138] Marshall and the other members of his Court accordingly understood judicial review as a by-product of popular sovereignty and their tribunal as the guardian of the Constitution.

Hobson's main premise is that Marshall invoked judicial review cautiously, constrained by the conventions of the common law and cognizant of the limits of federal judicial power. As a common law jurist, Marshall construed the Constitution as a special kind of statute,[139] aware that his principal objective was to interpret it as the fundamental law of the nation and not from the short term perspective of political expediency. Accordingly, Hobson argues that Marshall exercised his interpretative discretion in an exceedingly careful manner. Rather than proclaim the unqualified supremacy of the federal judiciary, Marshall assiduously asserted its independence to review the constitutionality of state and federal laws.[140]

In large part, Marshall's constitutional decisions support this conception of judicial review. For example, in *Marbury v. Madison*,[141] Marshall articulated the common law distinction between the judicial function and those of the political branches of government when he remarked: "The province of the court 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 . . . can never be made in this court."[142]

Consequently, Marshall refused to sanction the exercise of judicial review in disputes that primarily involved matters of for-

138. HOBSON, *supra* note 7, at 34-45. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 454-63 (Norton ed. 1972). *See also* Kamper v. Hawkins, 1 VA. Cases 20 (Va. Gen. Ct. 1793) (declaring unconstitutional a 1792 act that authorized district court judges to exercise broad injunctive powers not granted to them by the Virginia constitution); Case of the Judges, 4 Call. 142, 146 (Va. Ct. App. 1788) (distinguishing between the state constitution as an act of the people and a statute and suggesting that judges have the discretion to review the constitutionality of the latter consistent with the notion of popular sovereignty); Commonwealth v. Caton, 4 Call. 5 (Va. Ct. App. 1782) (dicta by Judge Wythe that the court could review the constitutionality of state laws).

139. HOBSON, *supra* note 7, at 199-200.

140. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch) 87; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

141. 5 U.S. (1 Cranch) 137 (1803).

142. *Id.* at 170.

eign[143] or military policy.[144] For this reason Hobson believes that Marshall's willingness to limn the boundaries of federal judicial power indicates his restraint as Chief Justice. As further support for this point Hobson cites Marshall's reluctance to embroil the court in disputes over slavery and Indian affairs, even though he personally opposed the institution of slavery and sympathized with the plight of Indians.[145]

One decision that might appear to contradict Hobson's thesis is *McCulloch v. Maryland*,[146] since Marshall's opinion for the Court broadly construed the Necessary and Proper Clause in sustaining the constitutionality of the United States Bank and ignited considerable political controversy. However, as Hobson suggests, Marshall interpreted this constitutional provision as he would a statute, and used his reasonable discretion as a judge to conclude that nothing in the Constitution precluded the federal government from implementing its enumerated powers through implied means.[147] Considered from this perspective, Marshall's sweeping statements in *McCulloch* about the need for flexible constitutional interpretation[148] reflected his affinity for the common law and its emphasis upon judicial pragmatism rather than a conscious attempt to expand the scope of federal authority at the expense of individual states. In addition, Hobson argues that Marshall deferred to Congress when he refused to scrutinize the actual necessity of a federal bank and thus prevented the Court from engaging in a political question.[149] Hobson regards this as a quintessential example of Marshall's judicial restraint.

Hobson further contends that in *McCulloch* and other decisions pertaining to federalism, Marshall employed judicial review defensively to preserve the national union from the excesses of

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143. *See, e.g.*, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (ruling a foreign affairs issue was non-justiciable); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (holding questions of foreign policy non-justiciable).

144. *See, e.g.*, Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) (holding war powers non-justiciable); *cf.* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (invalidating a Presidential order to capture a ship sailing from a French port).

145. HOBSON, *supra* note 7, at 164 -80 (discussing The Antelope, 23 U.S. (10 Wheat.) 66 (1825) (international slave trading dispute); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (Indian affairs); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (Indian affairs); and Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (Indian affairs)).

146. 17 U.S. (4 Wheat.) 316 (1819).

147. *Id.* at 406-23; HOBSON, *supra* note 7, at 122-24.

148. *McCulloch*, 17 U.S. (4 Wheat.) at 407 (stating "[W]e must never forget that it is a *constitution* we are expounding," and explaining that the Court should exercise broad discretion in construing Congress' enumerated powers under the Constitution).

149. HOBSON, *supra* note 7, at 160.

state sovereignty.[150] His principal objective was to maintain the supremacy of the Constitution,[151] which allocated authority between the states and the federal government, and not to augment national power through the guise of judicial review by striking down state laws. In this regard, Hobson notes that Marshall was especially critical of states' rights jurists who, he believed, unduly restricted the scope of federal legislative and judicial authority in ways inconsistent with the plain meaning and structure of the Constitution.[152] Thus, Marshall and the other justices readily sustained federal court jurisdiction in cases arising under the Constitution, federal laws,[153] or the nation's treaties,[154] and, in particular, insisted the Supreme Court's authority to review the constitutionality of state laws was an essential component of the federal system.[155]

Similarly, Hobson attributes Marshall's caution in cases involving interstate commerce and bankruptcy to judicial restraint. He notes that in *Gibbons v. Ogden*,[156] for example, the Chief Justice refused to interpret the Commerce Clause as conferring an exclusive power upon the federal government to regulate commerce among the states because neither the precise language of the Constitution nor its internal structure indicated the existence of such broad authority.[157] However, Marshall did not go so far as to rule that New York had concurrent power over interstate commerce. Instead, he simply held that because the New York steamboat licensing law conflicted with a federal act, constitutional supremacy required the Court to invalidate the local measure in order to prevent the state from infringing upon national power.[158] Hobson suggests that Marshall's interpretation of the Commerce Clause was deliberately ambiguous to keep the Court from involving itself in political disputes with states over whether their actions comprised legitimate police power regulations or impermissible attempts to restrict interstate commerce.[159]

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150. *Id.* at 21, 24, 69, 122-23, 148, 210-11.

151. *McCulloch*, 17 U.S. (4 Wheat.) at 403-06, 432-34.

152. HOBSON, *supra* note 7, at 200, 205-06. *See also* GUNTHER, *supra* note 79, at 155- 214 (containing copies of Marshall's essays in defense of the Constitution and federal judicial review published in 1819 in the *Alexandria Gazette*).

153. *See, e.g.*, Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824).

154. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

155. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). Marshall cogently expressed his own extra-judicial views in a series of essays defending the Court's exercise of appellate jurisdiction. *See* GUNTHER, *supra* note 79, at 155-214.

156. 22 U.S. (9 Wheat.) 1 (1824).

157. *Id.* at 186-220. HOBSON, *supra* note 7, at 142-47.

158. *Gibbons*, 22 U.S. (9 Wheat.) at 205-22.

159. HOBSON, *supra* note 7, at 145-47.

Likewise, Marshall doubted that the federal government had exclusive authority to regulate bankruptcy. Once the Court held as such, Marshall apparently feared that it would confront semantical distinctions between state bankruptcy laws and insolvency measures.[160] These were, in essence, political questions beyond the scope of federal judicial review.

Curiously, Hobson does not further develop this point in reference to Marshall's Contract Clause jurisprudence. Although, in some respects, Marshall acknowledged differences between contract rights and remedies, he refused to believe such distinctions diminished the scope of the Contract Clause as an absolute prohibition upon state police powers that impaired the obligation of contracts.[161] While Hobson briefly contrasts Marshall's rigid interpretation of the Contract Clause with his pragmatic analysis of the Commerce and Bankruptcy Clauses,[162] he should clarify that in all these areas of law Marshall declined to distort the meaning of the Constitution because he intended to insulate the Court from the external pressure of partisan politics.

Indeed, it was Marshall's efforts in this regard that belie Hobson's repeated assertion that Marshall's jurisprudence categorically distinguished between law and politics. For in proclaiming the authority of federal courts to decide issues of law and in articulating the limits of judicial power, Marshall actually demonstrated shrewd political instincts which enhanced the prestige of the federal judiciary and strengthened its constitutional role.[163] In part,

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160. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 194-96 (1819).

161. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 336-56 (1827) (Marshall, C.J., dissenting).

162. The Bankruptcy Clause provides that Congress shall have the power "To establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. 1, § 8, cl. 4. The Commerce Clause provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign nations and among the several States, and with the Indian Tribes . . . ." *Id.* at cl. 3. In contrast to the Commerce Clause, the Contract Clause absolutely prohibits specific state action. It exists to protect private contract rights from state interference and does not, on its face, involve the delicate balance between state and federal authority. HOBSON, *supra* note 7, at 45, 75. See Olken, *Contract Clause Jurisprudence*, *supra* note 92, at 513-16 (arguing that nineteenth and early twentieth century Contract Clause jurisprudence reveals divergent views of federalism), for a different view of judicial review and the Contract Clause.

163. In essence, the Marshall Court's choice to refrain from deciding certain cases actually may have increased its institutional legitimacy from the perspective of separation of powers. In this regard, Marshall's superb leadership skills and political acumen undoubtedly were largely responsible for the Court's emerging role as the prime guardian of constitutional values and liberties. Smith, unlike Hobson, emphasizes the political facets of Marshall's tenure as Chief Justice. SMITH, *supra* note 1, at 19-20. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Pow-*

Hobson recognizes this,[164] but his analysis of Marshall's work on the Court ignores the way in which the Chief Justice sometimes manipulated the law through seemingly neutral constitutional interpretation to achieve a certain result.[165]

Nowhere is this more clear than in *Marbury v. Madison*,[166] where Marshall ruled the Court lacked original jurisdiction to issue a writ of mandamus, yet used this opportunity to articulate the Court's authority to review the constitutionality of federal laws. Hobson, unlike Smith, at least recognizes this odd characteristic of Marshall's decision, and cryptically suggests that had the Court dismissed the case, it would have implicitly participated in the partisan politics that surrounded Marbury's claim.[167] However, one could argue that by hearing a dispute over which it had no jurisdiction, the Marshall Court involved itself in a political controversy in order to declare its constitutional power of judicial review.

Considered from this perspective, Marshall's interpretation of the Judiciary Act of 1789 and of Article III of the Constitution raises doubts about the motives Hobson imputes for him. The relevant language of the federal statute was ambiguous and conceivably constitutional under an alternative construction which Marshall blithely ignored.[168] In addition, Marshall, in dicta, erro-

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ers, 17 SUFFOLK U.L. REV. 881 (1983), for discussion of the connection between justiciability and separation of powers

164. HOBSON, *supra* note 7, at 49-51.

165. Hobson also does not really consider how Marshall's non-partisan political skills influenced the development of the Court's justiciability doctrine during the early nineteenth century. Through a series of self-imposed restraints upon federal judicial authority, the Marshall Court further legitimized those instances when federal courts actually decided cases. Marshall was undoubtedly perceptive enough to realize that by declaring the limits of federal judicial power his Court was actually solidifying the independence of the federal judiciary. Interestingly, Jean Edward Smith's biography of Marshall recognizes this facet of Marshall's judicial career whereas Hobson may not.

166. 5 U.S. (1 Cranch) 137 (1803).

167. HOBSON, *supra* note 7, at 54.

168. Section 13 of the Judiciary Act of 1789 provided in relevant part:

> The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

1 Stat. 73, 81 (1789). Given the statute's ambiguous juxtaposition of terms, one could argue that its provision for mandamus was not meant to modify the Court's original jurisdiction, but rather its appellate jurisdiction, which Congress can certainly do pursuant to the Constitution. *See* U.S. CONST. art. III, § 2, cl. 2. *See also* Van Alstyne, *supra* note 66, at 14-16. However, Marshall still was correct in finding that the matter before the Court was one concerning its original jurisdiction. In this sense, his conclusion that Congress could not alter the Court's original jurisdiction is correct, but nevertheless his gra-

neously implied that Congress could not modify the Court's appellate jurisdiction.[169] Both of these aspects of *Marbury* imply that notwithstanding Marshall's concerns about separation of powers, he relished the chance to apply the doctrine of judicial review to federal law. Ostensibly, Marshall may have sought to insulate the Court from partisan politics through his emphasis upon the rule of law as the basis of his decision. Yet, in this and other cases involving federal court jurisdiction, his interests in preserving federal judicial review and the institutional legitimacy of the Supreme Court were quite strong and probably influenced his tactics.

Hobson contends that although Marshall may have realized the political and economic effects of his Court decisions, his primary intent was to separate law from politics in Supreme Court adjudication. He further argues that Marshall could hardly anticipate in 1803 the extent to which judicial review would affect political controversies.[170] While on the whole there is considerable merit in these assertions, the distinction between legal and political issues in American constitutional law is not all that clear. Indeed, the Constitution itself is not only a legal document but also a political one that prescribes a guideline for government.[171] It emanated from widespread political and economic dissatisfaction in post-Revolutionary America that threatened the legal system. The constitutional framers implicitly recognized that in a democratic republic law reflects notions of politics, and they created a nation in which there are both political and legal limits to governmental authority.

Although the Constitution is the fundamental law of the land, it embodies political assumptions that permeate its provisions.[172]

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tuitous remarks about congressional regulation of the Court's appellate jurisdiction are not.

169. Marshall said:

> When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in [all] others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original.

Marbury, 5 U.S. (1 Cranch) at 175. Notice that Marshall omits reference in this passage to Congress' power to regulate the Court's appellate jurisdiction. The actual constitutional language is "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. See Van Alstyne, *supra* note 66, at 30-33, for a discussion of this constitutional error by Marshall.

170. HOBSON, *supra* note 7, at 70.

171. SMITH, *supra* note 1, at 2. "Constitutions are political documents. They define the way a nation is governed." *Id.*

172. *See, e.g.*, THE FEDERALIST NOS. 10, 51 (James Madison) (discussing the

As a result, constitutional interpretation invariably requires judges to assess issues of law that often have political ramifications.[173] To imply, as Hobson does, that the rule of law in a constitutional democracy is entirely distinct from politics is therefore somewhat inaccurate and misleading.

Marshall, no doubt, would have agreed with the early nineteenth century observation of Alexis de Tocqueville that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[174] As an attorney in Virginia and throughout his public career prior to coming onto the Supreme Court, Marshall observed first hand the interplay between law and politics. One problem with Hobson's appraisal of Marshall's jurisprudence is that it overstates the distinction between law and politics and presents the rule of law as an abstract concept devoid of its political context. While Marshall emphasized the rule of law in judicial decisionmaking, he never altogether ignored the political basis of law nor kept his political instincts at bay while on the Court.[175]

Indeed, when Marshall invoked the rule of law to protect property rights from the ephemeral whims of democratic majorities, he implicitly articulated certain political values.[176] Similarly, when he declared the supremacy of the Constitution to preserve the delicate balance between state and federal authority he legitimized, through the course of judicial review, a particular set of assumptions.[177] That Marshall's views may have represented a consensus, as Hobson suggests,[178] should not obscure the notion

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Constitution in the context of political factions, private rights and the tyranny of the majority; and discussing constitutional democracy, political factions and the separation of powers). *See also* NEDELSKY, *supra* note 10, at 1-8, 141-84, 203-11, 261-64.

173. *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 70 (discussing judicial review), 348-58 (1987) (discussing constitutional adjudication and public policy).

174. ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 280 (Knopf reprint. ed. 1972) (1835).

175. *See* WHITE, *supra* note 99, at 155, 163-80 (discussing the discretionary aspects of the Marshall Court's appellate procedure as evidence of the interrelationship between law and politics). White further explains that Marshall Court Justices differentiated partisan politics, from which they sought to insulate the Court, from ordinary politics and political ideas, which they recognized as intertwined with the law. *Id.* at 196-97. "Marshall Court Justices sought to claim political power by demonstrating their apparent avoidance of partisanship." *Id.* at 200.

176. *See, e.g.*, NEDELSKY, *supra* note 10, at 187-99 (discussing judicial review and the constitutional framers' emphasis upon private property).

177. In essence, Marshall's federalism decisions struck a blow at states' rights in that they rejected the compact theory of government and reiterated the notion that popular sovereignty was the basis for the union and of constitutional supremacy. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 222 (1827); McCulloch v. Maryland, 17 U.S. 316, 403-06, 425-37 (1819).

178. HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 7, at 206-07.

that the rule of law as applied by courts reflects the symbiotic relationship between law and politics in a democratic society. In the early nineteenth century John Marshall probably understood this concept better than anyone, and although in many respects his judicial opinions separated law from politics, they also melded them in subtle ways.

CONCLUSION

The legacy of Marshall as Chief Justice was to legitimize judicial review in a democratic republic and to preserve the Court's preeminent role in constitutional interpretation. For these reasons, he remains a figure of enormous importance in American constitutional law. Both Jean Edward Smith and Charles F. Hobson provide, in complementary studies, fresh perspectives on the life and jurisprudence of John Marshall that contribute significantly to understanding Marshall's place in history.