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An Assessment of G. Edward White's "Coterminous Power Theory"

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Abstract

In his response to considerations of his thesis, Professor White acknowledge that he formulated the "coterminous power axiom" theory to provide a conceptual framework that would illuminate the Marshall Court national supremacy cases.

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In his response to considerations of his thesis, Professor White acknowledges that he formulated the "coterminous power axiom" theory to provide a conceptual framework that would illuminate the Marshall Court national supremacy cases.[1] Professor White introduces this theory in the early stages of his argument, and fully explicates the essential elements in his analysis of Alexander Hamilton's "rationale" for federal court jurisdiction in the *Federalist Papers*. According to White, the language of *Federalist* No. 80 provides the "linguistic" home of the coterminous power theory: "[A] widely held proposition of political theory at the time of the framing of the Judiciary Act of 1789 and during the early and middle years of the Marshall Court . . . presupposed that in any "effective" republican form of government, the power of the judiciary would necessarily be coextensive with the power of the legislature, and vice versa."[2] From this observation, and from previous analysis of the writings and comments of St. George Tucker, Jefferson, and Marshall, Professor White deduces three interrelated elements of the theory: a) "[national] government must have the means to protect its existence by enforcing its own laws"[3]; b) that the federal judiciary would necessarily protect the federal government . . . "[since] federal courts could interpret the Constitution so as to enhance their own powers and the powers of Congress"[4]; and c) it follows that in order to provide the national government with adequate means of protecting its interest, the jurisdiction of federal courts must extend to disputes which involve the execution of the provisions expressly contained in the Constitution.[5]

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1. White, *Recovering Coterminous Power Theory*, 14 Nova L. Rev. 155 (1989).
2. *Id.* at 160; The Federalist No. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961).
3. White, *supra* note 1, at 160.
4. *Id.* at 184.
5. *Id.* at 169-71, 182-83.

White uses this theory in various ways, but his central argument is that it will help recover certain insights about the consolidationist/anti-consolidationist debate over federal court jurisdiction which have been lost because of the naivete of modern scholars. White insists that modern scholars devalue the anti-consolidationists' concern over the federal judiciary's role in destroying state sovereignty. Modern scholars accept too readily, he asserts, the language of moderation expressed in Marshall's sovereignty decisions, and mistakenly assume that Marshall did not embrace a "consolidationist" perspective. In developing this argument, White attempts to demonstrate that anti-consolidationists had real reason to fear the growth of national power through the jurisdictional extension of federal courts. First, he suggests that the fear was justified because the expansive contours of the coterminous power theory were asserted in Hamilton's *Federalist* essay No. 80 as well as in the language of Marshall's sovereignty opinions. Second, the fear was justified because as the anti-consolidationists correctly understood, there was no logical limit to federal power under this theory. Third, the fear was justified because it was clear to anti-consolidationists that Marshall embraced consolidation as a political agenda despite the disclaimer that he was doing nothing more than expressing the "will of the law" in interpreting the jurisdictional limits of congressional power. According to White, the coterminous power theory is necessary to show just how "correct" the anti-consolidationists were in fearing the demise of state sovereignty that was implicit in the coterminous power theory.[6]

Several critical flaws are embedded in the argument as presented by Professor White. Perhaps the first serious flaw lies in his premise that Hamilton and Marshall explicitly recognized a "mutuality of interest" among the three branches of the federal government, and that this explicit statement raised the fears of anti-consolidationists.[7] Certain individuals, such as Hamilton, may have believed as a political matter that a mutuality of interests might develop, but the idea itself is not stated in the *Federalist Papers*.

Moreover, the anti-federalists may have been correct in their assessment that Hamilton desired to destroy state power as part of his political agenda. Yet, as will be demonstrated later in this paper, the destruction of state power through the extension of federal court jurisdiction finds no support in the *Federalist* essays of Hamilton or Madison, or the decisions of Marshall. Indeed, most of their writings

6. *Id.* at 184.
7. *Id.* at 178.

reflect just the opposite: a desire to assuage anti-consolidationists' fears that an extension of federal court jurisdiction would necessarily entail a destruction of state sovereignty.

Perhaps more importantly, one can concede that Hamilton embraced the destruction of state power as reflected in the theory, and still reject the argument that Marshall also adopted such an extreme nationalist political agenda. Most modern scholars have acknowledged and documented the nationalist or "consolidationist" tendencies of the Marshall court. However, no serious scholar has argued that Marshall's position with regard to the union was interchangeable with Hamilton's ardent nationalism.

Before developing these criticisms, it is necessary to articulate fully the contours of White's central argument that modern scholars devalued the fears of the anti-consolidationists by denying Marshall's ardent nationalist agenda. Drawing upon the warnings of those who feared the unlimited possibilities of federal supremacy and the consolidation of national power implied in the adoption of common law, White construes their use of the word "consolidation" as a "code word for [the aggrandizement of the federal power and the corresponding] annihilation of state sovereignty in the American republic."[8] The key to understanding the debate, most especially the acute alarm of St. George Tucker and other Jeffersonians, is the coterminous power theory: the assumption that "for every extension of federal judicial power there would be a corresponding extension of federal legislative power."[9] Because of this axiomatic connection between the expansion of federal court jurisdiction and federal legislative authority, any decision concerning national-state supremacy was a foregone conclusion and consolidation was all the more possible. The value of recovering and understanding these fears and the logical consequences of extending federal judicial power is clear: once we understand that commentators of the Marshall Court took this axiomatic relationship seriously, it will reveal a dimension of the debates over the Marshall Court's sovereignty decisions that has not typically been appreciated.[10] In other words, the coterminous power theory will correct the historical error of modern scholars by exposing Marshall's ardent nationalism which necessarily entailed the destruction of state sovereignty.

As noted, the linchpin of White's argument is his claim that Ham-

8. *Id.* at 178.
9. *Id.* at 160.
10. *Id.* at 160.

ilton's short declaration in *Federalist* No. 80 reflects a belief in the "mutuality of interests" among the three branches of government: "If there are such things as political axioms, the propriety of the judicial power of government being co-extensive with its legislature may be ranked among the number."[11] This claim is the most significant and problematic component of White's theory, holding as it does that federal courts would invariably interpret the law involving a federal question in a manner favorable to the national government's interest. The "mutuality of interests" among the three branches derives from the broad language of federal court jurisdiction under article III, section II of the Constitution, extending federal judicial power to "all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ."[12] According to White, federal judges operating on the basis of the coterminous power theory would invariably interpret this broad language to expand federal power at the expense of state power. And, turning to the *Federalist Papers*, White finds the textual support for the idea of mutuality of interests in his interpretation of Hamilton's short declaration that the federal government must have a means to protect its interests, and that federal courts, which share the same interests as Congress, must have jurisdiction to interpret the Constitution.[13]

A close reading of the short passage from *Federalist* No. 80 and other writings of Hamilton and Madison does not reflect the notion of a mutuality of interests. It is worthwhile to review the ratification debates to illustrate the flaw in White's interpretation of Hamilton's *Federalist* essay. Almost all of the convention's participants acknowledged the possibility that the expansion of federal court jurisdiction might lead to an expansion of national congressional power at the expense of the states. On August 27, 1787, the full convention at Philadelphia revised the article III phrase "all cases arising under laws passed by the Legislature of the United States," striking out "passed by the Legislature." The revised version now reads: "The judicial Power shall extend to all Cases, in Law and Equity, arising under the Laws of the United States . . . ."[14] This new version extended federal court jurisdiction to all areas of federal law, not merely federal legislative law, potentially embracing English Common law. For those jealous of state's rights,

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11. *Id* at 176-77.
12. U.S. CONST. art. III, § 2.
13. White, *supra* note 1, at 177.
14. U.S. CONST. art III, § 2.

this possibility held grave implications. As Tucker evidently understood, if English Common law was to be regarded as the standing law of the United States, there would be no limit to the jurisdiction of the courts, and legislative authority would also be unlimited by the logic of coextensive power.[15] Not surprisingly, the great ratification issue of the convention was the proper sphere of federal supremacy.

Against this backdrop, Madison and Hamilton wrote various *Federalist* essays to allay the fear of the anti-federalists, who quickly perceived the possibilities of the new national government swallowing the states. They challenged the whole constitutional structure on this issue.[16] In *Federalist* No. 39, Madison responded, at first, by asserting the theory of concurrent sovereignty.[17] One could hardly have called the new government a "national one," for this implied a supreme government, and the general government was supreme only in its respective sphere. "In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[18]

Madison's initial response to those who warned against collusion between national departments was often weak and vague. He argued that the judiciary was by nature impartial, and other "precautions" had been "taken to secure this impartiality."[19] More specifically, impartiality was ensured because all decisions were to be made "accord-

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15. J. Madison, Notes of Debates in the Federal Constitution of 1787 539 (1984).

William Crosskey writes,

> [I]f the Common Law, with its British statutory amendments, was, in fact, regarded by the Federal Convention, in all its 'applicable' portions, as the standing law of the United States in their national capacity, then it seems certain the broadening change made in the Judiciary Article, on August 27th, could not have been inadvertently made. For, by men holding such a view, the broadening effect of striking out the words 'passed by the Legislature' would at once have been perceived; and if that effect was perceived, the broad meaning of this important second category of Article III must have been intended.

1 W Crosskey, Politics and the Constitution in the History of the United States 625 (1953) [hereinafter, Crosskey]; *see also*, R. McClosky, The American Supreme Court 6 (1960).

16. 2 Crosskey, *supra* note 15, at 712.

17. The Federalists No. 39 (J. Madison) (R. Fairchild ed. 1966).

18. *Id.* at 256.

19. *Id.*

ing to the rules of the Constitution."[20] However, in *Federalist* No. 51, Madison sought to minimize the possibility of coextensive power interests by showing that a separation of powers among the three branches would exploit the basic weakness of human nature in a manner that would prevent a mutuality of interests:

> Ambition must be made to counteract ambition. The interest of man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devises should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed: and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[21]

Similarly, Hamilton's writings in *Federalist* essays Nos. 78-80 were largely an effort to deny the existence of a mutuality of interests. By the time Hamilton's No. 80 appeared, the anti-federalist opposition to the national judiciary and its impartiality had reached a crescendo. *Federalist* essays Nos. 78-81 were a response to the "Letters of Brutus," which appeared in the *New York Journal and Weekly Register* of January 31, 1788.[22] In the "Brutus" essay of January, and those following on February 14 and March 20, Yates warned against the power of the Court to interpret the Constitution, which in his mind would "operate to a total subversion of the state judiciaries, if not to the legislative authority of the states."[23] Yates pictured the states caught in the jurisdictional vise of article III, section two, which permitted "every

20. *Id.*

21. THE FEDERALIST No. 51, at 160 (J. Madison) (R. Fairchild, ed. 1966); *see also*, W. Kristol, *The Problem of the Separation of Powers, The Federalist No. 47-51* SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING 123 (C. R. Kessler ed. 1987); C.M. WHITE, PHILOSOPHY, THE FEDERALIST AND THE CONSTITUTION 161 (1987).

22. Yates, *Letters of Brutus*, NEW YORK JOURNAL AND WEEKLY REGISTER, Jan. 31, 1788 *appearing in* E. CORWIN, COURT OVER CONSTITUTION 234 (1957).

23. *Id.*

adjudication of the Supreme Court, on any question that may arise upon the nature and extent of the general government."[24] This power would "affect the limits of the state jurisdiction," and would necessarily enlarge "the exercise of [the general government's] powers," thus, restricting state power.[25] Fearful of this mutuality of interests among the federal branches of government, Yates insisted that "the judicial power of the United States, will lean strongly in favor of the general government, and will give such an explanation to the constitution, as will favor an extension of its jurisdiction . . . ."[26] Yates offered the counter-claim to Madison's proposition that man's ambitious nature was a check on mutuality, arguing instead that this very quality of human nature encouraged mutuality between federal departments and made the theory of impartiality a farce.

> Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their authority. *Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts*; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise.[27]

It is hard to imagine a more explicit and clear statement of the key component of White's coterminous power theory. For Hamilton to adopt this very principle as his "rationale" in defense of the court, especially in light of Yates' powerful argument, would hardly make sense. In fact, Hamilton contended that Yates' fear that state sovereignty would be subverted by the supreme judiciary in collusion with the legislative or the executive branch, misconstrued the essential nature and spirit of the Constitution. As Hamilton saw it, the judiciary should have the power to declare acts contrary to the Constitution void because of its "impartiality." The Court, as the true representative of

24. U.S. CONST. art. III, § 2.
25. CORWIN, *supra* note 22, at 234.
26. *Id.* at 238.
27. *Id.* at 241 (emphasis added).

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the people's interest, should alone determine the limits of power attached to the other branches of government, as well as the power of the national and state governments. Without this impartial division of powers, the intention of the people would be subverted by the intention of their agents.[28]

Hamilton's comments must be interpreted in light of the controversy surrounding the ratification debates. His writings should be viewed as a response to Yates' attack on the idea of federal judicial supremacy. Admittedly, Hamilton argued for a Supreme Court that would authoritatively articulate federal law, including the Constitution. But his central rationale was that an impartial judiciary would prevent state parochialism that would flow inevitably from a stratified judiciary whereby state courts could independently interpret the meaning of federal law. Such parochialism would necessarily destroy the national government. Impartiality, unhampered by state politics, could be ensured by placing ultimate authority with the Supreme Court.[29]

This correction of White's reading of Hamilton's "axiom" does not deny Hamilton's deeper consolidationist motives, which became evident in his policies as Secretary of the Treasury. If Professor White had merely argued that the anti-consolidationist had reason to fear the emergence of a mutuality of interest as a political matter, his argument would have more force. Nevertheless, Hamilton's writings, particularly *Federalist* No. 80, must be placed within the proper historical context. Once this is done, the claim that Hamilton's axiom was the first textual justification of the coterminous power theory is not supported. Further, most modern scholars have documented Hamilton's political agenda, including his "hope" for the emergence of a strong centralized government, without the benefit of the coterminous power theory. So even if we restrict White's theory as an explication of Hamilton's political agenda, no new light has been shed on the consolidationist/anti-consolidationist debate over federal court jurisdiction.

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28. THE FEDERALIST No. 78, at 228-31 (A. Hamilton) (R. Fairchild ed. 1966); B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 20-26 (1942); E. CORWIN!,R *supra* note 22, at viii.

In No. 2 of the "Letters of Brutus," February 14, 1788, Yates continued the theme of mutuality of interest: "[T]he judiciary having such power of interpretation . . . will tend to extend the legislative authority." "It is easy to see, that in their adjudications they may establish ceratin principles, which being received by the legislature, will enlarge the sphere of their power beyond all bounds." Brutus No. 2, in Corwin, *supra* note 22, at 247.

29. THE FEDERALIST No. 78 (A. Hamilton), *supra* note 28.

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Professor White's second argument concerning the coterminous power theory, that modern scholars have devalued the reaction of the anti-consolidationist by an acceptance of Marshall's disclaimer of "judicial will," simply ignores modern historical scholarship on the post-convention period. Modern scholars, without benefit of the coterminous power theory, have documented the nationalistic tendencies of a federal judiciary with expansive jurisdiction. Further, modern scholars have not accepted Marshall's disclaimer that anti-consolidationists had nothing to fear from a weak judiciary. However, thoughtful historians have stopped short of White's more extreme assertion that Marshall shared Hamilton's political agenda. While acknowledging the nationalistic tendencies of Marshall's supremacy decisions, most modern scholars have not interpreted those decisions as an effort to destroy every semblance of state authority. However, White's presentation never responds to the substantial, well-documented historical scholarship that would deny Marshall's more sinister and extreme designs.

Before developing these criticisms, it is useful to review the historical debate over the nation-state relationship of the post-convention period. The debate over the jurisdictional limits of the national judiciary as defined in section 34 of the Judiciary Act of 1789 reinforced the worst suspicions of anti-consolidationists. Edmund Randolph, the new Secretary of State, only exacerbated their anxiety when he proclaimed the common law as "already the law of the United States."[30] In the absence of national legislation, the consequences of the inclusion implied complete generality of Congress' judicial rule-making power. It is not difficult, therefore, to understand why the party of Jefferson denied that Common Law had any application to national matters at all. Sir George Tucker's apprehension represents the conclusion of many who distrusted the new federal order.

The heated debate over national power subsided briefly with the emergence of a nationalist spirit after the War of 1812. Yet, if in the years ahead the center of anti-consolidationist opposition shifted from Virginia to South Carolina, there were many in the Old Dominion ready to attack the insidious destruction of the state autonomy, which by now they associated with the Supreme Court and its chief architect, John Marshall.

According to White, modern researchers have failed to take seriously the anti-consolidationist sentiments of the post-convention period.

30. 1 Crosskey, *supra* note 15, at 629.

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The coterminous power theory will recover what naive modern scholarship has lost: that Tucker was correct in his assessment that the jurisdiction and authority of the other branches of the federal government must be coextensive with that of [the federal] courts.[31] The difficulty with this claim is that it ignores substantial moderal scholarship which has carefully documented the fear of coextensive power.[32]

A few historical examples will illustrate this shortcoming in White's position. As early as 1953, Professor Crosskey offered a fairly extensive analysis of St. George Tucker's 1803 argument. Tucker denied that the Constitution adopted a single, federal common law system embracing the common law of the several states. Instead, Tucker postulated a theory that the Revolution severed the single system Common Law tradition, and created a system whereby the thirteen independent

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31. White, *supra* note 1, at 157.

32. In Professor White's original draft, he wrote: "As Morton Horwitz, in commenting on this passage in Tucker, put it, 'it is difficult to understand precisely what . . . the assertion that if the federal judiciary possessed jurisdiction [to declare common law rules] it would be able to obliterate all constitutional limitations on the federal government . . . was all about.' " Actually, White's use of the Horwitz response was somewhat inexplicable. Horwitz's response was directed to the remarks of Jefferson concerning federal law of crimes not to the comments of Tucker. Horwitz writes:

> Growing out of Jeffersonian hostility to criminal indictments of American citizens for pro-French activities, the constitutional objection to common law crimes boiled down to the assertion that if the federal judiciary possessed jurisdiction to impose criminal sanctions without a statute it would be able to obliterate all constitutional limitations on the federal government. [I]f the principle were to prevail,' Thomas Jefferson wrote in 1800, of a common law being in force in the United States it would 'possess . . . the general government at once of all the powers of the State Governments and reduce . . . us to a single consolidated government.

To these remarks of Jefferson, Horwitz responded:

> Although it was reiterated many times over, it is difficult to understand precisely what the Jeffersonian argument was all about. James Sullivan of Massachusetts understood that the question of common law jurisdiction involved no special constitutional difficulties, for all that it required was that federal common law jurisdiction be limited to those substantive crimes over which Congress had legislative power. In short, if Congress could not constitutionally make an activity criminal, the courts could not impose common law criminal sanctions. There would be no greater danger of a federal court punishing activity beyond the scope of federal power than of Congress passing a statute exceeding those same limits.

HORWITZ THE TRANSFORMATION OF AMERICAN LAW 10-12 (1977). White does make accurate reference to this letter of Jefferson to Gideon Granger, August 18, 1800, later in the text.

states' legislatures must independently interpret and develop common law.[33] Professor White's assertion that the essential ambit between congressional and judicial jurisdiction was an alarming fact to Jefferson and Tucker, merely restates Crosskey's conclusions. As Crosskey wrote:

> The real motivation of the early onslaughts on the judicial power, particularly in the South was dislike, not so much of the powers of the national courts as such, as it was of the concomitant rule-making power which, every competent lawyer supposed, would belong to Congress as the legislature of those courts.[34]

Crosskey further demonstrated the inevitable logic of an expanding congressional power by way of its legislative authority over the national courts by reference to Randolph's report on the Judiciary Act of 1789.

> Since Congress had the power to direct the national courts, "in the decisions of all matters that came before them, [and] since it was perfectly evident from the judiciary article that questions of all kinds of law, state and national, could, and inevitably would, come before the national courts, it seemed to Randolph to follow, on this entirely separate and undeniable ground, that the power of Congress over the laws of the states was general."[35]

Given this inevitable conclusion, all that Randolph in desperation could urge was that Congress not to exercise its power.[36]

Crosskey's writings, as well as the writings of other modern scholars, have documented the real threat to state power which was implicit in the expansion of federal court jurisdiction. Similarly, modern scholars have not lost sight of the centralizing tendencies of Marshall's jurisprudence. Yet, as noted earlier, Marshall's opinions have not been

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33. 1 Crosskey, *supra* note 15, at 635-38.
34. *Id.* at 669.
35. *Id.* at 673.
36. Crosskey notes, that as Randolph, all good lawyers knew this to be so, for it was the rule which defined the relationship between state legislative and judicial bodies. The Jeffersonian determination to shackle the national legislative reach was linked to their position on the Common Law. They were compelled to take this position because of "their view that legislative power and judicial power necessarily went hand in hand." *Id.* at 632, 673.

I present this review of Crosskey's thesis, without necessarily endorsing his conclusions, as one example of the contemporary discussion of coextensive power which Professor White suggests has been lost.

equated in modern scholarship with the more ardent political nationalism of Hamilton.

A brief review of the national supremacy cases before and during Marshall's tenure as Chief Justice, as well as the historical work of scholars such as Gerald Gunther, will reveal the inadequacies of White's analysis of Marshall's jurisprudence. It is well known that the central principle of Marshall's jurisprudence was unity. The leading assumption of the doctrine of Union or federalism is well known: with the ratification of the Constitution, the people of America had created a sovereign government; all acts of this government, once derived from the legitimate powers of the Constitution, were to take precedence over the acts of the state governments.[37] The Court's sovereignty decisions in *Martin v. Hunter's Lessee*[38] through *Osborn v. Bank of United States Gov't.*[39] reflected this fundamental assumption of national unity.

Moreover, signs of the national court's tendencies in the hands of the federalist justices were apparent even before Marshall's sovereignty decisions. In *Chisholm v. Georgia*,[40] the pre-Marshall court "unabashedly," to use Professor Robert McClosky's word, asserted that national supremacy was "the purpose of the Union."[41] The decision suggests that even before Marshall, the Court recognized the difficulty of the nation-state relationship and was "heavily disposed to create, or to encourage the creation of, a consolidated national union."[42] Marshall was forced to go slowly toward the goal of national unity because Jefferson's use of the impeachment power had placed the Court on the defensive.

However, the emergence of a nationalist sentiment in the early 1800's provided Marshall with a political climate more favorable to the purpose of national supremacy. *Fletcher v. Peck*[43] culminated the slow development of precedents establishing the Court's power and confidence, and demonstrated that the court was ready to assert its role in the formation of a national union. The War of 1812 had provided the proper environment, for it had reshaped American attitudes and politi-

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37. R. Faulkner, The Jurisprudence of John Marshall 96 (1968); *see also*, R. K. Newmeyer, The Supreme Court Under Marshall and Taney (1968) (especially the chapter entitled "John Marshall and the Consolidation of National Powers").

38. 14 U.S. (1 Wheat.) 304 (1816).

39. 22 U.S. (9 Wheat.) 738 (1824).

40. 2 U.S. (1 Dall.) 419 (1792).

41. McClosky, *supra* note 15, at 35.

42. *Id.*

43. 10 U.S. (6 Cranch) 87 (1810).

cal alignments.[44]

The history of the Marshall Court's supremacy decisions is well known. From *Martin* to *Osborn*, Marshall carved out a large share of state activity and placed it under national jurisdiction. In *Cohens v. Virginia*,[45] as Professor White reminds us, the issue addressed in the *Federalist Papers* emerged once again. Who is to decide cases affecting the implementation of federal laws? The Court reiterated the position which Justice Story spoke eloquently on in *Martin*, and which Marshall would continue to assert throughout the sovereignty cases:

> No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others.[46]

The *Cohens* opinion raised pressing questions. What limits were to be placed upon the courts if they could set forth the range of their own jurisdiction with that of the legislature? How could the states be secure against the voracious appetite of the national government?[47]

Almost all of the Marshall Court sovereignty cases stirred intense controversy. However, White focuses on two cases in particular to show that modern scholars, because of their unsophisticated acceptance of Marshall's disclaimer of judicial will, have failed to grasp the passionate nationalism underlying his jurisprudence. White finds that the anti-consolidationists correctly identified *McCulloch v. Maryland*[48] as the capstone of the conspiracy to destroy the states, and to consolidate all power into the hands of the national departments. White recounts Marshall's position in the heated exchange of Spencer Roane (alias "Hampden") and John Marshall (alias "The Friend of the Constitution") which followed the *McCulloch* decision.[49] He suggests that once we see that the coterminous power theory is embedded in the opinion, we can more fully appreciate the fears of the anti-consolidationists. In

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44. McCloskey, *supra* note 15, at 55.
45. 19 U.S. (6 Wheat.) 264 (1821).
46. *Id.*; *see also* The Supreme Court and the Constitution 44 (S. Kutler, 3d ed. 1984).
47. *Id.*
48. 17 U.S. (4 Wheat.) 316 (1819).
49. White, *supra* note 1, at 185.

his words: "Thus the criticism of the Virginia opponents of the Court, *long relegated to obscurity* not only because they were positions that [were] '*lost*' over time but because they have appeared as increasingly arcane, take on added cogency once their starting assumptions are recreated" (emphasis added).[50]

Professor White's analysis of *McCulloch* and the debate following is confusing in two ways. First, since the publication in 1969 of Gerald Gunther's *John Marshall's Defense of McCulloch v. Maryland*, this classic confrontation has been discussed at length in the major literature on the period.[51]

The second confusion is more troubling. White suggests that the *McCulloch* decision reflected the coterminous power theory, i.e., that the federal courts would necessarily interpret federal laws favorable to national interests. Yet a close reading of the "Friend" essays reveals a different meaning, one which was initially presented and developed by Madison and Hamilton in the *Federalist* and later applied by Marshall in *Cohens* and *McCulloch*. Marshall insisted, once more, that separation of powers, the integrity of the justices, and the framework of judicial authority established in the Constitution, all served to ensure the disinterested performance of judicial authority.[52] Perhaps the

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50. *Id.* at 192.

51. The work was known to Professor White as the primary source for his own discussion. G. GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (1969) hereinafter GUNTHER; *see also*, A. KELLY, W. HARBISON & H. BELZ, THE AMERICAN CONSTITUTION, ITS ORIGINS AND DEVELOPMENT 192 (6th ed. 1983); R.K. NEWMEYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 46 (1968); F. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 132 (1981); M. UROFSKY, A MARCH OF LIBERTY 215 (1988); W. WIECEK, LIBERTY UNDER THE LAW: THE SUPREME COURT IN AMERICAN LIFE 41-43 (1988). Francis Stites, in addition to the "Hampden" articles, cites earlier articles of William Brockenbrough's "Amphictyon," which appeared in the *Enquirer* on March 30 and April 2. Referring to the "Hampden" (Roane) articles, he writes, "[the articles] set forth the predictable strict constructionist view drawn from the state compact theory, and denounced Marshall's ideas that national power emanated from the people, not the stages, and his broad interpretation of the 'necessary and proper clause.'" STITES, *supra* at 132-33.

More interesting, perhaps are the five chapters which John Taylor devoted to refuting *McCulloch* in his *Constructions Construed and Constitutions Vindicated*, or Roane's last five essays sent off to the *Enquirer* from his sick bed where he lay dying, this time under the name of "Algernon Sidney," in response to Marshall's decision in *Cohens*. *Id.* at 133. Professor Wiecek suggests that John C. Calhoun and other state rightists, clearly saw Section 25 "as the linchpin of the federal system." WIECEK, *supra* at 42.

52. GUNTHER, *supra* note 51, at 17-19.

"Hampden" essays were responding to what Roane feared was Marshall's political agenda rather than his words. More importantly, modern scholars have shown how the *McCulloch* opinion expanded national power without attributing to Marshall the extreme nationalism which is suggested by the coterminous power theory. Again, Professor White makes no attempt to demonstrate the correctness of his view of Marshall's nationalism, other than his assertion that modern scholars have not fully grasped the fundamental assumptions behind Marshall's disclaimer of judicial will.

White makes a similar, but more developed, argument in his assessment of Marshall's jurisprudence in the *Osborn* opinion. Professor White argues that the coterminous power theory is reflected in a quote from Marshall's opinion: "the legislative, executive and judicial powers, of every well constituted government, are co-extensive with each other."[53] If we assume that the coterminous power theory embraces all three elements as defined early in this paper, we do not find sufficient evidence that the theory is articulated or taken up by Marshall in the *Osborn* opinion. The brief quote cited by White is the standard reiteration of the positions taken by counsel—in this case, by counsel for the Bank. Marshall's own belief that there is no logical certainty that these powers are co-extensive is revealed in his qualifier, that "they are potentially co-extensive."[54]

Moreover, Marshall's "co-extensive" theory in *Osborn* cannot be equated with the coterminous power theory suggested by White, i.e., that the federal courts would always interpret federal laws in the interests of the federal government. Rather, the *Osborn* opinion reflected the same jurisprudential fears that had been revealed in Marshall's other opinions: if federal courts did not have the authority to interpret federal laws, states would interpret those laws in parochial ways and would defeat the unifying purposes underlying the Constitution. After considering the claim of counsel, he quickly moved to re-state the principles established in *Cohens* and *Martin*: "All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws [under article III]."[55] Marshall explains the legitimacy of coextensive power within the context of those delineated powers which each

53. White, *supra* note 1, at 188-89.

54. Osborn v. Bank of Unites States Gov't, , 22 U.S. (9 Wheat.) 738, 818. (1824).

55. *Id.*

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branch possesses, and which must be permitted to function as prescribed by the Constitution if the government is to function effectively. This is the meaning of Marshall's earlier modifier, "potentially co-extensive." Marshall had always feared that the courts, being the weakest link in the general government, would be the focus of attacks. It followed from Marshall's view of coextensive powers, that if one department collapsed, other departments would follow. Article III enabled the "judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it."[56]

Marshall's version of coextensive powers can be further distinguished from White's theory by examining Marshall's discussion of Congressional expansion of original jurisdiction of federal circuit courts. Marshall argued that the very effectiveness of the national government depended largely on the Court's jurisdiction. Original jurisdiction provided the Court with its most potent authority to preserve the Constitutional structure, presumably against state provincialism. In Marshall's words, "Original Jurisdiction so far as the constitution gives a rule, is co-extensive with the judicial power."[57] Thus, Marshall rejected the claim that Congress limited the circuit courts' original jurisdiction to cases which fall under the courts' appellate jurisdiction.[58] Upholding the Bank's access to the Federal Courts, Marshall set forth a potentially expansive view of Congressional power to extend the original jurisdiction of federal courts: once an "ingredient" of the original cause falls under the jurisdiction of the judicial power of the Union as prescribed by the Constitution, then "it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."[59] Indeed, the expansion of federal court jurisdiction through this "ingredient" test prompted Justice Johnson's dissent.[60]

56. *Id.*

57. *Id.* at 821.

58. *Id.*

59. *Id.* at 823.

60. Professor White presents Justice Johnson's position as a concurrence. This is inaccurate. White, *supra* note 1, at 189.

Conclusion

Few, if any, would suggest that Marshall was an objective interpreter of the Constitution. Almost every state's rights advocate who attacked Marshall saw an unadorned nationalist.[61] Scholars of the Marshall Court have consistently categorized it as consolidationist or nationalist, and it is not uncommon to find examples of this in general history texts: "As a nationalist Marshall was inclined to interpret the powers of Congress broadly and to assert the federal government's supremacy in the exercise of its constitutional authority."[62]

However, Professor White carries this truism one step further, suggesting perhaps that modern scholars have not gone far enough. While not ascribing any particular reason to Marshall's motive beyond the extension of national power, presumably for power's sake, White leads the reader to believe, nevertheless, that Marshall's partisanship holds some sinister meaning. We should be skeptical, he writes, when judges advance "the ideal of the rule of law, as administered by 'disinterested' judges; thus, arguments that seek to emphasize judicial disinterestedness and cast law as a body of neutral principles or [a] disembodied force to be discovered by savants. . . ."[63] White finds good company here. Some years ago, Professor Corwin gave his appraisal of Marshall's famous maxim in *Osborn*. Corwin stated, "Educated lawyers would today smile at Marshall's assertion that 'courts are the mere instruments of the law, and can will nothing.' Rather they take their stand with Justice Holmes' account of judicial decision as involving at every step 'the sovereign prerogative of choice?' "[64]

But it is one thing to suggest that Marshall, like so many of his colleagues before and after him, failed to grasp the false assumptions inherent in their notions of legal reasoning, and quite another to suggest, as Professor White does, that the disclaimer was partisan strategy and a "skillful rhetorical [device,] designed to conceal the partisan na-

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61. Francis Stites' description of Spensor Roane's rage over the *Cohens* decision speaks persuasively of this generally held view. "He bitterly assailed judicial despotism for consolidating the national government on the ruins of the states and attacked Marshall as the 'ultra federal leader' who had hoodwinked his Republican brethren on the Court into uniting behind his extreme nationalism." Stites, *supra* note 51, at 133.

62. The National Experience 185 (J. Blum ed. 1988); *see also*, J. Garraty, The American Nation 257-60 (1987); R. Gruver, An American Experience 213-14 (1981).

63. White, *supra* note 1, at 193-94.

64. Corwin, *supra* note 22, at 79.

ture of judging."[65] It is entirely beyond the scope of this review to explore Marshall's motives. Yet one thoughtful alternative to White's assessment should be considered. Professor Gunther's introduction to the essays of William Brockenbrough ("Amphictyon"), Spencer Roane ("Hampden"), and John Marshall ("The Friend of the Constitution") is both enlightening and temperate. The essential claim of Roane and Brockenbrough was that the principles found in *McCulloch* provided the basis for unlimited central authority without feasible limits placed on the national power. Marshall's response was to deny, even more forcibly, the limitations of judicial authority as stated in *McCulloch*. Gunther states the essential aspect of Marshall's defense in these terms: "Those principles [expansive interpretation of national power] did not give Congress carte blanche, that they did preserve a true federal system in which the central government was limited in its powers—and that the limits were capable of judicial enforcement."[66]

Finally, Gunther asks the same question posed by Professor White, "What, then, does one make of Marshall's emphatic assurances here that substantial, judicially enforceable limitations on congressional power existed?"[67] Or to put it within the context of this paper: How are we to understand Marshall's disclaimer? "One conceivable approach to an answer, [writes Gunther,] is to view the centralizing progeny of *McCulloch* as offspring fully contemplated by Marshall and accordingly to dismiss the *Union* and *Gazette* essays as clever defensive propaganda designed to induce disbelief of the *Enquirer* charges that the emperor wore no clothes."[68] Gunther rejects this view. Gunther instead suggests that the *Union* and *Gazette* pieces "form, within the *McCulloch* opinion itself, parts of a coherent whole."[69] "For me," Gunther writes, "Marshall's newspaper commentary *reflects genuine views, not disingenuous facade.*"[70]

> His essays indicate, rather, that he did not believe that Congress had an unrestricted choice of means to accomplish delegated ends.

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65. White, *supra* note 1, at 194. In his earlier reference to this phrase, White suggested, "The quotation is alien only if one assumes it is taken seriously; that Marshall really believes that in determining the constitutional validity of the statutes of the Supreme Court is merely 'giving effect to the will of the legislature.' " *Id.* at 191.
66. GUNTHER, *supra* note 51, at 19.
67. *Id.*
68. *Id.*
69. *Id.* at 19-20.
70. *Id.* at 20. (emphasis added).

> He opposed extreme formulations, excessively broad as well as unduly narrow, of the range of legitimate means--'neither a feigned convenience nor a strict necessity; but a reasonable convenience, and a qualified necessity' was the guide he endorsed in the *Gazette*. Moreover, these pieces suggest that Marshall was quite serious in his often neglected assurance in *McCulloch*, reiterated and elaborated in the *Gazette*, that the Court would hold an act unconstitutional should Congress, 'under the pretext of executing its powers, pass laws for accomplishment of objects, not entrusted to the government.'[71]

With Gunther's assessment in mind, how are we to read the famous Marshall dictum in *Osborn* which states, "Courts are the mere instruments of the law, and can will nothing," and later, "Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."[72] If Marshall would have adopted the principles of the coterminous power axiom in his *Osborn* decision, his action would have been inconsistent with his prowess as a judicial politician. What could be gained by asserting the legitimacy of mutuality of interest between federal departments? The "ingredient" test, taken in conjunction with *Martin*, *Cohens*, and *McCulloch*, provided sufficient ground for an expansive reading of national power. With Gunther, we conclude that Marshall's views in *Osborn* are genuine views—even if naive—and not "disingenuous facade." The application of the "coterminous power axiom thesis," in this instance, seems to obfuscate our understanding rather than enhance it.

What new light has been thrown upon this debate as a consequence of the coterminous power theory? In addition to the skepticism we must adopt about judicial claims of disinterestedness, Professor White surmises that the jurisdictional ambit generates the conclusions that, "the strategy of the Marshall Court majority appears more consolidationist—more determined to carve out a vast area of federal sovereignty, and to restrict state power accordingly," and that the "criticisms of the Virginia opponents of the Court, long relegated to obscurity . . . take on added cogency once their starting assumptions are recreated."[73] While we owe a debt of gratitude to Professor White for his attempt to formulate a conceptual model, we cannot conclude

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71. *Id*; *see also* R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL (1968).
72. Osborn 22 U.S. (9 Wheat.) at 866.
73. White, *supra* note 1, at 192.

that any additional insight has been gained at the present stage by its application. Since the days of sociological jurisprudence and the legal realists, scholars are nothing but skeptical about the claims of judicial disinterestedness voiced from the bench. One cannot find signs, amidst the vast contemporary literature on the Marshall Court, that Marshall was anything but extremely serious about expanding the reaches of national supremacy.

If the coterminous power theory is to be endorsed as an effective analytical tool, certain clarity must be brought to the concept. Most important is the clarification of the axiom's elements. Are we to assume that all three components are present whenever the axiom's name is invoked? Recognizing the confusion surrounding the use of its essential component (mutuality of interests), how functional is it? And finally, do the insights we derive from its application justify its insertion into the debate?