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Chief Justice John Marshall and Federalism

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The organizers of today's symposium suggested that I talk about the great Chief Justice's views on state sovereignty. Certainly, the current Supreme Court's preoccupation with that subject suggests its timeliness. A good place to start the consideration of John Marshall's contributions in establishing the structural relationship between the sovereignty of the states and the superior sovereignty of the United States is the Virginia Convention that in June of 1788, over rather strong opposition, ultimately ratified the Constitution of 1787.[1] John Marshall, then a Richmond lawyer, was a delegate to that Convention and a participant in its debates.[2]

The source of Virginian opposition to ratification was the interrelationship between three key provisions of the 1783 Peace Treaty with Great Britain, and two key provisions of the proposed constitution.

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[1] *See* Dennis M. Cariello, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26 FORDHAM URB. L.J. 1493, 1536 n.208 (1999) (stating that role of courts and their effect on states was surprisingly heavily debated topic at Constitutional Conventions); Christina M. Royer, *Paradise Lost? State Employees' Rights in the Wake of "New Federalism"*, 34 AKRON L. REV. 637, 640-41 (2001) (explaining that sovereign immunity was raised and heavily debated both in 1776 while drafting Articles of Confederation, and during ratification of United States Constitution at Virginia Convention). *See generally* Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 129 (2000) (comparing proposals of different states, which provided for limited treaty powers).

[2] *See* Brannon P. Dennin, *Book Review: Marbury v. Madison: The Origins and Legacy of Judicial Review by William E. Nelson*, 93 LAW LIBR. J. 345, 348 (2001) (explaining that Marshall was active in politics, serving in state and local government, and as delegate to Virginia Convention which ratified new Constitution). *See generally* Cariello, *supra* note 1, at 1536 (claiming one of more passionately debated issues in ratification conventions was what effect strengthened national government would have on states); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1054 (2001) (noting young Marshall revealed flaws of George Mason's claims that judicial power and extensive judicial review would destroy states and individual liberties).

The Peace Treaty provided in Article IV "that creditors on either side, shall meet no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."[3] In Article V it provided that completed escheats of loyalist properties could be undone only by action of the state legislatures,[4] but in Article VI it prohibited all future confiscations.[5] Articles IV and VI were extremely unpopular in Virginia because at the end of the war, Great Britain had carried off from the south a large number of slaves. The Treaty made no provision for compensating their owners, while at the same time it protected British creditors and landowners.[6]

The proposed constitution provided in Article VI that "all treaties made, or which shall be made, under the authority of the United States shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding."[7] This was an explicit reference to the

[3] Treaty of Peace, Sept. 13, 1783, U.S.-Gr. Brit., art. IV, 8 Stat. 80, 82 [hereinafter Treaty of Peace]; *see* Eskridge, *supra* note 2, at 1063 (citing Marshall's argument, when he defended debtors in Ware v. Hylton, 3 U.S. 199, 220 (1796), that treaty provision only applied in cases where debt existed in 1783); Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs,* 70 U. COLO. L. REV. 1277, 1313 n.169 (1999) (asserting that many states did not enforce U.S.'s treaty obligations, which would have allowed British merchants to collect their prewar debts).

[4] *See* Treaty of Peace, *supra* note 3, at art. V.; *see also* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1123 (2000) (noting that despite Article VI's promise to loyalists, New York was inflamed by long years of revolutionary battle). *See generally* Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts—Jurisdictional Challenges under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1409 n.38 (1996) (explaining Hamilton's argument that Article VI of peace treaty protects foreign rights by implication).

[5] *See* Treaty of Peace, *supra* note 3, at art. VI; Golove, *supra* note 4, at 1122 (concluding that court had no difficulty finding provision for restitution of confiscated land fell well within scope of treaty power). *See generally* McDonnell, *supra* note 4, at 1408 n.25 (noting court in Ware v. Hylton placed emphasis on word debt in Article V Treaty).

[6] *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1901 n.59 (1983) (quoting letter written by George Mason "[i]f we are now to pay the debts due the British merchants, what have we been fighting for all this while?"); *see also* Golove, *supra* note 4, at 1126 n.142 (noting Virginia Governor's proclamation suspended Act until Great Britain stop violating Treaty of Peace by not returning or paying compensation for confiscated slaves); Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States,* 1990 DUKE L.J. 1229, 1243 n.60 (1990) (asserting treaty was controversial because it did nothing to compensate southerners for value of slaves carried off by British).

[7] U.S. CONST. art. VI, cl. 2.

supremacy of Peace Treaty Articles IV and VI over conflicting state law. And in the Judiciary Article, Section 2 of the Constitution provided that "the Judicial Power shall extend to all cases, in law or equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority . . . ."[8] Thus, Article III said in plain language, that Treaty Articles IV and VI could be enforced as the supreme Law of the Land by the "Judicial Power" of the United States.[9]

In 1777, Virginia had provided by statute that debts owed to British creditors could be discharged by payment of those debts into the state treasury in paper money, and that statute continued in operation after execution of the Treaty. Moreover, Virginia had enacted a procedure for the confiscation of real estate owned by British nationals. The effect on these statutes of Articles III and VI of the Constitution was a subject of heated debate in the 1788 Virginia ratifying convention. Particular reference was made to a large tract of Virginia real estate owned by Lord Fairfax. Both the debt problem and the real estate escheat problem would eventually come before the United States Supreme Court in two cases in which John Marshall was a participant, though not as a justice.

The first case is *Ware v. Hylton*,[10] a diversity case in which Marshall, the lawyer, represented Virginia debtors sued in the United States Circuit Court on a debt to British creditors contracted in 1774.[11] The Virginia creditors had in 1780 pursuant to the 1777 statute paid a part of the debt into the Virginia treasury, and they pleaded that this discharged that much of it. The Circuit Court ruled in favor of Marshall's

[8] U.S. CONST. art. III, § 2, cl. 1.

[9] *See* McDonnell, *supra* note 5, at 1417 (attesting that underlying assumption of Article VI was that it gave individuals right to assert treaties in federal and state courts as rules of decision.); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases,* 82 CAL. L. REV. 555, 603 (1994) (affirming that Southern defiance of treaty led to Supremacy Clause's declaration that treaties are binding on states and Article III's provision for federal jurisdiction over cases arising under duly ratified treaties). *See generally* Bradley, *supra* note 1, at 126 (explaining that uncertainties about scope of state and national powers made it unclear whether treaties were in fact infringing on states' rights).

[10] Ware v. Hylton, 3 U.S. 199, 199 (1976).

[11] *See id.* at 235 (Marshall doubted whether Congress has power to make treaty which would annul legislative act of state).

clients.[12] In his only argument before the United States Supreme Court, Marshall urged that under Virginia law, the debt was discharged prior to the execution of the 1783 Treaty.[13] Marshall lost the appeal. In a decision having significance to this day, the Supreme Court held that a treaty could and did retrospectively nullify the Virginia debt discharge law and restore the obligation to pay the British creditors.[14] Thus in losing, Marshall helped, in a way, to establish the primacy of the United States rather than the states in the conduct of foreign affairs.[15]

Oddly enough in his private affairs, Marshall, with other members of his family, took steps in reliance on the efficacy of Article VI of the Peace Treaty that would lead, eventually, to another great Supreme Court case about federal supremacy. In 1793, they purchased the Fairfax estate that had been mentioned so prominently in the debates in the Virginia ratifying convention.[16] They did so, obviously, in reliance on the protection afforded to loyalist landowners by Article VI of the Peace Treaty, and in the belief that the escheat process specified in the Virginia

[12] *See Ware*, 3 U.S. at 221 (Circuit Court allowed demurrer in favor of defendants and plaintiff brought writ of error before Supreme Court).

[13] *See id.* at 227 (if Virginia law had made direct and unqualified confiscation, there would be no doubt of its validity, debt would have been discharged and there would be no reason to revive it); *see also* Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 217 n.23 (1998) (commenting that John Marshall had argued that state governments, during American Revolution, could "confiscate" private debts owed to British creditors because they were property of enemy aliens).

[14] *See Ware*, 3 U.S. at 244-45 (holding that Federal Constitution establishes power of treaty over Constitution and laws of states and Court have shown that supremacy clause was intended and sufficient to nullify law of Virginia); *see also* Lessee of Pollard's Heirs v. Kibbe, 39 U.S. 353, 519 (1840) (stating that *Ware* held that Treaty of Peace repealed and nullified all state law, but its own operation, revived debt, removed all lawful impediments, and was supreme law); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L 132, 142 (2001) (noting that holding of *Ware* was that United States's treaty with Great Britain ending Revolutionary War invalidated Virginia statute that had provided for discharge of private debts owed to invalidated private British subjects).

[15] *See* Barbara J. Frischholz and John M. Raymond, *Lawyers Who Established International Law in the United States, 1776-1914*, 76 AM. J. INT'L L. 802, 805 (1982) (stating that Marshall formulated and qualified doctrine of absolute territorial jurisdiction of sovereign and that his clear statement of law has been quoted and followed abroad as well as in this country); Charles F. Hobson, *Editing Marshall*, 33 J. MARSHALL L. REV. 823, 837 (2000) (noting that Marshall played central role in history and that although his client's lost on issue, Marshall made best case possible for debtors and obtained better settlement than they otherwise might have received).

[16] *See* Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 753 (2000) (stating that after reaching accord with state over disposition of this vast property, Marshall formed group with some members of his family to purchase large portion of Fairfax Estate).

statute had not been completed prior to 1783.[17] Had it been, Article V of the Treaty would have protected landowners who derived their title through the Virginia escheat rather than from Lord Fairfax.

Marshall's positions as a lawyer and as a businessman were actually consistent. In *Ware v. Hylton* he urged that the critical event, payment into the Virginia treasury, occurred prior to the Treaty, while his purchase of the Fairfax estate was made in the belief that the critical event—formal escheat—was not made until after its ratification.[18] In neither case did he challenge the supremacy of the Treaty over state law, assuming its application.[19] And although his client in *Ware v. Hylton* lost, in the land deal the outcome was favorable to him and his associates. In *Fairfax Devise v. Hunter's Lessee*[20] the Supreme Court reversed a judgment of the Virginia Court of Appeals and held that because the formal statutory escheat procedures had not been invoked, Lord Fairfax's land titles were protected by treaty.[21]

Coming in 1812 when the United States was again at war with Great Britain, this reversal was a bitter pill for the Virginians, and the Virginia Court of Appeals reacted with the most dramatic assertion of state supremacy in our pre-Civil War history. It held that Section 25 of the Judiciary Act of 1789 authorizing the Supreme Court to review judgments of state courts rejecting federal claims was on state sovereignty grounds

[17] *See* Golove, *supra* note 4, at 1196 (noting that while title of Fairfax's Estate was under attack, Marshall took opportunity to organize collective effort among his close relatives and friends to purchase some of best portions of estate; along with his brother, he negotiated a complex purchase agreement with Fairfax in 1793, and then instituted further litigation to affirm under Fairfax title under Peace Treaty of 1783).

[18] *See Ware*, 3 U.S. at 221 (Marshall argued that defendants paid off such debts while state law continued in full force, despite said Peace Treaty).

[19] *See id.*, at 199; Fairfax Devise v. Hunter's Lessee, 11 U.S. 603 (1813).

[20] *Fairfax*, 11 U.S. at 603; *See* Smith v. Maryland, 10 U.S. 286, 304 (1810) (holding that Maryland escheat statute passed in 1780 was self-executing, and that Maryland escheats of loyalist properties were not affected by Peace Treaty).

[21] *See Fairfax*, 11 U.S. at 627 (because possession and seizen continued up to and after Treaty of 1794, which was Supreme Law of Land, confirmed title to him, his heirs and assigns and protected him from any forfeiture by reason of alienage); *see also* Morris v. U.S., 174 U.S. 196, 229 (1899) (*Fairfax* gives authority that acts of ownership shown to have been exercised by him over whole land, vested in him complete seizen and possession); Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421, 451 (1996) (Court in *Fairfax* had relied on Treaty of 1783 with Great Britain in reversing judgment of Virginia Supreme Court of Appeals).

unconstitutional.[22] In *Martin v. Hunter's Lessee*[23] the Supreme Court reversed the Virginia judgment, establishing the still-unchallenged legitimacy of federal court appellate jurisdiction over state courts. Thus even as an interested party, John Marshall made a major contribution to the law of the federal-state relationship.

It was, however, in his capacity as Chief Justice that Marshall made his greatest contributions in respect to the supremacy of national law. He did this, moreover, during periods in which the Supreme Court's authority was under attack by one or both of the other branches of the federal government.

It is worthwhile, I think, to distinguish between those pronouncements of what may be called "pure" constitutional law, and those instances in which he merely pronounced the supremacy of a national, but not necessarily immutable rule of law. By "pure" constitutional law, I mean those rules of law that no sovereignty, either state or federal, is free to change. When the Court lays down such a rule, it is exercising the *Marbury v. Madison*[24] power of judicial review in its most extreme form, and such an exercise can legitimately be criticized as undemocratic.[25] Undemocratic, that is, in the sense that the Court purports to tie the hands of the democratically chosen branches for all time, subject only to the cumbersome process of constitutional amendment.[26]

[22] *See* Hunter v. Martin, 18 Va. 11, 5 (1814) (Fairfax obtained writ of error from Supreme Court under 25th Section of Act of Congress); *see also* Ferris v. Coover, 11 Cal. 175, 184 (1858) (arguing in a dissent that holding in *Hunter* conclusively established that 25th Act of Judiciary was unconstitutional); James S. Liebman and William F. Ryan, *"Some Effectual Power:" The Quantity and Quality of Decision Making Required of Article III Courts*, 98 COLUM. L. REV. 696, 797 (1998) (noting that on remand, Virginia Court of Appeals refused to obey Supreme Court's mandate, concluding that Article III's "arising under" clause gave Court no authority to determine any issue – including whether, on facts of case, Fairfax retained "title" as of 1783 – that did not itself constitute what we today call "pure" question of federal law).

[23] Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

[24] Marbury v. Madison, 5 U.S. 137 (1803).

[25] *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 750 (1995) (explaining view that judicial review is "inherently and irreconcilably" undemocratic); *see also* Alan M. Dershowitz, *John Hart Ely: Constitutional Scholar (A Skeptic's Perspective on Original Intent as Reinforced by the Writings of John Hart Ely)*, 40 STAN. L. REV. 360, 365 (1988) (explaining that "taken to the extreme. . .judicial review can be transformed into an undemocratic veto by appointed and unaccountable [judiciary]"); Martin H. Redish, *Judicial Review and the 'Political Question'*, 79 NW. U. L. REV. 1031, 1045-46 (1985) (discussing argument that judicial review is undemocratic).

[26] *See generally* Erwin Chemerinsky, *The Price of Asking the Wrong Question: An*

The founding generation had rejected monarchy, and thus had rejected the fiction that those exercising governmental authority derived it from any supernatural source.[27] What legitimated government for them was the periodicity of representative assemblies that derived their authority from the people who elected them from time-to-time.[28] An obvious corollary to this legitimating principle was that one set of governors should not be able to tie the hands of their successors. Thus any "pure" constitutional law was inconsistent with the fundamental premises of the American rejection of monarchy.

At the same time, however, the framers of the 1787 Constitution were well aware of the dangers to individual autonomy interests posed by elected legislative assemblies.[29]

Essay on Constitutional Scholarship and Judicial Review, 62 TEX. L. REV. 1207, 1230 (1984) (noting that there have been few Supreme Court decisions that have been overruled by constitutional amendment); Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 811-12 (1974) (explaining that "apart from rarely used and difficult political recourse of constitutional amendment. . .the Supreme Court's constitutional pronouncements are held to be final. . .").

[27] *See* Marci A. Hamilton, *Perspective on Direct Democracy: The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 8 (1997) (noting that Framers "flatly and righteously" rejected monarchy as basis for government); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 394 (1993) (explaining that according to Declaration of Independence divine rights of kings violated "[l]aws of Nature and of Nature's God"); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1060-61 (1996) (explaining that Founders rejected divine right of kings as source of legitimate state power).

[28] *See* Candace H. Beckett, *Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635, 638-39 (1998) (explaining that to ensure that government would not end up oppressing people Framers placed ultimate power in electorate); Kristen Silverberg, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913, 926 (1996) (explaining that central to Constitutional scheme is belief that elected representatives serve only at will of people); Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 293 (1997) (noting that "real innovation under Constitution was that general government depended at all for its authority upon people" [*sic*]); Dwayne A. Vance, *State-Imposed Congressional Term Limits: What Would the Framers of the Constitution Say?*, 1994 BYU L. REV. 429, 436-37 (1994) (explaining that frequent elections would remind representatives that authority of government resides with people).

[29] *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 558 (1998) (noting that Framers were aware that representative government could endanger individual rights rather than protect them); Jeremy Elkins, *Constitution & Survivor Stories: Declaration of Rights*, 3 U. CHI. L. SCH. ROUNDTABLE 243, 309 (1996) (noting that American colonists recognized that even governmental bodies elected by people could neglect certain individual rights and liberties); Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 555 (1995) (explaining that Founders recognized that representatives of people were "as capable of tyranny and oppression as any monarch"); *see also* Frank Goodman, *Mark*

Thus to a limited extent, in Article I, Section 10, they included certain protections of individual autonomy against some of the more egregious excesses of state legislatures that had occurred during the Confederacy under the Articles of Confederation.[30] These, no democratically chosen governors could tinker with.

In the thirty-four years Marshall served as Chief Justice, there were remarkably few instances in which the Court announced pure constitutional law binding the states. Toward the end of his judicial career, in *Barron v. Baltimore*,[31] he confirmed the common understanding that the Bill of Rights, embodied in Amendments I through IX, did not bind the states.[32] Earlier, however, he referred to Article I, Section 10 as "what may be deemed a bill of rights for the people of each state."[33] This was said in *Fletcher v. Peck*,[34] the first of his Supreme Court opinions dealing with the impairment of contracts clause.[35] What is most

Tushnet on Liberal Constitutional Theory: Mission Impossible, 137 U. PA. L. REV. 2259, 2310 (1989) (discussing disillusionment at many legislative abuses that prevailed at time of Constitutional Convention); Bruce Stein, *The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 425-26 (1982) (explaining that experience under Confederation had shown Framers that legislative branch was capable of usurping powers delegated to other branches).

[30] *See* U.S. CONST. art. 1, § 10, cl. 1 (providing that no state shall "emit Bills of Credit; make any thing but gold and silver coin a tender in payment of debts; pass any . . . ex post facto law, or law impairing the obligation of Contracts. . ."); *see also* Ogden v. Saunders, 25 U.S. 213, 216 (1827) (explaining that Framers prohibited bills of attainders and ex post facto laws "in order to restrain the State legislatures from oppressing individuals by arbitrary sentences, clothed with the forms of legislation, and from making retrospective laws applicable to criminal matters"); Robert C. Palmer, *The Individual Liberties within the Body of the Constitution: A Symposium: Obligations of Contracts: Intent and Distortion*, 37 CASE W. RES. L. REV. 631, 635, 641 (1987) (explaining that legislative history indicates that Art. I, Sec. 10 was intended to act as restriction upon State power).

[31] 32 U.S. 243 (1833).

[32] *See id.*.at 250-51 (stating that provision in Fifth Amendment declaring that private property shall not be taken for public use without just compensation did not apply to States). *See generally* Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 555 (1998) (explaining that *Barron* established that Bill of Rights applied only to Federal government); Joyce A. McCray Pearson, *The Federal and State Bill of Rights: A Historical Look at the Relationship between America's Documents of Individual Freedom*, 36 HOW. L.J. 43, 62-63 (1993) (explaining that *Barron* found that Bill of Rights is not applicable to States).

[33] Fletcher v. Peck, 10 U.S. 87, 138 (1810). *See generally* Charles F. Hobson, *The Bill of Rights at 200 Years: Bicentennial Perspective: James Madison, the Bill of Rights, and the Problems of the States*, 31 WM. & MARY L. REV. 267, 273-74 (1990) (noting that unamended Constitution had to act as sort of bill of rights until adoption of Fourteenth Amendment); Jane Welsh, *The Bill of Attainder Clause: An Unqualified Guarantee of Process*, 50 BROOK. L. REV. 77, 85 (1983) (suggesting that Article I, Sec. 10 served same purpose as Bill of Rights absent in original Constitution).

[34] *Fletcher*, 10 U.S. at 138.

[35] *See id.* at 87. *See generally* Ogden V. Witherspoon, 2 Haywood 227 (1802) (discussing impairment involved in repealing Acts); Hadley Arkes, *On the Novelties of an Old Constitution: Settled Principles and Unsettling Surprises*, 44 AM. J. JURIS. 15, 17-18

significant about this first impairment of contracts case is that Marshall interpreted the clause as applicable not only to contracts made among private parties, but also to contractual undertakings by the state itself. *Fletcher v. Peck* involved a land grant made by one Georgia legislature in 1795 that was revoked by another Georgia legislature in 1796. Because the impairment clause applied to contracts with the state itself, one periodically elected legislature could, and did, bind its successor.[36] This was the purest of pure constitutional law, for if the irretrievable state grant was beyond the reach of a subsequent state legislature, it was also beyond the reach of the federal legislature, unless Congress was prepared in compliance with the Fifth Amendment to pay compensation for a taking.

Two years after *Fletcher v. Peck,* Marshall once again dealt with state impairment of a prior legislature's undertaking. In *New Jersey v. Wilson,*[37] the Supreme Court reviewed a New Jersey Supreme Court decision refusing to quash a tax assessment on lands that had in 1758 by a colonial-era statute been made exempt from taxation.[38] Since the state action sought a prerogative writ, New Jersey was the nominal plaintiff, but its fiscal interest was represented by the defendant assessor.[39] Marshall held the state to the bargain made by its colonial predecessor.[40]

Marshall next considered the impairment of contracts clause in 1819 in *Dartmouth College v. Woodward.*[41] This famous case also involved a contract with a government; in this case a royal

(1999) (discussing constitutionally of legislature intervention in contract obligations).

[36] *Fletcher*, 10 U.S. at 135 (concluding "one legislature cannot abridge powers of succeeding legislature").

[37] 11 U.S. 164 (1812).

[38] *See id.* at 167 (reversing and remanding so "that judgment may be rendered therein annulling the assessment" in previous proceedings).

[39] *See* State v. Wilson, 2 N.J.L. 282 (1807); s*ee also* David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 889, 900 (1982) (discussing Marshall's acceptance of tax exemption as inherent); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1947-1948 (1983) (noting New Jersey raised no Eleventh Amendment or state sovereignty objection to Supreme Court's review of its courts' decisions pursuant to Section 25 of Judiciary Act.).

[40] *Wilson*, 11 U.S. at 167; *see also* Sweet v. Schock, 245 U.S. 192, 197-98 (1917); Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647, 667 (1988) (arguing against judicial safeguards protecting legislative discontinuity).

[41] 17 U.S. 518 (1819).

charter granted in 1779. The State of New Hampshire was, at least in non-federal matters such as foreign affairs, the successor to the Crown. According to Marshall, the state's devolved sovereign powers did not, however, include the power to impair the charter by amendment.[42] Thus even corporations performing such quasi public functions as education were protected from state impairment of their charters.[43] The New Hampshire legislature was bound not only by undertakings made by their legislative predecessors post-1776, but also by undertakings made by a long-displaced monarchy.

The outcomes in *Fletcher v. Peck*, *Dartmouth College v. Woodward* and *Wilson v. New Jersey* were not preordained either by the cryptic language of Article I, Section 10, or by the miniscule record of the Constitutional Convention about the impairment of contracts clause. Plainly, it could have been read as applicable only to state impairments of contracts between non-governmental persons or entities. In the early part of the Nineteenth Century, however, the Great Chief Justice appears to have been determined to protect private persons and organizations from the vagaries of local political action, and thus to vindicate their reasonable reliance interests.

Marshall wrote two more important impairment of contract opinions, dealing not with state undertakings, but with state impairments of private undertakings. These cases, *Sturges v. Crownenshield*[44] and *Ogden v. Saunders*,[45] unlike *Fletcher v. Peck*, *New Jersey v. Wilson* and *Dartmouth College v. Woodward*

[42] *See id.* at 632-33. *See generally* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 426, 427 (1999) (noting broad method of interpretation Marshall used in his decision). *But see* David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L.J. 471, 489-90 (1983) (comparing *Dartmouth* decision with Butler v. Pennsylvania, 51 U.S. 402 (1850), holding that a term appointment of a state official is not a contract protected by the impairment clause).

[43] *See* James E. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1038-1040 (2000) (discussing relevancy of *Dartmouth* holding during time of business expansion); *see also* Kevin H. Dickinson, *Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership*, 33 AM. U. L. REV. 559 n.170 (1984) *citing Dartmouth College*, 17 U.S. at 636 (defining corporation using Marshall's premise that corporation exists "only in contemplation of law"); Gilbert L. Henry, *Continuing Directors Provisions: These Next Generation Shareholder Rights Plans Are Fair and Reasoned Responses to Hostile Takeover Measures*, 79 B.U. L. REV. 989, 1028 (1999) (discussing states' intention to promote public services from within corporate society).

[44] 17 U.S. 122 (1819).

[45] 25 U.S. 213 (1827).

did not involve "pure" constitutional law. They involved state legislation aimed at permitting debtors overwhelmed by debt to obtain by judicial action a fresh start. Clearly the national legislature could provide for such debtor relief, for Article I, Section 8, Clause 4 authorized Congress to establish "Uniform laws on the subject of Bankruptcies throughout the United States."[46] It was not until 1898, however, that Congress enacted a permanent bankruptcy law.[47] In *Sturges*[48] Marshall did not rely on the existence of an unexercised national bankruptcy power, but on the Contract Clause[49] that explicitly bound the states alone. Since the state debtor relief law was enacted after the date of the private undertaking, there was an impairment.[50] In *Ogden v. Saunders,* [51] Marshall, in his only dissent on a constitutional law issue, would have applied the *Sturgis* rule even to state debtor relief laws in place at the time of the private contract.[52] The majority recognized that the states could, in the

[46] *See* U.S. CONST. art. I, § 8, cl. 4 ("establish[ing] uniform Laws on the subject of Bankruptcies throughout the United States").

[47] "The Bankruptcy Act," referred to in this section is classified generally to http://www.lexis.com/research/buttonTFLink?_m=2dd8d34b4a956c146f8f6a1823c2ef96&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b45%20USCS%20%a7%20701%20%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=3&_butInline=1&_butinfo=11%20USC% 211 U.S.C.S. § 1 et seq., which was repealed by Act Nov. 6, 1978, P.L. 95-598, §§ 401(a), 402(a), 92 Stat. 1682, enacting Title 11; *see* 11 U.S.C.S. § 1 (2001); *see also* 9 AM. JUR. 2D, Bankruptcy §2 (explaining history of 1898 Act along with preceding three acts in 1800, 1803, 1841); Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. L.J. 5, 42-51 (1995) (articulating need for Bankruptcy Clause and Constitutional issues raised).

[48] 17 U.S. 122 (1819) (holding unconstitutional retroactive debtor relief legislation by state of New York because it impaired obligation of contracts between debtors and creditors).

[49] *See* U.S. CONST. art I, § 10, cl. 1 (stating in part that no state may impair obligation of contracts); *see* James W. Ely Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1028-1046 (2000) (explaining Marshall's employment of Contract Clause in connection with bankruptcy laws); *see also* New Jersey v. Wilson, 11 U.S. 164 (1812); Fletcher v. Peck, 10 U.S. 87 (1810) (both holding unconstitutional state impairments of contractual obligations applied to private and state contracts); Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 776 (2000) (stating Marshall's use of Contract Clause limited state's power, thus preserving integrity of contractual obligation). *But see* Providence Bank v. Billings, 29 U.S. 514 (1830) (rejecting Contract Clause challenge to state tax on capital stock in state chartered banks).

[50] *See Sturges,* 17 U.S. at 187 (arguing even if act was constitutional for all contracts made after it passed, it is unconstitutional as to existing contacts, since law impairs contract's obligations). *But see* Mitchell v. Clark, 110 U.S. 633, 643 (1884) (holding that Congress may enact legislation which impairs contracts).

[51] 25 U.S. 213, 346-356 (1827) (Marshall, C.J., dissenting).

[52] *See Sturges*, 17 U.S. at 122 (recognizing that when Congress fails to exercise its constitutional power to enact bankruptcy legislation, states may enact their own bankruptcy laws, provided that they do not violate Contract Clause); *see also* Hanover

absence of Congressional bankruptcy law preempting state law, at least prospectively provide for relief from private-party undertakings.[53]

Ogden v. Saunders is a rare—perhaps a singular—instance of Marshall getting things wrong about the federal-state relationship.[54] As the bankruptcy clause makes clear, some legislative authority could enact debtor relief laws. Their enactment did not involve an invasion of fundamental human rights. Thus what was involved was which political power, state or federal, could exercise the legislative choice. Congress had not, and until 1898, would not do so except for limited periods.[55] But if Congress would not, and had not prohibited the states from doing so, why should the Court substitute its political will on an economic issue. Whether or not New York could enact prospective debtor relief laws was essentially a federalistic question, the resolution of which the majority in *Ogden v. Saunders* properly left to the political branches of the national government.[56] Marshall would have foreclosed those branches for the future by a "pure" constitutional law decision.[57]

Marshall's unpersuasive dissent in *Ogden v. Saunders* should be contrasted with two other of his most-famous decisions: *McCollock v. Maryland*[58] and *Gibbons v. Ogden*.[59]

Nat'l Bank v. Moyses, 186 U.S. 181, 181 (1902) (recognizing that when Congress fails to exercise its constitutional power to enact bankruptcy legislation, states may enact their own bankruptcy laws, provided that they do not violate Contract Clause).

53 *See Ogden*, 25 U.S. at 247.

54 *See id.* at 346 (Marshall, C.J., dissenting) (arguing that majority's decision seriously undermines individual's contractual rights and protection under Contract Clause); *see also id.* at 213 (holding that Contract Clause only makes retroactive state laws impairing existing contracts unconstitutional, not those aimed at future agreements).

55 *See* Tabb, *supra* note 47 at 13-14 (explaining that prior to 1898, States exercised bankruptcy legislation power in all but 16 of Constitution's first 109 years).

56 *See Ogden*, 25 U.S. at 263-64 (basing conclusion on majority's condemnation of *Sturges* decision, and stating that Federal government's legislative power to pass bankruptcy laws is supported by Constitution).

57 *See id.* at 332-58 (examining decision's constitutionality by comparing it to past court decisions, defining restrictions on freedoms to contract, and exploring roots of contract law in our society).

58 17 U.S. 316 (1819) (tax on Second Bank of United States unconstitutional because states lack power to burden operations of federal instrumentalities).

59 22 U.S. 1 (1824) (Congress gave full authority to defendants' vessels to navigate waters of United States and New York state law prohibiting navigation within its waters unconstitutional). *But see* Olken, *supra* note 16 at 766 (indicating that Gibbons Court did not only limit state power, but also acknowledged their ability to enact public health and safety laws).

McCollock involved the decision by Congress to charter the Second Bank of the United States. Central banking is today so settled a feature of the American economy that most of us wonder how anyone could doubt the authority of Congress to create the Federal Reserve Bank in 1913.[60] Leaving control of the money supply in the hands of state-controlled institutions was never a sound policy.[61] At various times prior to 1913, however, representatives in control of the national legislative process thought it was. They were free to act on that insight, defective as it was, until their successors thought otherwise. But when they acted, Marshall deferred to their judgment and rejected state efforts to thwart the operation of the national central bank by hostile legislation. Marshall never suggested in *McCulloch* that the nation must have a central bank, but only that if the national political branches said we should, no state authority could interfere.[62] The necessary and proper clause in Article I, Section 5, Clause 18 was read as maximizing the authority of those political branches in the resolution of federalistic disputes.

In *Gibbons v. Ogden,* Marshall dealt not with the power of the national government, but with the power of the states to regulate interstate commerce, despite the grant to Congress in the Constitution of authority to do so.[63] Although Mr. Fulton had been granted a federal patent for his invention of the steamboat,

[60] *See* 12 U.S.C.S. § 226 (2001) (The "Federal Reserve Act" is Act Dec. 23, 1913, ch. 6, 38 Stat. 351) (stating in preamble to Federal Reserve Act states that it was intended to provide for establishment of Federal reserve banks, to furnish elastic currency, to afford means of rediscounting commercial paper, to establish more effective supervision of banking in United States, and for other purposes); *see also* Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification,* 67 U. CIN. L. REV. 393, 435 (1999) (explaining history of Federal Reserve Act and articulating need to establish effective means of supervising banking, monitoring nation's money supply, and providing national currency for international trade).

[61] *See id.* at 432 (articulating how money supply's current link to national debt and limits placed on total money supply control inflation); *see also* Alfred C. Aman Jr., *Bargaining for Justice: An Examination of the Use and Limits of Conditions by the Federal Reserve Board,* 74 IOWA L. REV. 837, 843 (1989) (contrasting gold-standard commercial banking system Federal Reserve Act aimed to regulate and today's credit-based economy); Michael W. Strong, *Rethinking the Federal Reserve System: A Monetarist Plan for a More Constitutional System of Central Banking,* 34 IND. L. REV. 371, 380 (2001) (stating federal reserve system was established to remedy defects in United States monetary policy and banking organization which, prior to its passage, led to recurring money panics and bank failures).

[62] *See McCulloch,* 17 U.S. at 436-37 (States have no power to tax or otherwise impede Congress's execution of its Constitutional powers).

[63] *See Gibbons,* 22 U.S. at 197-99.

that grant was of limited duration, and the New York Legislature enlarged it. It was argued that because of the existence of the Congressional power to regulate commerce, there was no state power to do so.[64] This was the same argument that was made in *Sturges v. Crownenshield* about the bankruptcy power. In *Sturges* Marshall relied instead on the contract clause.[65] It could have been argued in *Gibbons v. Ogden* that the patent clause in Article I, Section 5, Clause 8 had a similarly self-executing effect, although Gibbons' counsel, Daniel Webster, did not made that point. Justice Marshall was careful, however, to rest the holding on the Licensing and Enrollment Act, a federal statute.[66] Thus the Court deferred to the national political branches the ultimate reach of state power over interstate commerce. Others have misread his *Gibbons v. Ogden* opinion as "pure" constitutional law, but read carefully, it is not.

Five years later, in *Wilson v. Black Bird Creek March Co.*[67] what was implicit in *Gibbons v. Ogden* became explicit. Delaware's regulation of interstate commerce on a navigable stream was valid because Congress had not legislated on the subject.[68] The respective spheres of federal and state authority, except to the extent that individual rights were concerned (recall that Marshall regarded Article I, Section 9 as a bill of rights), were matters subject to federal legislative determination from time-to-time.[69]

The Marshall Court's deference to federal legislative or treaty supremacy met with resistance at the state level throughout his

[64] *See id.* at 189-91 (if navigation was not part of commerce, States, not Congress would have power to regulate it).

[65] *See* Sturges v. Crowenshield, 17 U.S. 122, 192-93 (Congress has power under Constitution to establish uniform bankruptcy laws); *see also id.* at 199 (finding that contract clause restrains States from passing laws affecting obligations of contracts, therefore holding that States cannot pass laws discharging obligations of bankrupt individuals).

[66] *See Gibbons*, 22 U.S. at 220-21 (stating that issue in question was resolved based on Licensing and Enrollment Act, and no further examination was necessary).

[67] 27 U.S. 245 (1829).

[68] *See id.* at 251-52 (opining that if Congress had in fact legislated on this subject, Delaware's law would have been unconstitutional).

[69] *See generally*, S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945) (stating that Congress has power to redistribute power over regulation of commerce from itself to States); California v. Thompson, 313 U.S. 109, 115-16 (1941) (opining that in order for States to regulate interstate transportation, they must not be overstepping laws already passed by Congress); Cooley v. Bd. of Wardens, 53 U.S. 299, 320-21 (1851) (stating that Congress intended to leave regulation of pilots to States).

tenure on the Court.[70] One clause that was relied on over the years was the Eleventh Amendment, that amended the judiciary article by providing that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or subjects of any Foreign State."[71] This amendment overruled the holding in *Chesholm v. Georgia*[72] that a state could be sued in the United States Supreme Court by a citizen of another state.

Recall my earlier discussion of Virginia's resistance to the Supreme Court's appellate jurisdiction in the *Fairfax Devise* litigation, and the Supreme Court's reaction in *Martin v. Hunter's Lessee*.[73] Interestingly, only one of the state courts opinions in the lengthy *Fairfax Devise* battle mentions the Eleventh Amendment.[74] A few years later, however, considering a Virginia criminal conviction, Marshall was faced with a motion by Virginia to dismiss a Section 25 writ of error seeking its review. The defendant, resisting the motion, urged that the Eleventh Amendment only applied when federal question jurisdiction depended on party status, and did not affect federal question jurisdiction. In Cohens v. Virginia Marshall rejected Virginia's Eleventh Amendment argument, observing that the judicial power was extended to all cases arising under the Constitution or laws of the United States without regard to parties.[75] In *Worcester v. Georgia*,[76]a case in which the party alignment was exactly that described in the Eleventh

[70] *See* Choate v. Trapp, 224 U.S. 665, 672 (1912) (reversing Oklahoma court's decision that failed to apply treaty); Hunter v. Martin, 18 Va. 1, 39-41 (1815) (Virginia court stating that Supreme Court had misinterpreted Constitution in granting Congress exclusive power to regulate interstate commerce). *See generally* R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 876 (2000) (discussing States' attacks on judiciary and backlash against Marshall during his tenure).

[71] U.S. CONST. amend. XI.

[72] 2 U.S. 419 (1793).

[73] *See id.* at 461-62 n.20 (addressing State concerns and independent movements over Federal government's jurisdiction in such cases need not be exercised so vigorously as in other proclaimed "free" nations because of Constitution's unique and express mention of "people").

[74] *See Hunter*, 18 Va. at 37 (discussing effect of Eleventh Amendment).

[75] Cohens v. Virginia, 19 U.S. 264, 412 (1821) (judicial power, as granted by Constitution, extends to all cases and controversies arising under federal laws, regardless of parties).

[76] Worcester v. Georgia, 31 U.S. 515 (1832).

Amendment, the Court again reviewed a federal question on a Section 25 writ of error to a state court.[77]

Cohens v. Virginia and *Worcester v. Georgia* were, of course, exercises of appellate jurisdiction. Until 1875 there was no general grant of original federal question jurisdiction to the lower federal courts. There was, however, a specific grant of such jurisdiction in the statute that created the Second Bank of the United States.[78] Following the Supreme Court's decision in *McCulloch v. Maryland*,[79] Ohio determined to put the federal bank out of business by authorizing state officers to seize the bank's specie reserves and deposit them in the state treasury.[80] The bank sued in the federal circuit court and obtained an injunction directing the state treasurer to restore the funds. The treasurer refused to obey it. The circuit court then issued a writ of sequestration directing federal officers to enter the state treasury and remove the seized specie. The federal officers did so, and the Ohio officials appealed to the Supreme Court contending that the Eleventh Amendment barred the bank's suit. Marshall's *Osborn v. Bank* opinion is most often cited for his broad definition of federal question jurisdiction.[81] He, also, however, explicitly rejected the contention that in a federal question case the Eleventh Amendment prohibited a suit seeking the restoration of funds from a state treasury.

In 1829 the Eleventh Amendment defense was asserted in a boundary dispute in which the State of New Jersey sued the State of New York relying on the Supreme Court's original jurisdiction.[82] New York contended that despite the language in

[77] *See id.* at 541.

[78] *See* Pub. Law Incorp. of the Bank Act, 3 Stat. 266, 269 (1816).

[79] McCulloch v. Maryland, 17 U.S. 316, 400 (1819) holding unconstitutional Maryland's bank tax law.

[80] *See* Osborn v. President, Dir. & Co. of Bank, 22 U.S. 738, 741 (1824).

[81] *See id.* at 823 ("when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it"); *see also* Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS 145, 148 (2001) (emphasizing Marshall's treatment of 11th Amendment as merely inconvenience encountered at pleading stage and not as substantive limit on federal judicial power over federal law claims). *But see* Nicole Sabado, *Adopting a Jurisdictional Approach to the Rights of Asset Purchasers from the FIDC*, 69 FORDHAM L. REV. 287, 298 (2000) (constitutional grant of power is broad, it is statutory law, such as federal question and diversity statutes, which dictates actual exercise of federal court power to hear case).

[82] *See* State of New Jersey v. People of State of New York, 28 U.S. 461 (1830).

Article II, Section 2, granting jurisdiction "to controversies between two or more states," the Court lacked jurisdiction.[83] Even though New York was a formal party on the record, the Court rejected this contention.[84] That holding was repeated eight years later in *Rhode Island v. Massachusetts*.[85]

Thus it is clear that throughout Chief Justice Marshall's tenure, under his leadership the Eleventh Amendment was always confined to its literal terms. It was not applicable to federal question cases, but only to cases in which federal court jurisdiction depended on the party status specified in the amendment.[86] The only case in the Marshall era or even up to the Civil War, that actually applied the Amendment in dismissing a suit is *In re Medrozo*,[87] a case in which a citizen of a foreign state sought, in an original proceeding in the Supreme Court, to recover from a state the proceeds of sale of a group of slaves the state had seized from a ship.[88] The Supreme Court had neither original federal question nor original admiralty jurisdiction. Medrozo relied on his alien-party status, and thus the case fell literally within the language of the Amendment.

Marshall never read the Eleventh Amendment as placing any limits on the power of Congress to authorize the federal courts to vindicate federally protected rights against the states. At the same time, he was, except in the contract clause cases, always careful to acknowledge on federalistic issues the primacy of the

[83] *See id.* at 464.

[84] *See id.* at 467.

[85] Rhode Island v. Massachusetts, 37 U.S. 657, 720 (1838) (asserting court's judicial power in cases where state is party to action and also establishing subject of boundary within court's original jurisdiction).

[86] Worcester v. Georgia, 31 U.S. 515, 540 (1832) (stating parties to plea must be examined to see if it falls within judiciary's power); Cohens v. Virginia, 19 U.S. 264, 378 (1821) (emphasizing that jurisdiction depends entirely on parties); *See* McCulloch v. Maryland, 17 U.S. 316, 429 (1819).

[87] 32 U.S. 627, 632 (1833); *See* John J. Gibbons, *supra* note 6, at 1968 (indicating Madrazzo as only pre-Civil War Supreme Court decision to dismiss suit on Eleventh Amendment grounds); *see also* Merritt R. Blakeslee, Case Comment, *The Eleventh Amendment and State's Sovereign Immunity from Suit by a Private Citizen: Hans v. Louisiana and Its Progeny after Pennsylvania v. Union gas Company*, 24 GA. L. REV. 113, 133 (1989) (discussing Madrazzo as only case where sovereign immunity, embodied in Eleventh Amendment, was dispositive). *Compare* David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 936 (1997) ("The Eleventh Amendment. . .clearly indicated intent to limit jurisdiction of federal courts over suits in which states were named as defendants without their consent.").

[88] *See* Sundry African Slaves v. Juan Madrazzo, 26 U.S. 110, 118-119 (1828).

federal political branches with respect to their resolution.[89] He may have been a bit too doctrinaire about the contract clause in his *Ogden v. Saunders* dissent, but even there he in effect aligned himself with the Congress that had not enacted a permanent bankruptcy law.

How far we have strayed from Marshall's wise jurisprudence respecting the federal-state relationship. To cite just a few examples, the great holding in *Osborn v. Bank of the United States* that federal courts can in federal question cases order payments out of a state treasury was effectively overruled in *Edelman v. Jordan*.[90] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[91] the Court held that Congress lacked the power to require the states to comply with the United States patent laws. In a series of cases, including *National League of Cities v. Usery*,[92] *United States v.*

[89] *See* H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1519 (1999) (explaining Marshall's restraint in deciding matters reserved for executive decision on basis of separation of powers). *See generally* David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 280, 320 (1992) (vindicating Marshall as "Jeffersonian" believing "judges were [not] intended to decide questions not judicially submitted to them, or to lead public mind in Legislative or Executive questions. . ."); Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1159 (2000) (showing Marshall not as advocate of judicial supremacy but as supporter of system of checks and balances).

[90] 415 U.S. 651, 663 (1974) ("the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment". . . (construing Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944))); *see also* Christopher Buchholtz, *Survey of Developments in North Carolina Law and The Fourth Circuit, 1996: II. Constitutional Law: The King Can Do No Wrong: How the Harter v. Vernon Court Ignored Confusing Precedent and Simplified the Analysis Required to Determine Eleventh Amendment Immunity*, 75 N.C.L. REV. 2281, 2289 (1997) (establishing focus of courts in Eleventh Amendment proceedings should be whether state treasuries would be forced to pay potential judgments); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1120 (1983) (identifying award of money judgments against state as traditional core of Eleventh Amendment); Jack W. Pirozzolo, Comment, *The States Can Wait: The Immediate Appealability of Orders Denying Eleventh Amendment Immunity*, 59 U. CIN. L. REV. 1617, 1640 (1992) (disallowing suits seeking compensation to be paid from state treasury).

[91] 527 U.S. 627, 630 (1999) (holding that statute cannot be sustained as valid legislation, because statute represented impermissible abrogation of State sovereign immunity by Congress); *See* John D. Livingston, Comment, *Uniformity of Patent Law Following Florida Prepaid: Should the Eleventh Amendment Put Patent Owners Back in the Middle Again?*, 50 EMORY L.J. 323, 323 (2001) (providing that protection of patent law is illusory because state can claim sovereign immunity under Eleventh Amendment); Scott D. Nelson, Note, *Big Brother Stole My Patent: The Expansion of the Doctrine of State Sovereign Immunity and the Dramatic Weakening of Federal Patent Law*, 34 U.C. DAVIS L. REV. 271, 274 (2000) (states are immune from federal intellectual property law under doctrine of sovereign immunity).

[92] 426 U.S. 833, 841 (1976) ("Congressional enactments which may be fully within

Lopez[93] and *Printz v. United States*,[94] the Court construed the commerce clause not as authority for the national political branches to determine the respective roles of state and national authority, but rather as authority for the Court to turn such determinations into "pure" constitutional law beyond the reach of our periodically chosen national representatives. As I and others have argued elsewhere, such political-power disputes should be resolved in the political arena, not in the courts.[95] The courts should reserve pure constitutional law for the vindication of individual human rights. Marshall appreciated this point. When he wrote *Marbury v. Madison*, constitutionalism had an eighteenth-century meaning: a "right order of things" in the affairs of government. *Marbury* introduced a second meaning: the Constitution as law superior to legislation, and thus judicial review.[96] Marshall recognized that the right order of things in the state-federal relationship would evolve over time, and that such evolution should be left to the interplay of interest politics at the national level rather than constitutionalized in the *Marbury v. Madison* sense. He was, I suggest, a wiser political

grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against [various Constitutional provisions]").

93 514 U.S. 549, 552 (1995) (affirming holding that statute in question was invalid as beyond power of Congress under the Commerce Clause).

94 521 U.S. 898, 924 (1997) (viewing Commerce Clause enactment as "act of usurpation" that violates principles of state sovereignty).

95 *See* Powell v. McCormack, 395 U.S. 486, 518 (1969) (stating "It is well established that the federal courts will not adjudicate political questions."); Baker v. Carr, 369 U.S. 186, 209-210 (1962) (explaining how political questions that arise from relationship between judiciary and coordinate branches of government are nonjusticiable); Nixon v. U.S., 938 F.2d 239, 244 (D.C. Cir. 1991), *aff'd*, 506 U.S. 224 (1993) (indicating how political questions contributed to courts finding of nonjusticiability); *see also* Louis Henkin, *Is there a "Political Question" Doctrine?*, 85 YALE L. J. 597, 597-598 (1976) (noting "That there are 'political questions'. . . is axiomatic in a system of constitutional government built on separation of powers. The federal courts exercise neither the 'legislative Powers' nor 'The executive Power'. . .").

96 *See* Marbury v. Madison, 5 U.S. 137, 180 (1803) (Constitution is mentioned primarily as supreme law of the land above United States laws generally); *see also* Erwin Chemerinsky, Symposium *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1211 (2001) (citing supremacy clause as the basis of authority for judicial review). *See generally* Erwin Chemerinsky, Symposium *On New Directions in Federalism: The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and The Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1308 (2000) ("Judicial Review is crucial to enforcing the American Constitution and all American law."); Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution*, 61 TUL. L. REV. 979, 986 (1987) ("Judicial review of congressional and executive actions for their constitutionality has played a major role throughout out political history.").

philosopher than any we have seen on the Court lately.