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## John Marshall and the Rule of Law

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BOOK REVIEW

JOHN MARSHALL AND  
THE RULE OF LAW

THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW. By Charles F. Hobson. Lawrence, Kansas: University Press of Kansas, 1996. Pp. xv, 256. \$35.00.

THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835. By Herbert A. Johnson. Columbia, S.C.: University of South Carolina Press, 1997. Pp. xii, 317. \$39.95.

JOHN MARSHALL: DEFINER OF A NATION. By Jean Edward Smith. New York: Henry Holt & Co., 1996. Pp. xi, 736. \$35.00.

*Reviewed by John V. Orth\**

On any list of America's greatest judges, John Marshall, the great Chief Justice, is sure to appear—usually at the top.<sup>1</sup> Judicial greatness is demonstrated not by a single great opinion but by a series of great decisions

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1. Perhaps the best known list of the greatest American judges was propounded by Dean Roscoe Pound of the Harvard Law School in lectures he delivered at the Tulane Law School in 1936 on the centennial of Edward Livingston's death. Listed in chronological order, "the ten judges who must be ranked first in American judicial history" are as follows: John Marshall, James Kent, Joseph Story, John Bannister Gibson, Lemuel Shaw, Thomas Ruffin, Thomas McIntyre Cooley, Charles Doe, Oliver Wendell Holmes, and Benjamin Nathan Cardozo. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 30 n.2 (1938). A 1978 statistical study reported that Marshall is "commonly acclaimed as the most important of all American jurists." ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* 40 (1978). A more recent list by Bernard Schwartz, limited to United States Supreme Court justices, also begins with Marshall and includes the following: Joseph Story, Roger Brooke Taney, Stephen J. Field, Oliver Wendell Holmes, Louis Dembitz Brandeis, Charles Evans Hughes, Hugo Lafayette Black, Earl Warren, and William J. Brennan, Jr. Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 *TULSA L.J.* 93, 94 (1995).

The reverse inquiry, identifying the least significant justice, has also been attempted. See David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 *U. CHI. L. REV.* 466, 480 (1983) (unable to reach a definitive conclusion); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 *U. CHI. L. REV.* 481, 496 (1983) (nominating Justice Thomas Todd).

rendered over a course of years. A precondition of greatness is, therefore, a long judicial tenure. Judicial greatness also implies impact: great decisions are seen to make a difference, usually by the judge's own contemporaries as well as by posterity. Great judicial opinions are well-written, usually including at least a few quotable passages. Therefore, great judges must possess a modicum of literary style.

The foundations of Marshall's greatness are firmly laid. He presided for thirty-four years over the United States Supreme Court.<sup>2</sup> Of the hundreds of opinions he authored, many were recognized immediately as important state papers. Trained in the plain style of eighteenth-century English prose, he wrote simple, clear, unornamented sentences, enlivened by occasional epigrams.<sup>3</sup>

Longevity alone does not ensure eminence in judging or in any other occupation, and a voluminous output is only a necessary, not a sufficient, condition of judicial greatness. A great judicial opinion is, above all, recognized as persuasive, first by the litigants and legal community, and also by the public at large. In *Mitchell v. United States*,<sup>4</sup> his last reported opinion as Chief Justice, Marshall dismissed "the hope of deciding causes to the mutual satisfaction of parties" as "chimerical" and set the more realistic goals of "convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the Court has been exercised on the case . . ."<sup>5</sup> Of course, persuading the public means stating the issue more broadly and associating it with principles of general application, a task at which Marshall famously excelled.

2. While none of the authors whose books are reviewed dwell on the practical impact of Marshall's long tenure, Hobson notes in his preface that "[a]s chief justice of the United States from 1801 to 1835, [Marshall] remained on the public stage far longer than his political contemporaries." CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* ix (1996).

3. There is a surprising paucity of quotations from Marshall in the books under review and a surprising lack of appreciation for Marshall's literary style, which even Oliver Wendell Holmes admitted was "good." OLIVER WENDELL HOLMES, *SPEECHES* 89-90 (1918). Consider, for example, the grand cadence of Marshall's oft-quoted statement of the holding in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means 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." Also ignored is Marshall's occasional flair for epigram. Perhaps the most famous, also from *McCulloch*, is the eminently quotable "the power to tax involves the power to destroy." *Id.* at 431. The reviewer's personal favorite is from *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), a case concerning Indian title. Marshall's language and sentiment would have appealed to Holmes: "Conquest gives a title which the Courts of the conqueror cannot deny . . ." *Id.* at 588.

4. 34 U.S. (9 Pet.) 711 (1835).

5. *Id.* at 723.

The quality of Marshall's judgment, including its source and exercise, is the subject of three new books. Jean Edward Smith's *John Marshall: Definer of a Nation* is a full-length biography.<sup>6</sup> Herbert A. Johnson's *The Chief Justiceship of John Marshall, 1801-1835* surveys Marshall's judicial contribution as part of a series on Chief Justiceships of the United States Supreme Court,<sup>7</sup> while Charles F. Hobson's *The Great Chief Justice: John Marshall and the Rule of Law*<sup>8</sup> is a study primarily of Marshall's great constitutional decisions.

Marshall was forty-five years old when he became Chief Justice. Aside from insignificant service on the Richmond City Hustings Court, it was his first judicial assignment. Without the Chief Justiceship to crown his career, Marshall would have deserved an honorable mention in the annals of the early Republic. As a soldier in the Revolutionary War, he served at Valley Forge.<sup>9</sup> As a leader of the Richmond bar, he served in the state legislature and ardently supported the Constitution at the Virginia ratifying convention. As a national statesman, he was one of three American envoys to France who vindicated republican virtue by refusing to accede to French demands for a bribe in the notorious XYZ Affair. After briefly serving in the U.S. House of Representatives as a Federalist from Virginia, Marshall attained his highest political office, Secretary of State, in the waning months of John Adams's Administration.

Smith covers Marshall's pre-Supreme Court years fully and fairly. Marshall emerges as the strongest and most principled of the American envoys<sup>10</sup> in Smith's account of the XYZ Affair. The story of the duel of

6. JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* (1996).

7. HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835* (1997). The series is edited by Johnson and published by the University of South Carolina Press. Other volumes in the series include WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (1995), JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910* (1995), and MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953* (1997).

8. HOBSON, *supra* note 2.

9. After recounting Marshall's service at the battle of Great Bridge, Smith reports that "Thomas Jefferson shared Washington's tactical opinion and extravagantly predicted that Norfolk would become a second Carthage. Paraphrasing Cicero, he wrote to his friend John Page, '*Delenda est Norfolk*' [Norfolk must be destroyed]." SMITH, *supra* note 6, at 50. As Jefferson must have known, the classic call for the destruction of Carthage was delivered not by Cicero but by Cato the Elder. See PLUTARCH, *THE LIVES OF THE NOBLE GRECIANS AND ROMANS* 276-90 (John Dryden trans., 1952) (life of Marcus Cato).

10. Smith seems to make one minor misreading of an original document in his reconstruction of events surrounding the XYZ Affair. In the text Smith reports:

News of Marshall's appointment as diplomatic envoy was greeted enthusiastically by the Federalists, but the Republicans were skeptical. One exception was Marshall's old friend St. George Tucker. Tucker

wills between the greedy French foreign minister, Talleyrand, and the U.S. envoy reads like a subtle diplomatic thriller. Overall, Smith allows the characters and their motives to come to life from the documents with few authorial comments.

As Chief Justice, Marshall was famous for his ability to charm all those around him, particularly his opponents. Johnson illustrates this in his study of Marshall's Court years: "Quite frequently, objective scholars working upon Marshall have been converted from impartial observers into impassioned Marshall advocates."<sup>11</sup> All three authors apparently succumbed; this reviewer certainly did. For his intelligence, patience, good humor, courage, compassion, and companionship, Marshall is exemplary. His invalid wife required lifelong care which Marshall tenderly provided.<sup>12</sup> Despite the antebellum South's emphasis on honor and dignity, Marshall saw nothing inconsistent between his status and personally doing the daily household shopping<sup>13</sup> or leading the weekly housecleaning with "mop in

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attended a farewell dinner for Marshall at the Eagle Tavern in Richmond and had a private conversation with him afterward. Immediately following that discussion, Tucker wrote to a friend "that of all the to'ther side men that I know he [Marshall] appears to me to preserve the best disposition to conciliate and to preserve our pacific relations with France."

SMITH, *supra* note 6, at 186-87. In the note to this text, Smith comments: "Tucker's reference to 'side men' indicates that it was assumed that Pinckney, as the senior of the envoys, would be the principal spokesman." *Id.* at 585 n.98. In context, however, it seems more plausible to read Tucker's phrase "the to'ther side men" as referring to men on "the other side" politically, that is, the Federalists. See 18 THE OXFORD ENGLISH DICTIONARY 290 (2d ed. 1989) (defining "tother"). What Tucker seems to be saying, in other words, is that of all the Federalists, Marshall was the least likely to upset the peace with France.

11. JOHNSON, *supra* note 7, at 3. Johnson notes that Senator Albert J. Beveridge's classic four-volume biography of Marshall, published in 1916-19, "exhibits little criticism of Marshall, and scant sympathy for the Chief Justice's detractors and opponents." *Id.* Johnson concludes that "for the good senator, it would appear that Marshall exhibited all of the outstanding qualities of citizenship and duty that Progressives of Beveridge's day held in high esteem." *Id.* One who did not succumb to Marshall's charm was Clarence Darrow's law partner, Edgar Lee Masters, later famous as the author of *THE SPOON RIVER ANTHOLOGY* (1916). See EDGAR LEE MASTERS, *THE NEW STAR CHAMBER AND OTHER ESSAYS* 37-50 (1904) (critical essay on Marshall originally published in the *Chicago Chronicle* on the occasion of the centenary of Marshall's appointment as Chief Justice). See also John V. Orth, *The Law in Spoon River*, 16 LEGAL STUD. F. 301, 304 (1992).

12. Mary (Polly) Ambler Marshall, ten years Marshall's junior, suffered many of the health problems, physical as well as psychological, that afflicted middle class women in the nineteenth century. Smith identifies two "mental breakdowns": the first in September 1786, brought about when 20-year-old Polly suffered a miscarriage only months after the death of another child born in June; the second in 1807, in response to news that a mob in Baltimore had hanged her husband in effigy after the acquittal of Aaron Burr. SMITH, *supra* note 6, at 107, 375.

13. Marshall's unassuming manners and easy-going nature are demonstrated in a

hand . . . and a handkerchief tied about his head.”<sup>14</sup>

The three books in review present differing perspectives that affect the final product. The only substantial question about Smith’s biography as it concerns the pre-Court years is one of proportion. Although quoting John Randolph of Roanoke as saying that Marshall’s “real worth was never known until he was appointed Chief Justice,”<sup>15</sup> Smith devotes 280 pages to Marshall’s life before he was named to the Court and less than 250 pages to the years as Chief Justice.<sup>16</sup> Smith’s analysis of Marshall’s judicial contribution is less penetrating than Johnson’s or Hobson’s, so he is less effective at finding the sources of Marshall’s jurisprudence in his prior career. In contrast, Johnson surveys the Marshall Court’s entire judicial output including the decisions of the justices while on circuit and is, in consequence, the best source for understanding the working life of the Court. Unfortunately, the book’s predominantly topical arrangement obscures the sense of chronological development.<sup>17</sup> Hobson is particularly determined to refute the charge that Marshall was unlearned in the law and makes a real contribution in his exploration of the connections between

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remarkable anecdote concerning his shopping in the Richmond farmer’s market:

One day, as he loitered with his produce, a young gentleman new to Richmond, who had never seen Marshall before, offered the poorly dressed chief justice a small coin to carry a plump turkey he had just purchased. Marshall obligingly added the turkey to his own provisions and trudged respectfully behind his new employer to a house not far from his own, whereupon he handed the bird to its owner and pocketed the coin flipped in his direction. The incident, witnessed by many at the market, sent the city into gales of laughter, although Marshall kindly noted that “we were going the same way” and it seemed only neighborly.

*Id.* at 376.

14. *Id.*

15. *Id.* at 280 (quoting John Randolph, *quoted in* EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 52 (1919)).

16. In addition, Smith packs a good deal of interesting information into the 150 pages of endnotes, which unfortunately lack running heads to identify the pages (or even the chapters) to which they relate.

17. Johnson’s book also suffers from typographical and other minor errors, and one is tempted to say it needed a good editor. For example, Marshall is said to have believed that by issuing paper currency “the republic sewed [sic] the seeds of its future decline,” JOHNSON, *supra* note 7, at 14; Justice James Iredell is at one point described as being from South rather than North Carolina, *id.* at 26; and Samuel Swartwout’s name is repeatedly misspelled, *id.* at 124-25. Moreover, the discussion of the Cherokee Cases is confusingly divided into three or four segments, see *id.* at 81-84, 94, 248-55, 257-61; and repetitions occasionally distract the reader’s attention, see *id.* at 75 nn.60-61, 254 n.87, 261 n.15. “During Marshall’s chief justiceship,” the reader is informed at one point, “the circuits were arranged into the configuration they would have throughout Marshall’s chief justiceship.” *Id.* at 120.

Marshall's background, both intellectual and practical, and his judicial decisions; the future Chief Justice's business experience in Richmond is particularly emphasized.<sup>18</sup> Although he owned slaves and vast tracts of land, Marshall was never a planter and his outlook was more commercial than agrarian or patriarchal.

Marshall's opportunity to become Chief Justice came when John Jay declined the offer by President John Adams. Jay had been the nation's first Chief Justice, serving from 1789 to 1795, but he refused to serve again, writing Adams that he had

left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.<sup>19</sup>

Learning of Jay's refusal, the President turned to Marshall, as the latter modestly recalled years later, and said, "I believe I must nominate you."<sup>20</sup>

The choice was vindicated because Marshall seemed to know exactly how to exploit the latent potential of the Supreme Court. It is true, but only half true, to say as Hobson does that "[t]hroughout his chief justice-ship Marshall exhibited a shrewd and discriminating sense of the limits of judicial power."<sup>21</sup> He also possessed an uncanny sense of its potential extent. By the end of his tenure thirty-four years later, the Court was

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18. HOBSON, *supra* note 2, at 74.

Without question his interests as a property owner and supporter of business enterprise, along with his experience as a lawyer representing merchants, planters, creditors, and debtors, shaped his thinking about the relationship between law and the economy. From the time he began practicing law in the 1780s, Marshall had a lifelong identification with the urban, commercial interests of Richmond. He regularly invested in companies chartered by the Virginia legislature to improve river navigation, construct canals, and build turnpikes, and also subscribed to stock in banks and insurance companies. As a direct participant in these projects, he acquired knowledge of Virginia's political economy and gained an appreciation of the role of corporations in promoting commercial prosperity.

*Id.*

19. 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 285 (Henry P. Johnston ed., 1893). Jay's revealing comment about the "defective" judicial system is not mentioned by any of the three authors.

20. SMITH, *supra* note 6, at 14 (quoting President John Adams, *quoted in* JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH 30 (John Stokes Adams ed., 1937)).

21. HOBSON, *supra* note 2, at 151.

functionally a coordinate branch of the federal government. If one man made it so, that man was Marshall. If not quite "the definer of a nation," as Smith would have it in his subtitle,<sup>22</sup> Marshall was in significant ways the definer of the Supreme Court and, as Hobson realizes, to a significant degree the inventor of American constitutional law.<sup>23</sup>

Like the great English jurist Lord Mansfield, Marshall seemed determined to make a difference from the very beginning of his Chief Justiceship.<sup>24</sup> The first reported appellate decision of his court, *Talbot v. Seeman*,<sup>25</sup> marked a change so significant, but so successful, that it almost eludes observation today. *Talbot* was "the first case in which the justices of the Supreme Court labeled their decision the 'Opinion of the Court.'"<sup>26</sup> Smith, a political scientist, recognizes the implications of this change and stresses it by entitling his first chapter on Marshall's Chief Justiceship "Opinion of the Court."<sup>27</sup> Before Marshall, the Supreme Court spoke with

22. It is surely too much to say, as Smith does, that "Marshall transformed the Constitution from a compact among the states into a charter of national life . . ." SMITH, *supra* note 6, at 19.

23. HOBSON, *supra* note 2, at 212 ("More than anyone else, John Marshall invented American constitutional law, a novel branch of law that brought constitutional interpretation into the ordinary task of adjudicating lawsuits.").

24. See C.H.S. FIFOOT, LORD MANSFIELD 52-82 (photo. reprint 1979) (1936). Hobson admits taking Fifoot's study of Mansfield as a model for his own book. HOBSON, *supra* note 2, at 247. He even paraphrases Mansfield himself while describing Marshall. Compare *id.* at 184 ("A notable instance in which inclination drew Marshall one way and a string of precedents the other occurred on circuit in 1811 . . .") with FIFOOT, *supra*, at 201 ("A judge on the bench," [Mansfield] told Garrick, "is now and then in your whimsical situation between Tragedy and Comedy, inclination drawing him one way and a long string of precedents the other." (quoting JOHN HOLLIDAY, THE LIFE OF WILLIAM LATE EARL OF MANSFIELD 211 (1797))). The ironies in this comparison are multiple: The "string of precedents" that constrained Marshall had been too much even for Mansfield. HOBSON, *supra* note 2, at 184. The 1811 circuit court case, referred to above, was *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811), a case challenging the propriety of a land seizure made during Jefferson's presidency, and one that worried the ex-President mightily. SMITH, *supra* note 6, at 397-99, 404-06. Jefferson thought Mansfield a pernicious influence on American judges, see HOBSON, *supra* note 2, at 36-37, yet in ruling for Jefferson, Marshall not only prominently cited Mansfield but also read the ex-President a lecture on the English jurist, hailing him as "one of the greatest Judges who ever sat on any bench, & who has done more than any other to remove those technical impediments which grew out of a different state of society, & too long continued to obstruct the course of substantial justice." *Id.* at 37 (quoting *Livingston*, *supra*, at 664).

25. 5 U.S. (1 Cranch) 1 (1801). See JOHNSON, *supra* note 7, at 201 (misprinting the defendant's name as "Seemen").

26. SMITH, *supra* note 6, at 292-93.

27. *Id.* at 282. Hobson and Johnson both recognize the novelty of the "Opinion of the Court," but neither stress its great institutional significance. Hobson refers to it obliquely in his discussion of influences on Marshall: "From [Edmund] Pendleton's example the future chief justice learned a style of leadership in which the court most often spoke through its



many voices, like virtually every common-law court in history. Accordingly, each participating judge delivered an opinion one after the other, *seriatim*. While the result in individual cases (the *res judicata* effect) is clear, the reasoning—and therefore the precedential value (the *stare decisis* effect)—is often cloudy. Yet the Marshall Court, speaking with one voice, and usually the voice of the Chief Justice, greatly enhanced the Court's influence. None knew this more than Thomas Jefferson who repeatedly railed at the practice.<sup>28</sup>

The Court's unified opinions were announced through a megaphone that amplified its voice. What it said in this louder voice was the true measure of its greatness. Hobson finds the "central thrust" of Marshall's decisions was "to allow the political departments broad scope to accomplish the objects confided to them by the Constitution and laws."<sup>29</sup> That much is clear. Marshall was no "Platonic guardian";<sup>30</sup> he never sought to usurp legislative powers. Indeed, one may go further and suggest that Marshall affirmatively sought to force the political departments of the national government to do their duty. In *McCulloch v. Maryland*<sup>31</sup> Marshall upheld the constitutionality of the Bank of the United States, a decision that may have enraged elements in some states but must have pleased the majority in Congress that passed the chartering statute and the President who signed it. In *Gibbons v. Ogden*<sup>32</sup> Marshall struck down New York's steamboat monopoly because of federal preemption by the Federal Coasting Licensing Act. Hobson noted "a studied ambiguity that made [the opinion] an uncertain guide for subsequent cases arising under

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presiding judge and a practical approach to the art of judging that emphasized substance over technicalities." HOBSON, *supra* note 2, at 34. Johnson emphasizes the protective value of the unanimous opinion in the political climate of the early years of the Jefferson Administration: "Seizing upon the Ellsworth Court's use of the *per curiam* opinion, Marshall introduced the 'opinion of the Court' device in his first term and used it effectively to protect individual members from identification with unpopular decisions." JOHNSON, *supra* note 7, at 100.

28. SMITH, *supra* note 6, at 448 & 662 n.72, 456 & 666 n.155. Jefferson lobbied certain Justices directly and indirectly to restore *seriatim* opinions and even suggested a statute requiring the practice. *Id.* at 456.

29. HOBSON, *supra* note 2, at 151. Hobson later suggests that Marshall deferred to Congress for prudential reasons: "Marshall, to be sure, well understood the Court's vulnerability to political forces, and this understanding powerfully reinforced his inclination to concede to Congress ample discretion to conduct its legislative business without judicial intervention." *Id.* at 159. Marshall was indeed constantly and acutely aware of his Court's "vulnerability to political forces," but in his day he probably feared that Congress would do too little rather than too much.

30. See, e.g., LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

31. 17 U.S. (4 Wheat.) 316 (1819).

32. 22 U.S. (9 Wheat.) 1 (1824).

the commerce clause.”<sup>33</sup> However, it is odd that Hobson discusses *Gibbons* without mentioning slavery. The slavery question may have led the usually pellucid Marshall to prefer ambiguity. An expansive reading of the Commerce Clause would have meant federal preemption of state actions like the Negro Seamen Acts,<sup>34</sup> which were designed to bolster the security of a slave-owning society but that incidentally trenched on interstate commerce, as Justice William Johnson made plain in his separate concurrence in *Gibbons*.<sup>35</sup>

Hobson rightly recognizes that for Marshall “preservation of the Constitution and union took precedence over the immediate eradication of slavery.”<sup>36</sup> What seems to escape Hobson is that Marshall may have seen the two goals of union and abolition as ultimately related. If the economy of the United States could be made so completely integrated that to disrupt it would be contrary to the self-interest of the vast majority, and if the “political departments” could be made to do their job of brokering conflicting sectional issues, then there might be hope for some compromise or, more likely, a series of compromises on slavery, eventually leading to its abolition. Marshall had seen agreement at the 1787 Constitutional Convention and again in the Compromise of 1820, and he had watched the slow extinction of slavery in the British Empire. While not a dreamer, and toward the end of his life increasingly pessimistic about the prospect, Marshall did seem to have a strategic vision of forcing, insofar as he could, the national government to govern the nation. Marshall’s inveterate opposition to states’ rights is best seen neither as a preference for centralized decision-making per se, as in *Gibbons*, nor as a preference for any particular national decision, as in favor of the Bank of the United States in *McCulloch*. Instead, his opposition should be viewed as a recognition that decentralized decision-making, particularly decentralized economic decision-making, would make disunion increasingly possible.<sup>37</sup>

For the Supreme Court to play a leading role in national life, the young nation needed an ethos in which law mattered. Marshall observed in *Marbury v. Madison*<sup>38</sup> that “[t]he government of the United States has

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33. HOBSON, *supra* note 2, at 145.

34. See, e.g., Act of Dec. 21, 1822, 7 S.C. Stat. 470 (act declared unconstitutional in *Elkison v. Dellesseline*, 8 F.Cas. 493 (C.C.D. S.C. 1823) (No.4366)).

35. See *Gibbons*, 22 U.S. (9 Wheat.) at 230.

36. HOBSON, *supra* note 2, at 164.

37. See John J. Gibbons, Book Review, 75 COLUM. L. REV. 222, 226 (1975) (reviewing CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V: THE TANEY PERIOD, 1836-64 (1974)) (“Marshall knew early in his career that the glue which would hold the Union together was economic interdependence. It seems overly simple, and overly generous to Taney, then, to divorce his economic views from his sectionalist and slavery views.”) (footnote omitted).

38. 5 U.S. (1 Cranch) 137 (1803).

been emphatically termed a government of laws, and not of men."<sup>39</sup> Smith seemingly takes him at his word and describes Marshall's opinion of the Court in *Marbury* as "a primer on representative government, a rationale for the rule of law."<sup>40</sup> Hobson also associates Marshall and the rule of law in the subtitle to his book. Although its great importance is conceded on all sides, the rule of law is nowhere clearly defined.<sup>41</sup> In his last reported opinion as Chief Justice, Marshall implicitly associated the rule of law with paying attention to the arguments of counsel, giving full and fair consideration to each case, and deciding in accordance with the Court's "best judgment."<sup>42</sup>

The picture emerging from some of the cases is more complicated. *The Antelope*,<sup>43</sup> for example, concerned the disposition of a ship and its cargo of Africans seized for an alleged violation of the federal law prohibiting the importation of slaves.<sup>44</sup> In his opinion for the Court, Marshall denounced the slave trade as contrary to natural law, but recognized that it was permitted by the positive law of some nations.<sup>45</sup> Because the ship flew the flag of a country that permitted the slave trade, the ship had to be returned to its owners.<sup>46</sup> The slaves also had to be returned, but the Court found the claims to only a small number of the Africans were substantiated.<sup>47</sup> Pursuant to federal law, the unclaimed slaves were freed and transported to Liberia.<sup>48</sup> Smith describes Marshall's decision in *The Antelope* as reflecting "the approach he often took in highly contentious cases. The principle enunciated went in one direction, but the

39. *Id.* at 163.

40. SMITH, *supra* note 6, at 326. "Marshall stood for the rule of law and a government of checks and balances." *Id.* at 334.

41. The rule of law has been described as "[a] concept of the utmost importance but having no defined, nor readily definable, content." DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 1093 (1980). See John V. Orth, *On the Relation Between the Rule of Law and Public Opinion*, 80 MICH. L. REV. 753 (1982) (reviewing RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* (1980)); see also A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (10th ed. 1959) (popularizing the modern usage of the term). Although the phrase is used in America, its primary function is served by the words "due process of law." But see Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 17 (1997) (discussing the various purposes served by the rule of law). The spread of the rule of law is much discussed today in foreign policy circles. See, e.g., Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998).

42. See *Mitchell v. United States*, 34 U.S. (9 Pet.) 712, 723 (1835).

43. 23 U.S. (10 Wheat.) 66 (1825).

44. *Id.* at 114.

45. *Id.* at 120-22.

46. *Id.* at 123.

47. *Id.* at 128.

48. *Id.* at 132-33.

pragmatic application of that principle allowed the Court to arrive at a decision more in conformity with the natural justice of the case."<sup>49</sup> Thus, in *The Antelope* Marshall recognized the legality—if not the morality—of the slave trade under certain circumstances, but “devised a formula that set 80 percent of the Africans free.”<sup>50</sup>

*Cohens v. Virginia*<sup>51</sup> illustrates another characteristic of Marshall’s judging. Pursuant to congressional legislation, the District of Columbia conducted a national lottery to raise money for municipal services.<sup>52</sup> Virginia law prohibited the sale in Virginia of out-of-state lottery tickets, and the Cohens were convicted in state court for violating that law.<sup>53</sup> The Supreme Court, speaking through Marshall, upheld its jurisdiction against a vigorous states’ rights challenge because of the need for uniform interpretation of federal law,<sup>54</sup> but affirmed the conviction because of its finding that Congress had not intended to authorize the sale of national lottery tickets outside the District of Columbia.<sup>55</sup> Smith describes the result in practical terms as follows:

The Court could easily enforce its decision as to jurisdiction, but it could not compel Virginia to admit federal lottery tickets against its will. If Virginia defied the Court and persisted in arresting those selling out-of-state ducats, there would be little the justices

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49. SMITH, *supra* note 6, at 488. Hobson sums up the case in similar terms: “If Marshall’s answer to the general question seemed favorable to the Spanish and Portuguese claims [to the slaves], his actual disposition of the particular case substantially increased the number of Africans awarded to the United States and thus designated for eventual release and transportation back to Africa.” HOBSON, *supra* note 2, at 168.

50. SMITH, *supra* note 6, at 487. There is a chilling calculation in the partial justice delivered, reminiscent of the original rule in the Constitution apportioning representation in Congress whereby a slave was counted as three-fifths of a person. U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XIV, § 2.

51. 19 U.S. (6 Wheat.) 264 (1821).

52. *Id.* at 285.

53. *Id.* at 375.

54. *Id.* at 416. Although Marshall himself spoke of “the necessity of uniformity,” *id.* at 418, the Federal Judiciary Act of 1789 had a more limited goal. Section 25 of the Act conferred appellate jurisdiction on the Supreme Court over final judgments in the highest state courts (1) holding against the validity of a treaty, federal statute, or “an authority exercised under the United States”; (2) upholding the validity of a state statute or “an authority exercised under any state” against a challenge based on the federal Constitution, a treaty, or federal law; or (3) holding against a “title, right, privilege, or exemption” claimed under the federal Constitution, a treaty, federal statute, or commission. Federal Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86. In other words, state courts could recognize greater federal rights without triggering a right of appeal; uniformity was not essential in cases favoring federal authority.

55. *Id.* at 444-47.

could do. Marshall was too astute to press an issue the Court could not win.<sup>56</sup>

In addition, if Congress had revisited the issue and enacted a statute authorizing the sale of national lottery tickets in interstate commerce, the Court presumably would have the national legislature on its side in any future challenge.

Johnson also notes Marshall's judicial pragmatism. In *Cherokee Nation v. Georgia*<sup>57</sup> a closely divided Court held, in an opinion by the Chief Justice, that it lacked original jurisdiction over a suit by an Indian tribe against a state.<sup>58</sup> For jurisdictional standing under the Constitution, the tribe would have to be either a foreign nation or an American state;<sup>59</sup> the majority found that the tribe was neither.<sup>60</sup> "The 3 to 2 decision," Johnson observes, "avoided conflict with the political branches of government and the potential embarrassment of having the Court's decree ignored . . . ."<sup>61</sup>

*Marbury v. Madison*,<sup>62</sup> the case usually credited with establishing judicial review, is itself customarily analyzed in practical terms.<sup>63</sup> The plaintiffs were Federalists appointed to office by President John Adams in the last days of his administration. The incoming Republicans, led by President Thomas Jefferson, were determined not to surrender the commissions. The plaintiffs claimed entitlement to commissions in the keeping of the Secretary of State and brought an action in the original jurisdiction of the Supreme Court seeking a writ of mandamus directing the Secretary to deliver the documents.<sup>64</sup> In his opinion for the Court, Marshall, after extensive dicta in favor of the plaintiffs' right, held that the Court lacked jurisdiction.<sup>65</sup> Although the Judiciary Act seemed to confer jurisdiction over such suits, Marshall found the Act unconstitutional to that extent.

From the day of its decision up to the present, *Marbury* has been

56. SMITH, *supra* note 6, at 459.

57. 30 U.S. (5 Pet.) 1 (1831).

58. *Id.* at 15-19.

59. See U.S. CONST. art. III, § 2 ("The judicial Power shall extend . . . to Controversies between two or more States . . . and between a State . . . and foreign States . . .")

60. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15-19.

61. JOHNSON, *supra* note 7, at 253. Elsewhere Johnson points out that executive powers were also constrained in this case: "In terms of power politics, even if [President Andrew] Jackson had wished to protect the Cherokee, it would have been virtually impossible to do so, given the [small] size of the federal army and the determination of the government and people of Georgia [to resist]." *Id.* at 94.

62. 5 U.S. (1 Cranch) 137 (1803).

63. See, e.g., JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 31-34 (1987).

64. *Marbury*, 5 U.S. (1 Cranch) at 137-38.

65. *Id.* at 176-77.

recognized as a case charged with great political significance. The case seemed to confront the Court with a cruel dilemma. If it ordered the Secretary of State to deliver the commissions and he refused, the Court would have no way to enforce the order; enforcement was the responsibility of the executive branch. Alternatively, if the Court declined to issue the writ of mandamus, the Court would be viewed as succumbing to Jefferson and the Republicans. Instead, Marshall refused to issue the writ, but for a reason that amounted to a claim of high prerogative—a claim, furthermore, with which the political branches could not interfere.<sup>66</sup>

What made *Marbury* a case of judicial review, rather than mere statutory interpretation, was that the holding was based on the Constitution rather than on the Judiciary Act. Smith thinks this was unavoidable: “The writ to which *Marbury* was entitled,” he writes, “was unmistakably provided for by statute . . . .”<sup>67</sup> If true, this clear entitlement would be remarkable because one of the principal drafters of that act was Justice William Paterson,<sup>68</sup> who joined in the *Marbury* opinion. Of course, it is possible, as Hobson believes, that Paterson’s handiwork had “flaws” that even he came to admit.<sup>69</sup> Hobson makes a spirited plea for Marshall’s reading of the relevant section of the statute as repugnant to the Constitution. Recognizing that there were “alternative constructions that reconciled the judiciary act and the Constitution,” Hobson nonetheless maintains that “[o]n reflection . . . it is clear” that Marshall adhered to his own rule of statutory construction: a judge must be persuaded beyond a reasonable doubt before declaring a statute void as contrary to the Constitution.<sup>70</sup> Hobson defends Marshall’s application of this rule in *Marbury*:

His espousal of the rule was not a self-serving, hypocritical expression of courtesy and deference to the legislature but a genuinely operative standard he faithfully employed in constitutional adjudication. Confining review only to instances where the repugnancy between statute and Constitution was plain, clear, and unequivocal did not mean that the infraction had to be so obvious, so palpable, that it could readily be detected by comparing the texts of the two laws. If this were the meaning of the rule, then judicial review would be a trivial, insignificant power that would almost

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66. ORTH, *supra* note 63, at 33.

67. SMITH, *supra* note 6, at 318.

68. *Id.* at 288. Paterson had also been a prominent delegate to the Constitutional Convention. *Id.* at 287-88. The other principal drafter was Oliver Ellsworth, Chief Justice before Marshall. HOBSON, *supra* note 2, at 69.

69. HOBSON, *supra* note 2, at 69. The only evidence that Paterson ever admitted flaws in the Judiciary Act seems to be that he joined in the opinion in *Marbury*.

70. *Id.* at 67-68.

never be invoked, for in this sense there could scarcely be any law that was unconstitutional beyond a reasonable doubt.<sup>71</sup>

At least one scholar, Akhil Amar, "has suggested that Marshall misread Section 13 of the Judiciary Act and that Congress had no intention of conferring original mandamus jurisdiction upon the Supreme Court."<sup>72</sup> Oddly, none of the authors quote the relevant passages. The Constitution expressly limits the Court's original jurisdiction to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."<sup>73</sup> In all other cases the Court's jurisdiction is appellate. The plaintiffs in *Marbury* relied on the following sentence in the Judiciary Act:<sup>74</sup>

The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.<sup>75</sup>

The plaintiffs in *Marbury* read only parts of the above sentence: "The Supreme Court . . . shall have power to issue . . . writs of *mandamus*, in cases warranted by the principles and usages of law, to any . . . persons holding office, under the authority of the United States."<sup>76</sup> In context, however, the whole sentence may apply only to the exercise of appellate jurisdiction. If that is true, then the statute's repugnance to the Constitution vanishes. The plaintiffs in *Marbury* would still lose but on a construction

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71. *Id.* at 68. Hobson belatedly concedes, in connection with his discussion of the Cherokee Cases, that in *Marbury* "the chief justice escaped an awkward dilemma by denying jurisdiction." *Id.* at 176.

72. JOHNSON, *supra* note 7, at 62 (citing Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443 (1989), but misspelling Amar as "Akmar"). Johnson himself is associated with the same suggestion in a co-authored book. 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 199 (1981). For an even earlier statement of the same argument see John J. Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 448-49 (1974).

73. U.S. CONST. art. III, § 2.

74. *Marbury*, at 148.

75. Federal Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

76. *Id.*; *Marbury*, at 148.

of the statute, not the Constitution. Marshall probably reached out for a rationale that was strictly unnecessary but very eye-catching. Depriving the Court of an apparent power to issue writs of mandamus in original actions, Marshall secured for the Court a far greater power—the power of judicial review. Remarkably, the Court's power expanded in a context of self-denial.<sup>77</sup> The Court would not exercise an unconstitutional power even when seemingly encouraged to do so by Congress. While hypocritical may be too strong a word to describe Marshall's tone in *Marbury*, sanctimonious is not.

The conclusion is inescapable—at least to this reviewer—that Marshall deliberately rejected a rationale based on humdrum statutory construction in favor of a momentous constitutional holding. Years later, in connection with a circuit court case concerning Virginia's Negro Seaman Act, Marshall wrote in a private letter to Justice Joseph Story: “‘A case was brought before me in which I might have considered its constitutionality, but it was not absolutely necessary and, as I am not fond of butting against a wall in sport, I escaped on the construction of the act.’”<sup>78</sup> In *Marbury* Marshall might equally have “escaped” but chose not to in order to teach the Republicans a lesson concerning the wall that separated the powers of government.

Marshall's escape in *Marbury* from a confrontation with the powers-that-be contrasts with his apparently provocative behavior in another case a few years later. *United States v. Burr*<sup>79</sup> was a prosecution of former Vice President Aaron Burr for treason, over which Marshall presided while on circuit. At trial the defendant deliberately posed the difficult question of whether the court could subpoena the President of the United States to compel the delivery of documents necessary for the defense.<sup>80</sup> Hobson's comment is revealing: “In only one other case besides *Marbury* did

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77. Hobson concludes:

The narrow scope of judicial review set forth in *Marbury* stands in sharp contrast to the expansive reach the doctrine has acquired in the twentieth century. For Marshall, judicial review was primarily a defensive weapon to preserve the independence of the judiciary, to resist encroachments by the states on the national government, and to protect private rights against infringement by acts of government (mainly state).

HOBSON, *supra* note 2, at 69. *Marbury* was, of course, defensive. However, it is speculative to conclude from it (and from the fact that the Marshall Court never again found an act of Congress unconstitutional) that Marshall would not have exercised judicial review more “aggressively” if confronted with a more activist Congress.

78. SMITH, *supra* note 6, at 473 (quoting Letter, Marshall to Story (Sept. 1823) in 9 MARSHALL PAPERS (forthcoming 1998) (referring to *Wilson v. United States*, 30 F. Cas. 239 (C.C.D. Va. 1820) (No. 17,846))).

79. 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

80. 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d).



Marshall presume to make the highest government officers answerable to judicial process. On circuit in 1807, he issued a subpoena *duces tecum* to President Jefferson . . . .<sup>81</sup> Indeed, Marshall did more; in granting Burr's application for bail, he seemed to indulge a rare display of passion against "the highest government officers."<sup>82</sup> After quoting Sir William Blackstone on the propriety of pre-trial detention, Marshall exclaimed: "I do not understand him as meaning to say that the hand of malignity may grasp any individual against whom its hate may be directed, or whom it may capriciously seize, charge him with some secret crime, and put him on the proof of his innocence."<sup>83</sup> Jefferson certainly thought Marshall was talking about him.<sup>84</sup>

Why would the great Chief Justice so sedulously avoid a confrontation with the executive in *Marbury* and later seem to court one in *Burr*? The answer reveals Marshall's seemingly instinctive ability to recognize and exploit the latent powers of the Supreme Court, powers that former Chief Justice Jay realized were required but which he failed to discover. In *Marbury* the Court would have needed executive compliance if it had granted the requested remedy. However, in *Burr* the executive needed the Court to secure its objective: the conviction and execution of Aaron Burr.<sup>85</sup>

Was this the rule of law? Hobson seems implicitly to doubt it. Smith, on the contrary, seems to see no inconsistency between pragmatism and principle. Johnson's position is more complicated. On the one hand, Johnson recognizes Marshall's maneuvers, describing the Chief Justice's effort in the Cherokee Case "to sidestep a politically dangerous decision."<sup>86</sup> On the other hand, Johnson remains convinced of Marshall's commitment to the rule of law.<sup>87</sup> The key may lie in Johnson's own sense of resignation: "Lawyers and judges are social and political pathologists;

81. HOBSON, *supra* note 2, at 156. It is not, strictly speaking, accurate to say that in *Marbury* Marshall made "the highest government officers answerable to judicial process." *Id.* In fact, Marshall found no jurisdiction in his court to do so.

82. *Id.*

83. *Burr*, 25 F. Cas. at 12. It is curious that none of the three books under review quote this remarkable sentence.

84. See DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809*, at 300-01, 304 (1974).

85. The Court lacked the force to prevent the Commander-in-Chief from simply having Burr shot, perhaps pursuant to the order of a court martial, but it certainly possessed the legal authority to find such a proceeding unlawful—and unconstitutional.

86. JOHNSON, *supra* note 7, at 258.

87. See, e.g., *id.* at 131 ("All of these limits upon prosecution discretion [in the *Burr* Case] were designed to insure that treason indictments were not used for political purposes and to insure a rule of law and not of men.").

it is hard to remain an idealist about human nature while serving as a member of the legal profession.”<sup>88</sup>

This reviewer is inclined to agree that Marshall did maneuver for advantage, but that he also remained committed to the rule of law. The profession of the law does strip one of comforting illusions concerning human nature, but Marshall’s gusto for the legal give-and-take almost reconciles one to this reality. Testing Marshall’s faithfulness to the rule of law in the great constitutional cases is in one sense unfair because “constitutional adjudication figured in a mere handful of the total judgments handed down by the Court during Marshall’s tenure.”<sup>89</sup> On the record of these three books, the great Chief Justice kept faith with his own ideal in all cases, large and small. Marshall listened to the arguments on both sides, considered the cases fairly and fully, and then exercised his best judgment. He was always disinterested, in the sense that he sought the best outcome, not for himself, but for the litigants, the court, and the nation. However, he also knew that it is not sufficient for a judge merely to cry “*Fiat Justitia, ruat coelum*” (“Let justice be done, though the heavens should fall.”).<sup>90</sup> *Marbury* and his fellow plaintiffs were going to lose anyway; why did it matter whether they lost on a construction of the Constitution or of a statute? Marshall believed in maintaining an effective institution for the fair resolution of disputes. That in itself is the commitment to the rule of law.

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88. *Id.* at 262.

89. HOBSON, *supra* note 2, at 155.

90. See FIFOOT, *supra* note 24, at 41-42 (discussing Lord Mansfield’s judgment in *Sommersett’s Case* concerning the legality of slavery in England and concluding: “[A]fter enlarging, with vague eloquence, upon the maxim, *Fiat Justitia, ruat coelum*, [Lord Mansfield] based his judgment on a technical fault in the return to the writ.”).

