JOHN MARSHALL'S CONSTITUTIONALISM

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ABSTRACT

CLYDE HOSEA RAY IV: John Marshall's Constitutionalism
(Under the direction of Michael Lienesch)

Although often cited for his formidable role in shaping early American jurisprudence, John Marshall is seldom conceived as a political thinker. This dissertation provides insight into this neglected dimension of Marshall's thought by examining his constitutional theory in the context of three of his most important Supreme Court opinions: *Marbury v. Madison* (1801), *McCulloch v. Maryland* (1819), and *Ogden v. Saunders* (1827). While many scholars have viewed Marshall's thought in exclusively partisan or legal terms, this interpretation draws attention to Marshall as a constitutional theorist concerned with the Constitution's basic moral legitimacy; its sovereignty over national and state government policy; and its ability to instill habits of democratic citizenship. I argue that these commitments illustrate Marshall's commitment to the Constitution as a source of national identity during the early-nineteenth century. In light of this recovery of Marshall's political thought, I contend that Marshall's constitutionalism makes critical contributions to our understanding of the creation of the American nation as well as debates concerning constitutional authority in the present day.

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Introduction: John Marshall and the American Constitution

Seated on the ground floor of the United States Supreme Court, the oversized statue of Chief Justice John Marshall greets all visitors as a perpetual reminder of the man whose opinions and career most shaped the national judiciary. Over two hundred years since it was recorded, Justice Oliver Wendell Holmes' claim continues to ring true: "If American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall."[1] So we have been told, and so we believe. Yet in spite of the prominence of his legacy in American legal discourse, Marshall's political thought remains a subject of surprisingly little scholarly attention. To some extent, the reason for this neglect is easily understood. Marshall's opinions addressed timely political controversies rather than timeless principles of political theory. Moreover, he was a judge, not a political philosopher: most of the hundreds of opinions he wrote pointedly avoided the abstract speculation and high philosophy that we find in the writings of contemporaries such as James Madison and Thomas Jefferson.[2] Nevertheless, his writings were inevitably both

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[1]Oliver Wendell Holmes, *Collected Legal Papers* (New York: Harcourt, Brace, and Howe, 1920), 270.

[2]As Samuel Konefsky notes, "Marshall himself denied that his political philosophy was the product of deliberate reflection or contemplation," instead attributing its emergence to the "casual circumstances" of the American Revolution rather than careful judgment. See his *John Marshall and Alexander Hamilton* (New York: Macmillan, 1964), 254.

political and theoretical, and he deserves to be considered an important contributor to the history of American political thought.

Over the years both Marshall and the volumes of opinions he left behind have been the subject of much scholarship. Interpretations of Marshall vary widely, from the hagiographic to the cynical. Some have painted his life in grand and sweeping strokes, portraying his career as one of almost mythic accomplishment. Among the most famous of such accounts is Albert Beveridge's multi-volume *Life of John Marshall*, which portrays Marshall in a highly sympathetic light as a legal and political giant during his own lifetime and a national hero after his death. These admiring interpretations have emphasized his decisive contribution in securing individual rights and legitimizing national power, as well as his statesmanship in deliberately eschewing the narrow political squabbles of his day. For such authors, Marshall was "the Great Chief Justice," the Constitution's most stalwart defender.[3] As one admiring biographer recently concluded, "Above all, Marshall's Court gave the American people—'We the people'—a means of redress against tyranny by federal, state, and local government."[4]

Other scholars have taken a more critical view of Marshall, often by situating him as a central player in early party politics. For these authors, Marshall was the Federalist *par excellence*, who used his position on the Supreme Court as a means for promoting

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[3]See, for example, Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, KS: University Press of Kansas, 1996), 164-170, 171-174, 177-178; Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996), 488-89; and R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, LA: Louisiana State University Press, 2001), 414-458.

[4]Harlow Giles Unger, *John Marshall: The Chief Justice Who Saved The Nation* (Philadelphia: De Capo Press, 2014), 321.

and defending the party's policies. In these interpretations, Thomas Jefferson's devotion to decentralized authority and popular sovereignty met its match in Marshall, whose more subtle loyalties to the Federalist Party consistently led him to endorse strong central authority and separation of powers.[5] Look past his pretensions of upholding the Constitution, these authors argue, and one will see the authentic Marshall: the "ardent Federalist," loyal to the end to Washington, Adams, and the strong national government they championed.[6]

A different approach has been to emphasize the legal as opposed to political impact of Marshall's thought. Here again scholars differ widely. For some, Marshall's chief contributions to legal theory are his fidelity to the rule of law and the words of the Constitution. His entire body of work, summarizes William Draper Lewis, shows "that he adhered closely to the words of the Constitution." Indeed, in a practical if not historical sense, "Marshall was the strictest of strict constructionists; and as a necessary result, his opinions are practically devoid of theories of government, sovereignty, and the rights of man."[7] By contrast, others have drawn different conclusions, arguing that he expanded the power of the federal judiciary far beyond the limits set by the Constitution.[8] These

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[5]Lawrence Goldstone, *The Activist: John Marshall, Marbury v. Madison, and the Myth of Judicial Review* (New York: Walker and Company, 2008), 7.

[6]Robert H. Bork, *Coercing Virtue* (Washington: AEI Press, 2003), 55.

[7]William Draper Lewis, *Great American Lawyers*, (Philadelphia: John Winston Co., 1907) 2: 378.

[8]Karen Orren and Christopher Walker, for example, have recently shown how Marshall's decision in *Marbury v. Madison* elevated the province of judicial jurisdiction above other political concerns implicit in the case. See their "Cold Case File: Indictable Acts and Officer Accountability in *Marbury v. Madison*," *American Political Science Review* 107.2 (2013), 241-258. For other studies of Marshall's use of judicial review comparing his practice to modern

more critical appraisals point to opinions such as *McCulloch v. Maryland*, which one recent scholar has cast as a case study of Marshall's "aggressive nationalism."[9] Yet one thing most of these interpretations agree: that Marshall was the first in a long line of thinkers who defined the character of American constitutional law. As renowned justice Benjamin Cardozo declared, Marshall "gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it … in the fire of his own intense convictions."[10]

Finally, for the few who have viewed Marshall through a philosophical lens, his thought has been a matter of controversy, with some seeing it as tied to classical republicanism, while others view it as representative of the Lockean influence on the American founders. Morton Frisch, for instance, sees a nascent "constitutional republicanism" in Marshall's Supreme Court decisions, while Robert Faulkner locates Marshall's emphasis on the protection of individual liberty and property rights squarely within the libertarian-Lockean framework.[11] Other Marshall scholars such as Richard

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applications, see Leslie Friedman Goldstein, "Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law," *Journal of Politics* 48.1 (1986), 51-71; Robert Lawry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, KS: University Press of Kansas, 1989); and Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven, CT: Yale University Press, 1990).

[9]See the title of Richard Ellis' recent book, *Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic* (New York: Oxford University Press, 2007). More even-handed but nonetheless nationalist interpretations of Marshall's thought include Edward S. Corwin, *John Marshall and the Constitution* (New Haven, CT: Yale University Press, 1919); Leonard Baker, *John Marshall: A Life in Law* (New York: Macmillan, 1974); Francis N. Stites, *John Marshall: Defender of the Constitution* (Boston, MA: Little Brown, 1981); and Mark R. Killenbeck, *McCulloch v. Maryland: Securing a Nation* (Lawrence, KS: University Press of Kansas, 2006).

[10]Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), 169.

Brisben have questioned the conceptual utility of either classical republicanism or liberalism as a means for appraising Marshall's thought, instead arguing that "[h]e was an individual whose values reflect the transition from republicanism to liberalism."[12]

This analysis examines Marshall's political thought in three Supreme Court cases through the lens of constitutional legitimacy, sovereignty, and republican citizenship. *Marbury v. Madison* illustrates Marshall's understanding of the basis of the Constitution's legal and political legitimacy, its moral authority as fundamental law. *McCulloch v. Maryland* sheds light on his view of constitutional sovereignty, and the superiority of the law of the Constitution relative to national and state legislation. And *Ogden v. Saunders* provides a venue for his understanding of the duties of citizenship and the meaning of liberty in the emerging commercial republic of the nineteenth century. Of the over five-hundred opinions Marshall authored in his time as Chief Justice, these three opinions together bring to light the core components of his political thought: his belief in the Constitution's fundamental moral legitimacy, its purpose in mediating authority relations between the national government and the states, and its promotion of a modern neo-republican form of liberty. Although over time these opinions have become tied to different legacies, a major part of the work of this analysis is to peel back the

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[11]See Robert K. Faulkner, *John Marshall's Jurisprudence* (Princeton, NJ: Princeton University Press, 1968), 3-44 and Morton Frisch, "John Marshall's Philosophy of Constitutional Republicanism," *Review of Politics* 20.1 (1958), 34-45. On Marshall's republicanism and pragmatist leanings, see also Thomas C. Shevory, "John Marshall as Republican: Order and Conflict in American Political History," in *John Marshall's Achievement: Law, Politics, and Constitutional Interpretation*, ed. Thomas C. Shevory (New York: Greenwood Press, 1989), 75-93.

[12]Richard A. Brisben, "John Marshall and the Nature of Law in the Early Republic," *The Virginia Magazine of History and Biography* 98.1 (1990), 57-80: 62.

conventional wisdom concerning these cases to arrive at a fresh understanding of Marshall's political thought, a perspective removed from the typical filters applied to Marshall's opinions.

The first chapter focuses on one of Marshall's most celebrated opinions in the case of *Marbury v. Madison*. Although scholars have typically approached the opinion from the perspective of judicial review, this analysis views the case through the lens of constitutional legitimacy. The chapter argues that Marshall looked to a variety of familiar traditions in order to justify the binding authority of the Constitution, including the document's protection of rights, its representation of popular sovereignty, and its instrumental value in settling political questions. Moving beyond these themes, however, the chapter argues that Marshall offers a unique theory of the Constitution's moral legitimacy that is derived from its embodiment of principles of good government and its status as the only viable legal order available to the nation. Hence, *Marbury* provides more than an argument on behalf of judicial supremacy. Marshall's opinion also brings together contemporary accounts of constitutional legitimacy, while also illustrating Marshall's own theory of constitutional obedience.

Chapter two turns to *McCulloch v. Maryland*, drawing on Marshall's opinion in the case as well as a series of Virginia newspaper essays he penned anonymously in the aftermath of the Court's decision to explore his view of the Constitution's sovereignty. While scholars are typically divided on the question of whether *McCulloch* advocates national sovereignty or federalism, this chapter contends that Marshall rests ultimate sovereignty in the Constitution itself. Moreover, his commitment to constitutional sovereignty is brought into sharper relief in his editorial exchanges with states' rights

advocate Spencer Roane. The logic of states' rights troubled Marshall, and he did not shy from pointing out its flaws. Writing as "A Friend to the Constitution," Marshall defends the Constitution as the final legal authority superior to the political branches as well as the state governments. In this rare excursion into the realm of public opinion, Marshall set forth an account of sovereignty intended to defeat theories that would render the Constitution as mere league between the states or identify its rule with a consolidated national government. By situating these essays alongside the Court's official opinion in *McCulloch*, one achieves a more comprehensive assessment of Marshall's constitutionalism and the limits he imposed upon national and state authority alike.

Chapter three examines Marshall's lone dissent as Chief Justice on a constitutional question in the case of *Ogden v. Saunders*. For Marshall, a seemingly innocuous New York bankruptcy act was a symbol for a nation that was increasingly neglecting the law of the Constitution. While his fellow justices had upheld the act permitting state interference in the terms of contracts governing default, Marshall argued that the legislation was not only incompatible with the Constitution's contract clause, but also undermined core aspects of the classical liberal and republican traditions that most Americans took for granted. But of even greater significance, Marshall's dissent also presents a neo-republican theory of non-domination that reconciled individual rights with the common good. This fragile partnership of concepts was jeopardized by the prospect of arbitrary political power. Here the greatest threat posed by the act was not its disruption of the national economy, but the specter of state legislatures invading the liberties and private agreements reached by citizens. In *Ogden*, Marshall presents the Constitution as the only barrier against such invasions, and declares that it is among the

powers of the Supreme Court to preserve the document's authority from "legislative infraction." The dissent is significant in its defense of the political theory undergirding the Constitution, a theory including elements of classical liberalism and republicanism but also embracing a modern version of republican liberty that was possible only under the rule of law.

Together these chapters illustrate that Marshall was not only guided by rules of legal interpretation, nor was he merely promulgating a veiled partisan agenda from the bench. On the contrary, the opinions examined here reveal a complex political thinker, whose convictions were anchored in the Constitution, not the national government or the Federalist Party. Marshall used the occasions examined here to develop and put forward a complex constitutionalism that was sensitive to the permanent ideas of political theory: the basis for obedience to national law in *Marbury*; the nexus of national and state sovereignty in *McCulloch*; and the tensions between individual liberty and the common good in *Ogden*. Taking full measure of John Marshall's political thought means dwelling on each of these aspects, for in doing so, one appreciates his opinions as not simply justifications of legal decisions, but as arguments on behalf of a political theory of the Constitution and its guiding role in national affairs.

At the heart of this constitutional theory was Marshall's commitment to the Constitution as the foundation of America's legal and political life. An unabashed supporter of the Constitution in the Virginia Ratifying Convention, Marshall believed the Constitution was "the greatest improvement on human institutions." Yet clearly the Constitution was never just a "splendid bauble" designed for admiration but possessing little practical value. Its instrumental function could not be exaggerated for a nation

coping with its newfound responsibilities in the commercial and international arena. For him, the document was principled and timeless, while also practical and flexible. As he famously put it, the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." A government invested with "ample powers" to fulfill the prosperity and happiness of the nation required by extension "ample means for their execution." Thus Marshall was not only upholding the Constitution, but also explaining the rule of law to an audience still uncertain and in some cases skeptical of the framers' achievement. To paraphrase one of his most famous maxims, Marshall never let the nation forget that it was a Constitution he was expounding.

Marshall's political thought extends well beyond the founding era. In fact, it has much to say to constitutional theory today. Perhaps the biggest intervention of his thought is in contemporary debates concerning national identity and the instrumental function of constitutions in cultivating such membership. Marshall's work speaks directly to this role of constitutions in unifying groups of people or states that share territory but lack a common history, what Jürgen Habermas has called "constitutional patriotism."[13] Such theories emphasize the acceptance of the rule of law as embodied in a constitution as a "form of civic, non-national" identity for individuals in multicultural societies.[14] In

[13]See his *Between Facts and Norms: Contributions to a Discourse Theory of Democracy* (Cambridge, MA: Polity Press, 1997), 499. See also Jan-Werner Müller, "A European Constitutional Patriotism? The Case Restated," *European Law Journal* 14.5 (2008), 542-557.

[14]See Jan-Werner Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2007), 2. Nor is the attractiveness of such theories limited to the developing world or ethnically-divided societies. Müller suggests that even "established democracies" such as the United States may require some sort of "civic minimum" as a "focal point of democratic loyalty" in order for political institutions to function effectively (5).

examining Marshall's opinions, a distinctive conception of the Constitution emerges that sought unity amid disparate political loyalties, states, and local economies in the early nineteenth century. As Chief Justice, he was well-situated for crafting and instilling a national identity based on a shared veneration for the Constitution. At a time when fragmentation along political and social lines runs deep in the United States as well as abroad, Marshall's constitutionalism is instructive for understanding the influence of a constitution as a source of shared meaning and common political vocabulary.

Citizens have and will continue to debate the basic political questions raised in in the cases explored here. Why do we continue to obey a Constitution over the course of several generations? How much political authority should the national government possess? What obligations, if any, does citizenship entail? Marshall's work addresses each of these disputes, while pointing up a key question about the Constitution itself: to what extent can a written document generate national identity and unity in addition to its function in creating a legal order? Few would question Marshall's influence in his time. The following pages show the lessons he imparts to our own.

Chapter One

John Marshall, *Marbury v. Madison*, and the Construction of Constitutional Legitimacy

Perhaps no other Supreme Court decision has offered a more lucid and forceful defense of the Constitution than *Marbury v. Madison* (1803). There are several explanations for the case's prominence in American legal history, including the Court's defense of the vested rights of individuals, its formulation of the "political questions" doctrine, and its assertion of judicial supremacy. In most accounts, the opinion's articulation of the principle of judicial review continues to loom particularly large.[15] All of these factors were indeed important in shaping the future course of the nation, and they

[15]For recent studies of the long-term consequences of the case, see Paul W. Kahn, *The Reign of Law: Marbury V. Madison and the Construction of America* (New Haven, CT: Yale University Press, 2002); Mark V. Tushnet (ed.), *Arguing Marbury V. Madison* (Stanford, CA: Stanford University Press, 2005); Goldstone, *The Activist*, 2008; and Cliff Stone and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* (New York: Public Affairs, 2009). Despite the importance often ascribed to *Marbury*, several scholars have downplayed both the significance of Marshall's opinion and the case's overall relevance to the practice of judicial review in America. See, e.g., Edward S. Corwin, "*Marbury v. Madison* and the Doctrine of Judicial Review," *Michigan Law Review* 12 (1914), 538-572; William Van Alstyne, "A Critical Guide to *Marbury v. Madison*," *Duke Law Journal* 1 (1969), 1-47: 36-37; David P. Currie, "The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835," *University of Chicago Law Review* 49.4 (1982), 646-724; James O'Fallon, "Marbury," *Stanford Law Review* 44 (1992), 219-260; Jack N. Rakove, "The Origins of Judicial Review: A Plea for New Contexts," *Stanford Law Review* 49.5 (1997), 1031-1064; Michael J. Klarman, "How Great Were the 'Great' Marshall Court Decisions?" *Virginia Law Review* 87.6 (2001), 1111-1184: 1113-1125; Larry D. Kramer, "The Supreme Court 2000 Term—Foreword: We the Court," *Harvard Law Review* 115 (2001), 4-169: 4-5; Sanford Levinson, "Why I Do Not Teach *Marbury* (Except to Eastern Europeans) and Why You Shouldn't Either," *Wake Forest Law Review* 38 (2002), 553-578; and Mark A. Graber, "Establishing Judicial Review: *Marbury* and the Judicial Act of 1789," *Tulsa Law Review* 38.4 (2003), 609-650. For a good, recent overview of the debate surrounding *Marbury*'s proper place in American constitutional history, see Barry Friedman, "The Myths of *Marbury*," in Tushnet, *Arguing Marbury V. Madison*, 65-87.

are rightfully acknowledged in any assessment of the opinion's impact. But they do not tell the whole story. To enter into a discussion of *Marbury* is above all to enter into John Marshall's discussion of the Constitution. For in drafting the Court's majority opinion, Marshall did more than artfully avoid a direct political clash between the Federalist judiciary and its Jeffersonian critics. More important, he offered a detailed justification of the binding authority of the Constitution, a justification that yields a purchase for surveying and challenging assumptions implicit in contemporary arguments concerning constitutional legitimacy.

While *Marbury*'s relevance for understanding the legal development of the United States needs little defense, scholars continue to disagree concerning the motives guiding Marshall's authorship of the Court's opinion. The most widespread interpretation of *Marbury* casts him as a cunning political operator who wielded the Constitution as a weapon against opponents of the Federalist Party.[16] Almost as popular is the argument that he seized the occasion to achieve non-partisan ends, specifically building the national influence of a weak Supreme Court that lacked the power to enforce its verdicts.[17] More

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[16]See Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908); Edward S. Corwin, *John Marshall and the Constitution*, 66; Benjamin Cardozo, *The Nature of the Judicial Process*; Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, IN: Bobbs-Merrill, 1962); Samuel J. Konefsky, *John Marshall and Alexander Hamilton*, 87; Robert Faulkner, *The Jurisprudence of John Marshall*, 200-212; and Francis N. Stites, *John Marshall: Defender of the Constitution*, 1981. Further underscoring Marshall's alleged partisanship is his significant reliance on Alexander Hamilton's reasoning in support of judicial review in *Federalist #78* to justify the Court's use of the practice in *Marbury*. See Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. J.R. Pole (Indianapolis, IN: Hackett, 2005), 411-418.

[17]See Akhil Reed Amar, "Marbury, Section 13, and the Original Jurisdiction of the Supreme Court," *University of Chicago Law Review* 56 (1989), 443-499; Paul W. Kahn, *The Reign of Law*, 118-119; and Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 2010), 25-27.

recently, a small but emphatic camp of scholars has challenged the consensus opinion that *Marbury* was a product of either partisanship or institution building, arguing instead that the decision set forth a fair and neutral interpretation of the Constitution.[18] It is important to note, however, that none of these accounts conflicts with Marshall's role as a figure who enhanced the Constitution's standing in the nation.[19] Thus his most hagiographic admirer, Albert Beveridge, could praise *Marbury* for its "perfectly calculated audacity" in engineering "a coup" on behalf of written constitutions "as bold in design and as daring in execution as that by which the Constitution had been framed."[20]

Absent among these evaluations, however, is a serious discussion of Marshall's role in establishing the Constitution's legitimacy. It is true that following its ratification, there was surprisingly little argument as to whether the American Constitution was the nation's supreme law. Instead, its Antifederalist opponents swiftly turned from criticizing the Constitution's new national plan of government to effecting political change through

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[18]See William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review* 76 (1978), 893-960; Christopher Wolfe, "John Marshall and Constitutional Law," *Polity* 15 (1989), 5-25; Robert Lowery Clinton, *Marbury V. Madison and Judicial Review*, 79; and R. Kent Newmyer, *John Marshall and the Heroic Age*, 162-163.

[19]On the Supreme Court's insignificance prior to Marshall's judgeship, see James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (New York: Simon and Schuster, 2002), 138-139.

[20]Albert Beveridge, *The Life of John Marshall* (Boston and New York: Houghton Mifflin, 1919) 3: 132, 142. For Beveridge, Marshall's deftness was to be celebrated, not criticized: "The assertion [of constitutional supremacy] … was the deed of a great man. One of narrower vision and smaller courage never would have done what Marshall did. In his management and decision of this case, at the time and under the circumstances, Marshall's acts and words were those of a statesman of the first rank" (142-3).

its amendment process.[21] Most Americans acknowledged the Constitution as the binding law of the land, as both Federalists and Jeffersonians "accepted the Constitution as their standard," writes John Murrin, even as the two sides differed sharply on the question of how best to implement the government it created.[22] Moreover, as Keith Whittington has argued, despite Federalist fears attending the so-called "Revolution of 1800" and the rise of Thomas Jefferson to the Presidency, Jeffersonians largely viewed their mission as rescuing the framers' work from the "constitutional errors" of their Federalist enemies.[23] Even so, loyalty to the Constitution meant different things to different people, so that long after its ratification, there was no single explanation for the Constitution's binding authority. To no small degree, Marshall's achievement in *Marbury* lay in his ability to sort through and lend a measure of coherence to these diverse explanations, thereby providing an opinion that organized and clarified the grounds for citizen's obedience to the Constitution.[24]

[21]On this point, see Lance Banning, "Republican Ideology and the Triumph of the Constitution," *The William and Mary Quarterly* 31 (1974), 167-188.

[22]John Murrin, "A Roof Without Walls: The Dilemma of American National Identity," in *Beyond Confederation: Origins of The Constitution and American National Identity*, eds. Richard Beeman, Stephen Botein, and Edward C. Carter, Jr. (Chapel Hill, NC: University of North Carolina Press, 1987), 333-348: 346.

[23]Keith Whittington, *Political Foundations of Judicial Supremacy* (Princeton, NJ: Princeton University Press, 2007), 54.

[24]Of course, Marshall's efforts to build constitutional loyalty were hardly confined to just *Marbury*. A more comprehensive appraisal of this commitment must show how his theory unfolded and matured throughout his Supreme Court opinions (as well as his other writings), including pivotal decisions such as *Fletcher v. Peck* (1810), *Dartmouth College v. Woodward* (1810), *McCulloch v. Maryland* (1819), and *Gibbons v. Ogden* (1824). However, close attention to *Marbury* reveals one of his earliest as well as most forceful defenses of the Constitution's legitimacy.

Arguments concerning constitutional legitimacy remain alive and well. After all, governments must justify their existence to those who are required to live under them in any age.[25] Applied to political institutions such as Congress or the Supreme Court, questions concerning legitimacy typically address the right by which such institutions wield political authority over citizens.[26] In relation to constitutions, however, justifications of legitimacy must address an even more difficult question, which is why the words of the constitution should be followed as opposed to an alternative law, authority, or tradition.[27] Thus an ongoing conversation among scholars of European integration concerns the question of whether the legitimacy of traditional national constitutions can be made compatible with the constitutional basis of the European Union. In answer to this question, political thinkers led by Jürgen Habermas have struggled to find new justifications of constitutional authority that look to a constitution's function in knitting together people who lack a common heritage but share the same

[25]See Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press 1991), 30. For more extensive treatments of this concept, see Randy E. Barnett, "Constitutional Legitimacy," *Columbia Law Review* 103 (2003), 111-148; Frank I. Michelman, "Is the Constitution a Contract for Legitimacy?" *Review of Constitutional Studies* 8 (2003), 101-128; Richard H. Fallon, "Legitimacy and the Constitution," *Harvard Law Review* 118 (2005), 1787-1853; and Carl Schmitt, *Constitutional Theory* (Durham, NC: Duke University Press, 2008), 136-139.

[26]Richard Fallon, *Implementing the Constitution* (Cambridge, MA: Harvard University Press, 2001), 118. As Rodney Barker remarks, "legitimacy is precisely the belief in the rightfulness of a state, in its authority to issue commands, so that those commands are obeyed not simply out of fear or self-interest, but because they are believed in some sense to have moral authority." See his *Legitimating Identities: The Self-Presentations of Rulers and Subjects* (Cambridge: Cambridge University Press, 2001), 87.

[27]As Randy Barnett puts it, "the problem of constitutional legitimacy is to establish why anyone should obey the command of a constitutionally-valid law." See Barnett, "Constitutional Legitimacy," 111.

constitutionally governed territory.[28] Indeed, even in the United States, where constitutional legitimacy would seem to be more self-evident, the concept is much debated and surprisingly little understood. As a result, writes Richard Fallon, "confusion often results—not only among readers and listeners, but also … in the minds of those who write and speak about constitutional legitimacy."[29]

A survey of contemporary discussions of the Constitution's authority reveals that there is seldom any agreement concerning the one element of the Constitution that ensures its legitimacy. Some thinkers argue that the Constitution is fundamental law, an eighteenth century text that protects individual liberties by constraining the ability of future elected officials and popular majorities to invade individual rights.[30] For these thinkers, the Constitution is delicate parchment: secure from the sullying touch of ordinary citizens, it issues its commands from under protective glass. Others contend that the Constitution is a continuing creation that binds citizens, at least for some duration of time, to the conditional consent given by the American people to its rule.[31] Their

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[28]See Jürgen Habermas, *Between Facts and Norms*, 499 and Müller, "A European Constitutional Patriotism? The Case Restated," 542-557.

[29]Fallon, "Legitimacy and the Constitution," 1790.

[30]See Jon Elster, *Ulysses and the Sirens; Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1984); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985); Cass R. Sunstein, "Constitutions and Democracies: An Epilogue," in *Constitutionalism and Democracy*, eds. Jon Elster and Rune Slagstad (New York: Cambridge University Press, 1988), 327-356; Stephen Holmes, *Passions and Constraints* (Chicago: University of Chicago Press, 1995); Adam Przeworski, *Sustainable Democracy* (New York: Cambridge University Press, 1995), 50; Jon Elster, *Ulysses Unbound* (Cambridge: Cambridge University Press, 2000); and Richard A. Epstein, *The Classical Liberal Constitution* (Cambridge, MA: Harvard University Press, 2014).

[31]See Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988), 13-14; Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991); Bruce Ackerman, *We the*

arguments suggest that the Constitution should appear frayed and worn: sometimes marked through, occasionally re-written entirely. Finally, there are those who are persuaded that the Constitution binds citizens because of its instrumental role as a settlement device, providing a practical roadmap or set of "focal points" for organizing politics.[32] Proponents of this view conceive of the Constitution as a valuable but well-used atlas that continues to prove handy when one gets lost. Each of these justifications address important principles embodied in the American Constitution, and none of them discount rights, consent, or the Constitution's instrumental value as sources of its legitimacy. Yet all too often these approaches look to a single paramount explanation that gives the Constitution its binding authority. Consequently, while today there is virtually no debate among constitutional theorists as to whether the words of the Constitution bind judges and ordinary citizens alike to its rule, the question of why it is legitimate remains a subject of debate.[33]

People: Transformations (Cambridge, MA: Harvard University Press, 1998); Jason Frank, *Constituent Moments* (Durham, NC: Duke University Press, 2010); and Bruce Ackerman, *We the People: The Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2014).

[32]See Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110.7 (1997), 1359-1387; Barry R. Weingast "The Political Foundations of Democracy and the Rule of Law," *American Political Science Review* 91.2 (1997), 245-263; John M. Carey, "Parchment, Equilibria, and Institutions," *Comparative Political Studies* 33 (2000), 735-761; Larry Alexander and Frederick Schauer, "Defending Judicial Supremacy: A Reply," *Constitutional Commentary* 17.3 (2000), 455-482; and David Strauss, *The Living Constitution* (New York: Oxford University Press, 2010).

[33]To be sure, several arguments concerning legitimacy do not fall neatly within the rights, consent, and settlement silos. The imposition of order on society, the ability of legal rules and institutions to achieve good government in light of social demographics, and the creation of an affective attachment to the nation have all been looked to as sources of constitutional legitimacy. Hence, while the theories discussed in this analysis may represent the most well-known justifications of constitutional authority, they are by no means exhaustive. For a recent overview of some of these alternative theories, see Mark A. Graber, *A New Introduction to American Constitutionalism* (New York: Oxford University Press, 2013), 40-64.

The simplest way to provide a more unified approach to constitutional legitimacy would be to embrace each of these views, combining them together into a more comprehensive defense of the Constitution's binding authority. Yet greater inclusion by itself cannot address a blind spot common to these theories, which is the notion that a reasonably just constitution exercises its own binding authority in the absence of better alternatives. What is therefore needed is a more developed theory of the Constitution's basic moral legitimacy. To this end, a careful examination of Marshall's words in *Marbury v. Madison* provides an opening for conceptualizing the Constitution's legitimacy that both locates elements of the existing approaches and reaches beyond their limitations.

Marbury v. Madison **Reconsidered**

The facts of the case date back to the final days of the administration of President John Adams in March 1801. Worried that the incoming Jefferson administration and new Democratic-Republican Congress would fill the federal judiciary with party loyalists, Adams nominated a slate of fifty-two candidates to fill various federal judicial offices only days before leaving office.[34] Although the nominees were confirmed by the Senate and their written commissions signed by Adams, several commissions belonging to these "midnight judges" remained undelivered (ironically by then-Secretary of State John Marshall) when Thomas Jefferson was inaugurated as the nation's third President. Upon learning of the failed deliveries, Jefferson ordered his Attorney General, Levi Lincoln, to

[34]For more detailed discussions of the events leading up to the case as well as the arguments presented to the Court, consider Van Alstyne, "A Critical Guide to *Marbury v. Madison*," 160-165; Smith, *John Marshall: Definer of a Nation*, 309-326; and Simon, *What Kind of Nation*, 173-190.

disregard Adams's appointments, basing his decision on the belief that non-lifetime appointments were revocable. After Jefferson sent his own candidates to the Senate for confirmation, a number of the previous appointees, including one William Marbury, petitioned the Supreme Court for a writ of mandamus enjoining the new Secretary of State James Madison to recognize their commissions, along with those of the other Adams appointees.[35] Opening arguments in *Marbury v. Madison* began on February 10, 1803, with Attorney General Lincoln representing the government and former Attorney General Charles Lee representing Marbury.

Notwithstanding able arguments presented by both attorneys, the verdict was unanimous. On February 24, Marshall delivered the Court's opinion, which was structured as a series of answers to three questions. First, did Marbury possess a title to his commission? Second, was the administration obliged to recognize his appointment? And finally, did the Supreme Court have the power to issue a writ of mandamus compelling the Secretary of State to accept the commissions? Marshall concurred with the plaintiff's argument that Marbury did possess a proprietary right to his appointment, and furthermore that the laws of the nation afforded him a legal remedy for the deprivation of his right. But in a surprising twist, the Chief Justice denied that the Supreme Court was the proper body for issuing the writ of mandamus, holding that section 13 of the Judiciary Act of 1789, which in broadening the Supreme Court's jurisdictional authority had permitted the Court to hear *Marbury*, violated the constitutional provisions governing the Court's original jurisdiction set forth in Article VI of the Constitution. Thus the Court asserted the superiority of constitutional over ordinary

[35]Marbury was Adams' nominee for Justice of the Peace for the District of Columbia.

law, striking down as invalid section 13, and with it, the legal standing of Marbury and the rest of Adams's appointees.

Marshall did not reserve his discussion of the Constitution to the rousing conclusion of *Marbury*. On the contrary, the Constitution is referenced eloquently and often provocatively throughout his opinion, and its authority is justified from multiple vantage points. Obviously, differences exist between Marshall's understanding of the Constitution's role and contemporary ones. But in allowing him to put forth his distinctive understanding of the Constitution's authority, *Marbury* provided Marshall with the opportunity to apply what have become some of our most important theories of constitutional legitimacy. He began with a discussion of rights.

***Marbury* and the Protection of Rights**

Among constitutional theorists, many argue that a written constitution's principal purpose is to protect citizen's rights.[36] For these thinkers, popular majorities, and particularly their elected representatives, will override individual liberties if not legally restrained from doing so. Ronald Dworkin has made this case well over the course of several decades. "The constitutional theory on which our government rests is not a simple majoritarian theory," Dworkin writes. "The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes

[36]See, e.g., Carl J. Friedrich, *Constitutional Government and Democracy* (Boston, MA: Little Brown and Company, 1941); Owen Fiss, "Groups and the Equal Protection Clause," *Philosophy and Public Affairs* 5.2 (1976), 107-177; Harry N. Hirsch, *A Theory of Liberty: The Constitution and Minorities* (New York: Routledge, 1992); and Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 2011).

to be the general or common interest."[37] Working from these assumptions, Dworkin has argued that a legitimate constitution must contain provisions that "disable" majority rule by codifying political and individual liberties alongside provisions that "enable" collective political decisions.[38] He goes on to assert that such a theory provides a constitutional conception of democracy that is based on the principle of equality rather than on its traditional association with majority rule. Accordingly, each member of the community is treated "with equal concern and respect," and "citizens' most basic freedoms" are protected from infringement by the democratic process.[39] The argument is by no means a recent one: the purpose of the Constitution as a bridle upon the dangers of popular rule was a prominent opinion voiced by political leaders throughout the Founding era. One need only turn to the warnings of James Madison himself in his famous *Federalist #10* for evidence of this widespread concern with securing the "public good and private rights" from the special "danger" posed by majority faction.[40]

Much of the first half of Marshall's opinion is centered on rights, and specifically on Marbury's right to assert legal title to his appointment as Justice of the Peace of the District of Columbia. Here it is important to note that it is unclear whether this matter

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[37]See Ronald Dworkin, *Taking Rights Seriously* (London and New York: Bloomsbury, 2013), 165. See also Cass Sunstein's argument that "Constitutions operate as constraints on the governing ability of majorities; they are naturally taken as antidemocratic," and that these protections are encoded in the constitutional text both explicitly (through amendments) and implicitly (through the separation of powers). In his "Constitutionalism and Democracy: An Epilogue," 327-328.

[38]Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Cambridge, MA: Harvard University Press, 1996), 21.

[39]Ibid., 73.

[40]Hamilton et al., *The Federalist*, 48.

needed to be addressed at all by the Court, let alone as its starting point. Indeed, Marshall's decision to pursue this question has often cast suspicion on his motives in the case.[41] As John Brigham's discussion of *Marbury* points out, "It seems obvious now that this talk of rights is an appropriate form of inquiry, but 200 years ago the legal foundations of the national Union were anything but certain."[42] Perhaps it was partly out of concern for crafting such foundations that Marshall agreed with the prosecution's claim that Marbury did hold a title to his commission. As he put it, the determinative moment that guaranteed Marbury's title was not the formal delivery of the sealed commission or any other "solemnities" involved in the confirmation process, as the attorneys for the Jefferson administration had argued. Ceremonies of delivery were "directed by convenience, not by law." The key turning point was the President's signature, for once affixed, deliberation had ceased, a decision had been rendered, and Adams' signature had given immediate "force and effect to the commission." Thus inscribed, Adams's constitutional power of appointment was discharged completely: "his judgment" had been made, and "the right of the office" was conveyed in whole from the President to his appointee. "The right to the office is *then* in the person appointed,"

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[41]As Corwin points out, "Marshall, reversing the usual order of procedure, left the question of jurisdiction till the very last, and so created for himself an opportunity to lecture the President on his duty to obey the law and to deliver the commission." In *John Marshall and the Constitution*, 65. For a similar criticism, see Susan Low Bloch and Maeva Marcus, "John Marshall's Selective Use of History in *Marbury v. Madison*," *Wisconsin Law Review* 301 (1986), 301-337.

[42]John Brigham, "Political Epistemology: John Marshall's Propositions for Modern Constitutional Law," in Shevory, *John Marshall's Achievement*, 159-172: 162.

concluded Marshall, "and he was the absolute, unconditional, power of accepting or rejecting it."[43]

Marshall drew on the familiar language of investiture to describe this transference. According to this doctrine, which had its origins in natural law philosophy, an individual was endowed with certain basic rights that were not subject to government control, including the possession and acquisition of private property.[44] On Marshall's understanding, Marbury was "invested" with a title to his office no different in its legal validity than "a patent for land." As was the case with any legal right, Marbury's was "protected by the laws of his country."[45] Marshall made the point in some of his most forceful and enduring language from the bench:

> The government of the United States has been emphatically termed a government of laws, & not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[46]

Admittedly, Marbury's was a statutory, not a constitutional right. But for Marshall, Marbury's vested right was part of a bigger picture. Here he used the particular case of Marbury's commission to make the broader point that the protection of rights was a fundamental purpose of government. Marbury's right to his office "was not revocable,"

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[43]John Marshall, "*Marbury v. Madison*," in *The Papers of John Marshall*, ed. Charles Hobson (Chapel Hill, NC: University of North Carolina Press, 1990) 6, 160-187: 168, 169, 171.

[44]See James W. Ely, "The Marshall Court and Property Rights: A Reappraisal," *John Marshall Law Review* 33 (2000), 1023-1061: 1048. Robert Faulkner, who is careful not to overextend Marshall's affinity to the natural law tradition, nonetheless argues that Marshall believed property rights were "not much inferior, at least in political importance, to the fundamental right to life itself … Marshall considered [the property right] to be unequivocally a natural right." See Faulkner, *John Marshall's Jurisprudence*, 17.

[45]*Marbury*, 171.

[46]Ibid., 172

he averred, and was secured "by the laws of his country." Indeed, he declared, "[t]he very essence of civil liberty" consisted of a citizen's legal protection from injury, and one of government's "first duties" was to afford such protection.[47] In making this argument, Marshall moved seamlessly from discussing the Constitution's protection of vested statutory rights to an amplification of the document's defense of the "absolute rights of individuals."[48] The tensions existing between these categories mattered less to him than the fact that both forms of rights were secured by the rule of law.

Having established Marbury's title to the commission, Marshall next turned to the question of whether the protection of this right was superseded by Jefferson's constitutional powers as Chief Executive. By taking up the topic, the Chief Justice implicitly repudiated the administration's position that the appointment process, along with executive branch decisions generally, was free from inspection by the judiciary. But he did not go so far as to claim that every decision made by the President and his officers was subject to review by the nation's courts, acknowledging a realm of discretion within which the President exercised independent authority ("accountable only to his country in his political character, and to his own conscience"). The exercise of these legitimate powers affected "the nation, not individual rights, and, being entrusted to the Executive, the decision of the Executive is conclusive." These distinctly "political powers" adhering to the office of the Presidency entailed some measure of independent authority and freedom, including the latitude to "appoint certain officers, who act by his authority and in conformity with his orders." The recent establishment by Congress of the Department

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[47]Ibid.

[48]Ibid., 178.

of Foreign Affairs was an example ready at hand for Marshall. The officers of that department, Marshall explained, were "to conform precisely to the will of the President. He is the mere organ by whom that will is communicated." Indeed, as Marshall concluded with a tone of finality, "the acts of such an officer, as an officer, can never be examinable by the Courts."[49]

Up until this point in the opinion, the Jefferson administration appeared to be in the clear. Yet the Chief Justice next argued that the administration did not possess the authority to annul Adams' appointments. Although the President and his cabinet possessed considerable authority for exercising their own discretion with respect to the affairs of the nation, this realm of discretion did not extend to the liberties of citizens. On occasions "where a specific duty is assigned by law, and individual rights depend on the performance of that duty," members of the executive branch complied with the Constitution rather than exercised their own discretion.[50] In his capacity as a public minister of the law, Secretary of State Madison did not have the authority to refuse Adams's appointees and sport away vested rights—a minor distinction in the opinion that would prove to have far-reaching consequences for legal limitations on presidential power in landmark cases such as *United States v. Aaron Burr* (1807) and *United States v. Nixon* (1974).[51]

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[49]Ibid., 174.

[50]Ibid.

[51]Considered another way, the political questions doctrine might be viewed as an emancipation rather than restriction of executive powers. It cannot be denied that Marshall limited the scope of judicial authority along with that of the President's: "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." See Ibid., 177.

Recognizing Marbury's commission thus signaled a larger acknowledgment that the government of the United States rested its authority on its ability to safeguard rights from political interference, which in *Marbury* included the right of citizens to seek and obtain legal redress when those rights were violated. Accordingly, Marshall defended the constraining force of the rule of law against decisions of political leaders that conflicted with constitutional protections, even when leaders such as Jefferson drew support from popular majorities. But what authority codified the protection of these rights in the form of a constitution? Having established Marbury's legal rights, Marshall turns to the important role of the American people in the creation of the Constitution. His retelling of their performance of this task indicates how popular sovereignty complements traditional approaches to rights-based constitutionalism.

***Marbury* and the Role of Popular Sovereignty**

A number of constitutional theorists look less to rights and more to the American people in locating legitimacy. The standard Lockean authorization of political consent—that is, as an express act of agreement to political authority by the governed—was one of the most familiar definitions of the concept in Marshall's time, and the significance of "majoritarian and populist mechanisms" as the keystone of the Constitution's legitimacy has continued to the present day.[52] Bruce Ackerman, for instance, describes the Founding as a moment of revolutionary politics that entailed the development of "a distinctive form of constitutional practice" that "established paradigms for legitimate practices of higher

[52]Compare John Locke, *Second Treatise of Government* (Indianapolis, IN: Hackett, 1980), 52-65 and Akhil Reed Amar, "Popular sovereignty and constitutional amendment," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton, NJ: Princeton University Press 1995), 89-116.

lawmaking that subsequent generations have developed further."[53] Such moments of "higher lawmaking" by the American people are rare, and they are distinguished by certain conditions: they must attract public attention to a greater extent than the ordinary, everyday political process; they involve the voice of a mobilized opposition; and they entail a majority of the population's support for legal initiatives based on their merits.[54] Ackerman argues that these self-conscious exercises of popular sovereignty—specifically, at the time of the Founding, Reconstruction, the New Deal, and the Civil Rights movements of the 1950s and 1960s—differentiate representative democracy from constitutive moments representing the "considered judgments made by the People."[55] Like Dworkin, Ackerman celebrates the abstract principles found in the Constitution. Unlike Dworkin, however, he views these principles as levers for collective political action rather than justifications for an expansive conception of rights. As he put it in a recent summary of his position, "the Constitution's authority is generated by the mobilized and self-conscious commitments of We the People."[56]

Once he had established the Constitution's protection of rights, Marshall next turned to this issue of popular consent. The context of the discussion was whether the

[53]See Ackerman, *We the People: The Civil Rights Revolution*, 3.

[54]Ibid., 6.

[55]Ibid., 5. More recently, the argument on behalf of consent as the basis of constitutional legitimacy has been taken up by Jack Balkin, who holds that "[p]ast acts create a framework—the written Constitution—that further acts implement." Thus, "popular sovereignty is not only central to the creation of the written framework, it also underwrites the constructions built on top of the framework that flesh it out over time." See his *Living Originalism* (Cambridge, MA: Harvard University Press, 2011), 54.

[56]Bruce Ackerman, "The Living Constitution," *Harvard Law Review* 120.7 (2007), 1737-1812: 1802.

Supreme Court could exercise the discretion conferred upon it by section 13 of the Judiciary Act of 1789, a provision that expanded the original jurisdiction of the Court partly in an effort to relieve the case burden on state courts.[57] For Marshall, the question of whether the Court could issue a writ of mandamus to Secretary Madison as permitted by Congress meant addressing the issue of "whether an act repugnant to the Constitution can become the law of the land," an issue he saw as "deeply interesting to the United States."[58] To answer this question, Marshall without reservation invoked the will of the people and its authority in striking down section 13. As he saw it, the American people were the sole authority behind constitutional government, and their power narrowed the scope of future legislation. Here, as in his defense of Marbury's commission, Marshall stood on noncontroversial ground, the will of the people being one of many popular justifications of constitutional authority.[59]

The reason why the Constitution was supreme to ordinary law, according to Marshall, was straightforward: the document's ultimate authority stemmed from the American people, who had both established and consented to its legal authority. Although Marshall does mention the intentions of the framers in *Marbury*, he emphasizes to a greater degree the role of the people as authors of the Constitution. Indeed, turning his opinion into what R. Kent Newmyer has called "a lesson in republican civics," he

[57] *Marbury*, 181.

[58] Among its provisions, section 13 authorized issuing "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."

[59] On the importance of consent for state constitutions during the Founding period, see Donald Lutz, "The Theory of Consent in Early State Constitutions," *Publius* 9 (1979), 11-42.

proceeded to claim that "the whole American fabric" was based upon the principle that "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."[60] The exercise of this right was an unusual exertion of the will of the people, one that could not and should not be repeated often. As he put it, the "original and supreme will" of the people had organized the government, allocating political powers among "different departments." In addition, the people did not grant authority to the three branches of government indiscriminately but had resolved to impose "limits not to be transcended by those departments." These limits apply especially to Congress: "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Both of these decisions— to form a national government and to set limits on its legislative authority—were based not on impulse but on the people's "contemplation" and decision to create a "fundamental and paramount law of the nation."[61] Only by understanding these popular origins of the Constitution could the reason for the binding character of its provisions be fully understood.

This interpretation of the Constitution's origins raised alarms among the opinion's Democratic-Republican readers, who had long feared that the Preamble's claim to speak on behalf of "We the People" aimed to collapse the thirteen state governments into a single, corporate nation.[62] Marshall's portrayal of the Constitution as a product of

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[60]See Newmyer, *John Marshall and the Heroic Age*, 173 and *Marbury*, 181, 182.

[61]*Marbury*, 182.

[62]See, for example, Patrick Henry's stirring speech to the Virginia Ratifying Convention in *The Essential Antifederalist*, eds. W. B. Allen and Gordon Lloyd (Lanham, MD: Rowman and Littlefield, 2002), 127-139. On Anti-Federalist fears of the erosion of state and local government

collective deliberation and determination rendered by all Americans—or "reflection and choice," as Alexander Hamilton described in *Federalist #1*—stood in direct contrast to Anti-Federalist and Jeffersonian interpretations of the document as nothing more than a mere alliance among the sovereign states. But Marshall was hardly advocating mass democracy. While it was the people alone who were ultimately responsible for the momentous decision to create a Constitution, Marshall was careful not to exaggerate their future importance. Although the Constitution's supremacy was based on the principle of popular sovereignty, he cautioned that the collective exercise of this authority was reserved for exceptional occasions. Going forward, the American people would hold the narrower responsibility of holding elected officials accountable for their political decisions at the ballot box.

Marshall's constitutionalism emphasizes the importance of popular sovereignty, agreeing with Ackerman on both the singularity of its exercise as well as the deliberation such movements require in order to confer legitimacy.[63] Moreover, as Marshall saw it, popular sovereignty was the ultimate source of the rights protections found in the Constitution. The authority of the people was "supreme," he declared in no uncertain terms, and the principles they established were "designed to be permanent."[64] Rights and consent were therefore two complementary pillars upon which the Constitution's

under the Constitution, see Herbert Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981), 15-23.

[63]At least within the context of *Marbury*, it is more of a challenge to determine what Marshall's judgment might be of the importance Ackerman attaches to ongoing public deliberation as an essential reinforcement of the Constitution's legitimacy. On Marshall's general apprehension toward mass democracy, see Faulkner, *John Marshall's Jurisprudence*, 147-194.

[64]*Marbury*, 182.

legitimacy stood. But do these two objects exhaust the justifications for constitutional obedience? What immediate, day-to-day guidance might the Constitution provide for national politics? While Marshall emphasized the Constitution's protection for rights and its basis in consent, he also located the source of the document's legitimacy in more practical terms. This understanding proved especially important in lending force to the closing argument of the Court's opinion.

***Marbury* and the Constitution as "Focal Point"**

A third way that some constitutional theorists locate legitimacy is to portray the Constitution in more instrumental terms, by basing the text's binding authority on its ability to organize, settle, and otherwise provide safe direction to the political affairs of a nation. Beyond the document's status as a guardian of rights and object of consent, these thinkers rest its legitimacy on its ability to institute and maintain stability amid political disagreement.[65] Put simply, as the nation's supreme law, the Constitution furnishes "focal points" that act as a roadmap for the political system and legislative agenda. This function has been described best by legal theorist David Strauss, who works from the premise that individuals in any social setting inevitably "disagree about various questions, large and small, related to how the government should be organized and operated."[66] Political rules that may seem straightforward and innocuous to many

[65]As Larry Alexander and Frederick Schauer have argued, "an important—perhaps the important—function of law is its ability to settle authoritatively what is to be done." See their "On Extrajudicial Constitutional Interpretation," 1377.

[66]While Strauss is concerned primarily with the influence of the common law tradition on constitutional interpretation, he does look to the text's specific language and technical rules as providing an organizational function for American politics, thus justifying the Constitution's authority even for citizens who have little attachment to the document, the country's traditions, or the founding fathers. See Strauss, *Living Constitution*, 104, 102.

Americans, such as the appropriate duration of the President's term of office or whether Congress should have one or two chambers, might otherwise hamstring the political process and even lead to "disastrous" consequences for the stability of the state were they left open-ended. The Constitution prevents this scenario insofar as its textual provisions provide a means to "settle" weighty political concerns. While the text may not offer an ideal solution to these fundamental political dilemmas, it does render a satisfactory one that people can live with. Hence, says Strauss, obedience to the Constitution as supreme law is grounded in "the practical judgment that following this text, despite its shortcomings, is on balance a good thing to do because it resolves issues that have to be resolved one way or the other."[67] This approach shows that the Constitution is valuable not because it pretends to embody either rights or the will of the people, but because it solves political disputes that would otherwise create serious social divisions through interminable litigation, frustrating the more immediately pressing policy needs of the nation. Put simply, constitutions are binding due to their practicality. Moreover, as Strauss argues, conceiving of the Constitution in this functional manner offers a clear and uncomplicated explanation for its status as supreme law, one that makes sense even to those with little attachment to the United States or even to the rule of law.[68]

Although the Constitution certainly settled a host of interstate difficulties attending the Articles of Confederation, this purpose had not achieved the same prominence as either rights or consent as an explanation for its authority at the time of

[67]Ibid., 105.

[68]David Strauss, "Legitimacy, 'Constitutional Patriotism,' and the Common Law Constitution," *Harvard Law Review Forum* 126 (2012), 50-55: 52.

Marbury. Indeed, as John Phillip Reid has pointed out, the great influence of the social contract tradition with its vocabulary of rights and consent often rendered alternative viewpoints of constitutional authority to a peripheral status.[69] Marshall's discussion of the provisions of the Constitution that gave order, rules, and direction to the nation's politics made clearer than ever before this instrumental function of the Constitution. Each part of the Constitution was intended to have a regulative effect on national politics, lest any of its clauses should be rendered as "mere surplusage" and "form without substance."[70] In arguing these points, Marshall moved beyond the familiar terms of the debate involving rights and consent, and drew attention to the organizational role the Constitution would play in American politics.

One national focal point that figures heavily in *Marbury* is the Supreme Court itself. At the time of *Marbury*, the Constitution lacked an authoritative and final expositor, and it was by no means clear that the Court could pass judgment upon the constitutionality of the actions of the political branches.[71] Yet Marshall is emphatic that the safest way to organize judgments of constitutionality is to confine such determinations to the Supreme Court. Marshall expressed no doubts here. Turning to the language of Article Three, he notes that the Constitution "vests the whole judicial power

[69]John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988), 68-83.

[70]*Marbury*, 180.

[71]Consider, for example, Thomas Jefferson's view in a letter to Abigail Adams on September 11, 1804: "It is a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions. It is one which would place us under the despotism of an oligarchy." As quoted in Simon, *What Kind of Nation*, 189. For an interesting comparison between Marshall's and James Madison's views on constitutional interpretation and authority, see Michael Zuckert, "Epistemology and Hermeneutics in the Constitutional Jurisprudence of John Marshall," in Shevory, *John Marshall's Achievement*, 193-216.

of the United States" in a single Supreme Court and "such inferior courts" established from time to time by Congress.[72] Its words, he wrote, "expressly extended" this power "to all cases arising under the laws of the United States." It was thus the Supreme Court's "province and duty … to say what the law is" when a law conflicted with the Constitution.[73] It was up to the Court, in other words, to evaluate legislation, and even its own conduct, against the standards set by the Constitution. Moreover, he continued, the Court did not reach its decisions on the basis of extraneous legal traditions or particular ideologies. Instead, the object that governed judges' conduct in their official character was the constitutional text itself, given that the framers had "contemplated that instrument as a rule for the government of courts, as well as the legislature."[74] Thus the only location for authoritative judgments of constitutionality in the case of justiciable controversy was the Supreme Court, and the Court's decisions on constitutional questions were determined solely by the Constitution. The Constitution was a guide for the nation and the nation's courts, a document that must be opened, read, "looked into," and "inspected."[75]

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[72]The authority bestowed by the Constitution upon the judiciary also settled an issue particular to the case at hand. As Marshall described, the question of whether a right was vested or not was "in its nature" judicial, and so could only be determined by the judiciary. See *Marbury* 180, 175.

[73]Ibid., 183.

[74]Ibid., 184.

[75]Ibid., 183, 184. Some advocates of constitutional departmentalism are quick to note that *Marbury* does not declare a principle of judicial supremacy, but rather a power of judicial review that was by itself hardly novel. Even accepting this debatable view, one cannot ignore *Marbury*'s contribution to the elevation of the Supreme Court as a national focal point for determinations of constitutionality. For a discussion of departmentalist and non-departmentalist interpretations of *Marbury*, see Dawn K. Johnsen, "Functional Departmentalism and Nonjudicial Interpretation:

In addition to providing guidance for its interpretation, the Constitution provided specific signposts to define and limit congressional power. For example, Article One prohibited state-issued taxes and duties. It also expressly forbade *ex post facto* laws and bills of attainder. Article Three provided clear instructions to the judiciary regarding treason convictions. Quoting this clause in full, Marshall notes that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Emphasizing that "many other selections" might be mentioned, he went on to affirm that such provisions illustrated that the Constitution was a guiding "rule" for both legislation and judicial decisions, and that such "constitutional principles" must never yield to an act of Congress. Reducing the Constitution to a status equal to that of "an ordinary act of the legislature," he warned, would give "to the legislature a practical and real omnipotence" in the nation's political affairs.[76]

Finally, Marshall draws attention to the oath of office as a constitutional focal point common to all branches of government insofar as it puts all members of the government under the obligation to support and defend the Constitution. Approaching the close of his decision, he portrays this oath not as an empty ceremony, but as a solemn vow to subordinate all decisions and "conduct in their official character" to the strictures of constitutional law. Why else, he asks, must a judge take this oath "to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule

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Who Determines Constitutional Meaning?" *Law and Contemporary Problems* 67.3 (2004), 105-148: 118-119.

[76]*Marbury*, 183.

for his government?"[77] If the oath did not carry with it the duty to regard the Constitution as such a rule, then both prescribing and taking the oath would be "equally a crime." Although the oaths taken by Presidents, justices, and members of Congress upon assuming office were different in length and content, in Marshall's eyes they were uniform insofar as they obligated all to uphold the Constitution. Thus, as he puts it in the dramatic conclusion to *Marbury*, the "particular phraseology of the Constitution of the United States" confirms the document's superiority to legislative law, and thus that "courts, as well as other departments, are bound by that instrument."[78]

In the short term, the Court's decision in *Marbury* proved uncontroversial, as the opinion met with little public outcry.[79] Whether this subdued response signaled tacit approval or stunned outrage, it proved temporary. Jeffersonians soon drew battle lines against the Marshall Court, perceiving it as the last Federalist stronghold in the national government. In 1804, a warning shot was fired in the Chief Justice's direction when Jefferson's followers in the House of Representatives impeached Justice Samuel Chase. Though Chase was not convicted, Thomas Jefferson's personal animus toward the Court in general and Marshall in particular never ebbed, even after his Presidency ended. Writing in 1819 to Judge Spencer Roane of the Virginia Court of Appeals, the former President would repudiate the notion that an unelected Supreme Court possessed "the

[77]Ibid., 184.

[78]Ibid., 185.

[79]When the Court's verdict in *Marbury* was rendered and all eleven thousand words of its opinion were published in a wide range of newspapers of various political stripes, neither Federalists nor Democratic-Republicans found much to criticize. See Smith, *John Marshall: Definer of A Nation*, 323-325.

right to prescribe rules" governing Congress and the President. Giving the judiciary such absolute authority over the Constitution's interpretation would reduce the document to "a mere thing of wax," he wrote, which justices "may twist and shape into any form they please."[80] In hindsight, *Marbury* represented the first episode in a long and often acrimonious clash between the Court and its Jeffersonian critics.

Yet *Marbury*'s failure to quell partisan rancor should not diminish Marshall's attempts at conciliation. As Gordon Wood points out, *Marbury* was the only occasion during Marshall's long tenure as Chief Justice that the Court declared an act of Congress unconstitutional, and Marshall's statement of the Court's role in the American constitutional system attempted to strike a note of restraint.[81] In justifying the binding authority the Constitution exercised on citizens, Marshall drew on familiar themes, not innovative ones. The Constitution protected the rights of citizens. It was authorized if not written by the original and supreme will of the people. While securing rights and embodying consent, it also served as a practical rulebook, identifying the Supreme Court as the site of constitutional interpretation while instituting boundaries on the reach of the national government. Among other matters, these boundaries included the limitations the Constitution placed upon the political powers of the President and the ability of Congress to extend the Supreme Court's jurisdiction beyond constitutional limits. In *Marbury*, each of the dominant explanations for the Constitution's legitimacy—rights, consent, and focal

[80]Thomas Jefferson, Letter to Justice Spencer Roane, in *Jefferson: Political Writings*, eds. Joyce Appleby and Terence Ball (New York: Cambridge University Press, 1999), 378-380: 378, 379.

[81]Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009), 442.

points—are components of a broader and more unified narrative of its authoritative role in the United States.

But if each of these approaches to legitimacy furnishes only a partial understanding of the Constitution's role in the United States, does merely lumping them together create a greater attachment to that document? Does creating such a partnership of principles add to or strengthen the Constitution's legitimacy, or does it merely reinforce existing reasons for obedience? In response to these questions, it is worth paying attention to still other ways in which Marshall describes the Constitution in *Marbury*, and how in doing so he points to a theory of the Constitution's moral legitimacy that refers to but also transcends the facets of his constitutionalism that have been examined so far.

Marshall's Theory of Constitutional Legitimacy

For many contemporary political and legal theorists, constitutions derive their legitimacy from more than their protection of liberties, their representation of consent, or their instrumental role in providing institutional and legal focal points for settling conflicts. These theories require more, linking a constitution's legitimacy to its ability to provide a just legal regime based on its moral justifiability or its worthiness of respect. In the words of Habermas, "legitimacy means that there are good arguments for a political order's claim to be recognized as right and just."[82] Disagreement abounds, however, concerning what threshold regimes must meet in order to be considered morally legitimate. Ideal theories of moral legitimacy stipulate that while no constitution is fully

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[82]Jürgen Habermas, *Communication and the Evolution of Society*, trans. Thomas McCarthy (Boston, MA: Beacon Press, 1979), 178.

legitimate, one can nonetheless be binding to the extent that it approximates an ideal moral standard such as justice or equality.[83] For instance, Sotirios Barber and James Fleming have defended a moral or "philosophic" approach to constitutional interpretation, emphasizing the "abstract moral and political principles" embodied in the Constitution that demand from justices "normative judgments about how [such principles] are best understood, not merely historical research to discover relatively specific original meanings."[84] Such arguments see legitimacy in aspirational terms only, insofar as they furnish a model or set of values that a constitution may approximate but never fully realize.[85] Alternatively, minimal theories of moral legitimacy insist that it is not necessary for a constitution to be morally legitimate in absolute terms in order to bind citizens to its rule, especially if a better, alternative constitution cannot be realized swiftly and peacefully.[86] Indeed, as Richard Fallon claims, a "sufficiently just" constitution is better than no constitution, and so a constitution's fundamental legitimacy may arise simply "from the facts that it exists, that it is accepted as law, that it is *reasonably* (rather than

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[83]See William Eskridge and Gary Peller, "The New Public Law Movement: Moderation as a Postmodern Cultural Form," *Michigan Law Review* 89 (1991), 707-791: 747; Joachim J. Savelsberg, "Cultures of Control in Contemporary Societies," *Law and Social Inquiry* 27.3 (2002), 685-710: 705-706; and John Rawls, *Political Liberalism* (New York: Columbia University Press, 2003), 217.

[84]Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007), xii, 65, 160, 165. A more recent exposition is found in James E. Fleming, "Fidelity, Change, and the Good Constitution," *American Journal of Comparative Law* 62.3 (2014), 515-545.

[85]Indeed, as A. John Simmons concedes, no existing constitutional regime meets an absolute moral standard of justice. In his *Justification and Legitimacy* (New York: Cambridge University Press, 2001), 155-156.

[86]See David Copp, "The Idea of a Legitimate State," *Philosophy and Public Affairs* 28.1 (1999), 3-45: 43-44 and Frank Michelman, "IDA's Way: Constructing the Respect-Worthy Governmental System," *Fordham Law Review* 72.3 (2003), 345-365: 358.

completely) just, and that agreement to a better constitution would be difficult if not impossible to achieve."[87] Joseph Raz takes the argument a step further, reasoning that "*as long as they remain within the boundaries set by moral principles,* constitutions are self-validating in that their validity derives from nothing more than the fact that they are there."[88] But whether these approaches emphasize an ideal or minimal moral legitimacy, on this much they agree: a constitution derives its legitimacy not only from rights, consent, or its settling function alone, but from its ability to situate these principles within the parameters of its moral justifiability.

In *Marbury*, Marshall resists making a stark choice between ideal and minimalist theories. On the contrary, he draws on both to advance a concept of moral legitimacy that challenges and reaches beyond the conceptual divide that separates them. On the one hand, his rhetoric in referring to constitutional principles is far too muscular for the comparatively uninspiring minimalist theories. On the other hand, he never describes the Constitution as ideal, nor did he hesitate to point out that constitutional government is better than no government at all.[89] Marshall's moral legitimacy falls below standards that

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[87]Fallon, "Legitimacy and the Constitution," 1798, 1792.

[88]Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (New York: Cambridge University Press, 2001), 152-193: 173.

[89]Randy Barnett also develops an intermediate position between minimalist and maximalist approaches to moral legitimacy, albeit from a perspective more concerned with policy than constitutions. On his account, moral legitimacy is not tied to ideal theories of consent or justice but rather to institutional and procedural qualities affecting the lawmaking process. Hence, a morally legitimate law is one that restricts freedom to the extent necessary to protect others without improperly infringing upon those whose liberties are being restricting. This allows Barnett to offer a theory of legitimacy that makes the concept "a matter of degree rather than an all-or-nothing characteristic." See his *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2004), 51.

could never be realistically met but above those that any legal regime might possess. Thus in contrast to approaches that set the bar of moral legitimacy either too high or too low, *Marbury* stakes out a middle ground.

Even if the Constitution was not perfect, however, it was nonetheless worthy of reverence and veneration. Indeed, for Marshall, the Constitution demanded a form of devotion that verged on the reverential. As Chief Justice, he often spoke of the document in religious terms, invoking it as the nation's "sacred" law.[90] Nor did he shy away from using such language in *Marbury*. He minced no words when declaring that the oath taken by political officers to support the Constitution is an ethical as well as a legal bond: "How immoral," he exclaims, "to impose [an oath] on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!"[91] Elsewhere in the opinion he again applies similar rhetoric when contending that the Constitution is worthy of the same veneration Americans attached to their state constitutions, which had long "been viewed with so much reverence."[92] Marshall was

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[90]On several occasions, Marshall turned to religious language to describe the Constitution and its framers. In *Sturges v. Crowninshield* (1819), Marshall describes the contract clause as embodying a principle the constitutional convention "intended to hold sacred." In *United States v. Maurice* (1823), referring to the President's appointment powers, Marshall emphasized he felt "no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into" the appointment clause. And in *Ogden v. Saunders* (1827), Marshall described the Court's approach to constitutional questions as one "filled with the sentiments of profound and respectful reverence." Such remarks led Robert Faulkner to declare that Marshall endeavored to found a "political religion," one that "dealt not merely with a constitution framed by unusual men, but with a sacred law made by sainted men." See Faulkner, *The Jurisprudence of John Marshall*, 219.

[91]*Marbury*, 184.

[92]Ibid., 183. Consider a similar point made by James Madison in *Federalist #49*, who argues that "frequent appeals" to the peoples' judgment "would in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps

ever mindful of this moral dimension of the rule of law, one that could not be adequately captured in legal terms alone.

Yet such rhetoric, no matter how moving, has its limits. After all, calling for reverence cannot by itself establish that the Constitution promotes a just legal order. But Marshall's theory of constitutional legitimacy is more than a stock of literary flourishes. Similar to ideal theories of moral legitimacy that emphasize principles such as justice, consent, and equality, Marshall's rhetoric is anchored to the Constitution's embodiment of fundamental principles that distinguished it from other legal documents. Referring to the constitutive power of the people, Marshall describes their accomplishment not only as an act of the people's consent, but also as the pronouncement of "such principles as, in their opinion, shall most conduce to their own happiness."[93] Having been declared, these principles are "deemed fundamental" and become "permanent," due in large part to the time and effort involved in their pronouncement.[94] Inscribed in the Constitution, they are "the basis on which the whole American fabric has been erected." Although Marshall does not specify these principles in detail, they can be easily inferred from his opinion: the formation of a national government, the defined and limited powers of the legislative branch, the Constitution's protection of civil liberties, and its supremacy to legislative acts, as well as specific, legal directives based on common law and earlier legal

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the wisest and freest governments would not possess the requisite stability." See Hamilton et al., *The Federalist*, 274.

[93]*Marbury*, 181-182.

[94]Ibid., 182.

traditions.[95] Together, these "essential" principles and rules supply the foundation for the rule of law, while also entailing a duty on the part of political officials to follow them.[96] Hence it was "necessity" and "the essence of judicial duty," Marshall wrote, that obligated the Court to render a determination of legality when ordinary legislation conflicted with the constitutional text.[97] While consent did play a legitimizing force for Marshall, it was the institution of those principles conducive to good government and the people's happiness that helped make written constitutions "the greatest improvement on political institutions."[98] In short, it was not the act of consent alone that was important for the Constitution's legitimacy, but the principles and objects that the people consented to and helped create.

Admittedly, Marshall also engaged minimalist understandings of moral legitimacy in arguing that the nation did not have a ready legal alternative to the Constitution. Here he provides a hint of what might follow from rejecting its legitimacy, producing for his readers a pair of stark political alternatives from which they must choose.[99] The options typically appear overdrawn, perhaps intentionally, and they are

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[95]Ibid., 185, 176, 184.

[96]Ibid., 185.

[97]Ibid., 183. While more concerned with interpretive practice than constitutional legitimacy, Fleming and Barber's argument nonetheless comports both with the notion of fidelity to a reasonably just constitutional order as well as Marshall's own invocation of the document's embodiment of principles conducive to the people's happiness.

[98]Ibid.

[99]In raising these options, one can see Marshall as erecting a legal hierarchy that has since been presented in more systematic form by Hans Kelsen. Kelsen conceives of a state's legal order as a tiered system whose constitutional laws shape and constrain lower, legislative enactments. See, e.g., Hans Kelsen, *An Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski-Paulson and Stanley L. Paulson (Oxford: Clarendon, 1992), 55-75.

posed to a variety of people, including judges, legislators, and the general public. Judges are obliged to follow and defend the Constitution as "paramount law," or they are "reduced to the necessity of" ignoring its words entirely, so that they "close their eyes on the Constitution, and see only the law."[100] When political officers swear to uphold and defend the Constitution, the oath of office either forms "a rule for the government of courts, as well as of the Legislatures," or else its administration is a crime "worse than solemn mockery."[101] Either an act of Congress contrary to the Constitution must be struck down, or the "legislature may alter the Constitution by an ordinary act," making written Constitutions "absurd attempts on the part of the people to limit a power in its own nature illimitable." Finally, *Marbury* declares in bold and sweeping terms that there is "no middle ground" on the question of whether the Constitution is "a superior, paramount law, unchangeable by ordinary means," or "on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please."[102] For Marshall, one either accepts the Constitution as providing an effective legal order for holding the nation together, or one is confronted with an unlimited and potentially tyrannical legislature.

Yet presenting the Constitution's moral legitimacy as a weave of principles and pragmatism was not enough for Marshall. Throughout the course of *Marbury*, he endeavors to amplify the Constitution's legitimacy by emphasizing its essential and foundational character. Repeatedly he depicts the Constitution as exercising its own

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[100]*Marbury*, 183.

[101]Ibid., 185.

[102]Ibid., 182.

power, enjoining the performance of actions and duties on the part of political officials, investing power in the judiciary, and prescribing rules governing admissible evidence.[103] At times he stands aside, allowing the Constitution to speak for itself, as when he carefully notes that it is the Constitution and not the Supreme Court that "has declared" where "their jurisdiction shall be original" and "where it shall be appellate." Every word of the document is binding, Marshall stresses, for "it cannot be presumed that any clause in the Constitution is intended to be without effect." The Constitution thus exerted a forcefulness that sets it apart from the Articles of Confederation. Moreover, he makes it clear that denying its legitimacy would lead to more than legal confusion or policy gridlock. Of worse consequence, it would render the basis of the Constitution "entirely void," "subvert the very foundation of all written constitutions," and undermine all the "principles and theory of our government."[104] Marshall's theory of the Constitution's moral legitimacy is one with teeth: in *Marbury*, the American Constitution—the entire American Constitution—is given its own voice as the nation's supreme law.

Marbury v. Madison, like most of Marshall's Supreme Court opinions, is a portrait of concise and methodical writing. It therefore appears odd, in light of his characteristic economy of words, that the language he uses to describe the Constitution requires more elaboration than he provides. How may we finally characterize Marshall's theory of constitutional legitimacy? *Marbury* indicates that the Constitution encompassed more than a bundle of notions about rights, consent, and settlement functions. Constitutional loyalty ran deeper than that for Marshall. He viewed the document as

[103]Ibid., 166, 174, 184.

[104]Ibid., 183.

legitimate because as the nation's supreme law it embodied principles citizens might not simply defer to but also revere as just foundations for good and stable government. Moreover, the federal Constitution was the only one the nation had. In the absence of realistic alternatives, its importance for supplying a coherent system of law applicable to all citizens should not be taken lightly, particularly given the myriad deficiencies attending the Articles of Confederation. Hence the Constitution deserved the veneration of all citizens as good law, but for those who were not persuaded by its merits, its moral legitimacy also stemmed from the fact that the nation could simply not do without one.

Conclusion

Marbury stands as both an invitation and a provocation to contemporary debates concerning constitutional legitimacy. Marshall's constitutionalism runs counter to approaches such as those of Dworkin, Ackerman, and Strauss, which tend to concentrate on distinctive purposes or functions as conferring legitimacy. Among these purposes are its protection of individual liberties, enshrinement of popular consent, and establishment of a blueprint for organizing politics. Since Marshall does not base his theory of legitimacy on any single justification, his opinion fosters a common ground for contemporary conversation concerning the basis of constitutional legitimacy. Yet however crucial these functions of the Constitution are to its legitimacy, they do not fully capture Marshall's comprehensive understanding of its authority. Marshall envelops these attributes in his constitutionalism, but also invites a distinct appreciation of the Constitution as embodying a fundamental moral legitimacy that elevates the standing of the document in the hearts and minds of citizens. Neither utopian dreamer nor hardboiled minimalist, he conceived of the Constitution as simultaneously principled and practical,

embracing both the philosophical ends and the practical means required to establish a just and workable regime. Thus *Marbury* offers a concept of constitutional legitimacy that subsumes but reaches beyond contemporary conceptualizations, insisting that readers question the sufficiency of explanations that fail to capture the complex character of the rule of law.

In setting forth Marshall's theory of constitutional legitimacy, *Marbury* also illustrates how constitutional loyalty is not simply a given, but must be constructed. While it is true that the Constitution was regarded as national law at the time the case was decided, viewpoints differed considerably regarding the particular element that granted the document its legitimacy. The opinion in *Marbury* is an example of how the Constitution's legitimacy was and indeed remains a constructed conviction rather than an automatic one, the achievement of political craftsmanship as much as a product of the power of its words alone. Nor was Marshall unaware of the importance of his words within the larger political context of his time. As Christopher Eisgruber has argued, in light of the general public's largely ambiguous attitude toward the national government during his tenure, the Chief Justice's rhetoric was directed toward convincing Americans "that national institutions, including the federal judiciary, would govern well."[105] Given the role that his statesmanship and persuasion played in instilling in citizens a belief in the Constitution's moral legitimacy, we might rethink the explanatory power of interpretations of Marshall that cast him as either a zealous defender of Federalist policies

[105]Christopher L. Eisgruber, "John Marshall's Judicial Rhetoric," *The Supreme Court Review* (1996), 439-481: 441.

or a figure who endeavored to transcend political matters entirely. Marshall was a considerably more complex political thinker than these cramped interpretations suggest.

Revisiting *Marbury* requires readers to reconsider the opinion, challenging the conventional wisdom that it is primarily concerned with judicial review. It also requires us to reconsider the conventional wisdom on John Marshall, who deserves to be seen as a formidable political thinker concerned with the concept of constitutional legitimacy. That said, *Marbury* and Marshall do not provide the final word on the topic. It is abundantly clear that Americans will continue to define and debate their constitutional fidelity according to many different standards. For Marshall, the tensions between these understandings should not necessarily be a source of worry. Rather, his arguments in *Marbury* show that the justifications we give for the Constitution's legitimacy cannot neglect the general acknowledgment that it is supreme law—a requirement that applies to Presidents, legislators, judges, and ordinary citizens alike. Though often overlooked, this acknowledgment of the moral legitimacy of the Constitution, so artfully articulated by Marshall in *Marbury*, can be considered the indispensible bond that ties all Americans to its authority, in his time and our own.

Chapter Two

John Marshall, *McCulloch v. Maryland*, and the Concept of Constitutional Sovereignty

John Marshall hated partisan politics. As Congressman, he worked tirelessly behind the scenes to achieve compromise during the contentious presidency of John Adams, leading his most famous biographer to commend his "independence of thought and action" as the defining characteristic of his brief time in office.[106] As Chief Justice of the Supreme Court, he sought to build the reputation of the Court as a refuge of impartiality and levelheaded thinking during the political storms of the first party system. And as the official chronicler of the nation's first President, his *Life Of Washington* provides a portrait of a President whose devotion to country might be emulated by all citizens. Few figures of the founding era worked as consistently and self-consciously as he did to extend the patriotism of the American Revolution into the republic's early years.

Marshall might therefore be chagrined to learn that with its bicentennial on the horizon, his famous Supreme Court opinion in the case of *McCulloch v. Maryland* (1819) remains a perennial source of political argument. Recently, the opinion has proved especially attractive to both supporters and opponents of the Affordable Care Act (ACA), even as the legality of the ACA appears settled. Some, notably Akhil Reed Amar, have

[106] Albert Beveridge, *Life of John Marshall* 2, 484.

lauded *McCulloch* for Marshall's repeated reliance "not on explicit clauses but on the implicit meaning of the Constitution as a whole."[107] On these accounts, Marshall's liberal construction of the powers of the national government chimes with his understanding of the document as "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs"—including one concerning healthcare.[108] On the other hand, a number of scholars have approached *McCulloch* more cautiously, arguing that the ACA runs counter to Marshall's defense of federalism and enumerated powers. As Robert Natelson and David Kopel argue, the opinion repeatedly emphasized a moderate and "fair" construction of the Constitution, which reserved to the states a limited but important domain of policymaking authority.[109] Despite his best efforts to avoid partisan fervor in his own day, the ongoing debates concerning Marshall's intentions in *McCulloch* are a testament to the case's fractious legacy in American political discourse.

Healthcare reform provides only the latest installment in the war of words concerning Marshall's intent in *McCulloch*. As Peter Smith has pointed out, "Decisions of the Marshall Court often provided something for everyone, and cases construing

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[107]Akhil Reed Amar, *America's Unwritten Constitution* (New York: Basic Books, 2012), 23.

[108]Felix Frankfurter once declared this famous sentence of the opinion to be "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending." See his "John Marshall and the Judicial Function," *Harvard Law Review* 69.2 (1955), 217-238: 219. For Amar's defense of the ACA based on Marshall's reasoning in *McCulloch*, see Akhil Reed Amar, "Constitutional Showdown," *Los Angeles Times* February 6, 2011 (http://articles.latimes.com/2011/feb/06/opinion/la-oe-amar-health-care-legal-20110206) and Akhil Reed Amar, "How to Defend Obamacare," *Slate*, March 29, 2012 (http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/supreme_court_and_obamacare_what_donald_verrilli_should_have_said_to_the_court_s_conservative_justices_.html).

[109]See Robert G. Natelson and David B. Kopel, "'Health Laws of Every Description': John Marshall's Ruling on a Federal Health Care Law," *Engage* 12.1 (2011), 49-54: 50.

Congress's affirmative powers were no exception."[110] Most scholars of the opinion have viewed it as an unambiguous defense of the powers of the national government, pointing to Marshall's support for a broad interpretation of the Constitution's words and his account of the document's creation by the American people rather than the states.[111] Others have taken a more tempered view of *McCulloch*, contending that Marshall defended a notion of national power that reserved a significant amount of authority to the states.[112] More recently, a more state-centered view has been advanced by Sotirios Barber, who has argued that *McCulloch* charted a "constitutional federalism" that represented a middle ground between states' rights and a form of extreme nationalism that denied any limits on national legislative authority.[113] But while these interpretations

[110]Peter J. Smith, "The Marshall Court and the Originalist's Dilemma," *Minnesota Law Review* 90 (2006), 612-677: 657.

[111]Edward S. Corwin, *John Marshall and the Constitution*, 130-131; Baker, *John Marshall: A Life in Law*, 594-595; Stites, *John Marshall: Defender of the Constitution*, 130; Killenbeck, *McCulloch v. Maryland: Securing a* Nation, 7-8; and Whittington, *Political Foundations of Judicial Supremacy*, 111.

[112]See Robert Lowry Clinton, *Marbury v. Madison and Judicial Review,* 192-198; Smith, *John Marshall: Definer of a Nation*, 445. G. Edward White sees *McCulloch* as emphasizing both national and state identities. See his *Marshall Court and Cultural Change* (New York: Oxford University Press, 1991), 563. Charles Hobson argues Marshall's nationalism is often overstated, and Marshall consistently sought in *McCulloch* and elsewhere to balance state, federal, and local political authority. In *The Great Chief Justice*, 122-24, 247. Finally, consider Judge Clarence Thomas's dissenting opinion in *U.S. Term Limits v. Thornton* (1995), where special attention is given to *McCulloch* as a defense of the reserved powers belonging to the states. As discussed in Martin S. Flaherty, "John Marshall, *McCulloch v. Maryland*, and 'We the People': Revisions in Need of Revising," *William and Mary Law Review* 43.4 (2002), 1339-1397: 1359-1367.

[113] Sotirios A. Barber, *The Fallacies of States' Rights* (Cambridge, MA: Harvard University Press, 2013), 6, 8. Others have argued *McCulloch*'s aims were primarily economic rather than political. See Harold J. Plous and Gordon E. Baker, "*McCulloch v. Maryland*: Right Principle, Wrong Case," *Stanford Law Review* 9.4 (1957), 710-730: 730; Robert K. Faulkner, *The Jurisprudence of John Marshall*, 80-81; and Ira L. Strauber, "*McCulloch* and 'The Dilemmas of Liberal Constitutionalism," in Shevory, *John Marshall's Achievement*, 137-158. With respect to the shadow the national economy cast over the case, see Joseph M. Lynch, "*McCulloch v. Maryland*: A Matter of Money Supply," *Seton Hall Law Review* 18.2 (1988), 223-329.

arrive at different conclusions regarding the scope of Marshall's nationalism and federalism, in general they tend to have one thing in common, which is their tendency to relegate Marshall's theory of constitutional sovereignty to the periphery.

The Constitution's sovereignty was hardly settled at the time of *McCulloch*. Indeed, it was a subject that few thinkers surveying the new political landscape could fully grasp. As Christian Fritz recently put it, following the Revolution "few disputed that the people would rule as the sovereign speaking through written constitutions. But in putting this idea into practice, Americans parted company with one another."[114] Even at the time of the Constitution's ratification, Walter Bennett contends, the "nature and location of sovereignty" remained a concept "so elusive" that any argument making use of the term could be made to appear insufficient if not outright defective.[115] For that matter, as Hugh Willis has shown, the creation of the practical expression of sovereignty remained open to debate well into the early nineteenth century.[116] Moreover, as Willis describes, the Constitution's status as representing the sovereign authority of the American people was a concept that took root in public opinion only gradually, comprising "long years of constitutional history and profound opinions of the United

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[114]See his *American Sovereigns* (New York: Cambridge University Press, 2008), 2.

[115]Walter Bennett, *American Theories of Federalism* (Tuscaloosa, AL: University of Alabama Press, 1964). Bennett goes on to detail this complexity: sovereignty sometimes "meant powers exercised governmental organs and sometimes what was represented as the source of these powers. Occasionally it referred to indivisible power and at other times to power which was assumed to be capable of division" (78).

[116]Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton, NJ: Princeton University Press, 1996), 23.

States Supreme Court."[117] Few public figures played as significant a role in effecting this transformation as Marshall.

The neglect of Marshall's constitutional theory in *McCulloch* is not the only omission that characterizes many analyses of the case. Although examinations of *McCulloch* typically begin and end with the opinion itself, this focus can tell one only so much. A more comprehensive assessment of *McCulloch* must thus turn to public commentary on the case. In the summer of 1819, Marshall articulated a defense of his *McCulloch* opinion in the popular press, the sole occasion in his long career of public service when he would engage in a journalistic discussion of any judicial decision.[118] Writing pseudonymously in a number of Virginia newspapers, he expanded on the Court's opinion, defending it against the attacks of critics. Although these essays have been acknowledged by scholars as providing a more candid view of Marshall's decision, their importance has been considerably undervalued. For the essays provide more than a mere defense or rationalization of *McCulloch*, and consist of far more than partisan bickering. Instead, they offer a full-fledged argument on behalf of Marshall's concept of constitutional sovereignty.

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[117]See Hugh Willis, "The Doctrine of Sovereignty under the United States Constitution," *Virginia Law Review* 15.4 (1929), 437-475: 437.

[118]Gerald Gunther, "Introduction," in *John Marshall's Defense of McCulloch v. Maryland* (Stanford, CA: Stanford University Press, 1989), 18, 19. While Gunther and Newmyer have contrasted the *Gazette* pieces with nationalist readings of *McCulloch*, they do not call explicit attention to Marshall's discussion of the Constitution in these articles.

***McCulloch v. Maryland* Revisited**

The economically tumultuous years of the late eighteenth century provided the backdrop for *McCulloch*.[119] When the twenty-year charter of the First Bank of the United States expired in 1811, the Republican Congress, which had always looked askance at the national bank for its centralizing tendencies, successfully blocked its renewal. But the financial strain of the War of 1812 reminded the nation of the need for a streamlined economic system, and the Bank was re-chartered in 1816 amid a wave of postwar nationalist euphoria. Upon its renewal, the Bank immediately began opening local branches throughout the country, ignoring objections raised by both private and state-chartered institutions that anticipated a significant loss of business to the national branches. Such fears were soon realized: the Bank flourished as the nation's major source of credit, and the backing of the federal government gave its branches a decided competitive advantage over their local counterparts. Within three years of its reincorporation, the Bank enjoyed widespread acclaim as a leading cause of the nation's postwar economic boom.

By late 1818, however, Americans had largely turned against the Bank. Many branches were forced to recall loans at a rapid rate in order to offset a drop in American

[119]The following reconstruction of *McCulloch* is culled from the narratives found in Stites, *John Marshall: Defender of the Constitution*, 129-136; Smith, *John Marshall: Definer of a Nation*, 440-445; and Simon, *What Kind of Nation*, 271-278. There are only two book-length scholarly treatments of *McCulloch*, to wit, Killenbeck, *McCulloch v. Maryland: Securing a Nation*, 2006 and Gunther's volume. Good article-length overviews of the case are provided in David S. Bogen, "The Scandal of Smith and Buchanan: The Skeletons in the *McCulloch v. Maryland* Closet," *Maryland Law Forum* 9.4 (1985), 125-132; A.L.L. Campbell, " 'It is a Constitution We Are Expounding': Chief Justice Marshall and the 'Necessary and Proper' Clause," *Journal of Legal History* 12.3 (1991), 190-245; and Daniel A. Farber, "The Story of *McCulloch*: Banking on National Power," in Michael C. Dorf, ed., *Constitutional Law Stories* (New York: Foundation Press, 2004), 34-67.

commodity prices overseas. Additionally, instances of embezzlement, fraud, and general mismanagement by branch officials that often went ignored or unpunished by federal authorities further heightened local resentments.[120] By 1819, several state legislatures had passed laws that attempted to curb the Bank's influence within their respective states. Among these states was Maryland, which targeted the Bank by imposing a banknote tax or an annual $15,000 fee on the operations of all non-state-chartered banks. The cashier of the Baltimore branch of the Second Bank of the United States, James McCulloch, refused to pay either sum to the state, which prompted Maryland to file suit against the Second Bank. After a Baltimore county court and the state Court of Appeals upheld the Maryland law, the case of *McCulloch v. Maryland* was appealed to the Supreme Court on the basis of a writ of error filed by the Bank.

The Court soon sensed the gravity of the confrontation between state and national government, extending the duration of oral arguments to one week while allowing both the prosecution and defense an additional lawyer. Adding to public interest in the case was the impressive roster of attorneys. Congressman Joseph Hopkinson, U.S. Attorney for the District of Columbia Walter Jones, and state Attorney General Luther Martin would defend the state of Maryland, while United States Attorney General William Wirt, future Attorney General William Pinkney, and a young Daniel Webster represented the Second Bank. The courtroom was packed when the first of nine days of arguments began on February 22, 1818. The issues raised in the trial were hardly novel, but they were

[120]A congressional investigation in early 1819 revealed widespread malfeasance among the Bank's eighteen branches that led to the resignation of the Bank's first President, William Jones. However, a subsequent effort to revoke the Bank's charter failed just as closing arguments in *McCulloch* took place. See Simon, *What Kind of Nation*, 272 and Gunther, *John Marshall's Defense*, 3-4.

argued passionately and in detail: counsel for Maryland defended a strict construction of the Constitution that emphasized the ultimate sovereignty of the states, while attorneys for the Bank defended the institution's legitimacy by pointing to Congress's implied powers as granted by the Constitution.

Marshall delivered the unanimous opinion of the Court on March 6, 1819, a mere three days after the trial's closing arguments.[121] The opinion raised and responded to two key questions. First, was Congress empowered to charter a national bank? And second, granting the constitutionality of the Second Bank, could Maryland lawfully impose a tax on one of its state branches?[122] In what proved to be one of his lengthiest opinions as Chief Justice, Marshall carefully pursued both questions. The Court determined that the Bank's incorporation was constitutional based on "a fair construction" of the Constitution and the implied powers of Congress.[123] Next, the Court held that Maryland was prohibited from imposing any tax on a branch's operation. While the state did exercise taxation power concurrently with the national government, that authority did not allow Maryland, or any state, to interfere with the laws of the national government pursuant to

[121]The swiftness of the decision and the length of the opinion has led many scholars to ask whether the opinion was prewritten and if *McCulloch* itself had been prearranged by the Court.

[122]See Gunther, "John Marshall's Opinion in *McCulloch v. Maryland*," in *John Marshall's Defense*, 23-51: 23, 41.

[123]As Marshall summarized the matter, "the powers given to the government imply the ordinary means of execution," and thus the Bank's incorporation represented an ordinary means to achieve a constitutionally-valid end (Gunther, *McCulloch*, 29).

the Constitution. Hence, Marshall concluded with respect to the state's bank tax, "such a tax must be unconstitutional."[124]

Public reaction to the *McCulloch* opinion varied widely by region. In the industrial North, where the Second Bank remained popular and the effects of the economic recession were milder, newspapers cast the Supreme Court's decision in a favorable light, while in the South and West, editorials were more mixed in their tone. But in Marshall's home state of Virginia, the backlash against the Marshall Court was especially fierce, led by powerful Democratic-Republican partisans in Richmond—the "Richmond Junto," as they came to be known—that had long detested Marshall and saw *McCulloch* as the latest blow to Virginian sovereignty.[125] The Junto's chief complaint was not that Marshall had declared the Second Bank constitutional, but that he had justified Congress' incorporation power in a manner that would render the states wholly subordinate to the political will of the national government.[126] Turning to Marshall's nationalist rhetoric in *McCulloch* shows that this criticism was not entirely unjustified.

[124]Gunther, *McCulloch*, 50.

[125]Little is known of the Richmond Junto's clandestine membership and operation. As Ellis (2007) notes, "Although there is a large body of literature on the Richmond Junto, there is no consensus among scholars about who its members were, how coherent it was, how it operated, how influential and powerful it was, its overall significance, and even whether it existed at all" (235-236).

[126]As Daniel Walker Howe notes, even stanch Jeffersonians had come around to endorse the Second Bank by 1816. See his *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), 145. On the general political consensus on the Bank's legitimacy, see also Klarman, "How Great Were The 'Great' Marshall Court Decisions?," 1128-1129.

McCulloch on national sovereignty

Sovereignty has long been understood to imply the presence of an ultimate political authority as one of its necessary attributes. It was certainly the widespread association of sovereignty with notions of consolidation, omnipotence, and unity that such luminaries as Hobbes, Bodin, and Grotius contemplated when formulating their distinct understandings of sovereign power as the unitary and indivisible promulgation of law. Similar concepts of indivisible sovereignty remained commonplace in the Anglo-American world of the eighteenth century.[127] Indeed, as Gordon Wood has described, even into the 1770s the belief in a supreme and absolute authority as a necessary attribute of government was taken for granted by most thinkers.[128] Admittedly, by the time of the American Revolution some had begun to articulate a coherent concept of divided sovereignty. But even as late as 1787, as Forrest McDonald has shown, the concept remained ill defined. In fact, however much the new Constitution's federal structure belied this abstract principle in practice, a stubborn belief persisted throughout the early years of the republic that any state must possess an ultimate site of political sovereignty.

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[127]As Walter Bennett describes in his *American Theories of Federalism*, even the draconian Stamp Act of 1765 was defended by supporters of Parliament in America and England "by invoking the conception of absolute and indivisible sovereignty commonly attributed to the sixteenth-century Frenchman Jean Bodin" (21).

[128]See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, NC: University of North Carolina Press, 1969), 350. Students of law were especially familiar with the unitary character of sovereignty from their reading of Sir William Blackstone, whose *Commentaries* enjoyed widespread popularity upon the publication of the first American edition in 1803. See Wilfrid R. Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (New York: Oxford University Press, 2008), 292. As Gary McDowell notes, "Blackstone's commitment to absolute sovereignty was firm. The safety and happiness of the individual citizens depended upon it. Without a supreme sovereign with unrestrained compulsive power to enforce the law, the absolute rights of the people would enjoy no security." See his *Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010), 211.

As McDonald puts it, many Americans "who thought about the matter accepted the indivisibility of sovereignty as an abstract theoretical proposition," even as local politics was increasingly being organized along the lines of "a *de facto* system of divided sovereignty."[129]

McCulloch seems to offer an unequivocal defense of this principle. The clearest evidence appears in Marshall's rejection of the many arguments made by the attorneys for Maryland on behalf of state sovereignty. During the trial, counsel for Maryland had insisted at length that the Constitution emanated not from the American people but from "the act of sovereign and independent States."[130] Accordingly, the powers of the national government were seen as subordinate to and revocable by the will of the states, "who alone are truly sovereign" and "possess supreme dominion." Stating that "it would be difficult to sustain" this interpretation of the Constitution's origins, Marshall spent much of *McCulloch* arguing against this states' rights doctrine and in support of a more nationalist interpretation of the Constitution's creation. While it was true that the framers may have been elected by state legislatures, Marshall argued, the proposed Constitution that emerged from Philadelphia nonetheless required ratification. To become the nation's supreme law, it first had to gain the approval of the American people, who were "at perfect liberty to accept or reject" the Constitution, acting upon it "in the only manner in which they can act safely, effectively and wisely, on such a subject -- by assembling in

[129]See his *Rights and the Union: Imperium in Imperio, 1776-1876* (Lawrence, KS: University Press of Kansas, 2000), 2.

[130]Gunther, *McCulloch*, 25.

convention."[131] State ratifying conventions hardly indicated the ultimate sovereignty of the individual states, but were instead a concession to the impossibility of "breaking down the lines which separate the States" and ratifying the Constitution *en masse*.[132] But this mode of adoption did not detract from the Constitution's authority as proceeding "directly from the people." As Marshall declared, the document was "ordained and established in the name of the people," and represented "emphatically and truly, a Government of the people." The Constitution was in both "form and substance" ratified by the will of the people, not the will of the states; its framing represented a national decision, not a combination of judgments rendered by a myriad of independent sovereigns.[133]

Marshall's theory of the Constitution's ratification went hand-in-glove with his argument on behalf of the authority of the national government. His argument began with a discussion of those aspects of the Constitution that indicated its national sovereignty. Because the people intended the Constitution to institute "effective government" and not a mere league between sovereign states, the powers of the national government were "to be exercised directly" on the people, "and for their benefit."[134] In matters of textual interpretation, and particularly with regard to the question of the Bank's constitutionality, this intention entailed giving the words of the Constitution a construction befitting a

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[131]Ibid., 26, 25.

[132]Ibid., 25.

[133]Ibid., 26.

[134]Ibid.

national document. While acknowledging that among the enumerated powers of the Constitution, "we do not find that of establishing a bank or creating a corporation," and conceding that neither the words "Bank" nor "incorporation" appeared anywhere in the Constitution, he nevertheless sharply disagreed with Maryland's argument that the Bank was thus illegitimate, arguing that if adopted, its narrow construction of the Constitution would so weaken Congress that its explicit powers "would be nugatory."[135] Instead, the intention of the American people "to form a more perfect union" and establish a national government "conducive to their happiness" meant "ample means" must be given to the government to execute its constitutional powers and duties.[136] The incorporation of the Bank, as well as the implementation of state branches, represented a legitimate "choice of means" to execute the powers granted by the Constitution to effect the public good.[137]

Having defended the constitutionality of the Bank, Marshall then turned to the legality of the Maryland bank tax. It was here that he dealt a direct blow to the hopes of Maryland and its doctrine of state sovereignty. While granting that the states exercised taxation powers concurrently with the national government, he claimed the Constitution could restrain even this "vital" authority in cases where its use was "in its nature

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[135]Ibid., 27, 28, 33. Marshall's interpretation of the Necessary and Proper clause borrowed significantly from the reasoning of another Federalist stalwart, Alexander Hamilton. Like Marshall, Hamilton rejected a restricted reading of "necessary" and favored its more expansive rendering as implying "convenience." For Hamilton's defense of the constitutionality of the First Bank of the United States on these grounds, see his "Opinion on the Constitutionality of an Act to Establish a National Bank," in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett (New York: Columbia University Press, 1965), 8: 97-134. Marshall praised Hamilton's defense of the Bank as "a copious and perspicuous argument" in the first edition of his *Life of George Washington*, (Philadelphia: C.P. Wayne, 1804-1807) 5: 294.

[136]Gunther, *McCulloch*, 26, 28.

[137]Ibid., 29.

incompatible with, and repugnant to, the constitutional laws of the Union."[138] Counsel for the Bank had argued the Maryland tax was just such a case, and Marshall agreed, noting the Bank's "claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."[139] This fundamental principle, he continued, "is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them." Such a "great principle," which according to Marshall might "be almost termed an axiom," entailed three corollary rules; first, "that a power to create implies a power to preserve;" second, "that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve;" and finally, "that, where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme." Connecting these rules to the case at hand entailed a clear conclusion: the Maryland tax imposed on the operations of the Second Bank was unconstitutional.

Couched within Marshall's practical conclusions in *McCulloch* are his more theoretical beliefs concerning the sovereignty of the national government. Marshall claimed that on those occasions when national and state power came into conflict, it was crucial to the nation that the "authority which is supreme must control, not yield to that

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[138]Ibid., 41, 42.
[139]Ibid., 42.

over which it is supreme."[140] For Marshall, it was clear that the national government was the supreme controlling political power in the United States that must not yield. Thus the Chief Justice forcefully declared that the states "have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national Government."[141] This proposition concerning the government's sovereignty was an irrefutable truth, however much it was denied by states rights' supporters in everyday politics. Indeed, Marshall emphasized, it was of "the very essence of supremacy" to remove any and all "obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments" that would interfere with the exercise of its influence. This principle of supremacy, he added, must always be kept in view when "construing" the Constitution.[142] Marshall thus defended a justification of Congress' implied power that gave the national government robust power. And he struck down a state law that aimed to limit the reach of national policy. Yet these facts do not comprise the whole of Marshall's theory of sovereignty. Indeed, they do not even tell the full story of *McCulloch*.

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[140]Ibid.

[141]Ibid., 50.

[142]Ibid., 43.

McCulloch on federalism

Political sovereignty has not always been defined in absolute and unitary terms.[143] As early as 1774, the possibility of federal and confederal political arrangements were being proposed with great fervor by radical republicans in the American colonies.[144] As Bernard Bailyn has shown, because these thinkers placed ultimate sovereign authority in the hands of the people, they were able to see it in more complex and multidimensional terms, so that with independence they were free to experiment with more dispersed political and legal power.[145] By 1787, federalism had become an accepted principle, clearly expressed by Madison in his *Federalist* #39, where he argued that states were "no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere."[146] Yet such statements aside, federalism in the early republic created new dilemmas, as jurisdictional challenges involving state and national government grew throughout the 1790s.[147] Hence

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[143]For recent critiques of the notion of unitary sovereignty, see the essays collected in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (New York: Cambridge University Press, 2010).

[144]See Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2010), 107.

[145]Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1992), 198.

[146]See Hamilton et. al., *The Federalist*, 210.

[147]On this point, and the attitude of the founding generation toward theories of political sovereignty in general, see Adam Tate, "James Madison and State Sovereignty, 1780-1781," *American Political Thought* 2.2 (2013), 174-197: 176-177. Gordon Wood has noted "the problem of sovereignty was not solved by the Declaration of Independence. It continued to be the most important theoretical question of political throughout the following decade, the ultimate abstract principle to which nearly all arguments were sooner or later reduced." In *Creation of the American Republic*, 354.

constitutional thinkers were faced with the challenge of elaborating a coherent conception of federalism, a challenge that Marshall sought to meet in *McCulloch*. Indeed, Ira Strauber has gone so far as to call the opinion "the classic statement" of American federalism, "a weave of pragmatic and political theoretical arguments about underdetermined sovereignty interests that mute the force of arguments for state and shared sovereignty without, however, altogether undermining claims for state power."[148]

Two arguments were central to Marshall's defense of federalism in *McCulloch*: the limitations the Constitution imposed on national law and the coordinate legislative powers exercised by both national and state government. He begins with the restrictions the Constitution placed on national policymaking. Though *McCulloch* put forward a broad reading of congressional power in its justification of the Second Bank, it did not extend to Congress free rein to pass any law that might be tangentially related to its constitutional powers. Limitations on Congressional authority did exist, the opinion stressed, and it was the responsibility of the Court to enforce those limits whenever they were breached. Marshall's statement of this commitment occurs in his discussion of the implied powers of Congress. All must admit, he announced, that the powers of the national government were limited, and that such limits "are not to be transcended."[149] In this regard, he cited a number of provisos governing the constitutional legality of any given piece of legislation. The first condition governed the object or end of legislation, which must be "legitimate" and "within the scope of the Constitution." Simply meeting

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[148]Ira Strauber, *Neglected Policies: Constitutional Law and Legal Commentary as Civic Education* (Durham, NC: Duke University Press, 2002), 109.

[149]Gunther, *McCulloch*, 38.

this threshold, however, did not guarantee the constitutionality of legislation. A second provision went further, declaring that the only means that may be employed by Congress to implement legitimate objects were those "which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."[150] Moreover, judgment of both the ends of legislation and the means to achieve those ends fell to the Supreme Court. This body, Marshall declared, would render the final determination as to whether legislation fulfilled these two conditions, and its affirmative judgment on the constitutionality of the Second Bank could very well change in future cases. As Marshall warned, should Congress "adopt measures which are prohibited by the Constitution" or "pass laws not intrusted to the Government," then "it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."[151]

The national government protected federalism in another way. Congress, Marshall suggested, was not the only political power states had to fear. As he pointed out, a national legislature afforded to each individual state protection from the invasions of another state. Noting the fact that "in the Legislature of the Union alone are all represented," he held that it was only reasonable that Congress rather than the states was entrusted with the power of controlling those "measures which concern all."[152] Jealous of

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[150]Ibid., 38, 39.

[151]Ibid., 40.

[152]Ibid., 46.

its power, one state would hardly turn over to another state the authority to control even the most insignificant of its operations, let alone the power of taxation. To solve this impasse, the national government would be entrusted with those matters that concerned all citizens, and like state legislatures, its representatives would be held accountable by the citizens of the United States for abusing that trust. Thus since "the people of all the States, and the States themselves, are represented in Congress," a state interfering with the operations of the national government acted not only upon its own constituents but also attacked other states and those "people over whom they claim no control."[153] As regional distinctions at the time of *McCulloch* continued to grow more pronounced, this was hardly an insignificant function of the nation's political institutions.

Proceeding to his second argument, Marshall allowed that the states were not only protected by the federal system: they possessed considerable power and autonomy of their own under its aegis. In particular, state governments retained a pivotal set of political powers to regulate their domestic affairs. Indeed, to the extent that state law did not conflict with the paramount law of the Constitution, all such laws were legitimate and due full obedience. The opinion went out of its way to emphasize that even the power of taxation was reserved to the states, notwithstanding the Court's particular annulment of the Maryland bank tax. As Marshall reminded his readers, "the power of taxation is one of vital importance" and "is retained by the States."[154] Neither the Supreme Court nor the Constitution had altered the exercise of this power by the state governments: "that it is

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[153]Ibid., 49.

[154]Ibid., 41.

not abridged by the grant of a similar power to the Government of the Union; [and] that it is to be concurrently exercised by the two Governments" were not merely opinions, but "truths" which had "never been denied" by the Court.[155]

Thus the Maryland tax was not invalidated because it trespassed upon a power that belonged exclusively to the national government. For Marshall, the illegality of the tax turned on its specific disruption of the operations of the Second Bank, "an instrument employed by the Government of the Union to carry its powers into execution."[156] The Court's decision may have been quite different had the Maryland law not posed such a direct threat to national law. Indeed, sounding a note of reassurance to the states, Marshall emphasized that the *McCulloch* verdict had not changed the basic balance of power between the states and the national government as defined by the Constitution. The Court's ruling, he declared, "does not deprive the States of any resources which they originally possessed." Apparently in a spirit of friendly support, Marshall even went so far as to list constitutionally valid forms of taxation that were at Maryland's disposal: the real property of the bank as well as interest held by its customers were both fit objects of state taxation, "in common with other property of the same description throughout the state." These remarks suffice to show that Marshall did not simply dismiss either the role of the states or state legislatures as integral pieces of the constitutional order. For Marshall, political power was distributed and shared between state and national government. He may have attached special importance to the supremacy of national law in light of the animosity toward the Bank seen in the public opposition to it, but in

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[155]Ibid., 41-42.

[156]Ibid., 50.

defending the Bank he was careful not to undermine the legitimacy of state banks or the valid measures state governments might institute to limit its influence. Seen in this light, the crux of *McCulloch* was not Marshall's nationalism, but his nuanced theory of federalism.

Beyond nationalism and federalism: Defining constitutional sovereignty

Nevertheless, Marshall's constitutionalism cannot be captured by the language of nationalism or federalism alone. For Marshall, neither the powers nor the policies of government stood as the nation's supreme legal authority. Instead, this authority belonged to the Constitution itself. Marshall's theory of constitutional sovereignty is implicit in *McCulloch*, but is brought into greater light in the essays that he wrote in its wake. The first two of these pseudonymous essays, written by "A Friend to the Union," appeared in the *Philadelphia Union* and the *Alexandria Gazette*. Nine others, by "A Friend to the Constitution," soon followed in the *Gazette and Alexandria Daily*.[157] In these articles, Marshall set forth a spirited defense of *McCulloch* that was at once precise and comprehensive. Nor were the essays purely partisan in their content, as we might expect from their popular political setting. Rather, they reflect the depth of seriousness the Chief Justice showed toward public perceptions of the Supreme Court in particular and the Constitution in general. Worried that the words of Virginia's states' rights proponents would prove fatal to the Constitution if left unanswered, Marshall meticulously justified *McCulloch* decision and defended the reputation of the Supreme

[157]Marshall's early "Friend to the Union" essays were badly mangled in the printing process, and at Marshall's urging were reprinted with substantial corrections in the *Gazette*. For this reason, the nine *Gazette* essays are typically viewed as Marshall's authoritative defense of the Court's opinion in *McCulloch*. See Newmyer, *John Marshall and the Heroic Age*, 884.

Court. But of even greater significance, these articles represent a robust argument on behalf of the Constitution's sovereignty.[158]

One does not need to look far to see what events motivated Marshall to write and publish the essays. When he returned to his Richmond home in the summer of 1819, animosity toward the Supreme Court in the state of Virginia was running at a fever pitch. On March 30th, the pro-Democratic-Republican *Richmond Enquirer* entered the fray. By way of introduction, Thomas Ritchie, the paper's editor-in-chief, announced to readers that a series of essays would appear in the coming weeks responding to the "alarming errors" of the Supreme Court.[159] The first two essays that appeared were most likely written by Virginia Judge William Brockenbrough, a partisan defender of Virginia sovereignty, employing the pen name "Amphictyon." Then, beginning on June 11th, four more articles were published warning readers of the danger the Marshall Court posed to the states, this time authored by Judge Spencer Roane of the Virginia Court of Appeals (and son-in-law of Patrick Henry), who employed the pen name "Hampden." By mid-summer, encouraged by a resolution passed by the Virginia legislature repudiating the *McCulloch* decision, public criticism of the case was escalating into open defiance of the Court's decision. Marshall followed this turn of events anxiously. As he confided to his

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[158]The debate between Marshall and Roane is also analyzed in William E. Dodd, "Chief Justice Marshall and Virginia, 1813-1821," *American Historical Review* 12.4 (1907), 776-787; Charles G. Haines, *The Role of the Supreme Court in American Government and Politics, 1789-1835* (New York: Russell & Russell, 1960), 357-368; Samuel R. Olken, "John Marshall and Spencer Roane: An Historical Analysis of the Conflict over U.S. Supreme Court Appellate Jurisdiction," *Journal of Supreme Court History* 14 (1990), 125-141; White, *The Marshall Court and Cultural Change,* 552-567; and Ellis, *Aggressive Nationalism*, 111-142.

[159]See "A Virginian's 'Amphictyon' Essays," in Gunther, *John Marshall's Defense*, 52-77: 52.

fellow justice Joseph Story, "our opinion in the bank case has roused the sleeping spirit of Virginia—if indeed it ever sleeps." Correctly predicting the opinion would be "attacked in the papers with some asperity," he went on to lament that the Court's supporters "never write for the public." By leaving the field to those who would cast the opinion in the worst possible light, he feared, the opinion would soon "be considered as *damnably heretical*." It was true that the newspaper attacks were directed primarily toward the national government in general and the Bank and the Supreme Court in particular. But the consequences of the argument, in Marshall's view, led inexorably toward undermining the Constitution. Concerned that the very existence of the still-fragile Constitution was at stake, Marshall made a decision: he would not let the battery of attacks pass in silence.[160]

While seeking to take the higher ground in defending the Constitution's sovereignty, Marshall was not afraid to throw a punch. He began by considering the stakes in the case. Writing as "A Friend of the Constitution," he warned that great constitutional questions must sometimes require "a course of intricate and abstruse reasoning, which it requires no inconsiderable degree of mental exertion to comprehend."[161] Thus the Court's opinions could be easily and grossly misrepresented, and the case of *McCulloch* in particular presented "the fairest occasion for wounding

[160]As Kent Newmyer notes, though Marshall could not see the particular historical course states' rights theory might lead the nation, experience had taught him "to read history in a tragic light," and the Chief Justice was greatly concerned in *McCulloch*'s immediate aftermath "that the rousing oratory of Virginia radicals would convert the Constitution into the old Confederation." In R. Kent Newmyer, "John Marshall, *McCulloch v. Maryland*, and the Southern States' Rights Tradition," *John Marshall Law Review* 33.4 (2000), 875-934: 883.

[161]See "Marshall's 'A Friend of the Constitution' Essays," in Gunther, *John Marshall's Defense*, 155-214: 156.

mortally, the vital powers of the government, thro' its judiciary." Then he turned to Brockenbrough and Roane. Combating the "weighty interests & deep rooted prejudices" that he saw as motivating the assault on the Court, Marshall responded to Roane's "ranting declamation," with its "rash impeachment" of the integrity of the Court, contrasting it with his own dispassionate "investigation of truth." Clearly, he realized that his opponents were not interested in a convivial discussion of principles, and both the tone and content of his writings reflect the acrimony of the occasion. Yet even while parrying his critics' charges in point-by-point detail, distinctive themes of his constitutionalism emerge. First, the Constitution was an abstract charter of government created by all Americans who saw the national government as accomplishing objects that affected all citizens. Second, its supremacy was a matter of practical necessity: any state required an ultimate source of political authority. Finally, the Constitution secured rather than undermined the principles of limited government and federalism that were held dear by all citizens. These lines of argument form the core of Marshall's defense of *McCulloch* and, just as important, his understanding of the Constitution's sovereignty.

In order to understand Marshall's constitutionalism, one must first consider his definition of the Constitution. To be sure, Marshall revealed some of this picture in *McCulloch*. There he had famously described the Constitution as a document as one "intended to endure for ages to come," and so must "be adapted to the various *crises* of human affairs" lest it become "a splendid bauble."[162] By its nature, it was a document of abstract principles, and thus "only its great outlines" could be marked and "its important

[162]Gunther, *McCulloch*, 34, 38.

objects" assigned.[163] Setting forth in intricate detail the actions that the national government could and could not perform would reduce the Constitution to "the prolixity of a legal code" scarcely comprehensible to the human mind. Writing as "Friend," however, Marshall went further than simply to claim the Court must be flexible in its interpretation of this inevitably abstract document. First and foremost, the Constitution was created through a partnership between fellow citizens, not a peace agreement among sworn opponents. Such "a contract between enemies seeking each other's destruction" would make its parties "anxious to insert every particular, lest a watchful adversary should take advantage of the omission." Moreover, the Constitution was not akin to a zero-sum agreement between private individuals "wherein implications in favor of one man impair[ed] the vested rights of another." Hence, it differed from "the cases put in the books of the common law," which were unconcerned with constitutional government. In positive terms, the Constitution "is the act of a people, creating a government without which they cannot exist as a people." The powers they granted to the national government were exercised for the benefit of the people by those representatives "chosen for that purpose." An excessively minimalist reading of Congressional power would defeat the Constitution's purpose as "a general system for all future times to be adapted by those who administer it." Reiterating that "from its nature, such an instrument can describe only the great objects it is intended to accomplish, and state in general terms the specific powers which are deemed necessary for those objects, " Marshall described members of Congress as ultimately beholden to its rule, not to their own. To fulfill the

[163]Ibid., 28.

"great objects" set forth in the Constitution, the office of a legislature is created, and as an emanation of the people, it was responsible for marking, "according to the judgment of the nation," its course "within those great outlines which are given in the constitution."[164]

Marshall also viewed the Constitution as playing a creative role in solidifying American national identity. Having denied that the union was simply a product of individual states, he now claimed that it was the Constitution that had given Americans a new "theoretical or constitutional existence."[165] On those occasions dealing with "national affairs," such as matters of war and peace, this identity was most evident. But the language of the Constitution also suggested that its existence was both more pervasive and more commonplace. Hence, Marshall pointed out, a Senator must have been a "citizen of the United States" for seven years, and the oath taken by every adopted citizen was to the United States. Such provisions proved, in his words, that "we are all citizens, not only of our particular states, but also of this great republic." The Constitution was much more than a document that specified the exercise of legitimate political authority. As a written testament to the national identity of the American people, it played a formative role in constructing an enduring constitutional citizenship that could not be confined to the vocabulary of either national or state membership.

Marshall was careful to emphasize that so long as the Constitution governed the nation's affairs, a despotic national government was a mere bogeyman conjured by the Constitution's opponents. Dispelling this imagined threat entailed reframing the basic

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[164] "Friend of the Constitution," 195.

[165] Ibid.

terms employed by its foes. Though Roane had consistently "confounded *supremacy* with *despotism*," Marshall argued that supremacy simply meant "highest in authority," an authority that may or may not abuse its legitimate powers.[166] Turning to the constitutional text, he asked: "Is not the government of the union, 'within its sphere of action,' 'supreme,' or 'highest in authority'? This is certainly the fact, and is certainly the language of the Constitution." After all, Marshall went on, in national affairs "what authority is above it?"[167] But the supremacy of the national government was not unbridled. Instead, its laws were anchored to those limitations imposed by the Constitution, which could itself be amended. As he reminded his readers, "The constitution may be changed, any constitution may be changed."[168] Laws could be altered and reformed, unlike despotic power, which operated unhindered by popular checks or institutional balances. Marshall's response to Roane's portrayal of an all-powerful national government was as calming as it was direct: so long as it remained the nation's supreme law, the Constitution secured all Americans from the possibility of a tyrannical national government.

The Constitution's protection of the principle of federalism supplies the final pillar of Marshall's newspaper defense of *McCulloch*. A core narrative for both Maryland's as well as Brockenbrough's argument against the Bank was the notion that the states, not the American people, had authorized the Constitution. Brockenbrough had

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[166]Ibid., 187.

[167]Ibid., 188. No great effort of the imagination was needed for citizens of Virginia to picture this scenario: "Under the confederation," Marshall reminded his readers, "congress could do scarcely any thing, that body could only make requisitions on the states" (Ibid., 163).

[168]Ibid., 188.

gone to great lengths to prove that the several states "not only gave birth to the constitution, but its life depended on the existence of the state governments."[169] For evidence, he looked to the historical record of the Constitution's creation: the federal convention was populated by delegates appointed by the state legislatures; the document was submitted for ratification to state conventions; and such conventions represented the states acting "in their highest political, and sovereign authority." For Brockenbrough, there could be no mistake: the Constitution "was adopted and brought into existence" by the states, who had surrendered none of their original sovereignty upon its ratification. Citing the example of Rhode Island's initial reluctance to ratify, he noted that the Constitution was not binding on any state, even the smallest in population, until that state had given its free consent. In distorting the Constitution's ratification, he continued, the Court had substituted the American people rather than the states as the authentic source of the Constitution's authority. This seemingly benign principle risked leaving a minority of Americans at the mercy of majority rule—or majority tyranny—as exercised by all citizens, no matter the state.[170]

For Marshall, Brockenbrough was tilting at windmills. Nobody had denied that the states played an important political role under the Constitution, just as they had under the Articles of Confederation. But Brockenbrough's more serious error was his conflation of the term "national" with "consolidation."[171] The principle that the United States was a

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[169]Gunther, "Amphictyon," 56.

[170]Ibid., 55.

[171]Gunther, "Friend of the Constitution," 193. Hampden described a consolidated government as one that acted solely upon individuals, bypassing both states and their governments. Marshall denied this charge, arguing that while the policies of the national

federal and not a consolidated government was "universally known and universally admitted. No person in his senses ever has, ever will, or ever can controvert it."[172] Brockenbrough had hastily assumed that this fundamental fact had been renounced by the Court along with compact theory. For Marshall, the nature and language of a legal document, not its mode of adoption, were the characteristics that determined its identity. The Constitution depended "not on its being adopted by the people acting in a single body, or in single bodies." If that notion were true, the kingdoms of Great Britain and Ireland would not be considered a consolidated kingdom, since they at one time comprised three distinct kingdoms. Rather, "the character of a government depends on its constitution."[173]

If the mode of adoption did not determine the type of government the nation had, what other principle might determine the authority of the Constitution? For Marshall, the language of the document itself must be considered in order to establish the type of political and legal order it envisioned for the nation. As he put it, "the words of an instrument, unless there be some sinister design which shuns the light, will always represent the intention of those who frame it."[174] And the words of the Constitution's preamble could not be clearer in declaring that the Constitution was the creation of the American people, and not the several states. In his words, "an instrument intended to be

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government did act upon individuals, the reach of its authority was limited by the Constitution and the jurisdictions that document preserved for the state governments (Ibid., 193-194).

[172]Ibid. 191.

[173]Ibid., 197.

[174]Ibid., 199.

the act of the people, will purport to be the act of the people," while conversely, "an instrument intended to be the act of the states, will purport to be the act of the states." Thus the Constitution clearly cast the people as those who create and define the government, while the Articles of Confederation "was intended to be the act of the states, and was drawn in language comporting with that intention."[175] The difference between the respective origins of these documents could hardly have been more stark. It was entirely evident, he concluded, that "our constitution is not a league. It is a government; and has all the constituent powers of a government."[176]

Like his opponents, Marshall was not above employing rhetorical flourishes to warn his readers of the consequences of rejecting the Constitution's sovereignty. Disregarding its supreme authority would have untold consequences, not the least of which would be throwing the country into a state of anarchy even more perilous than conditions under the Articles of Confederation. It is not inconceivable, Marshall mused, "that the constitution may be so expounded by its enemies as to become totally inoperative."[177] The only way to appease critics of *McCulloch*, Marshall imagined, would be to allow the individual states to pass judgment on each law proposed by the national government and consequently clog the political process. Thus "a new mode of amendment, by way of report of committees of a state legislature and resolutions thereon, may pluck from" the Constitution "power after power" in piecemeal fashion.

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[175]See Gunther, "Marshall's 'A Friend to the Union' Essays," in *John Marshall's Defense*, 78-105: 85.

[176]Gunther, "Friend of the Constitution," 199.

[177]Ibid., 160.

Alternatively, some state legislatures may instead choose to "sweep off the whole" Constitution and the powers it bestowed in its entirely, substituting in its place the "scanty and inconvenient means" the national government might employ to fulfill its great responsibilities. But whether the powers of the national government were reduced gradually or all at once, the result of leaving to the states the power of constitutional authority and interpretation would be the same. Under such circumstances, Marshall admonished, the state governments would eviscerate the document, leaving the Constitution "an inanimate corpse, incapable of effecting any of its objects." A far safer course would be to entrust judgments of constitutionality to the Supreme Court, Marshall claimed, for there was no body or tribunal less liable to be "swayed by unworthy motives" from the performance of its duties on behalf of advancing public prosperity.[178] Behind the veil of anonymity, the Chief Justice minced no words: the Court was the best defense against the failure of the Constitution.

With regard to *McCulloch*, Marshall's *Gazette* essays underscore familiar themes while drawing attention to new ones in his political thought. For Marshall, the Constitution represented much more than a new legal order. It symbolized the virtue and integrity of the American people, standing as a reminder to new generations of the patriotism that led to its creation. In making this argument, Marshall would drop his characteristic detachment as Chief Justice, driving his argument home in vivid and passionate terms. Seeing the "weakness" of the Articles of Confederation, he claimed, the American people had chosen to "cement" their fragile union by means of a new national

[178]Ibid., 212.

charter. Their decision to change the Articles "into an effective government" was a testament to the "wisdom and patriotism of our country," freeing the American people from political difficulties that would only reappear with the restoration of states' rights doctrine.[179] As Marshall summarizes in his concluding essay, more than the scope of Congressional authority was at stake in *McCulloch*. The attacks on the Court were "intended to produce a very serious effect," one that in his judgment could lead to the Constitution's "utter subversion," in which its sovereignty was prostrated "at the feet of its members.[180] Roane's states-rights diatribes threatened the powers of national government and the principles of federalism. But beyond even these dangers, still more was at stake in *McCulloch*. For as Marshall saw it, the Constitution itself was imperiled by the states' rights rhetoric. To overturn the concept of constitutional sovereignty, he believed, was to put at risk the nascent nation the framers had worked so diligently to construct. Indeed, without constitutional sovereignty, the nation would have no ultimate law at all. Whether writing as Chief Justice or "A Friend to the Constitution," Marshall was determined not to allow that to occur without a fight.

Conclusion

No matter how closely scrutinized, Marshall's opinion in *McCulloch* will continue to be a source of debate. Many nationalist interpretations of the opinion will continue to minimize Marshall's defense of state authority and limitations on national policy, while arguments that emphasize Marshall's federalism will continue to understate

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[179]Ibid., 200.

[180]Ibid., 214.

his concern for a robust national government with the capability to execute its laws. But these interpretations must acknowledge that the keystone of Marshall's political thought was neither nationalism nor federalism, but constitutionalism. After all, in *McCulloch* it was the Constitution, not the national government, whose principles must "be adapted to the various crises of human affairs."[181] It was the Constitution, not the states, that was the nation's ultimate legal authority. It was the Constitution, not the political branches—not even the Supreme Court—that was a lever for governance, not "a splendid bauble."[182] And it was the prevention of the subversion of the Constitution, "that grand effort of wisdom, virtue, and patriotism," that induced Marshall to risk criticism by taking his argument in *McCulloch* public.[183]

Only by turning to Marshall's *Gazette* essays do we see the full picture of his underlying theory of constitutional sovereignty in *McCulloch.* Only by reading both his legal and political opinions can we appreciate the full reach of his political thought. And only by attempting to understand his thought within this broader context can we see Marshall's overarching commitment to the Constitution. The essays reveal a different side of the Chief Justice than the persona he projected from the bench, one that shows him concerned with solidifying the sovereignty of the Constitution in the court of law and the court of public opinion alike. The real threat to the United States, he continually emphasized, came from those whose theories would return the country to the political

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[181]Gunther, *McCulloch*, 34.

[182]Ibid., 38.

[183]Gunther, "Friend of the Constitution," 214.

disarray that plagued the nation under the Articles of Confederation. So long as the Constitution remained supreme law, he believed, state governments as well as the nation's political branches had little reason to fear political authority.

As Americans continue to debate the contemporary significance of *McCulloch* for understanding the relationship between federal and state authority, we would do well to keep in mind Marshall's commitment to the Constitution's sovereignty. As the healthcare debate shows, the question of where state authority ends and national authority begins is one that continues to provoke considerable debate. But unacknowledged by nearly all the recent appropriations of *McCulloch* is the full story of the case. Marshall's view of the Constitution's sovereignty points to the need for more disciplined inquiry into his constitutionalism as it appeared not simply in his Supreme Court opinions, but outside the realm of the Court as well. His essays in the popular press show that he believed the Constitution's sovereignty could provide common ground for proponents of a strong national government as well as principled federalists. Thus interpretations of *McCulloch* that rely exclusively on either nationalism or federalism fail to capture its fuller meaning. After all, Chief Justice Marshall never pledged his utmost loyalty to the national government. Nor was federalism the principal object of his devotion. We must never forget that above all else the object he was expounding—and defending—was the Constitution.

Chapter Three

John Marshall, *Ogden v. Saunders*, and the Character of Neo-Republican Liberty

No Supreme Court justice had as much an impact on the legal foundations of the American economy as John Marshall. Many of his most memorable opinions bear on matters related to economic development. In *Fletcher v. Peck* (1810), he defended the sanctity of the Contract Clause against attempts by the state of Georgia to repeal the sale of millions of acres of land in the Yazoo River territory. In *Dartmouth College v. Woodward* (1819), he supported Dartmouth College against political efforts to alter the institution's private charter, in doing so laying the groundwork for the expansion of private corporate enterprise free from the meddling of state legislatures. And in *Gibbons v. Ogden* (1824), he struck down a New York steamboat monopoly, in turn affirming the authority of Congress to regulate commerce between the states. Francis Stites minced no words when describing the Chief Justice's economic philosophy. While the states possessed "some power over economic development," Marshall believed that when individual state and national economic interests conflicted, "the Supreme Court would make the final choice" concerning which interest prevailed. From where Marshall sat, that choice was clear: "National supremacy and economic policy went hand in hand."[184]

As a result of Marshall's influence in such cases, it is all too common to overlook those rare occasions when his legal views on commerce failed to carry the day. *Ogden v.*

[184]Stites, *John Marshall: Defender of the Constitution*, 111.

Saunders (1827) was perhaps the most important of those instances, marking Marshall's only dissent on a constitutional question in his thirty-four years on the nation's high court. The background of the case involved the technical details of contract law and default, but for Marshall, much larger stakes were involved. The case, he believed, went to the philosophical heart of the nation's liberal and republican foundations. But of even greater significance, the survival of the Constitution itself was jeopardized by the Court's decision. In *Ogden*, Marshall registered more than mild disagreement concerning the extent of contractual obligation. He examined the power of contract alongside the duty of performance, and anchored these concepts to the constitutional republicanism he saw as essential for securing the nation's burgeoning economy.

Students of Marshall's thought have long emphasized his devotion to classical liberal principles, notably the protection of property rights and a free market economy. Vernon Parrington noted that the "two fixed conceptions which dominated Marshall during his long career on the bench were the sovereignty of the federal state and the sanctity of private property."[185] Similarly, Max Lerner argued that Marshall sought "to fight the battles of the propertied group", securing private property rights "from governmental encroachment."[186] The decision of *Ogden v. Saunders* in particular has been seen as a hallmark of his classical liberalism. Robert Faulkner sees his *Ogden* dissent as "beset with difficulties" but suggests that, when "pruned of its problems," its conclusion is that free commerce must be limited only "according to the needs of

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[185]Vernon Parrington, *Main Currents in American Thought: The Romantic Revolution in America, 1800-1860* (New York: Harcourt Brace, 1927), 23.

[186]Max Lerner, "John Marshall and the Campaign of History," *Columbia Law Review* 39.3 (1939), 396-431: 401, 420.

commerce itself and of a commercial society." Marshall was convinced, Faulkner claims, that the public interest is served by fundamental *laissez faire*, by essentially free exchange."[187] Joseph Konefsky echoes a similar point of view in his discussion of *Ogden*, asserting that it was Marshall's conviction "that it was the duty of the Supreme Court to protect America's economic community."[188] Richard K. Matthews seems to agree: while noting that there are several "not necessarily incompatible" interpretations of Marshall's constitutional thought, he argues that "in the end, his liberalism wins out" and concludes that like "Hobbes, Locke, Hamilton, and Madison, Marshall is a nondemocratic liberal."[189] Finally, Peter Irons has argued that Marshall protected property rights by interpreting the Constitution selectively, protecting private property with a liberal construction but adopting a restrictive construction with regard to individual rights.[190]

Others have viewed Marshall as a thoroughly republican thinker. In contrast to those who emphasize his commitment to personal rights, these thinkers stress his concern with public duty. According to Walter Berns, Marshall was "the greatest of the Supreme Court's republican schoolmasters," who identified constitutionality with the great figures of the founding period who provided a model of selflessness and patriotism that all citizens might approximate on a smaller scale.[191] More recently, R. Kent Newmyer finds

[187]Faulkner, *The Jurisprudence of John Marshall*, 28, 30.

[188]Konefsky, *John Marshall and Alexander Hamilton*, 137.

[189]Richard K. Matthews, "*Marshall v. Jefferson*: Beyond 'Sanctimonious Reverence' for a 'Sacred' Law," in Shevory, *John Marshall's Achievement*, 117-13: 120.

[190]Peter Irons, *A People's History of the Supreme Court* (New York: Viking, 1999), 141.

[191]Walter Berns, "The Supreme Court as Republican Schoolmaster: Constitutional Interpretation and the 'Genius of the People,'" in *The Supreme Court and American*

a “republican dimension” even in *Ogden v. Saunders*. “Call it morality, duty, or honor, Marshall believed those individuals who shared the benefits of the contract culture were also fully responsible for the contracts they made. And it was the duty of the law to make them so.”[192] This emphasis is on duty is echoed by another leading Marshall scholar, Thomas Shevroy, who argues that Marshall’s republicanism saw a divided political world, “between the elements of virtue, goodness, and stable political order on the one hand, and those of vice, avarice, and passion on the other.” The only viable force to counteract the latter phenomena was the willingness of the American people to dutifully follow the Constitution, a legal framework he believed created “dikes” preventing political passions “from overwhelming stable order, at least for a time.”[193] As Edward White put it, one of the main projects of the Court during the early nineteenth century was “that of preserving, perfecting, and modifying the exceptional American version of republicanism” evinced during the American Revolution.”[194] For these authors, Marshall’s republicanism emphasized citizens’ obligations to the rule of law and one

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Constitutionalism, eds. Bradford P. Wilson and Ken Masugi (Lanham, MD: Rowman & Littlefield, 1998), 3–16.

[192]Newmyer, *John Marshall and the Heroic Age*, 261. On Newmyer’s account, contract was the crucial link between economic liberalism and classical republicanism for Marshall: “Not only did contract law liberate individual economic energy, it harnessed that energy to the collective prosperity and well-being of society…..For Marshall, possessive individualism and republican community were inseparable.” Indeed, “like other American conservatives of his age, Marshall had no complaint against rapid, even transformative, change as long as it could be controlled” (265). Newmyer goes so far as to conclude that *Ogden* illustrates Marshall’s commitment to making the Court “the ultimate guardian of republican values in a liberal age” and was crestfallen when his fellow justices abandoned the cause (266).

[193]See his excellent “John Marshall as Republican” in Shevory, *John Marshall’s Achievement*, 75-93: 90.

[194]White, *The Marshall Court and Cultural Change,* 9, 74.

another, and one of his foremost objectives was to preserve a sense of duty to one's country and its Constitution in a time when threats to the nation were subtler than the gun barrel.

In recent years, some scholars have taken a more measured approach to Marshall's thought, arguing that his views were bound neither to rights-based liberalism nor republican values. According to these authors, liberal conceptions of rights and republican notions of responsibility possessed little conceptual clarity during the politically tumultuous years of the Marshall Court. Arguing against those who would cast Marshall as a modern liberal, Bruce Ackerman suggests that those interpretations that would cast Marshall as a liberal miss their mark, noting "it would be laughable to assert that Alexander Hamilton and John Marshall did all the really tough work in elaborating the constitution of the modern welfare state."[195] On the other hand, James Ely contends that Marshall's emphasis on property rights was hardly atypical, but simply was a reflection of "principles generally recognized as legitimate" by most Americans. On his view, the Court's decisions were part and parcel of "a broad consensus supportive of private property and contractual arrangements." Far from representing a courageous stance in defense of property rights, Ely suggests Marshall's constitutional opinions appealed to "widely accepted norms" on those occasions when lawmakers "deviated from these principles."[196] In a similar vein, Stephen Siegel questions whether Marshall and his

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[195]Bruce Ackerman, "Constitutional Politics/Constitutional Law," *Yale Law Review* 99.3 (1989), 453-547: 491.

[196]See Ely, "The Marshall Court and Property Rights," 1028, 1029. As Ely puts it, "The framers of the Constitution and Bill of Rights wove guarantees of private property into the constitutional fabric of the new nation. Marshall and his colleagues, however, were instrumental in giving vitality to the property-conscious values of the framers. In so doing, they did much to

colleagues on the Court possessed any coherent and unified theory of private property, a term that was characterized by confusion during Marshall's time.[197]

These more subtle treatments of Marshall's constitutionalism notwithstanding, few scholars have given his dissent in *Ogden* the serious consideration it deserves. This neglect leads to an incomplete understanding of Marshall's views on contract rights and state bankruptcy legislation. More important, it fails to appreciate how Marshall moved beyond the categories of both classical liberalism and classical republicanism to defend a distinctive neo-republican a theory characterized by the protection of individual liberties and the dangers of political domination. To understand Marshall as a political thinker, one must firmly grasp his assimilation of elements of the liberal and republican traditions. But one must also appreciate his profound break from these traditions in his formulation of an understanding of freedom characterized by non-domination. Marshall's view of the Constitution as preserving this new species of republican liberty, a conception of liberty he believed was uniquely suited for the nation's growing economy, was key to the argument he constructed against the Court's majority in *Ogden*.

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set the parameters of American constitutionalism for more than a century" (1060). But unlike, e.g., Madison, Ely sees the Marshall Court's commitment to securing private property rights "as a means to bring about economic growth, not as a shield merely to safeguard existing interests" (1058).

[197]See Stephen A. Siegel, "Rebalancing Professor Ely's Reappraisal of the Marshall Court and Property Rights," *John Marshall Law Review* 33 (2000), 1165-1173: 1172. On the uncertain idea of property in the early years of the republic, Siegel notes that many Americans "extolled property rights but were divided over rights of privilege. Wealth in nineteenth-century America was not a unitary concept." (1170).

Revisiting *Ogden v. Saunders*

Lewis Saunders was a merchant in Lexington, Kentucky who came to court demanding payment of a $2,200 debt arising from a contract signed by George Ogden, a citizen of Louisiana who lived in New York at the time of the contract was signed. Ogden refused to pay, claiming he was discharged from doing so by a New York bankruptcy law enacted in 1801. The statute allowed for prospective debtor relief, meaning once an insolvent debtor surrendered his or her assets, the individual was absolved from all future contractual obligations and free to re-enter the marketplace. Creditors were stuck with the bill. To some, the law provided the legislature with the ability to act quickly in the economic sphere in cases of emergency, allowing economic actors relief from undue financial hardship. To others, it represented a clear infringement of the Contract Clause, to say nothing of the terms of private economic arrangements. The main issue confronting the Court was not only whether Congress possessed the sole authority to enact bankruptcy laws, but also whether the New York statute was constitutional. Daniel Webster, representing Saunders, argued forcefully that the Constitution's Contract Clause prohibited bankruptcy laws that altered the performance of existing as well as prospective contracts. Moreover, he claimed, the state law infringed upon the power of Congress to establish uniform laws on the subject of bankruptcy throughout the United States. Ogden's attorneys, led by Henry Clay, maintained that the law was a clear violation of the clause and arrogated to a state government a legislative power—bankruptcy law—that belonged exclusively to Congress.

On March 13, 1827, the Court upheld the New York legislation as constitutional, arguing that the fact that the law enacted provisions governing prospective default did not

amount to a violation of the Commerce Clause. In general terms, the Court's majority held that the bankruptcy law passed before a contract's execution became an integral part of the contract itself. And it rejected the notion that bankruptcy law resided exclusively in Congress, arguing that in the absence of federal law, state laws governing bankruptcy were legal. Justice Bushrod Washington, a longtime friend of the Chief Justice, wrote for the majority in arguing that the Contract Clause pertained only to contracts already signed and in existence; legislation affecting the terms of future contracts was implicit in the contracts yet to be created, and thus the law hardly qualified as an impairment. Moreover, the Court agreed with Webster that the state legislature could lawfully enact bankruptcy legislation concurrently with the federal government, arguing that the Constitution's grant of power to establish "uniform laws on the subject of bankruptcies throughout the states" did not appertain exclusively to Congress. Justice William Johnson, in his concurrent opinion, warned against focusing too much on economic rights at the expense of the national welfare, declaring that "the rights of all must be held and enjoyed in subserviency to the good of the whole," and the common good "must not be swallowed up and lost sight of while yielding attention to the claim of the creditor."[198]

In his lone dissent on a constitutional question as Chief Justice, Marshall framed his argument based on what he saw as "the single question for consideration," namely, "whether the act of the State of New York is consistent with or repugnant to the

[198]As quoted in Jonathan B. Baker, "Has The Contract Clause Counter-Revolution Halted? Rhetoric, Rights, and Markets in Constitutional Analysis," *Hastings Constitutional Law Quarterly* 12 (1984), 17-104: 79.

constitution of the United States?"[199] While the Court's earlier decision in the case of *Sturgis v. Crowinshield* (1819) had struck down as unconstitutional retrospective bankruptcy laws freeing debtors from contracts created before the enactment of those laws, at issue in *Ogden* was whether a prospective law dictating insolvency terms in advance of a contract's creation was similarly unconstitutional. Marshall disagreed sharply with his fellow justices on the answer to this question, arguing that the statute violated not only the Contract Clause but also infringed upon powers over bankruptcy that belonged exclusively to the Congress. But at the heart of Marshall's dissent lay deeper concerns about the ramifications of *Ogden*: concerns related to the security of rights, the importance of economic responsibility among citizens, and the legacy left by the framers of the Constitution.

Marshall as classical liberal

For many scholars, the classical liberal tradition was the main ideological lodestar for the American Revolution as well as the Constitution's creation. With its emphasis on protections of private property, personal freedom, and limited government, the language of John Locke was not simply in the atmosphere at the time of the founding: it provided the air that breathed life into the Constitution itself. Joyce Appleby, looking back to the American Revolution, contends that the movement toward American independence marked an emergence of the "ideology of liberalism," namely, "a belief in a natural harmony of benignly striving individuals" that replaced traditional historical theories of

[199]See John Marshall, "*Ogden v. Saunders*," in *The Papers of John Marshall*, ed. Charles Hobson (Chapel Hill, NC: University of North Carolina Press, 2000) 10, 350-374: 356. Marshall was joined in his dissent by Associate Justices Gabriel Duvall and longtime friend Joseph Story. By 1827, the Court was populated mostly by Democrat appointees, reflecting a shift away from the Court's federalist bent during Marshall's early years on Court.

"cycles of corruption" with "a universal law of self-interest."[200] John Diggins agrees, pointing to American liberal thought's self-conscious and emphatic break "from the paralyzing grip of the past."[201] Along similar lines, Issac Kramnick identifies "self-centered economic productivity, not public citizenship," as the "badge of the virtuous man" throughout the colonial period.[202] Such interpretations would seem to confirm broader historical arguments that the United States has always been home to a persistent, even "irrational," liberalism.[203] But apart from these theories' larger implications, on this much these authors agree: the early-colonial and founding periods were a time when abstract liberal principles found clear practical expression.

On the subject of contract creation, Marshall struck a distinctly liberal chord. In a narrative redolent of John Locke, he looked back to the past, to "the rudest state of nature," where "a man governs himself, and labours for his own purposes."[204] In such primitive circumstances, it was certain that the products one acquired through physical exertion were one's own, "at least while in his possession, and he may transfer it to another." Bartering and trading were rights predating society, Marshall claimed, as were

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[200]Joyce Appleby, "The Social Origins of American Revolutionary Ideology," *The Journal of American History* 64.4 (1978), 935-958: 956. See also Appleby's expansion of her argument in her *Liberalism and Republicanism in the Historical Imagination* (Cambridge, MA: Harvard University Press, 1992).

[201]John P. Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (Chicago: University of Chicago Press, 1984), 131-132.

[202]Issac Kramnick, *Republicanism and Bourgeois Radicalism* (Ithaca, NY: Cornell University Press, 1982), 662.

[203]Louis Hartz, *The Liberal Tradition in America* (New York: Harvest, 1991), 208. For a recent reappraisal and defense of the Hartzian thesis, see John W. Kingdon, *America the Unusual* (Belmont, CA: Wadsworth, 1999).

[204]*Ogden*, 365.

the informal norms of agreement and performance implied by such practices. Each individual possessed the fundamental right to form such agreements, as well as "the right to enforce" them by insisting that others "keep faith" with those agreements.[205] Such agreements were framed with an expectation of performance, not default. As he put it, "they are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected."[206]

The contrast between such simple primeval arrangements and the complexity of state bankruptcy legislation could hardly have been more stark. Contracts were agreements drawn up by and representing the rights of "honest, fair, and just men."[207] They were not "a creature of society," deriving authority from positive law.[208] For, as Marshall asserted, "we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know any thing, evince the idea of a pre-existing, intrinsic obligation."[209] The implication was clear: contracts may be controlled within certain limits by society, but they could never be a product of convention. Indeed, those who framed the Constitution and the Contract Clause were certainly familiar "with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion," and those authors concurred that "contracts possess an original intrinsic

[205]Ibid., 366.

[206]Ibid., 364.

[207]Ibid., 363.

[208]Ibid. 364.

[209]Ibid., 365.

obligation, derived from the acts of free agents, and not given by government."[210] For Marshall, as for Locke, property, acquisition, trade, and commerce were all rights or emanations of rights preceding society and legal interference. As he concludes, it is "the stipulation an individual makes which binds him" to "perform what he has undertaken to perform," not "some declaration of the supreme power of a State to which he belongs."[211]

It was true, Marshall conceded, that with the creation of civil society, the individual did not retain the enforcement power pertaining to contracts enjoyed in the state of nature. This right of coercion, he states, "is necessarily surrendered to government."[212] The point was a practical one for Marshall, since "it would be incompatible with general peace" for each individual to retain such authority in civil society.[213] This transfer imposed on government the important duty of furnishing a "more safe and more certain" legal remedy to contractual defaults. Moreover, he continued, the transfer gave government the right to nullify and prohibit economic agreements "deemed mischievous."[214] For Marshall, it was a fine but critical distinction concerning government power: individuals had surrendered only a punishment power to the state, not the authority to set legal terms to the agreements reached between private individuals.[215]

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[210]Ibid., 371, 372.

[211]Ibid., 365.

[212]Ibid., 366.

[213]Ibid., 369.

[214]Ibid., 367.

[215]As Newmyer suggests, "the fundamental error in the majority's position was to assume 'that it is not the stipulation an individual makes which binds him, but some declaration

For Marshall, the legislature's role in relation to contracts was largely remedial. Local governments, while "restrained from impairing the obligation of contracts," nonetheless "furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves."[216] While government could not negate the principle of obligation, there were circumstances where its officers were responsible for ensuring contractual stability. The Constitution, Marshall emphasized, had not made this enforcement explicit, because the document had treated the states "with the respect which is due to intelligent beings, understanding their duties, and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion."[217]

While laws may regulate the right to contract, where that right is not regulated, it is retained in its original extent. Individuals remain free to make contracts and are not dependent upon government for the sanction and obligation generated by such agreements. Hence while government may afford remedies and pass provisions such as those requiring that contracts be in writing, obligation itself remained sacrosanct, an incidence of "that degree of free agency" that Marshall believed the laws left to every individual.[218] The New York law, in Marshall's view, directly threatened this liberty. He felt "no hesitation in saying that however law may act upon contracts, it does not enter

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of the supreme power of a state to which he belongs.'" See Newmyer, *John Marshall and the Heroic Age*, 262.

[216]*Ogden*, 369.

[217]Ibid., 370.

[218]Ibid., 369.

into them and become a part of the agreement."[219] Rights and the obligations that followed from their exercise were not produced or directed by the whims of legislative majorities or executive fiat, but secured by the Constitution.

Marshall as republican

In contrast to those who identify the United States with Lockean liberalism, many scholars look to early America and see a distinctly republican influence. J.G.A. Pocock was perhaps the most systematic scholar to highlight the influence of classical republican thought in North America during the latter half of the eighteenth century.[220] Drew McCoy concurred, pointing out that "the Revolutionaries … seemed obsessed with the idea that a republican polity required popular virtue for its stability and success."[221] Similarly, Bernard Bailyn argued that classical republican themes of power and corruption were prominent concerns at the time of the Constitution's ratification.[222] Even after the Constitution's ratification, Lance Banning argues, classical republican ideas remained prominent in the vocabulary of many Americans throughout the 1790s.[223]

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[219]Ibid., 364.

[220]J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1974).

[221]Drew R. McCoy, *The Elusive Republic* (Chapel Hill, NC: University of North Carolina Press, 1980), 7.

[222]See Bailyn, *The Ideological Origins of the American Revolution*, 26, 35-54. Into the late eighteenth century, Robert Shalope agrees, the importance of classical republican ideas in early-American political thought was rarely denied by most historians of the period. See his "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," *The William and Mary Quarterly* 29.1 (1972), 49-80.

[223]Lance Banning, *The Jeffersonian Persuasion* (Ithaca, NY: Cornell University Press, 1978), 13-18. Some authors have argued that classical republican influences extended even into the nineteenth century. See, e.g., Rowland Berthoff, "Independence and Attachment, Virtue and Interest: From Republican Citizen to Free Enterpriser, 1787-1837," in *Uprooted Americans*, eds.

Marshall's classical republican sympathies emphasized the duty citizens owed each other, and those economic obligations that applied equally to all persons, regardless of background, wealth, or social standing. Once an agreement was entered, the fulfillment of its terms was irrevocable. This responsibility, generated "by the act of the parties," harkened back to those basic treatises on the law of obligation and contract that had been the basis of America's legal system.[224] In these works, Marshall claimed, one found general agreement "that contracts possess an intrinsic obligation, derived from the acts of free agents, and not given by government."[225] The bond created by economic agreements—"the duty of keeping faith between … parties and the right to enforce it if violated"—entailed an obligation toward others that was carried by individuals into society, one that was neither created nor removable by political officers.[226] Legislative attempts to modify this pre-political duty risked not only disrupting economic stability, but undermining a fundamental commitment incumbent upon all citizens.

Despite Marshall's emphasis on the minimal role of government in matters of contract, he nonetheless stressed that legislators maintained a narrow but important

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Richard L. Bushman, Neil Harris, David Rothman, Barbara Miller Solomon, and Stephen Thernstrom (Boston, MA: Little Brown and Co., 1979), 99-124 and John Murrin, "The Great Inversion, or Court versus Country: A Comparison of the Revolution Settlements in England (1688-1721), and America (1776-1816)," in *Three British Revolutions*, ed. J.G.A. Pocock (Princeton, NJ: Princeton University Press, 1980), 368-453.

[224]Gary McDowell speculates that such theorists surely included those with whom Marshall and the framers had an "easy familiarity," particularly "Grotius, Hobbes, Pufendorf, Locke, Vattel, Burlamaqui, Rutherforth, Blackstone, and Montesquieu." See his *Language of Law*, 314.

[225]*Ogden*, 372.

[226]Ibid., 366.

intermediary function. Affording legal remedies was one such responsibility. Instituting "statutes of frauds, of usury, and of limitations" were among other duties.[227] These exercises of "the external action of law upon contracts" constituted "the usual exercise of legislative power," one that refrained from "introducing conditions into them not agreed to by the parties."[228] It was the solemn duty of political officials to address such aberrations in commercial exchange, and the "high sense of duty which men selected for the government of their fellow citizens must be supposed to feel" should furnish a guard "against a course of legislation which must end in self-destruction" for the country.[229] The "solemn oath taken by every member to support the constitution of the United States," he warned, prohibited "intentional attempts to violate its spirit while evading its letter." Thus, to provide a legal remedy, "a delicate and important duty," was one of the foremost responsibilities of elected officials.[230] Indeed, the failure to uphold the Constitution and afford a remedy to injured parties would be calamitous from an economic standpoint. Worse, dereliction of this "high duty" would subject "the government to the just reproach of the world."[231] For Marshall, contractual obligation and law were complementary, not identical. As he put it, the two "originate at different times and are derived from different sources."

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[227]Ibid., 365.

[228]Ibid., 364.

[229]Ibid., 371.

[230]Ibid., 356.

[231]Ibid., 369.

Thus there were limits to the Constitution's legal coercion. Consistent with his belief that the law left a considerable zone of free agency to every individual, Marshall argued that the Court could not legally enforce all aspects of a contract. Some dimension of obligation must be left to citizens. For him, there existed a basic trust that parties entered into when drawing up a contract that could not be remedied or enforced. This moral dimension of a contract, Marshall conceded, ultimately depended upon the relationships among citizens, not legal means, for its observance. As he put it, "all admit that the Constitution refers to and preserves the legal, not the moral, obligation of a contract."[232] The continuity of economic arrangements was built upon the informal relationships created by citizens, those that were "enforced by the operation of internal and invisible agents, not by the agency of human laws."[233] Notwithstanding his unwavering veneration of the Constitution, Marshall recognized that the there remained a realm of public life separate from legal interference and coercion, an area characterized by the willingness of citizens to keep their word with each another. Ultimately, a prosperous economy depended as much on the level of trust that obtained among the marketplace's participants as it did on the principle of profit-maximization.

Marshall's neo-republicanism

While liberal and republican ideas may have been the most prominent source of ideas in early American political culture, it is important to remember that, like much else, these concepts were also undergoing definitional change. As John Gunnell concludes,

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[232]Ibid., 360.

[233]Ibid.

"the much contested issue of the philosophy of the founding" is best resolved by discarding "the fundamental premise ... that there was a distinct, or dominant, philosophy."[234] Throughout the eighteenth century, as John Murrin notes, North America was "experiencing a transition from a premodern to a modern social order," and traditional understandings of republicanism were not exempt from this transformation.[235] In this vein, many scholars have identified during these years the emergence of a new "commercial republicanism," a theory that wedded classical liberalism's emphasis on private interest to republican concerns for the common welfare.[236] On these accounts, thinkers as diverse as Adam Smith, Montesquieu, Benjamin Franklin, and Alexis de Tocqueville held to a common conviction that a society based on the interdependence fostered by commercial exchanges would offer "a more sensible and realizable alternative" to ancient republics that were sustained by a small, homogenous population governed by civic virtue or divine law.[237] More recently, scholars such as Quentin

[234]John Gunnell, *Imagining the American Polity: Political Science and the Discourse of Democracy* (University Park, PA: Pennsylvania University Press, 2004), 30.

[235]John Murrin, "Self-Interest Conquers Patriotism: Republicans, Liberals, and Indians Reshape the Nation," in *The American Revolution: Its Character and Limits*, ed. Jack P. Greene (New York: New York University Press, 1987), 224-229. As Thomas Pangle puts it, whatever remained alive of classical republicanism in 1787 could hardly maintain coherence while also "ballooning" to include Locke's State of Nature doctrine, Adam Smith, and American Puritanism." See his *Spirit of Modern Republicanism* (Chicago: University of Chicago Press, 1988), 35.

[236]See John T. Agresto, "Liberty, Virtue, and Republicanism: 1776-1787," *Review of Politics* 39.4 (1977), 473-504; Ralph Lerner, *The Thinking Revolutionary* (Ithaca, NY: Cornell University Press, 1987), 195-221; and Jean Yarbrough, "The Constitution and Character: The Missing Critical Principle?," in *To Form a More Perfect Union: The Critical Ideas of the Constitution*, eds. Herman Belz, Ronald Hoffman, and Peter J. Albert (Charlottesville, VA: University of Virginia Press, 1992), 217-249.

[237]As described in Ralph Lerner, "Commerce and Character: The Anglo-American as New-Model Man," *The William and Mary Quarterly* 36.1 (1979), 3-26: 3. As Lerner puts it, such

Skinner and Philip Pettit have endeavored to formulate a similar theory of republican liberty, characterized by individual enjoyment of "non-domination." Historically, Skinner contends, "unfree" states are those that are either ruled tyrannically or where an individual's "capacity for action" is "dependent upon the will of anyone other than the body of its own citizens."[238] By contrast, Skinner and Pettit have developed a theory of "neo-republicanism" defined by an individual being placed "in a position where no one can interfere arbitrarily in your affairs."[239] In practical terms, Pettit argues, such liberty is secured by institutions and laws that erect legal barriers against the domination of one citizen's liberty by another. These arrangements, he continues, have paved the way for a "newer republicanism," one with "a juridical cast in which a central place was given to the notion of rights—customary, legal, and constitutional rights—as bulwarks against absolute power."[240] For these neo-republicans, theorizing liberty as freedom from

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thinkers identified a "complex, ever-changing interdependence" arising from commercial exchange, an interdependence indirectly facilitated by all those who "labored intently to satisfy" personal wants. In doing so, "men would become commercial cousins, cool fellow-citizens of a universal republic" (11). See also Stephen Miller, "Adam Smith and the commercial republic," *The Public Interest* 61 (1980), 106-122.

[238]Quentin Skinner, *Liberty Before Liberalism* (New York: Cambridge University Press, 1998), 49. Skinner suggests that the mere threat of such domination constitutes a deprivation of liberty: "Your rulers may choose not to exercise these powers, or may exercise them only with the tenderest regard for your individual liberties. So you may in practice continue to enjoy the full range of your civil rights. The very fact, however, that your rulers possess such arbitrary powers means that the continued enjoyment of your civil liberties remains at all times dependent on their goodwill" (70).

[239]See his *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), 107.

[240]Ibid., 21. For Pettit, his neo-republicanism recalls seventeenth century notions of "people's rights under the law," especially "rights against the powerful" (22-23). Furthermore, Pettit claims that this idea of non-domination finds expression in the "contestatory" citizenship familiar to the earlier republican thought of Polybius, Cicero, and Livy. See Pettit, "Two

political domination complements and enriches republicanism's historical emphasis on the common good.

Marshall likewise feared political domination, and saw it proceeding directly from the halls of the state legislatures. The changes wrought by the New York legislature went to the heart of individual liberty in the economic realm. He was careful to emphasize that while state law may legitimately regulate market manipulation, the law's stipulations must not go so far as to become a "constituent" part of contract.[241] Legislative acts imposing stipulations that were not contemplated by either contracting party represented "a very unusual and a very extraordinary exercise of the legislative power," an encroachment that "ought not to be gratuitously attributed to laws that do not profess to claim it."[242] The legislature's ability to invade the right to contract could not be ceded lightly, Marshall believed, for once a law became an intrinsic part of "all subsequent contracts," nothing could halt state government's ability to regulate the terms of any and all economic agreements.[243] There was no turning back: Marshall feared that tolerating partial legislative control over contracts in *Ogden* could very well lead to total control over contracts. Conceivably, he speculated, a future law might decide that "all contracts should be subject to legislative control" and could be discharged only in such manner as the legislature prescribed. It would be far safer to allow the "act of the parties," not "the

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Republican Traditions," in *Republican Democracy: Liberty, Law, and Politics*, eds. Andreas Niederberger and Philipp Schink (Edinburgh: Edinburgh University Press, 2013), 169-204: 171.

[241]*Ogden*, 360.

[242]Ibid., 364.

[243]Ibid., 361.

interference of the legislature," to define the scope and contingencies of commercial agreements. By assuming for itself "the power of changing the relative situation of debtor and creditor, of interfering with contracts," the legislature had assumed for itself authority over those commercial relationships that went "home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management."[244] No individual, Marshall believed, could be free so long as this power loomed over economic affairs.

Like fellow Federalist James Madison, Marshall also feared the invasion of liberties by majorities or minorities, democratically elected or otherwise. The New York law rested its authority on just such a majority, not the law of the Constitution. The fact that the Court's majority had legitimized the law against the Constitution's commerce clause was a canary in the coal mine, signaling a growing transition of political authority away from the rule of law and toward the will of elected officials. After all, imposing "restraints" on legislation concerning contracts "was thought necessary by all those patriots who could take an enlightened and comprehensive view" of the Articles of Confederation.[245] Siding with the legislature against the Constitution meant siding with the passions of the moment, and not with the careful deliberations of the constitutional convention. This was a precarious foundation indeed upon which to build political authority. The states were unpredictable, their policies typically guided by neither caution nor prudence. Open the door to some legislative meddling in contractual negotiations,

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[244]Ibid., 372.

[245]Ibid.

Marshall warned, and very soon restrictions would be imposed for no other reason save that "the legislature has so enacted" them.[246] In effect, the law bestowed "a high prerogative indeed" upon the legislature "to decide that one enactment shall enter the contract," while others may "be excluded from it." Allowing the legislature such broad authority rendered the terms of economic arrangements, to say nothing of the nation's economy, highly uncertain and thereby unstable.

The significance of *Ogden* thus went beyond the arcane subject of contract law. According to Marshall, the New York law would imperil the civic health of the nation that had been rehabilitated by the Constitution's ratification in 1788. Pointing out that state interference with private contracts was a chief "mischief" afflicting the country under the Articles of Confederation, he recalled that legislative tampering was taken "to such an excess" by the state governments as to "break in upon the ordinary intercourse of society."[247] The "ordinary intercourse" of the nation included much more than economic relations. At a fundamental level, Marshall declared, "confidence between man and man" was also eroded by such legislation. Indeed, more than "the existence of credit" and "the sanctity of private faith," very "morals of the people" were threatened by political meddling. Certainly the Court's ruling would render the "great principle" of contractual sanctity, "one of the most important features in the constitution of the United States," entirely "useless." But of even worse consequence, the Court would effectively cast aside a clause "which the state of the times most urgently required, one on which the good and

[246]Ibid., 362.

[247]Ibid., 372.

the wise reposed confidently for securing the prosperity and harmony of our citizens."[248] Concerned as he was with the economic impact of *Ogden*, Marshall was just as troubled by the civic consequences of the Court's decision.

The most effective curb to political domination rested in the Constitution. The Constitution provided the legal structure and protections necessary to thwart the will of the elected branches of government. It was beyond doubt, he wrote, that the Constitution recognized that the "great mass of human transactions" arose informally among individuals.[249] Such agreements originated and "grew out of the acts of the parties," not government, and those agreements usually included whatever "stipulations, which, as honest, fair, and just men, they ought to have made." The framers of the Constitution appreciated the informal character of these agreements and understood that the very "nature of our Union" was intended "in a great measure" to make Americans a single people with respect to their commercial relations, and that "so far as respects the intercommunication of individuals … the lines of separation between States are, in many respects, obliterated."[250] Perceiving this destination on the horizon, the framers drafted a document that would facilitate rather than frustrate the nation's commercial progress. The document was a plan for the future, not a legal code to remedy short-term problems. It spoke in "general terms comprehending a whole subject," especially regarding economic matters.[251] The meaning of its Contract Clause was absolute, unequivocal, and final: "No

[248]Ibid., 361.

[249]Ibid., 363.

[250]Ibid., 357.

[251]Ibid., 374.

State," it declared, "shall…pass any…Law impairing the Obligation of Contracts." The implication was that the Constitution instituted a legal order leaving to each citizen "the conduct … in those things which he supposes to be proper for his own exclusive management."[252] Thus the document's language contemplated "restraint as to the obligation of contracts," not a determined "hostility to invade the inviolability of contract, which is placed beyond its reach."[253] Its words treat citizens and the state governments with a language of respect, as befitting "intelligent beings understanding their duties and willing to perform them; not as insane beings who must be compelled to act for self-preservation." In brief, the Constitution advanced an ideal of freedom in which citizens were given a wide berth to deliberate, plan, set terms, and see to conclusion the agreements they reached with one another. More than national political officials, the state governments, or even the judiciary, it was the Constitution that provided to the American people an escape from political domination.

Consistent with neo-republican theories, Marshall's dissent called attention to the dangers posed by political domination and the necessity of a legal framework to guard against them. The New York statute set a grave standard for future actions the elected branches of government could take in the economic realm. Ever the realist, Marshall warned that liberty was imperiled no longer by foreign enemies alone, but from threats issuing from domestic forces as well. Instituting effective barriers against the latter "evil" had been the mission of those truly virtuous and wise statesman at the time of the

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[252]Ibid., 372.

[253]Ibid., 370.

framing, he reminded his readers, and was "one of the important benefits expected" from their new Constitution.[254] Thus in *Ogden*, Marshall appealed to a constitutional republicanism, one that valued the classical emphasis on duty but recognized that alleviating the threat of political domination depended ultimately on the existence of a stable legal order.

Conclusion

For Marshall, *Ogden v. Saunders* was about themes of political theory that rose above bankruptcy law, contractual performance, or even the more typical questions the Supreme Court confronted concerning federal versus state sovereignty. On a larger scale, the case affected society "deeply and seriously," revolving around fundamental tensions involving economic versus political authority, individual rights and the claims of community.[255] While Marshall was clearly disturbed by the economic consequences of New York's newfound influence over commercial affairs, something greater than a hardboiled libertarian ideology characterized his dissent in the case. Indeed, by this point in his tenure, a number of Marshall's core beliefs were under fire. Liberties were in jeopardy. Republican virtues of duty and obligation were also at stake. And looming on the national horizon was the prospect of uncontrolled state legislatures, possessing the imprimatur of the Court to exercise hitherto unprecedented power over their constituents' affairs. In contrast to those who would emphasize above all else either Marshall's liberalism or republican commitments, *Ogden* attests to Marshall's sympathies for both traditions.

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[254]Ibid., 372.

[255]Ibid., 360.

Greater consideration of *Ogden* is therefore warranted to fully appreciate Marshall's political thought. His dissent in the case is much more than an oddity or piece of trivia, the rare occasion when Marshall departed from the consensus and unity he sought so diligently to build as Chief Justice. Moreover, the dissent is more than another example of his longstanding distrust of the state legislatures. Marshall invoked the language of natural rights as well as that of duty and obligation to build his argument against the majority opinion. But despite his support for elements of both theories, he does not limit himself to these two frameworks. Rather, he raises an alternative account of republicanism based on non-domination, one he saw as incorporating the best aspects of liberalism and republicanism. Marshall's neo-republicanism celebrated individual rights alongside the responsibilities toward one's fellow citizens that accompanied their exercise. Without the institutions provided by the rule of law, however, neither liberal rights nor republican duty could be secure.

Thus it is fitting that the Constitution itself was the keystone of Marshall's argument. Set aside the passions of the moment, he insisted, and look to "the mind of the convention" when interpreting the Constitution.[256] "Look back to the history of the times" and "the august spectacle" of the state ratifying conventions, he urged.[257] Remember and do justice to those who had taken a truly "enlightened and comprehensive view of our situation." Ever mindful of the fragility of constitutional government in America, even a seemingly mundane bankruptcy suit like *Ogden* stoked Marshall's

[256]Ibid., 373.

[257]Ibid., 372.

apprehensions. While drawing upon the influence of classical liberal and republican principles for understanding contractual obligation, Marshall pressed beyond these traditions to recognize the Constitution’s function in unifying the American people against political domination. In *Ogden*, one sees Marshall as not only a legal thinker. Nor is he merely a liberal or republican theorist. At the center of these often competing theories, and at the center of his lifetime of public service, was the Constitution.

Conclusions: The Legacy of Marshall's Constitutionalism

Despite his place at the summit of American legal and constitutional history, John Marshall's political thought has long been shrouded in ambiguity. Marshall is most famous for his constitutional opinions, and his thinking typically circumscribed to the Supreme Court. But like the man himself, his arguments are much more wide ranging and deliberate—indeed, much more philosophical—than they appear at first glance. His constitutionalism contained political dimensions that belie accounts that conceive Marshall's thought in the bloodless language of law alone. Furthermore, those accounts that do take seriously Marshall's political thought typically take matters too far: he was neither an uncritical liberal theorist nor a devotee of the Federalist Party. A full appreciation of Marshall as a political thinker must be all-encompassing enough to include his abstract philosophical convictions as well as his practical assessment of the Constitution's influence in the fledgling United States.

By revisiting some of the most important of Marshall's opinions, we gain better insight into his vision of what values the new nation should impress upon its citizens in its early years. As the nation's third Chief Justice, Marshall was in the thick of the difficult task of legitimizing a nation to a people whose identification and sense of citizenship had hitherto stopped at the shores of state boundaries. Such acclimation was by necessity gradual work, and forced Marshall to continually probe the question of what constitutional obligation, sovereignty, and citizenship required. Turning to John

Marshall's corpus reminds us that the role of the constitutional government—its content, scope, proper jurisdictions, and responsibilities—was publicly re-thought and contested even in the earliest years of the new republic. While no anti-Constitution party emerged after 1787, the function of the instrument was ambiguous. Well into the 1800s, it was up to political figures to elevate its status in national affairs.

Marbury v. Madison represents perhaps Marshall's most serious engagement with the notion of constitutional legitimacy. More than a case dealing with judicial review, Marshall invokes the Constitution's protection of liberties, its embodiment of popular sovereignty, and its ability to provide legal focal points for the nation as bases for its binding authority. But of even greater significance in *Marbury* is Marshall's theory of the document's moral legitimacy. In *McCulloch v. Maryland*, Marshall draws a line between national and state authority in striking down a state law taxing a federal institution. But in the opinion and in his public commentary following the verdict, Marshall emphasizes the sovereignty of the Constitution as controlling legislation passed by the national as well as state governments. Finally, in his dissent in *Ogden v. Saunders*, he used the occasion of a state law concerning bankruptcy to articulate a neo-republican understanding of liberty based on political non-domination, a type of freedom he believed could only be secured by the Constitution.

What unites the different threads of these arguments is Marshall's commitment to the absolute supremacy of the Constitution and the rule of law. Under its rule, seemingly contradictory notions of popular sovereignty and rights, federalism and nationalism, and liberalism and republicanism are mutually reinforcing for Marshall. While Marshall acknowledged other stakes in such debates, they were less important for him than loyalty

to the Constitution. But his was never an unthinking devotion. Instead, his writing consistently forces readers to reflect on the sufficiency of the political categories raised in a given case, as his arguments in support of the Constitution proceed by way of careful exposition. Thus Marshall's political thought approximates most closely those philosophies that see a role for the Constitution in knitting together disparate people as an alternative to traditional national identities held together by no stronger bonds than blood and soil. As William Booth puts it, "citizenship of the constitutional-patriotic sort stands midway between … national membership of the kind in which the boundary markers are … exclusionary, nonpolitical attributes, and the nomadic world of itinerants and their neighborhoods."[258]

In his later years on the Court, Marshall's optimism toward a union based on loyalty to the Constitution declined. By the 1830s, tensions between the states and the national government were rapidly reaching a breaking point. Partisanship was at an all-time high. And the unanimity Marshall had worked so hard to achieve as Chief Justice was dissolving before his eyes as Democrat-Republican judges were appointed to the bench. States rights' theories were becoming ever more popular, as was skepticism toward the national government. The nation was headed into uncharted waters, Marshall believed, and it was not clear the Constitution could guide the American people through—that is, if the people even wished for its guidance. By the time his tenure on the Court was drawing to a close in 1832, he gloomily predicted to close friend and colleague Joseph Story that "the union has been preserved thus far by miracles, and that cannot

[258]William James Booth, *Communities of Memory: On Witness, Identity, and Injustice* (Ithaca, NY: Cornell University Press, 2006), 56.

continue."[259] With the nation on the cusp of the Civil War, one cannot fault his prediction. When Marshall died in Philadelphia in 1835, he believed his lifelong efforts to build a national identity based on the Constitution had ended in failure.

Marshall would likely find much to lament in our political climate. He would regret the fractured state of American politics today, and deplore the political divisions that have come to characterize the decisions of the modern Supreme Court. But at least one feature of American politics would meet his approval: the enduring salience of the Constitution in American political discourse. "Powerful and ingenious minds," he warned in *Gibbons v. Ogden* (1824), would try their hardest to convince individuals "through refined and metaphysical reasoning" that the Constitution was "a magnificent structure, indeed, to look at, but totally unfit for use."[260] On this score, at least, it would come as some surprise to Marshall that the Constitution's enemies lost, and that the document he defended, after overcoming significant obstacles, has endured. Ever mindful of its tendency to come under fire, however, he would continue to point to the Constitution as an authority for national policy as well as a source of unity—perhaps the only source of unity—at a time of ongoing partisan strife and rancor. His political thought introduces us as readers, as students ourselves of the Constitution, to the fundamental and enduring importance of the rule of law for citizens today.

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[259] John Marshall, "Marshall to Story, 25 December 1832," in *The Papers of John Marshall*, ed. Charles Hobson (Chapel Hill, NC: University of North Carolina Press, 2006), 12: 247.

[260] John Marshall, "*Gibbons v. Ogden*," in *The Papers of John Marshall*, ed. Charles Hobson (Chapel Hill, NC: University of North Carolina Press, 2000) 10: 7-34, 33.

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