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# *Marshall vs. Jefferson Then and Now: How the Intellectual and Political Struggle Over the Constitution Resonates Today*

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Throughout the first decade of the American republic, competing claims regarding the proper interpretation of the Constitution and the application of its principles were confined primarily to the executive branch and Congress. The Supreme Court remained, for the most part, uninvolved in the resolution of constitutional questions concerning the scope of authority of the new government. The year 1801 marked the beginning of a dramatic turnabout in the role of the Court in national affairs. Thomas Jefferson, having promised to undertake a “revolution in the principles” of government, took office as the third president of the young nation. Although the legislative and executive branches of government came under the control of Jefferson’s Republican party in the election of 1800, the federal judiciary remained a bulwark of the rival Federalist party. At the head of this relatively untested third branch of government was Jefferson’s distant cousin and fellow Virginian, John Marshall. Marshall had been appointed Chief Justice of the United States by John Adams in February 1801 in one of his last acts as president. Adams, with the help of the lame-duck Federalist Congress, bolstered Marshall’s standing within the judiciary by

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creating several new federal court positions and filling them with party loyalists.

Clear and irreconcilable differences in the political and constitutional philosophies of Jefferson and Marshall sparked heated debate over such monumental issues as the use of judicial review over acts of Congress and the development of the doctrine of “implied powers.” With the rise of judicial authority under Marshall’s leadership, the judiciary was inexorably drawn into the political fray. Political considerations were paramount in determining the tactics employed by both leaders in their efforts to define the proper role of the judiciary in a balanced government and the role of the national government itself within the federal system.

Today, more than two centuries after the struggle over constitutional interpretation began with the landmark case of *Marbury v. Madison*, the debates between Jefferson and Marshall remain strikingly relevant. It is worthwhile to revisit these debates not only to shed light on the underlying factors that forged their views, but also to address the propensity of modern writers to labor under some misconceptions of what Marshall and Jefferson stood for in their day and how their legacies should be measured against today’s standards.

The attempt to impose contemporary understandings of jurisprudence and judicial behavior on the practices of the early nineteenth century distort significant differences that exist between the modern Court and the Court of John Marshall’s era. Contrary to Jefferson’s own view of Marshall, and the popular conception of many modern writers, Marshall’s constitutional philosophy emphatically did not set a trajectory toward the type of judicial assertiveness by which later courts (especially the Warren Court) would become policy-making rather than law-interpreting bodies.<sup>1</sup> Indeed, Marshall’s conduct on the bench as Chief Justice, coupled with the major decisions issued during his tenure, suggest that he would be troubled by the policy-making activism of the modern court.

*Despite reputation, Marshall not a policy-making activist by today’s standards.*

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<sup>1</sup> One modern student of the judiciary, Robert G. McCloskey, introduces his chapter on the Marshall era by highlighting the Court’s role as a “willful, policy-making agency of American government,” whose decisions “tend to fall into patterns that reflect current judicial views of what ought to be done.” See Robert G. McCloskey, *The American Supreme Court*, 2nd ed. (Chicago: University of Chicago Press, 1994), 16. This article suggests that a careful reading of Marshall’s Court opinions would lead to rejection of any characterization of the Court, in his time, as a “willful policy-making agency.”

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If the phrase “judicial activism” had existed during the Marshall Court’s tenure, Jefferson may well have used it to describe the Marshall Court in the pejorative sense in which the phrase is used today. But, by today’s standards, Marshall adhered much more to a course of judicial restraint than one of judicial activism. While it is true that Marshall sought to enhance national sovereignty and power during his tenure, he did so under a remarkably different set of circumstances. “As a young man on General Washington’s staff,” Archibald Cox has observed, Marshall “saw first-hand at Valley Forge the costs of self-interests, selfish pride, and constant rivalry among thirteen sovereign States—costs measured by unfilled quotas, departing militiamen, and half an army in the snow without blankets or shoes.”<sup>2</sup> Marshall’s nationalism was shaped in a completely different milieu from the one in which the mid- to-late twentieth century and early twenty-first century courts sit, where there is no real question as to the supremacy of national power. The fact that Antonin Scalia’s brief rumblings about bringing new scrutiny to questions of federalism and states’ rights was newsworthy a few years ago demonstrates how far that particular pendulum has swung.

During his time as Chief Justice, Marshall was pitted against Jefferson’s populist agenda and his belief in popular and unqualified majority rule. While Marshall thought it was essential to expand the national government’s authority vis-à-vis the states, so that uprisings like Shays’ Rebellion were kept in check, Jefferson sought to limit the national government’s power for fear that it would swallow up the authority of the states and threaten popular control of governmental institutions. Marshall’s decisions in cases like *McCulloch v. Maryland* make clear his opinion that Jefferson’s appeal for popular rule would quickly bring the new national government to ruin. There was much popular support in the state of Maryland for taxing the Baltimore branch of the National Bank—but it was clear to Marshall that the goal of Maryland’s popular tax on the Bank of the United States was to destroy an instrument of the federal government. As will become apparent in the discussion below, Marshall interpreted Constitutional provisions along more pragmatic lines than Jefferson, as, for example, by endorsing in *McCulloch* Hamilton’s earlier arguments on implied powers.

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<sup>2</sup> Archibald Cox, *The Court and the Constitution* (Boston: Houghton Mifflin Co., 1987), 48.

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However, *McCulloch* and other key decisions of the Marshall Court did not usher in an era of limitless congressional power, as Jefferson had feared.

Despite vast differences in constitutional philosophy, in some respects Marshall and Jefferson are closer in thought than modern members of the judicial community in that they both embraced the notion that judicial authority and federal power under the Constitution had fundamental limits. In contrast, the Court in modern times has increasingly become a front-line instrument for political and social change. From redistricting to abortion and affirmative action, some members of the Court seem largely unconcerned about the threat to institutional legitimacy that results when the Court oversteps its bounds to dictate policies that were once left to the legislature to decide.

### *Marshall and Jefferson: Common Ground and Deep Division*

Marshall and Jefferson had much in common. Both were Virginians. Both had fathers who were surveyors. As governor, Jefferson even appointed Thomas Marshall, John's father, as surveyor of the Kentucky territory. Both men were descended from the famous Randolph family. When Edmund Randolph was elected governor of Virginia in 1786, he turned his law practice over to John Marshall. Randolph had taken over the very same law practice from Thomas Jefferson when Jefferson chose to devote his full attention to politics in 1774. Hence, "Jefferson's law practice ultimately became John Marshall's."<sup>3</sup> In their preparation for the practice of law, Jefferson and Marshall both studied under and revered the same distinguished law professor, George Wythe of the College of William and Mary. More importantly, both Marshall and Jefferson were patriots who found common cause in the War for Independence. With all of these parallels, it is difficult to imagine how these two individuals would take such different paths in shaping the young nation's history. Yet it is clear that Marshall and Jefferson were guided by dramatically different perspectives and outlooks concerning government and politics. Despite their many similarities, "the contrasts that fueled their rivalry abounded."<sup>4</sup> University of Toronto political science professor Jean Edward

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<sup>3</sup> Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt & Company, 1996), 90-91.

<sup>4</sup> *Ibid.*, 12.

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Smith illuminates these differences quite nicely in his biography of John Marshall. As Smith puts it:

An exemplary aristocrat who advocated democracy, Jefferson was never comfortable associating with the common man. Marshall, who distrusted democracy, never lost the common touch. Jefferson opposed an energetic central government as a danger to individual liberty; Marshall saw the government in Washington as the keystone of national well-being. Jefferson identified with Virginia; Marshall, with the United States. Jefferson favored agriculture and advocated the virtues of rural life; Marshall, an avid farmer himself, was more attuned to the needs of commerce and industry. . . . In some respects the differences involved the classic tension between the man of ideas and the man of affairs. Jefferson was at his best when articulating a philosophy of government. Marshall, when applying one.<sup>5</sup>

*Jefferson lacked a consistent "position on ultimate questions of constitutional sovereignty."*

The translation of political vision into action marked Marshall's career more prominently than Jefferson's in large part because Marshall had a clear philosophy to guide him. Jefferson, on the other hand, struggled in translating theory into action because, as historian Joseph Ellis notes, he "did not have a consistent or cogently constructed position on the ultimate questions of constitutional sovereignty."<sup>6</sup> Describing the impractical nature of some of Jefferson's visionary impulses, Ellis writes: "In his more radical moments he seemed to believe that all fundamental constitutional questions should be settled by a popular referendum, since the doctrine of popular sovereignty empowered only the people at large to render such judgments. This was obviously burdensome, if not completely impractical, but it drew inspiration from the same visionary impulse that welcomed a 'sweeping away' of all laws every generation."<sup>7</sup>

That the debates between Marshall and Jefferson have had such lasting significance is due in part to the fact that both men were towering intellectuals. Their ability to articulate with force and acumen their different conceptions of the Constitution gives vitality to their views two hundred years later. Beyond the weight of sheer intellectual acuteness, the historical record remains important in helping us to understand how the politics of their day and the characteristics of individual philosophy and personality

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<sup>5</sup> Ibid., 12-13.

<sup>6</sup> Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Alfred A. Knopf, 1997), 222.

<sup>7</sup> Ibid.

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influenced the tone and temper of these debates.

### *Constitutional Construction: The Seeds of Division*

The political debates of the 1790s foreshadow the deeply ingrained differences in constitutional philosophy that were instrumental in promoting conflict between the Supreme Court under John Marshall's leadership and the other two branches of government after the ascendancy of Jefferson's Republican party in the elections of 1800. Sharp disagreement over the authority and functions of the national government led to an early split in George Washington's Cabinet between the chief architect of Federalist policies, Alexander Hamilton, and the future leader of the newly evolving Republican Party, Thomas Jefferson. More often than not, Washington's political disposition put him squarely on the side of Hamilton in disputes between the two men. Unhappy with the direction of administration policies, Jefferson resigned his position as Secretary of State in 1793. Prior to his resignation, Jefferson had begun actively recruiting individuals sympathetic to his political outlook to run for Congress, where his close friend, James Madison, was building a base of opposition to the policies of the Washington administration.

Early conflict between Federalist and Republican interpretations of the Constitution manifested itself most clearly in the debate over Alexander Hamilton's economic program, proposed early in Washington's administration. That program was formulated within the context of the poor economic conditions that plagued post-revolutionary America. One of the chief weaknesses of the general government under the Articles of Confederation was its total dependence on the goodwill of the states. Through its requisition system, the government was barely able to handle its own expenses, let alone the war costs and interest on foreign loans. By 1783, the financial situation was so hopeless that Finance Minister Robert Morris resigned in despair, saying: "It can no longer be a doubt . . . that our public credit is gone."<sup>8</sup>

Hamilton believed that the newly ratified Constitution empowered the national government to use all of the authority at its command to bring about a strong, stable economy with public credit that would be respected throughout the world. To accom-

*Hamilton's economic program an early object of contention.*

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<sup>8</sup> Samuel Eliot Morison, et al., *A Concise History of the American Republic* (New York: Oxford University Press, 1977), 111.

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plish these ends, Hamilton introduced his *First Report on the Public Credit* in 1790. In it he called for funding the national debt at par and for the assumption of state debts by the federal government. By assuming the war debts of the states, Hamilton hoped to bind their creditors to the national interest. "The only plan that can preserve the currency," he wrote, "is one that will make it the immediate interest of the monied men to cooperate with government in its support."<sup>9</sup> Hamilton believed that establishing the public credit on firm ground would instill integrity in the new government and would lessen the likelihood of internal conflict resulting from those who had opposed the Constitution.

Hamilton's financial system was aimed at making the national government of central importance to individuals, but this was exactly what disturbed Jefferson and his followers most.

An individual who was dependent on government was an individual who could come under the oppression of government. Jefferson and Madison pointed to England as an example of a nation in which Hamiltonian style monetization had corrupted the moral fabric of society.<sup>10</sup> Hence, while the Federalists were committed to the development of an active, centralized national authority to conduct the affairs of state, the Republicans generally favored governmental restraint. Too much concentration of power in the national government was considered unwise; centralization of power in the executive was thought to be dangerous. The arguments set forth in the debate over Hamilton's proposals in 1790 and 1791 outlined the general division of ideas and expectations concerning the proper functioning of the national government. These arguments pervaded the politics of the new republic.

The most controversial part of Hamilton's economic program, and the part that Republicans feared most, was the proposal for the establishment of a national bank. Different constitutional interpretations regarding the proper role of the national government crystallized over this issue. Hamilton justified creation of the Bank of the United States under the *necessary and proper* clause and the *general welfare* clause of Article I, Section 8 of the Constitution, as

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<sup>9</sup> A. J. Beitzinger, *A History of American Political Thought* (New York: Dodd, Mead & Company, 1972), 249.

<sup>10</sup> Historian Forrest McDonald traces the roots of the debate between the Federalists and Republicans over Hamilton's economic program to the policies of Walpole and Bolingbroke in England. See McDonald, *The Presidency of George Washington* (New York: Norton, 1975).

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they apply to the enumerated powers of this article. Taking a very broad view of the Constitution, Hamilton argued that Congress had the authority to create the bank so long as its prerogative to do so could be fairly construed from the enumerated powers of Article I, Section 8 of the Constitution (the power to lay and collect taxes, to borrow money on the credit of the United States, to pay the debts of the United States, etc.), in combination with the power to carry out these functions under the necessary and proper clause. So long as the authority to create the Bank was not prohibited by the Constitution, Hamilton asserted that creation of a national bank was indeed necessary to effectively implement the enumerated powers of Congress.

Jefferson, on the other hand, based his opposition to the bank on strict construction of the Constitution. Citing the Tenth Amendment (which was in the process of being ratified), Jefferson argued that the national government was prohibited from exercising any power not “expressly” granted in the Constitution. “To take a single step beyond the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.”<sup>11</sup> Ironically, Jefferson’s fellow Republican, James Madison, had deleted the word “expressly” from the Tenth Amendment, fearing that it would unnecessarily restrict national power. Taking a position that was inconsistent with the Republican notion of strict construction, Madison wrote that there “must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae.”<sup>12</sup>

Jefferson perceived the creation of the first Bank of the United States as a clear example of Federalist tampering with the Constitution in order to consolidate “the power of the national government at the expense of the states.”<sup>13</sup> The bank stood as a direct challenge to Jefferson’s idea that the Constitution imposed limitations on the power of the national government. In 1815, Jefferson expressed the hope that the Supreme Court “will never countenance the sweeping pretensions which have been set up under the words ‘general

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<sup>11</sup> Quoted in David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994), 190.

<sup>12</sup> Louis Fisher, *The Constitution Between Friends: Congress, the President and the Law* (New York: St. Martin’s Press, 1978), 16.

<sup>13</sup> Quoted in Daniel Sisson, *The American Revolution of 1800* (New York: Alfred A. Knopf, 1974), 140.

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defense and public welfare.”<sup>14</sup>

Four years later, the constitutionality of the bank was unanimously sustained by the Marshall Court in the landmark case of *McCulloch v. Maryland* (1819).<sup>15</sup> In his opinion for the Court, Chief Justice Marshall borrowed heavily from Hamilton’s original arguments on behalf of the first Bank of the United States. He also cited Madison’s argument from the congressional debate regarding the language of the Tenth Amendment. Marshall observed that there was no phrase in the Constitution which “excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.” Marshall went on to say:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.<sup>16</sup>

Taking a very broad view of the Constitution, Marshall reasoned that the last of the enumerated provisions in Article I of the Constitution not only gave Congress the power “to make all laws which shall be necessary and proper” to carry into execution Congress’s own specifically enumerated powers, but also a power to make all laws which shall be “necessary and proper” to carry into execution “all other powers vested by this Constitution in the government of the United States” or in any of its departments or officers.<sup>17</sup> Although “we do not find the word ‘bank’ or ‘incorporation,’” Marshall wrote, “we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare war; and to raise and support armies and navies. . . . It may with great reason be contended,” Marshall concluded, “that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be

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<sup>14</sup> Alpheus T. Mason, *The Supreme Court: Palladium of Freedom* (Ann Arbor: The University of Michigan Press, 1962), 103.

<sup>15</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819).

<sup>16</sup> *McCulloch v. Maryland*, 406.

<sup>17</sup> William W. Crosskey, “John Marshall,” in Stanley I. Kutler, ed., *John Marshall* (Englewood Cliffs, N. J.: Prentice Hall, Inc., 1972), 148.

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entrusted with ample means for their execution.”<sup>18</sup>

It is striking that Marshall’s opinion in *McCulloch* so closely parallels the earlier writing of Jefferson’s close friend and political ally James Madison in the *Federalist Papers*. In *Federalist* 44 Madison made the following observation:

Had the convention attempted a positive enumeration of the power necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the particular powers, which are the means of attaining the object of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.

Then, in language unmistakably Hamiltonian, and undoubtedly influential in shaping Marshall’s reasoning in *McCulloch*, Madison wrote that, “wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included” (*Federalist* 44).

At the heart of Marshall’s opinion in *McCulloch v. Maryland* is an explicitly stated belief in broad construction of the Constitution. This stands in sharp contrast to Jefferson’s firm belief that a literal construction of the Constitution is essential. In his 1791 brief on the constitutionality of the bill establishing the Bank of the United States, Jefferson wrote: “The incorporation of a bank, and other powers assumed by this bill have not . . . been delegated to the United States by the Constitution.”<sup>19</sup> These powers were not “among the powers specifically enumerated,” nor were they “within either of the general phrases” of Article I, the general welfare clause and the necessary and proper clause. As constitutional law professor David Mayer has written, one of the strongest arguments against creation of the bank was succinctly stated by Jefferson when he observed that “the very power now proposed as a means,” the power of Congress to incorporate a bank, was considered and “rejected as an end” by the constitutional convention. Beyond this, Jefferson noted that, although a national bank was *convenient*, it was not *necessary*. To Jefferson, the term *necessary* meant “essential” or indispensable in carrying out the enumer-

*Power of Congress to incorporate a bank was “rejected as an end” by the constitutional convention.*

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<sup>18</sup> *McCulloch v. Maryland*, 406.

<sup>19</sup> Mayer, *The Constitutional Thought of Thomas Jefferson*, 190-191.

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ated powers of Article I, Section 8 of the Constitution. A national bank was not “essential” in that the transactions envisioned for the institution were already being carried out. Professor Mayer elaborates on Jefferson’s argument as follows:

Acknowledging that a bank could “give greater facility, or convenience, in the collection of taxes” and that bank bills “may be a more convenient vehicle than treasury orders” for the transfer of funds between the states and the treasury, he nevertheless denied that the bank was necessary. Pointing, for example, to the practice then followed in Philadelphia, where the existing bank had entered into arrangements with the treasury for the receipt and transfer of debts to the United States, Jefferson maintained that this single example disproves “that *necessity* which may justify the assumption of a non-enumerated power as a means for carrying into effect an enumerated one. The thing may be done, and has been done, and well done without this assumption; therefore it does not stand on that degree of *necessity* which can honestly justify it.” Moreover, “if such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is no one which ingenuity may not torture into a *convenience, in some way or other, to some one* of so long a list of enumerated powers.”<sup>20</sup>

In *McCulloch*, Marshall wrote that the Constitution was “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”<sup>21</sup> While Marshall believed that such adaptation could take place through interpretation, Jefferson did not. “Our peculiar security is in the possession of a written constitution,” Jefferson warned. “Let us not make it a blank paper by construction.”<sup>22</sup> Jefferson firmly believed that constitutional amendment, not loose construction, was the means by which the document should be adapted to the times. “When an instrument admits two constructions,” he wrote, “the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by construction which would make our powers boundless.”<sup>23</sup> Jefferson believed that when the Constitution was changed by any process other than amendment it ceased to be fundamental law. For the

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<sup>20</sup> *Ibid.*, 192 (emphasis in the original).

<sup>21</sup> *McCulloch v. Maryland*, 413.

<sup>22</sup> Quoted in Caleb Perry Patterson, “Thomas Jefferson and the Constitution,” *Minnesota Law Review*, Volume 29 (1944-1945), 273.

<sup>23</sup> Quoted in Caleb Perry Patterson, *The Constitutional Principles of Thomas Jefferson* (Austin: University of Texas Press, 1953), 54.

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Court to take on the duty of adaptation meant substituting its will for the sovereignty of the American people. Guided by vastly different principles, John Marshall had no difficulty justifying precisely such a function for the Court.

### *The Philosophical Divide*

G. Edward White, a professor of law at the University of Virginia, suggests that a central theme of Marshall's legal principles was the tacit surrender of sovereignty by the people to their national government. Marshall believed that, although the people were the ultimate sovereign, "in consenting to be governed they had chosen a particular form of governmental control, the republican form. That form, in Marshall's view, constrained the people as much as it allowed them self-government."<sup>24</sup> In this regard, Marshall's thinking paralleled that of Alexander Hamilton. In *Federalist* 15, Hamilton wrote: "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint." And in *Federalist* 6, Hamilton wrote: "Have we not already seen enough of the fallacy and extravagance of those idle theories which have amused us with promises of an exemption from the imperfections, the weaknesses, and the evils incident to society in every shape?"

*Marshall believed the people had tacitly surrendered sovereignty to the national government.*

Both Marshall and Hamilton were of the view that the excesses of the people were to be moderated by government. Implicit in this formulation, White argues, "was a presupposition, held by Marshall throughout his life, that there was a distinction between an enlightened elite and the masses at large; between men of 'character' and the common man."<sup>25</sup> Marshall's nationalism was rooted in his early experience in the state legislature in Virginia. This experience, he wrote, had "proved that everything was afloat, and that we had no safe anchorage ground." The experience of the states, Marshall concluded, gave "high value . . . to that article in the Constitution which imposes restrictions on states."<sup>26</sup>

In sharp contrast to Marshall's elitist orientation—with its emphasis on the primacy of the national government, and restraint of the excesses of democracy—Jefferson's philosophy was at once

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<sup>24</sup> G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford University Press, 1978), 20.

<sup>25</sup> *Ibid.* 15.

<sup>26</sup> Quoted in Mason, *The Supreme Court*, 103.

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populistic and highly individualistic. He held that the law of nature gave each individual sovereignty over his own rights and that contracts, compacts, constitutions, or laws abridging these rights had to be based on the individual's consent.<sup>27</sup> Hence, while Marshall believed that republican government could succeed only if directed by a governing class to temper the extremist tendencies of the masses, Jefferson countered with the claim that republicanism necessitated a popular, democratic base. "Purely and simply," Jefferson wrote, a republic means "a government by its citizens in mass, acting directly and personally, according to rules established by the majority; . . . every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens."<sup>28</sup>

The philosophical tension between Marshall's elitist orientation and Jefferson's faith in popular rule finds expression in their divergent reactions to Shays' Rebellion. In 1787, Daniel Shays, who had served as a captain in the Massachusetts Line during the Revolutionary War, led a force of 1,100 debt-burdened farmers, armed with pitchforks, to forcibly prevent the courts from proceeding with foreclosure actions on their property. A more foreboding aspect of the rebellion is that hundreds of Shays' followers marched on an armory with the intention of overrunning it and stealing weapons and ammunition. Although the state militia successfully disbanded the mob, Shays' Rebellion became a symbol to many Americans of the potential for mob rule and the need for a strong national government to quell potential rebellions of a broader scale. George Washington, upon hearing of the rebellion, said that he was "mortified." Alexander Hamilton was prompted to ask "whether societies of men are really capable or not of establishing good government from reflection and choice."<sup>29</sup> Marshall joined Washington and Hamilton in expressing disdain for Shays' Rebellion, writing: "These violent, I fear bloody dissensions in a state I had thought inferior in wisdom and virtue to none in the union . . . cast a deep shade over that bright prospect which the revolution in America and the establishment of our free governments had opened . . . I fear that those have truth on their side who say

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<sup>27</sup> Patterson, *The Constitutional Philosophy of Thomas Jefferson*, 54.

<sup>28</sup> Quoted in Beitzinger, *A History of American Political Thought*, 274.

<sup>29</sup> John White, *The Early Party System*, 36.

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that man is incapable of governing himself.”<sup>30</sup>

Jefferson’s reaction to Shays’ Rebellion was markedly different. He viewed the rebellion not as a cause for alarm, but rather as a vindication of the people’s right to protest unpopular policies. In an incisive account of Jefferson’s reaction to the rebellion, David Mayer writes:

Although he considered the citizens’ resort to arms to be “acts absolutely unjustifiable,” he benignly concluded that such turbulence was the price that America paid for its republicanism . . . .

. . . To James Madison he expressed hope that the governmental authorities in America would not act too harshly in putting down such turbulence because it “prevents the degeneracy of government, and nourishes a general attention to the public affairs.” Thus, he concluded, “a little rebellion now and then is a good thing, . . . a medicine necessary for the sound health of government.”<sup>31</sup>

In a letter written to Edward Carrington, Jefferson expressed a similar desire for tolerance. “The people are the only censors of their governors; and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of public liberty.”<sup>32</sup> The presence of organized protest against government policies perceived as egregious was of less concern to Jefferson than passive acquiescence in such policies. If the people were to become “inattentive to public affairs,” Jefferson wrote, “you and I, and Congress, and Assemblies, judges and governors shall become wolves.”<sup>33</sup> Jefferson believed profoundly that “Free government is founded in jealousy, and not in confidence; it is jealousy, and not confidence which prescribes limited constitutions, to bind those whom we are obliged to trust with power.”<sup>34</sup>

Whereas Marshall generally subscribed to the view articulated by Hamilton in *Federalist* 71 that the governing elite would serve as the true guardians of the public interest when “the interests of the people are at variance with their inclinations,” Jefferson shared the view that Madison outlined in *Federalist* 10 that “enlightened statesmen will not always be at the helm.” He also agreed with Madison’s admonition at the constitutional convention that “all men having power ought to be distrusted to a certain degree.”

*Marshall agreed with Hamilton that the governing elite would protect the public interest.*

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<sup>30</sup> Quoted in Smith, *John Marshall*, 110.

<sup>31</sup> Mayer, *The Constitutional Thought of Thomas Jefferson*, 102.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* 3.

<sup>34</sup> *Ibid.*, 129.

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Jefferson believed that the people, themselves, are "the only honest depositories of the public rights and should . . . be introduced into administration of them in every function to which they are sufficient."<sup>35</sup> He called for a "wise and frugal" national government in which a "few plain duties" would be intrusted to a few servants of the people. He feared that the concentration of too much power in the national government would destroy liberty itself. To prevent centralized power, Jefferson became one of history's strongest proponents of federalism and decentralization. Jefferson elaborated on this theme in a letter to Joseph Cabell written in 1816, eight years after he had served as president:

The way to have good and safe government, is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to. Let the national government be entrusted with the defence of the nation, and its foreign and federal relations; the State governments with the civil rights, laws, police and administration of what concerns the State generally; the counties with the local concerns of the counties; and each ward direct the interests within itself. It is by dividing and subdividing these republics from the great national one down through all its subordinations, until it ends in the administration of every man's farm and affairs by himself; by placing under every one what his own eye may superintend, that all will be done for the best.<sup>36</sup>

The Jeffersonian philosophy of government had important implications for public policy. Republicans were generally opposed to standing armies because they believed that a militia, composed of the body of the people, served as a more proper and natural defense for a free state.<sup>37</sup> Except in times of invasion, a standing army would be detrimental to the public welfare.

Republicans opposed naval armament on the grounds that it would only serve to increase the potential for abuse of executive authority. (Ironically, it was Jefferson's own use of the Navy to enforce his infamous embargo that appeared to justify the Republican concerns along these lines.) Republicans opposed an increase in the national debt on the grounds that revenue should be raised only through taxes, not through borrowing, and taxation itself could erode individual freedom unless used very sparingly. Jefferson's close friend, John Taylor of Caroline, perhaps best articulated the Jeffersonian philosophy of government in his observation

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<sup>35</sup> Beitzinger, *A History of American Political Thought*, 274.

<sup>36</sup> Quoted in Mayer, *The Constitutional Thought of Thomas Jefferson*, 316-317.

<sup>37</sup> Sisson, *The American Revolution of 1800*, 299-300.

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that “that government which governs best governs least.”

The Federalist philosophy shared by Hamilton and Marshall left no room for the restrictive view of government held by the Republicans. The Federalist program called for funding the state and national Revolutionary war debts, instituting a “society with funds” that would make loans and grants available to “agriculture and the arts,” developing a reliable revenue system with sound fiscal management, creating a small but effective army and navy, sponsoring internal improvements in such areas as transportation and communications, and expanding the federal judiciary.<sup>38</sup>

Given the important philosophical and political differences between Jefferson and Marshall, it is no surprise that antagonism began to develop. The election of 1800 created a public forum for confrontation over long-standing differences between the two men. Republican control of the legislature and executive set the stage for a protracted struggle to rein in the Federalist-dominated judiciary. At stake was the very scope and breadth of judicial authority as well as the authority of the infant national government.

### *Confrontation Over the Judiciary*

While the seeds of division over constitutional construction were planted early in Washington’s administration, particularly in the debate over the national bank, partisan conflict over the role of the judiciary itself did not become apparent until the lame-duck Federalist Congress passed the Judiciary Act of 1801 less than a month before Jefferson took office as president. The Judiciary Act of 1801 had real merits. In particular, it relieved the Justices serving on the Supreme Court of the hardship of circuit court duty. Not only was circuit riding a time-consuming burden, it frequently placed members of the high court in the embarrassing position of having to decide on appeal cases which they themselves and their fellow Justices had decided in the circuit courts. The constructive aims of the Judiciary Act were, however, offset to a considerable degree by its partisan overtones.

*Merits of the  
Judiciary Act  
of 1801 offset  
by its partisan  
overtones.*

Republicans were concerned with President Adams’s insistence on filling all of the new judicial seats created under authority of the Judiciary Act with Federalists. The act was also marred by an

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<sup>38</sup> This enumeration of Federalist policies is found in Roger H. Brown’s *The Republic in Peril 1812* (New York: W. W. Norton & Company, Inc., 1971), 158. See also Sisson, *The American Revolution of 1800*, 312.

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“anti-Republican needle” which attempted to deprive Jefferson of the ability to nominate and appoint a new member to the Supreme Court by requiring that, when the next vacancy on the Court occurred, the number of Justices was to be permanently reduced from six to five.<sup>39</sup> The goal of making the membership of the Supreme Court an odd number in order to avoid tie votes may have been commendable, but lowering the membership to five instead of raising it to seven did not sit well with the Republicans.

Shortly after Jefferson’s election in 1800, Senator William Giles of Virginia urged “the absolute repeal of the whole judiciary system.” The revolution of 1800, Giles argued, “is incomplete so long as that strong fortress is in possession of the enemy.”<sup>40</sup> Jefferson, apparently less frantic than Giles, had planned to wait until the next session of Congress to ask for repeal of the Judiciary Act of 1801. In the meantime, he replaced Federalist prosecutors and marshals with Republican appointees. These actions alone, however, were not sufficient to moderate Federalist domination of the judiciary. Thus, on January 6, 1802, Senator John Breckinridge, at Jefferson’s prompting, moved to repeal the 1801 Judiciary Act. The Repeal Act was successfully passed by the Republican Congress.

The conflict between Federalists and Republicans during the repeal controversy was symptomatic of the partisan struggle that continued to be forged over the judiciary for years to come. Some Republicans wanted to use repeal of the Judiciary Act of 1801 as a pretext for a constitutional amendment to curb the power of the judiciary and to keep it directly under congressional control. Some of the High Federalists, on the other hand, sought to deepen the conflict by encouraging the justices of the Supreme Court to refuse to perform the duty of circuit judges which had been reimposed by the repeal act of 1802. Justice Samuel Chase supported this plan on the premise that the Repeal act of 1802 was unconstitutional. Chief Justice Marshall was more circumspect and less sympathetic toward efforts to defy Congress. He noted that, since the justices had acquiesced in circuit court duties under the Judiciary Act of 1789, he felt himself bound by the legislature’s decision to reinstate this duty. Some members of the Federalist party were infuri-

*Marshall deferred to Congress’s repeal of the 1801 Judiciary Act.*

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<sup>39</sup> Marshall Smelser, *The Democratic Republic 1801-1815* (New York: Harper, 1968), 65.

<sup>40</sup> Albert J. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin Co., 1929), Volume III, 22.

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ated with Marshall's acquiescence,<sup>41</sup> but his decision reflected his long-standing impulse toward moderation and accommodation.

Marshall had gained favor with Republican moderates twice before in his career. In 1798 he was openly critical of the Alien and Sedition Acts, which had been passed by the Federalist Congress to stifle Republican criticism of President Adams, saying that the legislation was "calculated to create unnecessary discontents and jealousies at a time when our very existence as a nation may depend on our union."<sup>42</sup> In January 1800, Marshall voted to repeal the Sedition Act, which carried the House by a vote of 50-48, much to the chagrin of his fellow Federalists. Indeed, it was the Federalists, not the Republicans, who "pressed Adams for a full week to withdraw Marshall's name" from consideration for the Chief Justice-ship.<sup>43</sup> Marshall also helped Adams steer the nation away from war with France during the summer of 1798, saying to a hawkish committee of New Jersey militia that "all honorable means of avoiding war should be essayed before the sword be appealed to."<sup>44</sup> Despite Marshall's earlier restraint, partisan conflict over the scope of judicial authority became unavoidable with the Court's landmark 1803 decision in *Marbury v. Madison*.

### *Marbury v. Madison*

On March 2, 1801, two days before leaving office, President John Adams nominated forty-two individuals for justice of the peace commissions. The Federalist Senate confirmed all of the nominees the next day. With only one day remaining before Jefferson was sworn in as the new president, the Federalists were not able to deliver these relatively minor commissions. Ironically, it was John Marshall, himself, "who had been remiss" in seeing to it that the seals had been affixed to the commissions and that the documents were sent out.<sup>45</sup> Jefferson, in a gesture of respect, asked Marshall to serve as Acting Secretary of State until Madison arrived in Washington. Marshall agreed to hold the position for this short interim period since the Supreme Court was not in session. Per-

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<sup>41</sup> Historian Richard Ellis argues that moderates in both parties tempered the extremist views of their colleagues in *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: W. W. Norton & Co., Inc., 1974), 49.

<sup>42</sup> Smith, *John Marshall*, 6.

<sup>43</sup> *Ibid.*, 15.

<sup>44</sup> *Ibid.*, 236.

<sup>45</sup> *Ibid.*, 316.

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haps because he was already thinking about his new responsibilities as Chief Justice, Marshall did not get around to attaching the seals and delivering the commissions for the justice of the peace positions. Consequently, when Jefferson took office, he found the commissions “lying on a table in the State Department.”<sup>46</sup> Having promised a frugal government, Jefferson reduced the number of appointments by twelve and granted recess appointments to thirty persons, “including twenty-five of those originally named by Adams, plus five of his own choosing.”<sup>47</sup>

William Marbury, one of the seventeen individuals nominated by Adams who did not receive his commission, had his attorney file suit requesting a writ of *mandamus* compelling the new Secretary of State, James Madison, to give Marbury his undelivered commission. The case of *Marbury v. Madison* had all the makings of an insignificant decision. As Smith writes, “there is absolutely no evidence that the Chief Justice sought to provoke a confrontation with Jefferson and his administration.”<sup>48</sup> Of more concern to Republicans was the fact that Adams had made last-minute appointments of leading Federalists to sixteen judgeships on the newly created circuit courts. These positions were much more significant than Marbury’s undelivered justice of the peace commission, or so it seemed. Yet *Marbury v. Madison* would take on greater significance than anyone had imagined in 1801 when the suit was filed. For one thing, “unlike virtually all cases to come before the Supreme Court,” *Marbury* was argued in front of the justices sitting as a trial court of original jurisdiction. “Marbury’s request for a writ of *mandamus* was not an appeal from a lower court holding but an original action brought before the Supreme Court under section 13 of the Judiciary Act of 1789.”<sup>49</sup>

If the Court issued a writ of *mandamus* requiring the administration to deliver Marbury’s commission, “it was abundantly clear that Madison would ignore it.”<sup>50</sup> On the other hand, “if the Court did not issue the writ to which Marbury was entitled, and which was unmistakably provided for by statute, the judiciary would be deemed a paper tiger.”<sup>51</sup>

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<sup>46</sup> *Ibid.*, 300.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 301.

<sup>49</sup> *Ibid.*, 315.

<sup>50</sup> *Ibid.*, 318.

<sup>51</sup> *Ibid.*

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The provision of the Judiciary Act of 1789 giving the Supreme Court authority to issue writs of *mandamus* was crystal clear. What was not clear to Chief Justice Marshall was whether this part of the 1789 statute was constitutional. Under the 1789 law, the Court was sitting as a trial court of original jurisdiction. But the real question, as Marshall saw it, was this: Could Congress, through the 1789 law, expand the original jurisdiction of the Supreme Court specifically enumerated in Article III of the Constitution? This was the central question that Marshall focused on in *Marbury v. Madison*. Article III is precise in stating the Court's purview: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to Law and Fact."<sup>52</sup> The enumeration of original jurisdiction in the Constitution was complete. Marshall thus ruled that Congress did not have the authority to expand the original jurisdiction of the Supreme Court. Hence, the provision of the Judiciary Act of 1789 expanding the jurisdiction of the Court was "repugnant to the Constitution" and, therefore, "void." Since the law granting the Court authority to issue writs of *mandamus* was void, the Court could not issue a writ of *mandamus* and the case of *Marbury v. Madison* was dismissed.<sup>53</sup> As Marshall put it: "an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently considered by this court, as one of the fundamental principles of our society."<sup>54</sup> As Smith notes, Marshall had turned a "no-win situation into a massive victory. The authority of the Supreme Court to declare an act of Congress unconstitutional was now the law of the land."<sup>55</sup>

Like Smith, political historian Alpheus Mason praises Marshall for his tact and ingenuity in *Marbury*. Mason notes, for example, that Marshall's narrow construction of Article III of the Constitution actually had the effect of expanding rather than contracting the Supreme Court's power. By declaring congressional extension of the Court's original jurisdiction unconstitutional, Marshall wisely protected the Supreme Court from being embarrassed by

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<sup>52</sup> Constitution of the United States, Art. III, Sec. 2.

<sup>53</sup> Smith, *John Marshall*, 322.

<sup>54</sup> *Ibid.*.

<sup>55</sup> *Ibid.*, 323.

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the likely refusal of the president to honor the Court's decision if it had ordered the delivery of Marbury's commission. In an advisory opinion, Marshall proceeded to reprimand Jefferson by stating what the Court would have done, given the proper jurisdiction. In doing so Marshall won both the battle and the war. "He went out of his way to assert judicial control over the President, but avoided a head-on clash in which the Chief Justice was bound to come off second best, by withholding jurisdiction as not within the Court's competence."<sup>56</sup>

Jefferson, himself, recognized the significance of Marshall's feat all too well. In obvious displeasure with the Court's decision, he wrote:

The Court determined at once, that being an original process, they had no cognizance of it; and therefore the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction in the case, to wit: that they should command delivery . . . . Besides the impropriety of this gratuitous interference, could anything exceed the perversion of law?

Yet this case of Marbury and Madison is continually cited by bench and bar, as if it were settled law, without any animadversion on its being an obiter dissertation of the Chief Justice.<sup>57</sup>

*In Marbury, Marshall assumed for the Court the role of final interpreter of the Constitution.*

Historian Donald O. Dewey is inclined to side with Jefferson on the matter. Dewey asserts that the decision handed down by Marshall blatantly violated the elementary rule that courts should seek a constitutional interpretation of legislation rather than an unconstitutional reading. "There was no need other than politics," Dewey writes, "for judicial review to have occurred in this case. Worse yet, Marshall's argument assumes rather than demonstrates, the legitimacy of the Supreme Court's role as final interpreter of the Constitution."<sup>58</sup>

Jefferson's support for an independent judiciary had always been somewhat qualified in that he never conceded that the judicial branch had ultimate sovereignty over the other two branches of government, even in a capacity as the guardian of fundamental law. "My construction of the Constitution," he wrote, "is . . . that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitu-

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<sup>56</sup> Mason, *The Supreme Court*, 111.

<sup>57</sup> Quoted in *Ibid.*, 83.

<sup>58</sup> Donald O. Dewey, *Marshall Versus Jefferson: The Political Background of Marbury Vs. Madison* (New York: Alfred Knopf, 1970), 185.

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tion in the cases submitted to its action; and especially, where it is to act ultimately and without appeal.”<sup>59</sup>

Jefferson reiterated his belief in departmental sovereignty in a letter to Abigail Adams written a year and a half after the *Marbury* decision. In addressing the right of the judiciary to decide the validity of the Sedition Act, he declared that

nothing in the Constitution has given them a right to decide for the executive, more than to the executive to decide for them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. . . . The opinion which gives to the 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 and executive also, in their spheres, would make the judiciary a despotic branch.<sup>60</sup>

*Jefferson believed each branch to decide the meaning of the Constitution in its own sphere of action.*

Jefferson’s early approval of a legal check in the hands of the judiciary included the qualifier that the Court “merits great confidence” only “if rendered independent, and kept strictly to their department.”<sup>61</sup> In Jefferson’s eyes, the Marshall Court had failed to meet this test. “In practice, judicial independence, once considered necessary and desirable had proved to be ‘quite dangerous.’”<sup>62</sup> The Supreme Court, which Jefferson had once viewed as an indispensable check, would in time appear as a “subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric.”<sup>63</sup>

### ***Confrontation Over Judicial Authority***

The *Marbury v. Madison* episode played an important role in precipitating a major challenge to the independence of the federal judiciary by rendering federal judges vulnerable to impeachment. A Republican newspaper in Boston warned that the judges must be impeached if they dared to issue a writ of *mandamus* to the Secretary of State in the *Marbury* case.<sup>64</sup> The Court’s decision not to issue a writ of *mandamus* apparently did not thwart the mounting drive

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<sup>59</sup> Patterson, “Thomas Jefferson and the Constitution,” 278.

<sup>60</sup> Quoted in Dewey, *Marshall Versus Jefferson*, 142.

<sup>61</sup> Mason, *The Supreme Court*, 104.

<sup>62</sup> *Ibid.*, 105.

<sup>63</sup> *Ibid.*

<sup>64</sup> Dewey, *Marshall Versus Jefferson*, 145.

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for impeachment.

Even before *Marbury*, Jefferson hinted broadly that Congress should impeach District Judge John Pickering of New Hampshire. Ironically, while Jefferson's philosophy of judicial independence led him to refrain from writing members of the judiciary regarding decisions made during his presidency, he felt no compunction in forwarding complaints against Pickering to the House of Representatives with the hope of rectifying through the impeachment process what he perceived as intolerable partisanship in the courts. The House obliged Jefferson by impeaching Pickering, and the Senate voted to remove the judge from office.

*Jefferson  
retreated from  
his earlier  
position in  
favor of  
judicial  
independence.*

Frustrated with the excessive length of Pickering's impeachment, Jefferson appeared to compromise his earlier principles regarding judicial independence, suggesting that "the Constitution ought to be altered so that the president should be authorized to remove a judge from office, on the address of the two houses."<sup>65</sup> The immediate consequence of the removal of Judge Pickering from office was to embolden Jefferson to encourage members of the House to move on to bigger game. Within an hour after John Pickering was convicted in the Senate, the House voted to impeach Justice Samuel Chase.

The outrage that Republicans had against Justice Chase extended in part from partisan instructions that Chase had delivered to a Baltimore grand jury in which he singled out the Republican party for attack. In his tirade against the Republicans, Chase warned that universal suffrage would "certainly and rapidly destroy all protection to property and all security to personal liberty and our republican Constitution will sink into a mobocracy."<sup>66</sup> Despite Chase's partisanship, his impeachment was viewed with disdain by those who saw it as a clear example of Republican tampering with the independence of the judiciary. The Senate failed on eight separate votes to convict Chase. Notwithstanding his acquittal, the impeachment trial apparently brought about a marked change in the Justice's behavior. Chase never again actively participated in politics, and he began to display some of the detachment for which Marshall had long been noted.

The Chief Justice remained in the background throughout the

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<sup>65</sup> Beveridge, *The Life of John Marshall*, 166-167.

<sup>66</sup> Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard University Press, 1974), 226.

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impeachments of Pickering and Chase. Although Marshall found the charges against Chase alarming to “the friends of a pure and independent judiciary,” he remained restrained and dispassionate in his testimony on Chase’s behalf at the impeachment trial. Clearly, Marshall did not wish to inflame members of Congress and exacerbate the tensions of the moment. His moderation throughout the impeachment proceedings against Chase helped steer the Court away from a direct confrontation with Congress over the issue of judicial review. Marshall’s restraint may well have served to sway moderate Republicans who, despite their contempt for Chase, were reluctant to damage the independence of the judiciary.

The *Marbury* decision and the impeachment crisis served to deepen the growing rift between Marshall and Jefferson. Holding sharply different views of the scope and authority of the national government, it is no surprise that both men were apprehensive about the consequences of each other’s acts. Marshall was concerned that Jefferson’s attacks on the authority of the Supreme Court would damage the independence of the judiciary. In disdain for Jefferson, he wrote:

For Mr. Jefferson’s opinion as respects this department, it is not difficult to assign the cause. He is among the most ambitious, and I suspect among the most unforgiving of men. His great power is over the mass of people, and this power is chiefly acquired by professions of democracy. Every check on the wild impulse of the moment is a check on his own power, and he is unfriendly to the source from which it flows. He looks of course with ill will at an independent judiciary.<sup>67</sup>

*Marshall:  
“Every check  
on the wild  
impulse of the  
moment is a  
check on  
[Jefferson’s]  
power.”*

Marshall’s observation that Jefferson’s “great power is over the mass of people,” accurately encapsulates what Claes Ryn has described as Jefferson’s Rousseauian impatience with representative institutions as set up by the Constitution. “Although by no means blind to the shortcomings of the common man,” Ryn notes, Jefferson’s “admitted inclination is to entrust the public interest to the mass of the people or a majority thereof rather than to popular representatives.”<sup>68</sup> Jefferson’s majoritarianism, Ryn writes, “is most clearly spelled out in his call for ‘absolute acquiescence in the deci-

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<sup>67</sup> Quoted in Mason, *The Supreme Court*, 113.

<sup>68</sup> Claes G. Ryn, *Democracy and the Ethical Life: A Philosophy of Politics and Community*, 2nd expanded ed. (Washington, D.C.: Catholic University of America Press, 1990), 184.

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Jefferson's majoritarianism helps explain his dislike of Marshall's judicial leadership.

sions of the majority—the vital principle of republics.”<sup>69</sup> In Ryn’s view, Jefferson’s philosophy leaves no room for representatives to act independently to check and refine popular opinion.

Jefferson’s disdain for a Burkean notion of representation (or for Madison’s emphasis on representatives’ refining and enlarging the public’s views) explains his dislike of Marshall’s leadership on the Court as a potential check on populism—as, for example, in striking down the state of Maryland’s tax on the Baltimore branch of the National Bank. Jefferson believed that under Marshall’s leadership the Court was using judicial interpretation to centralize power in the national government. The Supreme Court, Jefferson would write, was working “like gravity by night and day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the states, and the government of all be consolidated into one.”<sup>70</sup>

Jefferson’s mistrust of Marshall “was exacerbated by their mutual preference for a more subtle and indirect style that probably had its origins in the Virginia code of politeness.”<sup>71</sup> Jefferson biographer Joseph J. Ellis suggests that the animosity between Jefferson and Marshall was fueled not only by different philosophies, but by different methods of reasoning and disputation. As Ellis writes:

Marshall’s massive probity was powered by a mind that worked in ways fundamentally different from Jefferson’s, which tended to filter and fit experience through primal categories of right and wrong. Marshall worked in more shaded hues and colors in the middle of the spectrum and, much like Madison, was more intellectually agile in a lawyer-like way in making distinctions that broke down the Jeffersonian dichotomies into smaller components. He was a genius at what Jefferson later called ‘twistifications’—that is, intricate arguments that seemed to be headed in the proper Jeffersonian direction but then somehow doubled back and landed decisively on the other side. Much like Hamilton’s dexterity with account books and complex fiscal figures, Marshall’s reasoning usually appeared to Jefferson like the diabolical maneuvers of an evil wizard. He was also extremely adroit at doing the greatest damage to one’s cause

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<sup>69</sup> Ibid. Ryn’s quote of Jefferson is taken from Adrienne Koch and William Peden, editors, *The Life and Selected Writings of Thomas Jefferson* (New York: Modern Library, 1944).

<sup>70</sup> Quoted in Dewey, *Marshall Versus Jefferson*, 171.

<sup>71</sup> Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Alfred A. Knopf, 1997), 175.

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by apparently attempting to defend it.<sup>72</sup>

Jefferson resented Marshall's intellectual agility when he was up against it. On a more personal level, the flaws that he perceived in Marshall tended to be characteristics that he shared with Marshall. He viewed Marshall as a man of "lax lounging manners . . . and a profound hypocrisy."<sup>73</sup> Yet there was more than a hint of laxness in Jefferson's own informality as president, and there were certainly grounds for charges of hypocrisy in Jefferson's own leadership. With regard to Marshall's "lax lounging manners" there can be no doubt that Marshall enjoyed the company of his fellow Virginians and was a popular fellow at the taverns, a habit that served him well in his successful campaign for Congress in a Republican district. The fact that Marshall grew up on the frontier, in humble surroundings, with fourteen siblings, and later reached the rank of captain in the Virginia Line during the Revolutionary War, explains in part his austere and unpretentious nature. Marshall himself recognized that his appearance did not always project an image of stature and accomplishment. As Chief Justice, he was fond of telling the story of his journey from Richmond to Philadelphia to rejoin the army in August of 1780. "As was his habit, he traveled by foot, walking thirty to thirty-five miles a day." When he arrived in Philadelphia after two weeks on the road, "he looked so disreputable that the first hotel he stopped at refused to take him in . . . because of his shabby clothing, long beard, and unkempt hair, he had been turned away by the innkeeper, despite the fact that he was a captain in the Virginia Line and a member of the bar."<sup>74</sup>

Jefferson, however, was not alone in mistaking Marshall's easy-going style and simplicity of manners for lack of industry and stature. As Justice Story observed: "The first impression of a stranger, upon introduction to him, was generally that of disappointment. It seemed hardly credible that such simplicity should be the accompaniment of such acknowledged greatness . . . . You would never suspect . . . that he was a great man; far less that he was the Chief Justice of the United States."<sup>75</sup>

Marshall possessed a style perhaps not unlike that of the unassuming, clumsy, poorly dressed but persistent and very sharp

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<sup>72</sup> *Ibid.*, 175-176.

<sup>73</sup> *Ibid.*, 175.

<sup>74</sup> Smith, *John Marshall*, 82.

<sup>75</sup> *Ibid.*, 4.

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1970s television detective “Columbo” played by actor Peter Falk. As Justice Story put it, Marshall’s manners “are plain yet dignified; and an unaffected modesty diffuses itself through all his actions. His dress is very simple . . . he possesses great subtlety of mind.” Marshall’s “genius,” Story continued, is “vigorous and powerful, less rapid than discriminating, and less vivid than uniform in its light. He examines the intricacies of a subject with calm and persevering circumspection, and unravels the mysteries with irresistible acuteness.”<sup>76</sup>

Beneath the easy-going exterior, Marshall was a human dynamo. He usually began his day before sunrise with a vigorous walk of several miles. John Quincy Adams, during his tenure as President of the United States, frequently accompanied Marshall on these power walks. By noon, Marshall had frequently put in a full day’s work. And by the end of his tenure as Chief Justice, he had authored fully 519 of the 1006 opinions delivered by the Court. The perception that Marshall was somehow indolent clearly does not square with reality.

Marshall was living proof that appearances do not always convey reality. But Jefferson was hardly in a position to disparage Marshall’s demeanor. After all, Jefferson was very much like his second cousin in his air of informality. Indeed, as historian Forrest McDonald notes, Jefferson seems to have consciously worked at projecting the type of informality and unassuming leadership that came naturally to Marshall. Jefferson, McDonald asserts, “ostentatiously disdained ostentation.”<sup>77</sup> He rejected out of hand the ceremonial and symbolic functions of the presidency that George Washington had labored carefully to build. By de-pomping the presidency, Jefferson clearly aspired to signal that a populist democrat had been sent to Washington by the people to replace the monarchically aloof and elite Federalists.

Washington had fused with great success the prime ministerial functions of leadership in his role as chief executive with the dignified ceremonial role of head of state. Jefferson, on the other hand, “shunned display, protocol, and pomp”; he gave no public balls, and held no levees. Jefferson also abandoned the practice that Washington and Adams had followed of delivering the State

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<sup>76</sup> Ibid., 291.

<sup>77</sup> Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence: University Press of Kansas, 1994), 252.

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of the Union address in person before a joint session of Congress. Jefferson believed that this stately act looked too monarchical, and therefore distasteful, in a republic. He disassociated himself from Washington's precedent of making a grand tour of the country, saying that he was "not reconciled to the idea of a chief magistrate parading himself through the several states as an object of public gaze."<sup>78</sup> As president, Jefferson "never held court for government officials or . . . for foreign ministers." Rather, he held small dinner parties, rarely with more than twelve guests at a time, with an "atmosphere of studied casualness, of the country squire at home to friends." Unwigged and casually dressed, "Jefferson charmed his guests with easy conversation . . . stripping from everyone pretense and the trappings of status."<sup>79</sup> Hence, Jefferson in many ways mirrored the very casualness of style that he found so offensive in Marshall.

### *Jefferson: Republican Turned Federalist?*

Jefferson's criticism of Marshall's demeanor suggests that objective introspection was not one of Jefferson's strengths. His charge that Marshall was guilty of hypocrisy draws attention to Jefferson's own inconsistencies. The Louisiana Purchase of 1803 and the Embargo Act of 1807 provide the appearance, at least, of inconsistency in adhering to Jefferson's own Republican principles. The Louisiana Purchase, unquestionably one of the greatest accomplishments of Jefferson's presidency, was also the least consistent with the Republican principle of strict construction of the Constitution. In John Quincy Adams's view, the Louisiana Purchase was "greater in itself and more comprehensive in its consequences than all the assumptions of implied powers in the years of the Washington and Adams administrations."<sup>80</sup>

Jefferson was keenly aware of the dilemma posed by the purchase of the Louisiana territory. He appreciated the fact that the purchase would more than double the size of the United States at the bargain price of only \$15 million. Jefferson realized that the purchase also would cede French control of New Orleans, thus giving control of the entire Mississippi to the United States.

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid., 252-253.

<sup>80</sup> Stephen Skowronek, *The Politics Presidents Make* (Cambridge: Harvard University Press, 1993), 79.

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Yet, despite overwhelming support in and outside of Congress, Jefferson was plagued by doubts concerning the constitutional validity of acquiring and incorporating the territory.<sup>81</sup> In a letter to John Dickinson, Jefferson wrote: "Our confederation is certainly confined to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this."<sup>82</sup> In Jefferson's self-imposed intellectual struggle between constitutional scruples and pragmatic opportunity, expediency eventually won the day. Jefferson "acquiesced in the Louisiana Purchase without the constitutional amendment that he believed was necessary to sanction it."<sup>83</sup> Despite the apparent violation of the canon of strict construction, Skowronek notes that the sheer weight of the "substantive accomplishment" gave Jefferson "immunity from the inevitable charges of hypocrisy."<sup>84</sup>

*Jefferson's adherence to strict constructionist principles inconsistent.*

Immunity from charges of hypocrisy did not extend, however, to Jefferson's infamous embargo of 1807. The embargo was passed by Congress at Jefferson's request as a response to renewed British aggression toward American merchant ships. The Embargo Act had been passed with the intention of pressuring Britain and France into recognizing American neutral rights, without resorting to war, by banning all foreign trade. Disappointed with the initial results of the act, Jefferson sought to strengthen the embargo by instructing collectors to detain all vessels that appeared to be carrying cargo to the United States ports with the intent of evading the Act. The presidential authority to take such action was challenged by a ship-owner in Charleston, South Carolina, who believed that his ship had been wrongfully detained by a collector. Ironically, Jefferson's embargo was rebuked not by John Marshall but by Supreme Court Justice William Johnson, a Republican who had been appointed to the Supreme Court by Jefferson himself.

Justice Johnson, sitting in circuit in South Carolina, granted a writ of *mandamus* holding that the President had no authority to direct the detention of the vessel in question. In his court opinion,

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<sup>81</sup> Mayer, *The Constitutional Thought of Thomas Jefferson*, 215.

<sup>82</sup> *Ibid.*, 247.

<sup>83</sup> *Ibid.*, 215.

<sup>84</sup> Skowronek, *The Politics Presidents Make*, 79.

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Johnson wrote: “the officers of our Government, from the highest to the lowest, are equally subjected to legal restraint.”<sup>85</sup> Jefferson, construing Johnson’s decision as a personal attack upon him, had Attorney General Caesar Rodney issue an opinion to the press challenging Johnson’s ruling. Justice Johnson employed the press himself in order to reply to the administration’s attacks. Johnson made it clear that the administration’s repudiation and overruling of a federal judge was not tolerable.

While Justice Johnson held that the executive’s actions in the enforcement of the embargo were without legal justification, a resolutely Federalist judge, John Davis of the United States District Court of Massachusetts, sustained the administration’s position in a separate court case. In *U. S. v. The William*, Judge Davis held that the power of Congress was plenary to the point of complete prohibition of foreign commerce and could be used as well for its destruction as for advancement, to accomplish other objects of national importance. In sustaining the administration’s position, Davis based his decision on an extremely broad reading of the commerce clause of the Constitution. Jefferson, before becoming president, had condemned such a construction as irreconcilable with civil liberty.<sup>86</sup>

Jefferson’s willingness to violate the canon of strict construction of the Constitution in order to perpetuate the embargo policy represented a clear departure from Republican principles.

The rationale for the enforcement of the embargo was distinctively Federalist in nature. Not only were the powers cited by proponents of the embargo implied; they also had the distinctively Federalist ring of expanding the authority of the federal government. Jefferson, the uncompromising foe of centralization, used the powers of Congress and the executive to exert more control over the lives of individuals than had hitherto been exercised by the national government.

### *Marshall Versus Jefferson: An Assessment of Their Legacies*

In 1792 Jefferson had looked to the judiciary as “the last means of correcting the errors of others, and whose decrees are, therefore, subject to no further revisal.”<sup>87</sup> Clearly, as time passed, Jefferson

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<sup>85</sup> Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge: Harvard University Press, 1963), 128.

<sup>86</sup> *Ibid.*, 134.

<sup>87</sup> Mason, *The Supreme Court*, 110.

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lost faith in his original aspirations for the judicial branch of the new government. Embittered by his distaste for the Court's support of an energetic national government, Jefferson embarked upon campaigns, both during and after his presidency, to curb the Court's growing authority.

*Marshall was keenly aware of the political limits of the Court's authority.*

John Marshall was less outwardly partisan than Jefferson, although his judicial decisions were certainly wed in important ways to Federalist principles. The Chief Justice was always keenly aware of the political limits of the Court's authority. His refusal to go along with Chase and other Federalists in encouraging the justices to refuse to perform circuit duty after repeal of the Judiciary Act of 1801 undoubtedly served to head off an even more dramatic confrontation with impeachment than that which ensued. The Chief Justice's carefully weighed testimony at Chase's impeachment trial avoided provocation of an already angry Republican Senate. Marshall's decision not to enforce *mandamus* in the *Marbury* case showed good political sense. His decision to exercise judicial review by delimiting the authority of the Court itself left the doctrine much less vulnerable to direct partisan attack.

Throughout his tenure as Chief Justice, Marshall steered the Court relentlessly but cautiously toward greater independence and authority. But Marshall's interests went beyond the immediate concern for the judiciary. Above all, he wanted to enhance national power and national sovereignty. The doctrines of judicial review and implied powers set forth in *Marbury* and *McCulloch* went far in achieving these goals. Marshall's opinions in these cases showed what Robert McCloskey has described as a deft balance between boldness and restraint.

While Marshall often enhanced the power of the judiciary through his own restraint, Jefferson, it seems, was at times saved by members of his own party from destroying the judicial independence that Marshall was intent on establishing. Jefferson's advocacy of the Chase impeachment was moderated within the Republican party by senators who refused to vote for Chase's removal from office for fear that the independence of the judiciary would be badly damaged. Jefferson's proposal for a term limit on members of the Supreme Court and his proposal to make judges easily removable by a simple majority vote in Congress were too extreme even for many of his fellow Republicans. James Madison, while agreeing with Jefferson that the Court had in some ways

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been a disappointment, warned that “the abuse of a trust does not disprove its existence.”<sup>88</sup> Madison consistently used his influence to temporize Jefferson’s emotional impulses.

The Jeffersonian attack on the judiciary did not succeed in significantly altering the authority of the Court that Marshall had labored carefully to build. John Marshall died in 1835, but his impact in shaping the American judiciary was already firmly established. As Robert McCloskey writes:

*Jeffersonian  
attack on  
the judiciary  
ultimately  
unsuccessful.*

The old jurisprudence had not been broken down . . . or even very greatly altered . . . the nation was not constitutionally fragmented, judicial power was not surrendered. In fact, the position of the Supreme Court as the final arbiter of constitutional questions had become . . . more secure than ever before. The concept of judicial sovereignty, which Marshall had . . . defended against so many challenges, was by 1840 an almost unquestioned premise of American government.<sup>89</sup>

### ***The Modern Court: Neither Federalist nor Republican***

Notwithstanding Marshall’s contribution to building the permanent stature of the Court in the American system of government, the debates between Marshall and Jefferson continue to resonate at various junctures in American history. During the 1950s and 1960s the Supreme Court’s activism engendered strong debates concerning the legitimate role of the Court as an instrument of social reform.

Proponents of an assertive judiciary viewed the Court under Chief Justice Earl Warren’s leadership as a model for the constructive use of judicial authority to bring about political and social change. Defenders of the Warren Court viewed the Marshall Court as a historical counterpart. Historian Alpheus Mason was among those who found clear parallels between Marshall and Warren. If we accept “a positive conception of judicial function,” Mason wrote, and take into account Warren’s “insight concerning the central purposes and potentialities of society and his capacity for their realization,” then Warren “ranks with John Marshall.” For both men, Mason continued, “judicial review, in the context of their times, was constructive. Neither considered the Court merely a mystically passive weigher of the law. For both the Court was

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<sup>88</sup> *Ibid.*, 109.

<sup>89</sup> *Ibid.*

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a participant, along with other agencies of government, in the practical process of realizing the goals set out in the Constitution's preamble."<sup>90</sup>

While Warren Court defenders are likely flattered by such analogies, the comparison may not be warranted. For, as University of Chicago law professor Philip Kurland writes: "We are living neither in times like those of the early days of the nation nor . . . in times like those of the late nineteenth and early twentieth centuries." The Marshall Court, Kurland notes, "was writing on a blank page. The restraints that the demands of precedents impose were non-existent. The form of government but recently adopted was a unique experiment: none like it had ever before been tried. . . . Certainly the prime constitutional issue of importance was the allocation of power between the states and the nation."<sup>91</sup>

*Comparisons  
of the activism  
of recent  
Courts with  
that of  
Marshall's  
overdrawn.*

The notion that the Warren Court, or any other modern Court, is simply continuing in the tradition of the Marshall Court is misleading. In scope and breadth, the modern Supreme Court has far exceeded the judicial restraint of the Court under Marshall's leadership. Whereas the Marshall Court invoked judicial review to overturn an act of Congress only *once* in the thirty-four years that Marshall served as Chief Justice, the Warren Court, in just sixteen years, overturned acts of Congress twenty-five times. And while the Marshall Court overruled three Supreme Court decisions in thirty-four years, the Warren Court overruled forty-five decisions in less than half that time. Even accounting for the substantially greater number of laws passed by Congress and the ever growing docket of Supreme Court cases that are reviewed each year, the sheer number of statutes and prior Court decisions rescinded by the Supreme Court in the Warren era dwarfs by any standard the Court's scope of action in the first half of the nineteenth century. Looking at the Warren, Burger, and Rehnquist Courts during the period between 1953 and the Court's 2000-2001 term, an astonishing eighty-four acts of Congress were overturned and 131 prior Supreme Court decisions were undone.<sup>92</sup> During this same period, 428 state legislative acts were overturned compared to just

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<sup>90</sup> Alpheus T. Mason, "Whence and Whither the Burger Court? Judicial Self-Restraint: A Beguiling Myth," *The Review of Politics*, Vol. 41 (January 1979), 33.

<sup>91</sup> Philip B. Kurland, *Politics, the Constitution, and the Warren Court* (Chicago: The University of Chicago Press, 1970), 10.

<sup>92</sup> This data can be found in David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: W. W. Norton, 2003), 30.

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eighteen during the thirty-four years of Marshall's tenure as Chief Justice.

Even John Marshall's landmark decision in *McCulloch v. Maryland* showed judicial restraint. The decision was confined, in large part, to explicating Congress's authority under the Constitution to create the Bank of the United States. There was no pretense in the case to suggest that the Court had authority to define the extent and limitations of the necessary and proper clause. As John Marshall, himself, stated in *McCulloch*:

*Even Marshall's McCulloch decision showed judicial restraint.*

Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution . . . it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power.<sup>93</sup>

Kurland suspects that those who applaud the judicial activism of the Warren Court era, if they had lived in the early years of the republic, would have been drawn more to Marshall's critics than to his defenders. In the evolution of participatory democracy, Jefferson's principles would have undoubtedly had a more luring appeal than Marshall's elitist philosophy. "For the words that have since become anathema to liberal thought, the words 'states rights,' were then shibboleths for democracy and popular control of government."<sup>94</sup>

The principle of "one person, one vote," enunciated by the Warren Court in the case of *Gray v. Sanders*,<sup>95</sup> comported much more closely with the Jeffersonian notion of political equality than with the Federalist distrust of the excesses of democracy that Marshall had embraced at least partially. It seems unlikely, however, that Jefferson would have countenanced the Supreme Court's telling the people of the state of Georgia how to run their political affairs and how to redistrict their electoral districts! Indeed, Justice Felix Frankfurter, a Democrat appointed by Franklin Roosevelt and an avid "New Dealer," was himself uncomfortable with the anti-Jeffersonian message of the Supreme Court in the apportionment

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<sup>93</sup> Smith, *John Marshall*, 444.

<sup>94</sup> Kurland, *Politics, the Constitution, and the Warren Court*, 11.

<sup>95</sup> *Gray v. Sanders*, 372 U.S. 368 (1963).

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cases. In the Warren Court's landmark apportionment decision, *Baker v. Carr*,<sup>96</sup> Frankfurter argued that the Supreme Court had no business involving itself in the political question of legislative apportionment. As Frankfurter wrote in his dissenting opinion:

To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omniscience to judges. The framers of the Constitution persistently rejected a proposal that embodied this assumption and Thomas Jefferson never entertained it.<sup>97</sup>

Frankfurter believed that the Court in *Baker v. Carr* was fostering a judicial solution to a political problem that was fundamentally legislative in character. Sixteen years prior to *Baker v. Carr*, the Court, in the case of *Colegrove v. Green*,<sup>98</sup> had concurred with Frankfurter's view that the issue of legislative apportionment was, in fact, a non-justiciable "political question." The Court acknowledged that "tradition had long entrusted questions of this nature to non-judicial processes, and that judicial processes were unsuited to their decision."<sup>99</sup> For one brief moment, at least, Jefferson's constitutional philosophy appears to have been vindicated.

Today, some federal judges appear to want to combine elements of both worlds—the judicial assertiveness of John Marshall in order to effectuate the democratic ideals of Thomas Jefferson. Such a synthesis undoubtedly would have troubled both Marshall and Jefferson. Even though Jefferson viewed the Marshall Court's decisions as extravagant in applying constitutional principles that expanded the power of the Court and the national government, there is no question that, when compared to the past sixty years of Supreme Court activism, the Marshall Court showed remarkable judicial restraint even in the context of its most path-setting precedents. It is difficult to imagine Jefferson, who viewed the Tenth Amendment as the cornerstone of the Constitution, not being dismayed with the near evisceration of the Tenth Amendment's meaning in modern cases such as *U.S. Term Limits, Inc., v. Thornton* (1995) in which the Court ruled that states cannot impose term limits on members of Congress since these would constitute

Recent  
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ideals of  
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<sup>96</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>97</sup> *Ibid.*

<sup>98</sup> *Colegrove v. Green*, 328 U.S. 549 (1946).

<sup>99</sup> *Ibid.*

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“qualifications” stricter than those specified in the Constitution.<sup>100</sup> In *Thornton* the Court concluded that “the right to choose representatives belongs not to the States, but to the people.” Clarence Thomas, in a forceful dissent, countered that the Constitution’s authority depends on “the consent of the people of each individual State, not on the consent of the undifferentiated people of the Nation as a whole.” The Court’s attempt in *Thornton* to nationalize congressional elections, turning Americans into one homogenized mass, runs counter not only to Jefferson’s notion of federalism, but to John Marshall’s as well. Clarence Thomas noted this discrepancy in his dissent by quoting directly from John Marshall’s opinion in *McCulloch v. Maryland*. In that opinion, Marshall wrote: “No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.”<sup>101</sup> Thomas’s citation of Marshall’s language in the *McCulloch* case draws attention to the likelihood that the modern pretensions of judicial authority by the Supreme Court may well have concerned Marshall as much as they once concerned Jefferson. Indeed, the lines of division that separated Marshall and Jefferson so profoundly two centuries ago have become blurred by the hyperactivity of what Hamilton once described as the “least dangerous branch.”

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<sup>100</sup> *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995).

<sup>101</sup> Clarence Thomas, quoting John Marshall in *Thornton*, *Ibid.*