

in retirement, played an important role in this resurgence of states' rights. If you believe Marshall, he played a decisive role. "A deep design to convert our government into a mere league of States has taken strong hold of a powerful & violent party in Virginia. The attack upon the judiciary is in fact an attack upon the union." And further: "The whole attack, if not originating with Mr. Jefferson, is obviously approved & guided by him. It is therefore formidable in our states as well as in this. . . ." ³⁰

What generated the states' rights juggernaut that Jefferson championed was an economic and demographic revolution in the northern and middle states, which threatened the slave-based agriculture of the southern states. Three events, all in the span of two years, convinced the slave-holding states that their way of life was in jeopardy. The precipitating event was the Court's decision in *McCulloch v. Maryland* in 1819.³¹ Significantly, that decision came down during the first major economic depression of the century and while Congress debated the future of slavery in the new state of Missouri and in the Louisiana Purchase Territory. What southern politicians came to realize was that a northern majority in Congress—now armed with the doctrine of implied powers, which Marshall had given them in *McCulloch*—might force northern economic policy on the slave-holding states. What was needed was a constitutional doctrine that would protect southern institutions, including slavery, from northern political dominance.

Great shifts in constitutional law have always been rooted in fundamental changes in American society and culture. So it was in the 1820s. But shifts in constitutional doctrine are implemented by intellectuals, by politicians, and by lawyers, judges, and Justices of the Supreme Court. In the 1820s, Virginia politicians and Virginia judges started the intellectual ball rolling with the help of Jefferson.

While he was President, not surprisingly, Jefferson had fought the battle for liberty and democracy as a separation-of-powers issue:

as a contest between the executive branch (representing the "people") and the Court (representing the dead hand of the aristocratic past). That strategy was flawed, however. For one thing, there was no guarantee the President could dominate Congress in order to present a united front. In fact, Jefferson failed to do so—witness the Chase impeachment disaster. A worst-case scenario was the prospect that a Congress controlled by a northern majority might actually support the nationalist decisions of the Court. Jefferson saw the problem, and so did Virginia theorists like John Taylor of Caroline County and Judge Spencer Roane of the Virginia Court of Appeals.

The solution pursued by Virginia theorists in the 1820s was to take the power of judicial review away from the Supreme Court and return it to the states. Henceforth federalism, not separation of powers, would be the battleground—and the antidote for the Marshall Court's constitutional nationalism. Accordingly, in the course of the 1820s, Jefferson's Kentucky Resolution³² morphed into the "spirit of '98" and became the battle cry for those out to rein in the Court.

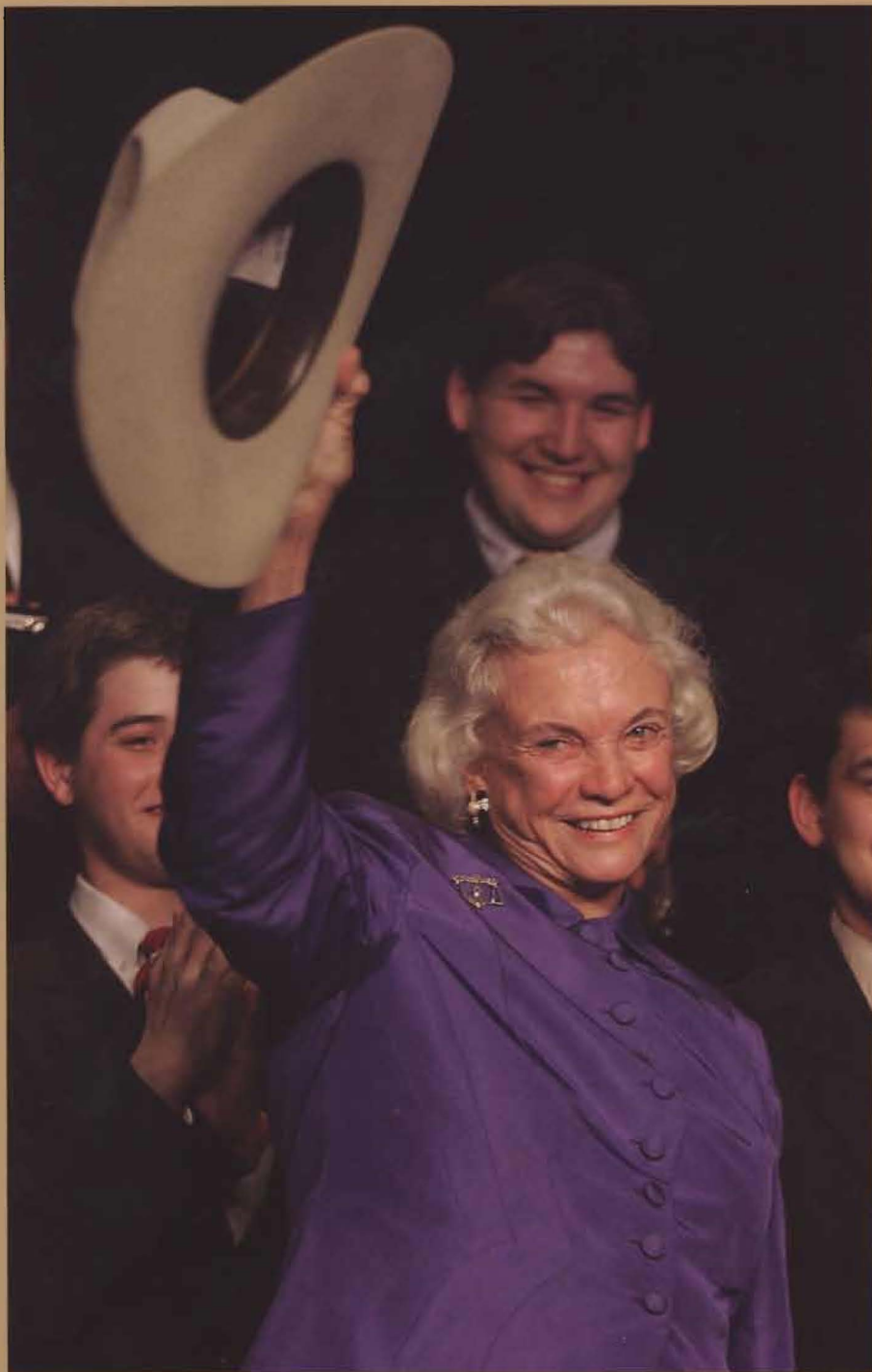
The fifteen-year assault, which lasted until Marshall's death in 1835, was the first comprehensive anti-Court movement in American history—the granddaddy of those to follow. It started in Richmond with an attack on Marshall's *McCulloch* opinion—and on Marshall personally—in a series of newspaper essays written primarily by Judge Roane. Marshall responded anonymously in nine brilliant essays of his own, which effectively pitted the Supreme Court against the Virginia Court of Appeals. Taylor joined the fray with three books in three years to prove Marshall wrong. Jefferson applauded Roane, Taylor and company; in addition, he established a chair of law at the newly founded University of Virginia in order to spread the word.

And spread it did, especially to states in the South and West and then to Congress. Throughout the decade, various measures were

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The Society accomplishes its mission by conducting educational programs, supporting historical research, publishing books, journals, and electronic materials, and by collecting antiques and artifacts related to the Court's history. These activities and others increase the public's awareness of the Court's contributions to our nation's rich constitutional heritage.

The Society maintains an ongoing educational outreach program designed to expand Americans' understanding of the Supreme Court, the Constitution and the judicial branch. The Society cosponsors Street Law Inc.'s summer institute, which trains secondary school teachers to educate their students about the Court and the Constitution. It also sponsors an annual lecture series at the Supreme Court as well as occasional public lectures around the country. The Society maintains its own educational website and cosponsors Landmarkcases.org, a website that provides curriculum support to teachers about important Supreme Court cases.

In terms of publications, the Society distributes a *Quarterly* newsletter to its members containing short historical pieces on the Court and articles describing the Society's programs and activities. It also publishes the *Journal of Supreme Court History*, a scholarly collection of articles and book reviews, which appears in March, July and November. The Society awards cash prizes to students and established scholars to promote scholarship.

The Society initiated the **Documentary History of the Supreme Court of the United States, 1789-1800** in 1977 with a matching grant from the National Historical Publications and Records Commission (NHPRC). The project seeks to reconstruct an accurate record of the development of the federal judiciary in the formative decade between 1789 and 1800 because records from this period are often fragmentary, incomplete, or missing. The Supreme Court became a cosponsor in 1979; since then the project has completed seven out of the eight volumes. An oral history program in which former Solicitors General, former Attorneys General, and retired Justices are interviewed is another research project sponsored by the Society.

The Society maintains a publications program that has developed several general interest books: **The Supreme Court Justices: Illustrated Biographies 1789-1995** (1995), short illustrated biographies of the 108 Justices; **Supreme Court Decisions and Women's Rights: Milestones to Equality** (2000), a guide to gender law cases; **We the Students: Supreme Court Cases for and About High School Students** (2000), a high school textbook written by Jamin B. Raskin; and **Black White and Brown: The Landmark School Desegregation Case in Retrospect** (2004), a collection of essays to mark the 50th anniversary of the *Brown* case.

The Society is also conducting an active acquisitions program, which has substantially contributed to the completion of the Court's permanent collection of busts and portraits, as well as period furnishings, private papers, and other artifacts and memorabilia relating to the Court's history. These materials are incorporated into exhibitions prepared by the Court Curator's Office for the benefit of the Court's one million annual visitors.

The Society has approximately 5,700 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enables the organization to function. These committees report to an elected Board of Trustees and an Executive Committee, the latter of which is principally responsible for policy decisions and for supervising the Society's permanent staff.

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Introduction

Melvin I. Urofsky

This issue is the first since the retirement of Justice Sandra Day O'Connor from the Supreme Court. While history will note that she was the first woman appointed to the High Court, and that during her quarter-century tenure she staked out an identifiable and influential jurisprudential position, we at the Supreme Court Historical Society will remember her as a friend who on many occasions helped us out, participated in our programs, and made valuable suggestions on projects she thought we should pursue. Personally, I recall how gracious she was to me when I gave my first talk at the Court, and during her introduction I was thinking how my mother would have swelled with pride to have her first-born introduced by none other than a Justice. While she is no longer an active member of the Court, we hope she will remain a friend of the Society, and we are pleased to have in this issue tributes by her colleague on the Bench, Justice John Paul Stevens, Professor Craig Joyce, a member of the *Journal's* Editorial Board, and by Deborah

Jones Merritt, one of Justice O'Connor's former clerks.

The bulk of this issue is devoted to the lecture series the Society sponsored last year on Thomas Jefferson and the Supreme Court. While most history books note President Jefferson's attack on the judicial system, culminating in the attempted impeachment of Justice Samuel Chase, the speakers in the series—and the authors of these articles based on those talks—provide a great deal more nuance, and look at different aspects of Jefferson's views toward the Constitution, the courts, and areas in which all branches of the government became involved. While some speakers—such as your editor—are critical of Jefferson's ideas, all agree that he left an imprint on early American constitutionalism that would not just affect the immediate future, but in some ways remains part of this nation's constitutional debate.

Finally, the Court continues to draw scholarly attention, and Grier Stephenson brings us up to date on the latest of the important works dealing with the Court.

Tribute to Justice O'Connor

JOHN PAUL STEVENS

The 102d Justice to serve on the Supreme Court was also the first whose name begins with the letter "O." Knowledgeable scholars and students of the Court's history are not likely to attach great significance to that fact. While Byron White was undoubtedly the finest athlete ever to serve on the Court, and also was an avid golfer, I am quite sure that No. 102 broke 90 more regularly than he did. I doubt that that fact will provide No. 102 with her principal claim to fame either. While a third happenstance—that she was also the first woman to serve on the Court—will be widely noted and acclaimed, in my judgment that is merely another interesting aspect of Sandra Day O'Connor's remarkable career and remarkable contribution to the work of the Court.

I firmly believe that it is the consistent quality of excellence in her opinions that will provide the most accurate and reliable evidence for future historians who write about her work. This quality appears not only in her opinions in cases subject to significant public attention, but also in the less heralded cases that are the grist of our docket. Consider, for example, her lucid and honest opinion in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), which, if not the very best, was surely one of the best opinions announced last Term. Or her dissent in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), with its forceful and persuasive points made in the clearest possible prose.

Having had the privilege of working with Sandra during the entire period of her active

service on the Court—a period during which my initial admiration and affection for her continuously grew stronger and stronger—I am competent to testify that her unrecorded contributions to our deliberations and to the resolution of the many problems the Court has confronted have been uniformly dedicated to the best interest of the institution. Like other fine athletes, she has been a true "team player," and this teammate will miss her greatly. I am confident, however, that her career as a valued leader in a larger arena is far from over. As the author of *The Tempest* has reminded us, "What's past is prologue." Knowing Sandra, and knowing something about her past, I confidently predict an interesting and memorable future.

"A Good Judge"

CRAIG JOYCE*

- Senator BAUCUS: How do you want to be remembered in history?
Judge O'CONNOR: The tombstone question—what do I want on the tombstone?
[Laughter.]
Senator BAUCUS: Hopefully it will be written in places other than on a tombstone.
Judge O'CONNOR: I hope it might say, "Here lies a good judge."
—Justice O'Connor's Confirmation Hearing (1981)¹

Sandra Day O'Connor will get her wish. For almost a quarter of a century, on an enormous range of issues—from affirmative action, to gender equality and opportunity, to reproductive freedom, to lawyer professionalism, to the powers of government in time of war, to the place of religion in a pluralistic society, to the very structure of our federalism, and more—when an anxious Nation awaited the Supreme Court's latest pronouncement, what it most often got was a commonsense opinion from the most reasonable voice in American law.²

As the Justice herself, however, would be the first to observe, there are places other than Washington, D.C., and spheres of activity other than service on the Nation's Court, where good judgment comes in handy on the journey through life.

* * *

The future Justice can take no credit, of course, for her good fortune in being born into the family of Harry ("DA") and Ada Mae Wilkey ("MO") Day,³ or for the good company over the years of her sister Ann (who gave her parents their nicknames when she was learning to spell and always has spoken of her sister as a role model) and her brother Alan (who took time from his own busy life to write, with the Justice, the loving memoir, *Lazy B*, that bears the ranch's name).⁴

The rest of her life, however, has been full of good decisions of her own making, as the footnotes to this tribute attest. There were educational choices, like the decision of a homesick cowgirl who had spent her early school years away from the *Lazy B* except for



Although Sandra Day O'Connor's appointment in 1981 as the first female Justice was a landmark in Supreme Court history, she asked in her confirmation hearings only to be remembered as a good judge.

summers and holidays, but who, after cajoling her parents into allowing her to spend eighth grade nearer the ranch, reluctantly decided to return to the better education offered in the distant metropolis of El Paso. There were the decisions to go to college at Stanford, to take early admission there at the law school when few other women were so inclined, and to marry John O'Connor.⁵

After law school, having failed famously—at least in the light of history—to secure a first job in private practice,⁶ she took a non-paying position as a county government attorney, hoping eventually to move up. She did.⁷

Following a brief stint as a federal government lawyer in post-World War II Germany due to her husband's assignment there by the U.S. military, she and John settled back in Arizona, where she further rounded her professional experience, this time in private practice in a two-person partnership.⁸

She stopped work for five years to raise small children, taking on volunteer work and political activities, thinking that otherwise she might never get another job as a lawyer.⁹

She need not have worried.¹⁰ In due course, she returned to the work world full-time, making a deliberate tour of all three branches of state government. First, there was service in the Attorney General's office.¹¹ Next

came the state senate, where, after an initial appointment to an unexpired term,¹² she was twice elected by her fellow citizens to serve in her own right and, in only her second full term, by her fellow legislators to become the majority leader.¹³ After that, having seen the politics of the Legislature, she moved on to the bench on the state trial and appellate courts¹⁴—spearheading, as one of her final acts as an elected official, a successful initiative drive to convert Arizona to merit selection of state court judges.¹⁵

Sandra Day O'Connor's final career move came in 1981, when President Reagan, in his own act of supreme good judgment, appointed her to serve as the Court's 102d Justice.¹⁶

Despite her busy career, the Justice has managed to balance work with family—family first. The methods work. The proof is in the sons. Scott, the best (traditional) athlete in the family, also has become a gourmet cook par excellence. Brian, the family adventurer and an extreme sports devotee, has climbed the Seven Summits—the tallest mountain on each of the seven continents—and dived the Titanic. Jay, the indispensable "Funky Unky" to his brothers' children, retains the most dangerous wit, and the best pen, in the family.¹⁷ Each



Sandra Day O'Connor posed with sons (top to bottom) Scott, Brian and Jay and husband John during her 1969 campaign for the Arizona state senate. She was re-elected to a second term.

is successful in business. None decided to essay law (with two tough acts to follow, if they had).

All three turned out well. Somebody did something right. Not surprisingly, the sons—and siblings—have strong views about Justice O'Connor's talents as a judge of things non-legal.

Her scrupulous fairness—a “hang-up,” almost—remains a marvel to all. Each of the sons always has received “equal justice [and Justice] under law”: dinners, Christmases, visits for their friends to the Chambers in D.C.—

all patently equal (a trait they believe carries over to her work on the bench as well).

She retains, too, from her Arizona days, a determination to work candidly and straightforwardly *with* others, despite occasional perplexity when others fall short of her own standard (usually signaled by “Goodness!”—the strongest word in her vocabulary). The family sometimes has found her recurring admonition about speaking *of* others—“If you don’t have anything nice to say, don’t say anything”—difficult to observe, but it is advice she herself follows. Other frequent advice,

this time about thank-you notes: always write them, always by hand, and always promptly. Again, not easy to do, but she always does.

She does not pre-judge. Always open to new and different experiences, people, jobs and activities in her own life, she never pushed any of her offspring in particular directions, instead supporting them, whatever their pursuits. Always inquisitive and a good listener, when forced to make judgments about people, it is always "100% on how they are, not who they are."

Still, it was always family first. One evening in Arizona when the boys were young and she was state senate majority leader, a group of legislators sat hammering out the language of a bill. Discussion dragged on. Finally, Senator O'Connor, mother, announced: "Everyone, we've got five minutes to resolve this. My son is leaving for summer camp tomorrow, and I've got to finish getting him packed tonight!" Language resolved, meeting ended, duffel packed.

The family all testify that those qualities abide today. "Whether you are family or friend or acquaintance, she touches you in some way. She doesn't see herself as the world sees her. She doesn't know how unique she really is." A life well lived.

* * *

And always along the way, of course, from Stanford on, there was John J. O'Connor, III. They met when assigned to edit a law review article together. John suggested they finish the project at a local pub. They dated for the next forty nights and married at the Lazy B in 1952.

But for that fateful edit, others, perhaps in her Stanford classes or in later life, might have merited her consideration. She chose John. Great choice. Smart, handsome, decent. Irish, and a storyteller. Wonderful husband, wonderful father. Superb counselor, strategist, and partner.

By the time I met John, he was effectively the managing partner at Arizona's oldest law



Off the Bench, Justice O'Connor took a keen interest in the upgrading and preservation of the Supreme Court building and its furnishings.

firm. I was the junior-most associate. He introduced me to his wife, by then a state court judge. They had a beautiful adobe home they had built, partly with their own hands, in Paradise Valley. He told me once, proudly: "I like to keep things simple—one wife, one job, one house."

In time, things changed. John's wife got a better job on the East Coast. They left Arizona and moved to Washington, D.C. He got a new position himself—and, in his spare time, started up the Supreme Court Husbands' Auxiliary. Founding member, and still president.

John remains the best practicing lawyer I ever met. But on the wife/job/house front, he is now batting only one for three. He picked the right one to hang onto.

In recent years, Sandra Day O'Connor and her husband had to face together the cruelty of his declining health. She was, by then, the most powerful woman in American law. Another decision. She again chose John.¹⁸

* * *

The rancher's daughter always believed in good breeding. She and John excelled in that department themselves. Along the way, they also helped others.

In 2005, Justice and Mr. O'Connor came to Houston to visit our family. Typically, she volunteered for extra duty, speaking not only to students, faculty and staff at the University of Houston Law Center and a dinner for 1,000 downtown, but also at the schools of our two sons. Will, 16 at the time, and Matt, then 12, introduced the O'Connors at their assemblies.

Will told this story. In 1978, then-Judge O'Connor and her husband decided to set up Will's future parents—her cousin's daughter and his bag-carrier at the firm—on a blind date, without warning either one. Dinner and an opera (Mozart's *Don Juan*, as it was known then in Phoenix) followed. Marriage, too, and further extension of the family. "If it weren't for the O'Connors, I wouldn't be here today," Will said. A good choice indeed.

Matt related a different story, and not about matchmaking. The summer before announcing her retirement, the O'Connors came to see us in the New Mexico mountains where she had visited long ago as a schoolchild in El Paso. I mentioned that a particularly pesky, overgrown apple tree by the front porch would need to be taken down soon. Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States, the first woman ever, the "five" in so many 5-4 votes, put the youngest members of the family to work picking, then headed for the sink and the stove. Voila! An hour later, we were enjoying the world's best homemade applesauce. That apple tree has a lease on life as long as the cabin, and our family, endure.

* * *

In all things, a good judge.

ENDNOTES

¹Note: The author attended oral argument on the first Monday in October for twenty-five Terms as Justice O'Connor's guest, and edited Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (Random House, 2003). This tribute is based on the cited sources, and on the personal reminiscences of Ann Day, Alan Day, Scott O'Connor, Brian O'Connor, Jay O'Connor, Molly Joyce, Will Joyce, Matt Joyce, and the author himself.

²Hearings Before the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, First Session, on the Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, Serial No. J-97-51, at 112 (Sep. 9, 1981).

³See Craig Joyce, "Lazy B and the Nation's Court: Pragmatism in Service of Principle," 119 *Harv. L. Rev.* 1257 (2006).

⁴Pronounced "Dee-ay" and "Em-oh." Sandra Day O'Connor & H. Alan Day, *Lazy B: Growing Up on a Cattle Ranch in the American Southwest* xi (2002). As described in *Lazy B*,

DA had refined features—a straight nose, neither large nor small, and hazel eyes that were alert and twinkling. He went bald at an early age. Perhaps to compensate, he always wore a well-trimmed mustache. He was

five foot eleven and well built. His most distinguishing characteristic was his genuine interest in everyone he met, whether poor or rich, educated or illiterate, well dressed or in rags....

MO was a tidy package of good looks, competence, and charm. She could fit in at a gathering of Arizona ranch wives or at an elegant party in Washington, D.C. She was the only female role model we had, other than Grandmother Wilkey. She made a hard life look easy. In a harsh environment where weather, the cowboys, and the animals were all unpredictable, she was unfailingly loving and kind. She created an appealing and delightful life for her family all her days.

O'Connor & Day, *supra*, chs. 3 ("DA") & 4 ("MO") at 28, 49.

⁴The ranch's name derives from the brand selected for the cattle by the Justice's paternal grandfather: a B lying flat on its side – that is, a "lazy" B. *Id.* at viii.

⁵See generally *id.*, chs. 11 ("School Days") and 27 ("A Wedding"); and see *infra* regarding John J. O'Connor, III.

⁶Here is the story in her own words:

[W]hen I entered law school, I didn't even think about the future, whether I would want to practice law, and if I did, what the job opportunities would be. I just assumed I would be able to get a job, and that was a very naive position, looking back.

I finally called an undergraduate woman friend of mine at Stanford, whose father was a partner in a well-known, very large California law firm, headquartered in Los Angeles. I said, "Ask your father, if you would, if he could get me a job interview in the law firm."

She did. And he did.

I made the trip to Los Angeles. I sat down with the law firm partner doing job interviews, and we chatted for a little while, and then he said, "Ms. Day, how do you type?"

I said, "Well, medium. I can get by but it's not great."

He said, "If you can demonstrate that you can type well enough, I might be able to get you a job in this firm as a legal secretary. But Ms. Day, we have never hired a woman as a lawyer here, and I don't see the time when we will."

So that was pretty much the situation.

Justice Sandra Day O'Connor, "Remarks at the University of Houston Law Center," at 2 (Mar. 10, 2005) (on file with the Supreme Court Historical Society at Opperman House).

⁷Again, as told by Justice O'Connor:

I really wanted to work as a lawyer. But how was I going to get a job?... I heard that the [District] Attorney in San Mateo County, California, just north of Stanford, had once had a woman lawyer on his staff.... I went to see him....

He said that he thought I had a very good record in law school, and he would certainly be happy to have me in that office. However, he had no vacancy, had no money to hire another deputy, and had no available office....

So I went back to the Lazy B Ranch to get ready for our wedding. I wrote him a letter....

I said, "I know you don't have any money, but I'd be willing to work for a while, without pay, in hopes that you will get funding."

And I said, "I know you don't have any space, but I would be willing to sit anywhere your secretary sits, if she will have me as a companion in that office."... So he consulted his secretary, and she said, "Great, I'd love to put a desk in here with mine."...

[So] I went to work in that office....

[A]fter a brief time there[,]... the [District] Attorney was made the [Superior Court] Judge for the area.... That opened up a position for the [District] Attorney. My supervisor... was made [District] Attorney. That opened up a slot for me, and so all was well.

Id. at 2–3.

⁸Again, Justice O'Connor:

Our neighbors were a television repair shop, a grocery store, a dry cleaner, and so on. We opened our doors, and we took whatever came into those doors.... Not the sort of problem that usually makes its way to the United States Supreme Court!

We had to pay the rent....

I remember representing one [criminal defendant] who was charged with writing a number of bad checks....

He said, "I didn't write those checks. That's not my handwriting."

I said, "Well, we can probably take it to court and you can say what you're telling me, but it's possible you won't be believed unless we get an expert witness, a handwriting analyst, to say, 'No, it isn't your signature.'"

He said, "Well, I don't have any money."

I told him, "I've asked, and the county won't pay for me to hire an expert. But I'll tell you what I'll do. I'll hire one, and we'll see what we get."

I paid for the services of the handwriting expert, who assured me that my client's signature was on that check.

So you live and learn.

Id. at 5.

⁹"I thought," as she recalled later, "'Goodness, I've been marginal so far. After five years without any legal work, who's going to hire me then?'" *Id.*

¹⁰Nor did she, much. Confident from her youth that she could handle whatever life threw at her, to this day she displays in her Chambers a pillow, made for her by a friend, that reads: "Maybe in error, but never in doubt." She decides, and moves on.

¹¹"Same old problem. I asked the Attorney General of Arizona to give me a job. He was from the opposite political party, and he declined. We had an election. He lost. I reapplied. I was hired." O'Connor, "Remarks at the University of Houston Law Center," *supra* note 6, at 6.

¹²"I thought, 'Well, that would be kind of interesting—to be in the Legislative Branch.' I had been working out of the Executive Branch of the government, so I said yes." *Id.*

¹³"[I]t was quite a challenge," as she said later:

I learned how to develop legislation that I thought was needed. I learned how to organize support to get that legislation passed. I learned what it takes to develop and enact public policy in a state legislature—and I suppose that knowledge is transferable. . . .

How do you do that? I think you do that by making friends on both sides of the aisle. And how do you do that? Well, you can ask all of them over to your house and fix a barbeque for them. I did that on a regular basis. And I did everything else I could think of to make relationships across party lines that would enable me to get that legislation passed.

Id.

¹⁴Not everyone can give up the elixir of electoral politics easily, but the future Justice did:

So [the senate] was good, but after a few years I worried that I was hearing too much flattering

commentary. Everyone who wants something had to come to me and would try to flatter me as a means of getting my support and attention. I don't think that's healthy.

So I thought, well, I ought to try the Judicial Branch of government, because as a judge, one person always loses, and one side is always going to say, "Judge, you're wrong."

Id. at 6–7.

¹⁵"By a narrow margin, that constitutional amendment passed. I lived in Arizona long enough after that to see the great benefit that change made in the quality and caliber of the judges Arizona had—and has to this day. It made a difference." *Id.* at 7.

¹⁶As of this writing, she is the twenty-fourth longest-serving Justice in history—just ahead of the retired Harry A. Blackmun and counting the still-sitting John Paul Stevens—at twenty-four years, four months, and six days. Her life on the Court (and before) is described in detail in Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* (2005). Readers with curiosity about the interplay between the Justice's life on and off the Bench will find of interest her judgment, courage and determination in fighting and beating breast cancer during the Court's 1988 Term.

In all, Justice O'Connor wrote 676 opinions, as the Court's Library and I count them. Lexis insists that there were 680. It appears to me that Lexis lists O'Connor opinions in three cases—*Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); and *Overton v. Ohio*, 534 U.S. 982 (2001)—in which she merely joined in others' opinions. Lexis also double-counts the single O'Connor opinion in *McConnell v. FEC*, 540 U.S. 93, a case so long that Lexis breaks its report in two and thus lists the case twice. In matters concerning the Court, it seems best to trust the Library.

¹⁷Regarding the foregoing thumbnails, *cf.* Confirmation Hearings, *supra* note 1, at 58 (descriptions of the sons in 1981, updated here).

¹⁸"I am 75 years old," she said through a Court spokeswoman. "I want to spend more time with my husband."

Justice Sandra Day O'Connor: The Framers' "First Woman"

DEBORAH JONES MERRITT

Sandra Day O'Connor's appointment to the Supreme Court was a historic stride in American women's slow but determined march towards full equality. At our nation's birth, Abigail Adams urged her husband and other members of the Continental Congress to "Remember the Ladies" in their new government.¹ "We know better than to repeal our Masculine systems," John Adams replied only half-jokingly.² More than two centuries would pass before a woman donned Supreme Court robes to help interpret the United States Constitution.

Justice O'Connor's 1981 confirmation struck a chord with women and men around the world. Letters flooded the new Chambers, offering congratulations and rejoicing in this affirmation of women's ability to lead. Citizens wrote movingly about how the appointment of a woman to the Supreme Court had inspired them and their daughters to set higher goals.

During that first Term, as in all those succeeding it, Justice O'Connor assumed two vital roles. In the first, she symbolized the new role of women in public life. She had married and raised three sons, but she had also practiced law, prosecuted crimes, led the majority in her state senate, spearheaded civic reform movements, and served with distinction as a state judge. On the Supreme Court of the United States, she demonstrated daily that

women could reach the highest levels of their professions and public life.

But role models have day jobs as well; O'Connor's second professional role was the demanding one of Supreme Court Justice. From the first Term, she showed her strength on the Bench. Lawyers quickly learned to prepare for her questions, which were likely to penetrate the weakest corners of their arguments. O'Connor authored key decisions, as well as noteworthy concurrences and dissents, from her very first year.

The O'Connor Chambers, like others at the Court, acquired its own culture. George Catlin's paintings of the American West adorned the office walls. The Justice gained a nickname, "SO'C," from participating in the cert pool. A first-year outing to the Smithsonian's Museum of African Art set the pace

for annual Chambers' expeditions. And an early morning exercise class attracted women from throughout the building, spawning a memorable t-shirt: "Women Work Out at the Supreme Court."

Through it all, the press and public watched to see how a "woman Justice" would differ from the men she joined. But O'Connor's voice was more centrist, pragmatic, and Arizonan than distinctively female. She displayed keen attention to the facts of each case, deciding disputes in the careful fashion of all thoughtful jurists. She respected state lawmaking, jury deliberations, and the discretion of lower-court judges.

Justice O'Connor also gave special voice to the intentions of the Constitution's Framers. Like them, she grew up in a half-wild, half-tamed land. Like them, she had to fight for equal treatment. And like them, she experienced dizzying change in her lifetime. John Adams evolved from British subject to President of a new nation; Sandra Day O'Connor advanced from offers of secretarial work to Supreme Court Justice.

O'Connor's judicial opinions reflect the Framers' respect for individual liberty. She shares their commitment to personal freedom and government restraint. At the same time, her jurisprudence reflects the Framers' recognition that individual liberty sometimes requires restraining the majority's will. As O'Connor explained in the last opinion she authored before announcing her retirement, "[W]e do not count heads before enforcing the First Amendment."³ To do so would contradict "the Founders' plan of preserving religious liberty . . . in a pluralistic society."⁴

O'Connor's own appointment to the Court symbolizes both our pluralistic society and the resilience of the Framers' constitutional design. John Adams and his colleagues surely did not intend an Arizona cowgirl to sit on the Supreme Court. But they created a Constitution strong enough to embrace territorial, cultural, and civic growth. The Framers were men of the Enlightenment who believed in progress.

They knew that their new nation would expand and that its citizens would outgrow eighteenth-century prejudices. Some day, slavery would end; some day, women would join men as the nation's leaders. The Framers crafted a Constitution that would propel the rule of law into that future.

Sandra Day O'Connor helped direct that movement, first by taking her seat on the Court and then through a quarter century of judicial decisions. Building on the Framers' efforts, she also worked to communicate constitutional principles to others. O'Connor added a third shift to her official duties, sharing insights about the rule of law with emerging democracies worldwide. In "retirement," she will continue to promote knowledge of the judicial role both at home and abroad.

During her first Term on the Court, Justice O'Connor authored an opinion declaring unconstitutional an educational scheme that reflected the "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."⁵ For those "mechanical . . . assumptions" O'Connor substituted "reasoned analysis."⁶ Women can do the work of men, and the rule of law has room for us all.

Justice O'Connor's own life and work elegantly embody the force of "reasoned analysis" in place of "mechanical assumptions." The Constitution's Framers would have loved Sandra Day O'Connor—and Abigail Adams would be proud.

ENDNOTES

¹Letter from Abigail Adams to John Adams, 31 March–5 April 1776, Adams Family Papers: An Electronic Archive, Massachusetts Historical Society, <http://www.masshist.org/digitaladams/aea/> (last visited May 29, 2006).

²Letter from John Adams to Abigail Adams, 14 April 1776, *id.*

³*McCreary County v. ACLU*, 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring).

⁴*Id.* at 2747.

⁵*Mississippi University for Women v. Hogan*, 458 U.S. 718, 726 (1982).

⁶*Id.*

Thomas Jefferson and John Marshall: What Kind of Constitution Shall We Have?

MELVIN I. UROFSKY

Although they were third cousins once removed—both descended from William Randolph of Turkey Island, one of the first settlers in Virginia—John Marshall and Thomas Jefferson had little familial affection for one another. During the disputed contest of 1800, the future Chief Justice felt “almost insuperable objection” to the man who eventually become the third President, declaring him “totally unfit for the chief magistracy of a nation which cannot indulge these prejudices without sustaining deep personal injury.”¹ For his part, Jefferson reciprocated, and his cousin became the embodiment of all he despised in the judiciary. He wrote of Marshall as a man of “lax lounging manners . . . and a profound hypocrisy.”²

But while their personal antagonisms may be amusing, it is far more important from our point of view to see their repeated clashes as part of an ongoing public debate over the future of the United States and how it would be governed under the Constitution. Thomas Jefferson, the great apostle of revolution and civil liberties, never overcame his dread of centralized government. John Marshall, the “great Chief Justice,” never overcame the revulsion that he and others, such as his idol, George Washington, felt at the breakdown of government in the mid-1780s. This debate, at its core, asked what kind of nation we would be.

This article proposes to look at some of the friction points between the two men in terms of their constitutional meaning. Central to their debate was the role of the judiciary in a constitutional government.³ Jefferson openly declared that “the great object of my fear is the federal judiciary . . . Let the eye of vigilance never be closed [against it].” Marshall, in decrying what he perceived as Jefferson’s demagoguery, noted that “he looks, of course, with ill will at an independent judiciary.”⁴ I suggest we start with two debates that took place in President Washington’s first term, not between Jefferson and Marshall, but between Jefferson and Alexander Hamilton. This



Although he was a third cousin once removed of John Marshall, Thomas Jefferson (pictured) considered the Chief Justice unfit for the judiciary and wrote of his "lax lounging manners."

is where conflicting visions first evidenced themselves, and, as many commentators have suggested, Marshall's magisterial opinion in *McCulloch v. Maryland* (1819)⁵ is a companion piece to Hamilton's state paper on the bank of the United States.

* * *

The major problems confronting the new government under the Constitution involved money. The Confederation had left a mountain of debt—a staggering \$50 million—an empty treasury, and no revenue measures in place. The Secretary of the Treasury, Alexander Hamilton, proposed a four-part program: federal assumption of the states' debts; refunding of both the federal and state debt at par; a tariff the revenue from which would be devoted solely to the payment of this debt; and a federally chartered but privately owned bank to help manage the government's financial affairs. Jefferson was willing to go along with the first three parts, but at a price; that is why the national capital is now on the Potomac rather than the Hudson or the Delaware. But

he objected strenuously to the bank, and when Washington sought the advice of his cabinet, his Secretary of State argued that the proper construction of the Constitution would not allow Congress to establish a bank.

According to Jefferson, "where a phrase will bear either of two meanings, [one should] give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless." As for the Necessary and Proper Clause, it did not intend to give Congress a free hand. The Constitutional Convention, he claimed, had not intended to give Congress broad powers, but to "lace them up straightly within the enumerated powers."⁶ In other words, the federal government had extremely limited powers—only those specifically listed—and the Constitution should not be interpreted to allow Congress to detract from the powers of the other parts, namely, the states.



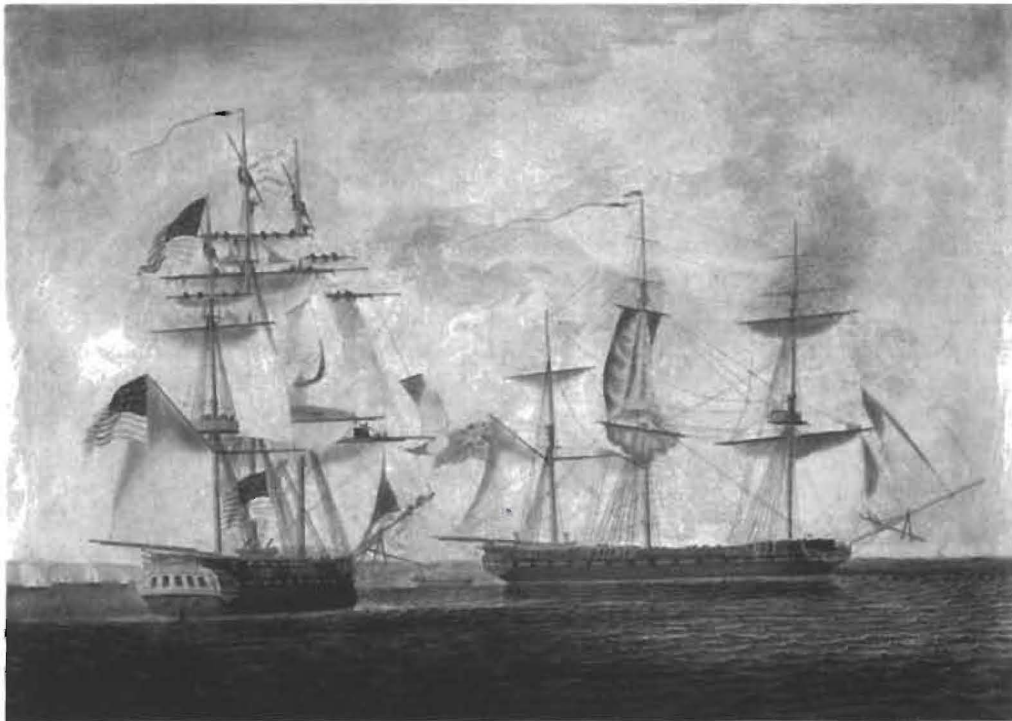
Secretary of the Treasury Alexander Hamilton (pictured) was at odds with Jefferson over how to generate revenue for the empty treasury they inherited. Hamilton thought the Constitution gave Congress the power to charter a national bank; Jefferson thought the bank would detract from the power of the states.

Hamilton, of course, took just the opposite view: that Congress had in fact intended the national government to have broad, albeit limited, authority. The Constitution, he argued, "ought to be construed liberally in advancement of the public good." The word "necessary" meant "needful, requisite, incidental, useful, or conducive to."⁷ If Congress was to legislate for the nation, than it had to have the authority to implement the goals of the Constitution as spelled out in the Preamble. Rather than see Congress as having only the powers enumerated, Hamilton suggested that Congress had all necessary powers, save only those expressly forbidden to it.

Hamilton won that debate easily; he and Washington had both been at the Philadelphia convention and knew that the delegates had deliberately avoided an effort to list all the powers of Congress, preferring to sketch in broad strokes. They also knew that the reason the

document did not specifically give Congress the power to charter banks and other institutions was that during the debates, the delegates agreed that such powers belonged to a sovereign government and need not be spelled out.

Now jump forward a quarter-century. James Madison, who along with Jefferson had originally opposed the Bank of the United States, had come to see the need for it during the War of 1812. Unreconstructed Jeffersonians and states'-rights advocates, however, continued to oppose it. The debate reached the Supreme Court in 1819 in *McCulloch v. Maryland*, and John Marshall's opinion for a unanimous Court—including a majority appointed by Jefferson and Madison—enunciated a broad interpretation of constitutional power. "We must never forget that it is a *constitution* we are expounding," a flexible instrument sufficient to the "exigencies of the



Although Jefferson continued to oppose the Bank of the United States, James Madison abandoned his opposition during the War of 1812 because the war showed the nation's need for such an entity. Above, a British ship fires on an American frigate in what has been called the Second War of Independence.

nation." If every power necessary to the federal government had to be listed, the Constitution would be nothing more than a legal code, whose prolixity "could scarcely be embraced by the human mind."⁸ In the key passage in the opinion upholding the constitutionality of the bank, Marshall declared, "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."⁹ Any other reading would reduce the Constitution to a "splendid bauble," and not a great charter of government "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."¹⁰

In the long term, and in relation to the debate over the type of nation the United States would become, the victory clearly belongs to Marshall and Hamilton. Neither common sense nor history supports the Jeffersonian view. Over the last 216 years there have been many debates over the extent of federal authority, whether exercised by Congress, the President, or the judiciary. At times, critics have complained that the government exceeded its constitutional powers; in different eras people have lamented that the government did not fulfill its obligations under the Constitution to promote the general welfare. Hardly anyone today, however, would argue that the national government could do *only* those things specifically listed in the Constitution and nothing else. James Buchanan took the Jeffersonian view when the southern states started seceding immediately after the 1860 election; they were acting illegally, he admitted, but he could find nothing in the Constitution to allow him to act.¹¹ Abraham Lincoln, on the other hand, found plenty of authority by a Marshallian reading of the document, and saved the Union.¹² However this country responds to terrorism and other challenges in the twenty-first century, it will do so through a broad reading of delegated powers.

Moreover, a close reading of the notes taken at Philadelphia that hot summer of 1787 shows clearly that the delegates knew exactly what they were doing. They gave Congress the power to tax, but did not spell out what sort of taxes or what the rates should be. They established a judiciary without spelling out the parameters of its authority. They made the President the commander-in-chief without defining what that term meant. They expected that the government would have the power necessary to meet the challenges it would face, not just in 1787 but in the future as well. One need not be an advocate of the "living Constitution" theory to recognize that a crabbed Jeffersonian reading—what has been called "clause-bound literalism"—would not have allowed the United States to grow and thrive and meet emergencies unforeseen by the Founders.

* * *

By the time Marshall handed down his decision in *Marbury v. Madison* (1803),¹³ his dislike of his cousin had intensified. He suspected and detested Jefferson's role in the drafting of the Kentucky and Virginia resolutions, with what he saw as their pernicious doctrine of state nullification of federal laws. In 1798 Marshall had been serving in the Virginia assembly, where he led the fight against the Virginia Resolution. The abuse heaped upon him, which he believed traced directly back to Monticello, led him to remark that "those Virginians who opposed the opinions and political views of Mr. Jefferson seem to have been considered rather as rebellious subjects than legitimate enemies entitled to the rights of political war."¹⁴

When the election of 1800 led to the totally unexpected tie between Jefferson and his running mate, Aaron Burr of New York, Marshall, then serving as Secretary of State under John Adams, agreed with Hamilton that of the two, Burr was the worse choice, but "I cannot bring myself to aid Mr. Jefferson," to whom he

HISTORY
of the
UNITED STATES.



CONVENTION AT PHILADELPHIA.

1787.

HARTFORD.

PUBLISHED BY HUNTINGTON & HOPKINS.

1823.

The author argues that the delegates sitting in Philadelphia during the summer of 1787 gave the government the powers necessary to meet the challenges it would face in the future. By contrast, Jefferson believed that the government's authority should be restricted to those powers specifically listed in the Constitution.

had "an almost insuperable objection." He did note, however, that "the democrats are divided into speculative theorists and absolute terror-

ists." Then with the charity of a gentleman, he conceded that he did not include his cousin with the latter group.¹⁵

We are all, of course, familiar with the general facts and holdings of *Marbury*. Historians agree that portions of the hastily enacted Judiciary Act of 1801 and the Organic Act for the District of Columbia should have been repealed; the District at that time certainly did not need forty-two justices of the peace, but it could have used appellate circuit courts, saving the members of the High Court from what they saw as the most onerous part of their work—riding hundreds of miles on circuit. But Jefferson did not want more judges, and especially not more Federalist judges.

Most of those who lost their new appointments ruefully accepted the fact, but not William Marbury. He had, after all, been appointed; John Adams had signed the commission; Marshall, then Secretary of State, had failed to deliver it; and now Jefferson and his new Secretary of State, James Madison, refused to hand over the document. Without the commission, Marbury could not exercise the powers of, or collect the fees due to, a justice of the peace. In hindsight we can see that a President has the power both to appoint people and, except where their tenures are defined by statute or the Constitution, to remove them. In 1801, however, the powers of the presidency—and indeed, of the entire government—were still in an early stage of evolution.

Marbury went directly to the Supreme Court and, under the terms of the Judiciary Act of 1789, asked the Court to issue a writ of mandamus, ordering the Secretary of State to deliver the commission. Marshall and the Court were in a quandary. At the time, the judiciary was not only, to use Hamilton's phrase, "the least dangerous branch,"¹⁶ but also the weakest segment of the national government. There was no fully developed judicial system such as that we have now. Most states had only one federal district court; there were no independent circuit courts; appeals were heard by members of the High Court riding circuit and sitting with a district judge; the Supreme Court itself would have no real home of its own

for another 135 years. John Jay had resigned as Chief Justice because he thought the Court would never be an important player in the governmental scheme.¹⁷

If the Court gave Marbury the writ he had demanded, Marshall knew full well that Jefferson and Madison would ignore it, leading to an even lower level of respect and authority for the judiciary. If, however, the Court denied Marbury, it would appear that it had acted out of fear of the executive. Jefferson once complained that if you let Marshall define the questions in a debate, then victory would be his. "So great is his sophistry," Jefferson declared, "you must never give him an affirmative answer or you will be forced to grant his conclusion. Why if he were to ask me if it were daylight or not, I'd reply, 'Sir, I don't know, I can't tell.'"¹⁸

And so it happened. Marshall asked three questions: Did Marbury have the right to the commission? Yes. If he did, and his rights had been violated, did the law provide him with a remedy? Yes. If so, did mandamus from the Supreme Court constitute the proper remedy? No, it did not.

In his answers to the first two questions Marshall vigorously criticized the Jefferson administration for its disregard of the law. Once the commission had been signed—an executive decision in which the courts would not interfere—then it was only a ministerial task to have it delivered, and here the courts could order government officials to carry out their duties. But Congress, in the 1789 Judiciary Act, had exceeded the authority given to it by the Constitution in defining the original jurisdiction of the Supreme Court, and as such, that portion of the law was void; the Court could not give William Marbury the relief he sought, not because he was wrong, but because he was in the wrong place.

Marbury is, of course, the great source of judicial review, and in utilizing this strategy Marshall was able to chastise his cousin for failure to do his duty and at the same time avoid the dilemma of issuing a writ and having

it ignored. While there has been considerable criticism of the case from a jurisprudential view, everyone is agreed that it was a brilliant political stroke. But there is more. A second and even more important part of the opinion affects us to this very day, and the power assumed by the Court set the stage for the Jeffersonian attack on the judiciary.

In claiming judicial review of legislation for the Court, a power not explicitly listed in the Constitution, Marshall did little more than expand on existing English and American law. Since the power existed at the time of the drafting of the Constitution, it surely would have been encompassed in Article III's broad delegation of "the judicial power" to a Supreme Court and other inferior courts.

The key is found in Marshall's avowal that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁹ He went on to claim that the Constitution, while more than a simple law, is still law, and that in interpreting what that law means, the Supreme Court has the final word. This, of course, is the great font of the authority and moral prestige of the Supreme Court: that it is the ultimate arbiter of constitutional questions. The key question is "who decides who decides." By that, I mean that while some constitutional questions are left to the determination of either the President or Congress, it is the Court who will determine when that is the case. The Court thus positioned itself between the Constitution, on the one hand, and the other branches of the federal government as well as the states, on the other. In *Marbury*, it became the gatekeeper of constitutional interpretation, and as such the most powerful constitutional court in modern times.

Jefferson, of course, realized what the decision meant, and it infuriated him. Although neither the President nor the Democratic-Republican press ever commented on it publicly—since, after all, Jefferson had "won"—privately he decried the opinion for its "sophistry" and what he called Marshall's "twistifications."²⁰ To Abigail Adams he wrote: "The

opinion which gives to judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature & executive also, in their spheres, would make the judiciary a despotic branch."²¹

Years later, reflecting on *Marbury*, Jefferson argued that Marshall had been wrong in deciding that *Marbury's* commission had been vested once the Chief Executive had signed it. Marshall had been right in holding that the Court had no jurisdiction, so he should have limited his decision to that matter. "The practice of Judge Marshall of traveling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable." Beside the "impropriety of this gratuitous interference," Jefferson asked, "could anything exceed this perversion of the law?"²²

The President also had been irked at the power that Marshall exerted over his brethren. While each member of the Court—including the Chief Justice—has only one vote, history shows that a forceful personality and/or intellect can exert great influence. Marshall had that personality, and he believed that the Court's decisions would be more respected if the Justices spoke through one voice—usually his. Under Jay and Ellsworth, the Court had followed the English practice of each judge delivering his opinion *seriatim*. Jefferson deplored the abandonment of this practice, and as late as 1811, after a majority of the Court consisted of Republican appointees, he fulminated over the seemingly magical power Marshall had over the other Justices. "An opinion is huddled up in conclave," he declared, "delivered as if unanimous and the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning."²³ He wanted to force the Justices each to write his own opinion and thus break down the illusion of unanimity which, as Marshall had hoped and Jefferson recognized, gave the Court's opinions such force with the public.



The attempted impeachment of Justice Samuel Chase (pictured) was intended not simply to remove a rabid Federalist from the Supreme Court but also to send a warning to those who would remain on the Bench. Jefferson took a hands-off role during the unsuccessful removal attempt.

Jefferson smarted at the time and afterwards because he had been lectured by his cousin, and even though he technically “won” the case, he realized that politically, Marshall had the upper hand. Moreover, Marshall had acted much as the President often did: he had avoided a direct confrontation and had masked his assertion of judicial supremacy under the veil of impotence. One wonders if Jefferson recalled the letter he wrote to James Madison at the time Madison was drafting what became the Bill of Rights, in which he argued that it was very important to put a “legal check” into the hands of the judiciary to control the legislature.²⁴ If he did, he may have regretted his earlier enthusiasm for such power. In 1803, Jefferson—and historians ever since—have known who won the battle in *Marbury*.

* * *

The decision in *Marbury* marked only the end of one battle in a continuing war between

the Jeffersonians and the judiciary. Although paying lip service to the idea of an independent judiciary, Jefferson, like many other critics of the courts ever since, valued this independence only when the judges handed down decisions of which he approved. In an era of high partisanship—which he had done so much to create—Jefferson believed that, in electing him, the people had chosen for the government to be in the hands of the democratic, as opposed to the federalist, forces. He and his party controlled the executive and legislative branches, but he found a federal court system staffed entirely by Federalists. Moreover, he did not get his first appointment to the High Court until 1804, and in his second term he made only two other appointments. The Federalists, he lamented, “have retired into the judiciary as a stronghold.”²⁵ He bemoaned the fact that in such a judiciary, few die, and none retire. So he decided to do something about it.

The impeachment of Associate Justice Samuel Chase was intended not only to rid the Jeffersonians of an arch-Federalist on the High Court, but also to teach a lesson to those who remained.²⁶ Where Marshall was a rapier, Chase was a blunderbuss, given to intemperate fulminations against the Jeffersonian party in his lengthy charges to grand juries. In the spring of 1800, as a presidential candidate, Jefferson assured James Monroe that no slander by Justice Chase against him or his party would provoke in him the slightest tremor of indignation. But in May 1803, after reading the published charge to a Baltimore jury in which he inveighed against Jefferson and the “mobocracy,” the President wrote to Joseph Nicholson, a Republican leader of the House: “Might this seditious and official attack on the principles of the Constitution . . . go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures. I ask these questions for your consideration. For myself, it is better that I should not interfere.”²⁷ Clearly, this constituted a command to his Republican leaders in Congress to impeach Chase.

The House impeached Chase, and after the removal of district judge John Pickering of New Hampshire, it looked as if the Republicans would dismantle the federal judiciary one judge at a time. But Pickering, who was an alcoholic and mentally unbalanced, deserved to be removed, and although his friends tried to get him to resign he would not. As Jefferson ruefully noted, in such cases the Constitution provided a very dull and cumbersome instrument to use in a delicate situation. Chase, while intemperate at times, was neither insane nor an alcoholic; instead, he was a recognized patriot, a signer of the Declaration of Independence, and the trial in the Senate clearly exposed the motives behind the impeachment.

William Giles of Virginia made no bones about what the impeachment meant: it was "nothing more than a declaration by Congress to this effect. You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. *We want your offices*, for the purpose of giving them to men who will fill them better."²⁸ Giles hinted that after they had removed Chase, they would go after John Marshall and the rest. Events in Pennsylvania at this time, where

the Republicans were attempting to impeach all but one of the judges of the state's highest court, underscored the seriousness of the threat.

The Federalists in the Senate had a field day. They pointed to the narrow requirements imposed by the Constitution as grounds for removing a judge, and could plausibly paint Chase as a political target and victim of the President. They particularly relished reminding Jefferson that the principle of an independent judiciary had been a rallying cry in the colonies at the time of the Revolution, one of those sacred truths that Jefferson had accused George III of violating. Even some of Jefferson's supporters could not stomach this attack, and in the end the Senate voted to acquit. Since then, several Presidents have taken on the Supreme Court, and all have come away as frustrated as Jefferson.

For Jefferson, the courts did not have an important role to play in a democracy. In the pure republicanism he espoused, the will of the people, as expressed through their elected representatives—preferably at the state level—would ensure freedom and self-rule. Jefferson went to his grave believing that Marshall and his colleagues on the Supreme Court were evil, a gang of "sappers and miners" hell-bent on sabotaging the republican government from within.²⁹

* * *

While Jefferson preferred to take a hands-off posture during the attempted removal of Chase, the President took a far more active role in the trial of Aaron Burr for treason. The choice of Burr as Jefferson's running mate in 1800 had been dictated by the fact that the Democratic-Republican party rested on an alliance between anti-Federalist forces in Virginia and New York. Then the two men wound up in an unexpected tie for the presidency, since the college of electors at the time did not differentiate between ballots for President and Vice President. Burr did nothing to help Jefferson, and relations between the two



Jefferson's running mate in the 1800 election, Aaron Burr (pictured), quickly became a pariah when the two wound up with an unexpected tie for the presidency because the electoral college of that time did not differentiate between votes for President and those for Vice President.

soured considerably, as Jefferson cut Burr out of his inner circle and gave him no patronage. After killing Hamilton in a duel, Burr had little political future left, and he began to lay his plans for a filibustering expedition into the Spanish-held area west of the Louisiana Purchase.

Then, as now, no one was quite sure just what Burr actually planned to do; he apparently considered a number of options, never settling on one in particular.³⁰ The whole scheme fell apart when his chief confederate, General James Wilkinson, the Governor of the Louisiana territory—a smarmy character who, in addition to plotting with Burr, was secretly in the pay of Spain—denounced Burr to Jefferson. The army seized Burr as he floated downstream on a flatboat to New Orleans and brought him to the site of the nearest federal court: Richmond, Virginia.

Jefferson's animosity toward his former running mate and Vice President soon turned into an obsession for Burr's conviction. He publicly denounced Burr in a letter to Congress, and he kept in constant touch with the proceedings throughout the case, personally instructing the government prosecutor. His disdain for the guarantees of a fair trial, his suggestion that habeas corpus be suspended, and his veiled threats that if Burr went free the entire Supreme Court should be impeached all reveal what historian Leonard Levy has termed "the darker side" of a man venerated in history as the great apostle of individual liberty.³¹

Painfully aware of the political implications, Marshall nonetheless recognized the important legal issues involved. Historians have, in general, given him high marks for his handling of the Burr trial, as well as for the law he propounded during it.³² The great Chief Justice, however, does not completely escape criticism. Several times during the proceedings he took the occasion to chastise the government for its apparent vendetta against Burr and its disregard of the essential safeguards of a fair trial—comments addressed to the

government prosecutor but clearly aimed at and intended for Jefferson. Rather indiscreetly, the convivial Marshall even attended a dinner given by Burr's counsel in honor of the defendant! Little wonder, then, that Jefferson saw Marshall as attempting to coddle traitors and embarrass Jefferson's administration.

While not rising to the level of *Marbury* or the great later cases such as *McCulloch v. Maryland*, *Dartmouth College*³³, and *Gibbons v. Ogden*,³⁴ the Burr trial did lay down what has remained as the law of treason in the United States. It proved to be far more difficult than many people expected. Certainly Jefferson believed that Marshall should just go in and tell the jury to convict, and he would be waiting outside the courtroom with a rope in his hands. But the Framers of the Constitution knew what a terrible tool a treason charge could be, and they had literally dozens of examples from English history where the Crown had accused and secured conviction of treason simply to silence a political opponent and seize his estate. They spelled out what would constitute treason, and what minimum evidence had to be produced to prove it.³⁵

Treason first came before the Supreme Court in two cases related to the Burr conspiracy. General Wilkinson had seized two of Burr's alleged co-conspirators, Samuel Swarthout and Dr. Justus Bollman, denied them hearing or counsel, and then sent them on to Washington in January 1807 for indictment on charges of treason. The two Republican judges on the circuit court ruled that they should be imprisoned without bail, while the sole Federalist on that court, William Cranch—better known to us as a reporter of the Court's cases—believed they should be freed for lack of evidence. The prisoners then appealed to the Supreme Court for a writ of habeas corpus, and Marshall directed the jailer to show cause why it should not be issued. Fearful that the Court would free the men, William Giles, Jefferson's lieutenant in the Senate, managed to get the upper house to pass, in one day, a bill suspending the privilege of habeas corpus for

three months. A few days later, however, the House of Representatives, despite its Republican majority, overwhelmingly rejected the bill.

Marshall understood the importance of the case and wanted to depoliticize it—an effort doomed to failure from the start, in large part because of Jefferson's obsession with the Burr enterprise. In his opinion, then, he concentrated on two crucial issues: could a writ be issued, and what should be the definition of treason? A majority of the Court voted with the Chief Justice that the Court could issue the great writ, but only because the case had already been heard in a lower court and the prisoners could thus appeal.³⁶

Defining treason proved a bit trickier. In Article III, section 3 of the Constitution, the Framers declared that treason against the United States "shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." To support the charge, therefore, war actually had to take place; conspiracy to make war, while certainly a crime, did not meet the definition of treason. In words that would haunt him at the Burr trial, Marshall conceded that

[i]f a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of the action, and who are actually leagued in the general conspiracy, are to be considered traitors.³⁷

Marshall actually had no reason to even deal with this matter, since conspiracy had not been part of the lower court ruling. But the administration seized upon it to justify its prosecution. It did not matter, according to the government, whether war took place; preparations amounted to the same thing. One is reminded of Chief Justice Fred Vinson's comment in the *Dennis* case nearly 150 years later: "[T]he words cannot mean that before the Government may act, it must wait until the *putsch*

is about to be executed, the plans have been laid and the signal is awaited."³⁸ But while Marshall provided words for a possible conspiracy charge, he made it clear that conspiracy to make treason did not constitute treason itself. War had not been levied, and absent war, there could be no treason.

On April 1, 1807, Marshall dismissed the charge of treason against Aaron Burr. Despite a reference to the "hand of malignity," which must not be permitted to "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 innocence"—words clearly directed at Thomas Jefferson—the Chief Justice's opinion displayed prudence and legal exactitude.³⁹ The evidence could not support a charge of treason for a simple reason: war had not been levied against the United States, the sole criteria given in the Constitution. The government would be allowed to try Burr for assembling a military expedition against Spain, a country then at peace with the United States. Moreover, if the government could assemble any evidence to show that Burr had intended to use his military forces against the United States, it could then seek a grand jury indictment for treason.

A livid Jefferson wrote to Senator Giles that the day could not be distant when the Constitution would be amended so as to remove "the error . . . which makes any branch independent of the nation." With more passion for vengeance than sensitivity to civil liberties, the President stepped in with personal oversight of the prosecution. Witnesses would be produced, he wrote Giles, as well as evidence to "satisfy the world, if not the judges," of Burr's treason. Jefferson immediately sent out a call for anyone connected with the affair to testify to Burr's guilt, promising pardon to anyone connected with the failed enterprise if they would cooperate. The President even instructed the government's attorney, George Hay, to introduce Marshall's opinion in *Marbury* and then denounce it "as not law."⁴⁰

Ultimately, after much maneuvering on both sides, the jury found Burr not guilty. Although Marshall had to explain away his dictum in *Bollman*, which had implied that just gathering an army would be treasonous, he reaffirmed the definition of treason that had been developed earlier and that remains valid to this day. According to Dumas Malone, Jefferson appears never to have discussed Marshall's opinion in legal terms, and he viewed the results of trial solely as a political event that "has been what was evidently intended from the beginning . . . not only to clear Burr, but to prevent the evidence from ever going before the world."⁴¹ For this result, he blamed only one person—John Marshall.

The most potentially controversial issue in the Burr trial failed to explode, however: the defense's demand that the President of the United States be summoned as a witness and produce documents in his possession. Burr learned that Wilkinson had falsified some of the papers forwarded to Jefferson, in order both to magnify Burr's involvement and to minimize his own. The government had denied Burr access to these documents, and he wanted the Court to issue a subpoena to the President unless the government produced them voluntarily. Surprisingly, Hay agreed that the Court had the power to issue the order, and Jefferson subsequently did turn over some of the papers. But the President insisted that he be the ultimate arbiter of what materials coming to his office would be opened to public scrutiny. He—not the Court—would determine what documents in his possession should remain confidential. As a result, there was no argument when Marshall in fact issued a subpoena.⁴² Ignored for the most part at the time, this aspect of the trial may have been, next to the insistence on a narrow definition of treason, the most important part of the case. Once again, Jefferson lost.

Marshall's order laid the basis for the Supreme Court's decision 167 years later in *United States v. Nixon* (1974), when Chief Justice Warren Burger, quoting freely from

John Marshall, ordered Richard Nixon to turn over tapes in his possession, and a unanimous Court dismissed Nixon's claim to executive privilege. Following Marshall's reasoning, the Court found that the Burr trial established the doctrine that while a court would give careful consideration to presidential claims that certain documents were either immaterial or their exposure would endanger government policy, the materials would have to be produced, and the court, in camera, would make the final decision as to whether they should be turned over.⁴³ Even while recognizing the existence of executive privilege, the Court still followed Marshall's ruling in *Marbury*: the Court, and not the President, would decide who decides.

Despite Marshall's occasional chastising of Jefferson, the Chief Justice remained sensitive to the overcharged political atmosphere surrounding the trial. His rulings displayed meticulous attention to legal principles and the meaning of words; given the confusion that still surrounds Burr's intentions, there is little doubt that treason, as defined by the Constitution, had not occurred. The Jeffersonians, as expected, reacted strongly to the acquittal. The President sent several hundred pages of supporting material to Congress, urging it to consider the appropriate steps that should be taken and implying that the most appropriate would be the removal of Marshall from the Bench. The public outcry over the acquittal, Jefferson predicted, would make it possible to secure a constitutional amendment to provide for the popular election of judges; such an amendment would well be worth the price of the traitor's acquittal.⁴⁴ Such an outcry, however, never materialized.

The closing of the Burr trial marked the end of open warfare between Jefferson and the Supreme Court. Increased tensions with Great Britain and France diverted the administration's attention to other matters.

* * *

During the period between 1804 and 1807, John Marshall did something that some

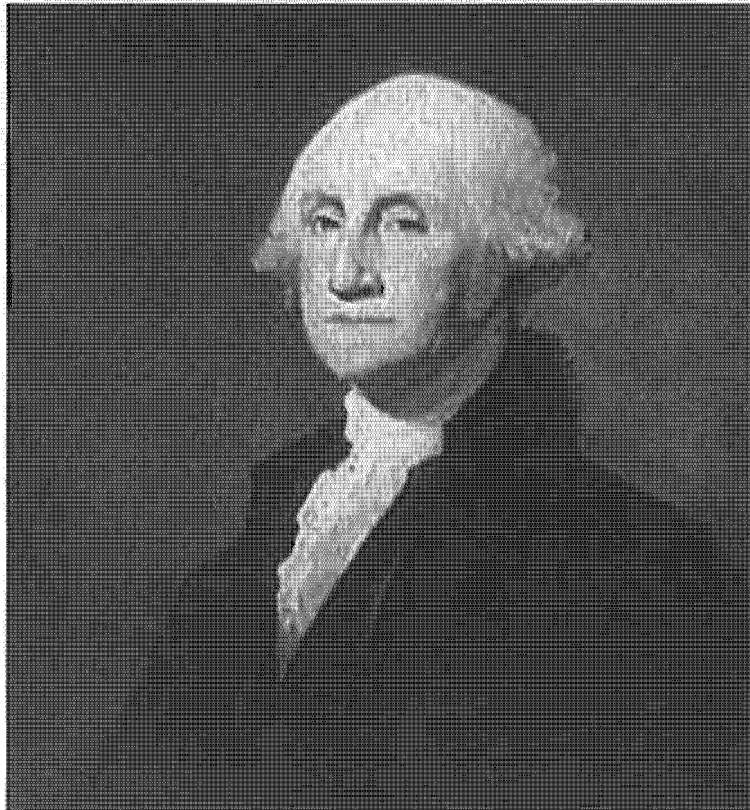


After his presidency, Jefferson returned to his cherished Monticello in Charlottesville, Virginia, where he made disparaging comments about the Court.

members of the current Court would have found familiar—he wrote a book. To be more accurate, he wrote five books, comprising a multivolume biography of his idol, George Washington. The work is dry and long, and has since been superseded many times both in terms of accuracy and style. Marshall always regretted the haste of its preparation, and he spent many years trying to boil it down into a more readable two-volume edition.⁴⁵ The last volume described the founding of political parties in the 1790s and was implicitly critical of Jefferson and his role in the creation of the Democratic-Republican opposition to Washington. It also contained a fulsome endorsement of federal authority over the states, an explicit rebuke to Jefferson, who saw the issue,

not as national as opposed to states rights, but as “different degrees of inclination to monarchy and republicanism.”

Jefferson labeled Marshall’s work a “five-volume libel,” and in his retirement he prepared three volumes of memoranda for a future editor of his papers. It contained what might charitably be called a “grand conspiracy theory” to describe conditions in the United States when he returned from France in 1790, with the country tending toward monarchy. Washington, while personally innocent of any desire to become King George I of America, was nonetheless the dupe of people like Alexander Hamilton and, by extension, John Marshall.⁴⁶ Volume 5 of Marshall’s work, the one so critical of Jefferson, incidentally



In the fifth and last volume of his biography of George Washington (pictured), Marshall criticized Jefferson both implicitly and explicitly. Jefferson called the work a "five-volume libel."

came out immediately following the Burr trial.

* * *

Had Jefferson retired at the end of his first Term, he would probably be remembered as one of the nation's most effective chief executives. He had overseen the peaceful transfer of power from one party to another, retired much of the nation's debt (thanks in large part to Hamilton's program, which he did not repeal), humbled the Barbary pirates, and acquired Louisiana. His second term proved a disaster, and made war with Great Britain inevitable.

On the other hand, had John Marshall stepped down after four years, or even eight, he would not be remembered as *the* great Chief Justice. It is questionable whether *Marbury* would have become such an important precedent had not Marshall also written his opinions in *McCulloch*, *Dartmouth College*, *Gibbons*,

and a dozen other cases that have shaped the meaning of the Constitution and formed the basis for national development over two centuries.

Elsewhere in this volume of the *Journal of Supreme Court History*, my good friend Kent Newmyer suggests that one should look at the war between Thomas Jefferson and John Marshall—indeed, the war between the Democratic-Republican party and the Court—as occurring in two stages. The first stage is the period of Jefferson's tenure as President (1801–09), which Kent believes Marshall and the Court won. Kent describes a paradox, whereby Jefferson's concerted campaign to humble the Court actually contributed to Marshall's success in consolidating judicial authority. The second and longer period, however, lasted roughly from 1819 (the year of *McCulloch* and *Dartmouth College*) until Marshall's death in 1835, by which time—"thanks in no small part to Jefferson—the Court was

no longer the republican check on the tyranny of the majority that Marshall had hoped it would be, that Jefferson feared it might be, and that Alexis de Tocqueville famously claimed it was."⁴⁷

While I would tend to agree with the first part of Kent's conclusion, in the language of this Court I "respectfully dissent" from the second. The two men brought different and, I would suggest, complementary views of government and society to the table. Had this country followed one to its logical extreme, it might well have slid into the type of democratic chaos that plagued France for well over a century; had it followed the other, it might have tended toward an aristocracy dominated by merchant princes. Neither man, however, would have found either of these extremes palatable. Despite Jefferson's suggestion that the tree of liberty needed to be watered by the blood of tyrants from time to time, he would have preferred that there be no tyranny at all. And while Hamilton certainly would have found an aristocracy comfortable, John Marshall, a member of the Virginia aristocracy, nonetheless believed in democratic government.

To Jefferson, democracy had to be reinvented anew, if not each day, then frequently. At the time of Shays' Rebellion—the event that horrified Washington and others and made the Constitutional Convention possible—Jefferson wrote approvingly of it. "The spirit of resistance to government is valuable," he told Abigail Adams, "that I wish it to be always kept alive . . . I like a little rebellion now and then. It is like a storm in the atmosphere."⁴⁸ Ten years later, he would gladly have fomented rebellion when he and Madison coauthored the Virginia and Kentucky resolutions, although I suspect that had the two men lived so long, they would have repudiated the use made of their rebellious ideals by the southern states in 1861.

For Marshall, as the historian Albert Beveridge wrote, "American nationalism was Marshall's one and only great conception, and the fostering of it the purpose of his life."⁴⁹ He

had fought in the Revolution to create a new nation, and for him the Constitution was the logical completion of the Revolution. He and others had freed the colonies from tyrannical rule, and with the Constitution the people of the United States had adopted an instrument for the growth and welfare, not of individuals per se, but for the nation that would then make individual liberty possible. The same Shays' Rebellion that inspired Jefferson's admiration led Marshall to fear that "the bloody dissensions" in Massachusetts would "cast a deep shade over that bright prospect which the revolution in America and the establishment of our free governments had opened to the votaries of liberty throughout the globe."⁵⁰

For Marshall, the one true safeguard for those liberties was government defined by the Constitution, a document that he and other Federalists believed had been made to last for generations. Jefferson thought each generation ought to make its own constitution. The Constitution that Marshall revered constituted, in Jefferson's eyes, a threat to liberty. The rights of individuals flourished best without government interference, since "that government is best which governs least." If one had to have a government, it should be at the state level; the national government should do as little as possible. As David Mayer notes, Jefferson did not care if the Constitution remained unsettled; that thought was anathema to his cousin.⁵¹

Why did Marshall win the first round of the battle? The simple answer is that he was smarter than his cousin in the one arena where it counted in this fight—the law—and, if not quite as astute a political mind as Jefferson, the Chief Justice knew a few things about how to win political battles as well. He outfoxed Jefferson politically in *Marbury*, and in doing so laid down a root principle of American constitutionalism—that the Supreme Court is the ultimate arbiter of what the Constitution says. In the Burr trial, it would have been politically easy to just let the government proceed; Burr had no potent political allies. But Marshall believed that the rule of law had to be nourished if the United States was ever to

grow into the type of nation envisioned by the Framers. Jefferson also overplayed his hand, and his vindictiveness with regard both to Burr and in the Chase impeachment led moderate men of his own party to question his judgment.

But did Marshall "lose" after 1819? The Newmyer thesis is that the ideas put forward by Jefferson in the Kentucky resolve laid the basis for the states'-rights federalism that sapped the Court of the authority it had earlier enjoyed. Marshall believed there existed a "deep design to covert our government into a mere league of States . . . The attack upon the judiciary is in fact an attack upon the union. The whole attack, if not originating with Mr. Jefferson, is obviously approved and guided by him."⁵² The problem, however, is that there was no nationwide states'-rights opposition to the Court. Slaveowners, of course, feared that after the implied-powers ruling in *McCulloch*, if the North gained control of Congress there would be an attack on slavery. Georgia, with the connivance of Andrew Jackson, ignored the Marshall Court's rulings in the *Cherokee Removal Cases*.⁵³ The greatest damage to the Court came from its ruling in *Dred Scott*, the infamous self-inflicted wound.⁵⁴ But if one reads the decisions of the Taney Court carefully, especially Taney's own opinion in *Ableman v. Booth* (1859),⁵⁵ they are every bit as nationalistic, every bit as assertive of the Court's powers as those penned during John Marshall's tenure.

Jefferson believed a bill of rights necessary to protect the people from government, especially the national government. For him, the states constituted the great protectors of individual liberties. I doubt that he ever considered that the states themselves would become the great enemies of individual rights, as they did in the former slave-holding states, or that the states would water down individual political freedom by failing to reapportion their state legislatures, or that they would pass laws proscribing certain types of political speech. It would have been a great shock to him to learn that the Supreme Court, utilizing the lessons and rules of John Marshall, became the great

protector of the individual, and that this was made possible by the vision of Marshall and others of a Constitution national in scope, dedicated to the welfare of the people, and strong enough for any emergency.

Thomas Jefferson deservedly belongs in the pantheon of this nation; only a constitutional historian could possibly find the language of *Marbury* or *McCulloch* as moving or as powerful as the opening paragraph of the Declaration of Independence. But although Jefferson would never have admitted it, the aspirations he articulated in 1776 were made real in large measure by the judicial opinions of the cousin he so detested.

ENDNOTES

¹John Marshall to Alexander Hamilton, 1 January 1801, in Charles F. Hobson *et al.*, eds, 6 *The Papers of John Marshall* 46 (Chapel Hill: University of North Carolina Press, 1974-). I am indebted to James Kelly of the Virginia Historical Society, whose exhibit and talk on the "cussin' cousins" pointed me to some of the more colorful comments by the two men.

²Joseph Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Knopf, 1997), 175.

³The reader should understand that this is but one aspect of a larger set of disagreements that existed between the two men, involving many different aspects of government and society. For an exemplary exploration of those disagreements, see James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (New York: Simon & Schuster, 2002).

⁴*Id.*, 9.

⁵17 U.S. (4 Wheat.) 316 (1819).

⁶"Opinion on the Constitutionality of the Bill to Establish a National Bank," 15 February 1791, in Julian P. Boyd *et al.*, 19 *Papers of Thomas Jefferson* 277 (Princeton: Princeton University Press, 1950-).

⁷"An Opinion on the Constitutionality of an Act to Establish a Bank," 23 February 1791, in Harold C. Syrett *et al.*, eds., 8 *Papers of Alexander Hamilton* 105, 102 (New York: Columbia University Press, 1961-87).

⁸17 U.S. at 407.

⁹*Id.* at 421.

¹⁰*Id.* at 415.

¹¹Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York: Harper & Row, 1982), 215-18.

¹²For Lincoln and the "adequacy of the Constitution" theory, see Harold M. Hyman, *A More Perfect Union: The*

Impact of the Civil War and Reconstruction on the Constitution (New York: Knopf, 1973).

- ¹³⁵U.S. (1 Cranch) 137 (1803).
- ¹⁴Marshall to Major Henry Lee, 25 October 1830, in "John Marshall Renders His Opinion of Mr. Jefferson," *Magazine of Albemarle County History* 30 (1972): 15, 16.
- ¹⁵Marshall to Alexander Hamilton, 1 January 1801, 6 *Marshall Papers* 46.
- ¹⁶*Federalist* #78, in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, J. R. Pole ed. (Indianapolis: Hacketts Pub. Co., 2005), 412.
- ¹⁷When John Adams offered to reappoint John Jay as Chief Justice, Jay replied: "The efforts repeatedly made to place the Judicial Department on a proper footing have proved fruitless. I left the Bench perfectly convinced that under a system so defective, it would not obtain the energy, weight, or dignity which are essential to its affording due support to the National Government, nor acquire the public confidence in the respect which, as the last resort of the Justice of the nation, it should possess." Quoted in Charles Warren, 1 *The Supreme Court in United States History* 173 (Boston: Little, Brown, 1923).
- ¹⁸Jefferson to Abigail Adams, 13 June 1804, cited in Ellis, *American Sphinx*, 222.
- ¹⁹⁵U.S. at 177.
- ²⁰Jefferson to James Madison, 25 May 1810, in James Morton Smith, 3 *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison, 1776–1826* (3 vols., New York: Norton, 1995).
- ²¹Jefferson to Abigail Adams, 11 September 1804, quoted in Simon, *What Kind of Nation*, 189.
- ²²Jefferson to William Johnson, 12 June 1823, quoted in David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994), 272.
- ²³Jefferson to Thomas Ritchie, 26 December 1820, in 3 *Republic of Letters*, 1852.
- ²⁴Dumas Malone, *Jefferson the President: First Term, 1801–1805* (Boston: Little, Brown, 1970), 152 n.46.
- ²⁵Jefferson to John Dickinson, 18 December 1801, quoted in Simon, *What Kind of Nation*, 163.
- ²⁶For two popular narratives of the Chase trial, see William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: William Morrow, 1992), and Joseph Wheelan, *Jefferson's Vendetta: The Pursuit of Aaron Burr and the Judiciary* (New York: Carroll & Grad, 2005).
- ²⁷Jefferson to Joseph Nicholson, 3 September 1803, quoted in Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971), 80.
- ²⁸John Quincy Adams, 1 *Memoirs* 322 (1871), quoted in Rehnquist, *Grand Inquests*, 27.
- ²⁹Jefferson used this analogy several times. See Ellis, *American Sphinx*, 276.
- ³⁰The Burr conspiracy remains clouded in mystery. Probably the best effort at unraveling it is Milton Lomask, *Aaron Burr: The Conspiracy and the Years of Exile, 1805–1836* (New York: Farrar, Straus & Giroux, 1982).
- ³¹Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge: Harvard University Press, 1963).
- ³²Robert K. Faulkner, "John Marshall and the Burr Trial," 53 *Journal of American History* 247 (1966).
- ³³17 U.S. (4 Wheat.) 518 (1819).
- ³⁴22 U.S. (9 Wheat.) 1 (1824).
- ³⁵The classic study is James Willard Hurst, *The Law of Treason in the United States* (Westport: Greenwood, 1971).
- ³⁶*Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).
- ³⁷*Id.* at 126.
- ³⁸*Dennis v. United States*, 341 U.S. 494, 509 (1951).
- ³⁹*United States v. Aaron Burr*, 25 F. Cas. 187 (CC Va. 1807).
- ⁴⁰Melvin I. Urofsky & Paul Finkelman, 1 *A March of Liberty* 203 (rev. ed., New York: Oxford University Press, 2001).
- ⁴¹Dumas Malone, *Jefferson the President: Second Term, 1805–1809* (Boston: Little, Brown, 1974), 339.
- ⁴²*Id.*, ch. 18.
- ⁴³*United States v. Nixon*, 418 U.S. 683, 708 (1974).
- ⁴⁴Forrest McDonald, *The Presidency of Thomas Jefferson* (Lawrence: University Press of Kansas, 1976), 134.
- ⁴⁵John Marshall, *The Life of George Washington* (5 vols., Philadelphia: C. P. Wayne, 1805–07). The work has been republished periodically over the years. In 1981, Marcus Cunliffe edited a one-volume edition (New York: Chelsea House), and more recently Robert Faulkner and Paul Carrese have also edited a one-volume edition aimed at high-school students (Indianapolis: Liberty Fund, 2000).
- ⁴⁶Ellis, *American Sphinx*, 254.
- ⁴⁷See Kent Newmyer's article in this volume of the *Journal of Supreme Court History*.
- ⁴⁸Jefferson to Abigail Adams, 22 February 1787, in Dumas Malone, *Jefferson and the Rights of Man* (Boston: Little, Brown, 1951), 158.
- ⁴⁹Albert J. Beveridge, 4 *Life of John Marshall* 1 (4 vols., Boston and New York: Houghton Mifflin, 1916–19).
- ⁵⁰Marshall to James Wilkinson, 5 January 1787, 1 *Marshall Papers* 201.
- ⁵¹Mayer, *Constitutional Thought of Thomas Jefferson*, *passim*.
- ⁵²Marshall to Joseph Story, 18 September 1821, 9 *Marshall Papers* 184.
- ⁵³*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).
- ⁵⁴*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
- ⁵⁵*Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

Thomas Jefferson and the Rise of the Supreme Court

R. KENT NEWMYER

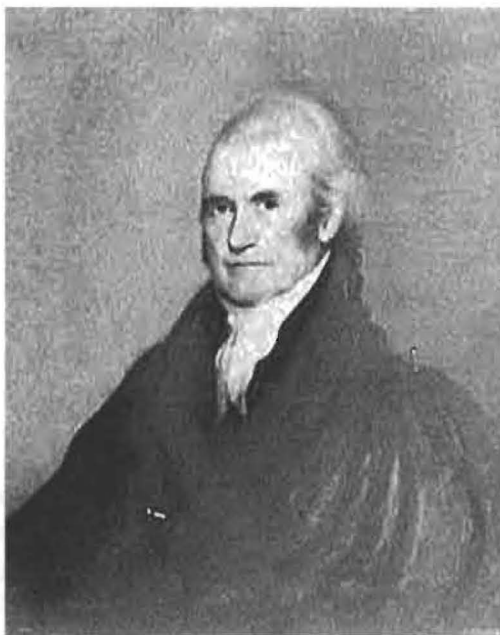
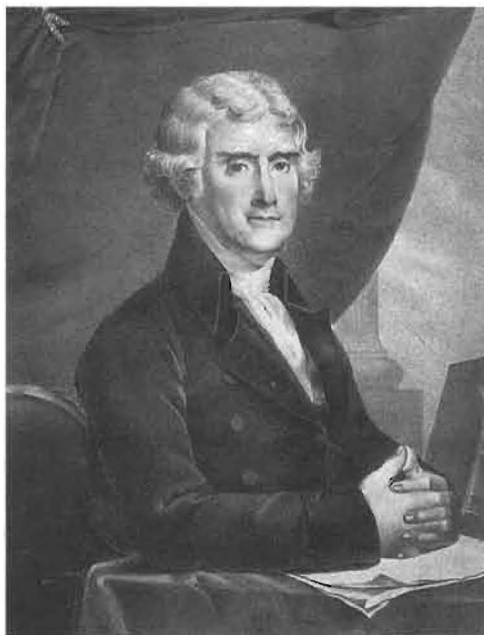
American constitutional history in the early national period seems at times to be a conversation—or an argument—among Virginians. There's James Madison, George Washington, George Mason, John Taylor of Caroline County, Judge Spencer Roane, John Randolph of Roanoke, to mention only some. At the center of this constellation were John Marshall and Thomas Jefferson.

I plan to discuss Jefferson and the Supreme Court, but I cannot do so without also discussing John Marshall. For over three decades, these two great Americans clashed passionately over the meaning of the American Revolution, the nature of the new republic, and the direction of American history. When in 1801 Marshall became Chief Justice and Jefferson assumed the presidency, their disagreement—fueled by an intense personal hatred—came into focus on the Supreme Court. The Chief Justice was determined to strengthen the Court so that it might check the states'-rights democracy advocated by Jefferson and his new political party. President Jefferson aimed to curb the Marshall Court because he believed it to be an aristocratic tool of the defeated Federalist party. Marshall believed Jefferson's party would destroy the Union; Jefferson was convinced

that the Marshall Court would betray the Revolution.

So, you might well ask, why talk about Jefferson and the rise of the Supreme Court, if he did everything in his power to humble it? That is the paradox I would like to explain—and as Justice Holmes once said, "There is nothing like a paradox to take the scum off your mind."¹

There are two stages to my argument, two periods. The first period, from 1801 to 1809, covers Jefferson's presidency and the first years of Marshall's tenure as Chief Justice. It was, I argue, Jefferson's concerted campaign to humble the Court during this period that contributed to Marshall's success in consolidating its authority; thus the paradox to be resolved. The second period in this ongoing war between Marshall and Jefferson over the Court lasted roughly from 1816—or more precisely,



Using Isaiah Berlin's famous distinction between the fox (who knows many things but none definitively) and the hedgehog (who knows only one thing fully), the author suggests that Jefferson (left) was the fox and Marshall (right) the hedgehog.

from *McCulloch v. Maryland* in 1819—until Marshall's death in 1835. At the end of this period—thanks in no small part to Jefferson—the Court was no longer the republican check on the tyranny of the majority that Marshall hoped it would be, that Jefferson feared it might be, and that Alexis de Tocqueville famously claimed it was. Marshall won the first round; Jefferson won the second. Singly and together, both men left lasting marks on the Supreme Court.

Before fleshing out some of the details of my argument, I need to touch briefly on the Marshall-Jefferson hatred and how it intertwined with constitutional ideology in the 1790s to shape their debate over the Court. The mystery is how two men who shared so much common ground should part company in such fundamental ways. As Piedmont neighbors, they were both sons of the American frontier, Marshall perhaps more so than Jefferson. They were cousins to boot. And as descendants of the early Randolph clan, they were automatically members of Virginia's ruling class, in which

land, slaves, and public service defined status. Both were lawyers, both students and admirers of the great George Wythe. Although Jefferson was Marshall's senior by twelve years, both were active participants in the Revolution. Jefferson was the wordsmith of liberty, law reformer, and Governor of Virginia. Marshall was a combat soldier in Washington's Continental Line, a veteran of Valley Forge, and a spokesman for the new Constitution at the Virginia ratifying convention in 1788.

How common genes and common experience should produce such different personalities—such divergent political philosophies—is the question I will leave to my friend Melvin Urofsky.² I would guess that hardwiring had something to do with it—some chemical disaffinity buried in the double helix. But different they were, in ways that shaped their approach to the Constitution and the Court. Their different mindsets call to mind Isaiah Berlin's famous essay on the hedgehog and the fox.³ The hedgehog knew one thing only, but knew it completely; the fox knew many things,

but none fully. Jefferson was the fox who knew many things. He had one of the most inquiring minds of his age; he was a true polymath, a born child of the Enlightenment. His magnificent library, which was only recently on display in the Library of Congress, tells the story. History, politics, law, education, religion, ethics, literature, language, natural history, horticulture, architecture—he touched them all, had an informed opinion about each. He studied, probed, argued—with others and even with himself.

And what a time it was for intellectual probing.⁴ Had Jefferson lived in our age, he would probably have been a distinguished professor at a leading university. But he lived when ideas counted, and he desperately wanted his to count. From the beginning he was inclined to think outside the box—and a successful

revolution invited him to do just that. Years later, Emerson spoke of the American who had a blueprint for everything in his vest pocket. That American was Jefferson. He was not a visionary—although Marshall thought he was—but he was a quintessential reformer who wanted to “begin the world anew.” If John Randolph of Roanoke is to be believed, Jefferson was also opinionated, meddlesome, and controlling: “St. Thomas of Cantingbury.”⁵ For John Marshall, he was “the great Lama of the mountains.”⁶ He was truly Isaiah Berlin’s fox—and never more so than when it came to the new Constitution.

Historians are fond of saying that the Constitution completed the Revolution—and so it did, if the primary aim of the Revolution was to create an independent nation armed with sufficient power to survive in a hostile world. That,

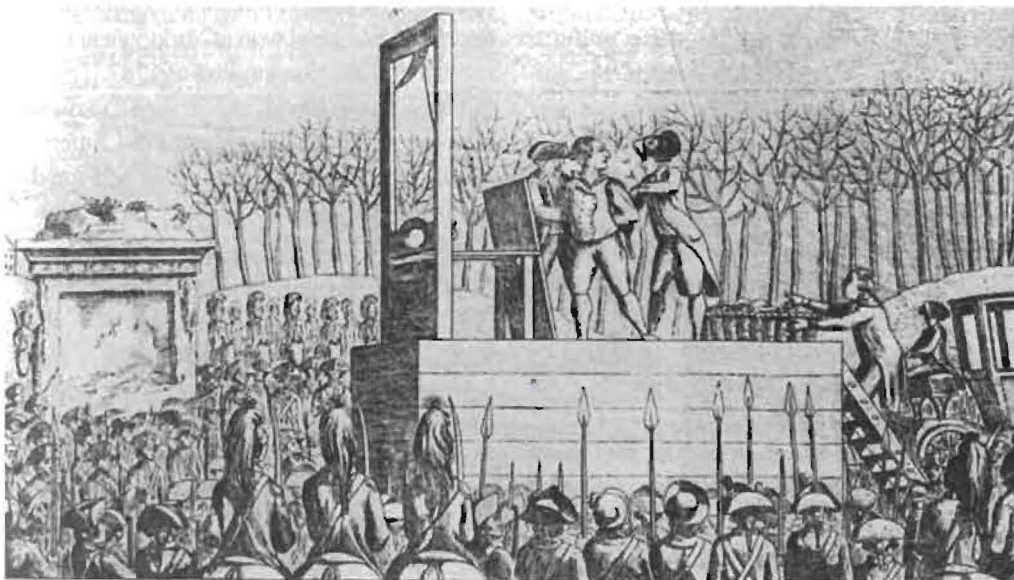


This pro-Federalist cartoon satirizes the major issues in Connecticut politics on the eve of the ratification of the Constitution. Below the storm clouds at right are six anti-Federalists, one of whom holds a “Success to Shays” sign, showing his support for the agrarian radicals led by Daniel Shays. Jefferson approved of the spirit of resistance of the specie-starved farmers who led the 1787 rebellion.

in a nutshell, was Marshall's view of the matter. But Jefferson did not want the Revolution to come to an end. For him, as for Benjamin Rush, the war was over but the Revolution had just begun. Jefferson urged his fellow Americans to explore their newfound liberty—to liberate themselves and the new nation from the shackles of the past. For him, "sovereignty of the people"—that ubiquitous phrase of the age—meant that the people should *actually* govern. The lesson he drew from the long debate with England leading to the Revolution was that government, by its very nature, was hostile to liberty. The tax revolt of specie-starved New England farmers in 1787 called Shays' Rebellion settled his thinking on the matter. "The spirit of resistance to government is so valuable," he wrote to Abigail Adams in February 1787, with the Shays' uprising in mind, "that I wish it to be always kept alive."⁷ And to Madison with regard to the same event: "A little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical."⁸ When it came to the new Constitution, Jefferson was true to his word.

Jefferson, who was in Paris during the framing and ratification, accepted the new Constitution; he even praised it once or twice. But he was also uneasy about it because, among other things, it presumed to settle the principles of government for ages to come. When, in the course of the 1790s, Alexander Hamilton put a nationalist spin on the document, Jefferson staged a little rebellion of his own. The question was no longer "the Constitution—yes or no?" but "the Constitution: what does it mean, and who gets to say?" Jefferson answered these questions during the 1790s, and what he said foreshadowed the struggle between him and Marshall over the role of the Supreme Court in American government.⁹ As Washington's Secretary of State, Jefferson opposed Hamilton's Bank of the United States; his memorandum to Washington on its unconstitutionality set forth the classic argument *against* implied powers.¹⁰

To oppose the nationalist policies of the Washington and Adams Federalists, Jefferson also organized the first political party in American history, one dedicated to small



Jefferson sided with the French and the French Revolution and accused the Federalists of being pro-English aristocrats who wanted to use the Constitution to roll back liberties proclaimed in the Declaration of Independence. Pictured is an engraving of the decapitation of Louis XVI in 1793.

government and states' rights. With a newspaper to give it voice and a well-honed organization in each state, the new party set out to reclaim government from the Federalists, who had allegedly stolen it from the American people. In the cold-war climate of the 1790s, Jefferson sided with the French and the French Revolution. He accused the Federalists of being pro-English aristocrats—if not secret Monarchists—who wanted to use the Constitution to roll back the liberties proclaimed in the Declaration of Independence. The Washington-Adams Supreme Court, Federalist to a man, was seen as the chief weapon in this counterrevolutionary conspiracy. When the Federalists attempted to silence his party with the Alien and Sedition Acts of 1798, Jefferson, along with James Madison, penned the Virginia and Kentucky resolutions. Even after he toned it down at Madison's suggestion, Jefferson's Kentucky Resolution claimed, among other things, that it was the right of the states and *not* the Supreme Court to settle constitutional disputes. When the southern states seceded from the Union in 1861, they called on Jefferson and the "Spirit of '98" to justify their action.

Scholars once dismissed the Virginia and Kentucky resolutions as mere political maneuvering—the platform for the upcoming election of 1800. For Marshall, that was precisely the danger. It was bad enough that Jefferson had created a party, which Marshall and most other statesmen of the age equated with a faction. Worse, Jefferson's party was designed to mobilize the masses, which Marshall distrusted. Worse still, the party claimed that the states were sovereign, that they had created the Constitution, and that they were the final authorities on its meaning.

On the Constitution, John Marshall was a hedgehog, the man who knew one thing and one thing passionately. As Albert Beveridge put it: "American nationalism was Marshall's one and only great conception, and the fostering of it the purpose of his life."¹¹ For Marshall, the Revolution had been fought to

create a new nation, and the Constitution was the completion of that nationalist revolution. Jefferson believed that independence opened up the possibility of ongoing revolution. Marshall believed that the Constitution, which ended the Revolution, made further revolution unnecessary—indeed, dangerous. Jefferson liked Shays' Rebellion; Marshall feared that "the bloody dissensions" in Massachusetts "cast a deep shade over that bright prospect which the revolution in American and the establishment of our free governments had opened to the votaries of liberty throughout the globe."¹² One revolution was enough for the future Chief Justice.

He also understood what antebellum history proved to be true: that the Constitution was, as one historian aptly called it, "a roof without walls."¹³ It was a nationalist document imposed on a highly fragmented local culture where most people knew only their own communities and their own states. Jefferson wanted to institutionalize—indeed, to constitutionalize—localism; Marshall feared it would unglue the fragile union. As Chief Justice, he saw himself fighting a defensive action against provincialism, localism, and states' rights, all of which threatened to undo the nationalist beachhead won at Yorktown and consolidated in the Constitution of 1787. The role of the Supreme Court, in Marshall's view, was to preserve the beachhead until the American people—motivated by economic self-interest and inspired by memories of the Revolution—could build the walls.

What Marshall cherished about the Constitution, in short, was precisely what Jefferson disliked. Marshall viewed the Constitution as a necessary enlargement of national authority. Jefferson viewed it as a limitation on national government. Therein lay the fateful clash over interpretation. Jefferson approached the Constitution and the administrations of Washington and Adams as he had approached the British administration on the eve of the Revolution: as a threat to the liberties of the people. Those liberties, he believed, flourished

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best without government interference: "That government is best which governs least." If government had to act, it was government at the state level that could be trusted. State government was the palladium of liberty because it was closest to the people. As he stated in his Kentucky Resolution, it was the people of the sovereign states who created the Constitution and it was the states that had the right to interpret the Constitution they had created. Jefferson and his party captured the national government in 1800 on this states'-rights platform.

It is hard to take Jefferson's Kentucky Resolution seriously as constitutional theory, since it seems obvious that if each state gets to say what the Constitution means, there would soon be as many constitutions as there were states. However, as David Mayer points out in his impressive study of Jefferson's constitutional thought, Jefferson did not mind if the Constitution was unsettled.¹⁴ His final position—one that brings him full circle to his passion for liberty and his faith in the people—was that one generation ought not bind future generations. The earth, he insisted, "belongs to the living."¹⁵ Each generation can—indeed, should—make its own constitution. Jefferson not only wanted "to make the world anew," he also wanted to do so every twenty years or so. Jefferson's Constitution was a work in progress. And the American people themselves should be in charge—and would be, if it were not for John Marshall's Court.

Jefferson's authorship of the Kentucky Resolution was not made public until 1821.¹⁶ Whether Marshall guessed the truth in 1798 is hard to say. But he knew what the Kentucky Resolution said, knew that its radical states'-rights, anti-Court doctrines were planks in the platform of the new political party that swept Jefferson into the presidency and took both houses of Congress in 1801. Despite the closeness of that election—a tie in the Electoral College, in fact—Jefferson believed that the people had given him a mandate. He called his election "the revolution of 1800." John Adams

put Marshall on the Court to keep the revolution from happening. Marshall promised not to "disappoint his friends."¹⁷ Two scorpions in a bottle.

If you enjoy irony, you would have loved March 4, 1801, when the new Chief Justice administered the oath of office to the new President. With his hand on the Bible held by Marshall, Jefferson swore to uphold the Constitution Marshall was sure he was about to destroy. For his part, Jefferson believed the Court was out to destroy him and his party, and he had already concluded that it would have to be humbled and the spirit of Marshallism eradicated.¹⁸ Nor was it coincidental that Marshall somehow managed to turn his back on the President during the ceremony. Less than two months before the inauguration, Marshall had written to Hamilton that Jefferson's "foreign prejudices" (read: French) and appetite for power made him "totally" unfit for the office. Marshall went on to brand his cousin a "speculative theorist" who would soon "sap the fundamental principles of the government."¹⁹

So imagine, if you can, the President and Chief Justice of the United States fighting it out from their high offices for the next eight years, each believing the other was going to subvert the republic. What defined the struggle—and what did so much to shape the Court as an institution—was the fact that Jefferson and his party controlled all branches of the federal government except the judiciary, which was Federalist to a man until 1804, when Jefferson appointed William Johnson. It was bad enough that the Justices were Federalists, and worse still that Marshall was the leader of the pack. The gauntlet was down. The President was determined to get the Court before the Court got him.

If the Chief Justice behaved as if the Court were under siege, it was because it in fact was. The siege opened with a face-off between the Chief Justice and the President in the famous case of *Marbury v. Madison*,²⁰ the preliminary hearing of which took place in December 1801.

Then in 1802, in the midst of violent anti-Court rhetoric, the Republican-controlled Congress repealed the Federalist Judiciary Act of 1801. That act, passed by a lame-duck Federalist Congress, had expanded the jurisdiction of the Supreme Court at the expense of state courts and created sixteen new circuit judgeships, which President Adams filled with good Federalists, including Marshall's brother, James Markham Marshall. In 1805, the Jeffersonians in the House impeached Justice Samuel Chase for his partisan behavior on the Bench.²¹ Many felt that if Chase were found guilty, Marshall would be the next to go. Two years later, in 1807, the President and the Chief Justice squared off again in the treason trial of Jefferson's former Vice President, Aaron Burr, held in Marshall's circuit court in Richmond.

Holmes once spoke of Marshall and "the campaign of history."²² These episodes were battles in that campaign. In addition to being pregnant with constitutional significance, each of these encounters was intensely personal in ways that are hard to imagine today. What comes through loud and clear is Jefferson's determination to eradicate the spirit of Marshallism.²³ Whether he had a grand strategy for doing so, however, is doubtful. After all, he was busy governing the country: purchasing the Louisiana territory, contending with the French and English, and putting out brush fires in his own party. In any case, it was the President's attack on the Court that dictated Marshall's defensive strategy, and it was Marshall's strategy that worked to consolidate the power and status of the Supreme Court during the first decade of the 1800s.

And, unlike the President, the Chief Justice *did* have a battle plan. Unfortunately for historians, he did not leave us a copy, but the pattern of his response to the attacks strongly suggests that he viewed the contest in strategic terms. Perhaps it is a bit far-fetched to say so, but Marshall's strategy resembled that of General Washington during the Revolution (and Marshall was putting the finishing touches on his five-volume biography of his

hero during Jefferson's first administration.) Like Washington, Marshall and his troops were badly outnumbered. Like Washington, Marshall realized that he needed to avoid frontal assaults, that he needed to choose the ground carefully on which to do battle, and that he needed to consolidate his interior lines of defense against superior forces. Like Washington, Marshall believed he was fighting for the survival of the new nation.

Marbury v. Madison reveals the key features of Marshall's strategy, along with his prowess as a legal tactician. Because we all live by symbols—judges and lawyers perhaps more than most—*Marbury* will always stand as the alpha and omega of judicial review. It has been cited thousands of times when judges and lawyers want to nail down a point—or obscure one. Do not get me wrong: voiding an act of Congress on constitutional grounds in 1803 was a first for the Court—and it was a timely victory. But judicial review was already widely accepted at both the state and federal levels by parties of all political persuasions. Marshall's reasoned justification for judicial review, while effective, did not advance the doctrine appreciably from what Federalists said and anti-federalists admitted during the ratification debates, and what the Supreme Court took for granted in the 1790s.

In short, *Marbury* was not an act of unbridled judicial aggressiveness, as has often been argued. Nor did it settle the matter of judicial review once and for all, as Marshall would be the first to acknowledge. What Marshall did do, however, was to eke out a small but much-needed victory against heavy odds. (Washington at the battle of Princeton perhaps.) And he achieved this victory because he correctly assessed the lay of the terrain and the political vulnerability of the Court.

In this strategic sense, what Marshall did *not* say was as important as what he did say. He did not rule on the general scope of congressional authority, only on congressional acts dealing with the judiciary, which even Jefferson conceded was within the Court's

authority. He did not claim that the Court's decision in constitutional matters was final, or that it was binding on the political branches. And of course he did not give the political branches a chance to respond, because he ended up denying the Court's authority to issue the writ of mandamus.

In the matter of judicial review, *Marbury* was no frontal assault. Marshall took what the historic moment allowed—but no more. The Court consolidated a beachhead in hostile territory and temporarily spiked the enemy's guns. And in the process, Marshall challenged Jefferson's Kentucky Resolution.

While Jeffersonian artillery was silent, the Chief Justice managed to get off one well-aimed shot of his own. I refer to his lecture to the President of the United States, reminding him that he was not above the law. This lecture has often been seen as a cheap shot on the part of the Chief Justice, proof of the political—and personal—nature of his opinion. Some have even suggested that Marshall threw the lecture in to divert attention from the doctrine of judicial review. There is no doubt that it was personal, and it did appear to be the lightning rod that attracted most of the Jeffersonian lightning at the time. But it was assuredly not extraneous. Indeed, a strong case can be made that Marshall's rule-of-law lecture was the heart of *Marbury*, and also the key to his Court-building strategy. Rule of law was a sturdy foundation on which to build. It was the grounds for American resistance to British authority, which led to the Revolution. And in Marshall's view, the Revolution was a legal revolution, a revolution fought in constitutional terms against English rulers who had turned their backs on their own constitution.²⁴

To put it another way, Marshall's lecture to Jefferson identified the Court with the rule-of-law principle that was the very foundation of constitutional government. In other words, the Chief Justice defined the Court as a legal institution, not the political institution the Jeffersonians said it was. In fact, much of Marshall's opinion—the part rarely included

in casebooks—was given over to his effort to separate law from politics as the key difference between the Court and the executive branch. At issue in the case, as Robert Clinton has shown, was not just Article III of the Constitution, dealing with original jurisdiction, or Section 13 of the Judiciary Act of 1789, dealing with the writ of mandamus. Marshall's opinion also dealt with the statutory duties of the Secretary of State, the office of which was an arm of the President.²⁵ The President, Marshall said, had complete political discretion to choose whomever he wanted for Justice of the Peace. Once the commissions had been legally completed, however—which happened when the President signed his name to them²⁶—the Secretary of State was bound by federal statute to deliver the commissions or show cause why not.

By looking at the commissions as a form of vested property, Marshall brought the case within the traditional ambit of judicial scrutiny. Protecting rights was what courts of law in England and America had always done. This, said Marshall, is what the Framers intended the Supreme Court to do. When it protects the rights of individuals, the Court operates on the basic principle of republican government, the one blazoned on the portal of this marvelous building: equal justice under law. The President, working through his Secretary of State, cannot take the law into his hands by ordering that the commissions not be delivered. He cannot take justice into his own hands. The divine right of rulers ended at Yorktown.

Marshall went on to say that it was the constitutional duty of the Court to see that the President obeys the law. The President might consider his election a mandate from the sovereign people. But, as Marshall noted wherever he got the chance, the sovereign people do not speak in elections. In their *sovereign* capacity, the people can speak and have spoken only in solemn convention or in constitutional amendments. And when they spoke thus, as they did in Article III of the Constitution, they charged the Court with



The Supreme Court met in the Old Supreme Court Chamber in the Capitol building during John Marshall's tenure as Chief Justice. It was here that Marshall worked to consolidate the power and status of the Court, challenging Jefferson's right to be the best interpreter of the Constitution.

maintaining the rule of law. However aristocratic the Court may appear, its democratic credentials are no less impeccable than those of the political branches. Since the old republic was becoming a popular democracy thanks to Jefferson, this was an essential point to make.

What we have in *Marbury*, then, is a contest between the political branches and the Supreme Court as to who is the most reliable interpreter of the law. And remember that nothing was yet settled in that regard. Certainly the Court was not bound to win. Indeed, judging from the 1790s, the political branches were very much at the center of constitutional action. Congress established the federal court system in 1789; Congress debated and seemingly settled the question of implied powers in 1791, when it chartered Hamilton's Bank. The debate over executive privilege in the Jay Treaty took place in the House of Representatives. It was Congress that took a stand on the meaning of the First Amendment—which

the Court dodged—when it passed the Alien and Sedition Acts in 1798. When the President claimed the right of interpretation for the political branches—for himself—he had some history on his side.

But he failed to capitalize on his advantage—and this is the lesson of the first ten years. That is, it was the Court—not the President, not Congress—that presented itself as best qualified to interpret the Constitution. Interpretation is a matter of law, not politics. The Court's emergence as the generally accepted interpreter of the Constitution has to be connected to the problematic performance of the political branches, and especially to the performance of President Jefferson. Marshall won the contest, not just because he was clever (which he was), or because the Court was perfect (which it wasn't). Rather, he won in no small part because Jefferson tended to disregard legal and constitutional restraints—due process of law—when he thought he had justice on his side.



Jefferson's arrest and prosecution of Aaron Burr, because he believed that the former Vice President planned to separate the Southwest from the Union, showed his vindictive side. Jefferson violated one of the basic principles of procedural justice when he pronounced Burr guilty of treason to Congress before he had been indicted by a grand jury. Pictured is Burr's tomb in Princeton, New Jersey.

Let me hasten to say that Jefferson can claim many accomplishments as President. If he had done nothing except consolidate the party system and acquire the Louisiana Purchase Territory, he would have been celebrated as a great President. However, his record on the rule of law—as an interpreter of the law—was governed by practical expediency and not principle, and at times, by personal feelings. Inconsistency abounds, and inconsistency is the bane of interpretation. It did not bother him, for example, that he ran on a states'-rights platform and behaved as a strong national executive. He was a brilliant critic of implied powers in 1791, but by his own admission he acquired the Louisiana Territory without constitutional authorization. (An amendment after the fact, he suggested.) In ordering the impeachment of Justice Chase, Jefferson appeared to be personally vindictive, and in fact he was repudiated by the moderates in his own party when the Senate ruled that Chase could not be convicted

for political improprieties, however egregious they might be.

In the Burr treason trial, the President looked even worse on the rule-of-law issue—and even more vindictive. To this day, no one has been able to figure out for sure what the former Vice President was up to when he recruited several boatloads of armed young men and headed down the Ohio River for New Orleans. But Jefferson was convinced—on the basis of a letter written by one of the greatest con men in American history and Burr's co-conspirator to boot—that the former Vice President was going to separate the Southwest from the Union. At the President's order, Burr was arrested and charged with treason. Jefferson announced Burr's guilt to a special session of Congress before Burr had been indicted by a grand jury—indeed, after one grand jury had refused to indict him. Jefferson promised immunity to a key witness in order to assure a conviction, only to renege on his promise. He

micromanaged the prosecution from the White House,²⁷ only to be defeated by Marshall's ruling on the admissibility of witnesses—and more importantly, by Marshall's repudiation of the English doctrine of constructive treason, on which Burr had been indicted.²⁸

Some have faulted Marshall for allowing counsel to bash Jefferson (which he did) and for refusing to let character witnesses appear against Burr as Jefferson wanted. But when the smoke cleared, it was Marshall's legal rulings and not Jefferson's political instincts that proved sound. Marshall put treason law on a nonpolitical basis, and in the process kept his cousin from hanging Aaron Burr, which was certainly a good thing for the "Apostle of Liberty" not to have done.

In the battle over interpretation, Jefferson helped Marshall by elevating his personal vision of justice above the rule of law. But Marshall won, mainly, I think, because he fought the battle on his own turf—and thus according to the Court's rules of the game. Indeed, the Court had a huge head start in the matter of interpretation, for the simple reason that it had interpretive rules to guide its deliberations. By emphasizing the Court as a legal institution, Marshall—among others of the founding generation—made available to the Justices the entire body of common-law rules of construction.²⁹ As several scholars have shown, the transposition of common-law hermeneutics to constitutional interpretation was one of the great accomplishments of the early Court.

So while the political branches were trying to get their interpretive act together, the Court was off and running—and not just in the great cases, but in the run-of-the-docket cases as well, both en banc and on circuit. Settling disputes according to established principles was judicial business. By giving people consistent rules to work and live by, the Court rose in popular esteem. And esteem turned into legitimacy. Without legitimacy, even the most eloquent statements about judicial review would not have counted for much.

One other thing in the contest over interpretation, the main thing: the Marshall Court was off running, but not as six Justices heading off in six directions. I refer to the silent revolution in the way the Court handed down its decisions. Marshall's most lasting accomplishment was to persuade his colleagues to abandon seriatim opinions—the practice in English courts at the time, in state courts, and in the Supreme Court itself in the 1790s. In place of separate opinions, the Marshall Court, from the outset, spoke in a single majority opinion. Not until the Court spoke in such a single voice could it perform the interpretive duties it claimed in *Marbury*.

Ironically, Jefferson played an important role in this development. Marshall succeeded in unifying the Court because of his legal ability (of course), his personal charisma, and his insistence that the majority opinion be fashioned by the collective deliberations of the whole Court. But he also capitalized on the fact that judges stick together when politicians beat up on them. In a sense, the Court was already unified by Jefferson's relentless attack on it.

So while Congress was arguing and debating about the Constitution and waiting for the President to lead the way, and while the President was oscillating and vacillating, the Court was consolidating. And there was nothing the Jeffersonians could do about it, because the revolution happened behind closed doors—most likely in the boarding house where the Justices ate and slept and mooted cases, and where John Marshall passed around the fine Madeira. The hedgehog, it would seem, had outfoxed the fox.

But in fact the chase was not over, and the fox knows many things. If Marshall won the first engagement, Jefferson won the last one—although he did not live to savor the victory. I refer to the states'-rights rebellion against the Marshall Court in the 1820s and the emergence of a new, powerful, anti-Court political party that brought the Marshall Court to its knees and a new Court into power. Jefferson, now

in retirement, played an important role in this resurgence of states' rights. If you believe Marshall, he played a decisive role. "A deep design to convert our government into a mere league of States has taken strong hold of a powerful & violent party in Virginia. The attack upon the judiciary is in fact an attack upon the union." And further: "The whole attack, if not originating with Mr. Jefferson, is obviously approved & guided by him. It is therefore formidable in other states as well as in this. . . ." ³⁰

What generated the states' rights juggernaut that Jefferson championed was an economic and demographic revolution in the northern and middle states, which threatened the slave-based agriculture of the southern states. Three events, all in the span of two years, convinced the slave-holding states that their way of life was in jeopardy. The precipitating event was the Court's decision in *McCulloch v. Maryland* in 1819.³¹ Significantly, that decision came down during the first major economic depression of the century and while Congress debated the future of slavery in the new state of Missouri and in the Louisiana Purchase Territory. What southern politicians came to realize was that a northern majority in Congress—now armed with the doctrine of implied powers, which Marshall had given them in *McCulloch*—might force northern economic policy on the slave-holding states. What was needed was a constitutional doctrine that would protect southern institutions, including slavery, from northern political dominance.

Great shifts in constitutional law have always been rooted in fundamental changes in American society and culture. So it was in the 1820s. But shifts in constitutional doctrine are implemented by intellectuals, by politicians, and by lawyers, judges, and Justices of the Supreme Court. In the 1820s, Virginia politicians and Virginia judges started the intellectual ball rolling with the help of Jefferson.

While he was President, not surprisingly, Jefferson had fought the battle for liberty and democracy as a separation-of-powers issue:

as a contest between the executive branch (representing the "people") and the Court (representing the dead hand of the aristocratic past). That strategy was flawed, however. For one thing, there was no guarantee the President could dominate Congress in order to present a united front. In fact, Jefferson failed to do so—witness the Chase impeachment disaster. A worst-case scenario was the prospect that a Congress controlled by a northern majority might actually support the nationalist decisions of the Court. Jefferson saw the problem, and so did Virginia theorists like John Taylor of Caroline County and Judge Spencer Roane of the Virginia Court of Appeals.

The solution pursued by Virginia theorists in the 1820s was to take the power of judicial review away from the Supreme Court and return it to the states. Henceforth federalism, not separation of powers, would be the battleground—and the antidote for the Marshall Court's constitutional nationalism. Accordingly, in the course of the 1820s, Jefferson's Kentucky Resolution³² morphed into the "spirit of '98" and became the battle cry for those out to rein in the Court.

The fifteen-year assault, which lasted until Marshall's death in 1835, was the first comprehensive anti-Court movement in American history—the granddaddy of those to follow. It started in Richmond with an attack on Marshall's *McCulloch* opinion—and on Marshall personally—in a series of newspaper essays written primarily by Judge Roane. Marshall responded anonymously in nine brilliant essays of his own, which effectively pitted the Supreme Court against the Virginia Court of Appeals. Taylor joined the fray with three books in three years to prove Marshall wrong. Jefferson applauded Roane, Taylor and company; in addition, he established a chair of law at the newly founded University of Virginia in order to spread the word.

And spread it did, especially to states in the South and West and then to Congress. Throughout the decade, various measures were

proposed to limit the Court. One of the most threatening—because it could be accomplished by a simple majority vote of Congress—was the repeal of Section 25 of the Judiciary Act of 1789. This section granted the Supreme Court the right to review constitutional questions, which were regularly tried in state courts. The repeal of Section 25 would effectively have given state courts the final say in constitutional questions. Only when the repeal movement failed did John C. Calhoun come up with his theory of nullification. Calhoun's theory, which put constitutional interpretation into the hands of state constitutional conventions, was aimed directly at the Marshall Court. South Carolina put Calhoun's theory into action in 1832 when it nullified the federal Tariff Acts of 1828 and 1832. Whether Jefferson would have approved of this radical curative pursued in his name, we do not know. We do know that when his friend James Madison peered into the abyss, he repudiated Calhoun's theory and came out in support of judicial review and the Marshall Court.³³

Jefferson continued to work against the Marshall Court until his death in 1826.³⁴ Two things in particular left a lasting mark. The first was Jefferson's attempt to weaken Marshall's authority and the authority of the Court by reintroducing *seriatim* opinions. This he did in a letter in 1822 to Justice William Johnson, whom he had appointed to the Court in 1804.³⁵ Johnson did not succeed in reintroducing *seriatim* opinions, but he did enter eighteen dissents from 1823 until his death in 1833. Jefferson would have been pleased to see that the internal divisions on the Court—which Johnson encouraged and which increased with new appointments after 1823—made life difficult for the Chief Justice. Out of necessity, the Marshall Court began a strategic retreat from its earlier nationalism.

The matter of new appointments to the Court brings me to Jefferson's greatest victory—the one he neither foresaw nor lived to see. What the Framers never foresaw, either, is that appointments to the Court would

become matters of party ideology. They failed to see this for the simple reason that they never foresaw the rise of political parties. Jefferson obviously saw the importance of party, since he created one. So far as I know, however, he did not understand that a political party might be an effective instrument for humbling the Court. And perhaps he can be forgiven for not seeing this, since the party system seemed all but defunct when he died in 1826. One year later, however, Martin Van Buren and Andrew Jackson revived it. And the new Democratic party that swept the Jacksonians into office in 1828 was a states'-rights party claiming direct lineage to Thomas Jefferson.

Things looked bad for the Marshall Court.³⁶ President Jackson had his own ideas about the Constitution, and he put politically loyal states'-rights Justices on the Court to implement them. Between Presidents Jackson and Van Buren, the Democrats put seven of nine Justices on the Court—including a new Chief Justice, Roger Taney. Over the next twenty-eight years, the Taney Court—sometimes subtly, sometimes abruptly—brought Marshallian nationalism into harmony with the Jacksonian political agenda.

Marshall did not live to see the full scope of the change, but he saw enough in the last years of his tenure to conclude that all was lost. He believed that the principles of the Constitution were meant to endure for all ages and that it was the Court's duty to see that they did. For him, a changed Court was no Court at all.

Fortunately, he was wrong. When the Taney Court put a states'-rights spin on the Marshall Court's decisions—even when it overturned them—it continued to exercise the interpretive authority of the Court that Marshall did so much to establish. Marshall's institution-building legacy has stood the test of time. It is safe to say that no man in American history has done so much to shape the development of an entire branch of the national government.

Constitutional doctrine was another thing, however, and here Jefferson had the final

word. What Jefferson, with the help of Jacksonian Democrats and the Taney Court, taught Marshall—and the rest of us—was that the American people, when sufficiently aroused about constitutional issues, could elect a President with a mandate to change the Court in order to change the law. The word of the Supreme Court might be final—but final is not necessarily forever. Marshall got his Court; Jefferson got the people back into the process of constitutional lawmaking.³⁷ The rest is history.

ENDNOTES

- ¹Holmes to Harold J. Laski, December 22, 1921, *Holmes Laski Letters* (New York, 1953), I: 302.
- ²See Melvin Urofsky's article in this volume of the *Journal of Supreme Court History*.
- ³Sir Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (New York, 1953).
- ⁴Bernard Bailyn, *To Begin the World Anew: The Genius and Ambiguities of the American Founders* (New York, 2003), is full of insights into the intellectual spirit of the age.
- ⁵Quoted in Gerald W. Johnson, *Randolph of Roanoke: A Political Fantastic* (New York, 1929), 255.
- ⁶Marshall to Story, September 18, 1821, *The Papers of John Marshall*, Charles Hobson, ed. (Chapel Hill, 1998), IX: 183.
- ⁷Jefferson to Abigail Adams, February 22, 1787, *The Papers of Thomas Jefferson*, Julian P. Boyd, ed. (Princeton 1955), XI: 174.
- ⁸Jefferson to Madison, January 30, 1787, in Boyd, ed., *Papers of Thomas Jefferson*, XI: 93.
- ⁹The most comprehensive account of the 1790s is Stanley Elkins & Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788–1800* (New York, 1993).
- ¹⁰Hamilton's memorandum to Washington—the one from which Marshall cribbed in *McCulloch v. Maryland*—remains the classic argument for implied powers.
- ¹¹Albert Beveridge, *The Life of John Marshall* (Boston, New York, 1916–19), IV: 1.
- ¹²Marshall to James Wilkinson, January 5, 1787, in Hobson, ed., *Papers of John Marshall*, I: 201.
- ¹³John Murrin, "A Roof Without Walls: The Dilemma of American National Identity," in Richard Beeman, et al., eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill, 1987), 333–48.
- ¹⁴David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville and London, 1994).
- ¹⁵Jefferson to Madison, September 6, 1789, *Papers of James Madison*, William T. Hutchinson, et al., eds. (Chicago and Charlottesville, 1962–91), XV: 392–97.
- ¹⁶Merrill Peterson, *The Jefferson Image in the American Mind* (New York, 1962), 39. For an account of how the "doctrines of '98" became the mantra of southern states' rights before the Civil War, see pp. 36–66.
- ¹⁷Marshall to Charles C. Pinckney, March 4, 1801, in Hobson, ed., *Papers of John Marshall*, VI: 89.
- ¹⁸Jefferson to James Monroe, April 13, 1800, *The Papers of Thomas Jefferson*, Barbara B. Oberg, ed. (Princeton and Oxford, 2004), 31: 499.
- ¹⁹Marshall to Alexander Hamilton, January 1, 1801, in Hobson, ed., *Papers of John Marshall*, VI: 46.
- ²⁰Cranch 137 (1803).
- ²¹This story was recounted nicely by the late Chief Justice Rehnquist in his book on that subject. William H. Rehnquist, *Grand Inquests: the Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York, 1992).
- ²²Holmes, "John Marshall," *Collected Legal Papers* (New York, 1920), 267.
- ²³Jefferson to James Monroe, April 13, 1800, *The Papers of Thomas Jefferson*, Barbara B. Oberg, ed. 31: 499.
- ²⁴For Marshall's conservative view of the Revolution, see Marshall to Edward Everett, August 2, 1826, in Hobson, ed., *Papers of John Marshall*, X: 299.
- ²⁵Robert L. Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, Kansas, 1989), especially chapter 5.
- ²⁶Marshall to James Markham Marshall, March 18, 1801, in Hobson, ed., *Papers of John Marshall*, VI: 90.
- ²⁷See, e.g., the dozens of letters Jefferson wrote to federal prosecutor George Hay.
- ²⁸For more on Jefferson's tendency to disregard the law see Leonard Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, 1963).
- ²⁹The dispositive paragraph in *Marbury* came from Blackstone's Tenth Rule of statutory construction. Clinton, *Marbury v. Madison*, 19–20.
- ³⁰Marshall to Story, September 18, 1821, in Hobson, ed., *Papers of John Marshall*, IX: 184.
- ³¹Wheat. 316 (1819).
- ³²Jefferson's authorship of the Kentucky Resolution was made public for the first time in the *Richmond Enquirer* in 1821.
- ³³For a discussion of Madison's opposition to nullification, see Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge, England,

1989), 136-139. Madison's support of judicial review is discussed in Mayer, **Constitutional Thought of Thomas Jefferson**, 290-91.

³⁴The posthumous publication of Jefferson's **Memoirs** in 1829 showed just how much he hated that Court.

³⁵Johnson's long response—bashing Marshall and belittling his colleagues on the Court—is remarkable for its candor, its venom, and its misunderstanding of Marshall's influence. Jefferson's letter of October 27, 1822 and Johnson's response are discussed in Donald G. Morgan, **Justice**

William Johnson: The First Dissenter (Columbia, S.C., 1954), chapter X.

³⁶John Marshall voted for his friend John Quincy Adams—the only vote he had cast in a presidential election since taking office in 1801.

³⁷Bruce Ackerman explores the manner in which the people have become part of the constitutional process in **We the People: Foundations** (Cambridge, Mass., 1991) and **We the People: Transformations** (Cambridge, Mass., 1998).

President Jefferson's Three Appointments to the Supreme Court of the United States: 1804, 1807, and 1807

HENRY J. ABRAHAM

In endeavoring to set the stage for an examination and analysis of Mr. Jefferson's three appointments to the Supreme Court of the United States, a summary glance into those of his two predecessors, George Washington and John Adams, both Federalists, is apposite.

Our first President, referred to as "His Excellency" by Joseph Ellis in the title of his recent book on George Washington,¹ made few mistakes during his two terms in office (1789–97). Presidential scholars continue to regard him as second only to Lincoln in terms of greatness of statute and accomplishment among our now forty-three chief executives.² Both judicious and secure in his pursuit of excellence, he knew what he wanted and readily admitted to staffing both the judicial and the executive branches with reliable, cautious, conservative adherents to the Federalist cause. He had the opportunity to nominate fourteen putative members to the Supreme Court, then a judicial body of unknown practical power. Only eleven of these fourteen served, however:

twelve were confirmed; one (John Rutledge as Chief Justice) was eventually rejected; but he served for four months on a recess appointment; one (William Paterson) was withdrawn, although resubmitted successfully later; and two (Robert H. Harrison and William Cushing, as Chief Justice) refused to serve after their confirmation. Whether one uses the figure fourteen, thirteen, twelve, eleven, or ten,³ Washington's number of appointment opportunities constitutes a record to this day—one hardly likely to be overcome. He was the original Court-packer!⁴

In choosing his candidates, Washington, more than any other President, not only had a septet of criteria for Court candidacy, but adhered to them predictably and religiously:



Both Robert H. Harrison (pictured) and William Cushing refused to serve on the Supreme Court after being confirmed as Chief Justice.

(1) support and advocacy of the Constitution; (2) distinguished service in the Revolution; (3) active participating in the political life of a state or nation; (4) prior judicial experience on lower tribunals, or at least litigation experience; (5) either a "favorable reputation with his fellows" or personal ties with Washington himself; (6) geographic suitability; and (7) "love of our country."⁵ Of these criteria, evidently the most important to him was a meaningful advocacy of the principles of the Constitution—the more outspoken the better. Perhaps more than many of his contemporaries, he recognized the potential strength and influence of the judicial branch, keenly sensing the role it would be called on to play in spelling out constitutional basic rights and penumbras. In letters of commission to his initial six nominees to the first Supreme Court in September and October 1789, he wrote: "The Judicial System is the chief pillar upon which our national Government must rest."⁶ That pillar needed strong men—proponents of the incumbent's Federalist philosophy of government. Seven of those

the President sent to the Bench had been participants in the Constitutional Convention of 1787. He knew most, if not all, of his appointees intimately: John Jay, John Rutledge, William Cushing, James Wilson, John Blair, Jr., Robert H. Harrison, James Iredell, Thomas Johnson, William Paterson, Samuel Chase, and Oliver Ellsworth.

Washington died too soon—just two years after he left the presidency—to see the full on-the-Bench record of his ten Federalist appointees who actually served, but he would have been well pleased with their performances. Practically no anti-Federalist decisions were rendered by them or their Federalist successors, and none of them wrote what could be called an anti-Federalist dissenting opinion. It was a pity that the first President could not witness the momentous decisions of the Court under the firm guidance of the towering John Marshall, who by his opinions and decisions as Chief Justice did so much to bring to fruition Washington's dreams for a strong central Republic.

John Adams was of considerably less public stature than Washington, but the much-too-often-underrated second President did what he could to follow what was indeed a tough act. History and most historians have been kind to Adams, most ranking him as a "near-great" President.⁷ Nonetheless, although he knew a great deal about political science, he was overshadowed by the talented, shrewd, and ambitious Hamilton and by the memories of Washington's administration. Adams proved to be only a marginally effective leader and a poor administrator, often taking the easy way out decisionally. Yet, as a good diplomat, he managed admirably to keep a shaky peace with France despite Hamilton's hawkishness and plotting. Benjamin Franklin's categorization of Adams as "always honest, often great, but sometimes mad" is appealing.⁸

Adams appointed but three men to the Court (four if one counts the Senate-confirmed reappointment of John Jay as Chief Justice late in 1800, which Jay declined): Bushrod



George Washington died just two years after leaving the presidency, before he could see his eleven Federalist appointees perform on the High Bench. This romantic 1853 painting portrays Washington on his deathbed in 1799, surrounded by family.

Washington, Alfred Moore, and John Marshall. His qualifying criteria for nomination were considerably less numerous than those of Washington: the preeminent requirement was that candidates be of strong Federalist persuasion. Thus, George Washington's favorite nephew, Bushrod, although only thirty-six years old at the time of his selection, had amply proved his Federalist loyalty during his career in the Virginia House of Delegates; Moore, forty-five, who was less than five feet tall and weighed less than 100 pounds, had had extensive judicial as well as executive experience in his native North Carolina and was widely regarded as one of the most gifted and persuasive Federal lawyers in the states; and Virginian Marshall personified the Federalist creed.

As with his predecessor, a potential appointee's home state was of genuine impor-

tance to Adams. There had been no Virginia seat on the Court since Justice John Blair's resignation in January 1796, and Adams, determined to avoid a potentially explosive situation, offered to John Marshall the post caused by James Wilson's death at fifty-six in 1798—the first incumbent to die. Marshall declined to serve, pleading financial exigencies. The President then turned to Bushrod Washington, who had studied law under James Wilson, the man whose seat he would now take on the High Bench. And when James Iredell of North Carolina died in 1799 at a mere forty-eight years of age, Adams selected the state's Alfred Moore.

On the other hand, Adams did not insist that his nominees have previous judicial experience; in fact, neither Washington nor Marshall had such experience. In Adams' eyes, public service was more important, and



John Adams did not insist that his appointees to the Court have previous judicial experience; he cared more about their experience in public service.

all of his appointees fit that criterion well: Washington had served as a state legislator; Moore had been North Carolina's Attorney General and a judge of its supreme court; and Marshall had been Congressman, cabinet officer, soldier, and diplomat. In sum, whereas President Washington followed a well-publicized set of seven criteria in his quest to staff the Court, his successor contented himself with four: Federalist loyalty, appropriate geographic base, public service, and a good reputation.

Adams' great achievement was his appointment of John Marshall. No one has had a more profound impact on Court and Constitution than the crafty, hedonistic, and brilliant Virginian. No wonder that a 1970 pool of sixty-five experts on constitutional law, ranking all Supreme Court Justices from 1789 until 1967, was *unanimous* in categorizing Marshall as "great"—the sole Justice to receive that recognition. Ironically, Marshall had played second fiddle to John Jay, Adams' initial selection for the Chief Justiceship vacated by Oliver

Ellsworth in December 1800. But Jay, whom Adams had not consulted before forwarding his name to the Senate, declined to serve, although his commission of appointment had been duly delivered, signed by Adams and his Secretary of State, John Marshall. Jay cited reasons of health; more accurately, he declined because—like a good many other colleagues on the Bench—he loathed circuit-riding and quite prophetically doubted that Congress would act reasonably soon to relieve the Justices of that fatiguing and often unpleasant chore. Further, he felt that the young Court lacked "energy, weight, and dignity."⁹ Adams's associates now urged him to return to a man frequently mentioned as worthy of Supreme Court status, Samuel Sitgreaves of Pennsylvania—especially since no Pennsylvanian was then on the Court. But Adams demurred—and he did so even more firmly when they suggested two prominent candidates of the Hamiltonian faction of the Federalist party: General Charles C. Pinckney of South Carolina, who had declined an appointment offered by Washington in 1791; and sitting Associate Justice William Paterson of New Jersey. Adams wanted his own man, one of whose loyalties he could be absolutely certain, especially because he had lost the election of 1800 and "that Radical" Jefferson was about to succeed him. On January 20, 1801, with but minimal consultation and practically no fanfare, Adams sent to the Senate the name of his forty-five-year-old Secretary of State, John Marshall (the eldest of 15 children—he and his wife Polly would produce ten), Virginia lawyer, dedicated soldier of the Revolution, successful diplomat, respected legislator, and distinguished cabinet member. Marshall was also Thomas Jefferson's second cousin once removed—and avowed political enemy, to whom Jefferson liked to refer as "that gloomy malignity."¹⁰ They detested each other profoundly.

The Senate, although still Federalist, was not pleased with its fellow partisan's nomination. Most of its leaders would have preferred



Despite pressure from his associates, Adams declined to appoint Charles C. Pinckney (pictured) of South Carolina, because Pinckney represented the Hamiltonian faction of the Federalist party and Adams was not sure of his loyalty.

Paterson, despite his link with the party's Hamiltonian wing. Indeed, there is considerable evidence that the Senate stalled for at least a week in hope that Adams could be persuaded to substitute Paterson after all. But Adams, now a lame duck and no longer subject to the kind of political strictures that might otherwise have caused him to waver, remained firm. The Senate—recognizing John Marshall's ability and the danger of a low-ranking spite nomination should it reject Marshall (or of leaving the vacancy for the eager incoming Jeffersonians)—yielded and unanimously voted confirmation on January 27,

1801. No Federalist could possibly have had any cause for regret: Marshall's record on the Court proved to be blue-ribbon Federalism in every respect. Moreover, he would serve the country longer (thirty-four-and-a-half years) than any other member of the Supreme Court to date except Justice Stephen J. Field (thirty-four-and-three-quarters years) and the longevity champion so far, Justice William O. Douglas (thirty-six-and-a-half years). And Marshall did so with an excellence and a distinction that deserve to be categorized as *sui generis*. In 1826, Adams could proudly and justly say: "My gift of John Marshall to the

people of the United States was the proudest act of my life. There is no act of my life on which I reflected with more pleasure. I have given to my country a Judge equal to a Hale, a Holt, or a Mansfield."¹¹

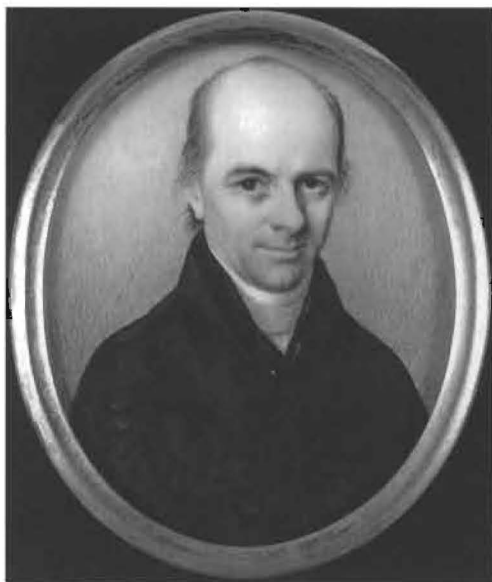
In Jay's view, the young Supreme Court was an "inauspicious" body, characterized by little work, dissatisfied personnel, and a lack of popular esteem and understanding. Jay so thoroughly disliked his job as first Chief Justice that he not only spent one year of his brief six-year tenure in England on a diplomatic mission, but also twice ran for Governor of New York. On the second try he won that post and happily resigned from the Court; as described above, he later declined to succeed Ellsworth as Chief Justice, although Senate-confirmed. He was "convinced that under a [judicial] system so defective [the Supreme Court] would not obtain the energy, weight, . . . dignity, . . . public confidence and respect which as a last resort of the justice of the nation, it should possess."¹² Ellsworth, too, had few regrets as he left his post for a diplomatic mission in France.

Marshall's helmsmanship brought about a change in the Court's posture and position that was as far-reaching as it was dramatic. Completely dominating his Court—what few dissents there were (a mere seventy-four in toto) came largely from Jefferson appointee William Johnson and, at the end of Marshall's term, a few from the pen of Justice Henry Baldwin—Marshall delivered the opinion for the Court in 519 out of a total of 1,215 cases between the years 1801 and 1835. Professor David P. Currie described the period as "John Marshall and the Six Dwarfs."¹³ And Marshall wrote thirty-six of the sixty-two decisions involving constitutional questions.¹⁴ In his thirty-six-plus years, he penned only one dissenting opinion in a constitutional case. It is simply beyond dispute that he, more than any other individual in the history of the Court, determined the developing character of America's federal constitutional system. It was Marshall who raised the Court from its lowly, if not discredited, position to a level of equality with the executive and the

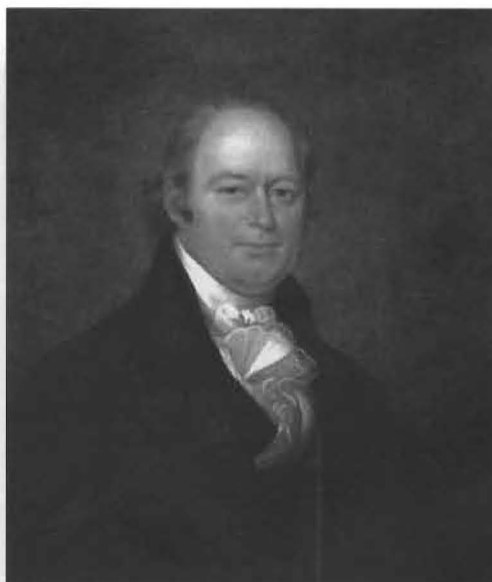
legislative branches—perhaps even to one of dominance during the heyday of his Chief Justiceship. Marshall called his constitutional interpretations as he saw them, always adhering to the following creed: "[I]t is a constitution we are expounding . . . intended to endure for ages to come and, consequently to be adapted to the various crises of human affairs."¹⁵ Yet he hastened to add that "judicial power, as contradistinguished from the powers of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing."¹⁶ He did quite a bit of "willing nothing!"

Under Marshall's guidance, the Federalist dreams of a powerful nation found articulation and sanction. The Federalists gave way to the Democrat-Republicans at the century's turn, but the broad outlines of the Federalist philosophy were secure. The many years of Jeffersonianism, whatever its success at the nonjudicial policymaking level proved to be, did not reverse the Federalist doctrines of the Marshall Court. Indeed, the six appointees of Jefferson, Madison, and Moore—all presumably loyal Democrat-Republicans—entered nary a dissent to the key Federalist rulings of Marshall's Court—not even Johnson.

Yet Jefferson's 1801 arrival on the canvas of government and politics as President represented a major departure from the *Weltanschauung* of the administration of his predecessors. Not entirely comfortable as chief executive, the stately, intellectual Virginian was above all a great leader of the legislature, a superb congressional party chief and party organizer. He would have been an ideal British prime minister, then as now. Jefferson has been ranked as "great" in all polls by presidential historians; yet the man himself had doubts about his accomplishments in that office, and he did not wish to see his presidency memorialized on his gravestone in the cemetery at Monticello.¹⁷ "And not a word more," read his instructions asking that only the following accomplishments be chiseled into simple stone: "Here was buried Thomas Jefferson, Author of



Adams's second appointee to the Supreme Court, the diminutive Alfred Moore (pictured) of North Carolina, served for barely four years due to ill health.



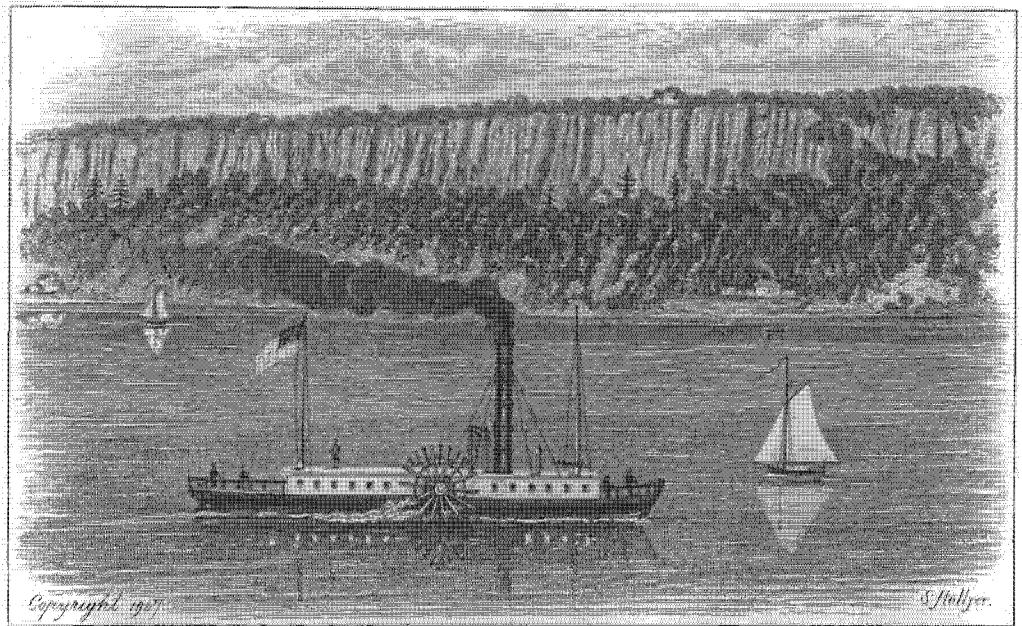
Jefferson moved cautiously in appointing William Johnson of North Carolina (pictured) in 1804. Johnson was a reliable Republican, but did not espouse radical Jeffersonian ideas.

the Declaration of American Independency, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia.”

Jefferson's first opportunity to appoint a Supreme Court Justice came in 1804 when Associate Justice Alfred Moore resigned from the Marshall Court because of ill health after barely four, by all accounts unremarkable, years on the High Bench. Although only forty-nine years old, Moore, like many of his contemporaries, was worn out by the loathed, arduous circuit-riding obligations. Moore was a brilliant lawyer with a profound knowledge of criminal law, but his short on-Court career made “scarcely a ripple in American judicial history”¹⁸: He delivered only one opinion, a seriatim one, in the admiralty case of *Bas v. Tingy*.¹⁹ The President, eager to designate only solid Democrat-Republicans, made it clear that any candidate would have to meet at least two criteria: loyalty to the Jefferson cause and appropriate geographic provenance. There was no question about the first; only presumably true-blue Democrat-Republicans were considered. As for the second, because neither the

Second nor the Third circuits were then “represented” on the Court, the nominee would have to come from New York, South Carolina, or Georgia.

There was no dearth of worthy candidates, and Jefferson looked to several highly qualified South Carolina attorneys who were faithful to the cause, or at least seemed to be. Jefferson moved cautiously, ultimately selecting a young Charleston native, attorney William Johnson, who came highly recommended by both the legal fraternity and the political practitioners. At thirty-two, Johnson was the second youngest Supreme Court appointee; only Joseph Story was a bit younger by a few weeks when Madison appointed him in 1811. Despite his youth, Johnson, a Princeton scholarship graduate, had already served as a judge of the South Carolina Appellate Court of Common Pleas (or Constitutional Court) as well as a Democrat-Republican member of the state's legislature, elected at twenty-three. While an avowed adherent to the Jefferson cause, he was a moderate Democrat-Republican who, in Richard E. Ellis's words



Jefferson was unhappy when Justice Johnson wrote a separate concurring opinion agreeing with Chief Justice John Marshall's majority opinion in *Gibbons v. Ogden*, which expanded the commerce power of the federal government. At issue was the right of a state to grant a steamboat company a shipping monopoly in its navigable waters.

"never espoused anything resembling a radical kind of Jeffersonianism."²⁰

Thus, it was not surprising that the first Democrat-Republican to mount the Supreme Court of the United States would prove to be an independent moderate jurist, not afraid to challenge Marshall on certain issues, but also not so politically *cum* jurisprudential by party as to refuse to vote with the Great Chief when that seemed to him to be constitutionally appropriate. Johnson was ready to support federal power and authority when he believed that to be constitutionally mandated, yet he would also defend and champion state power and authority when it appeared constitutionally justifiable. An apposite illustration of the former posture is his separate concurrence in the great steamboat case of *Gibbons v. Ogden*.²¹ As he had become all but an axiom, the Chief would write the opinion in significant decisions involving constitutional questions, dissents in such cases being forbidden. *Gibbons* was no exception, with the Chief, commanding a unanimous 6-0 Court, ruling that New York

could not grant a monopoly for shipping in navigable waters when the federal government, acting under the Interstate Commerce Power (Article I, Section 8, clause 3), had provided a federal license to an applicant. Marshall held that the commerce power was *plenary* and New York would have to yield. He suggested that the power might in fact be *exclusive*, but he did not deem it necessary to reach that question in the present case. Johnson penned a separate concurring opinion in which that presumed champion of states' rights contended firmly that the interstate commerce power was unquestionably designed to be *exclusive*, not merely *plenary*. Jefferson, now retired to his beloved Monticello, was not amused.

Nor had he been happy with his prize appointee when, five years earlier, Johnson joined Marshall's opinion for a 7-0 Court in the hugely significant case of *McCulloch v. Maryland*,²² the gravamen of which was the right of the federal government to establish a national bank under its constitutionally provided Article I legislative powers *implicit* in

the Necessary and Proper Clause (Section 8). Because the establishment of such a bank was not *expressly* authorized in that article, or anywhere else in the Constitution, Maryland felt entitled to tax the Second Bank of the United States. Maryland's trial and appellate courts upheld the state legislature's power to tax any bank operating within its borders, and the case reached the United States Supreme Court on a writ of error. In upholding the federal government's action under the Necessary and Proper Clause, Marshall made clear that the inclusion of that clause in the Constitution was designed to enlarge, not exclude, Congress's ability to execute its enumerated powers, concluding, in a famous sentence:

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 consistent with the letter and spirit of the Constitution, are constitutional.²³

Perhaps Justice Johnson swallowed a bit in the face of the tremendous establishment of federal constitutional authority, but he knew that Marshall was clearly justified in handing down his momentous ruling. There is no doubt whatsoever that, had Johnson been on the Court in 1803, when Marshall wrote his seminal opinion pronouncing the power of judicial review for his 5-0 unanimous Court in *Marbury v. Madison*,²⁴ Johnson would have joined the Chief.

Yet Jefferson could find considerable comfort in Johnson's demonstrated "pro-state," pro-Tenth Amendment rulings, especially in the second half of Johnson's almost three decades on the Court, when he would either carry the day in opinions favoring state power or dissent from a Court majority favoring federal power. For example, in *United States v. Hudson & Goodwin*,²⁵ Johnson wrote for a closely divided 4-3 Court: that the Democrat-Republican Jeffersonian denial of the existence of a federal common

law of crimes was constitutionally correct; that, in any event, no federal court could exercise common-law jurisdiction in criminal cases; and that federal courts had no constitutional power to create or enforce common-law crimes. The ruling did not identify the Court's lineup, but Professor Suzanna Sherry has suggested that "it is probable" that Marshall, Bushrod Washington, and Story dissented.²⁶ That ruling, now almost two centuries old, remains in force today.

One illustration of a lone Johnson dissent is his assertive denial of a 6-1 Marshall opinion in *Osborn v. Bank of the United States*.²⁷ The Chief's holding was another generous interpretation of the jurisdiction of federal courts, here applicable even to questions involving only state law in connection with the taxation of banks. As pointed out earlier, Johnson had voted with Marshall in the *McCulloch v. Maryland* "implied powers" case, and—much to Jefferson's annoyance and chagrin—Johnson had more often than not backed federal jurisdiction. But in *Osborn*, Johnson thought Marshall and his five supporters had gone too far, that there were simply too many areas in which the Court, led by the Chief and Story—the latter a nominal Democrat-Republican but one who arguably out-Marshalled Marshall—sided with federal authority, particularly in matters of federal judicial jurisdiction.

With the passage of time, Justice William Johnson has probably become best known as "the first dissenter." He assuredly became that, barely one year after joining the Marshall Court, in the relatively unknown case of *Huidekopers Lessee v. Douglas*.²⁸ A case could be made, however, for the contention that the real first dissenter was not Johnson, but his more or less forgotten namesake, Thomas Johnson, ex-governor and chief judge of Maryland's highest court, whom his close friend, George Washington, appointed to the Court in 1791. Thomas Johnson penned an at least partial dissenting opinion, joined by Justice William Cushing, in the fledgling Court's first



Johnson, sometimes called "the first dissenter," finally distanced himself from Marshall and his pro-federal authority coalition in an 1824 case involving the taxation of a state bank in Ohio.

important decision, *Georgia v. Brailsford*²⁹—a complicated case involving state proprietary rights and the first case in which opinions were issued formally. Thomas Johnson wrote no other opinions and resigned in January 1793, having served a mere fourteen months on the High Court.

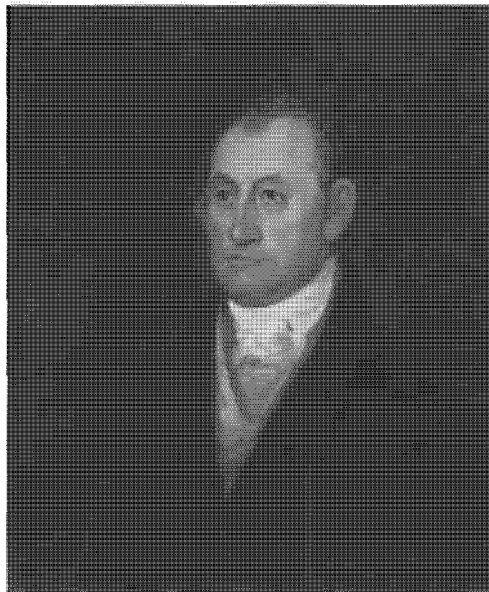
William Johnson, on the other hand, would grace the Court for thirty years, both an opponent and supporter of John Marshall's jurisprudence, along the way penning 33 additional dissenting opinions, which constituted one-half of all dissents authored during those three decades. In addition to his dissents, the hard-working Johnson produced 112 majority opinions and 21 separate concurring ones. In the words of his biographer, Donald G. Morgan, Johnson ultimately embraced "a community-centered," systematic jurisprudence capable of accommodating disparate conceptions of fairness without devolving into mere relativism. He therefore was an unwitting harbinger of Chief Justice Roger Taney's "dual federalism" and economic pragmatism.³⁰ A towering figure on the Marshall Court, he was second only to the Chief Justice and Joseph Story in his judicial impact on the infant Republic's emerging jurisprudence.

Jefferson's second appointment followed the death of Justice William Paterson in 1806, with the President selecting a prominent member of New York's and New Jersey's patrician Livingston family, the forty-nine-year-old Henry Brockholst Livingston (who would later drop the "Henry"). A pre-Revolution Princeton classmate of James Madison, Livingston was very much in the running at the time of the Johnson nomination, but had to wait a year or so before his turn came. A political activist, member of the New York State Assembly and a puisne judge on the New York State Supreme Court, he was a prominent public figure who befriended both Alexander Hamilton and Aaron Burr and for a while toyed with Federalist sympathies. These vanished rather quickly, however, propelled by his profound personal and political dislike of his sister Sarah's husband, Governor and future Chief Justice of the Supreme Court of the United States, John Jay. Jefferson became well aware of Livingston's now-consistent loyalty to Democrat-Republicanism, his demonstrated legal scholarship, and his effective public needling of the Federalists. Moreover, along with George Clinton, Burr, and his cousins Edward and Robert R. Livingston, Brockholst

was part of the New York political faction and had joined Virginia's Jefferson supporters to form the Virginia-New York alliance that proved to be so important in Jefferson's 1800–1801 election.³¹

Not in William Johnson's class as a major on-Court jurisprudential figure, Livingston nonetheless proved himself to be an able, thoughtful, delightfully humorous, learned member of the Court during his sixteen years there until death came in 1823. Like so many of his brethren, he was often influenced by Marshall. His interest in commercial and prize law dominated several of the thirty-eight majority, six concurring, and eight dissenting opinions he penned. Notwithstanding his Jeffersonian sympathies, they included illustrations of the spell of Marshall, whom Livingston joined in such seminal cases as the 4–1 Marshall opinion in the so-hard-to-teach *Fletcher v. Peck*,³² with Justice Johnson writing a partial dissent, and the 5–1 Marshall bombshell in *Trustees of Dartmouth College v. Woodward*,³³ with Justice Duvall dissenting without opinion. In these two rulings, Marshall managed to raise the Contract Clause of the Constitution (Article I, Section 10) to a new, anti-state power niveau, in effect protecting corporate charters from state interference. Livingston did not write in either—although he may have prepared, but did not publish, a concurrence in the latter³⁴—arguably awed or cowed by the Great Chief. Perhaps his Jeffersonian policy sympathies may have led him to “atone” for his vote and controlling opinion in such a contemporary “pro-state” case as *Adams v. Storey*,³⁵ “upholding the retroactive and extraterritorial application of the New York insolvency law against claims that the statute transgressed not only the contract clause but the preempted federal bankruptcy jurisdiction as well.”³⁶

Livingston was professionally happier on the New York than the federal Bench, producing almost four times as many opinions on the former than the latter. Yet he was a valued member of the U.S. Supreme Court, possessed of an unusually facile Scalienesque wit that



When Congress created a seventh Supreme Court seat in 1807 to accommodate the growing judicial business in Kentucky, Ohio, and Tennessee, Jefferson appointed Thomas Todd of Kentucky (pictured) to fill the seat. Todd was the first or second choice given to Jefferson, at his request, by the ten members of Congress from those three states.

laces his writing style. He was popular with his Brethren and particularly close to Justice Story. His death in his sixties cast a pall over his colleagues.

Jefferson would have had to content himself with only two appointments had not Congress created a seventh seat on the Supreme Court in 1807. The mounting population and resultant escalating judicial business in Kentucky, Ohio, and Tennessee dictated the creation of the additional position on the new Seventh Circuit. Ever conscious of the need to mend political fences, Jefferson adopted the unique strategy of officially requesting each member of Congress to suggest to him two individuals for the vacancy, indicating first and second choices. Delighted to be thus involved, Congress caucused repeatedly, debating the relative merits of three men: John Boyle and James Hughes, both of Kentucky, and U.S. Representative George W. Campbell of Tennessee, ultimately asking Jefferson to

designate Mr. Campbell. But the President demurred: He had serious doubts—and appropriately so—as to the constitutionality of appointing a sitting member of the legislative branch to an office created during his incumbency; and he was also less than enthusiastic about Campbell's expertise as a lawyer. Still wishing to abide by his determination to select someone congenial to Congress, however, Jefferson chose Thomas Todd of Kentucky, who alone among the names advanced by Congress was listed as either the first or second choice of each of the ten members of Congress from the three states of the new Seventh Circuit.

A native Virginian who had seen brief service in the American army during the War for Independence, Todd moved to the new state of Kentucky, which had successfully separated itself from the Old Dominion early in the last decade of the eighteenth century. Ultimately, Todd, who had been admitted to Virginia's bar in 1788 and soon became a well known specialist in land law, titles, and claims, was appointed to Kentucky's new Court of Appeals in 1801, rising to the position of its chief judge five years later. In 1807 came Jefferson's call for Todd's elevation to the Supreme Court of the United States, approved unanimously and rapidly by the Senate.

Plagued sporadically by ill health and sundry personal problems and hating circuit-riding—like almost all of his colleagues on the High Bench, past, present, and future—Todd missed at least five sessions of the Court between his 1807 appointment and his death at sixty-one in 1826. During his nineteen-year tenure, he wrote but fourteen opinions: eleven of these were majority ones for the Court, one a dissent, and two concurrences. Not surprisingly, ten of the fourteen dealt with controversies involving land claims and land surveys, his undisputed area of expertise. Although he remained a staunch supporter of Jefferson, Todd tended to defer to Chief Justice Marshall on major constitutional questions, as did most of the colleagues of the powerful Chief dur-

ing his thirty-four memorable years on the Court. Todd's closest friend on the Court, the great Justice Story, observed succinctly that, "though bred in a different political school from that of the Chief Justice, he never failed to sustain those great principles of constitutional law on which the security of the Union depends. He never gave up to party what he thought belonged to country."³⁷

Jefferson's fervent hope that his three appointments would serve to break the Marshallian-Federalist stranglehold on the course of Supreme Court decisions was not realized, although Johnson—a concerned humanitarian—provided a measure of success for him. Johnson—along with Story and John Marshall, the only truly outstanding Justices until the Taney Court period³⁸—displayed considerable intellectual independence while on the Court and, disdaining Marshall's bossy displeasure, insisted on writing a good number of separate opinions. Yet, as with Marshall, the major power thrust of Johnson's jurisprudence was the enhancement of national power, particularly in foreign and interstate commerce and in treaty matters. He was a bona fide nationalist patriot. Despite a joint total of almost four decades on the Bench, Livingston and Todd went along with Marshall with all but complete docility. Livingston, an able and popular jurist, was generally happy in concurring with his Chief's jurisprudence. Todd, during whose career 644 cases were decided by the Court, averaged less than one opinion a year. His sole dissent was his first written opinion as a Justice—a five-line comment in the 1810 Term.³⁹ No wonder Jefferson, back at his cherished Monticello for over a decade and in the process of establishing his beloved University of Virginia, would refer in 1820 to the Court—on which then still served all of his three appointees—as a "subtle corps of sappers and miners," consisting of "a crafty chief judge" and "lazy or timid associates."⁴⁰

Jefferson's presidential "children"—the two Jameses, Madison and Monroe—had three

opportunities to appoint avowed Democrat-Republicans to the Court, the former two (Joseph Story and Gabriel Duval), the latter one (Smith Thompson). All three, in greater or lesser measure and more or less willingly, would fall under the Great Chief's aura in key cases advancing the gravamen of national power authority. Story's nomination by Madison—which sent Jefferson into a veritable rage, since he had warned Madison that Story was a “Tory” who would outmarshall Marshall and arguably did—would prove to be one of the most fortuitous in the history of court and country, in terms of both intellectual leadership and jurisprudential commitment.⁴¹ He assuredly merits a presentation of his own!

ENDNOTES

¹Joseph Ellis, *His Excellency: George Washington* (New York: Knopf, 2004).

²See Appendix B of my *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham, Md.: Rowman & Littlefield, 1999).

³The twelve who were confirmed: Jay, John Rutledge (as Associate Justice), Cushing (as Associate Justice and as Chief Justice), James Wilson, John Blair, Robert H. Harrison, James Iredell, Thomas Johnson, Paterson, Samuel Chase, and Oliver Ellsworth. Two of these, Harrison and Cushing (as Chief Justices), declined post-confirmation. One, Rutledge (Chief Justice) was rejected; one nomination, Paterson, was withdrawn, but successfully resubmitted. Three—Cushing, Rutledge, and Paterson—had two nominations each, the first two serving as Associate Justices only. The fourteen nominations, thus, involved eleven different individuals: Jay, Rutledge, Cushing, Harrison, Wilson, Blair, Iredell, Johnson, Paterson, Chase, and Ellsworth. For further details, see Charles Warren, *The Supreme Court in United States History*, vol. 3, app. (Boston: Little, Brown, 1922).

⁴In second place stands Franklin D. Roosevelt's record of nine successful appointments.

⁵See Abraham, *OP. CIT.*, FN 2, p. 53.

⁶Fred L. Israel, “John Blair,” in Leon Friedman & Fred L. Israel, eds., *The Justices of the United States Supreme Court 1789–1978: Their Lives and Major Opinions* (New York: Chelsea House, 1969), vol. 1, p. 111.

⁷See Appendix B of Henry J. Abraham, *Justices, Presidents, and Senators*, *supra* note 12, for tabular rankings.

⁸As quoted by Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965), p. 347.

⁹See Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France*, 7th ed. (New York: Oxford University Press, 1998), p. 340. Jay would live another thirty years.

¹⁰*Ibid.*, p. 341. Marshall had also briefly been Secretary of War.

¹¹As quoted by Warren, *Supreme Court in United States History*, vol. 1, p. 178.

¹²As quoted in Frank Monaghan, *John Jay: Defender of Liberty* (New York: Bobbs-Merrill, 1935), p. 425.

¹³David P. Currie, “The Most Significant Justice,” 50 *University of Chicago Law Review* 466, 469 (1983).

¹⁴Robert J. Steamer, *The Supreme Court in Crisis: A History of Conflict* (Amherst: University of Massachusetts Press, 1971), p. 35.

¹⁵*McCulloch v. Maryland*, 17 U.S. 316, 407, 415 (1819).

¹⁶*Osborn v. United States Bank*, 9 Wheaton 739 (1824), at 865.

¹⁷To be buried in that cemetery, one has to be a descendant of the Jefferson family.

¹⁸Leon Friedman, “Alfred Moore,” in Friedman & Israel, p. 197.

¹⁹4 Dallas 37 (1800).

²⁰Richard E. Ellis, *The Jefferson Crisis: Courts and Politics in the Young Republic*. (New York: Oxford University Press, 1971), p. 238.

²¹22 U.S. 1 (1824).

²²17 U.S. 316 (1819).

²³*Ibid.* at 421.

²⁴5 U.S. 137.

²⁵11 U.S. 32 (1812).

²⁶See Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), p. 414.

²⁷22 U.S. 738 (1824).

²⁸3 Cranch 1 (1805).

²⁹2 Dallas 402 (1792).

³⁰Quoted in Hall, *supra* note 22, at 440. Morgan's excellent biography, published in 1954, is *Justice William Johnson, the First Dissenter: The Career and Constitutional Philosophy of a Jefferson Judge* (Columbia, S.C.: University of South Carolina Press).

³¹See Gerald T. Dunne, *Justice Story and the Rise of the Supreme Court* (New York: Simon & Schuster, 1970) and his “Brockholst Livingston,” in Friedman & Israel, pp. 387 ff.

³²10 U.S. 87 (1810).

³³17 U.S. 518 (1819).

³⁴Dunne, “Brockholst Livingston,” *supra* note 30, p. 393.

³⁵1 Fed. Cas. 141 (No.66) (C.C.D., N.Y. 1817).

³⁶Dunne, “Brockholst Livingston,” *supra* note 30, p. 392.

³⁷Warren, *Supreme Court in United States History*, vol. I, p. 301, quoted in Ellis, *Jefferson Crisis*, p. 241.

³⁸Taney succeeded Marshall in 1836 and served until 1864.

³⁹Fred L. Israel, "Thomas Todd," in Friedman & Israel, p. 409.

⁴⁰Letter to Thomas Ritchie, December 25, 1820, as quoted in Andrew A. Lipscomb & Albert E. Berghs, eds., *Thomas*

Jefferson Writings (Washington, D.C.: Thomas Jefferson Memorial Association, 1903), vol. 15, pp. 297-98.

⁴¹For a "thumbnail" sketch of Story, see Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham, Md.: Rowman and Littlefield, 1999), pp. 67-68.

Thomas Jefferson and the American Indian Nations: Native American Sovereignty and the Marshall Court

STEPHEN G. BRAGAW*

The *Cherokee Removal Cases*—*Cherokee Nation v. Georgia*¹ and *Worcester v. Georgia*²—stand as the dramatic last act of the Marshall Court era. Thomas Jefferson was long dead by the time of the removal of the American Indians from the land north and south of the Ohio River. Yet in many ways the *Cherokee Removal Cases* that bedeviled Marshall in his final years on the Court were Jefferson's revenge, the first bitter fruits of policies adopted during his presidency that created the political and legal environment for the Indian Removal Act of 1830 and the Cherokee Nation litigation itself. This Jeffersonian legacy is ironic, given that Jefferson as a scholar, diplomat, and Secretary of State was an ardent supporter of Indian sovereignty and eventual citizenship. Yet these views were subordinated during his presidency to concerns of what we would term "national security," to preserve the Union, and to advance the interests and needs of his political party.

After briefly examining the political denouement of the Cherokee litigation, this article will outline Jefferson's views on Indian citizenship and sovereignty before turning to a study of how Jefferson's administration set the stage for the *Cherokee Removal Cases*.

The Cherokee Crisis and the Marshall Court

The tragedy of the Cherokee Removal crisis resonates through time as the somber endnote

to the career of Chief Justice John Marshall. Marshall devoted his thirty-four years on the United States Supreme Court to promoting a strong national union and with it a capable federal government, while building the Court's independence and autonomy.³ Yet by late 1832, Marshall was despairing, writing to his long-time colleague Joseph Story,

I yield slowly and reluctantly to the conviction that our Constitution cannot last. I had supposed that north of

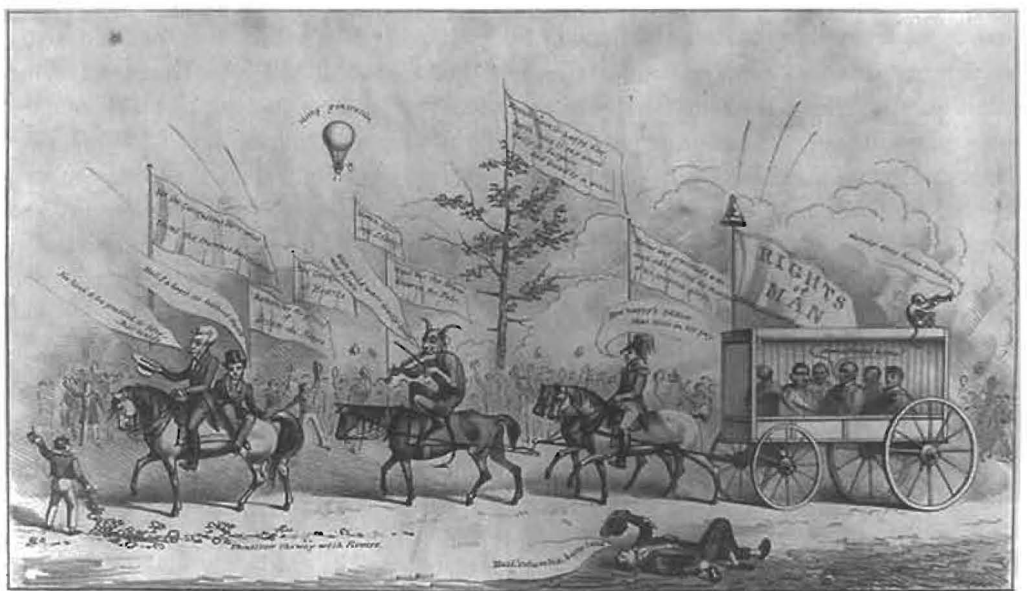
the Potomack a firm and solid government competent to the security of national liberty might be preserved. Even now that seems doubtful. The case of the South seems to me to be desperate. Our opinions are incompatible with a united government even among ourselves. The Union has been preserved so far by miracles, I fear that they cannot continue.⁴

All that Marshall had worked for seemed to be coming to naught.

Marshall's melancholy in September 1832 was fueled in large part by the impending re-election of President Andrew Jackson.⁵ Six months earlier, the Court had issued the decision in *Worcester*⁶ that held unconstitutional Georgia's detainment and arrest of Reverends Samuel Worcester and Elizur Butler for being in the Cherokee County without a Georgia-issued passport. The Court had found their

detentions an unconstitutional violation of the federal treaties of Hopewell and Holston,⁷ as well as the various federal trade and intercourse acts.

It was in many ways no accident that this case came before the Court in an election year. The counsel for the Cherokees was William Wirt, a long-time nemesis of Andrew Jackson and former presidential candidate, who was a close ally of Jackson's principal opponent, Henry Clay. Clay was portraying Jackson as a tyrant, and opponent of the Constitution. Jackson had made a signature feature of his first term his opposition to the Court.⁸ The Indian Removal Act had narrowly passed Congress two years before and was very unpopular in the North.⁹ By ruling against the state of Georgia, Marshall was effectively leaving Jackson two choices: enforce the decision and inflame his southern and western base in the midst of the election; or refuse to enforce the decision and give proof in the north and northwest of the



This cartoon of a burlesque parade being led by Andrew Jackson satirizes his administration, particularly Jackson's controversial Indian resettlement program whereby thousands of Cherokees, Seminoles, and members of other tribes of the southern United States were uprooted and moved to less desirable lands in the West.

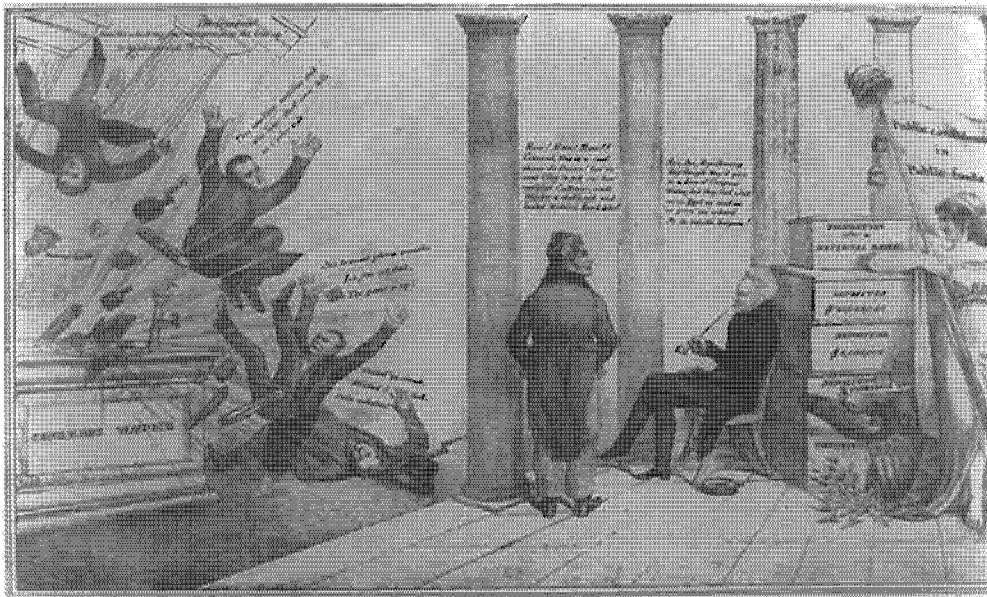


William Wirt (pictured), counsel for the Cherokees, was a longtime nemesis of Andrew Jackson and an ally of Henry Clay, Jackson's principal opponent.

characterization of "King Andrew" usurping the Constitution.¹⁰ Marshall created a situation to force Jackson either to act to uphold the Court or to reveal himself during the election campaign as a fickle supporter of national authority.¹¹ It was a risky endeavor. Due to

Marshall's legal cleverness, however, no decision yet existed for Jackson not to enforce: The formal order had not been actually issued by the Court under Section 25 of the Judiciary Act of 1789. The Court would issue its final Order of Judgment only after the case had been remanded with no effect, and this would not happen until the Court met again, in the spring of 1833.

The calculation failed: Jackson was handily reelected. Forty years later, Horace Greeley wrote that Jackson responded to this decision by uttering, "John Marshall has made his decision, now let him enforce it."¹² Much as "Play it again, Sam" has entered the popular imagination as the definitive Humphrey Bogart line, even though it was never said in *Casablanca*, this statement has stood to define Jackson's presidency, even though there is no proof that he said it and much evidence that he did not.¹³ Jackson did refer to the decision as "still born" in correspondence, and the decision was roundly attacked in the Democratic newspapers.¹⁴ But what transformed the calculus



This 1834 cartoon satirizes the combined failure of Clay, Daniel Webster, John Calhoun, and Nicholas Biddle to thwart Jackson's treasury policy. They had unsuccessfully opposed Jackson's devastating order to remove federal deposits from the Bank of the United States.

of Marshall's confrontation with Jackson was John Calhoun's South Carolina. Emboldened by Georgia's seemingly successful nullification of federal law and federal treaty and by Jackson's sweeping reelection victory, the legislature of South Carolina voted in November of 1832 to nullify the tariffs of 1828 and 1832 that they found repugnant.¹⁵ Nullification sentiment had been simmering for a while, providing the backdrop to the Webster-Haynes debates in 1830. Story had written to Marshall in early 1831, "The recent attacks in Georgia and the recent Nullification doctrine in South Carolina are but parts of the same general scheme, the object of which is to elevate an exclusive State sovereignty upon the ruins of the General Government."¹⁶

The nullification crisis transformed the entire situation. Georgia's nullification of federal treaties and statutes did not threaten the Constitution in the way that South Carolina's did: Georgia's action denied Indian sovereignty, while South Carolina's denied na-

tional authority. Jackson immediately pushed for Congress to pass the Force Bill, authorizing the President to use the military to execute the revenue laws and expanding the jurisdiction of the federal courts in the process. What had been a showdown over the ability of the Court to force the President and the states to respect its decisions became a challenge to the very nature of the Union. Jackson needed to separate the two issues, to ensure that South Carolina could not publicly make common cause with Georgia, widening the crisis to a full-blown civil war. The way out—to separate the Georgia issue from the South Carolina issue—was to make the Cherokee case go away. If Georgia Governor Wilson Lumpkin would issue a pardon to the reverends, and if the American Board of Commissioners for Foreign Missions would pressure the reverends to accept the pardon, the case would end and there would be no decision for Jackson not to enforce.

At the center of this storm engulfing the Court were Reverend Samuel Austin



Reverend Samuel Worcester (left), a Congregationalist minister from Vermont, was tried with eleven others for residing in Cherokee country without a passport. President Jackson wanted Georgia Governor Wilson Lumpkin (right) to pardon him so that his case would not become a political liability, but Worcester refused to admit wrongdoing. The *Cherokee Removal Cases* that came before the Marshall Court were a direct consequence of Jefferson's Indian policy.

Worcester, a thirty-four-year-old Congregationalist minister from Vermont, and his colleague, Dr. Elizur Butler. Worcester, Butler, and eleven others were tried in September 1831 for the crime of residing in the Cherokee territory without a state-issued passport, which could only be obtained upon swearing an oath of loyalty to uphold Georgia law. Only Worcester and Butler refused to accept an immediate pardon upon the swearing of the oath to Georgia. They were sentenced to four years hard labor at Milledgeville Penitentiary in Georgia.¹⁷ Worcester draped his imprisonment in martyr's robes: Writing to Jeremiah Evarts, president of the American Missionary Board, in January 1831, he boasted that he would "rather suffer with and for the Cherokees, than to disparage them by having it said that the Board and its Missionaries could not trust the Supreme Court of the United States."¹⁸ Yet over the ensuing year much changed. Evarts, the passionate defender of Indian rights, died, and Worcester received a steady stream of visitors, all urging him to accept a pardon, repeatedly framing the refusal as the pretext for disunion and civil war: Did he want the blood of a civil war on his hands?¹⁹ By May 1832, Worcester was more forlorn, writing to a colleague at the Board:

Who will hereafter venture to place any reliance on the Supreme Court of the United States for protection against laws however constitutional if we now yield through fear that the decision of the Court will not and cannot be executed?²⁰

On Christmas Day 1832, the Prudential Committee of the American Board of Commissioners for Foreign Missions voted to instruct Worcester and Butler to apply for pardons.²¹ The next week, the two imprisoned reverends wrote to Wirt that continuing the case "might be attended with consequences injurious to our beloved country."²² Governor Lumpkin issued the pardons, the missionaries swore the oath, and the case went away. Freed from this legal difficulty, the President was able to suc-

cessfully force South Carolina to rescind the Nullification Ordinance, albeit with a reduction in the federal tariffs. The Supreme Court found itself, in the words of Charles Warren, "in a stronger position than it had been" since *McCulloch v. Maryland*.²³ Joseph Story noted to a friend how remarkable the outcome was, the dual victories (that is, the end of the South Carolina legislature's attempt to nullify the federal statute as well as the State of Georgia's pledge to defy the US Supreme Court) of the end of the nullification crisis: "Who would have dreamed of such an occurrence?"²⁴

Four years later, President Martin Van Buren issued the order to General Winfield Scott for the removal of the southern tribes. All but scattered bands of the Cherokee, Creek, Chickasaw, Choctaw, and parts of the Seminole nations were moved across the Mississippi to their new home in the western Indian Territory, and over the ensuing years tribes north and south of the Ohio River were moved west.²⁵ Alexis de Tocqueville, ostensibly in America to study its penal system, witnessed a band of the Choctaw crossing the Mississippi at Memphis and later wrote:

The conduct of the United States Americans towards the natives was inspired by the most chaste affection for legal formalities. As long as the Indians remained in their savage state, the Americans did not interfere in their affairs at all and treated them as independent peoples; they did not allow their lands to be occupied unless they had been properly acquired by contract; and if by chance an Indian nation cannot live on its territory, they take them by the hand in brotherly fashion and lead them away to die far away from the land of their fathers. The Spaniards, by unparalleled atrocities which brand them with indelible shame, did not succeed in exterminating the Indian race and could not even prevent from sharing their rights; the United States Americans

have attained both these results with wonderful ease, quietly, legally, philanthropically, without spilling blood and without violating a single one of the great principles of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.²⁶

Understanding Jefferson's Legacy in the *Cherokee Removal Cases*

Since the advent of the disciplines of professional history and political science a little over a century ago, there has been a conflict over the question of Thomas Jefferson's responsibility in the policy of Indian removal. One camp has absolved Jefferson. Henry Adams, in his monumental history of the administrations of Jefferson and Madison, characterized Jefferson's policy towards the Indians as "humane."²⁷ Mid-twentieth-century Jefferson biographers such as Dumas Malone²⁸ and political scientists such as Louis Hartz²⁹ favored the Adams perspective, downplaying and minimizing the connection. For example, in the endnote analyzing Jefferson's first "Indian Address," the editors of *The Papers of Thomas Jefferson* noted in 1954 that the address "sets forth most of the sympathetic and far-sighted views on the status and future of the Indian that were embodied in TJ's Indian policy as President."³⁰

Another camp has consistently held Jefferson culpable, however. In the 1906 edition of the *Annual Report of the American Historical Association*, Indian scholar Annie Abel wrote a long and detailed monograph laying out the case for Jefferson's role as architect of Indian removal.³¹ This view has received much scholarly support in the recent past, from the work of distinguished scholars including such historians as Father Francis Paul Prucha³² and anthropologist Anthony F. C. Wallace, who argued for Jefferson as "the planner of cultural genocide, the architect of the removal policy, the surveyor of the Trail of Tears."³³

How do we address this question of Jefferson's responsibility in the formulation of the policy of Indian removal executed nearly three decades after he left the White House? And to what degree can we see the *Cherokee Removal Cases* that bedeviled Marshall and haunt his legacy as Jefferson's revenge upon his nemesis?

On the one hand, the view that Jefferson bears primary responsibility for Indian removal goes too far. It completely ignores or dismisses Jefferson's views on citizenship for the Native Americans and sovereignty for American Indian nations, views framed well before his presidency and pursued during his tenures as both Secretary of State and President. Jefferson did favor removal, but in circumstances that were virulently opposed by the advocates of removal of 1830.

On the other hand, in many ways this charge of Jefferson's responsibility does not go far enough, barely scratching the surface of the magnitude of Jefferson's culpability. Under his active leadership, Jefferson's administration undertook what would become an irreversible shift in the federal government's Indian policy. The administration moved away from the policies pursued by the British Empire, the Confederation, and the federalist administrations, which had sought to limit frontier conflict by controlling the pace and direction of frontier settlement and closely regulating trade. It moved to a policy that aggressively used land acquisition, settlement, and trade as tools to force assimilation or removal across the Mississippi. Jefferson's administration negotiated and assumed an obligation on the part of the federal government to Georgia to extinguish the sovereignty of the Cherokee and Creek nations, an obligation that was irreconcilable with federal treaties pledging federal respect and protection for those nations' sovereignty. Jefferson's stewardship created the perception of removal's inevitability, and Jefferson supported and encouraged young political and military leaders who became leading advocates of removal, such as William Blount

and Andrew Jackson. Perhaps most importantly, Jefferson's Indian policy fit within his broader concept of the "Empire of liberty"—his foreign policy view pursued by the two colleagues who succeeded in the presidency, James Madison and James Monroe.³⁴ Jefferson's ideas about Indian removal were linked—not just conceptually, but also programmatically and pragmatically—to the policies of the Monroe Doctrine and the repatriation of African-American slaves to Liberia.

Jefferson's Views on Native American Citizenship and American Indian Sovereignty

Jefferson's generation was not working with a clean slate: The language and rhetoric of what would become federal Indian law emerged out of three hundred years of legal precedent driven by military imperative, economic necessity, and political realities. The most important dimensions shaping Jefferson's thought and actions were his interpretation of *jus gentium*—the law of nations articulated by Francisco de Vittoria, Grotius, and Emmerich Vattel—and John Locke's Enlightenment-era conceptions of the "noble savage."³⁵ These served to define the parameters of the debate over the right to purchase land, regulate trade, and determine the "fate" of the Indians.

The First Context of Jefferson's Indian Views: International Law

Throughout Jefferson's writings on the issue of the legal status of American Indians, he refers consistently to *jus gentium*, or the idea of the law of nations. The distinctive feature of federal Indian law is that it is the only area of federal law the roots of which are, not English, but international.³⁶ The early modern law of nations, emerging out of the canon law of the Vatican, bore the indelible imprint of thirteenth-century canon lawyer Pope Innocent IV, who sought to frame the rights and obligations of the sovereign conqueror and discoverer.³⁷ Rooted in Thomistic

natural law as well as Augustinian just-war theory, Innocent's commentaries on *Quod super his* validated a Christian prince to invade lands possessed by infidels or heathens, derived from the suprajurisdictional Petrian authority of the pope to care for the souls of the world.³⁸ If a heathen or infidel prince refused to let the gospel be taught, his land could be invaded. Upon Columbus's return to Europe, Pope Alexander VI proclaimed *Inter cetera divinaria* in May 1493, which articulated the legal rights and responsibilities that came from being the first Christian nation to "discover" new lands. This formed the basis of the Spanish *Requerimiento*, which defined the original legal authority that Spain asserted in its transoceanic empire.³⁹

Within a generation after Columbus's voyage, however, the legitimacy of this legal framework among Spanish elites had eroded. In 1532, at the University of Salamanca, Dominican theologian Francisco de Vittoria argued (in *On the Indians Lately Discovered*, which ultimately became the core of his treatise on international law, *De Indies et de Jure Belli Relectiones*) that the natives of the Americas possessed natural legal rights as both sovereign nations and children of God and must be treated accordingly. Vittoria maintained that the inhabitants of the Americas possessed natural legal rights to their property as free and rational people. "[T]here is a certain method in their affairs," Vittoria reasoned, "for they have politics which are orderly arranged and they have definite marriage and magistrates, overlords, laws and a system of exchange, all of which call for the use of reason; they also have a kind of religion."⁴⁰ Therefore, Vittoria argued, Alexander VI's grant of land title to Spain was baseless, as not even a Pope had the right to grant what he did not possess. The natives must be dealt with as a sovereign nation, Vittoria argued, and the law of nations required treaties to be negotiated between sovereigns. Title would have to be purchased. But the Spanish were not without rights, too: Vittoria did not reject the Thomistic

worldview, with its concept of just war. Europeans had a right to freedom of travel and movement, trade, and to spread the gospel; native princes who denied these rights would legitimately provoke a just war and the taking of their land.

Vittoria's impact was profound in Spain as well as at the Vatican. In 1537, Pope Paul III issued *Sublimis Deus*, which incorporated much of Vittoria's thinking about international law as it applied to the colonization of the Americas. The implications for English and, later, American policy were clear: While aboriginal peoples were sovereign and could not have their land directly appropriated, there were certain legal rights of exclusivity that attached to the "discoverer" nation. *Sublimis Deus* also influenced the rhetoric of American Indian policy, as Paul III described the Petrian role of the pope as the "Great Father"—a term later used by American Presidents, beginning with Washington, to describe the President's relationship to the tribes. The distinctive feature of *jus gentium*—the exclusive right of the "discovering" nation (or its legal successor) to purchase the land, preempt the title, regulate trade, and, if necessary, extend its civil and criminal jurisdiction over the native peoples as the "conqueror"—all flow from this distinctively Roman and Spanish legal tradition, providing the language and logic within which Indian policy was discussed.

The Second Context of Jefferson's Views: Locke on the Role of Property in the State of Nature

While Vittoria's notions of international law provided the framework for the legal debates over Indian sovereignty, land, and trade, of equal importance was the influence of Enlightenment concepts of the state of nature and the "noble savage."⁴¹ To John Locke and Jean-Jacques Rousseau, the noble savage in the state of nature played a prominent role in the theoretical explanation of social contract theory. The romantic image of the American Indian loomed large in Locke's imagination of the state of nature: writing dramatically in the

Second Treatise on Government, he stated that "[t]hus in the beginning all the World was America . . ."⁴² But the Indians served as more than a prop: The hunter who ranged over the land but never worked it became the cornerstone of Locke's labor theory of real property. To Locke, real title was only gained by working the soil agriculturally; a pre-agricultural society did not own the land, and their title to it could be effectively preempted by a later arrival who would work the land productively. Work added value to natural resources previously held in common joint tenancy. The added value provided by labor gave the creator a property right to the fruits of his labor. To Locke, this theory of property had biblical roots, grounded in the Genesis grant of dominion of the earth to Adam.⁴³

In particular, Locke drew a distinction between hunter-gatherer societies and agricultural ones, distinguishing specifically between the "wild Indians" of America and their English colonial counterparts. The "savages" had property in the fruits of their labor: "The Fruit, or Venison, which nourishes the wild *Indian*, who knows no Inclosure, and is still a Tenant in common, must be his."⁴⁴ Yet, Locke argued that since they were not farmers, they had no property rights to the land, as would an English colonist farmer. "For I ask," wrote Locke, "whether in the wild woods and uncultivated waste of America left to Nature, without any improvement, tillage, or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land down in Devonshire where they are well cultivated?"⁴⁵ Neither conquest nor discovery would give legitimate dominion over America to the English. But development would.

In 1758, Emmerich Vattel argued in **The Law of Nations or the Principles of Natural Law**:

Who, though living in fertile country, disdain the cultivation of the soil and . . . in order to avoid labor, seek to live upon their flocks and the fruits

of the chase. This might well enough be done in the first age of the world, when the earth produced more than enough, without cultivation, for the small number of inhabitants. But now that the human race has multiplied so greatly, it could not subsist if every people wished to live after that fashion. Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labor, and they may not complain if other more industrious Nations, too confined at home, should come and occupy part of their land.⁴⁶

This sentiment was also later espoused by Jefferson, who wrote from France in 1785: "Whenever there is in any country undisturbed lands and unemployed poor, it is clear that the laws of property have been so far extended as to validate natural right. The earth is given as a common stock for man to labor and live on."⁴⁷ Yet the civilization program pursued by the first six U.S. Presidents itself undermined this legal theory. Fifty years later, William Wirt pleaded to James Madison for his support in Wirt's legal defense of the Cherokee Nation. Madison responded:

The plea, with the best respect, for dispossessing Indians of the lands on which they have lived, is, that by not incorporating their labour, and associating fixed improvements with the soil, they have not appropriated it to themselves, nor made the determined use of its capacity for increasing the number and engorgement of the human race. But this plea, whatever original force be allowed to it, is here repelled by the fact that the Indians are making the very use of that capacity which the plea requires . . .⁴⁸

The answer to this conundrum to Madison, though, was removal for the "sons of the forest": "It is so evident that they can never be

tranquil or happy within the bounds of a State, either in a separate or subject character, that a removal to another home, if a good one can be found, may well be the wish of their best friends."⁴⁹

Jefferson as Advocate of Indian Citizenship

The case for Jefferson as an advocate for Indian citizenship and sovereignty rests on three things: his passionate advocacy of Indian citizenship and eventual equality in the **Notes on the State of Virginia**; his rhetorical continuation of these themes as President; and his detailed defense, as Secretary of State, of tribal treaty rights in general and of the rights of the Creek and Cherokee against the southern states under the Treaty of Hopewell in particular.

Jefferson's views on the issue of Indian citizenship are fully described in the **Notes**.⁵⁰ The **Notes** were written in response to questions from Francois Marbois, secretary of the French legation to the United States, who in 1780 sent the same set of twenty-two questions to prominent people in each of the states to try to learn something about America after the Revolution. Jefferson used this as an opportunity to refute the theories of the Count de Buffon, who had argued that the plants and animals of America were inferior in both size and number because of the extremes of climate, temperature, and humidity.⁵¹

There were questions that dealt specifically with Indian history that Jefferson addressed perfunctorily. The most revealing answers, however, came in the section on natural history. Amidst a description of American flora and fauna, Jefferson chose to address the issue of the relative equality of Americans of European descent in relation to Indians of America and Africans slaves in America. Prefacing the comparison of their physical attributes, traits, and mores with the now-notorious descriptions of African inferiority, Jefferson noted "I do not need to deny that there are variations in the races of man distinguished

by their powers both of body and mind."⁵² Writing favorably of the Indians, he continued by stating that "we shall probably find that they are formed in mind as well as in body on the same model with '*homo sapiens Europaeus*.'"⁵³ Throughout this section of the *Notes*, he compares the languages, culture, military history, and familial habits of American Indians favorably to those of the French at the time of Julius Caesar:

Before we condemn the Indians of this continent as wanting genius, we must consider that letters have not yet been introduced among them. Were we to compare them in their present state with the Europeans North of the Alps, when the Roman arms and arts first crossed those mountains . . . How many good poets, how many able mathematicians, how many great inventors in arts and sciences, had Europe North of the Alps then produced?⁵⁴

As to their capacity for government and law, Jefferson argued, "[C]an they be said to have no *republique* who conduct all their affairs in national councils who pride themselves in their martial character?"⁵⁵ Concluding his criticism of de Buffon, Jefferson thundered: "In short, this picture [of de Buffon's] is not applicable to any nation of Indians I have ever known or heard of in North America."⁵⁶ Jefferson's optimism was entirely predicated on the Indians abandoning tribalism altogether and assimilating fully into American society.⁵⁷

Writing to his friend the Marquis Chastellux with a copy of the *Notes*, Jefferson stated that he was "safe in offering that the proofs of genius given by the Indians of N. America, plac[ing] them on a level with whites in the same uncultivated state."⁵⁸ Not only were Indians "white," Jefferson argued, but they were equally "American." His presidential Indian Addresses are littered with such statements. For example, in 1803 he asserted to a visiting

group of Choctaws that the Americans and the Indians were "born in the same land."⁵⁹ And the following year he noted to a group of Osage leaders how the Americans "seem to have grown out of this land, as you have done. . . . We are all now of one family, born in the same land, and bound to live as brothers."⁶⁰ In the waning days of the Revolutionary War, however, Governor Jefferson asserted to the Kaskaskian Chief Jean Baptiste Ducoigne that this kinship was not without hierarchy, declaring, "We, like you, are Americans, born in the same land, and having the same interests. . . . The Americans alone have a right to maintain justice in all the lands on this side of the Mississippi."⁶¹ This right created an obligation for the Americans. From Paris, diplomat Jefferson wrote to his old friend Benjamin Hawkins, the confederal agent to the Creek and Cherokees, that "[t]he attention which you pay to their rights also does you great honor, as the want of that is a principal source of dishonor to the American character."⁶² Yet this honor came at a price: Jefferson continued, "The two principles on which our conduct towards the Indians should be founded are justice and fear. After the injuries we have done them, they cannot love us, which leaves us no alternative but that of fear to keep them from attacking us. But justice is what we should never lose sight of. . . ."⁶³

In both of his inaugural addresses and in each of the annual messages he sent to Congress, Jefferson gave glowing accounts of the progress of the Indian civilization programs. In his first Annual Message, he rosily stated, "Among our Indian neighbors also a special spirit of peace and friendship generally prevails, and I am happy to inform you that the continued efforts to introduce among them the implements and the practices of husbandry and the household arts have not been without success."⁶⁴ Jefferson's rhetoric as Governor, diplomat, and President all pronounced this vision of the status of the American Indian together with the idea of "progress" towards "civilization."

Jefferson's Defense of the Treaty Rights of the Creek and Cherokee Nations

As Secretary of State, Jefferson was a strong advocate of Indian sovereignty and treaty rights. One episode in particular is important to examine in depth. It arose from the dispute between North Carolina and the Cherokee over the 1786 Treaty of Hopewell. The cession of North Carolina's western lands, which became the Territory South of the River Ohio in 1790 and then the state of Tennessee in 1796, left unclear the exact boundary on the ground of the Cherokee territory protected by the Treaty of Hopewell, which had been surveyed for the government by Jefferson's friend Hawkins. A large number of white settlers were within the land defined as Cherokee, and the tribe had petitioned the federal government for redress. Indian affairs and treaties were a foreign policy issue, and so Jefferson's colleague in the cabinet, Secretary of War Henry Knox, sought his opinion on whether the act of acceptance—the congressional confirmation of North Carolina's cession—superseded the Treaty. Jefferson wrote:

Were the treaty of Hopewell, and the act of acceptance of Congress to stand in any point in direct opposition to each other, I should consider the act of acceptance as void in that point; because the treaty is a law made by two parties, & not revocable by one of them either acting alone or in conjunction with a third party. If we consider the acceptance as a legislative act of Congress, it is the act of one party only; if we consider it was a treaty between Congress and North Carolina, it is but a subsequent treaty with another power, & cannot make void a preceding one, with a different power.⁶⁵

This was in effect the same argument Cherokee Chief John Ross and Wirt made to the Supreme Court forty years later: that a federal agreement with a state could not moot a ratified

treaty.⁶⁶ But there was a way out, utilizing the framework of *jus gentium* and Lockean ideas of property. Jefferson continued:

But I see no such opposition between these two instruments. The Cherokees were entitled to the sole occupation of their lands within the limits guaranteed to them. The state of N. Carolina, according to the *jus gentium* established for America by memorial usage, had only a right of preemption of the lands against all other nations. It could convey then to its citizens only this right of preemption, and the right of occupation could be united to it till obtained by the U.S. from the Cherokees.⁶⁷

The issue boiled over into the next year, with Jefferson writing again to Knox, giving his legal brief for Indian sovereignty and the primacy of treaty rights:

I am of opinion that government should fairly maintain this ground; that the Indians have a right to occupation of their lands, independent of the States within whose chartered lines they happen to be; that until they cede them by treaty or other transaction equivalent to a treaty, no act of a State can give a right to such lands; that neither under the present constitution, nor the ancient confederation, had any State or person a right to treat with the Indians, without the consent of the General Government; that that consent has never been given to any treaty for the cession of the lands in question; that the government is determined to exert all its energy for the patronage and protection of the rights of the Indians, and the preservation of peace between the United States and them; and that if any settlements are made on lands not ceded by them, *without the previous consent of the United States*, the government

will think itself bound, not only to declare to the Indians that such settlements are without the authority or protection of the U.S., but to remove them also by public force.⁶⁸

Jefferson was advocating a policy of Indian removal: removing white settlers from disputed lands at the request of the Cherokees. When the issue came up again before the Cabinet in 1793, Jefferson's notes record his defense of the full sovereignty of the tribes.⁶⁹ Jefferson's defense was partially pragmatic: He endorsed Knox's views that treaty rights should be respected because Indian wars were too expensive and bad for trade.⁷⁰

Challenging Jefferson's Sincerity

But the fundamental question with Jefferson, of course, is always: Did he mean it? On at least three occasions his sincerity was challenged by people he could not dismiss as "federal maniacs" deserving to be put in the English mental hospital at Bedlam.⁷¹

The first came at a private dinner meeting in June 1792 with British diplomat George Hammond, which Jefferson recounted in his notes. The first question: What were Jefferson's and the American's view on the right of Indians to the soil? Jefferson responded: "the exclusive rights of preemption of Indian lands, and the regulation of their trade, as governed by the standards of *jus gentium*."⁷² "We consider it as established usage of different nations," Jefferson noted, "into a kind of *Jus gentium* for America, that a white nation settling down and deciding that such and such are their limits, makes an invasion of these limits by any other white nation an act of war, but gains not right of soil against the native possessors."⁷³ Jefferson tersely records Hammond's response: "He said they apprehended our intention was to exterminate the Indians & take their land." To which Jefferson writes that he responded that it was not true; the Americans just

sought a "buffer boundary on their western borders."⁷⁴

The second challenge came from his friend Pierre Samuel du Pont de Nemours, who responded to President Jefferson's first annual message:

You congratulate her on the Indians becoming somewhat civilized: and on the increase, instead of the dwindling, of several of their tribes, due to the increased knowledge of agriculture. The inhabitants of your country districts regard—wrongfully, it is true—Indians and forests as natural enemies which must be exterminated by fire and sword and *brandy*, in order that they may seize their territory. . . . Thus you will find thorns among your roses . . .⁷⁵

This criticism Jefferson absorbed without comment, but the context is important: How much of Jefferson's defense of Indian equality in the **Notes on the State of Virginia** was sincere, and how much was just a cleverly biting riposte to du Buffon, by comparing his French ancestors to the "primitive" state of the American Indians?

The greatest challenge to Jefferson's sincerity came from the Cherokee themselves. In May 1808, a group of Cherokee chiefs representing the upper towns applied to Jefferson for United States citizenship as a means to forestall the voluntary removal program being promoted after the Louisiana Purchase. The request clearly caught Jefferson off guard, and the response is quite different from the rhetorical tone of the other Indian Addresses:

You propose, my children, that your nation shall be divided in two, and that your part . . . shall be placed under the government of the United States, become citizens thereof, and be ruled by our laws; in fine, to be our brothers, instead of our children.

My children, I shall rejoice to see the day when the red men, our neighbors, become truly one people with us enjoying all the rights and privileges we do . . . But are you ready for this?⁷⁶

Jefferson asserted the need for the Cherokees to fully adopt agriculture and private property, steps "necessary before our laws can suit you or be of any use to you."⁷⁷ But the Great Father suddenly was not omnipotent: "On our part," Jefferson explained, "I will ask the assistance of our Great Council, the Congress, whose authority is necessary to give validity to these arguments, and who wish nothing more sincerely than to render your condition secure and happy."⁷⁸ Ultimately nothing came of this request of the administration, but it had a tremendous effect on the development of Cherokee legal culture itself.⁷⁹

Jefferson as Advocate of Indian Removal

But while a sometime advocate for Indian citizenship and sovereignty as Secretary of State, and President, Jefferson also proposed policies for removal of eastern tribes over the Mississippi in two specific contexts.

The first was retribution against tribes that allied militarily with Britain. In August 1776, mere weeks after the passage of the Declaration of Independence, Jefferson wrote,

I hope the Cherokee will now be driven beyond the Mississippi & that this in future will be declared to the Indians the invariable consequence of their bringing a war. Our contest with Britain is too serious and too great to permit any possibility of avocation from the Indians. This then is the season for driving them off, and our southern colonies are happily rid of every other enemy & exert their whole force in that quarter.⁸⁰

As President, he would repeat similar threats of removal in letters of instruction to Indian

agents and Secretary of War Henry Dearborn, as well to chiefs themselves.⁸¹ After the War of 1812 and the Creek War and the purchases of Florida and Louisiana settled the issue of European bellicosity on the frontier, the pretext of retribution disappeared from later debates about Indian removal in the 1830s.

The second form of removal that Jefferson advocated was a voluntary option for tribes that did not want to participate in the federal "civilization" and assimilation program, which had devolved from British imperial policy and had been continued by the federalists.⁸² Jefferson and his agents repeatedly offered to swap eastern for western property acre for acre, promising financial support for the move and for getting settled as well. Jefferson described the outlines of the policy in depth to Governor W. C. C. Claiborne:

I think it will be good policy in us to take by the hand those of them who have emigrated from ours to the other side of the Mississippi, to furnish them generously with arms, . . . and other essentials, with a view to render a situation there desirable to those they have left behind, to toll them in this way across the Mississippi, and thus prepare in time an eligible retreat for the whole.⁸³

After the Louisiana Purchase, Jefferson made several offers in his Indian Addresses of voluntary removal to the leaders of the Cherokee,⁸⁴ Choctaw⁸⁵ and Chickasaw⁸⁶ nations. Jefferson's governor in Louisiana, General James Wilkinson, made repeated references in official correspondence to the Secretaries of State and War to the "president's policy of removal" and "depopulation," complaining that he had "no instructions how to proceed."⁸⁷ It was in the face of these requests that the group of Cherokee leaders requested citizenship in 1808.



After obtaining the Louisiana Purchase from the French, Jefferson made several offers to leaders of the Cherokee, Choctaw, Chickasaw and other eastern nations for removal to lands west of the Mississippi. Pictured is a lithograph of a Seminole village.

Jefferson's Voluntary Removal Policy and the Indian Removal Act of 1830

Jefferson's voluntary removal policy was fundamentally at odds with the political coalition that brought about the Indian Removal Act (IRA), which passed Congress by a razor-thin majority in 1830.⁸⁸ The coalition that conceived the IRA was made up of two distinctive camps. The first, composed primarily of southerners and westerners, made the argument that Indian sovereignty had been extinguished, both by American force of arms and by the exclusion by Britain of the Indians in the Treaty of Paris. The Treaty had transferred sovereignty from the Crown to the states, giving them sole prerogatives of both discoverer and conqueror, not just to purchase land and regulate trade, but also to extend the criminal and civil jurisdiction of their law over the entire soil of the state's territory. Furthermore, arguing against the Victorian tradition, this camp decried the acknowledgment of Indian dominion at all. As

Andrew Jackson wrote to James Monroe upon Monroe's ascension to the presidency, "I have long viewed treaties with the Indians as an absurdity not to be reconciled to the principles of our Government. The Indians are the subjects of the United States, inhabiting its territory and acknowledging its sovereignty, then is it not absurd for the sovereign to negotiate by treaty with the subject."⁸⁹

The other wing of the IRA coalition was made up of groups coming primarily out of the northeast that, for religious or ethical motivations, wanted to save the Indians from avaricious whites. Led by a group of prominent public intellectuals such as Louis Cass and Thomas McKinney, this wing received all sorts of favorable press in very influential media such as the *North American Review*.⁹⁰ The IRA coalition was truly one of the oddest political coalitions in American history. Yet both groups rejected both Jefferson's arguments made as Secretary of State about treaty rights and sovereignty and his arguments made

as President about citizenship, assimilation, or voluntary removal.

Jefferson as Architect of American Indian Removal

Joseph Ellis has famously described Jefferson as the "American Sphinx," succinctly describing the difficulty in penetrating the "inner" Jefferson as well as creating a visual image of Jefferson's ability to embody seamlessly radically divergent ideas.⁹¹ As Secretary of State, Jefferson wrote eloquently and passionately in defense of Indian treaty rights. Yet as President, Jefferson subordinated his views on Indian citizenship and sovereignty in response to three imperatives. The first centered around national security, predicated on the fears of frontier influence from French Louisiana, Spanish Florida, and British Canada that weighed heavily upon the first three years of Jefferson's presidency. The second was nationalistic, compelled by fears of southwestern and western interests becoming disconnected from Atlantic ones, leading to disunion and the loss of the West. And the third was pragmatic, motivated by Jefferson's desire to foster, promote, and advance the interests of his political party in the South and West. As President, Jefferson sanctioned an environment in which the ultimate arguments for Indian removal were fostered and nurtured. Jefferson's administration shaped what would become a durable shift in federal Indian policy, and with it the pace and direction of American expansionism.⁹²

The Sources of Jefferson's Indian Policy

Jefferson's Indian policy emerged in response to two separate events in the spring of 1802. First was the discovery of Napoleon's intention to return France to Louisiana and bring his war with Britain to North America, with the revelation of the secret treaty of the San Ildefonso in which Spain pledged to give back the Louisiana Territory and the city of New

Orleans to France. Second was Congress's approval of Georgia's offer to cede 57 million acres of its western charter lands, forming almost all of what would become Mississippi and Alabama. The last of the original cessions of the western territories under the 1787 Compromises that produced the Constitution, the Georgia Cession had been delayed for fifteen years by the nettlesome thicket of the Yazoo land controversy.

Threats to the Nation and the Union

The discovery of Napoleon's secret plans to return French rule to Louisiana was perhaps the greatest shock of Jefferson's first term, if not his career.⁹³ "The cession of Louisiana and the Floridas by Spain to France," Jefferson related to his minister in Paris, Robert Livingston, "works most sorely on the United States."⁹⁴ The Treaty of San Ildefonso called for suspending the American right of deposit, effectively shutting off the Mississippi to American commerce. The degree of duress under which Jefferson was working is clear in his willingness to commit the ultimate act of desperation: ally with Britain. "The day that France takes possession of N. Orleans," Jefferson warned Livingston, "fixes the sentence which is to restrain her forever with her low water mark. It seals the union of two nations who in conjunction can maintain exclusive possession of the ocean. From that moment we must marry ourselves to the British fleet and nation."⁹⁵ Defense of the southeast from the Napoleonic incursion became the highest priority, and the key would be to separate the southern Indian tribes from the border so as to create a military buffer zone.

The problem was that the tribes were increasingly unwilling to cede new lands. Writing to Governor Clairborne, Jefferson outlined the strategy: "As a means of increasing the security, and providing a protection for our lower possessions on the Mississippi, I think it also all important to press on the Indians, as steadily and strenuously as they can bear, the extension of our purchases on the Mississippi from the

Yazoo upwards, and to encourage a settlement along the whole length of that river, that it may possess on its own banks the means of defending itself, and presenting as strong a frontier on our western as we have on our eastern border."⁹⁶

The threat hovering came, not just from European incursion, but also from the Union splitting apart, not North from South, but West from East—a fear, dating back to the American Revolution, that western and Atlantic interests could not be reconciled.⁹⁷ Jefferson mused on this concern in a letter to scientist Joseph Priestly,

Whether we remain in one confederacy, or form into Atlantic and Mississippi confederacies, I believe not very important to the happiness of either part. Those of the western confederacy will be as much our children and descendents as those of the eastern, and I feel myself as much identified with that country, in future time, as with this; and did I now foresee a separation at some future day, yet I should feel the duty and the desire to promote the western interests as zealously as the eastern, doing all the good for both portions of our future family which should fall within my power.⁹⁸

The fears were well grounded, especially considering that it would be Jefferson's own Vice President, Aaron Burr, who would conspire to split the Union accordingly.

The Georgia Cession

Georgia's was the last of the colonial charter territorial cessions, a process in which seven states ceded 259 million acres of lands to form the national domain; Georgia's 56 million acres was second only to Virginia's cession of nearly 170 million.⁹⁹ Perhaps the thorniest legal issue of the early Republic had been the Yazoo controversy, in which the Georgia legislature

sold lands to which it did not have title to pay Revolutionary War bounties and to profit from land-speculation fever, only to have the subsequent legislature invalidate those grants before issuing its own disputed grants,¹⁰⁰ and that controversy delayed Georgia's cession by fifteen years.¹⁰¹ Yet the delay worked to incredible unanticipated advantage for the state, giving it negotiating leverage disproportionate to its situation. While Georgia had originally been willing to settle cheaply in 1788, by 1802 it was able to command a tremendous price.

In 1798, President Adams appointed a commission to resolve the Yazoo issues and negotiate the cession with Georgia as part of a larger bill establishing the Mississippi Territory. Adams named a troika that would play critical roles in Jefferson's cabinet: Albert



Albert Gallatin (pictured) was one of three members of a commission appointed in 1798 to resolve the Yazoo land controversy. Four years of negotiation produced an agreement in which Georgia ceded 56 million acres for \$1.25 million, to be paid out of the federal treasury by profits of the land sales. In return, however, Georgia committed the federal government to extinguish all land rights by the Cherokees in the state—a concession that would bedevil John Marshall and the Court thirty years later.

Gallatin, James Madison, and Levi Lincoln—Jefferson's future Secretaries of the Treasury and State and his Attorney General. Four years of negotiation produced an agreement in which Georgia ceded 56 million acres for \$1.25 million, to be paid out of the federal treasury by profits of the land sales, plus a twelve-mile strip of land running along the breadth of the state's northern border, ceded by South Carolina in 1787. However, the Georgia commissioners were able to extort a critical concession, which created the boundaries of the constitutional problem that would beleague Marshall thirty years later: Gallatin, Madison, and Lincoln agreed to the Georgians' demand "[t]hat the United States shall, at their own expense, extinguish for the use of Georgia, as early as the same can be peaceably obtained on reasonable terms, . . . the Indian title to all other lands within the state of Georgia."¹⁰²

Even had the commissioners been inclined to demand less, they had no choice: The extinguishment of the Cherokee and Creek sovereignty as a condition of Georgia's cession was a requirement of Section 23 of the Georgia Constitution of 1798, which held that the General Assembly had the power to define the boundaries of the state and could cede its western lands to the United States only if the federal government agreed in turn to extinguish Indian sovereignty within Georgia's borders.¹⁰³ "Soil and sovereignty" defined Georgia's legal dominion over its land and all residing on it, rooted in the assertion that the Treaty of Paris devolved sovereignty—and with it the rights of the discoverer and conqueror—to the individual states. Since the tribes were not a party to the Treaty, Georgia asserted, their sovereignty—if it had ever existed at all—was no more. This explicitly rejected Vittorian *jus gentium* as well as the Indian policies of the British Empire, the Confederation, and the Washington and Adams administrations.

This radical language of soil and sovereignty came to Georgia out of the 1776 Constitution of North Carolina and its western cession,¹⁰⁴ as well as from the 1796 con-

stitution of Tennessee,¹⁰⁵ and was developed in reaction to conflict between North Carolina and Georgia with the confederal and federal governments regarding the right of a state to purchase Indian land and extend its law into Indian territory within the state's borders. Leaders in Georgia, North Carolina, and Tennessee never accepted the Vittorian *jus gentium* framework. Georgia had negotiated a series of treaties with the Creeks and Cherokees in 1783 at Augusta, 1785 in Galphinton, and 1786 at Shoulderbone,¹⁰⁶ which were eventually explicitly rejected by the federal government.¹⁰⁷ The Treaty of Galphinton, which ceded a large tract of central Georgia at the fork of the Oconee and Ocmulgee Rivers, became a particular point of contention between Georgia and the United States, and the person who condemned it most forcibly was the agent to the Creeks, Jefferson's old friend Hawkins. Hawkins negotiated a series of competing treaties with the Creeks and Cherokee for the confederal government at Hopewell in 1785 and Holston in 1791, both of which were protested by Tennessee and North Carolina as a violation of their state's sovereign right to its soil.¹⁰⁸

It was in the conflict over the Holston Treaty that Jefferson offered his defense of Indian treaty rights to Henry Knox and the Washington administration firmly rejected the state's rights view of Indian law. As President, however, Jefferson welcomed what his biographer Henry Adams characterized as the liberal "concession to the principle of states-rights"¹⁰⁹ in the Georgia Cession's resolution of the land issue, and allowed the government to focus its attention on the development of the Mississippi Territory—newly significant as the buffer defense area against French Louisiana and Florida.

The federal government now had an obligation to extinguish Indian title in the southwest to satisfy the strident "soil and sovereignty" demands of southern leadership. It also had the need to extinguish Indian title to create the ability to defend the Southwest



Georgia had negotiated a series of treaties with the Creeks and Cherokees in the 1780s that were explicitly condemned by the federal government. The Treaty of Galphinton, which ceded a large tract of central Georgia at the fork of the Oconee (pictured) and Ocmulgee Rivers, became a particular point of contention between Georgia and the United States.

against British, French, and Spanish incursion and invasion, and to isolate the tribes from their former European allies. Over the winter of 1802–03, Jefferson set into motion a policy that reversed the federalist approach to the regulation of trade and the management of territorial expansion. It was this new policy, defined in a series of letters to Jefferson's agents in the Indian Department, that created the environment that produced the Indian Removal Act and the Cherokee litigation.

Jefferson's "Secret Letter" to Congress on Indian Trade

Jefferson's Indian policy began to be formulated in reports delivered in secret to the Congress on the subject of Indian trade and the impending renewal of the Trade and Intercourse Act.¹¹⁰ The broader context however

was national security. Describing the growing threat of America being drawn into Napoleon's war, Jefferson asserted, "I see the only prospect of planting on the Mississippi itself the means of its own safety."¹¹¹ This would require land: land to serve as strategic buffers between tribes and between tribes and European powers; land to serve as military and commercial roads; and land on which to settle citizens who could serve in a military capacity as a defensive militia. "The Indian tribes, residing within the limits of the United States," Jefferson fretted, "have, for a considerable time, been growing more and more uneasy, at the constant diminution of the territory they occupy." Tribes were resisting attempts to purchase land, as in the past. Jefferson proposed to Congress two strategies to address this. First, was to accelerate the civilization program, with the goal to convince Indians that they would need less land as farmers

than as hunters and could dispose of the surplus profitably. Yet that would take time, and time was at a premium. The second approach was more efficient, and would become the emphasis for the remainder of Jefferson's term: Drive Indian leaders into debt, and use the debt as a means to secure immediate land cessions. Jefferson proposed "to multiply trading houses among them, and place within their reach those things which will contribute more to their domestic comfort than the possession of extensive, but uncultivated lands."¹¹² The problem, however, was the presence of British traders, particularly along the Florida border. Jefferson proposed to drive the traders off, both to facilitate the debt strategy and to "rid ourselves [of] a description of men who are constantly endeavoring to excite, in the Indian mind, suspicions, fears, and irrationality towards us."¹¹³ How he proposed to do this he did not say to Congress. This policy took shape over the ensuing three weeks in a series of letters to three of his principal field agents: General Andrew Jackson, military district commander in the Mississippi territory; Colonel Benjamin Hawkins, the federal agent to the Cherokee and Creek nations; and General William Henry Harrison, the Territorial Governor, Indian superintendent, and military commander of the Indiana Territory.

Jefferson's Letter to Andrew Jackson

Jefferson's letter of February 16, 1803 to Jackson was a response to a complaint from Jackson about Hawkins' sluggardly performance in obtaining land cessions from the Creeks and Cherokees. Secretary of War Dearborn had sent Hawkins in July 1801 with the specific instructions to obtain the Oconee-Ocmulgee Fork, the subject of the much-disputed Georgia-Creek Treaty of Galphinton of 1785, which the Creeks again refused to sell.¹¹⁴ Hawkins, Jackson asserted, placed the interests of the Creeks and Cherokees on par with those of the state of Georgia and the United States. Jefferson began by cautioning Jackson regarding the overall goals of federal Indian policy: "1. The preservation of

peace; 2. The obtaining of lands. . . . Towards the attainment of our two objects of peace and lands, it is essential that our agent acquire that sort of influence over the Indians which rests on confidence. In this respect, I suppose that no man has ever obtained more influence than Colonel Hawkins."¹¹⁵ After lauding Hawkins' negotiating skills, however, Jefferson qualified his vote of confidence, noting to Jackson that he would "always be open to any proofs that [Hawkins] obstructs cessions of land" and that Hawkins would "be placed under . . . a [strong] pressure from the executive to obtain cessions."¹¹⁶ Jefferson's friendship with Hawkins went back to the Revolution; nonetheless, Jefferson told Jackson that Hawkins "shall be made sensible that his value will be estimated by us in proportion to the benefits he can obtain for us. I am myself alive to the obtaining of lands from the Indians by all honest and peaceable means."¹¹⁷ Jefferson assured Jackson that he would order Hawkins "to spare no efforts from which any success can be hoped to obtain the residue of the Oconee and Ocmulgee fork."¹¹⁸

Jefferson's Letter to Benjamin Hawkins

Jefferson wrote to Hawkins two days later. After praising Hawkins lavishly for his work with the civilization program, Jefferson described the larger goals of his Indian policy, but in a more revealing manner than he had to Jackson two days earlier:

In truth, the ultimate point of rest and happiness for them is to let our settlements and theirs meet and blend together, to intermix, and become one people. Integrating themselves with us as citizens of the United States, this is what the natural progress of things will, of course, bring on, and it will be better to promote than retard it. Surely it will be better for them to be identified with us, and preserved in the occupation of their lands. . . . I have little doubt but that your reflections



An old friend of Jefferson's from Revolutionary days, Benjamin Hawkins (pictured) served as confederal agent to the Creek and Cherokee Indians. Jefferson eventually clashed with him over Hawkins' defense of Indian rights and his unwillingness to extract land cessations from his tribes.

must have led you to view the various ways in which their history may terminate, and to see that this is the one most for their happiness. . . . I feel it consistent with pure morality to lead them towards it, to familiarize them to the idea that it is for their interest to cede lands at times to the United States. . . .¹¹⁹

After revealing the larger plan for the termination of the tribes via means of absorption, Jefferson turned to the issue of the Oconee-Ocmulgee Fork. Jefferson noted the intense pressure from Georgia to obtain this land, and related "the Creeks had at one time made up their minds to sell this, and were only checked in it by some indiscretion of an individual," knowing full well that the individual was Hawkins. Jefferson confronted his old friend: "I beseech you to use your most earnest endeavors; for it will relieve us here from a great pressure, and yourself from the unreasonable suspicions of the Georgians which you notice, that you are more attached to the interests

of the Indians than of the United States."¹²⁰ Four days later, Secretary of War Dearborn wrote to Hawkins, noting that it was "expedient" to remove Hawkins from his post as agent to the Cherokee Nation.¹²¹ The day before Dearborn wrote to demote Hawkins, Dearborn wrote to Wilkinson regarding the new debt policy,¹²² and he soon instructed Wilkinson to physically take Hawkins to the Creek Nation and negotiate to get the Fork, which the Creeks finally ceded reluctantly in 1804.¹²³

Jefferson's Letter to William Henry Harrison

Nine days later, Jefferson wrote a third letter that described in lurid detail the core of his new Indian policy, synthesizing the elements revealed in part to Congress, to Jackson, and to Hawkins. Harrison, from a trusted Virginian



WILLIAM HENRY HARRISON,
1804

Jefferson trusted William Henry Harrison because he was from an old Virginia family. Serving as Territorial Governor, Indian superintendent, and military commander in the Indiana Territory, Harrison was directed to carry out Jefferson's plan to drive Indian leaders into debt as a way to secure land cessations.

family, occupied the unusual situation of holding all three positions of power in the Indiana Territory: Territorial Governor, Indian superintendent, and military commander. Perhaps because of Harrison's extensive responsibility¹²⁴ or because of his trust in Harrison's discretion, Jefferson was quite candid. Taking on the issue of trade, Jefferson informed Harrison:

To promote this disposition to exchange lands, which they have to spare and we want, for necessities, which we have to spare and they want, we shall push our trading wares, and be glad to see the good and influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by a cession of lands.¹²⁵

That much he had revealed to Congress. But Jefferson detailed in private how the problem of the British traders was to be dealt with: "At our trading houses, too, we mean to sell so low as merely to repay us cost and charges, so as neither to lessen nor enlarge our capital. This is what private traders cannot do, for they must gain; they will consequently retire from the competition, and we shall thus get clear of this pest without giving offence or umbrage to the Indians."¹²⁶ Once they were driven out of business, the government could set more realistic prices.

Jefferson then detailed the ultimate goal of his Indian policy in very non-Victorian language:

In this way our settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi. The former is certainly the termination of their history most happy for themselves; but in the whole course of this, it is essential to cultivate their love. As to their fear, we presume that our strengths

and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from our notions of pure humanity only.¹²⁷

The context of this was the national security crisis: "the occupation of New Orleans, hourly expected, by the French, is already felt like a light breeze by the Indians."¹²⁸ "We bend our whole views," Jefferson continued, "to the purchase and settlement of the country on the Mississippi," repeating the assertion he had made to Congress of the need to "plant on the Mississippi itself the means of its own defense."¹²⁹ And if any tribe were to resist? "Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to others, and a furtherance of our final consolidation."¹³⁰ Jefferson concluded: "I must repeat that this letter is considered as private . . . and especially how improper to be understood by the Indians. For their interests and their tranquility it is best they should see only the present age of their history."¹³¹

The Results of Jefferson's Indian Policy

The epilogue to this story occurs on December 28, 1831, just months before the dénouement of the *Cherokee Removal Cases*. An elderly James Madison responded to R. R. Gurley, the head of the American Colonization Society, who had written to Madison, concerned that the project of freeing slaves and having them sent to Liberia was foundering with no funds. Madison wrote to his ally in the cause that "in contemplating the pecuniary resources needed for the removal of such a number to so great a distance, my thoughts and hopes have long been turned to the rich fund presented in the western lands of the nation which will soon entirely cease to be under a pledge from another project."¹³² Madison continued: "[S]hould it

be remarked that the states though all may be interested in relieving our country from the colored population, are not equally so benefited. It is fair to recollect that the sections most to be benefited are those whose cessions created the fund to be disposed of."¹³³ In other words, in the mind of the man who negotiated the Georgia Cession, the removal of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole tribes would allow their rich farmland to be sold—and the proceeds could be used to remove freed slaves to Africa. Indian removal could pay for removing slaves to Liberia. In the mind of Jefferson's Secretary of State, it was a direct, not just theoretical, connection.

Over the course of Jefferson's presidency, the federal government cleared title to the entire east bank of the Mississippi from the Gulf all the way to Illinois, as well as along both banks of the Ohio River. Thirty-two Indian treaties were negotiated and ratified, gaining cessions from American Indian nations of 200,000 square miles east of the Mississippi, at a cost of \$1,129,200—six times what the Washington administration had paid out in Indian land acquisitions. Sales were also accelerated: the Treasury received \$3,429,098.42 for sale of the public domain lands, nearly triple what the Washington administration scored.¹³⁴ The policy of pursuing cessions for the creation of roads for military defense as well as commerce intensified, trade was increased, and the British and Spanish influence was lessened. The northern and southern tribes were never able to form a united opposition to American expansion, and Burr's conspiracy to form a western empire failed to attract any significant support.

Jefferson's Indian policy, formed under the duress of the San Ildefonso crisis and fueled by the newly created obligation to Georgia, created the political and legal environment in which mandatory removal emerged as what seemed to be the only policy option over the next generation. Jefferson supported southern and western leaders, such as Jackson and Governors Blount and Clairborne, who rose to be-

come leading advocates for the states'-rights, soil and sovereignty ideology, while shunning old colleagues, such as Benjamin Hawkins, who were consistent in their views on Indian treaty rights. The final ironic effect, however, was on the Cherokees themselves. Jefferson taught far more than he realized—and certainly not what he intended—to the Cherokee Nation. As historian William McLoughlin documented, Jefferson's administration sparked a rise in Cherokee nationalism and acceptance of law as a means of national defense, and while Jefferson's tutelage shaped Jackson, it also had an important effect on John Ross, the leader of the Cherokee Nation during the removal crisis.¹³⁵

The nullification of federal treaties and statutes by Georgia that precipitated the Cherokee Removal crisis for the Marshall Court was not a radical assertion of state sovereignty but the rather belated assertion of authority legitimized thirty years before by the acceptance of the Georgia Cession's obligation to extinguish Cherokee and Creek sovereignty and the subsequent shift in federal Indian policy favoring rapid accumulation and settlement of land and the disparaging of Indian treaty obligations. This Jeffersonian legacy was a legal knot too great for even John Marshall to resolve.

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¹⁰³Article 23, Georgia Constitution of 1798, in Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, 7 vols. (Washington, 1909), II, 794.

¹⁰⁴Article XXV of the Declaration of Rights, Constitution of the State of North Carolina, 1776, in Thorpe, *The*

Federal and State Constitutions, Colonial Charters, and Other Organic Laws, V, 2787, 2788–89; Section 11, North Carolina Cession, cited in Donaldson, *The Public Domain*, 76.

¹⁰⁵Section 32, Tennessee Constitution of 1796, in Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, VI, 3414, 3424.

¹⁰⁶Text of treaties between Georgia and the Creek Nation at Augusta, Galphinton, and Shoulderbone, in *American State Papers: Indian Affairs* (Washington, 1832), I, 17–19.

¹⁰⁷Treaty of New York between the United States and the Creek Nation, 7 August 1790, in *American State Papers: Indian Affairs* I, 81; Letter of Henry Knox to George Washington, 6 July 1798, in *American State Papers: Indian Affairs* I, 15.

¹⁰⁸Memorial of Tennessee Legislature to the United States Congress, 19 August, 1797, in Robert White, ed., *Messages of the Governors of Tennessee*, 7 vols. (Knoxville, 1952), I, 22–24; North Carolina Remonstrance to the Congress and the President, in White, ed., *Messages of the Governors of Tennessee* I, 33; Protest of the Governor of Georgia against Benjamin Hawkins, 11 February 1786, in *American State Papers: Indian Affairs* I, 7.

¹⁰⁹Adams, *History of the United States of America During the Administrations of Thomas Jefferson*, 207.

¹¹⁰Thomas Jefferson, Report on Indian Trade to the Gentlemen of the Senate and House of Representatives, 18 January 1803, in *American State Papers: Indian Affairs* I, 684.

¹¹¹*Ibid.*

¹¹²*Ibid.*

¹¹³*Ibid.*

¹¹⁴Letter of Instruction to the Creek Treaty Commissioners, 17 July 1801, in *American State Papers, Indian Affairs* I, 651.

¹¹⁵Letter of Thomas Jefferson to General Andrew Jackson, 16 February 1803, in Bergh, ed., *The Writings of Thomas Jefferson* X, 357.

¹¹⁶*Ibid.*, 358–59.

¹¹⁷*Ibid.*, 359.

¹¹⁸*Ibid.*

¹¹⁹Letter of Thomas Jefferson to Col. Benjamin Hawkins, 18 February 1803, in Bergh, ed., *The Writings of Thomas Jefferson* X, 360, 363.

¹²⁰*Ibid.*, 364.

¹²¹Letter of the Secretary of War to Colonel Benjamin Hawkins, 22 February 1803, in Carter, ed., *Territorial Papers of the United States* V, 190.

¹²²Letter of the Secretary of War to Gen. James Wilkinson, 21 February 1803, in Carter, ed., *Territorial Papers of the United States* V, 189.

¹²³Letter of the Secretary of War to Gen. James Wilkinson, 16 April 1803, in Carter, ed., *Territorial Papers of the United States* V, 212; Speech of Hoopie Micco to

Benjamin Hawkins, 3 November 1804, in **American State Papers: Indian Affairs I**, 691.

¹²⁴Governor Jefferson sent a similar letter to George Rogers Clark concerning frontier Indian policy during the Revolution. Letter of Thomas Jefferson to Col. George Rogers Clark, 29 January 1780, in Boyd, ed., **The Papers of Thomas Jefferson**, 3, 273.

¹²⁵Letter of Thomas Jefferson to Gen. William Henry Harrison, 27 February 1803, in Bergh, ed., **The Writings of Thomas Jefferson X**, 368, 370.

¹²⁶*Ibid.*, 370.

¹²⁷*Ibid.*, 371.

¹²⁸*Ibid.*, 373.

¹²⁹*Ibid.*, 371.

¹³⁰*Ibid.*, 371.

¹³¹*Ibid.*, 373.

¹³²Letter of James Madison to R. R. Gurley, 28 December 1831, in **Letters and Other Writings of James Madison, Fourth President of the United States** (Philadelphia, 1865) IV, 213.

¹³³*Ibid.*, 214.

¹³⁴Donaldson, **The Public Domain**, 17.

¹³⁵William McLoughlin, **Cherokee Renasence in the New Republic** (Princeton, 1986).

Jefferson's Legacy to the Supreme Court: Freedom of Religion

BARBARA A. PERRY

Religion in Colonial Virginia

Except for Rhode Island, each of the thirteen American colonies created some form of established religion. The English venturists who undertook settlements in New England and Virginia simply assumed that religion would be inextricably tied to their colonial enterprises.¹ The 1606 charter creating the Virginia colony required that all ministers preach Christianity that followed the "doctrine, rights, and religion now professed and established within the realme of England"—in other words, the Church of England.² To bolster the struggling Jamestown settlement, in 1610–11, Sir Thomas Dale promulgated "Articles, Lawes, and Orders, Divine, Politic, and Martiall for the Colony in Virginia." Clergymen were to read "Dale's Laws," as they were labeled, to assemblies every Sabbath. The thirty-seven rules included eight that specifically referred to God and prohibited impiety, blasphemy, sacrilege, and irreverence toward preachers or ministers. The sixth law was particularly notable for its strict religious requirements and harsh penalties for violations: "Every man and woman duly twice a day . . . shall . . . repair unto the Church to divine service upon pain of losing his or her days allowance for the first omission, for the second to be whipped, and for the third to be condemned to the Gallies for six months. Likewise no man or woman shall dare to violate or break the Sabbath by any gaming . . . but duly sanctify and observe the same, both himself and his family; by preparing themselves at home with private prayer, that they may be better fitted for the public according to the commandments of God and the orders of our Church. . . ."³ Colonists faced the death penalty after the third offense of missing morning and afternoon Sunday devotional services.

Over the next century, English missionaries, assisted by the Church of England's Society for the Propagation of the Gospel and Society for the Promoting of Christian Knowledge, spread Anglicanism throughout the Chesapeake region and founded more than 75 parishes in Virginia and Maryland, which constituted over half of the 150 parishes in America, by Jefferson's birth in 1743. Yet Virginia parishes hardly resembled those found



English missionaries had founded more than seventy-five parishes in Virginia and Maryland by the time of Jefferson's birth in 1743, including this church in King William County, Virginia. Clerics complained about the small salaries and the long distances they had to travel to visit their small congregations.

in the mother country. The population was so dispersed that Anglican clerics complained about the long distances they had to cover in visiting their small congregations, in addition to legislative indifference to their salaries. Moreover, the England-based church hierarchy failed to assign a bishop to Virginia, which resulted in a lack of discipline, ordination, and clerical authority. Into this ecclesiastical power vacuum stepped Anglican parish vestries, which the clergy thought were too powerful. In turn, parishioners saw too many priests as escapees from England, leaving financial and family burdens behind for "retirement" in Virginia. Life in early colonial Virginia was hardly one of leisure, however. English criminals who were offered the options of hanging for their crimes or deportation to Virginia reportedly chose the gallows!⁴

The Anglicans' monopoly had profound ramifications for those colonists who were not members of the Church of England. In the chapter on religion from his *Notes on the State of Virginia*, Jefferson addressed the sad history of intolerance by the Anglican church in his native colony, especially against "the poor Quakers." Jefferson noted that Quakers had fled from English persecution in hopes of finding "asylums of civil and religious freedom; but they found them only for the reigning sect."⁵ In 1659, 1662, and 1693 the Virginia legislature criminalized Quakers' refusal to baptize their children, "prohibited the unlawful assembly of Quakers," forbid ship captains from bringing Quakers to Virginia, required those already in the Old Dominion or those who arrived later "to be imprisoned till they should abjure the country," established the

death penalty for Quakers who had accumulated three offenses of coming to the state, and banned Quakers from meeting in or near, or visiting, Virginians' homes.⁶

Jefferson's Religious Life

Of course, Jefferson himself sprang from this Anglican hegemony. Born in 1743 in what is now Albemarle County, Virginia, Jefferson was raised in the traditions of the Anglican church. Missionary pastors served the quasi-frontier that constituted the central region of the English colony where Jefferson spent his boyhood. As infants, he and his siblings were baptized in the Church of England, his mother taught him prayers, and his family would ask the lad to recite the Lord's Prayer for guests at dinner. Jefferson's older sister recited Psalms

for him,⁷ and Anglican clerics provided all of his formal primary and secondary education.

Scholars differ on how higher education at the College of William and Mary, an Anglican institution, may or may not have affected Jefferson's religious beliefs. He certainly encountered Deism and Enlightenment philosophy there, but he presumably attended Bruton Parish Church in Williamsburg during his collegiate years and his postgraduate study of law (1760–63).⁸ In July 1763, Jefferson wrote a spiritual letter to his closest friend at William and Mary, John Page, in which he argued that the only way to withstand life's "calamities and misfortunes" was "to assume a perfect resignation to the Divine will, . . . and to proceed with a pious and unshaken resignation, till we arrive at our journey's end, when we may deliver up our trust into the hands of him who gave it,



Jefferson attended the College of William and Mary (pictured), an Anglican institution in Williamsburg, Virginia. He encountered Deism and Enlightenment there, but scholars differ on how Jefferson's higher education affected his religious beliefs.

and receive such reward as to him shall seem proportioned to our merit."⁹

Although church records of Jefferson's membership have been lost to history, most of his biographers believe that he attended Episcopal services throughout his long life, particularly at his home parish in Charlottesville, using his dog-eared prayer book, served on the church's vestry, received communion, was married and buried according to Episcopal rites, and had his children baptized by Episcopal clergies.¹⁰ Yet Jefferson refused the invitation from a French friend to become his son's godfather, arguing, "The person who becomes sponsor for a child, according to the ritual of the church in which I was educated, makes a solemn profession, before god and the world, of faith in articles, which I have never sense enough to comprehend, and it has always appeared to me that comprehension must precede assent."¹¹

Where Jefferson parted company from traditional Anglican and other mainstream Christians was over their belief in the Trinity—three persons in one God: Father, Son, and Holy Ghost. "From the very early part of my life," Jefferson claimed, he could not reconcile "the ideas of Unity and Trinity."¹² As a devoted student of Enlightenment philosophy, and believing that individuals should only embrace ideas after rigorous application of reason, he simply could not "take it on faith" that Christianity, which purported to be monotheistic, could worship a Trinitarian godhead. Late in his life, the rise of Unitarianism in the United States pleased him, and he quite incorrectly predicted that it would "become the general religion of the United States."¹³ If the Trinity did not exist, according to Jefferson's enlightened reasoning, then he had to—and did—reject the divinity of Christ.

Jefferson's Enlightenment heroes were Francis Bacon, Isaac Newton, and John Locke. He once told Alexander Hamilton that these were the three "greatest men who ever lived, having laid the foundation of the physical and moral sciences."¹⁴ Jefferson was an inveter-

ate observer and recorder of all things natural, societal, and political, from weather to plants to agriculture to wildlife to social and religious mores, and his **Notes on the State of Virginia**, published in 1785, paid homage to empirical analysis. The power of God-given reason served as a barrier to, as Jefferson put it, "an indulgence in speculations that disquiet the mind, . . . plunging into the fathomless abyss of dreams and phantasms, determining between what really comes from God and the phantasms of deluded imagination."¹⁵ Jefferson believed that his heroic trio of Bacon, Newton, and Locke cleared the fog of medieval religious faith and superstition. He paid homage to them by hanging their portraits in the formal parlor at Monticello.

Regarding religious questions with the same Enlightenment rules of reason by which he measured historical, philosophical, and scientific data, Jefferson counseled his nephew Peter Carr to "[q]uestion with boldness even the existence of a God because, if there be one, he must approve of the homage of reason, than that of blindfolded fear."¹⁶ Jefferson viewed religion as a completely private domain for himself, as well as all others. He argued: "Religion [is] a subject on which I have ever been most scrupulously reserved. I have considered it as a matter between every man and his maker, in which no other, and far less the public, had a right to intermeddle."¹⁷ When a friend once questioned him about his religious views, he responded somewhat testily: "Say nothing of my religion. It is known to my God and myself alone. Its evidence before the world is to be sought in my life: if that has been *honest and dutiful* to society, the religion which has regulated it cannot be a bad one."¹⁸

Because Jefferson kept his religious views to himself most of his political life, his enemies were quick to distort them in the public square. When Jefferson ran for President, leading the party of Democratic-Republicans that he had founded, in the bitter election of 1800 against incumbent Federalist John Adams, his opponents labeled him atheistic and infidel.

As Martin Marty, historian of American religion, notes, "They were wrong on both counts. Jefferson was not 'infidel,' which means 'of unfaith,' but he had a different faith. He was not an 'a-theist,' which means 'without a God,' but . . . a Deist, who had a different concept of God, one that was characteristic of many Anglo-American intellectual figures of the Enlightenment."¹⁹ As a Deist, Jefferson believed in God, whom he described as "the Creator and benevolent governor of the world." This supreme being revealed himself, and sustained the universe, through the laws of nature that Newton ascertained.²⁰ Jefferson also considered himself "a Christian, in the only sense [Jesus] wished any one to be; sincerely attached to his doctrines, in preference to all others; ascribing to himself every human excellence; and believing he never claimed any other."²¹ Yet near the end of his life, Jefferson thought his religion so idiosyncratic that he admitted, "I am a sect by myself, as far as I know."²²

Although Jefferson reasoned that Jesus Christ was not God, as Christians who accepted his divinity believed, Jefferson described Jesus as possessing "the most innocent, the most benevolent, and the most eloquent and sublime character that ever has been exhibited to man."²³ Partly as a response to his opponents' virulent attacks on his religious beliefs, Jefferson drafted in 1803 a *Syllabus of an estimate of the merit of the Doctrines of Jesus, compared with those of others*, in which he labeled Christ's "system of morals" as "the most perfect and sublime that has ever been taught by man."²⁴ Jefferson believed, however, that the Evangelists who wrote the Gospels long after Jesus' crucifixion, and the priests who followed them, had adulterated the teachings of Jesus and the church founded in his name. Therefore, Jefferson produced his own scripture: first, a short piece in 1804 that he called *The Philosophy of Jesus of Nazareth*; and second, his now-famous Jefferson Bible, which he entitled *The Life and Morals of Jesus of Nazareth Extracted Textually from the*

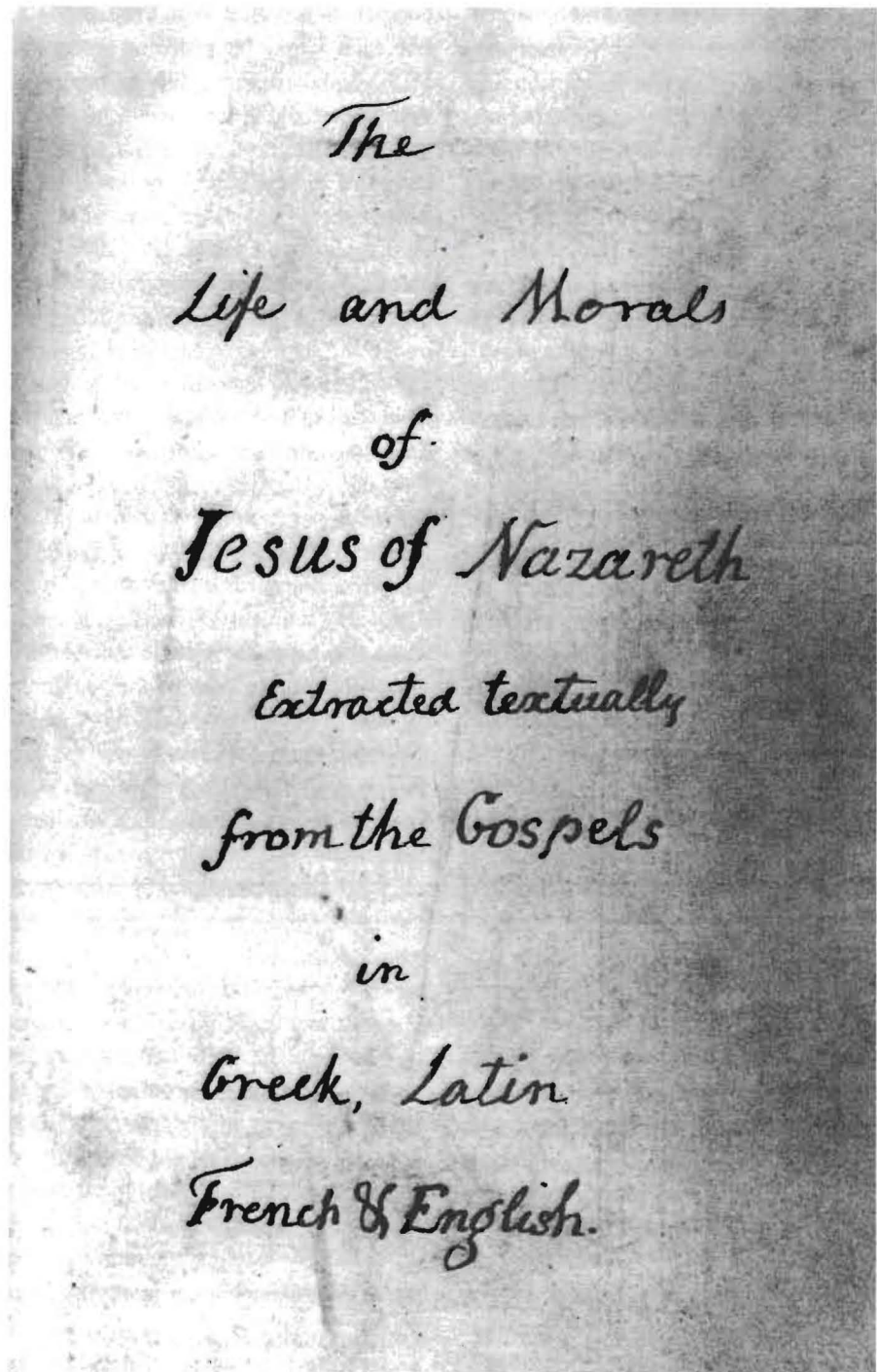
Gospels in Greek, Latin, French & English.

For each work, he procured several copies of the standard Bible, took a razor blade to their pages, and ultimately—long after he left the presidency and had the time to do so—compiled a New Testament that extracted, as Jefferson told John Adams, "the very words only of Jesus, . . . which [are] as distinguishable as diamonds in a dunghill."²⁵ For example, Jefferson quoted verbatim Jesus' Sermon on the Mount, but excised what he considered apostolic mythology from the story of Jesus' birth (the visit of the Magi, etc.) and the fundamental Christian belief in Christ's resurrection. The Jefferson Bible concludes with these simple passages from the Gospels of Luke and Matthew: "Now in the place where [Jesus] was crucified, there was a garden; and in the garden a new sepulchre, wherein was never man yet laid. There they laid Jesus. And rolled a great stone to the door of the sepulchre, and departed."²⁶

With his skepticism toward the Gospels' authors and the Christian church that they founded, Jefferson became increasingly anti-evangelical and anticlerical throughout his adult life. If the individual's private religious convictions must remain beyond the reach of ecclesiastical authority, then surely each person's religious beliefs were outside the purview of government as well. As Jefferson wrote in his *Notes on the State of Virginia*, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say that there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."²⁷

Jefferson succinctly summarized his reasoning for promoting religious freedom and disestablishment:

Difference of opinion is advantageous to religion. The several sects perform the office of a Censor morum over each other. Is uniformity attainable? Millions of innocent men, women, and children, since



Because Jefferson believed that the Evangelists, who wrote the Gospels long after Jesus' crucifixion, had adulterated the teachings of Jesus, he produced his own Bible, including *The Life and Morals of Jesus of Nazareth Extracted Textually from the Gospels* in Greek, Latin, French & English. During his retirement, Jefferson procured several copies of the standard Bible, took a razor blade to their pages, and compiled a New Testament that extracted Jesus' own words.

the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity. What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. . . . Let us reflect that [the world] is inhabited by a thousand millions of people. That these profess probably a thousand different systems of religion. That ours is but one of that thousand. That if there be but one right, and ours that one, we should wish to see the 999 wandering sects gathered into one fold of truth. But against such a majority we cannot effect this by force. Reason and persuasion are the only practicable instruments. To make way for these, free inquiry must be indulged; and how can we wish others to indulge it while we refuse it ourselves. [E]very state . . . has established some religion. No two . . . have established the same. Is this proof of the infallibility of establishments?²⁸

Jefferson's Contributions to Freedom of Religion at the American Founding

Accompanying the demands for political liberty in pre-Revolutionary America were intense efforts to achieve religious freedom. The flourishing dissenting churches in Virginia, particularly the Baptists and Presbyterians, had presented numerous petitions protesting religious discrimination to the Virginia House of Burgesses in the 1750s and 1760s.

The ministers of Virginia's dissenting sects presented the facts of the handicaps and discrimination resulting from establishment laws, and they molded public opinion in favor of religious freedom. Fortuitously, Virginia's extraordinary pantheon of statesmen and political theorists—which included George Mason, James Madison, and Jefferson—eloquently expressed the underlying philosophical princi-

ples for separation of church and state and embodied them in effective constitutional and statutory forms. With independence from England looming, Jefferson drafted a new constitution for Virginia, which included a passage containing strains of free exercise and disestablishment of religion: "All persons shall have full and free liberty of religious opinion; nor shall any be compelled to frequent or maintain any religious institution."²⁹ Jefferson's draft arrived too late in the process to be accepted by Virginia's Revolutionary Convention, but three weeks prior to the adoption of the Declaration of Independence, the convention adopted Mason's Declaration of Rights. A Madisonian amendment for disestablishment was branded too radical, however, and failed to pass.³⁰ Nevertheless, the last article (16) of the Virginia Declaration of Rights provided the following: "That religion, or the duty which we owe our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, toward each other."³¹ Madison had persuaded Mason to use the phrase "free exercise of religion."³²

In the earliest days of the Revolution, and after authoring the Declaration of Independence, Jefferson continued to write on the necessity for disestablishment while serving on the Committee on Religion in the Virginia legislature. In the fall of 1776 he wrote his reflections on John Locke's philosophy of religious toleration. Jefferson's notes combine his interpretations of Jesus Christ and Enlightenment theory. "Why persecute for diff[erences] in relig[ious] opinion?" Jefferson queries. "Our Saviour chose not to propagate his religion by temporal pun[ishments] or civil incapacitations, if he had it was in his almighty power. But he chose [to] extend it by its influence on reason, thereby shewing to others how [they] should proceed. . . . No man has power to let

another prescribe his faith. Faith is not faith with[out] believing. No man can conform his faith to the dictates of another. . . . If we chuse for ourselves, we must allow others to chuse also, & so reciprocally. This establishes religious liberty."³³

Jefferson borrowed the analysis and phraseology from his notes on John Locke for legislation he drafted in 1777 as "A Bill for Establishing Religious Freedom." First introduced in the Virginia General Assembly in 1779, after Jefferson had been elected Governor, the bill's Section I delineated his philosophical, religious, and historical premises for religious liberty. First, because "Almighty God hath created the mind free, and manifested his supreme will that free it shall remain," men's "opinions and beliefs" result from "the evidence proposed to their minds." Second, "all attempts to influence [the mind] by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness." Third, such attempts to coerce the mind "are a departure from the plan of the holy author of our religion, who being lord of both body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone." Fourth, civil and religious authorities, "who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and fallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greater part of the world and through all time."³⁴

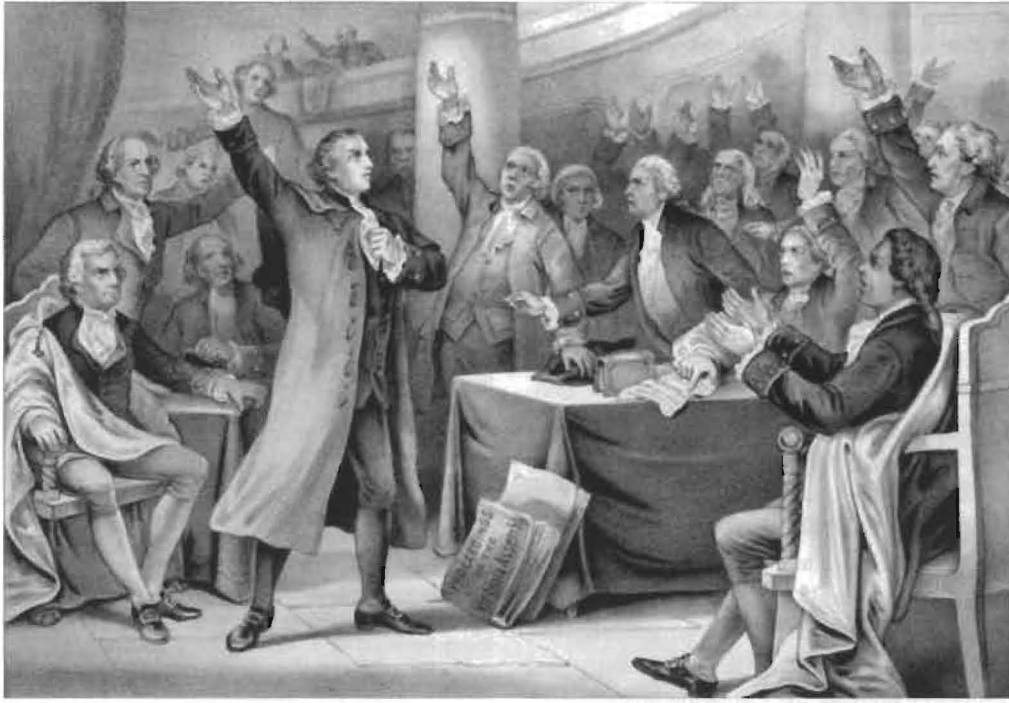
Section I of Jefferson's proposed legislation continued with a fervent condemnation of established religion's specific and deleterious impact on man's freedom of thought and choice. Declared Jefferson: "[T]o compel a man to furnish contribution of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; . . . even forcing him to support this or that teacher of

his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose moral he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind."³⁵

In addition, Jefferson proclaimed, with Enlightenment logic, that "our civil rights have no dependance on our religious opinions, any more than our opinions in physics or geometry; . . . therefore the proscribing any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens, he has a natural right; that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it. . . ."³⁶

Jefferson concluded his proposal's Section I by paying homage to classical liberalism's belief in the free marketplace of ideas as a means to truth, which "will prevail if left to herself; . . . she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when [the truth] is permitted to freely contradict them."³⁷

Based on Section I's foundation, Section II of the Bill for Establishment of Religious Freedom guaranteed the following affirmative rights: "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all



This romanticized 1876 lithograph shows Patrick Henry giving his famous "Give me liberty or give me death" speech in 1775 before the General Assembly in Richmond. A decade later, he introduced a bill calling for public taxation to support the Christian religion.

men shall be free to profess, and by argument to maintain their opinions in matters of religion and that same shall in no wise diminish, enlarge or affect their civil capacities."³⁸

The bill's third and final section was even more stunning in its procedural breadth. Jefferson reasoned that because "the rights hereby asserted [in Section II of the bill] are of the natural rights of mankind, . . . if any act shall be hereafter passed [by a future Virginia General Assembly] to repeal the present [bill] or to narrow its operation, such act will be an infringement of natural right."³⁹

A decade would pass before the bill's adoption, but the march continued incrementally toward complete religious freedom in the Old Dominion. The defeat in 1785 of Patrick Henry's General Assessment Bill, calling for public taxation "for the support of the Christian religion or of some Christian church . . .," sounded the death knell for church establishment in Virginia. Madison's landmark "Memo-

rial and Remonstrance," outlining the logic against establishment, was instrumental in the successful opposition of Henry's bill and foreshadowed the final victory for religious freedom and church-state separation with the passage of Jefferson's statute in 1786, which Madison expertly guided through the legislature while his friend was serving as the United States Minister to France.⁴⁰

Near the end of his life, as he wrote his autobiography, Jefferson observed: "[When] the bill for establishing religious freedom . . . was finally passed, . . . a singular proposition proved that its protection of opinion was meant to be universal. Where the preamble declares that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word 'Jesus Christ,' so that it should read 'a departure from the plan of Jesus Christ, the holy author of our religion.' The insertion was rejected by a great majority, in proof that

they meant to comprehend within the mantle of its protection the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination."⁴¹ Historian Merrill Peterson has summarized the legislation's historical impact: "The celebrated statute became a powerful directive for the unique relationship of Church and State in America, and, by its bold assertion that the opinions of men are beyond the reach of civil authority, one of the great charters of the free mind as well."⁴²

After the drafters of the new U.S. Constitution adjourned from Philadelphia in 1787, Jefferson, who was still in France, wrote to Madison—the document's main architect—to complain about "the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion."⁴³ Capturing the essence of Jefferson's Virginia Statute for Religious Freedom, Madison initially proposed to Congress the following amendments to the Constitution: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the right of conscience be in any manner, or on any pretext infringed..."⁴⁴ Through months of debate in the first Congress, Madison would hold fast to these principles, but he ultimately distilled them into the now-famous language of the Constitution's First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

Jefferson's most famous interpretation of the First Amendment's religion clauses appears in his 1802 letter to a Committee of the Danbury (Connecticut) Baptist Association in which he rejected their request for a day of fasting to reconcile the nation after the particularly acrimonious and divisive presidential campaign of 1800. "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate



Jefferson's most famous interpretation of the First Amendment's Religion Clauses appeared in an 1802 letter he wrote to a Baptist group rejecting their request for a day of fasting to reconcile the nation after an acrimonious presidential campaign. He asked his attorney general, Levi Lincoln (pictured), to review the original draft.

with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." In his original draft, Jefferson included, "Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even those occasional performances of devotion, practiced indeed by the Executive of another nation as the legal head of its church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective act." Jefferson apparently dropped the sentence after asking his Attorney General, Levi Lincoln, to review the letter draft to the Danbury group. In requesting Lincoln's review, the president noted, "The Baptist address, now enclosed, admits of a condemnation of the alliance between Church and State, under the authority of the Constitution. It furnishes an

occasion, too, which I have long wished to find, of saying why I do not proclaim fastings and thanksgivings, as my predecessors [Presidents Washington and Adams] did."⁴⁵

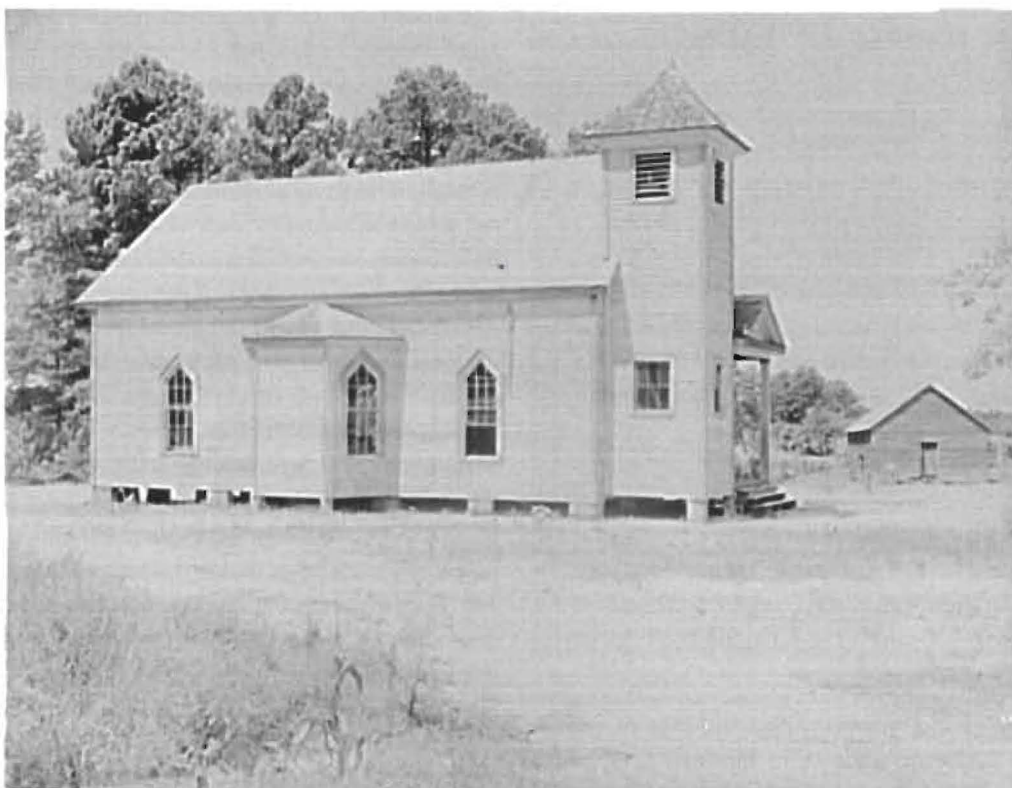
In a less well-known missive, Jefferson, in the last year of his White House tenure, wrote to the Reverend Mr. Millar and elaborated on his Danbury letter: "Fasting and prayer are religious exercises; . . . Every religious society has a right to determine for itself the times of these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it. . . . [E]veryone must act according to the dictates of his own reason, and mine tells me that civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents."⁴⁶

Jefferson's Views in Modern Supreme Court Church/State Jurisprudence: Justice Black's Role⁴⁷

To return to the title of this article, what links Jefferson's legacy in freedom of religion to the Supreme Court? Perhaps inevitably, given the simple word picture it creates, his "wall" metaphor became a mainstay of modern jurisprudence.⁴⁸ The Court originally referred to Jefferson as the authoritative interpreter of the First Amendment's creation of "a wall of separation between church and state" in *Reynolds v. United States*, the 1878 Free Exercise decision unanimously upholding the congressional ban on polygamy in the territories as a general secular regulation.⁴⁹ But it was Justice Hugo L. Black who popularized Jefferson's phraseology in applying the wall metaphor to modern Establishment Clause jurisprudence, starting in 1947's *Everson v. Board of Education of Ewing Township*, the New Jersey bus case.⁵⁰ Indeed, Jefferson's verbiage is probably more familiar to the general public than the First Amendment's actual language.⁵¹

What prompted Black to adopt Jefferson's nearly century-and-a-half-old analogy to underscore his own interpretation of the Establishment Clause? Black's upbringing in the Baptist faith, which, until the recent governmental activism of some fundamentalist factions, was a force for radical separation of church and state, would provide a facile explanation for his constitutional posture in cases delineating the proper relationship between religion and government. Yet the historical record reveals that Black actually rejected a number of the tenets and practices of his religious heritage. Indeed, it is likely that his reaction to his early religious experiences and his resultant attitudes toward the spiritual realm in part contributed to his staunch adherence to the Jeffersonian conceptualization of church-state separation. Moreover, Black may well have felt a special kinship to Jefferson, whose religious attitudes and philosophical foundations for the "wall" theory paralleled his own. Finally, the focusing of Jefferson's image in the American mind during the New Deal era, as so vividly portrayed and documented by Jefferson scholar Peterson,⁵² may have inspired Black, a Franklin Roosevelt appointee, to turn to the Sage of Monticello for the definitive word on the Establishment Clause of the First Amendment.

Born in rural Clay County, Alabama, in 1886, Black wrote in his memoirs that some of his earliest childhood memories were of attending morning Sunday school at the aptly named Primitive Baptist Church in his home town of Ashland and the afternoon Sunday school sessions at the local Methodist Church.⁵³ Like the Puritan churches of colonial New England, the Baptist congregation in Ashland felt obliged to impose its morality on all people in its self-styled society. Individuals accused of sins such as drunkenness, fornication, or adultery were "tried" before the congregation and expelled from the church if it returned a guilty verdict. An excommunicated member could earn reinstatement only by begging for mercy before the entire congregation.



Born in Ashland, Alabama, Justice Hugo L. Black attended morning Sunday school at the local Baptist Church (similar to the one pictured) and afternoon sessions at the local Methodist Church. When he moved to Birmingham in 1907 to join a law firm, Black became a pillar of the First Baptist Church. But after he moved to Washington as a U.S. Senator in 1926, he preferred to stay home on Sundays and send his sons off to a Methodist Sunday school.

Even as a boy, the future Justice Black, who would become an eloquent advocate of individual rights and procedural due process, thought that the congregational trial and punishment system was unjust.⁵⁴

Black refused to participate in such overt acts of contrition and thoroughly despised any of the zealous displays of religious fervor, such as his sect-encouraged witnessing to Jesus Christ. As Black's son, Hugo, Jr. remembered, "My father said he was always embarrassed when this happened to someone he liked or respected, and the person stood up and began to relate how the spirit hit him at a time when he had just committed adultery or fornication or was coming out of a drunken binge." Justice Black wryly remarked that he would have thought more highly of these contrite co-

religionists if the spirit had moved them to resist temptation *before* they engaged in sinful activity. Watching a member of the congregation speak in tongues (or "gibberish," as Black labeled it) was particularly repugnant to him. He recognized the spiritual importance of the demonstration for some individuals but concluded, "[M]an, it's hard to sit there and listen to that stuff."⁵⁵

Yet Black continued his regular church attendance even when he left home to attend Birmingham Medical College at age seventeen: "I worked hard seven days a week, taking time out for Sunday School and church on Sunday."⁵⁶ Of course the law was the future Justice's ultimate calling, and after completing his legal education at the University of Alabama, Black returned to his home town

of Ashland to open a law practice and rejoin his childhood church—but on his own terms. “I did not want to be publicly required to confess a religious faith greater than I had, nor did I intend to follow the custom of pretending that I had been a heavy sinner simply because I had sometimes played cards or danced.”⁵⁷

When he moved to Birmingham in 1907 to establish a larger legal practice, he became a pillar of the First Baptist Church. Yet after he settled in Washington as a U.S. senator in 1926, he never again attended church on a regular basis—though he sent his two sons off to Methodist Sunday school, while he and Mrs. Black remained at home.⁵⁸

To Hugo, Jr.’s inquiries, Justice Black responded, echoing Jefferson’s view of the Scriptures, “All I did was teach the Bible in Alabama: those parts I selected, I taught. I didn’t have to listen to the preacher.” Hugo, Jr. concluded that for his father the Scriptures provided a moral code, an ethical standard for life, rather than a profession of faith. According to the younger Black, his father had no steadfast “belief in God, the divinity of Christ, life after death, or Heaven or Hell.” On those points, except for Jesus’ divinity, the Justice parted company with Jefferson. Black was not an atheist, however. As he explained to his son, “I cannot believe. But I can’t not believe either.” Ethical conduct, guided by a nondenominational, universal Golden Rule, was Black’s true religion.⁵⁹ Reflecting Jefferson’s advice to his nephew Peter Carr,⁶⁰ Black instructed his son to pore over religious dogma and Scripture, especially the New Testament parables, and to question their meaning and application to life.⁶¹

Although Black eschewed organized religion after he left Alabama, he clearly recognized its significance for others. Above all, he believed, as did Jefferson, that religious beliefs were to remain in the private realm of a person’s conscience, where they should be free from ecclesiastical, societal, or governmental

coercion. He particularly abhorred any close relationship between a church and the state—especially one fostered by direct government aid to religion.⁶²

Black’s Interpretation of the “Wall”: *Everson and Beyond*

As Table 1 shows, a tally of Justice Black’s votes on church-state questions during his thirty-four-year tenure on the Court reveals that in the thirteen Establishment Clause cases in which he participated, Black sided with the separationists in all but two. Moreover, his vote in *Everson v. Board of Education of Ewing Township*⁶⁴ is somewhat misleading. Although his decision upholding New Jersey’s reimbursement of bus fare to parents of public and *parochial* school children reached a rather astonishing accommodationist result, Black’s opinion for a narrow five-man majority is in fact a ringing defense of strict separation between religion and government.

In his majority opinion, Justice Black recalled the excesses of church establishment in England and colonial America and the breaches of liberty that had occurred from governmental coercion in the religious realm based on state preference for one sect over another. He summarized the hard-fought struggle to separate church and state in revolutionary America, with particular emphasis on Jefferson’s Virginia Statute for Religious Freedom and Madison’s Memorial and Remonstrance.⁶⁵ The Justice often cited in tandem the eminent Virginians’ eloquent appeals for religious disestablishment in the Old Dominion. Yet if a catalog of Black’s library is any indication, he was far more familiar with Jefferson’s thought “and biography than with Madison’s. Professor Daniel Meador, a former Black law clerk, counted seventeen titles of Jeffersonian literature in Black’s personal collection at the time of the Justice’s death in 1971. In contrast, Madison’s co-authored *Federalist Papers* was the sole work representing the “Father of the Constitution” in Black’s library.”⁶⁶

TABLE 1: JUSTICE HUGO BLACK'S VOTES IN CHURCH/STATE CASES⁶³

Case	Pro-Separation Votes	Anti-Separation Votes
<i>Everson v. Bd. of Ed., Ewing Township</i> (1947)		X (majority opinion)
<i>Zorach v. Clauson</i> (1952)	X (dissenting opinion)	
<i>Bd. of Ed. v. Allen</i> (1968)	X (dissenting opinion)	
<i>Walz v. Tax Commission of New York City</i> (1970)		X
<i>Tilton v. Richardson</i> (1971)	X	
<i>McCullum v. Bd. of Ed.</i> (1948)	X (majority opinion)	
<i>Kedroff v. St. Nicholas Cathedral</i> (1952)	X	
<i>Engel v. Vitale</i> (1962)	X (majority opinion)	
<i>Abington Sch. Dist. v. Schempp, Murray v. Curlett</i> (1963)	X	
<i>Epperson v. Arkansas</i> (1968)	X (concurring opinion)	
<i>Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church</i> (1969)	X	
<i>Lemon v. Kurtzman</i> (1971)	X	
<i>Earley v. DiCenso</i> (1971)	X	

Black enunciated the minimum standards of church-state separation as mandated by the First Amendment in language reflective of his absolutist/literalist approach to constitutional interpretation. He wrote:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice reli-

gion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. *In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."*⁶⁷

Yet, despite his unequivocal advocacy of the separationist position, Black and his four Brethren (Chief Justice Fred Vinson and Associate Justices William Douglas, Stanley Reed, and Frank Murphy) upheld New Jersey's bus fare reimbursement scheme as one of several "general state law benefits [granted] to all citizens without regard to their religious belief." The author of the *Everson* opinion concluded that New Jersey's action had not breached Jefferson's "wall," which he insisted must remain "high and impregnable."⁶⁸



Justice Black (left) popularized Jefferson's words about "a wall of separation between church and state" in his 1947 opinion in *Everson v. Board of Education of Ewing Township* defending a strict separation of church and state. That decision, however, upheld New Jersey's reimbursement of bus fare to parents of parochial schoolchildren.



Just one year after handing down its decision in *Everson*, the Supreme Court again invoked the "wall" theory, but this time to invalidate an Illinois "released time" program

for religious instruction of public school children on public school grounds as a violation of the separation concept. Once more, Justice Black authored the opinion for an 8-1

Court in *Illinois ex rel. McCollum v. Board of Education*.⁶⁹ In his view, the "wall," which he had vowed in *Everson* must remain impenetrable, had been breached by the use of the state's tax-supported public school buildings to disseminate religious doctrine. Moreover, the state unconstitutionally aided religious groups by providing students for religious classes through the state's compulsory public school attendance laws. Black wrote for the nearly unanimous Court that the Illinois religious education program fell "squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*."⁷⁰

Black refuted the claim propounded by the Champaign, Illinois school board that a judicial invalidation of the "released time" program would manifest a governmental hostility to religion or religious education. Black agreed that such hostility would violate the Free Exercise Clause of Amendment One, but he reiterated that the Amendment's guarantee of religious freedom could best be realized by erecting a "wall between Church and State."⁷¹

In the 1962 case of *Engel v. Vitale*,⁷² Black returned to the absolutist line between church and state, which he had drawn, although not strictly adhered to, in *Everson*. Writing again for an 8-1 majority on the emotive issue of prayer in the public schools, he ruled that New York's use of its public schools to encourage recitation of a state-written and state-sanctioned nondenominational prayer "established the religious beliefs embodied in the . . . prayer" and thus violated the First Amendment's Establishment Clause.⁷³ Black elaborated in unequivocal language: "[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government."⁷⁴ In a solitary dissent from the *Engel* ruling, Justice Potter Stewart attacked the Court's "uncritical invocation of metaphors like the 'wall of sep-

aration,' a phrase nowhere to be found in the Constitution," as an irresponsible approach to constitutional adjudication.⁷⁵

With one exception—the *Church Tax Exemption Case* in 1970⁷⁶—Justice Black continued to vote on the separationist side in church-state cases until illness forced his retirement from the Court in 1971. The 1962 *Engel* decision, however, marked his last majority opinion on the subject. He missed the next phase of the Court's Establishment Clause jurisprudence, which searched for neutrality between religion and government via the *Lemon* test's trio of criteria applied to challenged public policy: 1) secular legislative purpose; 2) primary effect that neither advances nor inhibits religion; and 3) no excessive government entanglement with religion.⁷⁷ Black, who died in 1971, shortly after his retirement from the Bench, also missed the Court's debates over whether the three-pronged *Lemon* criteria should give way to singular questions of whether government policy *endorses* religion or *coerces* individuals to participate in it. Yet, in the Jeffersonian tradition, Black surely would have relished the discussion over the constitutional parameters of the Establishment Clause.

Two Men, Two Eras, One Wall

How was it that two public figures, separated by a century and a half of history and by cultural, geographic, socioeconomic, and religious disparities, could have embraced such similar theories of the proper relationship between religion and government? Although Jefferson and Black hailed from remarkably different religious backgrounds, they both derived the "wall of separation" principle from virtually the same set of attitudes toward and reactions to religion. And each enshrined in his constitutional interpretation of the First Amendment his firm belief in the private nature of religion and his conviction in the ability and right of the individual to reason out and

practice his faith in an environment free from any form of coercion.

The timing of Black's embrace of Jefferson's "wall" doctrine to address a new interpretive dilemma for the Court in church-state issues coincided with, and indeed may have reflected, the revival of the Jeffersonian spirit in American public life. Franklin Roosevelt's New Deal, for example, looked to Jefferson to provide a philosophical basis for its revolutionary approach to the governing of Depression-ravaged America. FDR presided over the canonization of Jefferson as one of the Republic's heroes. The celebration of the bicentennial of Jefferson's birth in 1943 and the symbolic dedication of the temple-like memorial to him in Washington, D.C. assured his inclusion in America's pantheon of political luminaries.⁷⁸ Just four years later, Justice Black turned to Jefferson, the nation's newest hero, for the solution to a new vexatious constitutional issue. The revival of Jefferson's image in the American psyche, which preceded Black's adoption of the "wall" principle, may have inspired his separationist interpretation.

As Alexis de Tocqueville proclaimed, "I prefer to quote Jefferson rather than anybody else . . . regarding him as the most powerful apostle of democracy there has ever been."⁷⁹

ENDNOTES

¹John F. Wilson & Donald L. Drakeman, *Church and State in American History: Key Documents, Decisions, and Commentary from the Past Three Centuries*, 3d ed. (Cambridge, MA: Westview Press, 2003), 7, 130.

²Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), 3.

³As quoted in Wilson & Drakeman, 26–27.

⁴Edwin S. Gaustad, "Colonial Religion and Liberty of Conscience," in Merrill D. Peterson & Robert C. Vaughan, eds., *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History* (Cambridge, UK: Cambridge University Press, 1988), 24–25.

⁵Jefferson, in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* (New York: Penguin Press, 1984), 208.

⁶Jefferson, in Peterson, *The Portable Thomas Jefferson*, 208.

⁷Charles B. Sanford, *The Religious Life of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1984), 3, 7.

⁸Sanford, 5.

⁹Jefferson, in Lenni Brenner, ed., *Jefferson and Madison on Separation of Church and State: Writings on Religion and Secularism* (Fort Lee, NJ: Barricade, 2004), 4.

¹⁰Sanford, 4–8.

¹¹As quoted in Eugene R. Sheridan, *Jefferson and Religion* (Charlottesville: Thomas Jefferson Foundation, 1998), 15.

¹²As quoted in Sheridan, 15.

¹³As quoted in Sheridan, 58.

¹⁴Characteristically, Hamilton countered that he considered Julius Caesar to be the greatest man who ever lived! Sanford, 9.

¹⁵As quoted in Sanford, 10–12.

¹⁶Jefferson, in Brenner, 87.

¹⁷As quoted in Sheridan, 14.

¹⁸Quoted in Alan V. Briceland, "Thomas Jefferson's Epitaph: Symbol of a Lifelong Crusade Against Those Who Would 'Usurp the Throne of God,'" 29 *Journal of Church and State* 285, 287 (1987) (emphasis in original).

¹⁹As quoted in Sheridan, 8.

²⁰Sheridan, 18.

²¹As quoted in Forrest Church, Introduction: "The Gospel According to Thomas Jefferson," in Thomas Jefferson, *The Jefferson Bible: The Life and Morals of Jesus of Nazareth* (Boston: Beacon Press, 1989), 30.

²²As quoted in Sheridan, 68.

²³As quoted in Church, 10.

²⁴As quoted in Church, 12.

²⁵As quoted in Church, 17.

²⁶Jefferson, *The Jefferson Bible*, 147.

²⁷Jefferson, in Peterson, *The Portable Thomas Jefferson*, 210.

²⁸*Id.*, 212.

²⁹Jefferson, in Merrill D. Peterson, ed., *The Political Writings of Thomas Jefferson* (Charlottesville: Thomas Jefferson Foundation, 1993), 35.

³⁰David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994), 158.

³¹Brenner, 22.

³²*Id.*

³³Jefferson, in Brenner, 26–28.

³⁴Jefferson, in Peterson, *The Political Writings of Thomas Jefferson*, 42.

³⁵*Id.*, 42–43.

³⁶*Id.*, 43.

³⁷*Id.*

³⁸*Id.*, 43–44.

- ³⁹*Id.*, 44. See also Mayer, 161–62.
- ⁴⁰Adrienne Koch, *Jefferson and Madison: The Great Collaboration* (Old Saybrook, CT: Konecky and Konecky, n.d.), 26–31.
- ⁴¹Jefferson, in Brenner, 48.
- ⁴²As quoted by Henry J. Abraham, *Symposium on the Virginia Statute for Religious Freedom*, University of Virginia, Sept. 19–21, 1985.
- ⁴³Jefferson, in Peterson, *The Political Writings of Thomas Jefferson*, 82.
- ⁴⁴Madison, in Brenner, 119.
- ⁴⁵Jefferson, in Brenner, 163–64.
- ⁴⁶Jefferson, in Wilson & Drakeman, 74–75.
- ⁴⁷See Barbara A. Perry, “Justice Hugo Black and the ‘Wall of Separation Between Church and State,’” 31 *Journal of Church and State* 55 (1989).
- ⁴⁸See Levy, 181–83.
- ⁴⁹98 U.S. 145, 164; see also Wilson & Drakeman, 158–59.
- ⁵⁰330 U.S. 1.
- ⁵¹See Edwin S. Gaustad, “Religion,” in Merrill D. Peterson, ed., *Thomas Jefferson: A Reference Biography* (New York: Scribner, 1986), 282.
- ⁵²Merrill D. Peterson, *The Jefferson Image in the American Mind* (New York: Oxford University Press, 1962).
- ⁵³Hugo L. Black, Sr., & Elizabeth Black, *Mr. Justice Black and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black* (New York: Random House, 1986), 8.
- ⁵⁴Hugo Black, Jr., *My Father: A Remembrance* (New York: Random House, 1975), 10–11.
- ⁵⁵*Id.*, 11.
- ⁵⁶Black, Sr., and Black, 16.
- ⁵⁷*Id.*, 21.
- ⁵⁸Black, Jr., 172–73.
- ⁵⁹*Id.*, 172–75.
- ⁶⁰See *supra* note 16.
- ⁶¹Black, Jr., 173–75.
- ⁶²*Id.*, 176.
- ⁶³In *Everson* through *Tilton*, the Supreme Court found no violation of the Establishment Clause. The Court did find a violation of the Establishment Clause in *McCormick* through *Earley*. See Henry J. Abraham & Barbara A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States*, 8th ed. (Lawrence: University Press of Kansas, 2003), pp. 337–52.
- ⁶⁴330 U.S. 1 (1947).
- ⁶⁵*Everson*, 330 U.S. at 8–14.
- ⁶⁶Daniel J. Meador, *Mr. Justice Black and His Library* (Charlottesville: University Press of Virginia, 1974), *passim*. Meador also reports that Black had read or reread virtually all of Jefferson’s writings. Moreover, Black’s admiration for Jefferson is demonstrated by Meador’s description of his former boss’s study, which included two engravings and a bust of Jefferson. The Justice also proudly displayed two Thomas Jefferson Award medals given to him by the Southern Conference for Human Welfare. Meador, 7.
- ⁶⁷*Everson*, 330 U.S. at 16–18 (emphasis added).
- ⁶⁸*Id.*
- ⁶⁹333 U.S. 203 (1948).
- ⁷⁰*McCormick*, 333 U.S. at 210.
- ⁷¹*McCormick*, 333 U.S. at 211–12.
- ⁷²370 U.S. 421.
- ⁷³*Engel*, 370 U.S. at 430.
- ⁷⁴*Engel*, 370 U.S. at 425.
- ⁷⁵*Engel*, 370 U.S. at 445–46.
- ⁷⁶*Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).
- ⁷⁷*Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- ⁷⁸See Peterson, *The Jefferson Image in the American Mind*, *passim*. As Peterson reminded the author in a letter, one of the four panels in the Jefferson Memorial features the Virginia Statute for Religious Freedom.
- ⁷⁹Alexis de Tocqueville, *Democracy in America*, J. P. Mayer, ed. (Garden City, NY: Anchor, 1969), 261.

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Laments about federal judges, Supreme Court Justices in particular, are nearly as old as the Republic. Those who say otherwise perhaps have either poor memories or a need to read more history. True, the Court has not been continuously caught up in strife, but controversies have occurred often enough to make Court-bashing a routine part of American political life.

The Supreme Court's first constitutional decision in *Chisholm v. Georgia*¹ provoked such a fuss that critics succeeded in ratifying a constitutional amendment—the Eleventh—to overturn the ruling. Only a decade after *Chisholm*, in *Marbury v. Madison*, Chief Justice John Marshall reinforced the “province and duty of the judicial department, to say what the law is,”² a claim that soon made the Court the judge of the constitutional validity of state and national statutes and virtually guaranteed that the Bench periodically would be thrust into the center of contention.

This was true not only when the Justices negated legislative acts but sometimes even when they did not. *McCulloch v. Maryland*³ troubled many in 1819 and for some years afterward, not merely because the Court invalidated the state's tax on the Second Bank of the United States, but because the Court also sustained the congressional statute that chartered the Bank. Smoldering resentment against the Court later erupted in Congress in what

became known as the Hayne-Webster debate, well in advance of the presidential elections of 1832 in which the Bank was a principal issue. As the Senate considered a resolution on public lands, Senator Robert Y. Hayne of South Carolina launched an oblique assault on section 25 of the Judiciary Act of 1789⁴ by asserting the authority of a state to declare unconstitutional a law that the Supreme Court had deemed constitutional. To Daniel Webster's reply that the Court was properly the arbiter of the meaning of the Constitution, Senator Thomas Benton of Missouri decried the results to which that theory led: “a despotic power over the States” and “a judicial tyranny and oppression.”⁵ The on-again, off-again debates that stretched over five months in 1830 confirmed what one periodical had already observed: “There are two parties in the United States, most decidedly opposed to each other as to the rights, powers, and province of the judiciary.” One “almost claims infallibility for the Judges, and would hedge them round

about in such a manner that they cannot be reached by popular opinion at all"; the other "would subject them to the vacillations of popular prejudice" and would "require . . . them to . . . interpret the Constitution according to the real or apparent expediency of things."⁶ Another commentator acknowledged a "truth of fearful import" that attention to ideological leanings might even affect appointments to the Court: "[A]s a party is the off-spring of our institutions, and always the heir apparent to the throne, men may be selected for this high office *because* they are known to be devoted to a great political party, and ready to become the willing instruments of its ambition or its vengeance . . ."⁷

By 1893, concerns over an expanded judicial power were so widespread that Harvard's James Bradley Thayer admonished judges not to "step into the shoes of the lawmaker."⁸ Sixteen years later, Samuel Gompers railed against judicial intrusion into the American Federation of Labor's dispute with the Buck's Stove and Range Co.⁹—and implicitly disputed Governor Charles Evans Hughes's recently uttered counterassertion¹⁰—by reminding listeners that the Constitution and a judge's interpretation of it were not necessarily the same: "I still believe that the Constitution . . . is greater than any Judge."¹¹ Similar concerns were voiced with even greater emphasis during the Court-packing fight of 1937, and they surfaced periodically in later decades. Contemporary worries about judicial excesses frankly pale in comparison to the serious Court-curbing battles that were waged in the late 1950s,¹² or to the Court-centered presidential campaign of 1968, when candidate Richard Nixon (among others) verbally chastised a judiciary that had "gone too far in weakening the peace forces as against the criminal forces."¹³ The presumptive Republican nominee accused the Supreme Court of giving the "green light" to "the criminal element" and, mentioning *Miranda v. Arizona*¹⁴ specifically, claimed that some decisions had contributed to "the

88 percent increase" in crime under Democratic presidents Kennedy and Johnson.¹⁵

Laments about the federal judiciary are not only common but probably unavoidable. At the most basic level, grievances stem from the nature of litigation itself. Pitting one side against another, cases create winners and losers. A decision means that a person or persons are sure to be pleased by the outcome and a different person or persons are equally sure to be displeased. And sometimes such decisions involve matters of public importance, well beyond the stake that each party might have in the litigation. The decision may carry with it great consequences. This is because of the principle of the rule of law: at the highest appellate levels, decisions pronounce rules that are to be applied in all other similar situations that may arise in other courts within a jurisdiction. Even though they may be cast in broad or narrow terms, or may come down somewhere in between, judicial decisions typically lack the convenient fuzziness, overlapping layers, multiple dimensions, and give-and-take of legislation whereby conflicting interests may come away from the legislative table reasonably satisfied that they gained at least something, if not everything. Such political luxury—and cover—that legislators enjoy only rarely accompanies judicial decision making.¹⁶

Aside from the recurring problem posed by unhappy litigants and those who empathize with them, additional reasons suggest why Supreme Court Justices must frequently endure criticism different in kind from that hurled at other public officials. These reasons derive from what might be called the Court's triple debility. The first is its ambivalent authority: The constitutional underpinnings of the Court's role as chief expositor of the nation's fundamental law are equivocal at best.

The second is its antidemocratic function: Judicial review allows an unelected branch of the federal government to invalidate decisions made by the elected branches. Thus the Court is fundamentally susceptible to a kind

of challenge to its work that Congress is not. While citizens constantly complain about the wisdom of policies Congress adopts or oppose the manner in which its proceedings unfold, there is surely no constitutional doubt that one of Congress's chief functions is to legislate: that is, to consider and then to adopt or reject various policies. The Constitution's text, however, offers far less expressivity to the Court. The "judicial power" conferred by Article III seems far less certain in meaning than the "legislative power" conferred by Article I. Questions about function and provenance are compounded when one realizes that no consensus exists even as to the proper method for interpreting the Constitution, as the debate between a "living Constitution" versus "originalism" illustrates.¹⁷

The third part of the triple debility is the Court's operational and structural aloofness. Justices effectively enjoy life tenure and so, unlike representatives, senators, and presidents, are not politically accountable in the ordinary sense. Moreover, the Justices do much of their work away from the public eye and properly shun the sort of publicity that most politicians crave. Even more significant, a decision of the Court on constitutional grounds cannot be altered through the devices ordinarily employed to change public policy. That can be done only by the Court itself or by the extraordinary—and rarely successful—means of constitutional amendment. Combined, these conditions add to the judiciary's vulnerability when charges are hurled that the Justices have improperly thwarted the will of the people.

So, in an environment that practically invites attacks on the judiciary from one quarter or another, no one should be surprised to read that "[c]onstitutional law professors have been very upset lately with the U.S. Supreme Court."¹⁸ So begins Keith E. Whittington's contribution to **That Eminent Tribunal**, a collection of eleven essays edited by Marquette University political scientist Christopher Wolfe on the subject of, in the words of the subtitle, "judicial supremacy and the

Constitution."¹⁹ Many in the unhappy chorus mentioned by Whittington are mainstream legal academicians who decry the conservative judicial activism sometimes practiced by the Rehnquist Court; they long instead for a robust activism in defense of liberal political values that characterized many Warren- and Burger-era rulings. The contributors to this book, however, are not members of that chorus. Instead, most question or condemn the activism preferred by the legal mainstream, while a few reject both styles of activism and hanker for a modest judicial role characterized by editor Wolfe as "traditional judicial review."²⁰

Nine of the essays—those by Hadley Arkes, Gerard V. Bradley, George W. Liebmann, Michael W. McConnell, Robert F. Nagel, Jack Wade Nowlin, Steven D. Smith, Jeremy Waldron, and Michael Zuckert—were originally delivered as papers at the American Public Philosophy Institute conference on "Reining in Judicial Imperialism."²¹ While the year of the conference does not appear to be noted in the book, a statement in Arkes's essay, referring to *Bowers v. Hardwick* as having been decided "[a]bout a dozen years ago,"²² indicates a date of about 1998. Endnotes for the conference essays suggest that updating for publication six years later was done only very sparingly. The eleven contributors include four professors of political science and/or jurisprudence, six law-school billeted faculty (one of whom is now a federal appeals judge), and one practicing attorney.

According to Wolfe, the central problem addressed by the authors is the "judicial imperialism"²³ that has "profound[ly] transform[ed]" the role of the Supreme Court in a way "fundamentally inconsistent"²⁴ with the Framers' scheme of separation of powers. "[E]xtreme notions of judicial power" have encouraged Americans to perceive the Court as "the *final* or *ultimate* authority on constitutional issues"²⁵—the precise situation that Abraham Lincoln, in his first inaugural address, cautioned against in the aftermath of the *Dred Scott* decision, a warning that inspired the

book's title. "[I]f the policy of the government, upon vital questions . . . is to be irrevocably fixed by decisions of the Supreme Court . . .," declared the sixteenth President, "the people will have ceased, to be their own rulers, having . . . practically resigned their government, into the hands of *that eminent tribunal*."²⁶ For Wolfe, the central contemporary question thus becomes how to limit judicial power "effectively in order to reestablish a full measure of republican government . . ."²⁷ In Bradley's words, the "Framers did not endorse—they could scarcely imagine—an insulated judicial prerogative to determine what the law should be."²⁸

That Eminent Tribunal insists that the present situation is without parallel, alongside even previous uproars over supposed judicial excesses. The example cited most often in a majority of the essays is the opinion of Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter in *Planned Parenthood v. Casey*,²⁹ particularly the "mystery of life" passage.³⁰ Zuckert finds in that paragraph and surrounding ones an "apparent endorsement of a nihilistic view of the universe—what meaning there is is meaning we supply (each of us) for ourselves. . . . A Constitution evolving to match the changing moral and metaphysical conceptions of the nation is one thing," he maintains, "but a Constitution evolving to impose exotic ideas on the nation is quite another."³¹ As portrayed by several authors, the tone of the "*Casey* Three"³² suggests arrogance and presumptuousness, quite unbecoming of the servants of a (small-r) republican nation. As Bradley contends, "The Court is telling us: 'We will be your Court and you will be our people.'"³³

That such a perspective could be at all plausible, McConnell believes, "lies [partly] in the nature of education about the history of the Supreme Court." In high school, college, and even introductory law-school exposures to constitutional law, "students are imparted a celebratory history" of the tribunal. With a beginning emphasis on *Marbury v.*

Madison, "[t]he key point is that constitutional law is defined . . . as the study not of the Constitution but of judicial review under the Constitution."³⁴ Emphasis then turns to the Fourteenth Amendment, the provisions of which offer "[p]rotections for the downtrodden, protection for civil liberties, defending the unity of the nation." Yet "[t]his cheery account of the Supreme Court's role as protector and defender of the Constitution has some hard going for a brief period—say, 120 years, between 1835 and 1954. . . . But most heroic sagas sometimes show the hero's weaker moments,"³⁵ so students are indeed made aware of "the dark period after Reconstruction and before the New Deal." What is learned, however, "is not that legislative and judicial institutions departed from the proper roles, but that the judicial personnel appointed at this particular juncture . . . were lacking in proper liberal sensibilities." Courses quickly shift, McConnell continues, "to the good stuff, starting with *Brown v. Board of Education*. . . . Then we come to the glorious civil rights revolution . . . , leading to the *really* good stuff, *Griswold v. Connecticut* and *Roe v. Wade*." Although "there has recently been a fall from grace" in the Rehnquist years, the Court is nonetheless and properly portrayed as "the agent of social change."³⁶

What is needed, McConnell believes, is a more balanced history of the role of the Court. Achieving that, however, requires two adjustments in the way the Court is perceived. "First is that through most of our history the Supreme Court has not viewed itself as the body with exclusive authority to tell us what the Constitution dictates. Instead, . . . [t]he function of the courts was to police the outer boundaries and make sure the Constitution was not flouted."³⁷ This thought echoes Professor Thayer's contention from more than a century ago that the ultimate question in constitutional interpretation "is not what is the true meaning of the constitution, but whether legislation is sustainable or not."³⁸ The second adjustment may be the more revolutionary to the modern mind,

in that McConnell prefers the doctrine of coordinate review. Under this notion, associated especially with Thomas Jefferson, all "actors in the system, within the scope of their own authority, have not just the right but the responsibility to read and understand the Constitution and [to] interpret it for themselves."³⁹ Accordingly, "the Court is not the exclusive, and maybe not even the most important, expositor of the Constitution."⁴⁰ For McConnell, even *Marbury v. Madison* itself did not substantially hold otherwise. "The arguments in support of judicial review in *Marbury* are based, not on the proposition that the Supreme Court has any special or exclusive role in constitutional interpretation, but on the proposition that the Constitution is supreme over the actions of every officer in government."⁴¹ The judiciary will have "the last word" in many controversies, but the doctrine of coordinate review "reserves both theoretical equality and substantial practical interpretive authority to Congress, the President, and the states."⁴²

Realizing that truth, McConnell concludes, "should lead to greater humility in the exercise of the power of judicial review."⁴³

Rebalancing is clearly in order, argues Ken I. Kersch of Princeton's Department of Politics in *Constructing Civil Liberties*,⁴⁴ a volume that could have been entitled "Reconstructing Civil Liberties" just as aptly. The author's ambitious objective is to explain that portion of American constitutional development that culminated in the landmark civil liberties and civil-rights decisions of the Warren and Burger Courts during the 1960s and 1970s—rulings that represent "the high tide of twentieth-century constitutional liberalism."⁴⁵ As frequently characterized in what Kersch terms "backwards-looking narratives,"⁴⁶ the judiciary's "rights-protecting triumphs" are part of a Court-centered "linear, teleological march of progress" that moved from "barrier" to "breakthrough" to "apotheosis."⁴⁷ The center point in these traditional accounts is the New Deal, in which



In *Constructing Civil Liberties*, Ken Kersch argues that the campaign for the prohibition of alcohol is one example of how progressives allowed government intrusion into business in the early twentieth century. Pictured, is confiscated contraband.

reformers and their progeny began their careers as critics of judicial power. "Rather than simply decrying judicial review and judicial activism, their new [scholarly] task was to remain at least rhetorically consistent with the views on which their newfound power had been won, while moving, in turn, to justify both."⁴⁸ As such, the challenge was to build new theories to justify the application of judicial power in certain circumstances but not others. Hence, judicial power in defense of "personal" (as opposed to economic) liberties was desirable even as it extended into "abstract principles such as 'privacy,' 'liberty,' or 'equality.'"⁴⁹ The result has been a dominant progressive or "Whig history" which shapes the past through an overdramatization to pit the forces of progress against the forces of reaction.⁵⁰ Kersch does not claim that such accounts are false in a broad sense. Rather, "[w]hat is so seductive about Whig histories is that they are paeans to the illumination and glory of the present."⁵¹ The cost is the loss of detail about movements and countermovements that, when uncovered, display a development that is far more complex and full of subtleties than the Whig history admits. In the subtitle, the author labels these complexities as "discontinuities."

Kersch aspires "to unsettle our wonted assumptions" that civil liberties today "represent in any broad sense an apotheosis of progress over reaction or the triumph of principle as if this were part of an ineluctable trajectory of history."⁵² In place of straight-line, unidimensional accounts that emphasize a newfound judicial willingness to protect civil liberties, the author's account explains the landmark decisions of the 1960s and 1970s as

the diverse endpoints of a layered succession of progressive spirited ideological and political campaigns of statebuilding and reform. In the heat of these campaigns—whose center was typically outside the Court—it

was apparent to the participants that key rights and liberties conflicted, and the meaning of both was contested. As such, it was understood by those animated by a strong substantive vision that some key rights and liberties would have to be jettisoned or circumscribed to advance others.⁵³

Constitutional development thus appears, not as a branch of moral philosophy, but "within the larger, messier, and decidedly less pristine study of American politics."⁵⁴

Kersch develops his thesis in three chapters through a series of lengthy case studies involving three "sites" or subject areas. These chapters are practically monographs unto themselves: privacy and criminal-process rights, labor and civil rights, and education rights.⁵⁵ Exploration of the topics in turn yields "genealogies"⁵⁶—or, for jargon-sensitive readers, the story that Kersch's research uncovers—that rest on a division of American national history into the old and the new. The old period consisted of the initial constitutional order that, borrowing from Stephen Skowronek,⁵⁷ Kersch defines as the "state of court and parties."⁵⁸ During this pre-Civil War era, political polarities such as those between Alexander Hamilton and Thomas Jefferson or between Andrew Jackson and Henry Clay "were lived chiefly in the realm of party politics and only rarely in the constitutional decisions of courts."⁵⁹ "Americans could balance—if often precariously—political views otherwise perpetually in tension."⁶⁰ The new era began to unfold after the Civil War, although Kersch warns that the transformation does not pivot on a "constitutional moment" or single transformative event," nor does it align with any particular "critical election."⁶¹ But what occurred was the building of the "physical institutions and coercive apparatus of the modern 'New American State,'" with the supporting underpinnings of the "New Constitutional Nation" that continues to the present.⁶²

The chapter on criminal-process rights and privacy illustrates the pattern at work. This segment of constitutional development consisted "of a series of sequential developmental struggles involving four distinct reformist political projects."⁶³ One would today not be regarded as involving criminal issues and entailed the efforts by progressives in the late nineteenth and early twentieth centuries "to construct a powerful, fact-fortified New American State"⁶⁴ that allowed a high degree of "legibility."⁶⁵ That is, before the emerging corporate order could be corralled and tamed, government needed to be able to probe business records and to make visible the activities of business leaders that had heretofore been deemed private and therefore beyond official reach. This project called for "a sustained political and legal campaign by progressive intellectuals *against* constitutional privacy rights"⁶⁶ that had been recognized in Supreme Court decisions such as *Boyd v. United States* and *Counselman v. Hitchcock*.⁶⁷ The first applied severe Fourth and Fifth Amendment limitations on the federal government's authority to compel disclosure of documents; the second held that the Interstate Commerce Act would violate the Fifth Amendment if it were read to compel a person to give testimony in a criminal case that subjected that person to possible prosecution. The New American State could not be fully achieved until progressive forces succeeded in convincing the Court to negotiate away privacy rights that it had initially protected.⁶⁸

The remaining three reformist criminal justice projects consisted of (1) the efforts to secure the civil rights of the recently freed slaves, (2) the campaign in the first quarter of the twentieth century for prohibition of alcohol, and (3) the revival in the mid-twentieth century of the antiracism imperative to restore African-Americans to full citizenship. With the first, the Court mainly used its powers, newly conferred by constitutional amendments and various statutes, to lay down no more than minimum constitutional standards in ex-

change for the equally important goal of sectional reconciliation.⁶⁹ The second launched the Court's modern criminal-process jurisprudence, with the Court initially cooperating with the reformist prohibition agenda but later, "in the face of multiple outrages," growing "more protective of those rights"⁷⁰—a movement led, not by the Court's liberals of that day, but by its conservatives.⁷¹ In Kersch's view, the third, initially inspired by prohibition-sparked awareness, the Wickersham Commission report of 1931,⁷² and the 1947 report of the President's Commission on Civil Rights,⁷³ eventually energized the Court to set criminal-process standards for the nation in what came to be called the "due process revolution." Thus, it was no accident that many of the early landmark criminal justice cases of the twentieth century came from southern states.

What emerges from **Constructing Civil Liberties** is a complex multifaceted image of a Supreme Court and its constitutional jurisprudence that is "doctrinal and political, an obstacle and a hope, active and restrained, formalistic and pragmatic."⁷⁴ The Court "both limited and extended constitutional criminal-process rights and weighed rights claims in some areas against conflicting rights claims in others. Whiggish narratives positing an initial lack of concern and then a cresting solicitude for personal rights and privacy fail to capture these distinctive developmental dynamics."⁷⁵

The Chief Justiceships of Roger Brooke Taney (1836–64) and Salmon Portland Chase (1864–73) fall into the initial stage of American constitutional development that Kersch defines as the "state of court and parties."⁷⁶ Having served about twenty-eight years, Taney ranks second (after Marshall) among all sixteen Chief Justices to date in length of tenure; with eight years and five months as Chief, Chase ranks tenth.⁷⁷ Furthermore, Taney remains the oldest serving Chief Justice, having died in harness at age eighty-seven.⁷⁸ Both the Taney and Chase periods are now the subjects of recent entries in the *Supreme Court Handbooks* series that has taken shape under the

general editorship of political scientist Peter G. Renstrom of Eastern Michigan University.⁷⁹ Historian Timothy S. Huebner of Rhodes College is the author of **The Taney Court**,⁸⁰ and legal historian Jonathan Lurie of Rutgers University has authored **The Chase Court**.⁸¹

Like other volumes in this series, this pair adheres to a format consisting of two parts. Part one contains four substantive chapters that examine (1) the Court in the context of its times, including the circumstances surrounding the appointment of each Justice who served during the particular period; (2) the individual Justices in terms of their backgrounds and jurisprudence; (3) significant decisions; and (4) the Court's legacy and impact. Part two, which in **The Taney Court** consumes about one-third of the pages and in **The Chase Court** more than half, includes a variety of useful reference materials and documents that relate to personalities, policies, and events addressed in part one. Huebner's volume supplements the second part with lengthy excerpts from the majority and dissenting opinions in two key decisions from the Taney years: *Charles River Bridge Co. v. Warren Bridge Co.*,⁸² and *Scott v. Sandford*.⁸³ Lurie's contains no case excerpts but reprints valuable period documents, including the familiar First Inaugural Address by Abraham Lincoln and the far less familiar Inaugural Address to the Confederacy by Jefferson Davis, as well as the Confederate Constitution.

While of obvious value to the academic community and the legal profession, **The Taney Court** and **The Chase Court**, like previous entries in the series, are intended to reach a wider and more general audience as well. This goal seems beneficially to distinguish the *Supreme Court Handbooks* series from two others. The tomes published so far in the Holmes Devise *History of the Supreme Court of the United States* series are truly treasures for the expert but are hardly written for the novice and pose a navigational challenge even to the generalist.⁸⁴ The more recently conceived *Chief Justiceships of the United States Supreme Court*⁸⁵ series is more accessible (and

modest in scope) than the Holmes Devise series, and seems more comprehensive than the *Handbooks* series in terms of the number of legal issues addressed. *The Handbooks* series, in contrast, promises a sharper focus on selected issues and a greater emphasis on individuals, context, and impact.

These and other histories suggest that the Supreme Court of each period has faced its own unique combination of challenges and opportunities. This was as true for the Court of John Jay's time as it has been for the Rehnquist Court. For the former, the definition of the federal judicial power loomed large. For the latter, the reach of legitimate governmental authority in combating terrorism, among other questions, has posed special problems. And the Taney and Chase Courts were no exception to this rule.

Taney was the first Chief Justice whose appointment, falling as it did during Andrew Jackson's presidency, was widely anticipated to help foster a judicial revolution. Noting that the Court under Marshall had "done more to change the character of [the Constitution] . . . than all the other departments of the Government put together," the *Richmond Enquirer* longed for "the good old State-Rights doctrines of Virginia of '98-'99 to be heard and weighed on the Federal Bench," and so looked forward to a "Democratic Chief Justice" who might "bring back the ship to the Republican tack. We believe that Taney is a strong State-Rights man."⁸⁶ For the precise reasons that Democrats were so heartened, Whigs were despondent. "Judge [Joseph] Story thinks the Supreme Court is gone, and I think so too," bemoaned Daniel Webster.⁸⁷ As Huebner shows, judicially inspired constitutional change on Taney's watch was much less than many Democrats hoped and Whigs feared. The Bench "built on Marshall's work without either blindly adhering to precedent or needlessly overturning it. Instead, the Taney Court adjusted existing constitutional doctrine to the demands of the age—to the new, more open, and more enterprising

society that began to emerge during Jackson's presidency."⁸⁸

In Huebner's estimate, the Taney Court's legal legacy was "most evident and significant in three general areas: economic regulation, federalism, and the separation of powers."⁸⁹ For example, rulings such as *Charles River Bridge v. Warren Bridge* on the Contract Clause, which provoked a forceful and lengthy dissent from Justice Story, were "an appropriate response to the economic growth and popular democracy of the age. The public good . . . triumphed over private rights."⁹⁰ Or as Justice Benjamin Cardozo explained much later, "Looking back over the century, one perceives a process of evolution. . . . [T]he court in its interpretation of the contract clause has been feeling its way toward a rational compromise between private rights and public welfare. From the beginning it was seen that something must be subtracted from the words of the Constitution in all their literal and stark significance."⁹¹ Efforts to grapple with the Commerce Clause "proved equally successful," Huebner believes. "With the slavery issue always looming in the background," Taney and his colleagues "struggled to figure out just exactly how far states could go in controlling commercial activity."⁹² The result was to allow considerable state regulation—but not at the expense of national authority. This stance was significant because Taney was Chief Justice during an era when Congress was not disposed to exercise much of its commerce power. To have insisted on a highly nationalistic application of Marshall's commerce views would have severely restricted state efforts to regulate commercial activity, effectively leaving that important arena free of control by any government. Other Taney-era decisions, such as *Swift v. Tyson*, *Louisville Railroad Co. v. Letson*, and *Genesee Chief v. Fitzhugh*,⁹³ considerably expanded federal judicial authority by enlarging either the jurisdiction of federal courts or their rule-making discretion where such jurisdiction already existed. Yet the Taney Bench was also cognizant of its place, articulating for the first

time in *Luther v. Borden*⁹⁴ the self-denying political-question doctrine that leaves resolution of certain controversies in the hands of the elected branches of government.

The Taney Court's political legacy is doubtless—and fortunately—unmatched in American history. The Chief Justice's opinion in the *Dred Scott* case "exacerbated northern fears that a 'Slave Power conspiracy' had taken hold of the national government, thus contributing to the sectional polarization of the political debate and causing northern sentiment to shift decidedly against the South."⁹⁵ Lincoln's outspoken hostility to the decision soon catapulted him to national prominence and "only confirmed southern fears that the election of a Republican president would bring about the abolition of slavery. Secession and war followed. A suit for freedom filed by an unknown slave litigant in Missouri had, in a sense, helped speed the sectional disintegration that culminated in the Civil War."⁹⁶

Because of *Dred Scott*, "[n]o chief justice has had a more disputed and controversial legacy."⁹⁷ Indeed, in different periods, prevailing estimates of Taney's stature have ranged from villainous to Marshall-like. Within months of Taney's death, Senator Charles Sumner of Massachusetts and others were able to block an appropriation of \$1000 to provide for a marble bust of the late Chief Justice that would adorn the courtroom. "[T]he name of Taney is to be hooted down the page of history," thundered Sumner. "Judgment is beginning now; and an emancipated country will fasten upon him the stigma which he deserves. . . . He administered justice at last wickedly, and degraded the judiciary of the country, and degraded the age."⁹⁸ With the decline in northern interest in the civil rights of African-Americans that began later in the nineteenth century and persisted well into the twentieth, Taney's reputation began to recover. By the 1930s, rehabilitation of his reputation seemed nearly complete. In a 1931 address in Frederick, Maryland, where Taney had practiced law for more than two decades,

In his new book on the Taney Court, Timothy Huebner discusses how Taney's opinion in *Dred Scott* brought him scorn. (The pictured pamphlet advertises copies of the opinion for sale.) Taney's reputation was not rehabilitated until the 1930s, when Chief Justice Charles Evans Hughes went to Taney's hometown of Frederick, Maryland (right) and delivered a speech extolling his virtues.



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Chief Justice Hughes "portrayed Taney as a serene and dignified leader in an age of partisan strife as well as a fitting successor to the great Chief Justice Marshall."⁹⁹ In 1936, the once-disgraced name was honored naively when the Coast Guard commissioned the *Taney*, its largest cutter at that time.¹⁰⁰ A year later, Felix Frankfurter, then a professor of law at Harvard (but soon to be an Associate Justice), published a book on the Commerce Clause that exalted Taney's judicial achievements and concluded that Taney "stood second in American constitutional history only to the great Marshall."¹⁰¹ The accolades of Hughes and Frankfurter were echoed by Chief Justice Earl Warren. Making the pilgrimage to Frederick in October 1954—ironically, only five months after the twentieth century's most notable civil-rights decision by the Supreme Court¹⁰²—Warren defended Taney and hoped

to "erase the calumny which Taney's enemies had hurled at him during his lifetime and which superficial historians preserved as gospel truth for a time after his death." Taney, said the fourteenth Chief Justice, was a man "who personally detested slavery but who detested even more the prospect of violent disunion." Alongside his other accomplishments, Warren insisted that Taney merited the designation of "a great Chief Justice."¹⁰³ During the past three decades, with renewed national efforts on behalf of civil rights, the Hughes-Frankfurter-Warren estimates have been taken down a few notches by scholars who have reemphasized Taney's labors to preserve slavery. For Huebner, a balanced approach is in order. Taney's Court "must be remembered both for its contributions to American constitutionalism and its role in exacerbating the sectional crisis. . . . Although in many ways a great chief justice, Taney will never be—and should never be—deemed the greatest."¹⁰⁴

Taney's Chief Justiceship ended barely six months shy of both President Lincoln's assassination and the Confederate surrenders at Appomattox Courthouse and Durham Station in April 1865 that brought the Civil War to an end. Chase thus became the first Chief Justice to preside over a Court at a time when the continued existence of the Union was not a question for serious discussion. From 1789 until 1865, the survival of the American nation had overshadowed nearly every national political issue and had been uppermost in the minds of members of Congress, Presidents, and Supreme Court Justices. Of course, no one knew with certainty how the balance of power between national and state governments would evolve in the decades after 1865, but nearly everyone acknowledged that there would be one, and only one, American nation: "an indestructible Union, composed of indestructible states," as Chase later acknowledged in *Texas v. White*.¹⁰⁵

Just as Taney had been indelibly linked to the Jackson administration—he was Jackson's second Attorney General and fourth Treasury

Secretary and a failed nominee for an Associate Justiceship before his appointment to the center chair—Chase was closely identified with the Lincoln administration as the sixteenth President's first Treasury Secretary, a post he held for three years. Ironically, Chase might never have been in circumstances even to be considered for the Chief Justiceship had it not been for Jackson, a man whom Chase, as a young man, detested. A protégé and legal apprentice of John Quincy Adams's Attorney General, William Wirt, Chase moved away from the capital in early 1830 because of Jackson's election, which also sharply curtailed Wirt's influence in Washington. Chase ventured to Ohio—the "Western country," as it was then still called¹⁰⁶—where he established a thriving law practice and was later elected to the U.S. Senate, the Ohio governorship, and, in 1860, to the Senate again.

Surely for everyone in Chase's generation, "the Civil War was its defining event."¹⁰⁷ The war caused a transformation that was continental in scope, "and we cannot understand the key decisions of the Chase Court without a sense of the altered context in which the Court operated. . . ."¹⁰⁸ Thus, if the Taney era began with uncertainties about the changes a newly configured Court might foster on the nation, the Chase era opened with anticipation about the effects of wartime upheaval on the Court and the constitutional system.

As Lurie demonstrates in **The Chase Court**, the sixth Chief Justice and his Bench restored respect for, and confidence in, the judiciary in the ambivalent climate of post-Civil War America. An image rebuilding was in order chiefly because of the *Dred Scott* decision, which had not only invalidated the founding free-soil principle of the new Republican party, but also placed the Court on the losing side in the presidential election of 1860 and the Civil War. Restoration of much of the Court's former luster was immeasurably aided by rapid changes in membership following Lincoln's inauguration. The result was practically a reconstituted Bench in record time.

By 1865, Lincoln Justices comprised a majority of the Court. This was no longer the *Dred Scott* Court. And by the time of Chase's death, only a single pre-war Justice, Nathan Clifford, remained.

This remade and then bobtailed Bench¹⁰⁹ was nonetheless prepared to wield judicial power. During Chase's tenure, the Court invalidated thirty-four state statutes or local ordinances, a number substantially above that of previous decades. Moreover, from Chase's appointment through 1870, the Court set aside no fewer than seven acts of Congress, compared with only one each in the entire Marshall and Taney courts.¹¹⁰ Still, none of the Court's post-war rulings struck at a major piece of the Republican party's Reconstruction program, the major legislative undertaking of the decade. With one significant (and temporary) exception, noted below, the Court was generally cautious with respect to the Congress and the President elsewhere as well. When the Justices declared in *Ex parte Milligan*¹¹¹ that civilians could not be tried by military courts if civil courts were functioning, they did so after the war was over. When congressional leaders feared that the Court might use *Milligan* to invalidate rule by military commissions in the conquered South, Congress repealed part of the Court's jurisdiction at the moment the Justices had the case under advisement. The Court then backed away in *Ex parte McCordle*,¹¹² unanimously ruling that it no longer had authority to decide the case.

The looming exception to this pattern was *Hepburn v. Griswold*.¹¹³ Not only was the holding controversial, but the Court's quick reversal of itself fueled charges of political tampering and Court-packing, illustrating that the Court is rarely far removed from politics. To help finance the Civil War, Treasury Secretary Chase went along with the administration's decision in 1862 to issue paper currency called "greenbacks" not redeemable in gold coin. The Republican-dominated Congress insisted that the greenbacks be "legal tender" for all debts and taxes; otherwise the greenbacks

could never gain acceptance. Even though the new paper dollars quickly depreciated in value, creditors were therefore legally bound to accept them as payment from anyone who owed them money. In *Hepburn*, the Court ruled 4-3, in an opinion by Chief Justice Chase, that the act violated the Constitution, at least with respect to debts contracted before the date of the law's passage. Not only had the Court invalidated key fiscal policy, but the Bench split by party. Chase, who had hungered for the Republican presidential nomination in 1856, 1860, and 1864, and who had courted both the Democratic and Republican presidential nominations in 1868 and held out hope for the Democratic nomination in 1872, was joined by Democratic Justices Clifford, Samuel Nelson, and Stephen Field. Dissenters were Republicans Noah Swayne, David Davis, and Samuel Miller. With the Court's allotment reset at nine, President Grant, who had been highly critical of the decision, named Republicans William Strong and Joseph Bradley to the Bench. When the administration quickly steered two other cases to the Court, Strong and Bradley joined the three *Hepburn* dissenters in upholding the legal-tender law for debts contracted both before and after passage.¹¹⁴

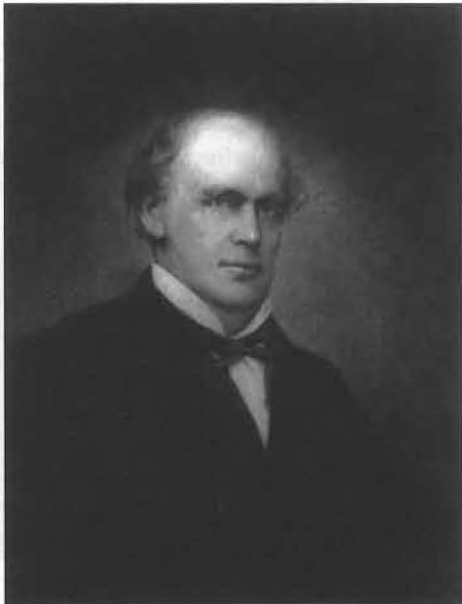
Chase was in the minority in the *Legal Tender Cases*, as he was in what Lurie considers one of the two most far-reaching decisions of this period: the *Slaughterhouse Cases*.¹¹⁵ The litigation gave the Court its first opportunity to construe the recently ratified Fourteenth Amendment. Motivated by a mixture of greed and public health concerns, the Louisiana legislature chartered the Crescent City Live-Stock Landing and Slaughterhouse Company and mandated that all slaughtering of animals in New Orleans and vicinity be done on its premises.¹¹⁶ Other slaughtering businesses could no longer use their own shops but would have to use the Crescent City Company's, and to pay a fee when they did. Some 1,000 displaced butchers retained former Supreme Court Justice John Archibald Campbell to press their case in the Supreme

Court. An Alabaman who had resigned from the Bench when his state seceded, Campbell was one of the stars of the Louisiana bar—“[L]eave it to God and Mr. Campbell,” said his admirers.¹¹⁷ Few could have failed to notice the irony-rich situation: Campbell, the late Confederacy’s Assistant Secretary of War, demanded on behalf of his mainly white southern clients that national power in the form of the Fourteenth Amendment—that key symbol of Union victory in the Civil War—displace states rights.

Speaking for a majority of five, with Chase, Field, Bradley, and Strong in dissent, Justice Miller was entirely unreceptive to the butchers’ constitutional objections. The first clause of the Fourteenth Amendment, he said, created no new rights. It merely conferred on the national government the duty of protecting rights adhering to national, but not state, citizenship. By contrast, state citizenship, which predated the Constitution, encompassed the more fundamental rights of acquiring, possessing, and using property that the butchers

thought Louisiana had infringed. Thus, they had no claim under the federal Constitution. Miller was equally cool to application of the Equal Protection and Due Process Clauses. He doubted the relevance of the former except in cases involving rights of the recently freed slaves. As for standards of due process, under no “admissible” interpretation he had seen could the challenged statute be deemed deficient.¹¹⁸

The Court’s narrow view of the protection the Fourteenth Amendment afforded against abuses by states translated into a narrow view of federal judicial power. Miller refused to recognize that the Fourteenth Amendment had fundamentally changed the relationship between the national and state governments. To do otherwise, Miller correctly maintained, “would constitute this Court a perpetual censor upon all legislation of the states on the civil rights of their own citizens, with authority to nullify such as it did not approve.”¹¹⁹ Even the amending process, apparently, could not alter the federal balance.



Possessor of a brilliant intellect, Chief Justice Salmon P. Chase (left) was also cold, selfish, and unscrupulous. Because he was a widower, his daughter Kate (right) accompanied him socially and helped plot his career moves. In Jonathon Lurie's new book on the Chase Court, he describes Chase Court's ambiguous legacy, especially with regard to Fourteenth Amendment interpretation.

The Slaughterhouse Cases are one of the chief reasons Lurie selects the word "ambiguity" to "describe the legacy left by the Court over which Chase presided," a word Lurie also believes to be "an apt description" of Chase himself.¹²⁰ Ambiguity descriptively fits the Chase Court because the Fourteenth Amendment later "took on a new life, relying not on privileges and immunities but on the Due Process Clause and, later, the Equal Protection Clause" to project federal power.¹²¹ At the same time, the hesitancy of the Chase Bench in recognizing the full potential of the Fourteenth Amendment made it far easier for the Waite Court (1874–88) frequently to look disapprovingly at congressional efforts to protect the rights of the recently freed slave population.¹²² Ambiguity fits Chase as a man because, perhaps more than that of any other person who has been Chief Justice, Chase's life exhibited both great personal strengths and character weaknesses. As Rutherford B. Hayes—long-time acquaintance and future "recipient of the presidency that had always eluded Chase"¹²³—recorded in his diary, Chase "possessed noble gifts of intellect" as well as "great culture and a commanding presence. When this is said, about all that is favorable has been said. He was cold, selfish, and unscrupulous. . . . Political intrigue, love of power, and a selfish and boundless ambition were the striking features of his life and character."¹²⁴

Toward the end of the Chase Court, the Judiciary Act of 1870 became law. While the Office of Attorney General had existed since 1789, the duties of the Attorney General had become so burdensome by the post-Civil War period that a separate law department was needed. The Judiciary Act of 1870 therefore established the Department of Justice and within it the Office of the Solicitor General (OSG). With an intent to centralize and coordinate control of litigation within the executive branch and to shift away from the increasingly costly practice of hiring private counsel to argue some of the government's

cases,¹²⁵ the Solicitor General would represent the legal interests of the United States and assist the Attorney General. This institutional change has had far-reaching effects, not only on every presidential administration since 1870, but on the Supreme Court as well. The office is the subject of **Between Law & Politics** by political scientist Richard L. Pacelle, Jr., of the University of Missouri–Saint Louis.¹²⁶ His is probably only the third book within the past two decades to concentrate specifically on the Solicitor General,¹²⁷ and, given the office's historically close association with the Court, it merits inclusion here. Pacelle's study is greatly enriched by insights he gleaned from interviews, most conducted during 1998, with thirty-four former Solicitors General, Attorneys General, principal deputies, and others closely associated with the work of the OSG.¹²⁸

The time frame for **Between Law & Politics** is the half century from the Truman presidency (1945–53) to the Clinton administrations (1993–2001). Choosing the Truman years as a starting point was no accident, for the OSG began to undergo significant changes at about that time—changes that have had serious implications for the Solicitor General's role ever since. As Pacelle explains, at the outset the OSG had little authority to enter litigation. In the days before the Justice Department had a Civil Rights Division and before the Equal Employment Opportunity Commission was created,¹²⁹ "[t]he lack of statutory authority limited the opportunities for the government to be a party to cases and did not allow the solicitor general to sequence litigation . . . [or to act] as a law enforcement officer. The solicitor general had no history of using the *amicus* brief to assist private third parties."¹³⁰ Only since the late 1940s and 1950s have those mechanisms and opportunities become available. The ability to become a party to litigation and to file briefs when the government is not party to a case has "moved the solicitor general away from the Court to a degree . . . [and]

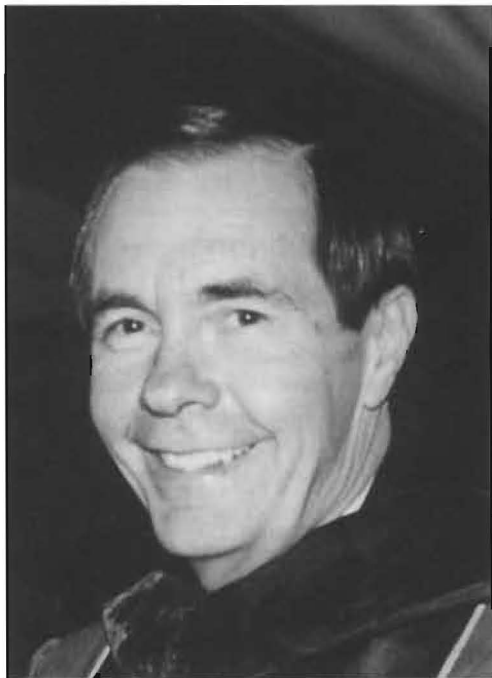
pushed the solicitor general closer to the president and the attorney general."¹³¹

Within that half-century period, Pacelle's focus is on the role of the OSG in affecting and effecting policy in the Supreme Court in three areas: civil rights, gender discrimination, and reproductive rights. To that end, Pacelle examines briefs and decisions in all Supreme Court cases involving those issues (225 in civil rights, 93 in gender, and 30 in reproductive rights) but is most interested in 178 civil-rights, 58 gender, and 9 reproductive-rights cases in which the Solicitor General participated.¹³² His goal is an assessment of "how the office handles competing constraints and how that balancing act is resolved,"¹³³ with "balancing" being the operative word because of the contending forces to which the office is subject.

Thrust into politics by virtue of the appointment process, the Solicitor General "must

pursue a changing executive agenda" and is also called upon to defend acts of Congress that have been challenged and to deal with relevant agencies the interests of which do not always align with those of the White House. But the arena for the Solicitor General is "the Supreme Court and its trappings, precedent and doctrinal development."¹³⁴ Thus the book's title is apt: as "arguably the most strategic actor in Washington,"¹³⁵ the Solicitor General must navigate a legal vessel through a sea of politics. "May it please the Court and my clients," as former Solicitor General Rex E. Lee once intoned.¹³⁶ The Solicitor General must serve both the President and the Supreme Court. Indeed, the felt obligation to the latter is so great that the OSG's "relationship with and duties to the Court are more important than winning individual cases."¹³⁷ This means that "solicitors general must calculate the judicial response to their briefs and arguments."¹³⁸ An argument in an area of settled law, explained one former Solicitor General, would "destroy the special status that I enjoyed by virtue of my office. . . . I would acquire a new status equally special. The Court would have written me off as someone not to be taken seriously."¹³⁹

Pacelle's research across the three subject areas reveals three roles for the OSG in litigation: as "tenth justice," as Attorney General, and as "fifth clerk."¹⁴⁰ The last ensues when the government is party to a case. Here, the OSG acts as a gatekeeper or case-screener, petitioning for review in those cases the office believes at least four Justices will find worthy. In effect, the OSG helps to determine the Court's agenda by placing certain cases, but not others, on its docket for consideration. "As a petitioner, the solicitor general helps shape the decision through its briefs and oral argument. . . . Because the solicitor general understands that the government is less likely to prevail on the merits when it is a respondent, the office adopts a defensive posture" or "damage control" in such instances.¹⁴¹ Either way, the OSG is uniquely successful,



Richard Pacelle's new work on the Office of the Solicitor General highlights the importance of that job and how it has evolved since the Truman administration. Pictured is Rex Lee, who argued fifty-nine cases before the Supreme Court and served as Solicitor General in the 1980s.

winning more than half its cases even as the respondent.¹⁴²

The Attorney General role unfolds in two ways when the OSG acts as *amicus curiae*. Sometimes the OSG furthers the enforcement powers of the government, as might happen in Title VII and voting-rights cases. The second, which is highly discretionary, involves *amici* briefs filed to advance the current administration's policy agenda. Here, Pacelle finds, a middle path seems to be the best approach. If the OSG fails to file such briefs, the administration's views in a case may not be heard at all, but filing too many *amicus* briefs may strike the Court as an abuse of privilege.¹⁴³

The tenth-Justice role manifests itself at the invitation of the Court when the Justices call for the views of the solicitor general in a particular case. Just as agenda-advancing *amicus* briefs are highly discretionary, responses to such "invitations" are not. Effectively, they are commands. In this third role, the OSG acts not so much as an agency of the executive branch "as a legal advisor to the Supreme Court" or "a disinterested 'expert witness,'"¹⁴⁴ helping the Court to maintain or to impose "doctrinal equilibrium."¹⁴⁵

Remarkably, the OSG accomplishes what it does in relative obscurity. As Pacelle notes near the end of his book, the Solicitor General continues "to work beneath the public's radar." Even presumably astute observers of the executive branch frequently pass over the significance of the OSG. "[V]irtually none of the biographies or autobiographies of recent presidents even mention a solicitor general. It seems to be an odd omission for an appointee whose successes and failures go a long way toward defining the most important issues of the day and determining the legacy a president will leave."¹⁴⁶ Curiously, therefore, even though the Solicitor General is intimately involved in the work of the Supreme Court, the OSG usually escapes the controversies that swirl about the Court itself.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

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LURIE, JONATHAN. **The Chase Court: Justices, Rulings, and Legacy** (Santa Barbara, CA: ABC-CLIO, 2004). Pp. xi, 245. ISBN: 1-57607-821-3, cloth.

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ENDNOTES

¹² U.S. (2 Dallas) 419 (1793).

²⁵ U.S. (1 Cranch) 137, 177 (1803).

³¹⁷ U.S. (4 Wheaton) 316 (1819).

⁴This provision extended the Supreme Court's appellate jurisdiction to cases from state courts involving a federal question where the highest court of a state had ruled against the federal claim. Act of September 24, 1789, ch. 20, § 25, 1 Stat. 73, 85.

⁵Quoted in Charles Warren, **The Supreme Court in United States History**, vol. 1 (rev. ed. 1926), 722.

⁶*Niles' Weekly Register*, June 22, 1822. Quoted in G. Edward White, **The Marshall Court and Cultural Change, 1815-1835** (1988), 947.

⁷Warren Dutton, "Constitutional Law," 10 *North American Review* 83, 107 (1820).

⁸James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129, 152 (1893).

⁹The dispute eventually reached the Supreme Court in *Gompers v. Bucks [sic] Stove & Range Co.*, 221 U.S. 418 (1911).

¹⁰"We are under a Constitution, but the Constitution is what the judges say it is." Speech at Elmira, New York, May 3, 1907, in Charles Evans Hughes, *Addresses of Charles Evans Hughes* (2d ed., 1916), 185.

¹¹"Gompers Raps the Courts," *New York Times*, April 6, 1909, p. 18.

¹²Former Justice James F. Byrnes fired one of the opening volleys. See his "The Supreme Court Must Be Curbed," *U.S. News & World Report*, May 18, 1956, p. 50.

¹³Robert Semple, Jr., "Nixon Withholds His Peace Ideas," *New York Times*, March 11, 1968, p. 1, 33.

¹⁴384 U.S. 436 (1966).

¹⁵*New York Times*, May 31, 1968, p. 18.

¹⁶Survey results released in June 2005 revealed that 57 percent of Americans had a "favorable opinion" of the Supreme Court; a similar survey in January 2001 had found the Court's favorability rating to be 68 percent. Much of the drop in the rating was attributed to partisanship—higher negative opinions of the Court among moderate Democrats and conservative Republicans. Despite the decline in the Court's approval rating during this period, Congress's was even lower, at 49 percent in 2005. The congressional data reflected a decline from 56 percent in 2004 and represented the lowest mark since the 1999 impeachment trial of President Bill Clinton, when the congressional approval rating in January 1999 was 48 percent. The Pew Research Center for the People & the Press, "Court Critics Now on Both Left and Right," news release, June 15, 2005, pp. 1–3. The Pew data suggest that while the institutional stature of the Court surpasses that of Congress, the political vulnerability of the Court remains greater than that of any single member of Congress.

¹⁷Consider the conflicting perspectives of Chief Justices Marshall and Taney. Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) at 407, 415 (emphasis in the original):

[W]e must never forget, that it is a *constitution* we are expounding[,] . . . a constitution, intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs.

Chief Justice Taney in *Scott v. Sandford*, 60 U.S. (19 Howard) 393, 426 (1857):

[The Constitution] must be construed now as it was understood at the time of its adopting. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present

form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers. . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion of the day. . . .

Moreover, even among those who, like Marshall, prefer a "living" or evolving Constitution, there is no consensus as to the proper source for the meaning to be injected into the document.

¹⁸Keith E. Whittington, "The *Casey* Five versus the Federalism Five: Supreme Legislator or Prudent Umpire?" in Christopher Wolfe, ed., *That Eminent Tribunal: Judicial Supremacy and the Constitution* (2004), 181.

¹⁹Wolfe, *That Eminent Tribunal* (hereafter Wolfe).

²⁰Christopher Wolfe, "The Rehnquist Court and 'Conservative Judicial Activism,'" in Wolfe, 202.

²¹Christopher Wolfe, "Introduction," in Wolfe, 9.

²²Hadley Arkes, "Antijural Jurisprudence: The Vices of the Judges Enter a New Stage," in Wolfe, 59.

²³Wolfe, "Introduction," in Wolfe, 3.

²⁴*Id.*, 1.

²⁵*Id.* (emphasis in the original).

²⁶*Id.* (emphasis added). For a longer excerpt from this part of Lincoln's address, see Alpheus Thomas Mason & Donald Grier Stephenson, Jr., *American Constitutional Law: Introductory Essays and Selected Cases* (14th ed., 2005), 75–76.

²⁷Wolfe, "Introduction," in Wolfe, 2.

²⁸Gerald V. Bradley, "Is the Constitution Whatever the Winners Say It Is?" in Wolfe, 15.

²⁹505 U.S. 833 (1992).

³⁰"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the *mystery of human life*. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." 505 U.S. at 851 (emphasis added).

³¹Michael Zuckert, "'Casey at the Bat'—Taking Another Swing at *Planned Parenthood v. Casey*," in Wolfe, 44–45.

³²*Id.*, 54.

³³Bradley, "Is the Constitution Whatever the Winners Say It Is?" in Wolfe, 18. Bradley's choice of words has a biblical parallel, specifically Jeremiah 7:23 (New International Version): "Obey me, and I will be your God and you shall be my people."

Ironically, while preserving the "core" holding of *Roe v. Wade*, 410 U.S. 113 (1973), that abortion should be allowed through at least the second trimester of pregnancy, students of the Court know that *Casey* upheld nearly all of the Pennsylvania abortion regulations challenged in that case. Most acknowledged at the time that those provisions were designed to discourage abortions, and prior to Kennedy's arrival in 1987 most of them would almost

certainly have been struck down. Alongside ambivalent opinion showing that the public is troubled by abortion but desires that the option remain available, the decision tacked to starboard. The contrast between what the Court did and what it said in *Casey* and similar cases argues that Congress and the American people are probably less moved by judicial style and words than by judicial actions. Most of the contributors to *That Eminent Tribunal* are concerned about both. The eventual impact of commentaries such as theirs in the long-running debate about judicial review may depend on persuading others that, as possible parents of future acts, words and style matter, too.

³⁴Michael W. McConnell, "Toward a More Balanced History of the Supreme Court," in Wolfe, 142.

³⁵*Id.*, 143.

³⁶*Id.*, 144 (emphasis in the original).

³⁷*Id.*, 144–45.

³⁸Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," p. 150 (emphasis omitted).

³⁹McConnell, "Toward a More Balanced History of the Supreme Court," in Wolfe, 145.

⁴⁰*Id.*

⁴¹*Id.*, 148.

⁴²*Id.*

⁴³*Id.*, 156.

⁴⁴Ken I. Kersch, *Constructing Civil Liberties* (2004) (hereafter Kersch).

⁴⁵*Id.*, 1.

⁴⁶*Id.* "Narratives" in the ordinary sense are, of course, always backwards-looking, in that they attempt to chronicle something that has happened. Kersch presumably refers to accounts that are written after the "something" has run its course, as opposed to narratives that chronicle developments as they unfold, before the conclusion or endpoint is reached.

⁴⁷*Id.*, 1–2.

⁴⁸*Id.*, 2.

⁴⁹*Id.*, 1.

⁵⁰Here Kersch draws on Herbert Butterfield's *The Whig Interpretation of History* (1965).

⁵¹Kersch, 3.

⁵²*Id.*, 4–5.

⁵³*Id.*, 1.

⁵⁴*Id.*, 8.

⁵⁵*Id.*, 5.

⁵⁶*Id.*, 17.

⁵⁷Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities* (1982).

⁵⁸Kersch, 13.

⁵⁹*Id.*, 14.

⁶⁰Rogan Kersh, *Dreams of a More Perfect Union* (2001), 275.

⁶¹Kersch, 13. In political science, a "critical" or realigning election is a transforming event in which voters perceive a

distinct difference between political parties and then shift in large numbers from the ranks of one party to another, thus handing control of the machinery of government to the victorious party for a period of years spanning several presidential terms. Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (1970), 10.

⁶²Kersch, 13.

⁶³*Id.*, 19.

⁶⁴*Id.*

⁶⁵*Id.*, 30.

⁶⁶*Id.*, 19.

⁶⁷116 U.S. 616 (1886); 142 U.S. 547 (1892).

⁶⁸Kersch, 31, 132.

⁶⁹*Id.*, 70.

⁷⁰*Id.*, 132.

⁷¹*Id.*, 74, 80.

⁷²*Report on the Enforcement of the Prohibition Laws of the United States* (1931).

⁷³*To Secure These Rights: The Report of the President's Committee on Civil Rights* (1947).

⁷⁴Kersch, 26.

⁷⁵*Id.*, 133.

⁷⁶*Id.*, 13.

⁷⁷With eight years and seven months, William Howard Taft is ranked in ninth place, just ahead of Chase.

⁷⁸By comparison, Marshall was not quite 80 when he died in office in the summer of 1835; Chase was 65 when he died, also in office.

⁷⁹The author of this review essay contributed a volume to the series: *The Waite Court: Justices, Rulings, and Legacy* (2003).

⁸⁰Timothy S. Huebner, *The Taney Court* (2003) (hereafter Huebner).

⁸¹Jonathan Lurie, *The Chase Court* (2004) (hereafter Lurie).

⁸²36 U.S. (11 Peters) 420 (1837).

⁸³See note 17.

⁸⁴No volume in the Holmes Devise series seems to have appeared since 1993. The first two volumes in the series—one on the pre-Marshall Court by Julius Goebel and the other on the Chase Court by Charles Fairman—appeared in 1971.

⁸⁵The initial volumes in this series, on the pre-Marshall and the Fuller courts, appeared in 1995. The most recent entry is Michael Belknap's *The Supreme Court under Earl Warren, 1953–1969* (2005).

⁸⁶Quoted in Warren, *The Supreme Court in United States History*, vol. II, 9.

⁸⁷*Id.*, 10.

⁸⁸Huebner, xii.

⁸⁹*Id.*, 185.

⁹⁰*Id.*, 186.

⁹¹These words of Cardozo are from a draft of an *unpublished* concurring opinion that he sent to Chief Justice Charles Evans Hughes during preparation of the latter's

opinion for the Court in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934). Reprinted in Mason and Stephenson, *American Constitutional Law*, 352.

⁹²Huebner, 187.

⁹³41 U.S. (16 Peters) 1 (1842); 43 U.S. (2 Howard) 497 (1844); 53 U.S. (12 Howard) 443 (1852).

⁹⁴48 U.S. (7 Howard) 1 (1849).

⁹⁵Huebner, 191.

⁹⁶*Id.*, 192.

⁹⁷*Id.*, 175.

⁹⁸*Id.*, 176. Funds for Taney's bust were not appropriated until after Chief Justice Chase's death, when Congress, without debate, provided money for busts of both Taney and Chase. *Id.*, 181.

⁹⁹*Id.*, 181. See Charles Evans Hughes, "Roger Brooke Taney," 17 *American Bar Association Journal* 785 (1931).

¹⁰⁰The ship remained in active service as late as the Korean and Vietnam wars. Huebner, 182.

¹⁰¹*Id.*, 183. See Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (1937). It was also during this period that political scientist Carl Brent Swisher wrote his admiring biography of Taney, a book that remains the most comprehensive examination of Taney's life and judicial career: **Roger B. Taney** (1936). Much later, Swisher authored volume six in the *Holmes Devise History of the Supreme Court of the United States: The Taney Period, 1836-1864* (1974).

¹⁰²*Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁰³Huebner, 183-84.

¹⁰⁴*Id.*, 192-93.

¹⁰⁵74 U.S. (7 Wallace) 700, 725 (1869).

¹⁰⁶Albert Bushnell Hart, *Salmon Portland Chase* (1969 reprint of 1899 ed.), 13; John Niven, *Salmon P. Chase: A Biography* (1995), 27.

¹⁰⁷Lurie, 3.

¹⁰⁸*Id.*, 4.

¹⁰⁹A Lincoln-configured Bench was one thing. A Bench fashioned by the soon-to-be-impeached Andrew Johnson would be something else entirely. A Union Democrat from Tennessee who had been put on the ticket with Lincoln in 1864 and who became President upon Lincoln's assassination in 1865, Johnson had never joined the Republican ranks or gained their confidence. In 1866, Congress accordingly reduced the number of Justices from ten to seven, with the shrinkage to occur as Justices departed, thus denying the new President any appointments to the High Court. Only after President Ulysses Grant succeeded Johnson was the Court's roster reset at nine, where it has been ever since.

¹¹⁰Lee Epstein, *et al.*, *The Supreme Court Compendium: Data, Decisions, and Developments* (1994), 96, 101.

¹¹¹71 U.S. (4 Wallace) 2 (1866).

¹¹²74 U.S. (7 Wallace) 506 (1869).

¹¹³75 U.S. (8 Wallace) 603 (1870).

¹¹⁴Legal Tender Cases (*Knox v. Lee* and *Parker v. Davis*), 79 U.S. (12 Wallace) (1871).

¹¹⁵The second decision that Lurie ranks as among the most important was *Ex parte Milligan*, mentioned above. Lurie, 95. While the Court was unanimous in holding in that case that the military tribunal had no jurisdiction to try Milligan, Chase wrote a separate opinion, joined by Justices Wayne, Swayne, and Miller, which took exception to the conclusion of Justice Davis's majority opinion that civilians in such circumstances could *never* be subjected to military justice if local courts were open and operating. For Chase, Congress was fully empowered to authorize such tribunals to try conspirators like Milligan.

¹¹⁶With Ronald M. Labbé, Lurie has authored a volume on the Slaughterhouse Cases: **The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment** (2003). See "The Judicial Bookshelf," 29 *Journal of Supreme Court History* 346, 348-52 (2004).

¹¹⁷William Gillette, "John A. Campbell," in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions*, vol. 2 (1969), 939.

¹¹⁸83 U.S. at 81. Chief Justice Taney's arguably analogous use of the Fifth Amendment's Due Process Clause in *Dred Scott* and Chief Justice Chase's similar use of the same clause in *Hepburn* were presumably not "admissible" interpretations as far as Miller was concerned.

¹¹⁹83 U.S. at 78.

¹²⁰Lurie, 85.

¹²¹*Id.*, 100.

¹²²See generally Stephenson, *The Waite Court* (2003), 153-68.

¹²³Lurie, 85.

¹²⁴Quoted in *id.*

¹²⁵According to Rex E. Lee, who was Solicitor General in President Ronald Reagan's administration between 1981 and 1985, in the Supreme Court's 1869 Term, "eighteen cases were argued by the Attorney General and/or his assistants, and fifteen with some apparent involvement of outside counsel." Lee, "The Office of Solicitor General: Political Appointee, Advocate, and Officer of the Court," in D. Grier Stephenson, Jr., ed., *An Essential Safeguard: Essays on the United States Supreme Court and Its Justices* (1991), 56.

¹²⁶Richard L. Pacelle, Jr., *Between Law & Politics* (2003) (hereafter cited as Pacelle).

¹²⁷Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (1987); Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (1992).

¹²⁸See Pacelle, 273-74, for the list of the interviewees.

¹²⁹The modern era of federal involvement in protection of civil rights began in 1939, when Attorney General Frank Murphy organized a civil-rights section within the Criminal Division of the Justice Department. The civil-rights

section became a full-fledged division as a result of the Civil Rights Act of 1957. The Equal Employment Opportunity Commission was created by the Civil Rights Act of 1964.

¹³⁰Pacelle, 265–66.

¹³¹*Id.*, 266.

¹³²*Id.*, 7.

¹³³*Id.*, 8.

¹³⁴*Id.*, 10.

¹³⁵*Id.*, 271.

¹³⁶The quotation formed the title of a lecture delivered by Mr. Lee on October 24, 1985, at Franklin & Marshall College. The lecture was later reprinted under

a different title, as indicated by the citation in note 125.

¹³⁷Pacelle, 14.

¹³⁸*Id.*, 262.

¹³⁹*Id.*, 16.

¹⁴⁰*Id.*, 20.

¹⁴¹*Id.*, 21–23.

¹⁴²*Id.*, 23.

¹⁴³*Id.*

¹⁴⁴*Id.*, 24.

¹⁴⁵*Id.*, 10.

¹⁴⁶*Id.*, 272. Even college-level texts in American government routinely give the Solicitor General barely a mention.

Contributors

Henry J. Abraham is the James Hart Professor of Government, Emeritus, at the University of Virginia.

Stephen G. Bragaw is the director of the Law and Society Program and an associate professor of government at Sweet Briar College.

Craig Joyce is the Andrews Kurth Professor of Law and the Co-Director, Institute for Intellectual Property & Information Law, at the University of Houston Law Center.

Deborah Jones Merritt is the John Deaver Drinko/Baker & Hostetler Chair in Law, Moritz College of Law at The Ohio State University. Professor Merritt clerked for Justice O'Connor during her first Term on the Court.

R. Kent Newmyer is a professor of law and history at the University of Connecticut School of Law.

Barbara A. Perry is the executive director at the Virginia Law-Related Education Center and is the Carter Glass Professor of Government at Sweet Briar College.

D. Grier Stephenson, Jr. is the Charles A. Dana Professor of Government at Franklin and Marshall College. He regularly contributes "The Judicial Bookshelf" to the *Journal*.

John Paul Stevens has been an Associate Justice since 1975 and shared the bench with Justice O'Connor for twenty-five years.

Melvin I. Urofsky is professor emeritus at Virginia Commonwealth University and serves as chairman of the Society's Board of Editors.

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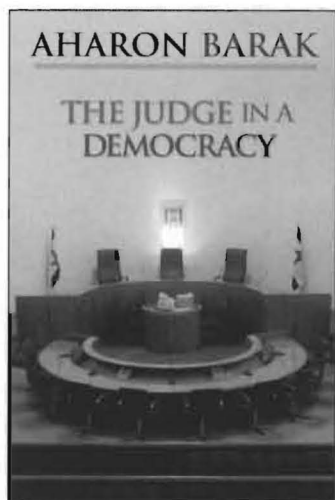
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Errata: In the previous issue the retirement date of Justice Charles E. Whittaker was incorrect in former clerk Alan Kohn's review of the new Whittaker biography. The year was 1962. On page 14 of that issue the reference to the 1988 Inauguration is also incorrect. The election took place in 1988 but the inauguration occurred in 1989.

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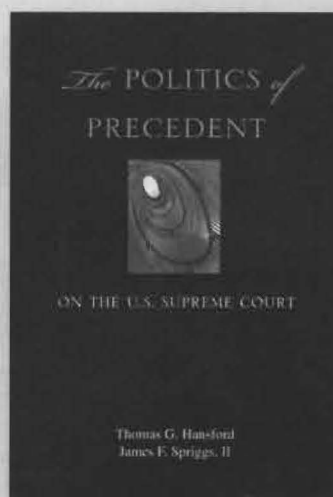
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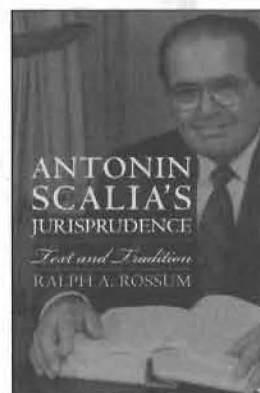
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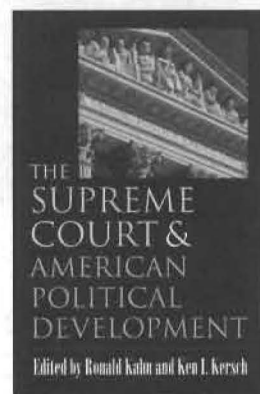
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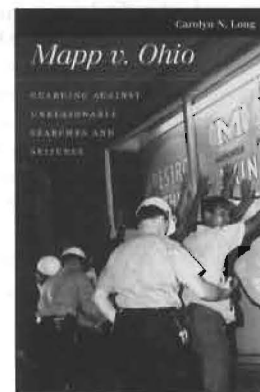
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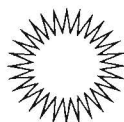
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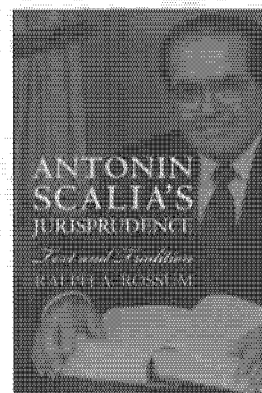
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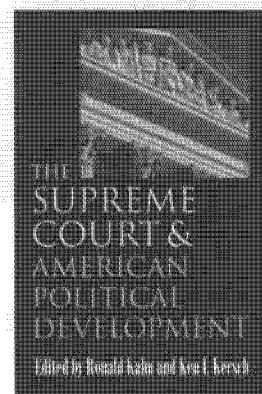
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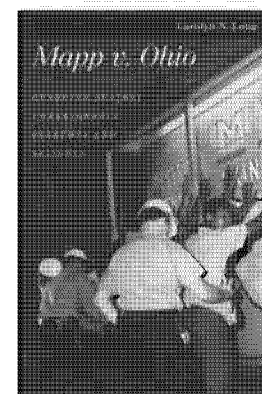
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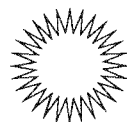
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