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Foreword

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SYMPOSIUM

FEDERALISM: THE BATTLE RECOMMENCES

Celebrating the 200th Anniversary of Chief John Marshall's Ascendancy to the U.S. Supreme Court

FOREWORD

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Tensions between the states and the federal government, disagreement over the degree to which the Supreme Court can restrict the ability of Congress to legislate and citizens to sue – these concerns are as vivid today as in John Marshall's time. On this bicentennial of our prime Chief Justice's accession, the legal and political issues he and the nation faced are with us once again—plus a change.

St. John's Law School is proud to host this homage to John Marshall on his two hundredth anniversary as Chief Justice, and to enable four eminent legal scholars to discuss the uncanny reprise of the very issues he wrestled with, and wrote about so eloquently. Many tend to see Marshall as a noble but vague figure on a pedestal, author of the prodigious series of decisions

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establishing judicial review and delineating Congressional power. In truth, as his two great biographers Charles Hobson and Jean Edward Smith portray him, he was very much a person: a Virginian Renaissance man, soldier, lawyer, state legislator, congressman, diplomat and finally jurist. He served with bravery and distinction under Washington at Brandywine and Valley Forge. He studied law at the foot of George Wythe and litigated many salient cases before representing the Republic in Paris, holding his own in the XYZ Affair against the devious Talleyrand. His devotion to his wife, Polly, was legendary.

Marshall's appointment as Chief Justice has been aptly described: "He hit the Constitution much as the Lord hit the chaos, at a time when everything needed creating."[1] And in truth his background, experience and intellect highly qualified him, and history bears out the greatness of his opinions – remarkably, nearly all for a unanimous Court—sculpturing judicial review in *Marbury v. Madison*,[2] sustaining Congressional power in *McCulloch v. Maryland*,[3] unifying the nation's commerce in *Gibbons v. Ogden*,[4] and safeguarding right of contract from state interference in *Fletcher v. Peck*[5] and the *Dartmouth College*

[1] JOHN PAUL FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 62 (1958) *quoted in* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 280 (1996). *See* Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367, 367 (1999) (explaining Marshall's broad distinction between law and politics, and how it gave shape to previously amorphous judicial branch); G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 50-51 (1984) (outlining undefined and commonly practiced extra-judicial activities of that time that would likely be considered improper today).

[2] 5 U.S.137 (1803); *see* United States v. Munoz-Flores, 495 U.S. 385, 396-97 (1990) (showing that nearly 190 years after *Marbury*, premise of judicial review is still valid despite specifically enumerated remedies by Congress); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14-15 (1983) (arguing that *Marbury* sheds new light on how judicial review should be treated in modern context of administrative agencies).

[3] 17 U.S. 316 (1819); *see* Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966) (reiterating Marshall's *McCulloch* rationale of letter and spirit of Constitution in context of limiting states' rights in establishing voter requirements in conflict with Congress's Voting Rights Act of 1965); David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 929-31 (1982) (explaining that Marshall's rationale in *McCulloch* to be most convincing in establishing Congressional authority and in limiting states' power).

[4] 22 U.S. 1 (1824); *see* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 140-47 (1996) (explaining significance of expansion of Federal government's powers without upsetting public's normal desire for increased state power or crippling states' rights to regulate trade); Currie, *supra* note 3, at 938-41 (defining limitations of states rights, which provided foundation for future judges to expand Federal government's control of commerce).

[5] 10 U.S. 87 (1810); *see* James W. Ely, Jr., *The Marshall Court and Property Rights: A*

Case[6] and treaty rights in *Worcester v. Georgia*.[7] Through all this Marshall resisted extraordinary political suasion, from presidents on down, and his opinions have definitively shaped constitutional law and American history ever since.

Charles Hobson, biographer of Marshall and editor of the multi-volume collection of his papers at the College of William and Mary, describes his extraordinary influence on the Court, "hitching its destiny to the Constitution itself," and yielding to "neither power nor patronage." He portrays Marshall the person and shows the influences that helped produce the great jurist.[8]

Martin Flaherty, professor at Fordham Law School, highlights the vast importance of Marshall's *McCulloch* decision.[9] Marshall there nailed to his masthead the idea that the Constitution emanates from the people, not the states, a concept that, ultimately, the Civil War was fought to preserve, and that was recently reaffirmed by the Court in *U.S. Term Limits v. Thornton*.[10] As Professor Flaherty points out, to Marshall the

Reappraisal, 33 J. MARSHALL L. REV. 1023,1035-36 (2000) (claiming that Marshall's strong belief in Contract Clause was rooted in his respect for Constitution's framer's strong valuation of private property as founding principle for United States); Samuel R. Olken, *Chief Justice John Marshall In Historical Perspective*, 31 J. MARSHALL L. REV. 137, 148 (1997) (stating *Fletcher* has achieved Marshall's goals of bolstering Constitution's power through various political climates and majorities).

[6] Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819); *see* Henry N. Butler & Larry E. Ribstein, *Regulating Corporate Takeovers: State Anti-Takeovers Statutes and the Contract Clause*, 57 U. CIN. L. REV. 611, 631-42 (1988) (examining vitality of *Dartmouth's* Contract Clause today measured against states' rights to alter corporate contract); R. Kent Newmyer, *John Marshall as a Transitional Jurist: Dartmouth College v. Woodward and the Limits of Omniscient Judging*, 32 CONN. L. REV. 1665, 1666-67 (scrutinizing Marshall's ability to envision future utility of his decision at time it was made, yet fully acknowledging importance that opinion has held in nation's history).

[7] 31 U.S. 515 (1832); *see* Currie, *supra* note 4, at 953-55 (stating that Marshall overanalyzed *Worcester* case by examining Federalism principles of Georgia ignoring Federal Indian treaty, while explicit Constitutional authority existed).

[8] *See* HOBSON, *supra* note 3, 140-47; *see also* JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH 3 (1937) *reprinted in* SMITH, *supra* note 1, at 21-22 (recollecting his father's influence during childhood, which outlined his hunger to learn); ALLAN B. MAGRUDER, JOHN MARSHALL 251-73 (1972) (providing first-hand evidence of Marshall's opinions on slavery, Andrew Jackson's administration, generosity and importance of physical health).

[9] Martin Flaherty, *John Marshall and We the People,* 16 ST. JOHN'S J. LEGAL COMMENT. (forthcoming Spring 2002).

[10] 514 U.S. 779 (1995). *See generally* Polly J. Price, *Term Limits On Original Intent? An Essay On Legal Debate and Historical Understanding*, 82 VA. L. REV. 493, 529-33 (considering hypothetical case involving electing convicted felon rather than limiting number of terms of elected officials, and examining longstanding tradition of prohibiting former during today's Federalism struggles); Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 105-09 (1995) (explaining foreseeable implications of *Term Limits* decision in divided Supreme Court's

Revolution itself established the principle; to the Chief Justice, "union and resistance to . . . Great Britain were inseparable."[11] And to Flaherty the contrary view, espoused by Justice Thomas' dissent in the *Term Limits* case, is built "on a foundation of sand."[12]

Judge John Gibbons, who served for many years with distinction on the Third Circuit Court of Appeals, focuses on Marshall's steadfast protection of individual rights under the Contract Clause,[13] the only provision significantly safeguarding personal autonomy from impairment by the states until the enactment of the Fourteenth Amendment, as shown by his opinion in *Fletcher v. Peck*[14] and again in *Sturges v. Crowninshield*.[15] Judge Gibbons goes on to describe Marshall's placing limits on the Eleventh Amendment in *Cohens v. Virginia*,[16] sustaining Supreme Court review of state criminal convictions and rebuffing the state's claim that the Eleventh

struggle between Federal and states' rights).

[11] Flaherty, *supra* note 9.

[12] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 796 n.12 (criticizing Justice Thomas' dissent for improperly relying upon Powell decision, when this decision was not based upon "default rule" of states' enjoyment of power in absence of Constitutional mention); Flaherty, supra note 9.

[13] *See* U.S. CONST. art. I, § 10, cl. 1; *see also* G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 OHIO N.U. L. REV. 403, 407 n. 24 (1989) (articulating that under Marshall, "the Court adopted a position linking all protection of individual rights to the specific provisions of the Constitution."); Samuel R. Olken, *Chief Justice Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 778 (2000) (suggesting that Marshall court Contract Clause jurisprudence reflected effort to protect certain types of individual rights).

[14] 10 U.S. 87 (1810); *see* Olken, *supra* note 5, at 138 (stating that "the power of the legislature over the lives and fortunes of individuals is expressly restrained."); *see also* Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181, 238-239 (1999) (stating that decision in *Fletcher v. Peck* suggests view of individual property rights as needing protection from legislatures); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 96-97 (2000) (stating that state government must behave under limitations of private person); Note, *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414, 1423 n. 67 (1984) (stating that *Fletcher* illustrates proposition that any unnecessary restriction by state on contractual liberty, impermissibly invades realm of private rights). *See generally* David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 362 n. 74 (1996) (citing authority as example where Court enforced federal constitutional limitation on powers of state).

[15] 17 U.S. 122, 208 (1819) (holding that state cannot pass bankruptcy law that impairs obligations of contracts). *See* John Gibbons, *Chief Justice John Marshall*, 16 ST. JOHN'S J. LEGAL COMMENT. (forthcoming Spring 2002); *see also* Mayer, *supra* note 14, at 362 n. 74 (stating that *Sturges* case is example of judiciary imposing constitutional limitations on states); Note *supra* note 14, at 1424 (stating that *Sturges* illustrates proposition that any unnecessary restriction by state on contractual liberty, impermissibly invades realm of private rights).

[16] 19 U.S. 264 (1821). *See* Gibbons, *supra* note 15.

Amendment barred such review.[17] Universally accepted now, the *Cohens* decision was highly controversial, and gave rise to a popular verse:

Old Johnny Marshall, what's got in ye,
To side with Cohens against Virginny. . .
You've thrown the whole state in terror
By this infernal writ of error.[18]

As Judge Gibbons notes, Marshall would likely have been appalled at the recent string of 5-to-4 rulings using the Eleventh Amendment and state sovereignty arguments to bar suits in federal as well as state courts against states assertedly violating federal law.[19] Gibbons believes Marshall "a wiser political philosopher than we've seen on the Court lately" for leaving federal-state relationships chiefly to the political process.[20]

Our final contributor, Professor Susan Herman of Brooklyn Law School, notes that the Court has overturned twenty-five acts of Congress in the past six years, far in excess of the 200-year average of one a year.[21] She deplores the current majority's

[17] *Cohens*, 19 U.S. at 293 (holding that writ of error is not "within the amendment, but is governed entirely by the Constitution as originally framed and . . .that in its origin, judicial power was extended to all cases arising under the Constitution or laws of the U.S. without respect to parties."). *See* Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1063 n. 75 (1999) (surmising that *Cohens* Court concluded that Eleventh Amendment did not bar Court's review of state criminal convictions); *see also* Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 579-580 (2001) (stating that *Cohens* Court held that Eleventh Amendment does not apply when state is plaintiff).

[18] ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 307 (1986).

[19] *See* Gibbons, *supra* note 15; *see also* Kimel v. Florida Bd. of Regents, 582 U.S. 62, 73 (2000) (stating that "Constitution does not provide for federal jurisdiction over suits against non-consenting states"); Alden v. Maine, 527 U.S. 706, 713 (1999) (stating that states' immunity from suit is "fundamental aspect" of state sovereignty); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669-70 (1999) (opining that Eleventh Amendment upholds sovereign immunity enjoyed by states before they entered Union).

[20] *See* Gibbons, *supra* note 15; Symposium, *Roundtable: Negotiating the Constitution,* 31 SETON HALL L. REV. 50, 55 (2000) (Gibbons foreseeing trouble for court as it takes on task of enforcing legislative process under guise of judicial review). *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function,* 114 HARV. L. REV. 1883, 1901-02 (2001) (citing HERBERT WECHLER, THE POLITICAL SAFEGUARDS OF FEDERALISM: THE ROLE OF THE STATES IN THE COMPOSITION AND SELECTION OF THE NATURAL GOVERNMENT, 543 (1954) for the proposition that states' position in political process obviated any need for judicial protection of states' rights against national power); Lamar F. Jost, *Constitutional Law – The Commerce Clause in the New Millennium: Enumeration Still Presupposes Something Not Enumerated. United States v. Morrison, 120 S. Ct. 1740 (2000),* 1 WYO. L. REV. 195, 200 (2001) (citing Marshall's broad deference to Congressional interpretation of its legislative authority under Commerce Clause).

[21] Susan Herman, *Splitting the Atom of Marshall's Wisdom,* 16 ST. JOHN'S J. LEGAL

unwillingness to defer to Congress and, this Term in a Clean Water Act decision,[22] to the executive branch as well. She argues that, ironically, the recent decisions barring private suits against states under acts of Congress involving wages, hours of work and discrimination based on age and disability will engender more actions by federal bureaucrats against states[23]—hardly consistent with the present majority's professed concern for states' rights.[24]

John Marshall's towering legacy continues to dominate our understanding of the Constitution and the powers of the judiciary, whatever the outcome of the current struggles over the issues these essays describe. And as judicial review and constitutional principles have been adopted in nation after nation, he now commands a worldwide stage. The last word undoubtedly belongs to John Adams, who appointed Marshall to the Court, as cited by Charles Hobson: "[i]t was the pride of my life that I have given to this nation a Chief Justice equal to Coke or Hale, Holt or Mansfield."[25]

COMMENT. (forthcoming Spring 2002)

[22] *See* Herman, *supra* note 21; *see also* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (stating that grant of authority to Congress under Commerce Clause, though broad, is not unlimited).

[23] *See* U.S. v. Morrison, 529 U.S. 598, 607-10 (2000) (showing court's unwillingness to defer to broad interpretation of congressional authority under Commerce Clause); U.S. v. Lopez, 514 U.S. 549, 559-60 (1995) (showing court's unwillingness to defer to broad interpretation of congressional authority under Commerce Clause); New York v. U.S., 505 U.S. 144, 157 (1992) (limiting federal power to regulate in realm that court finds is states' traditional province).

[24] *See* Herman, *supra* note 21. *But see*, Archis Parasharami, *Immunity as an Essential Element of Statehood Alden v. Maine, 199 S. Ct. 2240 (1999)*, 35 HARV. C.R. – C. L. L. REV. 257, 258 (2000) (recognizing holding in *Alden v. Maine* as further step by court's majority toward new regime where states' rights trump power of federal government); Melanie K. St. Clair, *A Return to States' Rights? The Rehnquist Court Revives Federalism*, 18 N. ILL. U. L. REV. 411, 412-13 (1998) (positing that decisions in *Printz v. U.S.*, 521 U.S. 898 (1997) and *City of Boerne v. Flores*, 521 U.S. 507 (1997) represent "the Court's shift toward a new dynamic, one which reins in the power of Congress and affords increased deference to the autonomy of the states."); John Aloysius Farrell, *Pragmatism, High- Profile Cases Constitutional 'Common Sense' is Applauded*, RICHMOND TIMES-DISPATCH, June 29, 1997, at A12 (quoting Laurence Tribe, Harvard Law Professor, "The court has clearly reaffirmed and underscored the depth of its constitutional commitment to states' rights. The most consistent commitment of the current court is probably to a vision of federalism that gives states considerably more autonomy and protection from the national legislature than any court in decades has done.")

[25] Adams to Marshall, MARSHALL PAPERS, Aug. 17, 1825, *quoted in* SMITH, *supra* note 1, at 15.