Foreword

Philip Weinberg
SYMPHONY

FEDERALISM: THE BATTLE RECOMMENCES
Celebrating the 200th Anniversary of Chief John Marshall’s
Ascendancy to the U.S. Supreme Court

FOREWORD

PHILIP WEINBERG*

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

* Professor of Law, St. John’s University of Law; J.D. Columbia Law School 1958. The author teaches Constitutional Law and a Constitutional Rights Seminar and is editor-in-chief of the Macmillan Compendium: The Supreme Court (1999) as well as numerous articles.
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*

---


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).


5 10 U.S. 87 (1810); see James W. Ely, Jr., *The Marshall Court and Property Rights: A
Case and treaty rights in *Worcester v. Georgia.* 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.

Martin Flaherty, professor at Fordham Law School, highlights the vast importance of Marshall's *McCulloch* decision. 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.* As Professor Flaherty points out, to Marshall the
Revolution itself established the principle; to the Chief Justice, "union and resistance to... Great Britain were inseparable." And to Flaherty the contrary view, espoused by Justice Thomas' dissent in the Term Limits case, is built "on a foundation of sand." 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, 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 and again in Sturges v. Crowninshield. Judge Gibbons goes on to describe Marshall's placing limits on the Eleventh Amendment in Cohens v. Virginia, 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.


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).

Amendment barred such review.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{21} She deprecates the current majority's

\textsuperscript{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).

\textsuperscript{18} *Encyclopedia of the American Constitution* 307 (1986).


\textsuperscript{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,\textsuperscript{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\textsuperscript{23}—hardly consistent with the present majority's professed concern for states' rights.\textsuperscript{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."\textsuperscript{25}

\textsuperscript{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).


\textsuperscript{25} Adams to Marshall, MARSHALL PAPERS, Aug. 17, 1825, quoted in SMITH, supra note 1, at 15.